STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2020AP29-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESTLEY D. WHITAKER,

Defendant-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING THE JUDGMENT OF CONVICTION AND AN ORDER DENYING RESENTENCING, ENTERD IN VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY JO ROOD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Other Authorities

ISSUES PRESENTED

The first issue below is the one that this Court raised sua sponte and directed the parties to address in its order granting review. This Court also granted review on the second and third issues below as articulated by Whitaker in his petition for review and brief.

The issue raised by this Court

1. Does the sentencing factor objective of "protection of the public" include permitting the sentencing court to increase the sentence imposed on the defendant to send a message to an identified set of third parties that they should alter their behavior in the future, apart from generally being deterred from committing offenses like those committed by the defendant?

The trial court believed that it had the authority to impose a prison sentence on Whitaker based in part on its desire to protect children in the local Amish community from sexual assaults by encouraging adults in that community to report assaults to civil authorities promptly both to protect the victims and to get early treatment for juvenile offenders in the juvenile justice system.

The court of appeals held that the trial court had the authority to use Whitaker's sentence in part to encourage reporting of child sex abuse in the Amish community to protect victims and to obtain treatment for offenders in the juvenile justice system before the case ends up in criminal court.

The issues raised by Whitaker

2. Does it violate the First and Fourteenth Amendments to the United States 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 parties agreed and the trial court found that the elders in the local Amish community did not report known child sexual assaults to civil authorities such as social workers or the police, opting instead to address the matter only internally. That is what occurred here: Amish elders did not notify civil authorities of Whitaker's many known acts of sexual intercourse with his younger sisters for more than two years. The assaults came to public light many years later only after Whitaker, who had left the State and turned 25 years old, was confronted by his sisters. The trial court imposed two years of initial confinement in prison followed by two years of extended supervision in part to punish Whitaker for his actions, but also in the hope that his prison sentence would deter the practice of adults in the local Amish community of not engaging civil authorities when they learn that child sexual assaults have occurred.

The trial court held on postconviction review that it did not sentence Whitaker for his religious beliefs or his past association with the Amish community.

The court of appeals held that it was proper for the trial court to base Whitaker's prison sentence in part on its desire to protect children in the Amish community by encouraging elders to promptly report known child sexual assaults to civil authorities.

3. If the sentencing court can consider a defendant's religious association to deter other members of a religious community, does the "reliable nexus" test followed by this Court require congruity between the offense and the activity protected by the First Amendment?

The trial court believed there was a reliable nexus between Whitaker's admitted sexual assaults of his sisters and its desire to prevent similar offenses from occurring in the future by encouraging Amish adults to promptly report child sexual assaults to civil authorities.

The court of appeals held that there was a "reliable nexus" between Whitaker's many sexual assaults of his sisters and the trial court's desire to protect children in the Amish community from sexual assault and to get treatment in the juvenile justice system for known juvenile sex offenders such as Whitaker.

POSITION ON ORAL ARUGMENT AND PUBLICATION

The State believes that this case is appropriate for both oral argument and publication.

STATEMENT OF THE CASE

The original charges and facts supporting them

The State charged Whitaker with six counts of first-degree sexual assault of his two siblings, R.A.W. and S.E.W., committed over a period of more than two years when Whitaker was between ages 12 and 15. The State charged three counts for each victim. His total penalty exposure if convicted of all six counts was 360 years, 60 years maximum for each count. (R. 1; 10.)

Police interviewed R.A.W. on June 22, 2017. As alleged in the complaint, R.A.W. stated that Whitaker sexually assaulted her and her two siblings repeatedly when she was between ages 10 and 13, and he was between ages 12 and 15, from 2005 through 2007. (R. 1:2.) It was "almost [on] a daily basis, and it was a lot more severe for [R.A.W.] because she was the oldest." (R. 1:2.) It "involved almost daily sexual intercourse, penis to vagina penetration, from Westley." (R. 1:2.) R.A.W. said that Whitaker's assaults caused her two siblings to "move[ ] to Michigan to get away from this type of behavior and out of the household." (R. 1:2.)

Whitaker turned himself in two-and-one-half months later on September 7, 2017, when he called police and

admitted his guilt in a telephone interview from his home in New York State. (R. 1:3.) Whitaker was aware that R.A.W. had given a statement to police, that "it was [her] idea that he call and give a statement," and he hoped it would "bring closure." (R. 1:3.) Whitaker said he and R.A.W. discussed this in person at a family wedding a week earlier, and he also discussed this with S.E.W. over the phone. After discussing this with R.A.W. "and a counselor from the church," Whitaker agreed to turn himself in but only after asking: "Just to be clear, they are not pressing charges, right?" (R. 1:3.) Whitaker said, "since they were not pressing charges, he wanted to bring it all out and get it dealt with." (R. 1:3.)

Whitaker admitted in the telephone interview that the sexual activity "started in May 2005, and [he] believed June 2007 was the last time anything happened." (R. 1:3.) Whitaker admitted to having penis to vagina intercourse with R.A.W. "several times per week." (R. 1:3.) He would ejaculate inside her vagina without protection. (R. 1:4.) Whitaker also admitted sexually assaulting S.E.W. multiple times and another sister, C.R.W., once. Although Whitaker denied penis to vagina intercourse with those two, he admitted to ejaculating on them. (R. 1:4.) Whitaker added the detail that his victims "always had their eyes closed while the assaults were occurring." (R. 1:4.) Whitaker said he began assaulting S.E.W. in late 2006 and stopped in June 2007, when "I realized the wrongness." (R. 1:4.)

S.E.W. told police in an October 2017 interview that the assaults on her began in 2005 when she was seven years old and ended when she was ten years old. (R. 1:4, 5.) She said Whitaker would rub his penis on her but there was no penetration, and "it occurred approximately every other day and occurred over the course of the summer." (R. 1:5.) S.E.W. explained that Whitaker "tried to penetrate her vagina with his penis, but could not because it was too painful for her." (R. 1:5.) One time, Whitaker penetrated her vagina with his

fingers, "it was really painful for her, and there was blood from injuries caused by [Whitaker] inserting his fingers into [her] vagina." (R. 1:5.) According to S.E.W., Whitaker "ejaculated every time she was assaulted," and "it would normally go in her vaginal area." (R. 1:5.) Whitaker threatened to "kill" S.E.W. if she told anyone, and he threatened to "make her life hard if she did not cooperate with him." S.E.W. said she went along with it because "she didn't know what else to do." (R. 1:5.) S.E.W. said that Whitaker and another brother jointly assaulted her on one occasion and they "took turns." (R. 1:5.)

