No._____

In The
# Supreme Court of the United States

JASEN RANDHAWA,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

**On Petition for a Writ of Certiorari to The Wisconsin Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Does a court violate a defendant's right to due process when a lengthy sentence is based upon mistaken information that a severe sentence will deter others from committing similar crimes when the court is provided overwhelming evidence that severe sentences do not deter others from committing those crimes?

II. Does due process prohibit a court from imposing a severe sentence that it expressly states is intended to accomplish a purpose which social science establishes cannot be achieved?

III. Does a court violate a defendant's right to due process when it imposes a severe sentence expressly based on a general sentencing factor that is not relevant to the particular offender or charges?

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The order of the Supreme Court of Wisconsin denying review appears at page 20 of the Appendix. The order was unpublished and not reported.

The opinion of the Wisconsin Court of Appeals appears at pages 1-11 of the Appendix. The opinion was ordered unpublished and reported at, 2023 WI APP 44, 995 N.W.2d 488.

The opinion of Milwaukee County Circuit Court Judge Mark A. Sanders appears at pages 12-19 of the Appendix.

## JURISDICTION

The Wisconsin Supreme Court denied Randhawa's petition for review on October 30, 2023. This court has jurisdiction to decide the constitutional due process issues presented by this case pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Over seventy five years ago, this Court in *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), held that a sentence predicated on misinformation violated the due process clause of the 14th Amendment to the United States Constitution. Section 1 of the 14th Amendment states in part:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Randhawa was convicted of three counts of 2nd Degree Reckless Homicide, violations of Wis.Stats § 940.06(1), and one count of Second Degree Reckless Injury, a violation of Wis. Stats. § 940.23(2)(e). R.48.

## STATEMENT OF THE CASE

The criminal complaint against Randhawa in *State of Wisconsin vs. Jasen Randhawa*, Case No. 2016CF4787, 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. in the City of Milwaukee, Wisconsin. 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. Three young women were killed in the accident - all were unbelted passengers in the back seat of the Uber vehicle. The Uber driver was hospitalized for injures suffered in the accident but had recovered by the date of sentencing in the case. *Id.* at 56.

Randhawa fled the scene of the accident on foot following his passenger, unaware that there was anyone in the back seat of the Uber vehicle that had been fatally injured. *Id.* at 71-72, 123. The defendant was captured on two different videos taken during cab rides in the hours after the accident discussing ways that he could avoid responsibility for the accident. *Id.* at 72-78. However, the next day he learned that three women had died in the accident and shortly thereafter contacted an attorney

who made arrangements for Randhawa to immediately turn himself in to authorities. *Id*. at 79, 121-122.

Randhawa was twenty three years old at the time of the offense and had no prior criminal record. *Id*. at 116. He had one prior civil OWI conviction which occurred fourteen months prior to this offense, *Id*. at 64-65, and his license had not been reinstated at the time of the offense. He comes from a supportive, hard working and law abiding family. *Id*. at 149-151; App. 34-37.

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

> 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.

Sentencing was held on May 19, 2017, before Milwaukee County Circuit Court Judge Mark A. Sanders. The court heard statements from several family members of the victims and relatives of Randhawa. R.67: 9-88, 93-109. Randhawa's counsel provided the court with a summary of sentences imposed in similar cases which the court did not review. R.67: 82-83.[1] The court imposed a determinate sentence of 39

[1]The summary included a compilation of CCAP records and a chart relating to sentences imposed in other hit and run, reckless and OWI homicide cases in Wisconsin. R.73, 75, 125. No sentence in the 30 cases documented came close to the 39 years of initial confinement ordered here.

years of initial confinement followed by 16 years of extended supervision for an aggregate sentence of 55 years. Under Wisconsin law, Randhawa will serve the first 39 years in prison with no chance of parole. Judge Sanders made it very clear that he was imposing the 55 year sentence he gave Randhawa in large part for purposes of general deterrence because "it was the only way" to deter other potential offenders and make "fewer crime victims". *Id*. at 159-160; App. 44-45.

A motion for post conviction relief was filed on April 12, 2021. R.153,154. The motion argued in part that the court relied on inaccurate and false assumptions when it imposed the severe sentence because 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. 51-56.

