STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No.: 2021AP001818-CR
Milwaukee County Circuit Court
Case No.: 2016 CF 4787

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JASEN RANDHAWA,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Appeal From A Judgment of Conviction
Entered In The Circuit Court For Milwaukee County,
Hon. Mark A. Sanders, Presiding

Respectfully Submitted,

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STATEMENT OF THE ISSUES

I. Whether Randhawa's rights were violated by private counsel for the victim knowingly providing the court prejudicial, misleading and inaccurate information which the court considered for sentencing?

Answer by Circuit Court: **Not Answered**

II. Whether Randhawa's constitutional right to be sentenced on accurate information was violated by the court's mistaken belief in imposing a severe sentence for a purpose that will never be achieved?

Answer by Circuit Court: **No.**

III. Whether the court gave undue weight to improper factors and improperly refused to consider defense proferred evidence of sentences imposed in comparable cases?

Answer by Circuit Court: No.

IV. Whether the Court erroneously exercised its discretion and Randhawa's due process rights were violated by the court imposing a fifty five years sentence without explaining the basis for imposing consecutive rather than concurrent sentences for one reckless act and without providing the underpinnings of an explained judicial reasoning process?

Answer by Circuit Court: **No.**

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Counsel believes that the parties' briefs will adequately address the issues raised in this appeal, and that the Court will therefore deem oral argument to be unnecessary. Because the appeal involves an issue which arises routinely and a decision in this case could provide needed guidance to courts when sentencing defendants in criminal cases, publication may be warranted to give guidance in future cases.

STATEMENT OF THE CASE

On October 27, 2016, the defendant, Jasen Randhawa, was charged with multiple offenses arising out of a tragic motor vehicle accident in the City of Milwaukee. The criminal complaint charged three counts of second degree reckless homicide, violations of §940.06(1), one count of second degree reckless injury, a violation of §940.23(2)(a), three counts of hit and run involving death, violations §§346.67(1) and 346.74(5)(d), one count of hit and run involving great bodily harm, a violation of §§346.67(1) and 346.74(5)(c), three counts of operating motor vehicle while revoked causing death, violations of §§ 343.44(1)(b) and (2)(ar)4, and one count of operating motor vehicle while revoked causing great bodily harm, a violation of §§ 343.44(1)(b) and (2)(ar)3. R.1.

Shortly after his initial appearance, Randhawa waived his preliminary

hearing. On February 13, 2017, he entered guilty pleas to Counts 1-4, three counts of second degree reckless homicide and one count of second degree reckless injury - great bodily harm.

Sentencing was held on May 19, 2017, the Honorable Mark A. Sanders, presiding. The court imposed consecutive 15 year prison terms with initial periods of confinement of eleven years on Counts 1-3 and a consecutive 10 years prison term with six years of initial confinement on Count 4. The total sentence or 55 years requires the defendant to serve thirty nine years of initial confinement followed by sixteen years of extended supervision. R.46.

The defendant subsequently retained post-conviction counsel and on April 12, 2021, the defendant filed his motion and memorandum seeking post-conviction relief pursuant to § 809.30. R.153,154. That motion sought resentencing on the grounds that Randhawa was sentenced on inaccurate information and unsupportable assumptions which were relied upon by the court in fashioning his sentence and that the court erred in imposing consecutive sentences by not explaining its reasons for doing so on the record. The court entered a written decision denying the motion without a hearing on October 4, 2021. R.180; APP. 105-112. Defendant's notice of appeal was filed on October 18, 2021. R.181.

STATEMENT OF FACTS

The criminal complaint alleged that at approximately 2:34 am on October 23, 2016, the defendant's vehicle ran a red light and crashed into the driver's side of an Uber vehicle while it traveled southbound on North 2nd St. at W. Clybourn St.. Defendant's vehicle crash data recorder indicated he was traveling as fast as 63 mph prior to the crash and at 47 mph at the moment of collision. R.67: 69-70; APP. 182-183. The three young women killed in the accident were unbelted passengers in the back seat of the Uber vehicle. The Uber driver was seriously injured in the accident but had fully recovered by the date of sentencing in the case. *Id.* at 109; APP. 222. Randhawa left the scene of the accident on foot following his passenger, unaware that there was anyone in the back seat of the vehicle that had been fatally injured. *Id.* at 71-72, 123; App. 184-185, 236. The defendant was captured on two different videos taken during cab rides in the hours after the accident discussing with others ways that he could avoid responsibility for the accident. *Id.* at 72-78; App. 185-191. However, the next day he learned that three women had died in the accident and shortly thereafter he turned himself in to authorities knowing he would be going to prison for a long time. *Id.* at 79, 121-123; App. 192, 134-135.

The defendant was twenty three years old at the time of the offense and had no prior criminal record. *Id*. at 86,116; App. 199, 229. He had one prior

civil OWI conviction which occurred fourteen months prior to this offense. *Id.* at 64; App. 177. He comes from a supportive, hard working and law abiding family. *Id.* at 149-151; App. 262-264.

The defendant accepted responsibility expeditiously without putting the State or the victims' families through any unnecessary litigation. As ADA Grant Huebner advised the court:

> My understanding is the defendant was going to accept responsibility almost from the get-go and that is not something we see that often, and he did so knowing that the State's recommendation was probably going to be... the most strict sentence I have recommended on a traffic homicide in my career...

Id. at 80; APP. 193.

Sentencing was held on May 19, 2017. The court had previously received and reviewed victim impact statements and letters on behalf of the victims, a defense sentencing memorandum and letters in support of the defendant. The court also considered materials provided by a private attorney representing one of the victims which included evidence not in the possession of the State and conclusions about the evidence that were not adopted or argued by the State. R.11. The court heard statements from several family members of the victims. R.67 at 9-88; App. 122-201. The court also heard statements from a number of family members and relatives of Randhawa. *Id.* at 93-109; App. 206-222. Judge Sanders made it very clear that he was imposing the 55 year sentence he gave Randhawa based on the gravity of the

offense and because "it was the only way" to deter other potential offenders and make "fewer crime victims". *Id*. at 159-160; App. 272-273.

The defendant filed his motion for post conviction relief on April 12, 2021. R.153,154. The motion argued that the court relied on inaccurate and false assumptions when it imposed the severe sentence to "create fewer crime victims," as it is the clear understanding of social scientists today that severe sentences do not deter others from committing crimes – especially non-intentional ones. The defendant provided the affidavit of an internationally renowned expert on severe sentences, Dr. Ashley Nellis of the Sentencing Project in Washington, D.C., who offered her opinion that the reasons Judge Sanders articulated for giving the severe sentence were erroneous. R.154; App. 325-330. The motion also argued that a sentence of only 18 years that Judge Sanders imposed in another similar reckless homicide case with more aggravated facts just five months after Randhawa's sentencing highlighted his improper application of the *Gallion* factors to Randhawa's sentence. Finally, the motion argued that Judge Sanders failed to establish reasons on the record for imposing consecutive sentences for the one act of reckless driving at issue. R.153.

