STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal No. 2020AP000029-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

WESTLEY D. WHITAKER

Defendant-Appellant-Petitioner

BRIEF 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 Defendant-Appellant-Petitioner

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1. **Does it violate the First and Fourteenth Amendments to the U.S. Constitution 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 Circuit Court and the Court of Appeals held that it does not.

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 require congruity between the offense and the activity protected by the First Amendment?**

   The Circuit Court and Court of Appeals held that inaction by Amish elders in response to childhood sexual offenses was sufficiently related to allow consideration of Mr. Whitaker's former membership in the Amish church and association with the Amish community.

3. **Does the sentencing objective of protecting the public permit a sentencing court to increase a sentence imposed on a defendant to send a message to identified third parties that they should alter their behavior in the future apart from the objectives of general deterrence?**

   The Circuit Court did not address this question. The Court of Appeals held that encouraging police reporting of intrafamilial child sexual assault within a religious community was a valid application of the public protection sentencing objective.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By accepting review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE AND FACTS

On January 25, 2019, at the age of twenty-five, Westley Whitaker pleaded no contest 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, 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 his early adolescence. (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 in his community 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 by the elders. (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 Vernon County investigator Matt Sutton 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 his conviction in this case, 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 both 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 by Licensed Clinical Social Worker William Kelly[1] before sentencing to determine his risk of sexually reoffending, and submitted a written risk assessment to the sentencing court. (21; 23). The assessment concluded that Mr. Whitaker would have scored low risk for sexually reoffending at the end of his adolescence, and when he was sentenced, posed no more risk of sexually offending than any other twenty-five-year-old male. (21:3-4). Mr. Kelly concluded that Mr. Whitaker displayed no traits consistent with psychopathy. (21:4). The assessment noted that Mr. Whitaker suffered emotional turmoil because of his childhood offenses, and was motivated to report his offense to police with the hope that it would help his sisters heal. (21:2). Despite being criminally charged, Mr. Whitaker told Mr. Kelly that he did not regret confessing, and believed that his decision to do so was

[1] Mr. Kelly is a diplomate in sex therapy and a clinical member of the Association for the Treatment of Sexual Abusers. (21:5).

best for his family. (21:2). Mr. Whitaker submitted the sexual risk assessment in support of a motion to relieve him from sex offender reporting requirements. (20). District Attorney Gaskell did not object to exempting Mr. Whitaker from sex offender registration. (54:5; App. 145). Immediately before sentencing, the trial court granted Mr. Whitaker's motion to exempt him from sex offender reporting requirements, holding:

> "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." (29; 54:5-6; 31; App. 6, ¶ 11).

Relying on the entire record and the sexual risk assessment, the trial court explicitly concluded that at the time of sentencing 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, in part, 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).

Deterrence intended to influence the behavior of Amish elders

During sentencing the trial court repeatedly referenced 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 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:

> "[E]very Amish young man is raised in that type of community, in that situation, and you aren't seeing them all sexually assault their sisters night after night after night…I'm hoping that this sentence deters, as I said, the community." (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 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

[2] *Gallion* is misspelled as "Galleon" in the sentencing transcript.

filed a post-conviction motion alleging that the deterrent objective improperly considered his faith and religious association with the Amish community.[3] (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:

> "[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).

Noting that it intended to focus deterrence on the Amish community, rather than their religious beliefs, the trial court concluded that Mr. Whitaker's constitutional rights were not violated. (61:14). The trial court denied Mr. Whitaker's post-conviction motion and signed a written order incorporating its oral rulings 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 published decision on Mr. Whitaker's appeal affirming sentence and the post-conviction motion on all grounds. (App. 100).[4]

The Court of Appeals assumed without deciding that the trial court considered a prohibited factor at sentencing, specifically Mr. Whitaker's religious beliefs and association with the Amish community at the time of the offenses. (App. 102, *Whitaker*, 396 Wis. 2d 557, ¶ 4). On review the Court of Appeals held that the objective of encouraging Amish elders to

[3] Mr. Whitaker also alleged that the adult term of imprisonment violated the Eighth and Fourteenth Amendments for a youthful offender who would have been subject to a maximum of thirty days punitive confinement if adjudicated as a juvenile, and that the trial court's explanation of the bifurcated sentence did not satisfy *State v. Gallion*.

[4] *State v. Whitaker*, 2021 WI App 17, 396 Wis. 2d 557, 957 N.W.2d 561.

report sexual abuse between children in their community was a form of general deterrence. (App. 116; *Id*. ¶ 33). This general deterrent objective was intended to apply solely to the Amish community. (App. 116; *Id*. ¶ 33). Since Mr. Whitaker was not at risk of sexually offending in the future, the Court of Appeals held that specific deterrence did not apply to him. (App. 116; *Id*. ¶ 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; *Id*. ¶¶ 33-34). Specifically, the Court 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. (App. 116-19; *Id*. ¶¶ 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; *Id*. ¶ 36).

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," but ultimately accepted the trial court's sentencing rationale. (App. 114; *Id*. ¶ 28).

Relying on a combined reading of *State v. J.E.B.*, *State v. Fuerst*, and *Dawson v. Delaware*, 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; *Id*. ¶ 48).