Police then interviewed C.R.W. She reported that Whitaker sexually assaulted her one time when "she was either six or seven years old" and Whitaker was fourteen years old. (R. 1:6.) Like S.E.W., C.R.W. said that Whitaker "tried to penetrate her vagina with his penis, but he could not penetrate her." (R. 1:6.)

Whitaker's no-contest plea

After plea negotiations with the State, Whitaker pled no contest on January 25, 2019, to one count of first-degree sexual assault of a child. (R. 55:10.) The other five sexual assault charges "would be dismissed but read in" for consideration at sentencing. (R. 55:4.) The allegations in the criminal complaint served as the factual basis for the plea. (R. 55:9–10.) At the plea hearing, Whitaker's attorney stipulated only to the facts supporting the one count to which Whitaker pled guilty. (R. 55:9–10.) He did not, however, dispute the facts supporting the other five counts that were dismissed but read into the record.

Sentencing

Whitaker was sentenced on April 18, 2019. (R. 54.) Defense counsel acknowledged that fifteen years earlier, Whitaker "began a series of terrible crimes against his sisters. We're not here today because Mr. Whitaker has denied or

minimized those offenses." (R. 54:13.) The trial court considered a presentence investigation report that included a victim impact statement. (R. 54:4.) The parties agreed, and the court held, that Whitaker would not have to register as a sex offender because he no longer posed a risk to the public for the crimes he committed as a juvenile. (R. 54:5–6.) The victims recommended that Whitaker serve two to five years of initial confinement in prison. (R. 54:11.) The prosecutor recommended that he serve three years of initial confinement followed by three years of extended supervision because, despite his admission of guilt, Whitaker should be punished and must know that there are consequences for his actions. (R. 54:11–12.)

Defense counsel pointed to several mitigating factors: Whitaker had no criminal record, he has led a productive life as an adult, he turned himself in and pled no contest rather than go to trial, and he had sole custody of a young son. Although the presentence report recommended only a 30-day jail sentence as a condition of probation, counsel argued that Whitaker should not have to serve any time at all or even be placed on probation. When Whitaker committed these crimes, he was an immature adolescent who, because of his sheltered upbringing, knew almost nothing about sex or the impact of his conduct on the victims. Whitaker stopped once he realized the wrongfulness of his conduct and he is no risk to reoffend. The stigma of this felony conviction will follow him for life and alone is sufficient punishment, counsel argued. (R. 54:19–27.)

In exercising his right of allocution, Whitaker expressed remorse for his conduct, apologized to the victims, and hoped that this will be "a step forward in the healing process." (R. 54:28.)

In exercising its sentencing discretion, the trial court agreed with both attorneys that it faced a "[v]ery difficult decision" given that Whitaker committed these offenses when he was young and is no longer a risk. (R. 54:29.) "But it's not

one time, one act. It was a thousand. It was years of abuse." (R. 54:29.) The court saw the need to punish Whitaker for these crimes. It also saw the need to use his sentence to deter adults in the Amish community of which Whitaker and the victims were members from the practice of not reporting child sexual assaults, choosing instead to address them internally. (R. 54:29.) The Court explained:

> 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 it often happens and that it is dealt with in the community. And that's not sufficient. That's not sufficient when it is not a one-time thing and not when the women, the 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.

(R. 54:29.) The court sought to deter adults in the local Amish community "from permitting their sons, their husbands to engage in this" behavior. (R. 54:29–30.)

The court recognized that there is "zero" risk of Whitaker reoffending. (R. 54:30.) That is why it did not require him to register as a sex offender. (R. 54:30.) The court also was pleased that Whitaker came forward and did not force the victims to go through a trial. (R. 54:30.) Nonetheless, the court emphasized the serious impact Whitaker's actions had on the victims, especially R.A.W.:

> So not only was [R.A.W.] destroyed by these acts night after night after night, but she was destroyed by the threats of her beloved older brother. But also she couldn't raise it in her family, or she would be blamed. She couldn't raise it in her family because she had no power in which to do so. She was not permitted to have those independent thoughts, I believe.

(R. 54:30.)

The court refused to give credit to Whitaker for eventually turning himself in as an adult because the matter should have been addressed years earlier when he was a juvenile and when adults were aware of his endless abuse of his sisters but did not act to stop it. (R. 54:30–32.) "Further, it would be unjust for this court to conclude that a juvenile who avoids apprehension until he is an adult should be given the benefit of his illegal actions." *State v. Davis*, 2005 WI App 98, ¶ 23, 281 Wis. 2d 118, 698 N.W.2d 823.

The court believed that Whitaker's "remorse is sincere" (R. 54:30–31), but pointed out that most Amish men raised the same way as Whitaker do not "sexually assault their sisters night after night after night." (R. 54:31.) Explaining the need for confinement, the court thought "no confinement would depreciate the seriousness of this offense" (R. 54:32.) adding:

> And the actual facts of this case are abhorrent, that she was victimized. She's in bed. She can't go to sleep comfortably in her own house. Mr. Whitaker can. Her parents can. But [R.A.W.] couldn't. In the one place where she is supposed to feel safety, with her parents' support, she didn't have it. And she didn't have the support of her beloved older brother.

(R. 54:31.) That is what made punishment a "critical" factor in the court's eyes. (R. 54:33–34.) The court concluded that "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." (R. 54:32.)

Noting that the maximum prison sentence it could impose was 60 years (R. 54:30), the trial court rejected the State's recommended six-year bifurcated sentence as too long. It imposed a four-year bifurcated sentence instead (R. 54:32). The court stayed execution of the sentence and released

Whitaker on bond pending appeal. (R. 54:36, 39–40.) The judgment of conviction was entered on April 22, 2019. (R. 29.)

The postconviction proceedings

Whitaker filed a postconviction motion for resentencing. (R. 35.) He argued that the trial court improperly considered his affiliation with the Amish community and its religious practices as a primary sentencing factor in violation of his First Amendment right to the free exercise of religion. Whitaker also argued that his sentence violated the Eighth Amendment's proscription against cruel and unusual punishment. Finally, Whitaker argued that the trial court erroneously exercised its sentencing discretion. The trial court denied Whitaker's motion at a hearing held on December 30, 2019. (R. 61.)

After conceding that the court could use Whitaker's sentence to deter others from committing sexual assaults, defense counsel argued that it could not use his prison sentence to encourage elders in the Amish community to protect future victims by promptly reporting child sexual assaults to civil authorities. In doing so, Whitaker argued, the court was in effect sentencing him for having been both raised Amish and a member of the Amish community when the assaults occurred. (R. 61:5–7.)

The prosecutor argued that the trial court was not using Whitaker's sentence to deter a religious practice (R. 61:12), and there was a "reliable nexus" between Whitaker's conduct and his Amish community (R. 61:13).