On October 4, 2021, Judge Sanders denied the defendant's motion on briefs without a hearing. The court found that the defendant failed to allege an

"objective act" warranting resentencing, that he did not rely on improper factors, that the sentence imposed was not unduly harsh and that he had set forth a complete sentencing analysis regarding his imposition of consecutive sentences. R.180; APP. 104-112.

ARGUMENT

I. The Court Considered Misleading and Prejudicial Information for Sentencing That Was Provided by Private Counsel Who Improperly Inserted Himself into the Role of Prosecutor.

Soon after the accident at issue in the case, the family of one of the deceased victims hired a local attorney with prosecution experience to bring a civil suit against Randhawa and others. That attorney sent Randhawa's counsel a threatening letter demanding that Randhawa cooperate with him by providing information regarding the offense or at sentencing "the families will say [Randhawa] has continued to hurt them by not assisting." R.7; App. 332-333.[1] Prior to the sentencing hearing in the case, that same lawyer submitted written materials to the court including a letter with cherry picked and misleading references to discovery materials and other evidence, audio and video recordings from the District Attorney's file highlighting certain evidence in the case, evidence not in the District Attorney's file and additional recordings of some voice mails left by the victim and of her eulogy. R.11.

[1]Trial counsel advised the court of the threatening letter so it is in the record, R.7, and the Appendix. App. 331-333.

Randhawa's counsel objected to the court viewing these submissions in a letter to the court dated May 3, 2017. R.10. Judge Sanders advised the parties at the sentencing hearing that he had received the materials from the attorney and said "I watched [the videos] twice. I actually re-watched them last night." R.67: 6-7, 59-60; App. 119-120, 172-173.

The private attorney prepared a memorandum for the court highlighting the most aggravating facts and another video compilation of portions of cab videos of Randhawa after the crash. Another video prepared by that victim's family, which included the eulogy given at her funeral and recordings of voice messages she had left, was reviewed by the court prior to sentencing. R.67: 6, 35-36; App. 119, 148-149. The private attorney was acting for his private financial gain and misrepresented information to the court, in violation of Randhawa's rights.

The United States Supreme Court has repeatedly affirmed that the State is the only entity that may prosecute a criminal case.

> Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another.

Robertson v. U.S. ex rel. Watson, 560 U.S. 272, 130 S. Ct. 2184, 2188, 176 L. Ed. 2d 1024(2010)(Chief Justice Roberts dissent). The duties and authority of the district attorney in Wisconsin are set by statute. Section 978.05 provides: "Except as otherwise provided by law, [the district attorney] shall prosecute all

criminal actions before any court within his or her prosecutorial unit...” No other person is authorized to participate in a criminal prosecution. This has been the rule in this state for over one hundred and twenty-five years. In 1888, the Wisconsin Supreme Court articulated the importance of the public prosecutor:

> The question for determination is whether it is in accord with the statutes and laws of the state and with public policy that the court should permit an attorney employed by and expecting compensation from private parties to appear and aid in the prosecution of a person charged with a crime punishable by imprisonment in the state prison. We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases.

Biemel v. State, 71 Wis. 444, 37 N.W. 244, 245 (1888). The court recognized the value of the sole use of a public prosecutor in enhancing the fairness of the criminal justice system and the inherent problems with the use of privately retained attorneys in any aspect of a criminal case:

> ...the district attorney, who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state, provided at the expense of the state for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial.

Id. at 71 Wis. 444, 37 N.W. 244, 247.

The court re-emphasized the importance of the sole participation of the district attorney in all aspects of a criminal trial forty years later in *State v.*

Peterson, 195 Wis. 351, 218 N.W. 367 (1928): "it is the established rule in this state that the participation in the trial of a criminal case in court by an attorney paid by private parties is error sufficient to vitiate the conviction." *Id*. at 367. The court in *Peterson* found that it was against public policy to allow attorneys paid by private parties to even assist behind the scenes. *Id*.

The decision in *In re Jessica J.L.,* 223 Wis.2d 622, 589 N.W.2d 660 (1998), re-affirmed the well-established principle that attorneys representing private parties may not participate directly in a criminal prosecution. The decision recognized a victim's right to have their wishes communicated to and expressed by the prosecutor. The court in *In re Jessica J.L* held that a victims' interest in the outcome of a case can be protected by communicating those interests to the public prosecutor who then has a duty to assert and protect those interests when valid. *Id.* at 631.

In this case, the victim's attorney bypassed the public prosecutor and provided the court with unsubstantiated and misleading evidence which would have been impossible for the court to ignore when imposing a sentence in the case. For example, private counsel cited to a social media exchange between Randhawa and unknown individuals from 6 years earlier:

> Defendant was a lifelong ne'er do well. He had every chance of success, having the benefit of living in Mequon and attending Homestead High School. He was a malcontent, who prided himself on driving fast and flaunting the law. A 2011 Facebook exchange between Mark Kuenn and Jasen Randhawa shows the defendant's braggadocio about driving

> recklessly, which he was proud of long before he killed Lindsey and her friends.

R.11: 2. The social media post referred to contained no "braggadocio" nor did anything in the post or the record of the case establish that he was "proud of" driving recklessly.[2]

Similarly, the private attorney's letter to the court suggested that the defendant was racing at the time of the accident, something the police and prosecutor did not argue to the court because witnesses to the accident and property videos did not corroborate that there were any other vehicles involved prior to the collision. The letter states that Randhawa "was asked later by police if he was drag racing and with whom," and that "Randhawa, through his counsel, refused to answer." R.11: 4. This assertion is not true. Randhawa was never asked by any officer whether he was drag racing. Randhawa turned himself in with counsel and on his advice asserted his constitutional rights and was not asked any specific questions and did not make any statement.

Private counsel in this case provided unsolicitated information that was unfairly prejudicial to Randhawa that was not an honest and impartial

[2]The Facebook post included in the letter to the court was from over five years prior to the accident. An individual posted: "Only Jasen Randhawa would get away with going 80in a 55 right passed a cop while cutting off a car and not signaling. You lucky son of a bitch!!!" to which the defendant replied "What can I say....". *Id*. at 3.

interpretation of the evidence. It was motivated by private gain[3] and would have been a violation of the standards required of a public prosecutor for the State to present and argue the evidence. Judge Sanders received the information - examining it twice in fact before the sentencing - and made no record to support a finding that the sentence he imposed was not influenced by the evidence. The court's consideration of the materials and information provided by private counsel retained by one of the victims, over the objection of the defendant, violated long-standing public policy and statutes precluding private prosecution, particularly where the information was misleading.