The Court of Appeals noted that unlike prior cases, there was not congruity between Mr. Whitaker's offenses and his association with a community of faith. (App. 126-128; *Id*. ¶¶ 49, 51). Holding that the "reliable nexus" test requires only some link to a legitimate sentencing rationale, the Court of 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; *Id*. ¶ 49). The Court of Appeals rejected as undeveloped Mr. Whitaker's position that selecting a defendant for deterrence based solely on his religious association violates *Lemon v. Kurtzman*. (App. 128-29; *Id*. ¶¶ 52-54).

ARGUMENT

I. A sentencing court cannot direct a deterrent objective solely to a religious community without improperly basing the objective on the defendant's constitutionally protected religious beliefs and association with a community of faith

A. Introduction

Between 2005 and 2007, Mr. Whitaker, then a twelve to fourteen-year-old child in an Amish community, sexually assaulted his younger sisters. Elders in his religious community became aware of this conduct, but did not report it to secular authorities at the time of the offenses. Twelve years later, Mr. Whitaker appeared for sentencing on his childhood offenses as a twenty-five-year old man. The trial court concluded that Mr. Whitaker presented zero risk of

reoffending, had no rehabilitative or supervisory needs, and was a stable and prosocial adult. However, the trial court sought to deter third parties in the Amish community from addressing intrafamilial sexual assaults within their religious community, and outside of the secular justice system. As a result, Mr. Whitaker was sentenced to prison with an objective that was explicitly based on his membership in a community of faith.

This appeal presents a basic conflict between the use of an individual sentence to deter others from criminal activity, and the right of a defendant to freely associate with communities of faith without being penalized for his or her religious affiliation at sentencing. In this case Mr. Whitaker was sentenced to a term of imprisonment that explicitly relied, in part, on an objective of deterring similar behavior only within the Vernon County Amish community, an objective plainly based on his childhood faith and membership in the Amish community. The first question before this Court is whether a sentencing court may ever set a sentencing objective of deterring criminal behavior solely within a religious community, without also violating the prohibition against considering a defendant's religious beliefs and association with a community of faith.

B. A deterrent objective limited to a religious community is fundamentally inconsistent with the prohibition against considering a defendant's religious practices at sentencing

"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. 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). 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. 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).

General deterrence has long been an acceptable sentencing objective in Wisconsin. This Court explicitly recognized deterrence to others as one of four principal sentencing objectives in *State v. Gallion*. 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197. *Gallion* concluded that a sentencing court could properly attempt to deter others from impaired driving by imprisoning an individual defendant convicted of a similar offense. *Id*. ¶ 61. Subsequent cases distinguish between general and individual deterrence in Wisconsin, but consistently note that deterrence is a proper sentencing objective. *See e.g. State v. Owens*, 2016 WI App 32, ¶¶ 26-28, 368 Wis. 2d 265, 878 N.W.2d 736 (specific and general deterrence in reckless homicide). However, until this case, no authority has addressed whether a general deterrent objective may be directed solely to a defendant or group of people whose activities are protected by the First Amendment.

The link between the deterrent objective in this case and Mr. Whitaker's association with the Vernon County Amish community is clear. 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 to report underage sexual activity to secular authorities, which was the explicit goal of the deterrent objective set by the sentencing court. Whether it is characterized as a form of limited general deterrence, or ensuring that the rights of the community are protected at sentencing, Mr. Whitaker received a prison sentence that explicitly relied, in part, on his constitutionally protected association with the Amish community.

If a deterrent or other sentencing objective requires membership in a specific community of faith to justify the objective, defendants of the targeted faith are plainly inhibited

when the criminal justice system will not rely on the same objective for defendants who belong to a different religious 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).[5] *Lemon v. Kurtzman* 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 a criminal sentence in *State v. Fuerst*, where the circuit court rejected probation for a defendant 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). Relying on the plain language of the sentencing court, *Fuerst* held that the sentence violated the second and third prongs of the test in *Lemon v. Kurtzman* by advancing 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.

This Court later reiterated the blanket rule that a defendant's religious beliefs are not a proper factor for a sentencing court to rely on as a basis of a sentence in *State v.*

[5] This brief uses complete case titles to distinguish *Lemon v. Kurtzman* from the D.C. Circuit decision in *U.S. v. Lemon*.

Ninham. 333 Wis. 2d 335, ¶ 96. In *Ninham*, family of a homicide victim asked the sentencing court to release the victim's soul with its sentence, consistent with Hmong religious and cultural beliefs. *Id*. *Ninham* reiterated that "*a circuit court may not base its sentencing decision upon the defendant's or the victim's religion*." *Id*. (emphasis added). Since the trial court in *Ninham* did not actually base its sentence on the religious beliefs of the victims, it was not error to refer to these beliefs during sentencing. *Id*.

