STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal No. 2020AP000029-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESTLEY D. WHITAKER,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. Mr. Whitaker was denied due process when a sentencing objective was based on his membership in a community of faith and no reliable nexus linked his religious association to his offenses

However it is ultimately classified, the parties agree that the deterrent objective in this case was explicitly premised on Mr. Whitaker's childhood membership in the Amish community.[1] (Resp. Br. 35). The trial court confirmed it intended to target indifferent Amish elders at the post-conviction motion hearing, and the Court of Appeals presumed that the trial court relied on Mr. Whitaker's religious association to achieve a goal it ultimately concluded was lawful. (61:9-10); *State v. Whitaker*, 2021 WI App 17, ¶¶ 4, 28, 396 Wis. 2d 557, 957 N.W.2d 561. "Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors." *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409. As the State notes, a defendant is denied due process when a sentencing court considers a prohibited factor like religious beliefs as a basis of a criminal sentence. (Resp. Br. 43). *State v. Alexander*, 2015 WI 6, ¶ 23, 360 Wis. 2d 292, 858 N.W.2d 662.

Mr. Whitaker maintains that it is impossible to establish a deterrent objective directed solely at the defendant's religious community without also relying on a prohibited sentencing factor. If that factor is the defendant's religious faith, or association with a community of faith, reliance constitutes both a due process sentencing violation, and violates the Establishment Clause of the First Amendment by disadvantaging members of the defendant's religious community over similarly-situated offenders outside of the same community. *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

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[1] Mr. Whitaker does not waive any fact, issue or claim not specifically addressed in this response.

A. The reliable nexus test requires congruity between a protected interest and an offense

The State largely ignores the issue of whether a deterrent objective can ever apply solely to a religious community. Instead the State argues that Mr. Whitaker's childhood membership in an Amish community that did not report childhood sexual assaults to secular authorities was sufficiently related to his offenses because inaction by adults in the community allowed the assaults to continue. (Resp. Br. 37). As such, the State argues that the sentencing court was within its rights to set an objective that relied on Mr. Whitaker's membership in a religious community. The State effectively asks this Court to determine that the reliable nexus test requires only a tangential connection between a criminal offense and an interest protected by the First Amendment before it may be considered at sentencing. Since the reliable nexus standard requires a more direct connection between the protected interest and a goal of sentencing, the State's argument must fail.

The State cites no authority for the proposition that simple inaction by a group protected by the First Amendment is sufficient to satisfy the reliable nexus test, particularly when the defendant himself did not influence the actions of the third parties. Until the Court of Appeals decision in this case, every published decision issued or applied by Wisconsin Courts on the reliable nexus test has required a degree of congruity between the protected interest and the offense. *See e.g. State v. Fuerst*, 181 Wis. 2d 903, 912, 512 N.W.2d 243 (Ct. App. 1994) (sufficient nexus if defendant in a drug prosecution uses controlled substances as part of his religious practices); *State v. J.E.B.*, 161 Wis. 2d 655, 673, 469 N.W.2d 192 (Ct. App. 1991) (sufficient nexus to consider pornographic books depicting childhood sexual assault when defendant convicted of child sexual assault); *State v. Wickstrom*, 118 Wis. 2d 339, 357, 348 N.W.2d 183 (Ct. App. 1984) (sufficient nexus when defendant's antigovernment beliefs led to his attempted takeover of local government).

Requiring such a showing makes sense, as it protects against arbitrary consideration of a prohibited sentencing factor by requiring a direct connection between the protected association, and a defendant's criminogenic needs. This interpretation is also consistent with Wisconsin authority that requires individualized sentencing. *See State v. Loomis*, 2016 WI 68, ¶ 67, 371 Wis. 2d 235, 881 N.W.2d 749. If a defendant is motivated by, or commits crimes in concert with an interest protected by the First Amendment, then the interest is necessarily relevant to assessing the defendant's individual risks and needs at sentencing. *See J.E.B.*, 161 Wis. 2d at 673. However, if the interest did not motivate or otherwise closely mirror the offense, then it is not necessary to consider in concert with the defendant's individual sentencing needs. *See Dawson v. Delaware*, 503 U.S. 159, 165 (1992); *Barclay v. Florida*, 463 U.S. 939, 949 (1983).

