STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
CASE NO. 2012AP000393-CR

STATE OF WISCONSIN,

Plaintiff/Respondent,

v.

CORTEZ LORENZO TOLIVER,

Defendant/Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, HONORABLE FAYE FLANCHER PRESIDING, RACINE COUNTY CIRCUIT COURT

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. Did the trial court exercise appropriate discretion in denying the petition for reverse waiver?

Trial court answer: Yes.

2. Did the trial court exercise proper sentencing discretion when it did not explain its reason for maximum and consecutive sentences or accurately consider character factors?

Trial court answer: Yes.

3. Was denial of postconviction relief erroneous?

Trial court answer: No.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The appellant submits that the issues presented do not present any change in law or warrant an extension of existing law and therefore publication would not serve any purpose. The facts are easily understandable and the legal questions can be succinctly reduced to writing, therefore there is no compelling need for oral argument.

STATEMENT OF CASE

Following his guilty plea, Cortez Lorenzo Toliver was convicted of one count First Degree Reckless Injury/Use of a Dangerous Weapon. (R37) (App.1) The offense is a violation of Wis. Stat. sec. 940.23(1)(a), which is a class D felony, exposing the offender to maximum penalty of thirty years imprisonment divided as 20 years of initial incarceration and ten years of extended supervision. A penalty enhancer for the weapon increased the maximum penalty five years. He was also convicted of one count Attempted Robbery With Threat of Force/Use of a Dangerous Weapon which offense is a violation of Wis. Stat. 943.32(1)(b). It is a class E felony, exposing the offender to a possible maximum of 12 and a half years prison which is ten years of initial confinement and two and half years of extended supervision. (R44) (67)

Prior to the plea, defense counsel filed several motions including "Petition for Reverse Waiver" which was supported by an evidentiary hearing on November 2, 2009. (R8,57) (App.2) The trial court orally denied the hearing on that date and entered a written order on December 17, 2009. (R25) (App.2,3) The defendant appealed the court's decision and the court of appeals denied relief at that time, ruling the issue should be pursued following judgment of conviction. (R28) (App.4)

The trial court imposed a term of twenty years of initial confinement followed by ten years of extended supervision on count one and on count two, imposed a term of seven years of initial confinement followed by two years of extended supervision, consecutive. (R44) (R67) (App.1) Cortez was granted 816 days custodial credit. He was not eligible for challenge incarceration or earned release. He was required to provide and pay for a DNA sample and surcharge. The court ordered he have no contact with the victim and no use or possession of alcohol or controlled substances. It

further ordered as condition of supervision that he participate in AODA assessment and treatment recommendations. (R44)

The offense was committed on April 11, 2009 and he was convicted on June 3, 2011. At the time of the offense and at the time of reverse waiver hearing, he was 16 and he turned 19 last December. (R2) (R44)

The state recommended a lengthy prison sentence without specifying a length or whether it be imposed concurrently or consecutively. (R67/6) The presentence investigative report (PSI) recommended for count one a fifteen year term of initial confinement followed by five years of supervision and ten years of initial confinement followed by four years of supervision on count two, consecutive for initial confinement but concurrent as to supervision. (R39/6) A defense sentencing letter was prepared on behalf of Mr. Toliver but contained no recommendation. (R40)

Defense counsel acknowledged prison was appropriate but explained a different structure would permit Toliver to be confined and yet be rehabilitated while supervised in the community. (R67/20,21) He asked for up to ten years initial confinement on count one followed by maximum term of extended supervision, and on count two, a sentence up two ten years divided as five years initial confinement followed by five years extended supervision and impose them concurrently since this arose from one incident. (R67/20)

Mr. Toliver contends that the court committed flaws in exercising its sentencing discretion and sought a sentence reduction. Cortez Toliver filed a motion for postconviction relief and the court held a hearing and denied the motion which was reduced to a written order. (R46,47,68) (App. 6)

He now appeals the court's denial of reverse waiver and sentence modification.

STATEMENT OF FACTS

Cortez and the victim, Dontai Gorman, were playing dice and he lost money to Gorman; they arranged to meet again so Cortez could win his money back. When they met again on April 11, 2009, the day of the incident, Gorman was aware that Cortez had a firearm. The two became involved in a heated argument. Cortez wanted to have his money returned so he could return to Milwaukee where he lived and attended school. Instead of accepting the loss, he pulled a gun and shot him a single time in his lower back as Dontai Gorman turned to leave. Cortez ran out and left Dontai. Dontai Gorman was permanently paralyzed from the waist down as a result of the gunshot. It was devastating to him and his family. (R2) (R39)

Cortez Toliver was genuinely remorseful for his actions and hoped that Mr. Gorman would make some kind of recovery. (R67/18) Dontai Gorman attended the sentencing hearing. He spoke in court and explained the many losses and changes to his daily life and his children resulting from his paralysis. (R67/22-24)

The following facts are relevant to the particular issues. The state at the postconviction relief hearing denied that Cortez had a firearm to Gorman's knowledge. (R52/50 The transcripts of the preliminary hearing which reflect the victim's testimony, the state's own witness, contradict the assistant district attorney.