Ninham, *Fuerst*, and numerous U.S. Supreme Court decisions clearly hold that it is improper to consider a defendant's religious faith or membership in a community of faith as the basis of a criminal sentence. *See Id*.; *Fuerst*, 181 Wis. 2d at 916; *Stephens*, 462 U.S. at 885. Applying the same simple prohibition as the Court of Appeals did in *Fuerst*, this Court should conclude that a deterrent objective cannot survive First Amendment scrutiny when it is directed only towards a specific religious community. Targeting only a specific religious community for deterrence directly inhibits the interests of defendants who belong to the targeted community, advances the interests of defendants facing similar charges who do not belong to the targeted community, and is aimed at forcing a religious community to interact with secular authorities, which enmeshes government priorities with those of a closed religious community like the Amish, that may reject such interaction. *See Lemon v. Kurtzman*, 403 U.S. at 613; *See also Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972). [6]

Mr. Whitaker's position that a deterrent objective intended only for members of a specific religious community violates *Lemon v. Kurtzman* is based on a common-sense interpretation of the plain language used by the sentencing court. In this case the trial court explicitly and repeatedly stated that it intended to send a deterrent message to the Amish community to report child sexual assaults to secular authorities.[7] This objective was quite clear, as the trial court repeatedly stated it intended to deter Amish adults from failing

[6] The Court of Appeals cited *Yoder* for Old Order Amish religious practices in its decision. (*Whitaker*, 396 Wis. 2d 557, ¶ 41 fn. 13).

[7] Mr. Whitaker addresses whether the deterrent objective is more properly categorized as a public safety objective later in this brief.

to report underage sexual activity by its children. *Whitaker*, 396 Wis. 2d 557, ¶¶ 26-28. The deterrent objective was plainly based on Mr. Whitaker's childhood membership in the Vernon County Amish community. *Id*. ¶¶ 26, 28-30.

When deterrence is directed solely towards members of a religious community, it becomes impossible to separate the prohibited sentencing consideration from the lawful deterrent goal. To effectively deter a religious community, the defendant must logically be a part of it. There is no question that a sentencing court could set an objective of generally deterring others from committing similar offenses, so long as the objective is applied to the community at large. *Gallion*, 270 Wis. 2d 535, ¶ 40. However, when deterrence is directed solely towards a community of faith, the deterrent objective and any term of imprisonment based on that objective, will always stem from the defendant's constitutionally protected beliefs and associations. For this reason, any deterrent objective that is directed solely towards a community of faith will logically be founded on a prohibited sentencing factor.

To be clear, Mr. Whitaker does not argue that a sentencing court may never consider a defendant's faith, or association with a community of faith for purposes other than deterrence. Rather, he takes the position that a deterrent objective intended only to impact a religious community will always rely on a prohibited sentencing factor, impede the interests of defendants with similar beliefs, and advance the interests of defendants who are not part of the targeted religious community. For these reasons, Mr. Whitaker asks the Court to conclude that the deterrent objective in this case relied on a prohibited factor, and that doing so constituted an abuse of discretion requiring resentencing. *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 652.

II. If a sentencing court may set a deterrent objective directed solely towards a religious community the "reliable nexus" test requires congruity between an offense and an interest protected by the First Amendment

A. Introduction

If an objective of sentencing may be constitutionally directed solely to a religious community, it is necessary for this Court to determine the degree of the connection required between an offense and an interest protected by the First Amendment before the protected interest may be considered at sentencing. The answer to this question has ranged from any rational connection, to a significant relationship between the offense and interest, to offenses explicitly committed to further an illegal goal of an organization. In this case, the Court of Appeals applied a combined reading of *Dawson v. Delaware*, *State v. Fuerst*, and *State v. J.E.B.* 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. (App. 126, ¶¶ 48-49). This holding strays from prior decisions of the Court of Appeals that required a more direct connection between the offense and the protected interest. Mr. Whitaker's position is that any sentencing objective based on an interest protected by the First Amendment and Article I, Section 18 of the Wisconsin Constitution requires a significant connection between the interest and the offense that directly impacts the public safety, punitive, or rehabilitative needs of the defendant.

B. Application of the reliable nexus test in the Court of Appeals

Prior to its decision in this action, the Court of Appeals applied the reliable nexus test in three published cases: *State v. Fuerst*, *State v. J.E.B.*, and *State v. Wickstrom*. Each decision required that an interest protected by the First Amendment be substantially related to the criminal act before the protected interest could be considered during sentencing. In this matter, the Court of Appeals departed from the congruity it required in earlier cases, and held that any rational connection between the

protected interest and the goal of sentencing was sufficient to satisfy the test. *Whitaker*, 396 Wis. 2d 557, ¶ 49.

The Court of Appeals first briefly addressed the degree of congruity required before a court may adversely consider a defendant's protected political beliefs in *State v. Wickstrom*. 118 Wis. 2d 339, 348 N.W.2d 183 (Ct. App. 1984). In *Wickstrom*, the defendant attempted to form his own local government after he was defeated in a Shawano County election. *Id*. at 340. He issued public notices, approved liquor and business licenses, and appointed himself town clerk and municipal judge. *Id*. Describing Wickstrom's beliefs as "insidious," the sentencing court imposed maximum consecutive jail sentences. *Id*. at 345, 356. Even though these beliefs were protected by the First Amendment, the Court of Appeals held that it was proper for the sentencing court to consider Wickstrom's anti-government beliefs, as they directly related to his offense, lack of remorse, and possibility of rehabilitation. *Id*. at 357.