Acknowledging that Mr. Whitaker's current criminogenic needs are not impacted by his childhood association with the Vernon County Amish community, the State nevertheless argues that there is sufficient nexus because, by their passivity, elders in the community created an environment that allowed the assaults to continue. (Resp. Br. 28-29, 31). This rationale for considering a defendant's religious association is not supported by the decisions in *Dawson*, 503 U.S. at 165, or *U.S. v. Lemon*, 723 F.2d 922, 939 (D.C. Cir. 1983), which held that membership in organizations that presumably looked favorably towards certain criminal activity[2] may not be considered as an aggravating sentencing factor unless the offense was committed to further an unlawful goal of the organization.

While the reliable nexus test has never required a showing of cause and effect, courts have been careful to guard against outcomes where activity protected by

[2] In *Dawson*, membership in a white supremacist prison gang, and in *Lemon*, an organization that funded its political and religious goals through theft and other property crimes.

the First Amendment formed the basis for a criminal sentence. That was the subject of *U.S. v. Lemon*, which held that unless the government could show that a defendant committed crimes to further an illegal goal of a religious community, it was improper to consider his membership. 723 F.2d 922, 939 (D.C. Cir. 1983) adopted by *J.E.B.* 161 Wis. 2d at 673. *U.S. v. Lemon*, as adopted by the Court of Appeals in *J.E.B.*, established a simple test for whether a trial court may base a sentencing objective on a defendant's religious association. *Id*. The same test is present in Chapter 973 of Wisconsin's statutes, requiring a finding that a defendant committed a crime for the benefit, or at the direction, of a criminal organization, before gang affiliation may be considered as an aggravating factor. Wis. Stat. § 973.017(3)(c).

The State's position would depart from twenty years of precedent in the Court of Appeals, and dilute the protections of *Lemon* to the point that nearly no nexus at all would be required before basing a sentencing objective on a prohibited factor. In the case of religious association, trial courts would be free to penalize a defendant for membership in a religious institution, not because a crime is connected to his faith or community, but because third parties over whom he has no control did not intervene in individual criminal offenses.[3] It takes little imagination to envision how such a standard could be abused at sentencing, and would allow trial courts to consider nearly any prohibited factor when the nexus is based on inaction by third parties. *See Alexander*, 360 Wis. 2d 292, ¶ 23 (due process violation to base a sentencing objective on factors like religion, race, or ethnicity). To protect against due process violations that are bound to result from this approach, Mr. Whitaker urges this Court to reaffirm the congruity requirements of *U.S. v. Lemon*

[3] If the reliable nexus test is applied as suggested by the State, it would lead to absurd inconsistencies in how protected associations are addressed at sentencing. For instance, by statute, members of a gang could not be penalized at sentencing if associates failed to report the defendant's earlier crimes, however, members of a church could be penalized under the same rationale.

and *State v. J.E.B.* *Lemo*n, 723 F.2d at 939; *J.E.B.*, 161 Wis. 2d at 673.

B. The State's reliance on *State v. Neumann* is misplaced

The State also relies on the holding in *State v. Neumann*, arguing that it has a compelling interest in protecting children in religious communities. 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560; (Resp. Br. 35). This issue was never in dispute. *Neumann* addressed the authority to criminalize child neglect stemming from a parent's decision to substitute prayer treatment for lifesaving medical care. *Id*. ¶¶ 116, 126. In *Neumann*, this Court addressed the constitutionality of a criminal statute that defined a parent's duty of care, and whether a statutory defense to child abuse allowing the use of prayer to treat illness also applied in a reckless homicide prosecution. *Id*. ¶ 62. The decision focused on the individual culpability of the parents, not the actions of third parties within their church. *Id*. *Neumann* did not address the issue in this case: whether a sentence objective may be explicitly based on the defendant's membership in a community of faith.