In addition to the statements Judge Sanders made at sentencing, the record of the post conviction proceeding established that Judge Sanders had increased Randhawa's sentence significantly for the purpose of general deterrence. Randhawa's motion argued that a sentence of only 19 years that Judge Sanders imposed in another similar multiple count reckless homicide case with two deaths and one serious injury which had more aggravated facts just five months after Randhawa's sentencing

highlighted Judge Sanders' improper application of general deterrence to increase Randhawa's sentence.[2] R.153:15-20.

On October 4, 2021, Judge Sanders denied the defendant's motion on briefs without a hearing. The court found that Randhawa failed to allege an "objective fact" that was inaccurate that warranted resentencing, that he did not rely on improper factors and that the sentence imposed was not unduly harsh. Judge Sanders found that his assumption that the 55 year sentence would "make fewer crime victims" was a "fundamentally subjective judgment" and not an "objective fact" that is "capable of being true or untrue". App. 16. Neither the district attorney in their briefing nor Judge Sanders in his decision addressed or challenged the underlying premise of Randhawa's argument that severe sentences do not deter others from committing non-intentional crimes. R.180; App. 13-20.

A notice of appeal was filed on October 18, 2021, R. 137. The Court of Appeals issued a *per curiam* decision on July 5, 2023, affirming the conviction and denying all claims of error argued by Petitioner. *State of Wisconsin vs. Jasen Randhawa*, Case No. 2021AP1818, App. 2-12. The Court of Appeals found that Judge Sanders did not give

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[2]In *State v. Lontrell L. Lee*, Milwaukee County Circuit Court Case No. 2017CF426, R.192; App. 203-204, Lee was convicted of two counts of second degree reckless homicide and one count of fleeing an officer causing injury. Lee's case had many of the same aggravating factors as Randhawa's case: driving at high speeds on city streets, disregarding traffic controls, leaving the scene of the fatal accident, and a prior OWI offense. Lee had also carjacked the vehicle he drove at gunpoint and led police on a high speed chase. He fled the scene after crashing the vehicle without checking on his deceased passengers and was not arrested until months later. He showed no remorse, had a prior gun and auto theft convictions, was unemployed and smoked marijuana daily. Judge Sanders discounted the applicability of general deterrence in his case "because young people that are fleeing from the police don't necessarily believe that anything bad is going to happen" and ultimately sentenced Lee to 19 years of initial confinement, 20 years less than he gave Randhawa. R.192: 40.

undue weight to improper factors even though the sentence was at odds with sentences imposed in other vehicular homicide cases.[3] App. 9-11. The Court of Appeals held that "[d]iffering opinions about the circuit court's sentencing objective of general deterrence does not constitute inaccurate information so as to allow for resentencing under *Tiepelman*." App. 9. The Court of Appeals agreed with the circuit court's holding that "[the] differing view of an expert does not render the court's determination inaccurate" and held that "an expert's opinion and citations to journal articles cannot define the bounds of a constitutionally appropriate sentence." App. 8-9. Again, neither the State in their brief nor the Court of Appeals in its decision addressed the underlying premise of Randhawa's due process challenge that severe sentences do not deter others from committing non-intentional crimes.

Randhawa filed a Petition for Review of the Court of Appeals decision with the Wisconsin Supreme Court on August 4, 2023. *State of Wisconsin vs. Jasen Randhawa*, Case No. 2021AP1818. The Wisconsin Supreme Court issued a summary order denying Randhawa's Petition for Review on October 30, 2023. App. 1. The State in its briefing in the Supreme Court continued to avoid addressing the underlying premise of Randhawa's due process challenge that severe sentences do not deter others from committing non-intentional crimes.

This petition for a writ of certiorari follows.

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[3]Prior to sentencing, Randhawa's trial counsel provided Judge Sanders with a compilation of CCAP records and a chart relating to sentences imposed in other hit and run, reckless and OWI homicide cases in Wisconsin. R.73, 75, 125. No sentence in the 30 cases documented came close to the 39 years of initial confinement ordered here.