II. The Sentencing Court Violated Randhawa's Due Process Rights By Relying on Inaccurate Information.

A. Defendants have a due process right to be sentenced on the basis of accurate information.

Wisconsin courts have consistently recognized that the sentence imposed in each case should call for 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. *State v. Gallion*, 2004 WI 42, ¶ 23, 270 Wis. 2d 535, 678 N.W.2d 197. Aside from imposing

[3]Importantly, the private attorney was not merely representing the victim on a restitution claim, but rather on a civil claim that would enure to his financial benefit. This is evident from the threatening letter he sent Randhawa's attorney demanding information including Randhawa's assets and financial position. R.7; App. 333. *See Biemel v. State*, 37 N.W. at 245 (public policy against private counsel in criminal case motivated by personal interest or private gain)

the least restrictive sentence, a trial court has broad discretion in sentencing. *State v. Kourtidias*, 206 Wis. 2d 574, 588, 557 N.W.2d 858 (Ct. App.1996). However, the due process clauses of the state and federal constitutions restrain a trial court's discretion by conferring on the defendant the right to be sentenced only on true and correct information. *Townsend v. Burke*, 334 U.S. 736, 740-41, 68 S.Ct. 1252, 92 L.Ed. 1960 (1984), *State v. Tiepelman*, 2006 WI 66, ¶42, 291 Wis. 2d 179, 717 N.W.2d 1. *State v. Skaff*, 152 Wis. 2d 48, 54, 447 N.W.2d 84 (Ct. App. 1989), *State v. Borrell*, 167 Wis. 2d 749, 772, 482 N.W.2d 883 (1992).

If a trial court relies on inaccurate information in sentencing, it errs in the exercise of its discretion. *Bruneau v. State,* 77 Wis. 2d 166, 175, 752 N.W.2d 347 (1977); *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). A defendant who is sentenced based on inaccurate information is entitled to re-sentencing. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *State v. Tiepelman*, 2006 WI at ¶27, 291 Wis. 2d 179, 717 N.W.2d 1. It follows that a court violates due process when it imposes a sentence based on erroneous assumptions and for a demonstrably inefficacious purpose. Just recently, the Wisconsin Supreme Court reiterated the constitutional importance of a fair sentencing process:

> When a circuit court relies on inaccurate information, we are dealing "not with a sentence imposed in the informed discretion of a trial judge, but with

> a sentence founded at least in part upon misinformation of a constitutional magnitude". A criminal sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand.

State v. Coffee, 2020 WI 1, ¶37, 389 Wis. 2d 627, 937 N.W.2d 579 (quoting *United States v. Tucker*, 404 U.S. at 447, 92 S.Ct. 589). In *Coffee*, the Wisconsin Supreme Court reaffirmed the applicable legal standards when a defendant asserts he was sentenced on inaccurate information:

> A defendant who was sentenced based on inaccurate information may request re-sentencing. The defendant must show by clear and convincing evidence that: (1) some information at the original sentencing was inaccurate, and (2) the circuit court actually relied on the inaccurate information at sentencing. A circuit court actually relies on incorrect information when it gives explicit attention or specific consideration' to it, so that the misinformation formed part of the basis for the sentence. If the defendant meets this burden, then the burden shifts to the State to prove beyond a reasonable doubt that the error was harmless. If the State fails to meet this burden, then the defendant is entitled to re-sentencing.

State v. Coffee, 2020 WI 1, at ¶37 (citations omitted).

Requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed. *McCleary v. State*, 49 Wis.2d 263, 281, 182 N.W.2d 512 (1971). The most important piece of evidence for a court reviewing a sentence is the sentencing transcript itself, not the [post-conviction] court's assertions or speculation about what a circuit court would do in the future upon resentencing. *Id*., *see also State v. Groth*, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d. 163. There should be no issue as to the weight Judge Sanders gave to the factors and

assumptions at issue here because the record of the sentencing hearing clearly establishes his reasons for imposing the extreme sentence and he doubled down on those reasons in his post conviction decision denying resentencing. R.180; APP. 105-112.

B. The court erroneously relied on general deterrence as a primary reason for imposing the fifty-five year sentence, wrongly assuming others will be deterred by the extreme sentence it imposed.

Judge Sanders advised Randhawa that he had to consider three factors in arriving at his sentence: the nature of the offense, his character and the needs of the public. R.67: 138; App. 251. The court said there were two aspects to satisfying the needs of the public: specific deterrence and general deterrence. Specific deterrence, as the court explained to Randhawa, is the need to protect the public "from you." *Id*. at 159; App. 292. Judge Sanders did not describe specific deterrence as a factor, let alone a significant factor in imposing the lengthy sentence in Randhawa's case.

The court did make it very clear that general deterrence was a particularly important reason it was imposing the 55-year sentence:

> In fact, a significant aspect of protection of the public is general deterrence, and that's a particularly important aspect in cases like this... because many times these people that commit drunk driving offenses are more like you than they are like the other people that sit in that chair sometimes.

Id. at 160; App. 273. Judge Sanders explained why he was going to impose an

extreme sentence in this case:

> The only way I can protect the public fully is by crafting a sentence in this case that is sufficient to cause other people to be aware of the consequences of drunk driving more fully so that they know and that they may think when they're at a bar with some friends, you know, I'm just going to drive home, the hope is that there that it will go through their heads, well, damn, that Randhawa-- that Randhawa guy, he killed some pokes -- some folks, that was terrible and then he went to prison for a long time, I'm not gonna do that. That's how public protection can be achieved. The hope is that there will be fewer crime victims in the future.

Id. at 159-160; App. 272-273. The court then stated that the need for public protection, together with the aggravated nature of the offense, "almost completely overcome the good aspects of [Randhawa's] character" and were "the most significant aspects of this case that the court has to take into consideration." *Id*. at 161; App. 274.

The judge made it clear that general deterrence was a primary motivation for the fifty-five year sentence when he stated it was the "only way" to cause other people to be aware iof the consequences of drunk driving and make "fewer crime victims." *Id.* at 159-160; App. 272-273.

C. It is now widely accepted in social science that general deterrence is not accomplished by long sentences and long sentences do not make fewer crime victims by deterring others from committing crime.

The court relied on inaccurate information and its own mistaken assumption that imposing an extremely long sentence in this case would make "fewer crime victims." It is now widely accepted in social science that individual severe sentences do not deter crime. The court gave Randhawa an

extreme 55 years sentence that is certain to be completely ineffective for its stated purpose.

The deterrent effect of the criminal justice system has been studied for hundreds of years. It has been recognized from the earliest days of the research that individual severe sentences, especially in non-intentional crimes involving impairment or recklessness, cannot be expected to deter others. Social science experts studying the impact of punishment on potential offenders now universally accept that general deterrence is primarily a function of the *certainty* of punishment, not its *severity*. Carnegie Mellon University Professor Daniel Nagin, considered the leading deterrence scholar in the United States, concluded that "[t]he evidence in support of the deterrent effect of the certainty of punishment is far more consistent and convincing than for the severity of punishment and that the effect of certainty rather than severity of punishment reflect[s] a response to the certainty of apprehension." *See,* Daniel S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, 42 CRIME & JUST. 199, 207 (2013)[4]. Another prominent scholar concluded that Nagin's conclusions make intuitive sense:

> offenders are not planning on being apprehended and unlikely to be thinking about the risk of being caught, let alone know how much prison time they may face.

[4] https://kilthub.cmu.edu/articles/journal_contribution/Deterrence_in_the_Twenty-first_Century_A_Review_of_the_Evidence/6471200/1 (last visited April 2, 2022).