Similarly, the State argues that the sentence in this case was not directed towards a religious community, but was instead focused on a group of irresponsible adults. (Resp. Br. 37). The State argues that a similar objective would be appropriate if directed towards a scout troop, youth sports team, boarding school, music camp, or other entity that refused to report suspected abuse. (Resp. Br. 37). This comparison misses the point. Unlike Mr. Whitaker's membership in the Amish community, none of these activities constitute a prohibited sentencing consideration.[4] *See Alexander*, 360 Wis. 2d 292, ¶ 23. Membership in a

[4] It is also likely that many working in this capacity would be subject to institutional or statutorily mandated reporting requirements.

church community unequivocally does.[5] *See e.g. State v. Ninham*, 2011 WI 33, ¶ 96, 333 Wis. 2d 335, 797 N.W.2d 451.

II. The deterrent objective is not properly categorized as a public safety objective

The parties agree that the trial court was clear in its deterrent rationale for Mr. Whitaker's prison sentence: it intended to deter inaction by elders in the Vernon County Amish community. Arguing that Mr. Whitaker has not cited any law that "allows a religious community of any sort to shield a child sex offender from civil authorities," the State distorts the issue before this Court. (Resp. Br. 31). Mr. Whitaker never took the position that any religious community has a "right" to conceal child sexual assault. The issue in this case is whether a child perpetrator, who had no control over elders in his community, can be sentenced to prison because he once belonging to a religious community whose elders discouraged reporting crime to secular authorities.

A. Mandatory reporter status of Amish elders

A relevant factor in the issues before this court is whether the deterrent objective was enforcing an existing legal obligation, or reflected the trial court's moral and social beliefs. The State asserts that Amish elders are mandatory reporters pursuant to Wisconsin statute § 48.981(2), and as such, the trial court was attempting to enforce the law by requiring elders to report sexual assaults to secular authorities. (Resp. Br. 40). To qualify as mandatory reporters, the elders would need to meet two prerequisites. First, the elder would need to be acting in his capacity as a "spiritual adviser." Wis. Stat. § 765.002(1). Second, the elder would need to have "seen" the child in the course of his professional duties. Wis. Stat. § 48.981(2)(bm)1.

[5] As Mr. Whitaker discusses later in this brief, he also disagrees that targeting indifferent third parties is not a proper exercise of the public protection sentencing objective.

Neither prerequisite is supported by the facts in the record, which notes only that Mr. Whitaker's parents discussed his conduct with unknown elders, and that they recommended keeping the allegations within the community. (54:16; App. 154). The record does not indicate that the elders were acting in their spiritual capacity when they gave this advice, or that they interacted with or "saw" the child victims in a professional capacity during this exchange. (54:16; App. 154).

Moreover, while section 948.02(3) permits prosecution of a parent or caregiver who fails to act to prevent sexual abuse of a child, it applies only to a limited class of people legally responsible for the welfare of a child, and does not include Amish elders. Wis. Stat. § 948.01(3). Without an existing legal obligation, any attempt by the trial court to influence the behavior of Amish elders was in effect, an attempt to impose an individual judge's social and moral standards on a community that had no legal obligation to do so. On a related note, imposing a de facto legal obligation on a religious community runs significant risk of excessively entangling the interests of the State with those of the community. *Lemon v. Kurtzman*, 403 U.S. at 613; *Fuerst*, 181 Wis. 2d at 911.

B. The legislature has already established remedies for failure to protect children and defined by statute what must be considered at sentencing

Even if the elders targeted by the deterrent objective in this case had a legal obligation to report child abuse to secular authorities, using an individual criminal sentence to spur social change exceeds the remedies imposed by the legislature, and detracts from the obligation to individually sentence the defendant before the court. Wisconsin statute 48.981(6) permits criminal prosecution and penalties of up to six months in jail and a fine of up to $1000.00 for mandatory reporters who fail in their responsibilities, and a parent or guardian who fails to take reasonable action to prevent sexual assault can also be prosecuted. Wis. Stat.