Dontai Gorman testified at the preliminary hearing that Cortez pulled out a gun and stated "I didn't believe that he would shoot me at all, so you know, I turned around and ran with all of the speed I had, and he shot me right in the back…" (R52/4) Gorman was aware that Toliver had a gun. (R52/6) Gorman testified that there was a disagreement over the dice game. (R52/6) He explained "He was angry, like very high tempered, and started to throw the dice and told me that I was going to have to give him all of his money back or

else he would hit me. That was his way of saying shoot me, you know, otherwise he would shoot me. So kind of panicked and made the wrong decisions." (R57/6) The state clarified "When you were having this argument about you giving Mr. Toliver his money back, was the gun present?" Answer "Yes, he had the gun to my head." (R52/6)

Gorman conceded that Cortez ran and did not go through his pocket or person to recover any money or property. (R52/8)

I. THE COURT ERRED IN NOT GRANTING THE REVERSE WAIVER: CORTEZ TOLIVER PROVED REVERSE WAIVER WAS APPROPRIATE.

A. Standard of Review.

A reverse waiver is governed by section 970.032(2), Wis. Stats., providing that the court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence that he would not receive adequate treatment in the criminal justice system, that transferring jurisdiction to the juvenile court would not depreciate the seriousness of the offense and that retaining jurisdiction in adult court is not necessary to deter the juvenile or others from committing similar crimes in the future. The trial court's decision whether to grant reverse waiver is discretionary and therefore reviewed under the exercise of discretion standard. "A decision to retain or transfer jurisdiction in a reverse waiver situation is a discretionary decision for the trial court." State v. Dominic E.W., 218 Wis.2d 52, 56, 579 N.W.2d 282 (Ct. App. 1998), and State v. Verhagen, 198 Wis.2d 177, 191, 542 N.W.2d 189 (Ct. App. 1985). An appellate court will not reverse the trial court's discretionary determination if the record shows the court exercised discretion and reasonable grounds exist for its determination.

B. Reverse Waiver Should Have Been Granted Because the Court Ignored Facts and Its Findings Are Not Based on Accurate Reference to Facts of Record.

The complaint was filed originally in the adult criminal system. Cortez Toliver filed a petition for reverse waiver into adult court pursuant to Wis. Stat. sec. 970.032(2). At the time of the offense, Toliver was 16 years old and juvenile under the law, confronting substantial criminal penalties. (R8) The court conducted an evidentiary hearing. (R57) The court denied the petition by oral ruling and entered a written order. (App.2,3)

The defendant bears the burden of proving reverse waiver is appropriate by satisfying three prongs: that if convicted the defendant could not receive adequate treatment in the criminal justice system, that transferring to the court assigned to jurisdiction under chapter 48 and 938 would not depreciate the seriousness of the offense and third, that retaining jurisdiction is not necessary to deter the juvenile or others from committing the violation. State v. Verhagen, 198 Wis.2d 177, 191, 542 N.W.2d 189 (Ct. App. 1985)

At the hearing Shelly Hagan, director of the Office of Juvenile Offender Review in the State Division of Juvenile Corrections testified. (R57/29) Her role in part is to oversee treatment plans when a juvenile is placed in a secure juvenile correctional institution. (R57/29) She testified that the recidivism rate of offenders is 14-18 so that 86 percent of offenders who are released are not reconvicted or readjudicated. (R57/32) Individual treatment plans are created based on assessments in education, mental health, gang involvement and victimization. (R57/33) Ms. Hagan explained the intensity of staffing is a major difference between juvenile and adult facilities. (R57/38) The ratio is about 1 to 60 for psychologists, and 1 to 30 for social workers, both of which emphasize treatment. (R 57/38) Classroom sizes are about ten. (R57/40) They are able to address and treat homicide related adjudications. (R57/38) The serious juvenile offender program

would allow a longer time in the division for more intensive programming to focus on what prompted their conduct. (R57/3)

Kyle Davidson, superintendent at Ethan Allen School for Juveniles testified that Ethan Allen has a staff member for every offender, the current capacity is 220 for a high of 500. (R57/46,47) He described the various programs designed to specifically address a juvenile offender's needs, such as drug and alcohol treatment, victim impact programming, counseling, psychiatric services and constant monitoring. (R57/48) Clinical staff is a 1 to 20 ratio and social services staff is 1 to 25 or 30. (R57/49,50) Ethan Allan has a nationally recognized Juvenile Cognitive Intervention program that is geared toward the minds of a young offender rather than an adult offender. (R57/52) The goal of Ethan Allen is to protect the public and return offenders to society when they are ready in order to protect the public. (R57/53)

The final witness was Julianne Wurl-Koth, the Director of the Office of Correctional Services for the Division of Adult Supervision charged with providing consistency and oversight to adult educational and treatment programs. (R57/63) She explained the special educational services that would be available to adult offenders, that Green Bay Correctional is over capacity by 338 inmates and Racine Youthful Offender facility would not be available to a maximum risk offender. (R57/64) The ratio of staff to offenders at Green Bay is about 3 offenders to 1. (R57/65) Columbia Correctional was also over capacity, with about 300 offenders in excess of capacity and has a ratio of 2.45 staff to offenders. (R57/65) Completion of secondary education was the initial step of their program. (R57/66) She explained that an offender such as Cortez Toliver with an attempted homicide conviction would be subject to an assessment and evaluation at Dodge and his needs determined by several things, including his current risk level. (R57/66) Educational needs are the first and primary objective; classes are full time and can include vocational training. (R57/66,67) Green Bay has anger management, violence and cognitive

invention (sic) program for treatment options. (R57/67) She conceded that a report showed for the years 2008 no one completed the anger management program because it was not available due to staffing vacancies, the economic downshift cutting funding and that current conditions have not improved sufficiently to fully fill staffing vacancies to provide those programs. (R57/69)

Staff at adult institutions was not differentiated. Her testimony did not describe if the staff referred to in the staff ratio were treatment providers such as psychiatrists, psychologists or social workers.