The trial court denied that it had improperly considered Whitaker's religious beliefs and association as sentencing factors. (R. 61:14.) The court explained that the Amish do not condone child sexual assaults but they must be encouraged to report sexual assaults that occur within their community to prevent this from happening again. (R. 61:7.) It did not consider religion as a factor. (R. 61:8.) The court's objective

was both to address the failure of this Amish community to properly deal with child sexual assaults and to encourage victims to come forward. (R. 61:9–10.)

Defense counsel acknowledged that the court articulated proper sentencing factors and that its sentence was well within the statutory range for first-degree sexual assault committed by an adult. Counsel argued nonetheless that the court erroneously exercised its discretion by failing to give proper weight to the factors that Whitaker committed his crimes as an adolescent, was no longer a danger to the community, and no longer needed to be rehabilitated. (R. 61:26–27.)

The court pointed out that Whitaker did not come forward when he was a juvenile at a time when he could have benefitted from juvenile jurisdiction and its lesser penalties. Whitaker came forward as an adult only after the victims finally confronted him. (R. 61:17.) He did not come forward for many years, there were three victims, and this delay exacerbated R.A.W.'s recovery because she could not effectively deal with the trauma until then. (R. 61:23.) These serious offenses especially against R.A.W. occurred almost every day for over two years. (R. 61:20.) It was "every night" and "really an extreme situation." (R. 61:23–24.)

The court explained that the sentence it imposed was what it believed to be the minimum necessary to achieve its sentencing objectives even though Whitaker no longer posed a danger to the public and no longer needed rehabilitation. (R. 61:27–28.) The need for punishment was the primary factor and anything less than the sentence imposed would unduly depreciate the seriousness of Whitaker's offenses. (R. 61:27–28.) This was "[m]ore than just a teenager experimenting with sex, it was a brutal assault, because she was so young, on his sister." (R. 61:28.)

The decision of the court of appeals

The Wisconsin Court of Appeals affirmed in a published decision. *State v. Whitaker*, 2021 WI App 17, 396 Wis. 2d 557, 957 N.W.2d 561. At the outset, the court narrowly defined the local Amish community of which Whitaker was a member and to which the trial court addressed its remarks. *Id.* ¶ 9.

The court of appeals next noted that "[t]he parties and the circuit court operated from shared factual premises that inadequate responses to child sexual assault in the Amish community allowed sexual assaults to occur in this case and also risk continuing to allow child sexual assaults." *Id.* ¶ 38; *see id.* n.10.

The court of appeals acknowledged that the trial court relied in part on the general deterrence sentencing factor to encourage elders in the Amish community to promptly report child sexual assaults to civil authorities, *id.* ¶ 14, with the objective of preventing future child sexual assaults and "encouraging child protection efforts." *Id.* ¶ 26. Its intent was not specifically to deter adults in the Amish community from committing sexual assaults. *Id.* ¶¶ 26, 33, 36.

The court of appeals believed that the trial court's deterrence rationale fit more properly under the sentencing factor of protecting the public, in this case, children. *Id.* ¶¶ 34, 37. The sentence served the public interest by protecting the right of children in the Amish community to be free from sexual assault. *Id.* ¶ 36. The court of appeals also interpreted the trial court's intent as wanting "to teach or remind adults in the Amish community that a potential prison sentence awaits a man, who as a boy, sexually assaulted another child, but who avoided involvement in the juvenile justice system because his delinquent conduct was not adequately addressed while he was younger than 17." *Id.* The objective was to encourage adults in the Amish community to engage civil authorities while the perpetrator is still young instead of

waiting to address the issue in criminal court where the offender, even though he committed his offenses as a juvenile, could be imprisoned. *Id.* ¶ 37.

The court of appeals rejected Whitaker's First Amendment challenge. It concluded that the trial court could consider factors like general deterrence and the public interest at sentencing even assuming they might infringe on Whitaker's rights to the free exercise of religion and to free association with a religious community. *Id.* ¶ 56. Before doing so, the court assumed without deciding that the trial court attributed the lack of effective intervention by Amish adults to one or more religious beliefs. *Id.* ¶ 40. It held that the trial court operated from the premise that the Amish community opposes child sexual assault and that there would be no excessive entanglement with its religious beliefs to use Whitaker's sentence to express its strong disapproval of child sexual assault. *Id.* ¶ 53.

The court of appeals also assumed that the sentence infringed on the right of association with a religious community and on religious beliefs that do not allow Amish to "interact more regularly with secular authorities." *Id.* ¶ 43. But, it concluded, Whitaker failed to prove by clear and convincing evidence that the trial court relied on an improper factor because there was a "reliable nexus" between his admitted crimes and his religion. *Id.* ¶ 44. The court of appeals described the nexus as, "child sexual assaults—which [the trial court] 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." *Id.* ¶ 48.

The court of appeals held that this nexus was sufficient to survive First Amendment scrutiny because "it is relevant to the legitimate purpose of protecting children from sexual

assaults." *Id.* ¶ 49. This was proper because "all that is required is a reliable nexus tied to a legitimate sentencing rationale, which does not need to be a rationale based on a likelihood of recidivism by Whitaker." *Id.*

The court rejected Whitaker's argument that the sentence violated the Establishment Clause because its deterrence rationale did not involve excessive entanglement with the Amish religion. *Id.* ¶ 53. "Whitaker has failed to establish . . . that according to the dictates of their faith, members of the Amish community are under all circumstances prohibited or discouraged from communicating with authorities about child sexual assaults." *Id.* ¶ 40 n.12.

This Court granted Whitaker's petition for review on June 16, 2021. It directed the parties to address the first two issues raised by Whitaker in his petition along with a third issue raised by this Court.

STANDARD OF REVIEW

Review of a sentence is deferential, limited to whether the trial court erroneously exercised its discretion. *State v. Harris*, 2010 WI 79, ¶ 3, 326 Wis. 2d 685, 786 N.W.2d 409. "Sentencing decisions are afforded a presumption of reasonability consistent with Wisconsin's strong public policy against interference with a circuit court's discretion." *Id.*

The sentencing court is presumed to have acted reasonably, and Whitaker bears the burden of proving an unreasonable or unjustifiable basis in the record for the sentence imposed. *State v. Davis*, 2005 WI App 98, ¶ 12, 281 Wis. 2d 118, 698 N.W.2d 823. Due to this presumption of reasonableness, the burden of proving an erroneous exercise of sentencing discretion is a "heavy" one. *Harris*, 326 Wis. 2d 685, ¶ 30.

ARGUMENT

I. The sentencing court properly considered the need to deter adults in the Amish community from the practice of not engaging civil authorities when children in the community are sexually abused.