Marc Mauer, *Long-term sentences: Time to Consider The Scale of Punishment*, The Sentencing Project (November 5, 2018).[5]

At the foundation of a general deterrence strategy is the assumption that the subject one hopes to deter processes information rationally and concludes it is in his/her interest not to commit the crime. Researchers have recognized a number of reasons why a general deterrence strategy is even more unlikely to be effective for non-intentional conduct than for calculated and intentional crimes. One obvious problem with applying a general deterrent strategy to the imposition of a sentence in non-intentional types of reckless conduct cases, especially where the perpetrator is under the influence of drugs or alcohol at the time of their offense, is that the impaired capacity of the targeted offenders leads to a failure to consider the consequences of their actions for the following reasons:

> 1. Awareness: If one is unaware of the risks involved in a deviant act, it is unlikely that perceptions or behavior will be altered.
>
> 2. Comparative Risk: Most drinking drivers are aware that driving performance is impaired by alcohol and the probability of crashing is increased when impaired. Thus, the risk of arrest needs to be greater than the perceived risk of crashing in order to affect a change in behavior.
>
> 3. Impaired Decision-Making: The immediate decision to drive after drinking is usually made after the driver is impaired and not thinking clearly about risks and probabilities of crashing or being arrested.
>
> 4. Infrequent Behavior: For some, driving while impaired is an infrequent or

[5] https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment (last visited April 2, 2022).

> aberrational act, performed in response to situational conditions or stressors. Public policy and special enforcement are unlikely to eliminate individuals' infrequent or aberrational behavior.
>
> 5. Chronic Behavior: Conversely, for some individuals driving while impaired is habitual, even a way of life. General deterrence approaches might increase the perceived risk of arrest but are unlikely to deter these chronic offenders from driving while impaired by alcohol.

Jacobs, J.J. *Drunk Driving: An American Dilemma*. The University of Chicago Press: Chicago, IL, (1989) (quoted in NHTSA's*, Creating Impaired Driving General Deterrence: Eight Case Studies of Sustained High-Visibility Enforcement,* (2006*).*[6] The United States Supreme Court in *Hall v. Florida* recognized this same fact in finding those with intellectual disability are "likely unable to make the calculated judgments that are the premise for the deterrence rationale." *Hall v. Florida,* 572 U.S. 701, 709, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014).

Both the Wisconsin Supreme Court in *Gallion* and *McCleary*, and the U.S. Congress in the Federal Sentencing Guidelines, codified in 18 U.S.C. §3553, recognize that general deterrence is a factor a court may consider in sentencing. However, due process requires that it should only be relied upon to support a sentence when it will in fact have a chance to, as Judge Sanders stated here, cause "fewer crime victims." For example, the legislative history of the inclusion of general deterrence as a factor in 18 USC §3553 reveals

[6] https://www.nhtsa.gov/sites/nhtsa.gov/files/809950.pdf

Congress was concerned with planned and deliberate criminal conduct, particularly in the area of white collar crime, at a time when major white collar criminals often were sentenced to small fines and little or no imprisonment that could be written off as a cost of doing business. *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006). *See* also, *United States v. Phinazee*, 515 F.3d 511, 516 (6th Cir. 2008) (noting drug dealing was lucrative intentional conduct that needed to be deterred). However, federal courts have also recognized that incarceration is not the only aspect of a criminal prosecution and sentence that will act as a general deterrent, finding that §3553(a) "does not require the goal of general deterrence be met through a period of incarceration." *U.S. v. Edwards*, 595 F.3d 1004, 1017 (9th Cir. 2010).

Thus, the application of a general deterrence purpose in sentencing where the offense involved *intentional* conduct and where *deliberative repeated* strategies are involved may be effective. For instance, recently the Wisconsin Court of Appeals upheld a sentence ordered in a child sexual assault case that the sentencing court articulated it was imposing in part as general deterrence to encourage adults to protect girls in the Amish community. *State v. Whitaker*, 2021 WI App 17, 396 Wis.2d 557, 957 N.W. 2d 76. The assault of the 5 year old victim at issue in the case was known to adults in that Amish community but went unreported. The Court of Appeals found the objective of

protection of the public included the rights of children to be protected from sexual assaults and upheld the sentencing judge's rationale that a short 2 year prison sentence would create an additional incentive for adults in the Amish community to effectively intervene. *Id*. at 20.[7]

No such circumstances exist in Randhawa's case where the underlying offense involved non-intentional conduct committed while he was allegedly under the influence of alcohol. Adding decades to his sentence for a speculative general deterrence purpose that has no chance of being fulfilled violates due process.

The Court of Appeals in Alaska recently overturned a harsh sentence in an aggravated OWI homicide case that was imposed by the court in part to make an example of the defendant precisely because there is no evidence that severe sentences deter others from engaging in crime:

> This court is unaware that any particular type of criminal activity has disappeared because... of the severity of the sentences it imposed for it. And, ultimately, there is no practical way to know whether increasing the penalty for a crime by 1 year or 5 years or 10 years will achieve any further reduction in the incidence of that crime.

Graham v. State, 440 P.3d 309, 325 (Ct. App. 2019). The court in *Graham* adopted the finding of the Alaskan Supreme Court three decades earlier:

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[7]It is noteworthy that the court in *Whitaker* determined that a sentence of only two years was effective to supply general deterrence to the Amish community even when that defendant's conduct involved thousands of assaults and years of abuse and the defendant confessed to assaulting two other child victims. *Id.* at 4, 7.

> The easy assumption that the benefits of deterrence will continue to increase with the severity of a sentence is not necessarily true: "Our understanding of general deterrence is incomplete, but the fragmentary evidence available tends not to conform to any simple model under which sentences of high severity can always be justified on the grounds that they yield greater preventive benefits."

Pears v. State, 698 P.2d 1198, 1205 (Alaska 1985).

D. Individual sentences in alcohol related cases do not deter others from committing similar offenses.

In support of his motion for post conviction relief, the defendant filed the Affidavit of Dr. Ashley Nellis, associated with the Sentencing Project in Washington D.C.. R.154; App. 325-330. Dr. Nellis' affidavit establishes that she is an internationally recognized expert on long term imprisonment and its effect on public safety in the United States. Dr. Nellis was retained to offer her expert opinion on whether the 55 year sentence imposed in Randhawa's case will act as a general deterrent to others - the purpose articulated by Judge Sanders. Dr. Nellis' affidavit reviews the research and identifies the reasons underlying the results. Dr. Nellis' conclusion is consistent with the findings of virtually every researcher studying the issue. It is Dr. Nellis' expert opinion that the 55 year sentence imposed in this case will not deter others from committing reckless or impaired driving offenses as intended by Judge Sanders. *Id.* at 6; App. 330.

For several decades researchers have concluded that individual sentences in OWI related cases have no general deterrent effect. In their 1991

study, Evans, Neville and Graham found no conclusive evidence that any specific form of punitive legislation is having a measurable effect on motor vehicle fatalities. Their report found evidence that multiple laws designed to increase the certainty of punishment (e.g., sobriety checkpoints and preliminary breath tests) have had a synergistic deterrent effect but found that other policies aimed at general deterrence were not effective. W. N. Evans, D Neville, J D Graham *General Deterrence of Drunk Driving: Evaluation of Recent American Policies.*[8]

The current effort in the United States to deter impaired driving reflects this understanding. Two strategies unrelated to severity of sentences have been employed: enforcing existing impaired-driving laws and enacting high-visibility enforcement programs that attract public attention. These strategies recognize that effective deterrence is based on the perception of the probability of apprehension and sanctioning and not on the actual numbers of citations and individual penalties imposed. *Preventing Impaired Driving Opportunities and Problems*, Robert B. Vas, Ph.D. and James C. Fell, M.S. Alcohol Res Health. 2011; 34(2): 225B235.[9](Citing Ross HL. *Deterring the Drinking Driver: Legal Policy and Social Control*. 2nd ed. Lexington, MA:

[8]https://doi.org/10.1111/j.1539-6924.1991.tb00604.x (last visited April 2, 2022).