Counsel submitted that Toliver did not preplan or intend to kill in showing the seriousness of the offense did not warrant adult jurisdiction. (R58/4) Toliver shot the victim in the back when he became angry over a dispute. The victim survived. His injuries were devastating but Cortez did not under those circumstances at the age of 16 deserve Green Bay or Columbia Correctional, which would not have appropriate treatment and programming. The institutions have disproportionate staff to offender ratios, are overcrowded while juvenile facilities are not overcrowded and are intended to provide treatment to offenders who have committed serious crimes with a ratio of 1 to 20 and 1 to 60 doctors to offenders. (R58/5)

Counsel pointed out that no one completed cognitive intervention programs in the adult system. Additionally, high school education was not treatment. (R58/5) At the time, Ethan Allen was under capacity as was Lincoln Hills. Both have serious juvenile offender programs. (R57/6,7) Family and after support was also provided. (R58/7) The juvenile treatment was initiated immediately upon a juvenile's entrance. (R57/33) The treatment incorporates the victim's perspective and desire for treatment. (R57/35) Progress is monitored. (R57/35) A report for Columbia Correctional for the same time frame indicated that no one had participated or completed that program because of staffing vacancies due to budget cuts. (R57/70) Designated

population for all adult Wisconsin prisons is over capacity by approximately 5,000 inmates. (R57/72) She did not have updated recidivism rates for adult offenders. (R57/75,76) A person convicted of a serious offense would not be eligible for Racine Youthful Offenders Institution for the first ten years at which time they would not be young enough to qualify for transfer there. (R57/82)

The court found that Green Bay and Columbia Correctional had better educational programming for juvenile offenders. (R58/12) It found both had numerous treatment options such as anger management, domestic violence and were staffed with psychologists, psychiatrists, teachers and social workers. (R58/12) It found despite funding cuts, Toliver could receive adequate treatment in the criminal justice system. (R58/13)

The court considered the second prong, to not depreciate the seriousness of the offense by transferring jurisdiction to the juvenile court, and found the offense to be extremely serious and that counsel's argument was only downplaying it. (R58/13)

For the third prong, the court found that under any circumstances sending Mr. Toliver to juvenile court where he could be released in three years despite being at high risk to reoffend would shock the conscience of this community and send the wrong message. (R58/14) The court found that Toliver by counsel had not met his burden of proving by the preponderance of the evidence that reverse waiver is appropriate. (R58/14)

The court's ruling amounts to an erroneous use of discretion because it ignores facts that support waiver and its findings contradict the facts of record. Discretion should reach all these factors.

The court stated:

> "Miss Hagan and Mr. Davidson were both employed with the Department of Corrections in the juvenile offender programming, and they testified pretty much as to what was available in the juvenile court system.
>
> Certainly, there are numerous programs available, but then our third witness, Ms. Julienne Wurl-Koth testified that in the adult system, that in fact they have made special arrangements in two facilities, both Green Bay and Columbia Correctional, where juveniles such as Mr. Toliver would probably be located, and that they have better educational resources, including special educational resources, including special educational programming that's available for all the young offenders. In fact, she testified that those facilities are able to follow multi faceted education programs, and that their teachers are specially trained in this regard.
>
> In addition, they have numerous treatment options, anger management, CGIP, domestic violence, things of that nature. They have psychologists, psychiatrists on staff, teachers, social workers, available. The question is not—the question is adequate treatment, and I'm satisfied from her testimony that while there may have been some funding cuts and perhaps not all of the programs are currently staffed, clearly based on the testimony, if convicted, Mr. Toliver could receive adequate treatment in the criminal justice system." (R58/12,13)

The court ruled that Cortez Toliver would be able to obtain adequate treatment in the adult criminal justice system. However, it identified domestic abuse as a treatment program as one which was offered although Toliver did not have such a background or need. (R39/4) The court did not indicate which targeted treatment was appropriate for Cortez and distinguish

which facilities could make that available. It did not explain why criminal adult offender treatment and facilities were preferred over juvenile facilities which were designed to help juvenile offenders even with serious offenses. The court ignored the testimony from Ms. Wurl-Koth, the Director of the Office of Correctional Services for the Division of Adult Supervision, that no treatment was available for the year 2008 and under current budget cuts, the treatment is not fully staffed and available and the program was not available. (R57/70) (R58/12)

The court, without explanation, determined that special educational programming was essential, which preempted special treatment, cognitive intervention and other treatment. The court determined treatment could be adequately provided in the criminal system despite the budget cuts. (R58/13) Its reference to treatment was generic because it did not specify which treatment was needed or appropriate for Toliver's rehabilitative needs. The court did not acknowledge or address if the economic conditions at that time could provide the eliminated treatment and to what extent. It had no information to suggest the treatment not available in 2008 could be provided to Cortez Toliver, when or if at all.

The court did not address capacity issues and whether that would contribute or impede rehabilitative efforts and the institution's ability to effectively provide treatment. (R58/13) The court ignored that treatment was designed for the juvenile mind, as explained by Kyle Davidson of Ethan Allen. The court did not review or ask what past experiences Toliver had or what his prognosis was.

The court was remiss in addressing his youthful age. That Cortez was 16 at the time of charging, the youngest of any age represented of any inmate encountering older adults, and that he did not intend to shoot the victim suggests juvenile level treatment should be emphasized in his rehabilitation disposition.

On review, the court of appeals can search the record to find reasons to sustain the trial court's decision. "When reviewing a trial court's exercise of discretion, we will look for reasons to sustain the decision." State v. Verhagen, *supra*, citing J.A.L. v. State, 162 Wis. 2d 940, 960-61, 471 N.W.2d 493, 501 (1991).

Likewise, the record reveals reasons that the reverse waiver was improvidently denied. The PSI, prepared for sentencing on June 30, 2011, contains factors highly relevant to Toliver's need for juvenile programming as contrasted to criminal institution. These substantiate counsel's contentions.