## REASONS FOR GRANTING THE PETITION

### I. Introduction

This case involves real and significant questions of state and federal constitutional law. The Court of Appeals of Wisconsin issued a decision that highlights an important question of federal and state law that has not been, but should be, settled by this Court. Defendants have a constitutional right to be sentenced on accurate information and assumptions. Randhawa's constitutional due process right to be sentenced on accurate information was violated when decades of imprisonment were added to his sentence based upon a mistaken belief and inaccurate information that a severe sentence would serve to deter others from committing non-intentional crimes. While virtually all states and federal law require courts to consider a number of factors at sentencing, including general deterrence, the decision of the Court of Appeals here gives judges the license to impose severe sentences by mechanistically citing general sentencing factors whether relevant or not given the particulars of the case.

A sentencing court should not be permitted to impose a severe sentence merely by mechanistically referencing a standard sentencing factor when common sense and social science evidence clearly establish is not relevant or efficacious given the crimes charged. The decision of the Wisconsin Court of Appeals allows a trial court to sentence a defendant to decades in prison based on an unreasonable and uninformed subjective opinion and for a stated purpose that will never be achieved. At stake here is the balance between individualized sentencing and sentencing used as an instrument of

a social policy. Randhawa was given decades longer in prison for a purpose which all available evidence and virtually every social science expert establish will never be realized. This Court should assure that no citizen is deprived of their right to be sentenced only upon facts and assumptions that are accurate and relevant. Judge Sanders had an obligation to scrutinize the evidence provided him in the post conviction proceeding that established severe sentences do not deter others from non intentional crimes. Instead, he ignored that evidence and reasserted his own "subjective judgment" which is in conflict with all experts studying the issue.

The record of this case clearly establishes the court's reasons for imposing the virtual life sentence[4] it gave Randhawa and therefore presents a unique opportunity for this Court to protect a defendant's due process rights by mandating meaningful restraints on a sentencing court's discretion to impose a sentence based on unreasonable assumptions and for an inefficacious purpose.

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[4]Confining Mr. Randhawa from age of 23 without the possibility of parole until he is 63 years old, then supervising him until the age of seventy eight with the sanction of re-imprisonment for an additional 15 years, is the equivalent of a life sentence. Life expectancy in the United States is age 76 for males, yet both findings of scientific studies and common sense dictate that the life expectancy of Mr. Randhawa will be considerably lower given that he will spend his *entire* adult life in prison before his release in 2055. Researchers have identified a linear relationship between incarceration and life expectancy. One researcher found that for each year lived behind bars, using an average sentence in criminal cases of five and one half years, a person can expect to lose two years off their life expectancy. *Mass Imprisonment and the Life Course Revisited: Cumulative Years Lost to Incarceration for Working-Age White and Black Men*, Patterson, E. and Wildeman, C., 53 Social Science Research 325 (2015). Another 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, p. 21, September 20, 2019. Inferior health services, environmental conditions, crimonogenic conditions, stress and violence all contribute to make the sentence imposed a virtual life sentence for the then 23 year old Jasen Randhawa.

A decision by this Court would promote the goal of individualized sentencing by requiring judges to make sentencing decisions based only on relevant considerations, rather than mechanistically applying general recognized factors to a given category of crime. Review by this Court would assure that citizens who are convicted of crimes are not used as mere instruments of social policy and only serve the minimum period of confinement necessary given the gravity of the offense, the needs of the public, the rehabilitative needs of the defendant and all other relevant considerations.

## 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

Trial courts in both the federal and state system have very broad discretion in imposing a sentence within the confines of any mandatory minimum or maximum sentence prescribed for an offense. That discretion is not limitless and 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. McCleary*, 49 Wis.2d 263, 276; 182 N.W.2d 512 (1971); *State v. Setagord*, 211 Wis.2d 397, 416, 565 N.W.2d 506 (1997); *State v. Borrell*, 167 Wis.2d 749,764, 482 N.W.2d 883 (1992); *State v. Krueger*, 119 Wis.2d 327, 336–37, 351 N.W.2d 738 (1984); *State v. Gallion*, 2004 WI 42, ¶ 23, 270 Wis. 2d 535, 678 N.W.2d 197. The court in *McCleary* stated:

> It is thus apparent that the legislature vested a discretion in the sentencing judge, which must be exercised on a rational and explainable basis. It files in the face of reason and logic, as well as the basic precepts of our American ideals, to conclude that the legislature vested unbridled authority in the judiciary when it so carefully spelled out the duties and obligations of the judges in all other aspects of criminal proceedings. Just because the legislature provides a range of ten years, it would be nonsense to conclude that, in a particular case, it would make no difference in terms of legislative intent whether the sentence was for one year or ten.