"It is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756–58 (1982) (citation omitted). Here, "[t]here is no question that Amish elders were aware of Mr. Whitaker's offenses while they were happening, and did not notify secular authorities." (Whitaker's Br. 29.)[1] "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." (Whitaker's Br. 27.)

This section addresses the issue raised by this Court *sua sponte*: whether a sentencing court may rely on the factors of general deterrence and protection of the public "to send a message to an identified set of third parties that they should alter their behavior in the future." Whitaker argues that the trial court relied on an improper factor, his membership in the Amish religion, when it sentenced him to two years of initial confinement in prison in part to encourage adults in his Amish community to report child sexual assaults to civil authorities.

A. Whitaker must prove by clear and convincing evidence that the sentencing court relied on an improper factor.

The sentencing court erroneously exercises its discretion when it "actually relies on clearly irrelevant or

[1] Citations to Whitaker's brief are to the electronic page number and not to the number listed at the bottom of the brief.

improper factors." *Harris*, 326 Wis. 2d 685, ¶ 66. Whitaker must present clear and convincing evidence that the court actually relied on an irrelevant or improper factor. *Id.* ¶¶ 34–35, 60; *see State v. Loomis*, 2016 WI 68, ¶ 31, 371 Wis. 2d 235, 881 N.W.2d 749; *State v. Alexander*, 2015 WI 6, ¶¶ 2, 17, 360 Wis. 2d 292, 858 N.W.2d 662 (same).

The sentencing court actually relies on an improper factor when it pays "explicit attention" to that factor and it forms the "basis for the sentence." *Alexander*, 360 Wis. 2d 292, ¶ 25 (citation omitted). When determining whether the sentencing court relied on an improper factor, the reviewing court "review[s] the sentencing transcript as a whole and consider[s] the allegedly improper comments in context." *State v. Williams*, 2018 WI 59, ¶ 52, 381 Wis. 2d 661, 912 N.W.2d 373.

B. It is undisputed that this particular Amish community did not report child sexual assaults to civil authorities.

It is important to note at the outset that the Amish community in question was not "the Amish religion" or even all Amish persons in Vernon County: "When we refer to 'the Amish Community,' we mean 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." *Whitaker*, 396 Wis. 2d 557, ¶ 9. The court made this point clear: "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.*

Whitaker does not dispute what amounts to the trial court's finding of fact that it was then a common practice of this narrowly-defined Amish community in which Whitaker was a member to not report child sexual assaults by its

members against other members, opting instead to address the problem internally. (R. 54:29–30.) *Whitaker*, 396 Wis. 2d 557, ¶¶ 9, 38. Two key facts are relevant here. "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." *Id.* ¶ 2. And, "[s]econd, 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." *Id.*

In his sentencing remarks, the prosecutor discussed why it took so long for these assaults to come to light: "We've dealt with these situations, Your Honor, in the past in the Amish community, where we have had sisters, daughters that have been sexually assaulted, and then they end up actually leaving the Amish community, and then it gets reported years later." (R. 54:8.) The prosecutor continued:

> So I understand the culture surrounding the Amish, that they want to handle these situations internally. And a lot of times what they end up doing is they end up sending the people off to Ohio, is one of the treatment places that a lot of these individuals in the past have gone to.
>
> So there's a lot of -- there's a lot of things that are going on as to why this wasn't reported, why it wasn't addressed 12 or 14 years ago.

(R. 54:8.)

In his sentencing remarks, Whitaker's attorney acknowledged the following: "I think it's also important to note that there were adults who were aware of this conduct when it was happening. *They went to their religious elders at the time, and it was recommended that the allegations remain within the community*." (R. 54:16 (emphasis added).) Counsel explained further that "[t]his is not unusual" because "they treated it as is traditionally treated in the Amish

[community], and as a result there was never any meaningful intervention *even though people were aware that this happened*." (R. 54:16 (emphasis added).)

C. Protecting children and deterring adults in the Amish community from the same harmful conduct that contributed to Whitaker's offenses are proper sentencing factors.

"The interests of both society and the individual must be weighed in each sentencing process." *McCleary v. State*, 49 Wis. 2d 263, 271, 182 N.W.2d 512 (1971). "The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized." ABA Standards for Criminal Justice, Sentencing § 18-6.1 (3d ed. 1994).

Deterrence of others is one of the primary factors a court may consider when imposing sentence. *State v. Gallion*, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197. Protection of the public is another. *Id.* "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *Id.* "The court also observed that society has an interest in punishing Gallion so that his sentence might serve as a general deterrence against drunk driving." *Id.* ¶ 61.

"[S]entencing must accurately reflect the community's attitude toward the misconduct of which the offender has been adjudged guilty and thereby ratify and reinforce community values." *United States v. Grayson*, 438 U.S. 41, 48 n.8 (1978) (citation omitted) (*superseded by statute as noted in Barber v. Thomas*, 560 U.S. 474, 482 (2010)) "[A] sentencing court can consider the impact a defendant's crimes have had on a community and can vindicate that community's interests

in justice." *Deyton v. Keller*, 682 F.3d 340, 346 (4th Cir. 2012) (citation omitted).

General deterrence of others is widely recognized as a proper sentencing factor. *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985). But deterrence should not be "the *sole* aim in imposing sentence." *Id.* "General deterrence is the threat or imposition of sanctions on one person to demonstrate to the broader public the expected costs of criminal acts. General deterrent effects depend on the probability that offenders view their behaviors as likely to be detected and punished." Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Deliquency*, 16 Notre Dame Journal of Law, J.L. Ethics & Pub. Pol'y 1, 23 (2002). "[C]riminal sanctions may be used in an attempt to foster respect for the law and deter criminal conduct. . . . Thus, information about criminal sentences may encourage people to respect the law as a whole and increase the numbers of law-abiding citizens." *ABA Standards for Criminal Justice, Sentencing*, Commentary to § 18-2.1(a)(i), p. 11 (3d ed. 1994) (footnote omitted).

D. The court of appeals correctly held that the trial court's desire to spur adults in the Amish community to protect their children from sexual assault was a proper sentencing factor.

The court of appeals believed that the trial court's rationale, though expressed as its desire to deter the practice of not reporting child sexual assaults in the Amish community, was better understood as its desire to protect members of the public, namely children, from sexual assault in this particular Amish community. *Whitaker*, 396 Wis. 2d 557, ¶ 34.

The desire to protect the public is, like deterrence, a long-recognized proper factor to be considered when deciding what sentence to impose, *Gallion*, 270 Wis. 2d 535 ¶ 40. It is, along with the gravity of the offense and character of the offender, one of the three primary factors a court must always consider at sentencing. *Harris*, 326 Wis. 2d 685, ¶ 28.