Cortez had no history of violence of this nature, drug or alcohol use or aggression. Cortez Toliver had several periods of supervision for juvenile adjudications. There were no pending charges at the time of this incident. The delinquencies encompassed criminal trespass to dwelling, criminal damage to property, carrying a concealed weapon. He had ADHD and confronted many issues in school. He has neared completion of his HSED and worked on it pending the case. (R39/3)

He hoped to pursue further education. He had no drug and alcohol problem or history. (R39/5) He completed and did well in the treatment programs such as About Face and Life Skills. (R39/5) The PSI author stated he became very involved and did well. (R39/5) The trial court identified education as the primary reason to place him in the criminal justice system; his educational needs were met and not needed or critical.

The court did not consider his age, his age in relation to the age of adult offenders, the excessive capacity of both adult facilities, the lack of treatment available in the adult facilities, Cortez's need for treatment and of what nature, the need for completing education, the need for cognitive intervention, and the benefits of the individualized attention

provided at the juvenile facility. The court emphasized that he would need punishment and it must deter other offenders.

The court's discretion cannot be sustained. It employed a narrow and generic definition of treatment, it omitted an explanation of how adult level institutional treatment was adequate for Cortez Toliver and it failed to specify what treatment he needed that could be adequately provided. This does not support that treatment could be adequately provided.

II.
SENTENCE MODIFICATION IS WARRANTED DUE TO THE COURT' S ERRORS.

A. Standard of Review.

The Court of Appeals reviews both the trial court's sentence and decision and order denying postconviction relief for an erroneous exercise of discretion. If the Court of Appeals is satisfied that the trial court record contains evidence of a reasoned and articulated exercise of discretion, the court will not disturb the decision on appeal. If the Court of Appeals would disagree with the ultimate decision of the trial court but the record contains evidence of the court's discretion, the court of appeals may not overturn or modify the decision but must affirm such. State v. Iglesias, 517 N.W.2d 175, 185 Wis.2d 117 (Ct. App. 1994), cert. den. 115 S. Ct. 641. Hence the standard of review for sentencing and postconviction relief orders is whether the court exercised erroneous discretion.

Appellate courts are required to more closely scrutinize the record to ensure that "discretion was in fact exercised and the basis of that exercise of discretion is set forth." State v. Gallion, 2004 WI 42, 270 Wis.2d 1, 678 N.W.2d 197, ¶ 4, 6.

B. The Court's Use of Discretion Cannot Be Sustained Because It Failed To Meaningfully Consider Facts of Record.

Cortez Toliver presented mitigating factors in support of his requested sentence. In some instances the court committed flaws in its exercise of sentencing discretion. There were many mitigating factors with which the court should have been concerned but were not.

Cortez was 18 years old at sentencing and is now 19. He was 16, a juvenile within meaning of the law when he committed the offense and although he was charged in adult court, he possessed the attributes, experience and maturity of a juvenile. (R67/14) Trial counsel pointed out that a juvenile mind acts on impulses more than rationale and or consequential thinking. (R67/14) Due to the developing and maturing brain, special consideration and programming was warranted and the juvenile code was created to reflect that rationale. Counsel acknowledged probation would diminish the seriousness of the offense but maximums as suggested by the presentence investigative author were not warranted. (R67/20)

Counsel argued that under Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005), a juvenile aged offender is still entitled to the protections of the Eighth Amendment guarantee against excessive sanctions. The court should consider punishment of a juvenile. While the Supreme Court was addressing the death penalty imposed upon a juvenile, the underlying studies were acknowledged and recognized by the court. (R67/15,16) Counsel asked the court to consider Cortez Toliver was a juvenile. (R67/16)

Mr. Toliver had no adult record and had no correctional experience or incarceration experience of this level. (R39/3) He had no pending charges at the time of the incident. (R39/3) Counsel contended that his punishment should not correlate to that given to an adult. Over the two years he sat in prison

pending resolution of this case, he made progress in thinking and understanding about the situation. (R67/19)

Counsel explained his observations concerning the incident. Only one bullet was found in a staircase but no casings. (R67/17) There were no multiple bullets to support multiple shootings. (R67/17) Cortez did not take money or physically touch Mr. Gorman. (R67/17) Trial counsel explained he left the scene, which he believed supported recklessness rather than intentional action. Counsel emphasized at sentencing that Toliver was not running after Gorman and shooting him in the back as he chased him. Counsel also emphasized his youth and criminal punishment was intended for an adult offender. (R67/17) Gorman thought Toliver was bluffing. (R52/4)

Cortez's family members and his den mother came to court to show their support for him. (R67/21) Cortez addressed the court and stated that he felt bad for what happened and he was remorseful and took responsibility for what happened. (R67/22)

A presentence investigative report prepared for sentencing purposes that detailed many facets of Cortez's life and upbringing. (R39) A defense sentencing memo letter also provided more background. (R40) Cortez's parents were in a brief, unmarried relationship when he was conceived and born. (R39/3) He was denied a traditional parenting structure and upbringing. At the time the PSI author sought background interviews, his father was incarcerated on a sexual assault charge and his mother was unreachable for an interview. (R39/4) He had no relationship with his father and was not raised by him, he indicated. He related that he had a good relationship with his mother and loved her. She was employed as a nursing assistant (CNA). (R39/4) (40/3) He had three half siblings and was briefly raised by his grandmother. (R39/4) He had never been in a romantic relationship and has not fathered children. (R40/3)(R39/4) The PSI author surmised he was

guarded and could not distinguish between lies and the truth when relating his upbringing. (R39/5)

Despite trouble in school and having ADHD, he had nearly completed his HSED during the pendency of the case. (R39/5) He hoped to pursue further education. He had no drug and alcohol problem or history. (R39/5) He completed and did well in the treatment programs such as About Face and Life Skills. (R39/5) The author stated although once reluctant, he became very involved and did well in the program. (R39/5)

Cortez's mother was interviewed for the sentencing memorandum letter and explained that Cortez Toliver liked and was active in all kinds of sports and had received a trophy. He had received some treatment while in juvenile facilities. (R40/5) The author determined he was remorseful. (R40/4)

He had no employment record or experience due to his young age. He had enrolled and transferred to many different schools during his tenure because of his mother's constant moving. He was diagnosed with ADHD and was placed in special education classes. He was subject to disciplinary measures for poor conduct and behavior issues displayed at school. (R39/5) Yet his grades spanned As to Fs.