[9]https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3629952 (last visited April 2, 2022).

Lexington Books; 1984). In 93% of fatal crashes caused by alcohol the driver did not have a prior OWI conviction.[10] The CDC has identified numerous strategies that have been effective in reducing OWI related offenses - imposing severe sentences is not even mentioned.[11]

The State virtually conceded in the post-conviction briefing that severe sentences don't deter when it argued that "even if only one person is deterred by the defendant's sentence from committing a repeated drunk driving, then the court's objectives have been met." R.173: 9. The State provided no reason to believe that even one person would be deterred by the extreme sentence given to Randhawa from committing a "repeated drunk driving," let alone an OWI injury or homicide case.

Furthermore, there is no empirical evidence that Randhawa's extreme sentence served to reduce the number of victims in OWI or reckless homicide cases in the two years following the sentencing. According to NHTSA statistics, there were 193 fatalities in Wisconsin in accidents involving an impaired driver in 2016, the year of the offense at issue here. There were 199 alcohol related traffic deaths in Wisconsin in 2017, the year of Randhawa's sentencing, and the same number in 2018, the year following Randhawa's

[10] https://www.responsibility.org/wp-content/uploads/2020/02/FAAR_3974_State-of-Drunk-Driving-Fatalities_Shareable_JPGS-V2-Pg18.jpg (last visited April 2, 2022)

[11] https://www.cdc.gov/vitalsigns/drinkinganddriving/ (Last visited April 2, 2022)

sentencing.[12] There were approximately 1,000 more alcohol related crashes in Wisconsin each successive year from 2016 to 2018.[13]

No study or research supports the court's assumption here that the extreme sentence given to Randhawa will spare the life of another victim - let alone that the 55 year sentence would be more of a deterrent than, for instance, a 25 year sentence. As Mauer concluded:

> The limited impact of extending sentence length becomes even more attenuated for long term incarceration. If the penalty for a second robbery conviction is twenty years and a legislative body increases that penalty to twenty-five, few would-be-robbers undeterred by the prospect of only a twenty year sentence would balk at an additional five years.

Mauer *Long-Term Sentences: Time to Reconsider the Scale of Punishment,* Sentencing Project, at 123.

E. The findings of social science can be considered by courts reviewing constitutional sentencing claims.

The United States Supreme Court has recognized that the Constitution "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378, 30 S. Ct. 544, 54 L. Ed. 793 (1910). Accordingly, appellate courts, including the Wisconsin Supreme Court and the United States Supreme Court,

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[12] https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630 (2017).
https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812864 (2018).
https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812450 (2016)

[13] https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx (last visited April 2, 2022)

have approved the use of social science research to inform on a question of law. *See*, *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (impermissively suggestive show-ups); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (segregation in education); *Muller v. State of Oregon*, 208 U.S. 412, 283 S.Ct. 324, 52 L.Ed. 551 (1908) (women's working hours); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed. 508 (2003)(criminalization of sodomy); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002) and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005) and *Hall v. Florida, supra*. (death penalty on the mentally ill and juveniles). In *Hall*, the United States Supreme Court overturned a state law which established that the level of intellectual disability sufficient to allow the death penalty used outdated criteria and "goes against the unanimous professional consensus" regarding measuring the level of mental disability. *Hall v. Florida*, 572 U.S. at 722, 134 S. Ct. 1986, 188 L.Ed.2d 1007.

In *State v Trammel*, 2019 WI 59, 387 Wis.2d 156, 928 N.W.2d 564, the Wisconsin Supreme Court dismissed a challenge to the pattern reasonable doubt jury instruction which was based on two surveys which established the instructions cause jurors to apply a lesser burden of proof than constitutionally required. In her concurrence, Justice Dallet made it clear that the decision in

Trammel should not be interpreted as "suggesting that this court can no longer be informed by current research that measures the effects of previous court decisions on an evolving society." *Id.* at ¶ 71. Justice Dallet found that despite the decision in *Trammel*, "*Dubose* stands for the principle that prior decisions of this court may become unsound when they are based upon principles that are no longer valid." *Id*. at ¶70.

Accordingly, just last year the Wisconsin Supreme Court referred to social studies which established a relationship between intoxication and gun violence in deciding a 2nd Amendment issue in *State v. Christen*, 2021 WI 39, ¶58, 396 Wis.2d 705, 958 N.W.2d 746. The court in *Christen* referred to social science research to establish the dangers inherent in handling a firearm while intoxicated:

> "[r]esearch shows that 'people who abuse alcohol or illicit drugs are at an increased risk of committing acts of violence.' " *Id.*, ¶36 (quoting Webster & Vernick, *Keeping Firearms from Drug and Alcohol Abusers*, 15 Injury Prevention 425 (2009)). Beyond even a general risk of violence, "[s]tudies show that there is a strong correlation between heavy drinking and self-inflicted injury, including suicide, from a firearm." *Id.* (citing Branas, Han & Wiebe, *Alcohol Use and Firearm Violence*, 38 Epidemiologic Reviews 32, 36 (2016)). Horrifically, "[f]or men, deaths from alcohol-related firearm violence equal those from alcohol-related motor vehicle crashes." *Id*. (quoting Garen Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, 79 Preventive Medicine 15 (2015)). These data support a substantial relationship between intoxicated use of firearms and public safety, preventing gun violence, and the protection of human life.

Id. at 735.

The uncontroverted findings of social scientists that severe sentences

do not deter crime should now be recognized by Wisconsin sentencing courts. While we do not know exactly how many of the 39 years of confinement or 16 years of extended supervision were imposed by Judge Sanders to create fewer crime victims in this case, the court described general deterrence as one of two overriding factors behind the sentence. For Judge Sanders to speculate that a 55 years sentence would "create fewer crime victims," despite the universal agreement among researchers and actual crash/fatality statistics to the contrary, does not satisfy due process.

When decades are added to a sentence for a specific purpose, that purpose must have at least a reasonable chance of being achieved and/or some evidence that it's purpose will be fulfilled to satisfy due process. Otherwise, we are left with "obsolete" motivations that are not reflective of an "evolving society" that is "enlightened by a humane justice." *Weems*, 217 U.S. at 378, 30 S. Ct. 544, 54 L. Ed. 793 (1910).

F. The court's decision on the defendant's motion for post-conviction relief repeated its erroneous assumptions and misapplication of the *Gallion* factors.