The State agrees that the trial court was primarily concerned with protecting future child sexual assault victims, but it also believes that the court's desire to protect future victims goes hand-in-hand with its stated desire to deter the practice of non-reporting by adults in the Amish community; or, stated affirmatively, the court's rationale was to encourage adults in the Amish community to promptly report child sexual assaults to civil authorities to protect future victims and to get prompt treatment in the juvenile justice system for juvenile offenders. The trial court's "rationale was to encourage effective interventions by adults in the pertinent Amish community to protect girls from sexual assaults by family members." *Whitaker*, 396 Wis. 2d 557, ¶ 2. Its rationale, therefore, served both to deter inaction by third parties and to protect children from assault.

The trial court sought to protect children in Whitaker's Amish community because they are especially vulnerable given the practice of adults in the Amish community not to involve civil authorities even after they learn of the assaultive conduct. *Whitaker*, 396 Wis. 2d 557, ¶ 34. It was the court's hope that imposition of a prison sentence on Whitaker for crimes committed long ago would encourage respect for the law and prevent future assaults by telling adults in the Amish community to intervene early both to protect victims and to address the juvenile's misconduct in the juvenile justice system where he can get treatment, rather than years later in criminal court where he will face prison. *Id.* ¶¶ 36–37.

The trial court gave careful consideration to the need to protect the public after everyone agreed that the protection of children from sexual abuse in this particular Amish community was not adequate. *Whitaker*, 396 Wis. 2d 557, ¶ 38. The court properly weighed the interests of society to protect children from sexual assault and the need to punish Whitaker for his serious crimes. It considered the statements of the victims, revealing the severe impact that Whitaker's unchecked assaultive conduct had on them and their family. It is proper to consider "the impact of the crime on the victim or victim's family. " *Gallion*, 270 Wis. 2d 535, ¶ 65; *see State v. Ninham*, 2011 WI 33, ¶ 96, 333 Wis. 2d 335, 797 N.W.2d 451 (same).

Whitaker acknowledges that a court may impose a sentence designed to deter third parties from *committing* the same crimes as his, but it may not use his sentence to deter a third-party group or organization of which he and the victims are members from the practice of *failing to disclose* those crimes. Whitaker does not adequately explain why the former is permissible but the latter is not.

The trial court's goal of encouraging third parties in a community to promptly report child sexual assaults to civil authorities, whether the factor is defined as deterrence or protection of the public, is more likely to be effective where as here the community is local and insular, the offender and the victims were all children within that insular community when the assaults occurred, and the criminal wrongdoing was known to the elders in the community when it occurred. The trial court's goals were more narrowly targeted, and potentially more effective on this particular community, than for example the permitted imposition of a lengthy sentence on a drunk driver in hopes that it will deter all motorists from driving drunk in the interest of public protection. *Gallion*, 270 Wis. 2d 535, ¶ 61.

> While each convicted felon is an individual deserving of individual treatment at sentencing, the interests of the public, too, will vary according to the particular community in which the crime was committed, the capacity of the community to rehabilitate the criminal, and the needs of that community for protection from that type of criminal activity.

Matter of Jud. Admin. Felony Sent'g Guidelines, 120 Wis. 2d 198, 202, 353 N.W.2d 793 (1984). The trial court properly took into account these relevant "interests of the public" in this "particular community" when imposing sentence on Whitaker.

Here, admittedly, the deterrence objective is one step removed from the typical goal of deterring third parties from committing the same crime as the defendant. But the objective here was every bit as valid. *Whitaker*, 396 Wis. 2d 557, ¶ 49. Whitaker's crimes increased in number and severity for over two years *because* adults in his community did not stop him or get him the outside help he obviously needed, to the severe detriment of his victims and of Whitaker himself.

The adults here failed both Whitaker and his victims. Every indication is that those adults will fail again if presented with a similar situation in the future. The trial court could reasonably use Whitaker's short prison sentence to show the adults in this community what will happen to a future juvenile offender who escapes detection because they allowed his assaultive conduct to continue unabated rather than notify civil authorities to put a stop to it; the treatment and leniency available in the juvenile justice system may be replaced in the criminal justice system by punishment and incarceration as a result of their inaction.

Whitaker's sentence may or may not deter future juvenile offenders like him but it could prevent future assaultive conduct from going on for so long by forcing the

hand of responsible adults. It was reasonable for the trial court to encourage elders in the Amish community to involve civil authorities from the beginning so that the assaults stop, young Amish offenders can receive appropriate treatment in the juvenile justice system with its lesser penalties, and child victims in the community will be protected and empowered to demand a stop to the abuse sooner. Whitaker's sentence also might have the ancillary effect of deterring future *adult* offenders in the Amish community and empowering their *adult* victims to come forward.

Whitaker is simply wrong when he insists that "the deterrent objective in this case literally punishes Mr. Whitaker for the sins of his fathers." (Whitaker's Br. 30.) Whitaker was punished for *his own* grievous sins that were allowed to continue unabated for over two years thanks to the enabling "sins of his fathers." Whitaker, though an adolescent, took full advantage of the adults' hands-off approach by committing hundreds of assaults on his sisters without repercussion. The elders made the decision to protect Whitaker at the expense of his sisters' physical and psychological well-being. As a result, both Whitaker and his three sisters suffered severe psychological consequences due directly to the inaction of responsible adults in their community. The trial court properly addressed the "sins" of *everyone* involved in this sordid, entirely preventable situation when it sentenced Whitaker to a brief term of initial confinement in prison to punish him and to spur future action by adults in the hope that something like this will never happen again to another family in that Amish community.

Whitaker's argument that his sentence was not individualized to him (Whitaker's Br. 30–31), simply ignores the trial court's thorough exercise of discretion that focused on many individualized factors including the gravity of his offenses, their impact on the victims, Whitaker's character, his delayed disclosure only after being confronted by the

victims years later, mitigating factors, the need to punish him for his aggravated and repeated acts despite those mitigating factors, along with the desire to encourage adults in Whitaker's unique community to prevent this from ever happening again to other children. (R. 54:29–34.) "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, 427, 576 N.W.2d 912 (1998) (citation omitted). The trial court treated this unique situation properly and imposed a sentence for these serious offenses that addressed the needs of both Whitaker and his community.

The likelihood that the deterrence/public safety message sent by the trial court would be received by the identified third parties was greater here than in the normal deterrence situation because Whitaker, his victims, and the third-party adults to whom the message was sent were all members of the same insular local community and the inaction by those adults directly contributed to the scope and severity of Whitaker's admitted conduct. The message no doubt got to his parents and the elders as soon as sentence was imposed. The trial court properly exercised its discretion when it used Whitaker's sentence in part to influence the actions of third parties to better protect their children because they no doubt received that message. Whether those third parties act on that message in the future is up to them.