Cortez Toliver was a juvenile with ADHD; the impulsivities prevalent in one with ADHD combined with the general impulsivities of a maturing youth had a greater role in Cortez's actions than acknowledged or given credit by the court. Rehabilitation of a juvenile offender is intended to be the primary goal of the juvenile system. At his young age, Cortez was being placed with much older adult offenders with drug and serious criminal histories. He would be vulnerable to them and the opportunity to arrive at a rehabilitated changed person would be compromised in that environment. (R39)

Cortez Toliver was genuinely remorseful for his actions and hoped that Mr. Gorman would make some kind of recovery. (R67/18)

Court Findings. The court first acknowledged the seriousness of the crime prior to reasoning its sentence. (R67/ 24-26) The court stated that the offense was sad due to the nature of the offense and the permanent and life altering impact on the victim. (R67/26) The court noted that one bullet was sufficient to harm the victim and that Toliver "booked" away. (R67/27)

The court noted that his juvenile record was significant. (R67/26,27,28) The court reviewed at length the facts of the case and his background distilled from the reports. (R67/24-30)

The court stated that he had an opportunity to take his money back from Gorman but did not and in fact decided to shoot him. The court explained that made the matter more aggravating. (R67/27)

The court criticized him for discrepancies in his report to PSI and defense regarding who reared him and for what period of time. (R67/30) Cortez appeared to display a smooth veneer about his life, presenting favorable factors. (R39) (R67/34,35)

The court discredited defense counsel's theory that a juvenile offender's brain is maturing and developing and that rehabilitation at one age differs from another. (R67/36) The trial court had no sentence reduction measures incorporated into the sentence because Mr. Toliver was not statutorily eligible to participate. As a result, the maximum and near maximum consecutive sentences were unduly harsh and excessive and represented his actual confinement.

The court was very critical of Mr. Toliver for only

taking three tests during the two years he sat in custody pending resolution of this case. (R67/33) The court was critical of his upbringing. (R67/ 32) The court did not appear to consider how academic challenges or ADHD negatively influenced his progress and opportunities for accomplishments. (R67/34) The court did not acknowledge he was nearly finished with his HSED and he was 18.

The court stated "Really there are no mitigating factors here. I don't consider your age a mitigating factor." (R67/36)

The court explained to Toliver the three primary factors it is obligated to consider. (R67/35) The court considered rehabilitative needs and deterrence of others. She was not sure what needs he had or did not have. (R67/36) The court considered the need to protect the public. (R67/36)

The court accepted the facts in the amended information as the factual basis of the plea. There was no mention in the preliminary hearing or the information that Gorman had placed any money on a table or that money was offered to or taken by Toliver. However, at the sentencing, the court specifically chastised Mr. Toliver for not taking the money on the table and chasing. The court stated:

> "You had an opportunity, Mr. Toliver, and this is what makes the case so egregious, the victim ran away, he ran. He left all of the money on the table and he ran. You could have stopped it right there. You could have stopped it right there. Yeah, you still could have been in trouble, you sill would have been in trouble, but you had to get up; you had to chase after him and you had to fire the gun." (R67/37)

The court imposed the maximum term of incarceration on count one and near maximum term on count two, consecutively. (R67/38,39)

Legal Principles.

In several respects, the trial court violated many sentencing principles and committed sentencing errors; a correction of these entitles Mr. Toliver to a reduced sentence.

The court did not meaningfully take into account the factors presented at sentencing that had great bearing on Mr. Toliver's rehabilitative needs and character.

A trial court must consider three primary factors in imposing sentence: character of the offender, need for protection of the public and gravity of the offense and it may consider other factors including history of undesirable behavior pattern, degree of culpability, demeanor at trial, results of a presentence investigation, the defendant's social traits, character, defendant's age, education and employment, remorse, repentance, length of pretrial detention. State v. Harris, 75 Wis.2d 513, 250 N.W.2d 7 (1977).

The circuit court can base its sentence on one or more of the three primary factors after all relevant factors have been considered. Anderson v. State, 76 Wis. 2d 361, 251 N.W.2d 768 (1977). A sentence should be the minimum required to advance the protection of the public factor, reflect consideration of the character of the defendant and gravity of offense. State v. Borrell, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992). In this case Mr. Toliver's requested sentence would have sufficiently advanced the sentencing objectives and would not have unduly depreciated the seriousness of the offense. The court did not acknowledge or apply this principle.

When the court sentenced Mr. Toliver, it acknowledged the three primary factors it was obligated to consider but its actual consideration did not meaningfully extend to all factors. It emphasized seriousness of the offense and impact on society but to the exclusion of other worthwhile and legitimate sentencing factors. As the Supreme

Court recently explained, recitation of these factors does not extinguish a trial court's duty to exercise appropriate sentencing discretion. In State v. Gallion, 2004 WI 42, 270 Wis.2d 1, 678 N.W.2d 197, ¶28, the court explained: "With the advent of truth in sentencing, we recognize a greater need to articulate on the record the reasons for the particular sentence imposed." Mere magic words such as the primary factors are insufficient. Id, ¶37. The Supreme Court provided an exacting method for trial courts to follow when imposing sentence that provides the most detailed accounting of their rationale. Courts must identify the general objectives of greatest importance. "Courts are to describe the facts relevant to these objectives. Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives. Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision." Gallion, at ¶ 42,43.

"In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." Gallion, at ¶46.