The Court of Appeals next addressed whether the defendant's interest in sexualized novels constituted an improper factor to consider at sentencing in *State v. J.E.B*. 161 Wis. 2d at 660-1, 469 N.W.2d 192 (Ct. App. 1991). A presentence investigation noted that the defendant regularly read pornographic novels that depicted graphic sexual encounters between adults and children. *Id*. at 660. While the books were protected by the First Amendment, the Court of Appeals held that the content of the novels closely mirrored the defendant's criminal acts, and as such, was properly considered during sentencing. *Id*. at 663, 673.

J.E.B. adopted the rationale of the D.C. Circuit Court of Appeals in *U.S. v. Lemon*,[8] 723 F.2d 922 (D.C. Cir. 1983). *U.S. v. Lemon* addressed whether the defendant's alleged affiliation with the Black Hebrews, a political and religious organization with radical viewpoints, could 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

[8] Mr. Whitaker uses the complete case title of *U.S. v. Lemon* throughout this brief to distinguish from the U.S. Supreme Court decision in *Lemon v. Kurtzman*, which is also cited.

Hebrews were in fugitive status, and had committed acts of fraud to further a collective goal of repatriating members in Israel. *Id*. at 926. Prosecutors asked the District Court to consider the defendant's acts as part of a larger pattern of criminality by the Black Hebrews. *Id*. On appeal the D.C. Circuit 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 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 in *J.E.B.* determined that the defendant's offense of sexually assaulting his daughter closely paralleled the content of his pornographic stories. *J.E.B*., 161 Wis. 2d at 673. Since there was a "reliable showing of a sufficient relationship between the two," the sentencing court properly considered the pornographic novels at sentencing even though they were otherwise protected by the First Amendment. *Id*.

State v. Fuerst applied *J.E.B.*, and *U.S. v. Lemon* to a defendant without religious convictions, holding that it was error for the sentencing court to negatively consider the defendant's lack of church attendance during sentencing. 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 (emphasis added). As an example, *Fuerst* noted that it would be permissible to consider the religious practices of a defendant convicted of a drug offense if his faith involved the use of illegal drugs. *Id*. Since there was no rational connection in *Fuerst* between the defendant's lack of religious affiliation and his offense, the Court of Appeals determined that no reliable nexus existed. *Id*. at 915.

C. U.S. Supreme Court authority on the use of beliefs and associations protected by the First Amendment at sentencing

The U.S. Supreme Court has also addressed the relationship between a belief or association protected by the First Amendment and its application to criminal sentencing in *Dawson v. Delaware*, 503 U.S. 159 (1992), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In *Dawson*, state prosecutors sought to introduce evidence that the defendant was a member of the Aryan Brotherhood, a white supremacist prison gang, during the penalty phase of a capital murder case. 503 U.S. at 162. The defendant had escaped from prison and murdered a woman while stealing money and a car. *Id*. at 161. *Dawson* rejected the defendant's position that the Constitution bars all evidence of protected beliefs and associations at sentencing. *Id*. at 165. However, since the defendant's crime was not driven by his membership in the Aryan Brotherhood, the Court held that this association could not be properly considered during the penalty phase of trial.[9] *Id*.

Dawson relied significantly on *Barclay v. Florida*, which addressed the defendant's membership in the Black Liberation Army, an organization that advocated the indiscriminate murder of Caucasian people, with the goal of starting a race war. 463 U.S. at 942. The defendant and an accomplice drove through Jacksonville, Florida, seeking Caucasian victims, and eventually murdered a random victim, affixing a note to his chest with a knife that heralded the beginning of a race war. *Id*. at 943. Rejecting the jury's recommendation for a life sentence, the sentencing judge discussed Barclay's membership in the Black Liberation Army and the racial animus for his offense, and sentenced him to death. *Id* at 944. Since the defendant's racial animus formed the motive for his offense, the Supreme Court concluded that

[9] The following year the Court of Appeals applied *Dawson* in *State v. Marsh*, 177 Wis. 2d 643, 654-5, 502 N.W.2d 899 (Ct. App. 1993), holding that it was harmless error to note the defendant's association with white supremacy organizations when the trial court did not explicitly rely on the defendant's association during sentencing.

it was proper to consider Barclay's association with the Black Liberation Army during sentencing. *Id*. at 949.

A year after deciding *Dawson*, the U.S. Supreme Court unanimously held in *Wisconsin v. Mitchell* that a statute providing for greater penalty if a victim was selected because of his or her race did not violate the First Amendment. 508 U.S. at 479. Unlike *Dawson*, where the defendant's racist beliefs were divorced from his motive for his crimes, in *Mitchell* a group of teenagers selected their victim explicitly because of his race. *Id*. at 480. It was this explicit motive that distinguished the outcome in *Mitchell* from that in *Dawson*. *Id*. at 486.

D. The reliable nexus test requires congruity between a criminal offense and an interest protected by the First Amendment

Whether a reliable nexus exists between the exercise of a First Amendment right and a criminal offense has turned on both the application of *U.S. v. Lemon* for crimes committed for the benefit of a group with illegal aims, and what the Court of Appeals described in *J.E.B.* as "congruity" between the protected act and the offense. 161 Wis. 2d at 673. *See Wickstrom*, 118 Wis. 2d. at 357 (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); *Mitchell*, 508 U.S. at 486 (racist beliefs can be considered when the defendant committed a battery in furtherance of those beliefs); *Dawson*, 503 U.S. at 166 (affiliation with white supremacy gang could not be considered when the offense was not committed to further the defendant's racist beliefs).