*State v. McCLeary*, 49 Wis.2d at 276.

The due process clause of the Fourteenth Amendment to the United States Constitution restrains a trial court's discretion at sentencing by conferring on the defendant the right to be sentenced only on true and correct information. *Townsend v. Burke*, 334 U.S. at 740-41; *State v. Tiepelman*, 2006 WI 66, ¶42; *State v. Borrell*, 167 Wis. 2d at 772. The foundation of that right is the due process protection against arbitrary government decisions. Any sentencing process must conform with "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932). A convicted offender has a right to a fair sentencing process - one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information. If a trial court relies on inaccurate information in sentencing, it errs in the exercise of its discretion. *Townsend v. Burke*, 334 U.S. at 740-41; *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).

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). A court violates due process when it imposes a sentence based on "materially false assumptions relevant to any material facts at sentencing". *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987) *citing United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir.1970). In *Adams* the sentencing court's assumption that it takes at least 18 months to rehabilitate a drug addict was "unreliable" and violated the defendant's due process rights. *United States v. Adams*, 873 F.3d at 518. *See also: Pearson v. United States.* 265 F.Supp.2d 973, 980 (E.D.WI. 2003) (inaccurate understanding as to where the defendant would serve her sentence and her ability to be allowed family care release privileges to care for her elderly parents).

A defendant who is sentenced based on inaccurate information is entitled to re-sentencing. *United States v. Tucker*, 404 U.S. at 446 (1972); *State v. Tiepelman*, 2006 WI at ¶27. The Wisconsin Supreme Court just a few years ago quoted from *Tucker* to reiterate 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.(quotations omitted).

*State v. Coffee*, 2020 WI 1, ¶37, 389 Wis. 2d 627, 937 N.W.2d 579.

The issue presented here is whether a due process violation occurs when a court imposes a severe sentence for a stated purpose and based upon an assumption and belief that a general sentencing factor is relevant in that case when common sense and virtually every social science expert examining the issue concludes the factor is not relevant to the offense and the court's purpose will never be realized.

### 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.

Almost 25 years ago, Wisconsin adopted Truth In Sentencing whereby the sentencing judge imposes the amount of time a defendant serves both in confinement and on supervision upon release. The structure of the 55 year sentence imposed by Judge Sanders requires Randhawa to serve 39 years of confinement in prison followed by 16 years of extended supervision. Randhawa has no opportunity for parole or any other kind of early release prior to serving every day of the 39 years in prison.

With the advent of Truth in Sentencing in 2004, the opportunity to review and correct an unreasonable period of confinement was the focal point of the Wisconsin Supreme Court's decision in *Gallion*. In *Gallion,* the court recognized the need to require courts to articulate on the record the reasoning behind a sentence so that a reviewing court has a meaningful opportunity to determine whether the circuit court

properly exercised its discretion on a "rational and explainable basis." *State v. Gallion*, 49 Wis.2d at 276. The court in *Gallion* recognized that Truth in Sentencing meant there was no longer a parole system to remedy an abuse of discretion which led to an unduly long sentence. The court in *Gallion* stated:

> With the advent of truth-in-sentencing, we recognize a greater need to articulate on the record the reasons for the particular sentence imposed. Under the old, indeterminate system, sentencing discretion was shared among all three branches of government. The legislature set the maximum penalty and the manner of its enforcement; the courts imposed an indeterminate term; and the executive branch, through the parole board, determined how much of that term was going to be served. *See Borrell*, 167 Wis.2d at 767, 482 N.W.2d 883 (citation omitted). Under truth-in-sentencing legislation, the executive role has been diminished with the elimination of parole. The legislative role is limited to setting the parameters of the penalty. As a result, the judiciary's responsibility for ensuring a fair and just sentence has significantly increased.

*Id,* at ¶28, 553.[5]

The record of the sentencing hearing clearly establishes that general deterrence was an overriding reason for giving Randhawa the extreme sentence of 55 years with 39 years of initial confinement. Prior to imposing sentence, Judge Sanders advised Randhawa that general deterrence was a particularly important factor he had to consider in imposing a sentence in a case such as Randhawa's:

> 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.