II. The Court of Appeals properly held that the trial court did not violate Whitaker's First Amendment rights to the free exercise of religion and to associate with a religious group.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

Whitaker argues that his sentence violated the First Amendment's Free Exercise and Establishment Clauses.[2] Whitaker maintains that he is being punished both because he was a member of the Amish community when the assaults occurred and because of the Amish community's practice of not engaging civil authorities when child sexual assaults occur among its members.

Whitaker cites no case law that allows a religious community of any sort to shield a child sex offender from civil authorities at the physical and psychological expense of his young victims simply because the offender and his victims are members of that religious community.

Neither Whitaker's parents, other responsible adults, nor the elders had any right to jeopardize the safety of the children in their community. A parent's right to the free exercise of religion may be restricted by the State, "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972).

A. Whitaker's sentence, imposed in part to protect Amish children from sexual abuse, did not violate the Free Exercise Clause of the First Amendment.

The trial court may not base its sentence on either the defendant's or the victim's religion, the defendant's religious beliefs, or those of the victim's family. *State v. Ninham*, 2011

[2] As he phrased the first issue in his petition for review, Whitaker also argued that his sentence violated Article I Section 18 of the Wisconsin Constitution, Wisconsin's counterpart to the First Amendment to the United States Constitution. The State will not address that separate issue because Whitaker did not develop in the court of appeals and does not develop here any separate argument for relief under the Wisconsin Constitution. *See Whitaker*, 396 Wis. 2d 557, ¶ 20 n.4.

WI 33, ¶¶ 90, 94, 333 Wis. 2d 335, 797 N.W.2d 451. Whitaker must prove by clear and convincing evidence that the court actually relied on his religious beliefs or association for the sentence it imposed. *Id*. ¶ 100.

A court may not enhance a sentence based solely on the defendant's abstract beliefs because they are protected by the First Amendment. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992). The defendant's "religion or creed" is among those personal characteristics that are not to be considered "in and of themselves" at sentencing. *ABA Standards for Criminal Justice, Sentencing*, § 18-3.4(d) and (iv); *see id*., Commentary at 57 ("The present Standard considers the use of personal characteristics in the absence of such a nexus to culpability.").

The Free Exercise Clause protects religious beliefs and practices. The freedom to believe is absolute, but the freedom to act on those beliefs may be subject to government regulation. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). The religious practice may be regulated so long as the law in question is neutral and generally applicable. *Employment Division of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (*superseded by statute as noted in Tanzin v. Tanvir*, 141 S. Ct. 486, 489, 492 (2020)).

Religious beliefs are absolutely protected, but "[c]onduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 303–04. "The United States Supreme Court has held, as the circuit court instructed, that 'the constitutional freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society.'" *State v. Neuman*, 2013 WI 58, ¶ 125, 348 Wis. 2d 455, 832 N.W.2d 560.

There is no "constitutional right to ignore neutral laws of general applicability." *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) (*superseded by statute as noted in Holt v. Hobbs*, 574 U.S. 352, 357–58 (2015)). "When the exercise of religion

has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Id*. at 535.

"The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Smith*, 494 U.S. at 885 (citation omitted). The government may "enforce generally applicable prohibitions of socially harmful conduct." *Id*. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense." *Id*.

B. The sentencing court may consider a defendant's religious beliefs and association if they are relevant to sentencing factors or there is a reliable nexus between them and the crime committed.

The Constitution does not absolutely prohibit consideration of a defendant's religious beliefs or association at sentencing even though they are protected by the First Amendment. *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993). The sentence may be enhanced when the defendant's abstract beliefs or his association with an identified group having those beliefs are "relevant to several aggravating factors." *Id*. (discussing *Barclay v. Florida*, 463 U.S. 939 (1983)).

The Supreme Court, "in *Dawson* suggested that evidence of a defendant's protected associations or beliefs *would* be relevant at sentencing *if* the Government tied that evidence to the offense of conviction or introduced it to rebut mitigating evidence." *United States v. Schmidt*, 930 F.3d 858, 863 (7th Cir. 2019). The defendant's protected beliefs and

associations may be considered when they are relevant to proper sentencing factors. *Id.* at 864–66 (and cases discussed therein). A defendant's white supremacist beliefs, coupled with his criminal record, were properly considered as evidence of his future dangerousness and lack of respect for the law. *Id*. at 867–69. "Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Mitchell*, 508 U.S. at 484.

Wisconsin law is the same. There must be a "reliable nexus" between the crime and the defendant's religious beliefs or practices. *See State v. Fuerst*, 181 Wis. 2d 903, 912–13, 512 N.W.2d 243 (Ct. App. 1994) (so holding as a matter of due process). This nexus can be established even absent a "cause and effect" relationship between the crime and the defendant's religious beliefs or practices. *State v. J.E.B.,* 161 Wis. 2d 655, 673, 469 N.W.2d 192 (Ct. App. 1991). *See United States v. Lemon*, 723 F.2d 922, 936 (D.C. Cir. 1983) (due process requires an "identifiable link" between the defendant's association and the crime committed). "For example, it would be permissible for a court sentencing a defendant convicted of drug offenses to consider the defendant's religious practices as a factor at sentencing if those religious practices involve the use of illegal drugs." *Fuerst*, 181 Wis. 2d at 913.

In *Fuerst,* the presentence investigation report properly contained information about a defendant's religious history, along with his personal and social history, when it evaluated his character. *Id*. In *J.E.B.*, 161 Wis. 2d at 673, it was proper for the court to consider the fact that the defendant read books containing child pornography because the crime, sexual contact with a child, paralleled the arguably protected activity. "[T]he mere mention of a religious element during sentencing is generally insufficient to establish a due process violation." *State v. Betters*, 2013 WI App 85, ¶ 11, 349 Wis. 2d 428, 835 N.W.2d 249.

Whitaker succinctly describes the nexus drawn by the trial court "between the deterrent objective in this case and Mr. Whitaker's association with the Vernon County Amish community" here: "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." (Whitaker's Br. 17.)

Correct. And that was a rational nexus given the aggravated and entirely preventable facts of this case. The trial court reasonably exercised its discretion when it decided to impose a relatively brief prison sentence on Whitaker not only to punish him for his past serious delinquent conduct, but to spur action by adults in the Amish community to protect their children from such harm in the future.

This Court has recognized that parents have a legal duty to act to protect their children and "a parent's omission to fulfill this duty is a public wrong, which the State may prevent using its police powers." *Neuman*, 348 Wis. 2d 455, ¶ 106. "The parents' fundamental right to make decisions for their children about religion and medical care does not prevent the State from imposing criminal liability on a parent who fails to protect the child when the parent has a legal duty to act." *Id.* ¶ 116. "The State's authority is not nullified merely because a parent grounds his or her claim to control the child in religious belief." *Id.* ¶ 126.