While not explicitly defined in Wisconsin, the reliable nexus test has permitted consideration of interests protected by the First Amendment at sentencing when the interest motivated an offense, closely paralleled the criminal act, or was committed to advance an illegal goal of a protected group or organization. Every prior decision issued or adopted by the Court of Appeals relied on whether there was similar congruity between the offense and the interest protected by the First Amendment. The Court of Appeals acknowledged in this case that there was not similar congruity between Mr. Whitaker's association with the Amish community and his offenses. *Whitaker*, 396 Wis. 2d 557, ¶ 44. However, the Court of Appeals did not require congruity between Mr. Whitaker's offense and his association with the Amish community:

> "Yet all that is required is a reliable nexus tied to a legitimate sentencing rationale, which does not need to be a rationale based on the likelihood of recidivism by Whitaker." *Id*. ¶ 49.

Since the parties agreed that Amish elders failed to intervene in intrafamilial sexual assaults at the time of Mr. Whitaker's offenses, the Court of Appeals concluded that the trial court properly considered his association with the Amish community to justify the term of imprisonment. *Id*.

While the reliable nexus test is flexible, it must require more than a tangential connection between an offense and an interest protected by the First Amendment. Without this protection, a sentencing court could justify deterrent goals against any group of people with the simple declaration that it intended to deter crime within a specific religious, racial, political, or other community protected by the First Amendment. The U.S. Supreme Court set basic limitations against such an outcome in *Dawson*, *Mitchell*, and *Barclay* by establishing a rule that a sentencing court may not consider beliefs protected by the First Amendment at sentencing unless the defendant was driven to commit his offense because of these beliefs. *Dawson*, 503 U.S. at 165; *Barclay*, 463 U.S. at 949; *Mitchell*, 508 U.S. at 486.

The test in *U.S. v. Lemon* more specifically addresses whether a defendant's membership in a religious community can be considered at sentencing. 723 F.2d at 938-939. The

Court of Appeals adopted *U.S. v. Lemon* in *J.E.B.*, and it remains an appropriate rule to address the lawfulness of a sentencing objective based on a defendant's religious association. *J.E.B.*, 161 Wis. 2d at 673. *U.S. v. Lemon* carefully balances the protected interest in associating with a likeminded religious community against the State's interest in considering relevant conduct at sentencing, and is based on a simple premise: "*A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid*." 723 F.2d at 938 (emphasis added). The D.C. Circuit distilled its holding in *U.S. v. Lemon* to a straightforward rule:

> "Thus 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 939.

The rule in *U.S. v. Lemon* sets an objective test that clearly precludes conduct protected by the First Amendment from consideration during sentencing, unless there is a firm link between the defendant's conduct and an illegal aim of a religious organization. This rule ensures that defendants do not face punitive sanctions for their religious beliefs and association unless there was clear congruity between membership in a religious community and a criminal act. *Id*. Wisconsin courts are used to applying the same rule at sentencing in another context. The test in *U.S. v. Lemon* is identical to what a sentencing court must consider when determining whether a defendant committed an offense for the benefit of a criminal gang. Wis. Stat. § 973.017(3)(c). Section 973.017(3)(c) mirrors the language in *U.S. v. Lemon*, and permits a sentencing court to consider gang membership as a statutory aggravating factor only if the defendant "committed the crime for the benefit of, at the direction of, or in association with any criminal gang…with the specific intent to promote, further, or assist in any criminal conduct of gang members." Implicitly recognizing that a defendant's association with a gang is protected in part by the First Amendment, section 973.017(3)(c) uses the same objective test in *U.S. v. Lemon* that protects defendants from being penalized for their association with a group that may have both lawful and unlawful aims. The First Amendment interest in associating with a community of faith is at least equal to the protection afforded to associating

with a gang. *See Dawson*, 503 U.S. at 164 (gang association constitutionally protected if not committing offenses to further crime); *U.S. Jaycees*, 468 U.S. at 618 (religious association a fundamental element of personal liberty, and association for purposes of exercising a First Amendment right is protected). It is logical that the associational protections afforded to alleged gang members at sentencing should also apply to members of a religious community.

J.E.B. and *Fuerst* extended the analysis employed in *U.S. v. Lemon* to permit consideration of an interest protected by the First Amendment if the crime closely mirrored the protected interest. In certain scenarios, considering the protected interest at sentencing may be appropriate when the sentencing court cannot address the defendant's risks and needs without such information. One good example is the hypothetical drug defendant in *Fuerst* whose church encourages drug use. 181 Wis. 2d at 913. It would be impossible to address a defendant's criminogenic needs in that scenario without also considering any religious association that prompted the crime. For the same reason, it was proper to consider the reading habits of the defendant in *J.E.B.*, whose deviant sexual fantasies appeared to mirror, if not drive, his offenses against children. 161 Wis. 2d at 660. When it is impossible to separate a defendant's criminogenic needs from his constitutionally-protected beliefs or associations, there is likely sufficient congruity that permits consideration of an otherwise prohibited factor.