The Supreme Court in Gallion stated it meant to reinvigorate the trial court's obligations based on well-established sentencing principles. The trial court must articulate its basis for a particular sentence on the record. State v. Echols, 175 Wis.2d 653, 499 N.W.2d 631 (1993).

An erroneous exercise of discretion occurs if the sentencing court fails to state on the record the factors influencing its decision or emphasizes a factor to the exclusion of other worthwhile factors. State v. Larsen, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987). The court did not adequately address his upbringing, his

intelligence, functioning, and remorse to mitigate the severity of the offense and sentence. It evaluated his character chiefly in terms of the general nature of the offense and past juvenile record.

The sentencing decision provided little meaningful sentencing rationale within the meaning and intent of the Supreme Court in State v. Gallion, 2004 WI 42, 270 Wis.2d 1, 678 N.W.2d 197. It did not explain how the sentencing objectives were met with that particular disposition and it did not explain how the particular length of prison chosen was needed to meet the objectives or why such a lengthy term was warranted. Because the seriousness of the offense and public protection are general factors not specifically targeted to the individual defendant, they are rationales that could apply to any defendant who is convicted of an offense of this nature.

Because the court failed to take these factors into consideration, remedy is warranted.

C. Character of the Offender.

The court did not meaningfully evaluate or consider character of the offender, which yielded positive consideration for Mr. Toliver but preferred generalized notions of the offense over individualized assessment. The court repeated the factors of record without explaining to what extent they figured into the sentence. The court could have imposed shorter confinement if applying these principles and considering the above stated factors. It did not significantly incorporate factors relating to his remorse, background, and education, which are traditionally used as character factors. While the nature of the offense is a legitimate sentencing factor, it cannot preempt consideration of other factors.

The court bluntly denied the existence of any mitigating factors. It ignored the several promising facts

contained in the PSI. The court stated: "Really there are no mitigating factors here. I don't consider your age a mitigating factor." (67/36)

At the postconviction hearing, the state cast doubt on Toliver's credibility in being cooperative and remorseful. However, its only basis for that characterization is that he "refused to give his version to the PSI writer. On remorse, the state replied that "he refused to give his version to the cops." R52/6) However, the state omitted that Toliver exercised his right to have an attorney as he is entitled to and as a16 year old reasonably should. (R2)

The PSI detailed his efforts and achievements since the offense. During the pendency of the case, he had been attending Adult Basic Education Program and was nearing completion of his HSED in spite of having no treatment or support for his ADHD and many past academic challenges. (R39/5) This demonstrated his resourcefulness, intelligence and motivation. He also had no drug or alcohol dependence or use and never took an opportunity to use drugs which made his rehabilitation simpler. (R39/5) He participated in the Rogers Day program at Rawhide and became very involved and did well despite initial reluctance. (R39/5) He also successfully completed Life Skills Program at PSG. (R39/5)

The court exercised erroneous discretion in not recognizing the mitigating nature of these factors.

A trial court must consider three primary factors in imposing sentence: character of the offender, need for protection of the public and gravity of the offense and in its discretion, it may consider other factors including results of a presentence investigation, social traits, character, age, education and employment, remorse, repentance. State v. Jackson, 187 Wis.2d 431, 523 N.W.2d 126 (Ct. App. 1994).

While no case provides a specific, definitive definition

of "character", this case obviously indicates that the meaning of "character of the offender" encompasses more than the offense and criminal or juvenile history and takes into account social traits, accomplishments and personality. To apply a substantive and meaningful definition of character is to extend the spirit and mission of State v. Gallion, 2004 WI 42, 270 Wis.2d 1, 678 N.W.2d 197. A succinct appraisal of one's character frustrates the duty to render an indivualized sentence. A sentence should be individualized. State v. Holloway, 202 Wis.2d 695, 551 N.W.2d 841 (Ct. App. 1996). However, the court's limited and narrow use of character of offender is foreclosed to mitigating factors, a rationale that the Supreme Court rejected in Gallion. Character extends beyond one's criminal history.

The imposition of a criminal sentence must in the very least be based on the gravity of offense, the character of the offender and the need for the protection of the public. Anderson v. State, 76 Wis.2d 361, 251 N.W.2d 768 (1977). But discretion does not cease upon acknowledgement of these principles. The court did not explain its reasons for not considering certain mitigating factors or failing to extend its consideration to other factors in the record. Consideration of those factors and imposition of such a sentence would not have diminished the value of protecting the community from such behavior or the seriousness of the offense and would have been equally effective. The court of appeals has concluded that a trial court's omission is discretion without the underpinnings of an explained judicial reasoning process. McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971).

In this regard the sentence decision was flawed. "A good sentence is one which can be reasonably explained." McCleary v. State, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971). A defendant has a constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court. State v. Hall, 2002 WI App 108, 255 Wis.2d 662, 648 N.W.2d 41. The trial

court must articulate its basis for a particular sentence on the record. State v. Echols, 175 Wis.2d 653, 499 N.W.2d 631 (1993). The court's sentence lacked a sufficient basis, resulting in an excessive sentence under the circumstances. In State v. Ziegler, 2006 WI App 49, 289 Wis.2d 594, 712 N.W.2d 76, the court recognized the limitations upon a reviewing court as impressed upon it by the Supreme Court in State v. Gallion, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197. It stated "We are not permitted to engage in "implied reasoning" by the sentencing court when we review a sentence. See id., ¶50. Rather, we must have an "on-the-record explanation for the particular sentence imposed." Ziegler, ¶25.

Based on the court's omission in this regard, a modification is necessary.