In *Newman*, this Court held that the prosecution of parents for reckless homicide because they decided against seeking medical treatment for their child on religious grounds did not violate the Free Exercise Clause. *Id.* ¶¶ 113–17. This Court also held that the statutory exception to the child abuse statute allowing for treatment through prayer does not immunize parents from liability for reckless homicide caused by treatment through prayer. *Id.* ¶¶ 48–53.

Whitaker is simply wrong when he insists that "there is no congruity between inaction from third-party Amish elders and Mr. Whitaker's childhood offenses." (Whitaker's Br. 29.) Had the elders acted promptly, Whitaker's conduct may have ended after one, two or a few incidents and long before his conduct escalated to the almost daily acts of penis-vagina intercourse against R.A.W. for more than two years. Swift action would likely have prevented Whitaker from assaulting his other two sisters as well. Swift action would have protected Whitaker's sisters from the grave physical and psychological abuse they suffered and it would have gotten Whitaker the prompt professional treatment he so desperately needed but did not get.

The trial court's desire to protect Amish children from sexual assault within their community plainly does not "concern[ ] government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 707 (2012). Amish parents may not have to send their children to a public school so that their children between the ages of 14 and 16 can work on the family farm, *Yoder*, 406 U.S. at 228–30, but like all parents Amish parents are legally required to protect their children from harm. *See Prince v. Massachusetts*, 321 U.S. 158, 168, 170 (1944); *Neuman*, 348 Wis. 2d 455, ¶¶ 113–17; *see also* Gage Raley, Note, *Yoder Revisited: Why the Landmark Amish Schooling Case Could–and Should–be Overturned*, 97 Va. L. Rev. 681, 699–702 (May 2011). It follows that a legislature or a court may take steps to encourage Amish parents to protect their children from sexual assault without violating the First Amendment. Lisa Biedrzycki, Comments, *Conformed to this World: Education Exception in a Changed Old Order Society*, 79 Temple L. Rev. 249, 267 (Spring 2006). Whitaker has not shown that child sexual assault, or the decision of Amish elders not to report it, has anything to do with the "faith and

mission" of the Amish religion which he agrees abhors child sexual assault. *Hosanna-Tabor*, 132 S. Ct. at 707.

There was, then, a "reliable nexus" between Whitaker's conduct and his association with the Amish community when he committed these offenses for such a long time. There was a "reliable nexus" between his crimes and the practice of the Amish community not to report child sexual assaults to civil authorities and instead to deal with them internally; a practice that enabled Whitaker to continue the abuse for over two years. There was a "reliable nexus" between Whitaker's crimes and the relevant sentencing factors of deterring this failed practice and protecting vulnerable children in this community from sexual assault.

Whitaker misses the mark when he insists that the trial court's deterrence/public protection objective was "directed only towards a specific religious community." (Whitaker's Br. 19.) The deterrence interest would be the same if the insular community in question were not religious. If the adults in charge of a boarding school, Eagle Scout troupe, youth hockey team, dance classes, summer music camp, or college gymnastic team, make the conscious decision not to report known sexual abuse of young people under their charge, a trial court could reasonably use the sentence of one who took advantage of that culture both to punish the offender and to deter the organization's *laisse faire* attitude towards sexual abuse that directly contributed to the criminal conduct for which sentence was imposed.

The Amish community's practice of not reporting child sexual abuse was, therefore, relevant to several sentencing factors. It also greatly aggravated Whitaker's offenses by allowing them to go unabated for over two years, increasing in severity to daily penis-to-vagina intercourse with R.A.W., and unnecessarily subjecting his victims to repeated abuse and resulting severe psychological harm. The trial court did not rely on an improper factor, namely Whitaker's religious

beliefs or membership in the Amish religion. It relied instead on the severity of his assaultive conduct enabled as it was by adults in his community.

C. Whitaker failed to prove that his sentence violated the Establishment Clause.

The Establishment Clause prohibits the government from either promoting or inhibiting religion, thereby protecting believers and non-believers alike. *See* Paul Winters, *Whom Must the Clergy Protect? The Interests of at-Risk Children in Conflict with Clergy-Penitent Privilege,* 62 DePaul L. Rev. 187, 195–96 (2012). A statute must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it "must not foster an excessive government entanglement with religion." *Id.* at 196, citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). "Excessive entanglement occurs 'if a court is required to interpret church law, policies, or practices.'" *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶ 43, 961 N.W.2d 635 (citation omitted). Whitaker has not proven by clear and convincing evidence that his sentence excessively entangled the trial court in the laws, policies, or practices of the Amish religion.

In *United States v. Lee*, 455 U.S. 252, 258–61 (1982), the Court rejected an Amish employer's First Amendment challenge to the mandatory collection and payment of social security taxes on the ground that the Amish faith prohibits participation in a governmental support program. The Court reasoned as follows: "The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." *Id.* at 257. "The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* "To maintain an organized society that guarantees religious

freedom to a great variety of faiths requires that some religious practices yield to the common good." *Id*. 259. *See id*. at 263 (Stevens, J., concurring) ("The Court's analysis supports a holding that there is virtually no room for a 'a constitutionally required exemption' on religious grounds from a valid tax that is entirely neutral in its general application.").

The State believes that a court's desire to protect Amish children from sexual abuse in their community serves an overriding governmental interest at least as great as requiring Amish employers to participate in the social security system. "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Yoder*, 406 U.S. at 223–34.

In *State v. Yoder*, 49 Wis. 2d 430, 437–443, 182 N.W.2d 539 (1971), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court and the United States Supreme Court on certiorari review both upheld a First Amendment challenge to Wisconsin's law requiring two years of compulsory high school education for Amish children between ages 14 and 16 because the State's interest was not compelling on balance with the longstanding Amish tradition of teaching children in that age group to work on the family farm. Social changes in the Amish community and subsequent decisions by the Supreme Court have arguably relegated its decision in *Yoder* to the status of a relic that relied on facts no longer true and on an analysis no longer used. *See* Raley, 97 Va. L. Rev. at 698–702, 713–16. This, then, addresses the court of appeals' concerns about protecting Amish traditions. *Whitaker*, 396 Wis. 2d 557, ¶ 41 n.13.

Simply put, some traditions are sacred whereas others do not stand up to scrutiny when evaluated under the lens of preserving social order and protecting the innocent. "Religious conduct intended [to] or certain to cause harm need not be tolerated under the First Amendment." *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997).

The court of appeals had little difficulty rejecting Whitaker's excessive entanglement argument:

> It is sufficient to reject the excessive entanglement argument that Whitaker fails to explain why we should conclude that a sentence based in part on the challenged rationale here requires or dictates extensive (as opposed to only limited) communications or cooperation with government representatives, allows social workers or police to interfere with specific religious beliefs or practices, or more generally involves any sort of ongoing government monitoring of religious life in the Amish community.