However, when the connection between a protected interest and an offense is less direct, the need for a sentencing court to consider the factor is less compelling. *U.S. v. Lemon* made this point clearly when it held that a defendant could not be punished merely for associating with the Black Hebrews, unless he committed a crime for their benefit. 723 F.2d at 929. The U.S. Supreme Court drew the same line for defendants associated with racist organizations in *Dawson* and *Barclay*. *Dawson*, 503 U.S. at 165; *Barclay*, 463 U.S. at 949. In *McCleary*, this Court mocked the position that a defendant's socialist reading habits somehow contributed to his offense, finding that reading Karl Marx bore no relationship to his

financial crimes.[10] 49 Wis. 2d at 284. These cases illustrate that there must be a direct relationship between conduct protected by the First Amendment and an offense before the protected interest may be considered at sentencing. The holdings in *Dawson*, *Barclay*, *J.E.B.*, *Fuerst*, and *Wickstrom* all suggest that if a defendant's socially undesirable association did not motivate, mirror, or otherwise drive his offense, then it cannot be considered as an aggravating factor at sentencing. To the extent that interests protected by the First Amendment can form the basis of a sentencing objective, Mr. Whitaker urges this Court to conclude that the reliable nexus test requires clear congruity between the defendant's offense, and the belief or association protected by the First Amendment.

The specific question before this Court is whether inaction by Amish elders during Mr. Whitaker's youth is sufficiently connected to his offenses to base a deterrent objective on his childhood membership in the Amish community. There is no question that Amish elders were aware of Mr. Whitaker's offenses while they were happening, and did not notify secular authorities. It is also clear that there is no congruity between inaction from third-party Amish elders and Mr. Whitaker's childhood offenses. Indeed, the trial court found that Mr. Whitaker's offenses were "hormone driven." As the Court of Appeals noted, the Amish community opposed child sexual assault. *Whitaker*, 396 Wis. 2d 557, ¶ 53. Mr. Whitaker did not commit his offenses to further any unlawful aim of the Amish community, and unlike every prior Court of Appeals case addressing similar factors, there was not congruity between the association protected by the First Amendment and the criminal offense. *Id*. ¶ 44. Penalizing Mr. Whitaker for the inaction of others is reminiscent of an Old Testament proverb:

> "A son is not to suffer because of his father's sins, nor a father because of the sins of the son." *Ezekiel* 18:20 (Good News Bible 1976).

[10] The *McCleary* decision noted that the defendant's affinity for the works of Karl Marx "is not a crime, though perusal of its turgid marshalling of preconceived prejudices may well be a form of punishment." As the defendant's political reading did not directly impact his offense, it was an abuse of discretion to rely on his political philosophy. *Id*. at 284-5.

To quote this axiom, the deterrent objective in this case literally punishes Mr. Whitaker for the sins of his fathers. As a twelve, thirteen, and fourteen-year-old child, he had no control over the elders in his community, and there is no logical nexus between his hormone-driven offenses, and the decision of Amish elders to avoid contacting secular authorities. Without strong congruity between institutional indifference of the Amish elders and Mr. Whitaker's crimes, there is no reliable nexus between the two. For these reasons, Mr. Whitaker asks this Court to conclude that the reliable nexus test requires clear congruity between an interest protected by the First Amendment and the defendant's crime before the protected interest may form the basis of a sentencing objective. Since no such congruity existed in this case, Mr. Whitaker asks this Court to conclude that the trial court relied on an improper factor, and remand the matter for a new sentencing hearing.

III. The sentencing objective of protecting the public does not permit a sentencing court to attempt to influence otherwise lawful behavior of third parties beyond general deterrence against committing similar offenses

This Court directed the parties to address whether a sentencing court may set an objective of protecting the public that is solely designed to alter the behavior of third parties. In this case, whether the public protection objective could be used to encourage the Vernon County Amish community to proactively report underage sexual activity to secular authorities. For several reasons the public protection objective of sentencing can not be used to influence the behavior of third parties beyond general deterrence directed to the entire community.

A. Use of the public protection objective to influence third parties is incompatible with the requirement of individualized sentencing determinations

Using an individual defendant's sentence to encourage third parties to change their otherwise legal behavior has never been sanctioned by any published or persuasive decision in Wisconsin. The goal of protecting the public is a

straightforward objective appearing in every major sentencing decision of this Court, and has always been addressed to individual defendants. *See e.g. McCleary*, 49 Wis. 2d at 283 (public right to protection from financial crimes); *Gallion*, 270 Wis. 2d 535, ¶ 61 (protection from impaired driving offenses); *Ninham*, 333 Wis. 2d 335, ¶ 82 (incarceration protected public from violent offender by incapacitating him). The public protection objective is typically considered in concert with the requirement that any term of confinement be the "minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *Gallion*, 270 Wis. 2d 535, ¶ 44. This language suggests that the public protection objective is limited to protecting the community from an individual defendant.

This Court has long held that sentencing determinations must be individualized to the defendant. "[I]ndividualized sentencing 'has long been a cornerstone of Wisconsin's criminal justice jurisprudence.'" *State v. Loomis*, 2016 WI 68, ¶ 67, 371 Wis. 2d 235, 881 N.W.2d 749 citing *Gallion*, 270 Wis. 2d 535, ¶ 48.