D. Maximum Sentences Require a More Specific Explanation.

The trial court stated the following when imposing the maximum sentence for count one and a near maximum sentence for count two:

> "Mr. Toliver, having considered all of the factor that I am required to consider in sentencing you today, I agree with the State that very lengthy prison sentences are mandatory in this case.
> On Count 1, first degree reckless injury with use of a dangerous weapon, I am sentencing you to the maximum term of incarceration, 20 years of initial confinement and 10 years of extended supervision for a total of 30 years.
> On count 2, attempted robbery with threat of force with use of a dangerous weapon, I am sentencing you to 9 and a half years, 7 years of initial confinement and 2 and a half years of extended supervision. I am running those sentences

consecutive." (R67/38,39)

A trial court must abide by more exacting requirements when imposing the maximum sentence or near maximum sentence.

When a court imposes a maximum or near maximum sentence, the court must state its reasons why a lengthy, near maximum sentence was appropriate. McCleary v. State, 49 Wis.2d 278 at 282, 182 N.W.2d. 512 at 516. The court's rationale did not conform to this principle. This obligation is in addition to a court's traditional sentencing obligations. Appellate courts recognize that trial courts should impose "'the minimum amount of custody'" consistent with the appropriate sentencing facts, State v. Hall, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 671, 648 N.W.2d 41, 45.

A good sentence is one which can be reasonably explained." McCleary v. State, 49 Wis. 2d 263, at 282.

An explanation of this nature and specificity is required by law. "Finally, if a circuit court imposes a bifurcated sentence for a crime committed after December 31, 1999, it shall explain why its duration and terms of extended supervision should be expected to advance the objectives." Id, ¶44. "As McCleary observed, judges are to explain the reasons for the particular sentence they impose." Gallion, ¶39.

As the Supreme Court recently explained and stated herein above, recitation of primary factors does not extinguish a trial court's duty to exercise appropriate sentencing discretion. In State v. Gallion, 2004 WI 42, 270 Wis.2d.535, 678 N.W.2d 197, the Supreme Court stated: "Courts are to describe the facts relevant to these objectives. In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily

reviewed for a proper exercise of discretion." Gallion, at ¶46. The court did not draw any linkage on the record.

A sentence should be the minimum required to advance the protection of the public factor, reflect consideration of the character of the defendant and gravity of offense. State v. Borrell, 167 Wis.2d 749, 764, 482 N.W.2d 883 (1992). The court did not acknowledge or apply this principle.

E. The Court Did Not Explain The Reason for the Consecutive Sentences or Their Length.

The court imposed sentence without providing explanation as to the length of the bifurcated sentence nor for the consecutive structure. (R67/38,39)

The court gave no notice to Mr. Toliver how it arrived at the ultimate decision and how that sentence length and structure was meant to satisfy its sentencing objectives. The court had stated that protection of the public was warranted but did not explain how the sentence was intended to satisfy that objective. The court did not explain how rehabilitative objectives could be satisfied with that sentence and not a lesser sentence. Sentencing decisions must contain certain explanations encompassing the sentence's length and structure.

The two flaws pose a conflict to well established authority. In State v. Gallion, 2004 WI 42, 678 N.W.2d 197, ¶28, the court explained, "With the advent of truth in sentencing, we recognize a greater need to articulate on the record the reasons for the particular sentence imposed." Mere magic words such as the primary factors are insufficient. Id, ¶37.

"Courts are to describe the facts relevant to these objectives. Courts must explain, in light of the facts of the

case, why the particular component parts of the sentence imposed advance the specified objectives. Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision." Gallion, at ¶ 42,43. "In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." Gallion, at ¶46.

The trial court must articulate its basis for a particular sentence on the record. State v. Echols, 175 Wis.2d 653, 499 N.W.2d 631 (1993).

A court's obligations encompass the length and content of each sentence. "A good sentence is one which can be reasonably explained." McCleary v. State, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971). A defendant has a constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court. State v. Hall, 2002 WI App 108, 255 Wis.2d 662, 648 N.W.2d 41.

The court imposed the two extensive sentences consecutively without furnishing any explanation for such. The state only requested a global recommendation without referencing any consecutive structure and Toliver asked for a shorter concurrent global structure. There was one gunshot, one victim, one argument. More was required from the court to support its decision to impose a consecutive sentence.

The Berggren court stated "A trial court properly exercises its discretion in imposing consecutive sentences by considering the same factors as it applies in determining sentence length." State v. Berggren, 2009 WI App 82, ¶ 45, 320 Wis.2d 209, 769 N.W.2d 110.

Other court of appeals authority likewise reflects the

principles stated in McCleary, requiring express statements for imposition of consecutive sentences. In State v. Ziegler, the court of appeals also stated consecutive sentences must be explained, expressly identifying McCleary for that principle. It stated that Ziegler "correctly observes a consecutive sentence must be supported by a statement of reasons for the selection of consecutive terms." State v. Ziegler, 2006 WI 49, 289 Wis.2d 594, 712 N.W.2d 76. The Ziegler court recognized the limitations upon a reviewing court as impressed upon it by the Supreme Court in State v. Gallion, 2004 WI 42, 270 Wis.2d 575, 678 N.W.2d 197. It stated: "We are not permitted to engage in implied reasoning by the sentencing court when we review a sentence. See id, ¶50. (citing Gallion). Rather, we must have an "on-the-record explanation for the particular sentence imposed." Ziegler, ¶25.

The requirement that a court explain its rationale extends to the decision to impose a consecutive sentence authorized under Wis. Stat. sec. 973.15(2). A specific explanation is required from the sentencing court when imposing consecutive sentences. A trial court must provide sufficient justification for and apply the same factors concerning the length to its determination of whether sentences should be served concurrently or consecutively. The court offered no explanation for its decision to structure the sentence in this fashion and there is no basis in the record by which an inference could be drawn or implied reasoning, if permitted, could impart an explanation.