In its decision denying Randhawa's arguments below, the court cited *State v. Sobonya,* 2015 WI App 86, 365Wis.2d.559, 872 N.W.2d 134, for the proposition that "an expert's opinion based on previously known or knowable facts" is not a basis for resentencing. The court's reliance on *Sobonya* is

misplaced. That court ruled that a professor's opinion about social study research was "not a new factor" under sentencing modification jurisprudence. The only issue there was whether the information was available at the time of sentencing. Judge Sanders acknowledged that "the defendant need not establish under *Tieplman* that the fact or information in this case was unknown or unknowable at the time of sentencing." R.180: 5; App. 110. The court nonetheless concluded:

> The defendant cannot demonstrate that the court relied on inaccurate information merely by offering a differing perspective from an "expert" related to one or more of the court's sentencing objectives.
>
> The retained expert's differing opinion about the court's sentencing objective of general deterrence is not the sort of inaccurate information claim that allows for re-sentencing under *Tiepelman*, as it is not an objective fact.

Id. at 4-5; App. 109-110. Judge Sanders suggests in his decision that it was only Dr. Nellis' opinion at issue, refusing to even acknowledge that it is also the consensus of virtually every expert in the field that severe sentences do not deter others from committing crimes - especially non-intentional ones. The court did not cite to one study or opinion that supported a finding that his purpose behind imposing the 55 year sentence had a chance of being fulfilled.

Judge Sanders stated in his decision that his belief that the sentence he imposed needed to be long enough deter other drunk drivers constituted "a fundamentally subjective judgment on one of the sentencing factors delineated

in *Gallion*: it is not an objective fact." *Id.* at 5; App. 110. Judge Sanders adopted the State's argument in their response to Randhawa's motion that the inaccurate information under *Tiepelman* must be an "objective fact." R.173: 7. That argument is wrong. The due process right to be sentenced on accurate information "is not limited to information solely about the defendant's actions and criminal history." *United States v. Adams*, 873 F.3d 512, 518 (6th Cir. 2017). Reviewing courts have found due process violations when a sentencing court misunderstands the effects of a sentence, including a defendant's parole eligibility or the circumstances under which a sentence will be served. *See*, *Pearson v. United States*. 265 F.Supp.2d 973, 980-981 (E.D.WI. 2003); *King v. Hoke*, 825 F.2d 720 (2d Cir. 1987).The court in *Adams* reversed a sentence because the sentencing court relied on a faulty premise regarding the length of time a drug addict needs to rehabilitate.

The core principle of the due process right at issue is that a defendant is entitled to be sentenced based on considerations that are reasonably applied and accurate. A court violates those principles when it imposes a sentence based on unreasonable or inaccurate assumptions. Here, the reasons the court articulated to justify the 55 year sentence it imposed were based on inaccurate information and assumptions which made the court's primary purpose for imposing the sentence inefficacious.

G. The state cannot prove these errors were harmless beyond a reasonable doubt.

Because Randhawa's due process rights were violated by the inaccurate information relied on at sentencing, he is entitled to resentencing unless the state proves beyond a reasonable doubt that the error was harmless *State v. Tiepelman*, 2006 WI 66 at ¶26 , 291 Wis. 2d 182, 717 N.W.2d 1. The state cannot meet its burden in this case. The record here clearly reveals that Judge Sanders made unreasonable and inaccurate assumptions and relied on an erroneous belief that a severe sentence will deter others when he pronounced the sentence in this case. Judge Sanders clearly articulated that he was imposing the extraordinarily long sentence because it was "the only way" to send a message that will deter other impaired individuals from getting behind the wheel. Both the State in its arguments[14] and the court in its decision virtually conceded that there is no evidence to suggest that severe sentences deter others from committing crimes – especially non-intentional ones – when both failed to cite any support whatsoever to the contrary.

The court's failure to confront the experts and studies cited by the defendant highlights just how speculative and unlikely it is that there will be

[14]The State did cite to a number of OWI Homicide cases in the post conviction proceeding where the court mentioned general deterrence as a factor it considered in sentencing. None of the sentences imposed in those cases come close to the severity of the 39 years initial confinement imposed for Randhawa.

fewer crime victims *because* the court gave the defendant 39 years rather than, for example, a lesser sentence of 25 years. Judge Sanders' decision on the post conviction motion doubled down on the unsettling premise that the severe sentence he imposed in this case – one of the longest ever given in Wisconsin for the charged offenses – should stand even when it is based on a mistaken belief that it will serve a purpose it will never achieve. *See United States v. Adams*, 873 F.3d 512, 518(6th Cir. 2017) (sentencing court wrongly incorporated unreliable drug rehabilitation information to achieve a purpose).

III. The Court in Randhawa's Case Gave Undue Weight to Improper Factors.

A. The court improperly refused to consider defense proffered evidence of sentences in comparable cases.

In *Gallion* the Wisconsin Supreme Court recognized that a court can consider sentences imposed in other similarly situated cases when determining an appropriate sentence. *Gallion*, 2004 WI 42 at ¶47 , 270 Wis.2d 561, 678 N.W.2d 197. The Wisconsin Supreme Court recently reaffirmed that the sentences imposed in similar cases is a proper source of inquiry.

> [I]n sentencing, a trial judge may appropriately conduct an inquiry broad in scope and largely unlimited either as to the kind of information considered or the source from which it comes." *Handel v. State*, 74 Wis. 2d 699, 703, 247 N.W.2d 711 (1976). Consistent with this mandate in *Handel*, we expressly stated in *Gallion* that circuit courts "may . . . consider information about the distribution of sentences in cases similar to the case before it." *Gallion*, 270 Wis. 2d 535, 547.

State v. Counihan, 2020 WI 12, ¶43, 390 Wis. 2d 191, 938 N.W.2d 539. This

practice promotes the general policy that "consistency in criminal sentencing is desirable . . . ." *In re: Felony Sentencing Guidelines*, 120 Wis. 2d 198, 203, 353N.W.2d 793 (1984). Consistency in sentences is required for public confidence in the fairness of the judicial process and discrepancies between similarly situated defendants can highlight the influence or lack of influence of improper considerations in any given sentence. Furthermore, scholars have recognized that inconsistent sentences in similar cases designed to make an example of an offender and thereby promote general deterrence can backfire by undermining the justice system's reputation for fairness and consistency.[15]

Counsel for Randhawa had provided the court with a compilation of CCAP records and a chart relating to sentences imposed in other hit and run, reckless and OWI homicide cases. R.73, 75, 125. No sentence in the 30 cases documented came close to the 39 years of initial confinement ordered here.[16] In his letter accompanying this information, counsel for Randhawa advised the court he was providing the information for purposes consistent with what the *Gallion* court recognized:

> Enclosed please find a chart showing the dispositions of cases arising out

[15] https://www.researchgate.net/publication/284266868_The_Role_of_Deterrence_in_the_Formulation_of_Criminal_Law_Rules_At_Its_Worst_When_Doing_Its_Best, Paul Robinson and John Darley

[16] Of the 30 cases, the initial confinement portion of the sentence was 10 years or less in 18 cases, 15 or less in 5 cases, 20 years or less in 4 cases, 25 or less in 2 cases and 30 years in 1 case.