> "[N]o two convicted felons stand before the sentencing court on identical footing. The sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors." *State v. Lechner*, 217 Wis. 2d 392, 427576 N.W.2d 912 (Wis. 1998) citing *In re Felony Sentencing Guidelines*, 120 Wis. 2d 198, 201, 353 N.W.2d 793 (Wis. 1984) (per curiam).

A sentencing objective designed only to impact the behavior of third parties in the community removes focus from the individual needs and circumstances of the defendant, and places his fate entirely in the actions, or inactions, of third parties over whom he has no control. When a sentence imputes the moral culpability of third parties onto the defendant, it is no longer individualized to the offender. A court that sentences a defendant in Mr. Whitaker's position for the decisions of third parties beyond the defendant's control contradicts the very premise of individualized sentencing required in Wisconsin. *Loomis*, 371 Wis. 2d 235, ¶ 67.

On a related note, a sentence aimed at influencing the behavior of third parties is inconsistent with the requirement of imposing only the minimal amount of confinement necessary to fulfill the objectives of sentencing. *Gallion*, 260 Wis. 2d 535, ¶ 44. While an individual offender may require little or no incarceration to protect the public from future criminality, using the public safety objective to influence third parties could justify a term of incarceration greater than the minimum required to protect the public from the individual offender. Mr. Whitaker is a perfect example. The sentencing court determined that he had no rehabilitative needs, was not presently dangerous, and presented "zero" risk of sexually reoffending. He was so low risk that all of the parties involved, including the sentencing court, agreed that Mr. Whitaker should be exempt from sex offender reporting requirements. Yet, the public safety rationale was employed to justify a prison sentence that was not rationally supported by the facts relevant to Mr. Whitaker's individual risk. As a result, the Court of Appeals confirmed a term of incarceration that exceeded the minimum necessary to achieve the goals of protecting the public from Mr. Whitaker, an outcome fundamentally inconsistent with *Gallion* and *McCleary*. *Id*.; *McCleary*, 49 Wis. 2d at 276.

B. Use of the public safety objective to influence third parties allows a sentencing court to substitute its social expectations for legal obligations created by the legislature and circumvents the limitations of the deterrent objective

A related problem with the approach taken by the Court of Appeals is that the use of a public safety rationale to alter the behavior of third parties substitutes an individual sentencing court's judgment on the responsibilities of adults within the targeted community for those established by the legislature. In Mr. Whitaker's case the public safety rationale adopted by the Court of Appeals does not enforce any existing law, but instead seeks to impose the sentencing court's moral and social expectations for how to react to intrafamilial sexual assault on the Amish community. The legislature has already defined the circumstances when adults are required to report suspected sexual abuse to secular authorities, and established

remedies for a community's failure to do so. For instance, certain mandatory reporters of abuse are required to notify law enforcement of suspected child sexual assault. *See* Wis. Stat. § 48.981. Adult caregivers responsible for a child's welfare can be prosecuted if they become aware that a child is being sexually assaulted, and fail to protect the child. Wis. Stats. §§ 948.21(2) & 948.21(3)(b)2. Victims of childhood sexual assault may also pursue civil relief against a church or community that permitted the abuse to occur. *See e.g. John Doe v. Archdiocese of Milwaukee*, 2007 WI 95, 303 Wis. 2d 34, 734 N.W.2d 827.

Amish elders are not subject to Wisconsin's mandatory reporter requirement. Wis. Stat. § 48.981. Moreover, the State has not alleged that individual caregivers are criminally responsible for their failure to intervene when Mr. Whitaker committed his offenses. *See* Wis. Stat. § 948.21(2). Instead, the public safety sentencing objective identified by the Court of Appeals is explicitly intended to address subjectively undesirable, but otherwise lawful indifference by elders within the Amish community.

Additionally, the use of an individual sentence to inspire social change has long been the sole province of the general deterrent objective. A general deterrent sentencing objective is limited to encouraging others to avoid committing similar criminal offenses. *See Gallion*, 270 Wis. 2d 535, ¶¶ 40, 61. This objective is consistent with an individualized sentencing requirement because it focuses on the individual defendant's offense, and only seeks to create social change by deterring conduct that is already illegal. The public safety objective employed by the Court of Appeals in this case should not be analogized to a lawful deterrent objective because (1) this use of the public safety objective in this case targets lawful behavior by Amish elders, (2) creates de facto social obligations for reporting underage sexual activity beyond those required by the legislature, and (3) penalizes defendants who happen to belong to a group or class that offends the sentencing court's notion of how a community should address crime.