Whitaker, 396 Wis. 2d 557, ¶ 53.

Whitaker argues that the trial court could not consider the failure of this Amish community to adequately protect its children from sexual abuse because the Amish are exempt from the mandatory reporting law, Wis. Stat. § 48.981(2). (Whitaker's Br. 33.) He is wrong. Under Wis. Stat. § 48.981(2)(bm)1.a., "a member of the clergy" must report "if the member of the clergy has reasonable cause to suspect that a child seen by the member of the clergy in the course of his or her professional duties: (a) [h]as been abused, as defined in s. 48.02(1)(b) to (f)." Those reportable offenses include sexual intercourse or sexual contact with a child. Wis. Stat. § 48.02(1)(b). It appears that an Amish elder would be considered a "member of the clergy," required to report sexual intercourse with a child, as broadly defined by Wis. Stat. §§ 48.981(1)(cx) and 765.002(1). The mandatory reporter

"shall immediately inform" civil authorities of child sexual assault. Wis. Stat. § 48.981(3)(a)1. [3]

The duty to report child sexual abuse to civil authorities is difficult for anyone, not just the clergy or Amish elders. But, "even more disturbing are the devastating effects experienced by victims of child abuse. Children, because of their peculiar vulnerability require special protection." Winters, 62 DePaul L. Rev. at 219. "[T]hese factors, which are peculiar to children and the injuries they suffer, make non-reporting of known child abuse far more loathsome." *Id*.

At the very least, regardless of their religious beliefs or practices, Whitaker's parents would be subject to prosecution under Wis. Stat. § 948.03(4), for knowingly allowing their son to have sexual intercourse with their daughters for two years. They would also be subject to prosecution for child neglect under Wis. Stat. § 948.21(1). The trial court was rightly concerned about protecting children in this community from sexual abuse. "Furthermore, the primary purpose of the duty to report is the safeguarding of children. Thus, the burden to religion would be merely incidental." Winters, 62 DePaul L. Rev. at 209.[4]

---

[3] The exception to the mandatory reporting law for a "member of the clergy" who receives a report of child sexual abuse "solely through confidential communications . . . privately or in a confessional setting," does not apply here. Wis. Stat. § 48.981(2)(bm)3. That exception only applies if the member of the clergy "is authorized to hear or is accustomed to hearing such communications and, under the disciplines, tenets, or traditions of his or her religion, has a duty or is expected to keep those communications secret." Wis. Stat. § 48.981(2)(bm)3. Whitaker has not shown that the elders' decision not to disclose serious crimes to civil authorities and not to adequately protect Amish children from serious harm was required by the basic "disciplines, tenets, or traditions" of the Amish religion.

[4] Also, the Legislature's decision to exempt only religious clergy from mandatory child-abuse reporting laws, applicable to all

(continued on next page)

Even if the mandatory reporter law somehow does not apply to Amish elders, that policy decision by the Legislature is not a license for elders to shield Amish child abusers from civil authorities. The elders still *may* report the abuse even when they are not required to do so. Wis. Stat. § 48.981(2)(bm)3. The fact that Amish elders may not be *mandated* to report child sexual abuse does not mean that society in general, and the State of Wisconsin in particular, condones the practice of not reporting. It does not prevent civil authorities or, as here, the courts from strongly encouraging Amish elders to report child sexual abuse to protect their own children.

This was not, therefore, merely the "indifferent, yet lawful, behavior of third parties." (Whitaker's Br. 34.) It was lawless behavior by responsible adults that the trial court could use Whitaker's sentence to discourage in the future. The trial court did not "impose [its] moral and social expectations for how to react to intrafamilial sexual assault on the Amish community." (Whitaker's Br. 32.) The court did not "substitute its own social judgment" for what is required by law (Whitaker's Br. 34), "promote[] social behavior that the trial court believed desirable" (Whitaker's Br. 34–35), or further "the behavioral expectations of an individual circuit court judge on parenting Amish youth." (Whitaker's Br. 35). Rather, the court rightly expressed *society's universal condemnation* of the practice of any insular secular or religious group not to report child sexual assaults committed by one of its members against other members.

Simply put, the decision by adults in the Amish community to allow Whitaker to have sexual intercourse with his helpless young sisters for over two years without reporting

---

other counselors and professionals, may create its own Establishment Clause issues by promoting religion. *See* Winters, 62 DePaul L. Rev. at 215–18.

it to any civil authority serves no valid religious purpose and is universally condemned by society. Whitaker has not proven otherwise by clear and convincing evidence. The trial court properly used Whitaker's sentence to encourage action by third parties in this community that will prevent a tragedy similar to what occurred here from ever happening again.

D. Whitaker's sentence, imposed in part to protect Amish children from sexual abuse, did not deny him due process.

Whitaker's challenge arguably fits more neatly under the Fourteenth Amendment's Due Process Clause than under the First Amendment's Establishment or Free Exercise Clauses. It is unfair, a denial of due process, to consider the defendant's race, religious beliefs, or religious affiliation as sentencing factors. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). The pertinent issue is whether the sentencing was fair; not whether it violated the Establishment Clause. *Bates v. Sec'y, Fla. Dep't of Corrs.*, 768 F.3d 1278, 1290 (11th Cir. 2014) (and cases cited therein).

Likewise, in Wisconsin it is a denial of due process for a sentencing court to consider the defendant's religion, religious beliefs, or his failure to attend church. *Alexander*, 360 Wis. 2d 292, ¶ 23; *Fuerst*, 181 Wis. 2d at 911–12. Defendants have a "constitutionally protected due process right to be sentenced upon accurate information and a fair sentencing process." *State v. Travis*, 2012 WI App 46, ¶ 13, 340 Wis. 2d 639, 813 N.W.2d 702.

For the same reasons that Whitaker failed to prove by clear and convincing evidence that the trial court improperly relied on his religious beliefs or association, or excessively entangled itself in Amish beliefs, tenets, and traditions in violation of the First Amendment, he has failed to prove that the trial court denied him substantive due process in violation

of the Fourteenth Amendment by imposing an unfair sentence based on an irrelevant and improper factor.

Whitaker failed to prove by clear and convincing evidence that the trial court relied on an improper factor at sentencing: his abstract religious beliefs or association untethered to his admittedly egregious conduct. The trial court properly exercised its discretion.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 27th day of August 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,468 words.

Dated this 27th day of August 2021.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and 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 brief filed with the court and served on all opposing parties.

Dated this 27th day of August 2021.

_____
DANIEL J. O'BRIEN
Assistant Attorney General