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[5] Under prior Wisconsin law, an inmate was eligible for parole after serving just 25% of their sentence. Wis Stats Sec 304.06(2)(b). *State v. Borrell*, 167 Wis. 2d at 772.

App. 44. Judge Sanders told Randhawa why he was going to impose an extreme sentence in his 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.

App. 43-44. 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." App. 45. Judge Sanders made it even clearer that general deterrence was a primary motivation for the fifty-five year sentence he imposed when he stated it was the "only way" to cause other people to be aware of the consequences of drunk driving and make "fewer crime victims." App. 43-44.

In the post-conviction proceeding, Judge Sanders refused to even consider the social science evidence or the expert affidavit of Dr. Ashley Nellis submitted by Randhawa and doubled down on general deterrence justifying his sentence in his post- conviction decision denying resentencing. App. 13-20.

### 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 in imposing its sentence on Randhawa relied on inaccurate information and a mistaken assumption that led him to "hope" that imposing an extremely long sentence would make "fewer crime victims in the future." App. 44. 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 based upon a "hope" and for a stated purpose that is certain to be completely ineffective.

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. App. 51-56. 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. App. 56.

As Dr. Nellis recognized, 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.*[6]

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)(emphasis added)[7]. Another prominent scholar concluded that Nagin's conclusions make intuitive sense:

> [O]ffenders 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.

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[6] See Abstract: https://doi.org/10.1111/j.1539-6924.1991.tb00604.x (last visited January 23, 2024).

[7]See Abstract: https://kilthub.cmu.edu/articles/journal_contribution/Deterrence_in_the_Twenty-first_Century_A_Review_of_the_Evidence/6471200/1 (last visited January 23, 2024).

Marc Mauer, *Long-term sentences: Time to Consider The Scale of Punishment*, The Sentencing Project (November 5, 2018).[8]

At the foundation of a general deterrence strategy is the assumption that the person one hopes to deter will process information rationally and conclude 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 deterrence 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. This Court in *Hall v. Florida* recognized this same underlying consideration 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 (2014).

For some, driving while impaired is an infrequent or aberrational act performed in response to situational conditions or stressors. Public policy and special enforcement are unlikely to eliminate individuals' infrequent or aberrational behavior. Conversely, for some individuals driving while impaired is habitual, even a way of life. A general deterrence approach might increase the perceived risk of arrest but is unlikely to deter

[8] https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment (last visited January 23, 2024).

these chronic offenders from driving while impaired by alcohol. *See* Jacobs, J.J., *Drunk Driving: An American Dilemma* (University of Chicago Press 1989) (quoted in NHTSA's, *Creating Impaired Driving General Deterrence: Eight Case Studies of Sustained High-Visibility Enforcement,* (2006*).*[9]

The current effort in the United States to deter impaired driving reflects an understanding that severe sentences do not deter other potential offenders. 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.[10](Citing Ross HL. *Deterring the Drinking Driver: Legal Policy and Social Control*. 2nd ed. Lexington, MA: Lexington Books; 1984). In 93% of fatal crashes caused by alcohol the driver did not have a prior OWI conviction.[11] The CDC has identified numerous strategies that have been effective in reducing OWI related offenses - imposing severe sentences is not even mentioned.[12]

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[9]https://www.nhtsa.gov/sites/nhtsa.gov/files/809950.pdf (Last visited January 23, 2024)

[10]See Abstract: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3629952 (last visited January 23, 2024).

[11]https://www.responsibility.org/wp-content/uploads/2020/02/FAAR_3974_State-of-Drunk-Driving-Fatalities_Shareable_JPGS-V2-Pg18.jpg (last visited January 23, 2024)

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

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 sentencing.[13] There were approximately 1,000 more alcohol related crashes in Wisconsin each successive year from 2016 to 2018.[14]

No study or research supports the court's assumption here that the years added to the severe sentence given to Randhawa will deter other drunk drivers or spare the life of another victim as Judge Sanders intended - let alone that the 55 year sentence with 39 years in prison without the possibility of parole would be more of a deterrent than a shorter sentence. As one of the leading experts on sentencing recognized:

> The limited impact of extending sentence length becomes even more attenuated for long term incarceration. [F]ew would-be-robbers undeterred by the prospect of only a twenty year sentence would balk at an additional five years.