Use of a criminal sentencing objective, as applied by the Court of Appeals in this case, replaces the statutory requirements that define who must intervene or report

suspected sexual assault to authorities with the circuit court's subjective judgment as to how a community should react. More problematically, it permits a sentencing court to justify a prison sentence solely on the indifferent, yet lawful, behavior of third parties. It is basic human instinct to protect and care for children, and efforts by the circuit court in this case to achieve this goal are understandable. However, nothing in *McCleary*, *Gallion*, or progeny cases permits a circuit court to substitute its own social judgment for the requirements established by the legislature on what steps must be taken by members of the community to address intrafamilial sexual assault. Permitting sentencing courts to socially engineer communities under this rationale opens a Pandora's box of due process and equal protection challenges for defendants who are sentenced with the goal of imposing the social and moral standards of an individual sentencing judge. *See e.g. State v. Jorgensen*, 2003 WI 105, ¶ 38, 264 Wis. 2d 157, 667 N.W.2d 318 (discussing equal protection and due process challenges stemming from disparities in district OWI sentencing guidelines). The public safety objective used to justify sentences under this rationale would vary widely depending on the moral and social expectations of an individual circuit court judge, with defendants at the mercy of the sentencing court's impression of whether third parties should have done more to prevent the defendant's crimes.

Furthermore, when this use of the public safety objective is applied to a religious community, the potential for excessive entanglement between a government action and a community of faith is real. Examining whether a deterrent objective entangles the interests of the State with those of the Amish community is tied to the question of whether a sentencing objective may be employed to encourage behavior that is not otherwise required by law. *Lemon v. Kurtzman*, 403 U.S. at 613. The public safety objective in this case was not limited to dissuading others from committing sexual assault, but included encouraging elders to report sexual assaults between Amish children. *Whitaker*, 396 Wis. 2d 557, ¶ 36. As Amish elders are not statutory reporters of sexual assault, and are not required to intervene in conduct that impacts children outside of their care, the public safety objective employed by the Court of Appeals 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 on parenting Amish youth and responding to adolescent sexuality risks entangling the prerogatives of the State with those of the Amish, particularly when the response the sentencing court desires is not otherwise required by law. *Lemon v. Kurtzman*, 403 U.S. at 613. Indeed, a fundamental tenet of the Amish community is separation from secular society:

> "Old Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from worldly influence. This concept of life aloof from the world and its values is central to their faith." *Yoder*, 406 U.S. at 210.

While no religious community has a right to sexually assault children, they do have the right to remain aloof from secular society, and abstain from interacting with government agents when they are not required by law to do so. *Id*. A sentencing goal aimed at forcing similar interaction between a religious community and government actors comes dangerously close to entangling the interests of a religious community with those of the State. *Lemon v. Kurtzman*, 403 U.S. at 613.

C. The sentencing rationale is not logically related to a lawful goal of sentencing

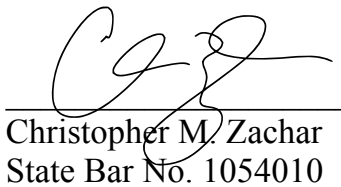
Finally, a proper exercise of sentencing discretion requires a "conclusion based on a logical rationale founded upon proper legal standards." *McCleary*, 49 Wis. 2d at 277. Although there are conceivably circumstances in which the two could be rationally related, in this matter, there is no logical link between the sentence imposed and the desired public safety goal. It is illogical to assume that sentencing Mr. Whitaker to prison as an adult for his childhood offenses would prompt Amish elders to report more children who commit sexual assault to the police. Indeed, both the Circuit Court and the Court of Appeals noted that Mr. Whitaker's prison sentence may have the opposite effect, and cause Amish elders to report fewer incidents of intrafamilial sexual assault to secular authorities when doing so would result in more members of their community going to jail or prison. *Whitaker*, 396 Wis. 2d 557, ¶ 28. Wisconsin law requires an objective explanation for

how a sentence will achieve its intended effects. *McCleary*, 49 Wis. 2d at 281. Absent a logical connection between Mr. Whitaker's prison sentence, and the goal of encouraging Amish elders to report future underage sexual conduct to secular authorities, this sentence is not the product of a proper exercise of discretion. *Id*. at 277.

CONCLUSION

For these reasons, Mr. Whitaker respectfully requests that this court reverse the decision of the Court of Appeals and remand this matter to the Circuit Court for resentencing.

Respectfully submitted this 14th day of July, 2021.



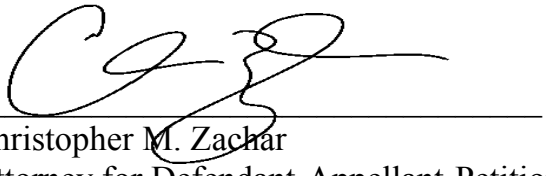
Christopher M. Zachar
State Bar No. 1054010
Zachar Law Office, LLC
115 5th Ave. So. Ste. 420
La Crosse, WI 54601
(608) 518-3224
chris@zacharlawoffice.com

Attorney for the Defendant-Appellant-Petitioner

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 9,806 words.

Dated this 14th day of July, 2021.



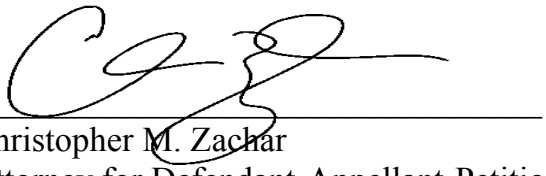
Christopher M. Zachar
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1054010

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 14th day of July, 2021.



Christopher M. Zachar
Attorney for Defendant-Appellant-Petitioner
State Bar No. 1054010