> of behaviors which may be considered similar to the facts in this case. I believe **this information may provide the court guidance regarding the types of sentences that have been given in cases involving similar behaviors...** I have also printed out portions of CCAP so that you will have all documents necessary to evaluate these cases... I do believe, that **one of the objectives in determining an appropriate sentence, is the kinds of sentences given in related cases.** (emphasis added)

R.125. Judge Sanders advised the parties at the sentencing hearing that he did not review the materials provided by defendant's counsel for the following reasons:

> I don't and would not have had time to effectively analyze the precise level of detail in each of the other situations that Schiro references in those documents to determine to my level of satisfaction their level of comparability. That's a detailed level of analysis that would be required as to each of the cases and there are many references and I – there wasn't going to be time for me to do that. Even if there were time for me to do that, I'm not sure how valuable that analysis could be.

R.67: 83; App. 196.

Judge Sanders' refusal[17] to engage in the exercise of determining the range of sentences given by other courts in similar cases highlights again his failure to anchor the extreme sentence he imposed to any recognized due process consideration. Judge Sanders' failure to consider what had been done in other cases ignored the goal recognized in *Gallion* that sentences should be consistent and as least restrictive as possible and was another factor contributing to the due process violations resulting in the sentence he imposed.

[17]In contrast, Judge Sanders did advise the parties that he had time to review the materials submitted by the victims *twice*, including the night before the sentencing. R.67: 60.

It should be noted that the sentence imposed in this case confining Randhawa from the age of 23 until he is 63 without the possibility of parole, then supervising him until the age of seventy nine with the sanction of re-imprisonment for an additional 16 years, is one of the most severe sentences ever imposed in Wisconsin for an OWI or Reckless Homicide offense. Randhawa will serve the entirety of his productive adult life in prison for one act of unintentional conduct committed when he was just 23 years old.[18] The virtual life sentence imposed was both unusual and extremely harsh. The 55 year sentenced imposed in Randhawa's case was grossly disparate to virtually every other sentence imposed for similar conduct in Wisconsin. In making his recommendation, ADA Huebner recognized this when he stated he was asking the court to impose a "monstrous" sentence, "the most strict sentence I have recommended on a traffic homicide in my career...." R.67:80, 86; App. 193, 199.

[18]Life expectancy in the United States is age 76 for males in the general population, but both social science and common sense dictates that life expectancy will be considerably lower for Randhawa who will serve his entire adult life in prison before his release in 2055. Researchers have identified a linear relationship between incarceration and life expectancy. A recent study found that incarceration translates into a 13 percent loss of life expectancy at age 45. *The Consequences of Incarceration for Mortality in the United States*, Sebastian Daza, Alberto Palloni and Jerrett Jones, Center for Demography and Ecology, University of Wisconsin-Madison, September 20, 2019.

B. The 55-year sentence imposed in Randhawa's case is insupportable when compared to the sentence imposed by the same judge just five months later in another reckless homicide case with more aggravated facts.

In *State v. Lontrell L. Lee*, Milwaukee County Circuit Court Case No. 2017CF426. R.192; App. 279, Judge Sanders sentenced Lee to 18 years of initial confinement, 21 years less than the term imposed in Randhawa's case, when Lee's case had the same aggravating factors considered by the court in Randhawa's case, plus additional factors that were even more aggravated. In in his post-conviction decision in Randhawa's case, Judge Sanders said he "rejects the defendant's invitation to engage in a comparative sentencing analysis" of the Randhawa and Lee cases and that he had "no obligation to comment on [his] sentencing analysis in an unrelated matter." R.180: 6-7; App. 105-112. The defendant is asking this Court, consistent with *Gallion*, *Counihan* and *In re: Felony Sentencing Guidelines*, to engage in a comparative analysis of the cases because it will expose the inconsistent and conflicting application of the *Gallion* factors that resulted in the severe sentence imposed in Randhawa's case.

Lee entered pleas of guilty to two counts of second degree reckless homicide and one count of fleeing an officer causing injury. Lee fled from police in a stolen vehicle that had been car jacked at gunpoint during a drug deal an hour before, at speeds of up to 70 miles an hour on busy city streets.

He ran four stop signs and a red light before crashing the vehicle into an another occupied vehicle and then into a concrete pole. The vehicle hit the pole with such speed and force that it split in two and both passengers with Lee were thrown from the vehicle - one a distance of over 100 feet - and both died. The driver of the other vehicle suffered a debilitating leg fracture. The defendant fled the scene on foot without checking on his passengers or the innocent other driver. R.192: 16-20; App. 295-299. A warrant was issued for Lee's arrest and it took over three and one half months for authorities to locate and arrest him.

Lee was 19 years old. He had a prior criminal record for a weapons offense and a prior police contact for operating a motor vehicle without owners consent. He also had a prior OWI conviction less than one year prior to his offense, dropped out of school in the 10th grade, was chronically unemployed and smoked marijuana daily. He illegally possessed a firearm found in the vehicle. His PSI writer indicated he had shown little remorse for the offense. *Id*. at 35-38; App. 314-17.

Judge Sanders imposed consecutive sentences of 13 years, 8 years of initial confinement and five years of extended supervision on the two homicide counts, and a consecutive 5 years, with 2 years initial confinement and 3 years extended supervision on the fleeing count.

Judge Sander's sentence requires Lee to serve 18 years of initial confinement followed by 13 years of extended supervision. R.192: 43-44; App. 322-323.

Comparing the *Gallion* and *McCleary* sentencing factors, there is no legally cognizable difference in Lee and Randhawa's cases to account for the gross disparity in the sentences. Every aggravating factor identified by the court in Randhawa's case also applied to Lee's case, including high speeds on city streets, failing to obey a number of traffic controls and leaving the scene after the accident. However, in addition to those in Randhawa's case, Lee had committed or aided and abetted a car jacking at gunpoint, fled police in a high speed lengthy chase, abused drugs, had a criminal record and was on the run for three and one half months after the accident until he was finally located and arrested. The only distinction of three deaths in Randhawa's case versus two in Lee's case does not account for the gross disparity in sentences. Even accounting for a third victim in Lee's case for which he would have received an additional 8 years, his total sentence would have been only 26 years, 13 years less than that imposed in Randhawa's case.[19]

Judge Sanders did cite general deterrence at Lee's sentencing as a reason that he was imposing the sentence, using much of the same language he used in Randhawa's case. For example, Judge Sanders advised Lee:

[19]The prosecutor in Randhawa's case did argue that the sentence imposed should be tied to the defendant and what he did, not to the number of victims. *Id*. at 85-86

> If you flee from the police, people die. If that by itself isn't enough reason for people to not flee from the police, perhaps a sentence that I come up with in this case will be enough to deter them because this has got to stop... I have a blunt instrument to try to affect their behavior and that instrument is essentially sending them the message that if you do this and you get caught, there's an enormously serious consequence so that hopefully the next time there's a group of guys in a car and the police pull behind them that they decide, you know, Lontrell got big sentence on this, I don't know if I can -- I'm not going to run from the police and they're willing to pull over and...

Id. at 39-40; App. 318-319. However, unlike in Randhawa's case, Judge Sanders did not state at Lee's sentencing that general deterrence was the most significant aspect of this case or that the only way to protect the public was to impose an extremely harsh sentence.