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[13] https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630 (2017)(Last visited January 23, 2024).
https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812864 (2018)(last visited January 23, 2924.
https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812450 (2016)(Last visited January 23, 2024).

[14] https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx (last visited January 23, 2024).

Marc Mauer, *Supra: Long-term sentences: Time to Consider The Scale of Punishment,* at 123. Accordingly, the Supreme Court of New York has recognized that general deterrence may be satisfied through "relatively short but substantially inexorable sentences to prison". *People v. Suitte*, 90 A.D.2d 80, 87, 455 N.Y.S.2d 675 (NY 1982)(Citing Frankel, *Criminal Sentences*, p. 110) .

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). The fact that a tragic accident happened, the offender is apprehended, jailed, convicted and sentenced in line with the history of preceding cases in the jurisdiction will all serve to accomplish the goal of general deterrence. Social science experts know that a virtual life sentence will provide no additional deterrent effect. In fact, scholars have recognized that severe sentences inconsistent with 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]

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[15] See Abstract: 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

### D. While courts are directed to consider the protection of the public in imposing a sentence, it violates due process to rely on general deterrence in cases where it has no chance to succeed.

The State throughout this appeal, Judge Sanders in his post-conviction decision and the Court of Appeals all believed that, because general deterrence was a factor generally recognized by case law, it was not a violation of due process to utilize it to give Randhawa a decades longer sentence even given the scientific evidence it would not be effective in his case. Neither the State, Judge Sanders or the Court of Appeals believed it was necessary to confront the evidence provided by Randhawa as to inefficacy of a general deterrence strategy in non-intentional crimes. All avoided the issue by relying on the fact that Wisconsin case law has directed that it is one of the general factors a court should consider in sentencing. *See: State v. Gallion, supra.*

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 should consider in sentencing. However, due process requires that the use of the general deterrence rationale in a given case be tethered to factually accurate information and relied upon to support a sentence only 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 U.S.C. §3553 reveals Congress was aware that there were certain classes of cases where general deterrence may be particularly effective. The legislative history of 18 U.S.C. §3553 reveals that 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). Federal courts have recognized that "economic and fraud-based crimes are more rational, cool and calculated than sudden crimes of passion or opportunity," which make them "prime candidates for general deterrence." *United States v. Howard*, 28 F.4th 180, 209 (11th Cir. 2022).

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 Supreme Court 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*, 2022 WI 54, 402 Wis.2d 735, 976 N.W.2d 304. 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 Wisconsin Supreme court 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 community to intervene. Id. at ¶17. 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. It is one thing to impose a short 2 year prison sentence in a repeated child sexual assault case with a five year old victim and quite another to impose one of the longest sentences in state history in a non-intentional vehicular homicide case. Adding decades to Randhawa's sentence for a speculative general deterrence purpose that has no chance of being fulfilled violates due process.

Aside from the issue of the efficacy of general deterrence in non-intentional type offenses, Courts have recognized that while general deterrence is a factor the court should consider in some cases, a criminal sentence must reflect an individualized assessment of a particular defendant's culpability rather than a mechanistic application of any recognized factor to a given category of crime. Courts must understand that there must be limits on the arbitrary or automatic use of deterrence for the purpose of enhancing sentences if the goal of individualized sentencing is to be preserved. Examining just a three-year sentence for illegal distribution of cocaine, the First Circuit in *United States v. Foss*, 501 F.2d 522 (1st Cir. 1974), ordered resentencing after concluding the district court relied too mechanistically on general deterrence and failed to "individualize" the sentence.

> The court's duty to 'individualize' the sentence simply means that, whatever the judge's thoughts as to the deterrent value of a jail sentence, he must in every case reexamine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation"

*Id*. at 528. General deterrence can be legitimate aim, but it has never been the sole aim in imposing sentence. *U.S. v. Barker*, 771 F.2d 1362 (9th Cir. 1985). The court in *Barker* stated:

> Central to our system of values and implicit in the requirement of individualized sentencing is the categorical imperative that no person may be used merely as an instrument of social policy, that human beings are to be treated not simply as means to a social end like deterrence, but also— and always—as ends in themselves. *See, e.g.*, I. Kant, *Groundwork of the Metaphysic of Morals 66–67* (H.J. Paton trans. 2d ed. 1964) ("Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end"16 ); see also I. Kant, *Philosophy of Law* 196 (W. Hastie trans.1887) ( "one man ought never to be dealt with merely as a means subservient to the purposes of another"); accord *United States v. Barker*, 514 F.2d 208, 231 (D.C.Cir.1975) (en banc) (Bazelon, J., concurring); L. Tribe, *American Constitutional Law*, 463 (1978); R. Dworkin, *Taking Rights Seriously* 198 (1977). Deterrence is not inconsistent with this principle, but the principle does demand that a balance be struck between the goal of general deterrence and the enlightened imperative of individualized sentencing. *Cf.* Golding, note 10, *supra*, at 79 (distinguishing between deterrence as a legitimate purpose of punishment and the "moral fit" nevertheless necessary between a given offense/offender and the amount of punishment).

*Id* at 1368-9.

### E. This Court needs to establish limits on a court's ability to impose a severe sentence based on a general sentencing factor that the record of the case establishes is not relevant to the particular offender or charges.

The history of a case in Alaska demonstrates the need for this Court to establish limits on the discretion of judges to impose severe sentences for a specific purpose which the evidence in the case establishes will never be fulfilled. A decision by this Court would require sentencing judges to apply general sentencing factors only when the evidence available to the court establishes it is relevant and any intended affect has a chance of being realized. This Court should make it clear that, just like any other general sentencing factor, the fact that sentencing courts are directed by statute

or case law to consider general deterrence is not a license to apply it to add years to a sentence in a case where all available evidence establishes it will not be efficacious.

The defendant in *Alaska v. Graham* was sentenced to 32 years of confinement for an OWI homicide offense. *Alaska v. Graham*, 513 P.3d. 1046 (Alaska 2022). That sentence was the longest sentence imposed in Alaska for an unintentional vehicular homicide. The record at sentencing established that the sentencing judge imposed the severe sentence in part to make an example of the defendant, i.e. general deterrence. The Court of Appeals of Alaska had overturned the sentence and ordered re-sentencing 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. Alaska*, 440 P.3d 309, 325 (Alaska App. 2019). In ordering re-sentencing, the Court of Appeals of Alaska adopted the finding that the Alaskan Supreme Court had made in *Pears v. State*, 698 P.2d 1198 (Alaska 1985), three decades earlier:

> 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.

*Id. at* 1205.

Three years later the Supreme Court of Alaska reversed the Court of Appeals decision in *Graham v. Alaska*, concluding that general deterrence is a recognized sentencing factor and, despite issues as to it's efficacy in OWI related homicides, the sentencing court did not abuse its discretion in imposing the sentence. *Alaska v. Graham*, 513 P.3d. at 1062. The Alaska Supreme Court avoided the issue of the efficacy of general deterrence in reckless homicide cases by relying on it being one of the factors case law dictates should be considered by stating:

> We acknowledge the debate about whether increased sentences actually have a greater deterrent effect. But the legislature requires sentencing courts to consider "the effect of the sentence imposed in deterring other members of society from future criminal conduct" and our case law has long viewed general deterrence as an especially important consideration in drunk driving cases.

*Alaska v. Graham*, 513 P.3d. at 1063.

The Wisconsin Court of Appeals here completely ignored "the debate about whether increased sentences actually have a greater deterrent effect" which was at least recognized by the Alaska Supreme Court. The Court of Appeals here refused to even acknowledge the issue of whether the decades added to Randhawa's sentence for the purpose of deterring others was likely to deter anyone even though the record before it established that virtually every social science expert studying the issue has concluded severe sentences do not deter others from committing non-intentional crimes. Instead, the court reasoned that "established precedent accepts general deterrence as a valid sentencing objective for cases involving defendants who commit drunk driving offenses" App. 9. This Court needs to grant certiorari to direct courts to

consider all available evidence regarding the relevancy of a particular sentencing factor to the charge or offender before applying it to significantly enhance a sentence.

Judge Sanders characterized his "hope" that the severe sentence he gave Randhawa will make fewer crime victims as a "subjective judgment" - "not an objective fact capable of being true or untrue". App. 16. The Court of Appeals agreed with Judge Sanders' charecterization and held that "[the] differing view of an expert does not render the court's determination inaccurate". App. 9. The point is that courts should not be adding decades to a prison sentence based on a misinformed personal judgment - especially when that personal belief is contradicted by the scientific evidence in the case which the court here refused to even consider.