§ 948.02(3). The legislature's intent is also present in section 973.017, which defines general sentencing considerations and aggravated factors, but does not require consideration of third-party behavior during sentencing.

C. Employing the public protection sentencing objective to influence third parties outside of the deterrent objective violates the right to individualized sentencing

Basing a sentence objective on the actions or inaction of third parties beyond a defendant's control detracts from the obligation of a trial court to individually sentence the person before the court. *State v. Loomis*, 2016 WI 68, ¶ 67, 371 Wis. 2d 235, 881 N.W.2d 749. Wisconsin authority has generally applied this objective to the defendant's individual risk to the community. *See e.g. McCleary v. State*, 49 Wis. 2d 263, 283, 182 N.W.2d 512 (Wis. 1971) (financial crimes); *State v. Gallion*, 2004 WI 42, ¶ 61, 270 Wis. 2d 535, 678 N.W.2d 197 (impaired driving offenses); *Ninham*, 333 Wis. 2d 335, ¶ 82 (violent offender). Read in combination with Wisconsin's individualized sentencing requirement, the public safety objective must be limited to protecting the community from the defendant's acts, and not from third parties over whom he or she has no control. Nearly every recognized aggravating and mitigating sentencing factor is unique to the individual defendant, and the decisions that led to a criminal conviction. The actions or inactions of third parties are not. Wis. Stat. § 973.017. If the sentencing court intends to discourage future crime, then it may do so through by crafting a sentence designed to serve a valid deterrent objective that applies to the entire population. *Gallion*, 270 Wis. 2d 535, ¶ 40.

D. The public safety objective was not rationally applied in this case

Finally, while the State repeatedly argues that the trial court's attempts to influence Vernon County Amish elders was targeted and effective, the facts in the

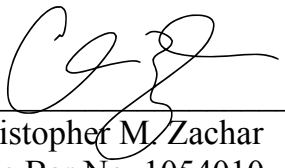
record suggest otherwise. (Resp. Br. 30). In this case, the public safety[6] objective was explicitly premised, in part, on inaction by Amish elders approximately fifteen years earlier, in a community that Mr. Whitaker is no longer a part of. (1; 19:11). Contrary to the State's suggestion that the deterrent or public safety goal was a targeted one, the record is devoid of any indication that the same elders or their practices remain in place years later. Furthermore, Mr. Whitaker and his family have not been a part of the Vernon County Amish community for more than nine years. (19:11). Thus, there is reason to doubt that Vernon County Amish "received the message" from Mr. Whitaker's sentence. (Resp. Br. 30). Instead, it is rational to assume, like the trial court and Court of Appeals both noted, that Mr. Whitaker's prison sentence may have the opposite impact on elders already reluctant to cooperate with secular authorities. (App. 114); *Whitaker*, 396 Wis. 2d 557, ¶ 28. Without some rational explanation for how a sentence is expected to achieve its objectives, the trial court did not properly exercise its discretion when it sentenced Mr. Whitaker to prison with the expectation that the Amish would report more, not fewer, sexual assaults to authorities. *McCleary*, 49 Wis. 2d at 277, 281.

III. Conclusion

For all of these reasons, Mr. Whitaker asks this Court to conclude that the deterrent/public safety objective of his sentence was based on an improper factor, that there was no reasonable nexus between his religious association and criminal offense, and that the public safety sentencing objective cannot be used to influence the actions of third parties. Mr. Whitaker requests that this Court reverse the Court of Appeals and remand for a new sentencing hearing.

[6] Or deterrent objective, as described by the trial court.

Respectfully submitted this 10th day of September, 2021.



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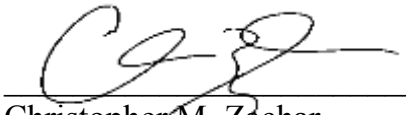

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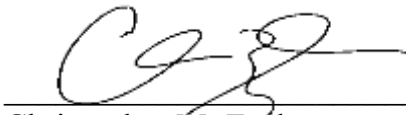

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