Judge Sanders advised Randhawa that general deterrence in his case was especially important because "many times these people that commit drunk driving offenses are more like you than they are like the other people that sit in that chair." R.67: 159; App. 272. However in Lee's case, Judge Sanders recognized that general deterrence was unlikely to be successful precisely for the same reason recognized by experts for decades that he ignored in Randhawa's case:

> [Defense counsel's] suggestion that general deterence is not enormously effective in this circumstance. There is some truth to that because young people that are fleeing from the police don't necessarily believe that anything bad is going to happen.

R.192: 40; App. 319.

The 39 years of initial confinement imposed here, compared to the 18

years of initial confinement given to Lee, cannot be explained by more aggravated factors in Randhawa's case. One can assume from the record that Judge Sanders gave Randhawa decades more initial confinement than he gave Lee because he unreasonably believed that others would be deterred by the extreme sentence, a consideration he did not believe was relevant to Lee's case.

In both cases the deaths that resulted were not intended. Judge Sanders never acknowledged that fact at Randhawa's sentencing, but he did acknowledge it in Lee's case:

> I accept that you did not intend for anybody to die because of what you did. I also accept that as a direct result of your decision to push down that accelerator that two people died and one person was injured maybe for the rest of his life. You didn't mean for that to happen but your conduct was the cause of those results.

Id. at 32-33; App. 311-312. Judge Sanders' failure to acknowledge that Randhawa did not intend to cause the deaths in his case is another example of how the court strayed from a fair application of relevant sentencing factors here. Clearly the fact that Randhawa did not intend to harm any of the victims was a relevant factor - it has been an axiom guiding the application of justice in this country that the reckless actor should be distinguished from the intentional actor:

> The reckless actor has not chosen to bring about the killing in the way the intentional actor has. The person who chooses to act recklessly and is indifferent to the possibility of fatal consequences often deserves serious

> punishment. But because that person has not chosen to kill, his or her moral and criminal culpability is of a different degree than that of one who killed or intended to kill...Differential punishment of reckless and intentional actions is therefore essential if we are to retain "the relation between criminal liability and moral culpability" on which criminal justice depends.

Tison v. Arizona, 481 U.S. 137, 170-71, 107 S.Ct. 1676, 95 L.Ed. 127 (1987) (Brennan, J. dissenting).

The inconsistent application of the *Gallion* factors in the two cases might be explained by the charged emotional environment of the sentencing hearing in Randhawa's case which was improperly enhanced by the submissions of private counsel motivated by his private financial gain. *See supra*, Argument Section I. There was little mention of the loss of the two victims in Lee's case, while the tragedy of the deaths of the extraordinary young women victims in Randhawa's case was a central focus of the sentencing hearing. The presentations at Randhawa's sentencing consumed 166 transcript pages, nearly four times longer than at Lee's hearing.

A court can weigh the positive contributions and character of victims in assessing the harm caused by the crime, but it does not follow that a court can impose a sentence decades longer than it does in a similar case with facts that are more aggravated but with victims less admirable. Such an inquiry opens a door which should remain closed. *State v. Spears*, 227 Wis.2d 495, ¶46, 596 N.W.2d 375 (1999) (Abrahamson, J., dissenting, quoting trial court: "For the most part, the victim's individual worth is not itself a proper factor at

sentencing.... The court should ... not attempt to measure the relative value of the victim's life."). An impartial judge must impose a sentence that is not founded upon race, religion, or the relative social status of the victims and defendant. The discrepancy in the sentences imposed – 18 years of initial confinement for Lee and 39 years of initial confinement for Randhawa – demonstrably underscores just how influenced the court was in Randhawa's case by improper factors.

The only conclusion that can be reached is that the court gave undue weight to improper factors in Randhawa's case and thereby violated Randhawa's constitutional right to be sentenced based on relevant considerations.

IV. The Trial Court Failed to Properly Exercise its Discretion When it Imposed Consecutive Rather Than Concurrent Sentences.

When sentencing a defendant on multiple charges at a single sentencing hearing, a court should ordinarily order each of the sentences to be served concurrently or else give a statement of reasons for the selection of consecutive terms. In *State v. Hall*, 2002 WI App ¶ 13, 255 Wis.2d 662, 648 N.W.2d 41, the court adopted the ABA Standards for Criminal Justice Sentencing:

> [S]entencing courts should not change the type of sanction or increase the severity of sentences for multiple offenses merely as a result of the number of counts or charges made from a single episode...

> [W]here the separate offenses are not merged for sentencing, a sentencing court should consider imposition of sanctions of a type and level of severity that take into account the connections between the separate offenses and, in imposing sanctions of total confinement, ordinarily should designate them to be served concurrently.

ABA Standards for Criminal Justice Sentencing, s. 18-6.5(c)(i) and(ii).

When a defendant is convicted of more than one offense and the sentencing court chooses to impose consecutive rather than concurrent sentences, the court must justify the decision by applying the same factors relied upon in determining an appropriate length of sentence. *State v. Hall*, 2002 WI App at ¶ 8; *State v. Hamm*, 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988); *State v. Borrell*, 167 Wis.2d 749, 764-65, 482 N.W.2d 883 (1992).

In Randhawa's case, where the charges were all related to one reckless act by the defendant, the rationale for concurrent sentences is strong. The court rejected defense counsel's request for concurrent sentences, but never explained why.

> Mr. Schiro makes a very skillful argument, as he always does, suggesting that concurrent sentences would be appropriate or suggesting that 15 years of confinement would be sufficient. I don't believe either of those thing is accurate. I understand where his arguments come from, but I'm not going to follow his recommendations.

R.67: 164; App. 277. Judge Sanders ruled in the post-conviction motion that he engaged in a "complete sentencing analysis," stating that the reasons he put on the regard as to the length of sentence applied equally to his determination

that consecutive sentences should be imposed, R.180: 7; App. 11, even though he never stated so at the sentencing.

Judge Sanders did not explain his reasons for imposing consecutive sentences for the one act of driving recklessly in this case. That decision will cause the defendant to serve 28 more years than he would have if the sentences were concurrent. This was an erroneous exercise of discretion. *State v. Hall*, *supra; State v. Ziegler*, 2006 WI App 49, 289 Wis.2d 594, 712 N.W.2d 76; *State v. Loomis*, 2016 WI 68, ¶30, 371 Wis. 2d 235, 250, 881 N.W.2d 749 (An erroneous exercise of discretion occurs when a circuit court imposes a sentence without the underpinnings of an explained judicial reasoning process.). The court erroneously exercised it's discretion in imposing four consecutive sentences for the one act of driving recklessly. Therefore, Randhawa is entitled to a resentencing.

CONCLUSION

For all of the foregoing reasons, the defendant respectfully requests that this court remand the case back to the trial court for resentencing.

Dated this 4th day of April, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this Document conforms to the rules contained in sec. 809.19 (8)(b), (bm) and (c) for a brief. The length of this document is 10,880 words.

I also hereby certify that filed with this brief is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under §809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any and final decision of the administrative agency.

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Electronically signed by Dudley A. Williams
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