This Court should make it clear that while legislatures and case law provide that there are a number of factors a court should consider in sentencing, the factors a court relies on must be relevant to the case before it for a sentence to be constitutional. A court cannot disregard overwhelming evidence that a sentencing factor is irrelevant to a case or offender and then rely on a "hope" the evidence is wrong and cite the factor as a basis to add decades to a sentence. It is not enough that a sentencing factor has been generally recognized and may be relevant in other cases. This Court must make it clear to sentencing courts that when the overwhelming consensus of social scientists establishes a factor is not relevant to a given case, it is a violation of that defendant's due process rights to rely on that factor to add multiple years to a sentence.

Instead of providing any scientific evidence, expert opinions or even common sense arguments establishing that general deterrence may be effective, courts dealing

with this issue often rely on hope and hunches to justify lengthy prison terms. The district attorney here argued in his brief in the post conviction case that "even if only one person is deterred by the defendant's sentence from committing a repeated drunk driving, then the Court's objectives will have been met." R. 73: 9. Judge Sanders advised Randhawa that he was giving him the 55 year sentence because "the hope is that there will be fewer crime victims in the future". App. 44. The Supreme Court in *Graham* noted the sentencing court's justification for imposing its severe sentence: "we never get the deterrent effect we hope to get but any deterrent effect is an improvement over the situation, and we're likely to get some". *Alaska v. Graham,* 513 P.3d at 1063. This Court should require that any sentencing consideration relied on be relevant to the defendant and case and have some chance of being realized or fulfilled rather than be based on an uninformed hope or hunch.

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

The Court of Appeals held that "an expert's opinion" and "citations to journal articles" cannot define the "bounds of a constitutionally appropriate sentence". App. 8-9. That holding is both erroneous and unsettling. The United States Supreme Court has recognized that the law "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), *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct.272, 633L.Ed. 2d 346 (1972). And in *Hall*, this Court recognized that in pursuit of enforcing the Constitution's protection of human dignity, this Court looks

to the "evolving standards of decency that mark the progress of a maturing society." *Hall v. Florida*, 572 U.S. at 708, citing *Trop v. Dulles*, 356 U.S. 86, 101(1958).

Accordingly, appellate courts, including the Wisconsin Supreme Court and this Court, have approved the use of social science research to inform on a question of law. *Brown v. Board of Education*, 347 U.S. 483 (1954) (segregation in education); *Muller v. State of Oregon*, 208 U.S. 412 (1908) (women's working hours); *Lawrence v. Texas*, 539 U.S. 558 (2003)(criminalization of sodomy); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551; *Hall v. Florida, supra.* (death penalty on the mentally ill and juveniles); *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (impermissively suggestive show-ups)(reversed on grounds that original social science disputed by additional social science research).

In *Hall*, this Court ruled that a state law which established a level of intellectual disability sufficient to allow the death penalty was based upon outdated criteria and "goes against the unanimous professional consensus" regarding measuring the level of mental disability. *Hall v. Florida*, 572 U.S. at 722. A decade ago in *Miller vs. Alabama*, 567 U.S. 460 (2012), this Court recognized social science as the basis for its decisions in prior 8th Amendment sentencing decisions involving the death penalty;

> Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. Id., at 569, 125 S.Ct. 1183. In *Roper*, we cited studies showing that " '[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.' " *Id.*, at 570, 125 S.Ct. 1183 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham*,

> we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." 560 U.S., at 68, 130 S.Ct., at 2026.5

*Id*. at 471.

The uncontroverted findings of social scientists that severe sentences do not deter crime cannot be ignored. When any part of sentence is imposed for a specific purpose, that purpose must have at least a reasonable chance of being achieved and/or some evidence that its purpose will be fulfilled to satisfy due process. This Court cannot condone the addition of decades to a sentence in a particular case based on an irrelevant consideration and inaccurate assumptions that are in conflict with the consensus of social scientists worldwide. Otherwise, sentencing courts will be left to employ "obsolete" motivations that are not reflective of the "evolving standards of decency" of a "maturing society".

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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