A trial court should specify its reasoning in the record for imposing consecutive sentences as authority has established. The core principle was applied in State v. Hall and originates in McCleary. The court of appeals stated in State v. Hall, 2002 WI App 108, 255 Wis.2d 662, 648 N.W.2d 41, in situations where the defendant is convicted of more than one offense, the sentencing court may impose consecutive rather than concurrent sentences. See State v. Borrell, 167 Wis.2d 749, 764-65, 482 N.W.2d 883 (1992). In sentencing a

defendant to consecutive sentences, the trial court must provide sufficient justification for such sentences and apply the same factors concerning the length of the sentence to its determination of whether sentences should be imposed concurrently or consecutively. See State v. Hamm, 146 Wis.2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988). Therefore in situations where the sentencing court has the ability to stack sentences consecutively, ad mortem, "(t)he sentence imposed should represent the minimum amount of custody consistent with those factors." State v. Setagord, 211 Wis.2d 397, 416, 565 N.W.2d 506 (1997); see also Borrell, 167 Wis.2d at 764-65.

In *Hall,* the court of appeals found an erroneous and unsustainable exercise of sentencing discretion when the trial court imposed several consecutive sentences but did not add up the terms to determine the aggregate amount of confinement. State v. Hall, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 671, 648 N.W.2d 41, 45. The court of appeals determined the sentence could not be sustained and reversed and remanded. The trial court had imposed a sentence exceeding the defendant's life expectancy but without considering the practical implications of the sentence of reaching a reasoned conclusion on the record. The trial court in Cortez Toliver's case similarly erred.

The rationale followed in Hall, *supra,* is derived from that in McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971) and echoed in State v. Gallion, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197.

The court's decision was deficient because it gave no explanation or clue for the consecutive structure. The incident involved a single victim with a single gunshot and a single effort to have his money returned. The situation did not support consecutive sentences and the reasoning of the trial court cannot be inferred or sustained.

F. Recommendations of Mr. Toliver.

The recommendations of the parties, while not binding upon the court, are relevant and gauge the excessiveness of a sentence. The trial court did not address Mr. Toliver's recommendation or explain any reason for rejecting all aspects of it.

The Supreme Court in Gallion stated "Because we recognize the difficulty in providing a reasoned explanation in isolation, we encourage circuit court to refer to information provided by others. Courts may use counsel's recommendations for the nature and duration of the sentence and the recommendations of the presentence report as touchstones in their reasoning. Courts may also consider information about the distribution of sentences in cases similar to the case before it." State v. Gallion, 2004 WI 42, 678 N.W.2d 197, 270 Wis.2d 535, ¶47.

The sentence imposed by Judge Flancher cannot be sustained because it lacks explanation as to the length, particularly the maximum length and the consecutive structure.

III.
THE TRIAL COURT FAILED TO EXERCISE APPROPRIATE DISCRETION IN DENYING POSTCONVICTION RELIEF

Mr. Toliver filed a Motion for Postconviction Relief alleging the sentence must be reduced because it had been the result of an erroneous use of discretion and was excessive. (R46)

Mr. Toliver asked the court to consider the other factors of record concerning his background and the offense. These factors pertain to his character, prognosis for rehabilitation and address to what extent the public requires protection from him.

They are highly relevant factors for they address primary sentencing factors.

The trial court conducted a hearing and denied the motion. (R47,68) It determined the length of the sentence would not be modified. The court did not change its assessment and denied relief. (R47) (App. 6) It explained why it believed the length and structure of the sentences were valid exercises of discretion based on the facts of the case. (R68)(App. 6)

Mr. Toliver's motion identified the misuses of discretion entitling him to a reduction in sentence and recaptured his foregoing arguments. (R46)

The court was remiss in denying relief on the basis of excessiveness of the sentence. Mr. Toliver identified several aspects of the court's sentence decision and rationale that was contrary to well established legal principles and which, when properly applied, dictated a different result.

The court had authority and facts to permit a modification. A trial court has an inherent power to modify a sentence. State v. Hegwood, 335 N.W.2d 399, 113 Wis.2d 544 (1983). A trial court may review its sentence for an abuse of discretion if it concludes that the sentence was unduly harsh or unconscionable. State v. Krueger, 351 N.W.2d 738, 119 Wis.2d 327 (Ct. App. 1984). A trial court may not change or overturn a sentence simply upon reflection or reconsideration. It must be convinced that it originally committed some error in exercising discretion during the course of the original sentencing process, ignored relevant considerations and determine whether such were communicated effectively on the record. If the record at the time of sentence explains the court's decision and the decision itself is based on legitimate primary factors, the sentence is the result of an appropriate use of the trial court's discretion.

The seminal case, McCleary v. State, 49 Wis.2d 263, 182

N.W.2d 512 (1971), teaches that omission without the underpinnings of justice is not sustainable discretion. McCleary contends that it is requisite to a *prima facie* valid sentence that trial court detail reasons for selecting the particular sentence. It did not list the factors for a trial court to consider in reaching a sentencing decision but determined that there were no aggravating factors to justify the excessive sentence handed to the defendant.

The court was asked to assess its decision for the reason that it had not accorded the rationale proper and steadfast application of legal principles. Imposition of a criminal sentence must in the very least be based on the gravity of offense, the character of the offender and the need for the protection of the public. Anderson v. State, 76 Wis.2d 361, 251 N.W.2d 768 (1977). An abuse of discretion might be found if the trial court failed to state on the record material factors which influenced its decision, gave too much weight to one factor in face of other contravening considerations or relied on irrelevant or immaterial factors. State v. Krueger, 119 Wis.2d 327, 351 N.W. 2d 73 (Ct. App. 1984). The sentencing court is required to state on the record its reasons for imposing the sentence chosen. State v. Mosley, 547 N.W.2d 806, 210 Wis.2d 36, (Ct. App. 1996) rev. den., 204 Wis.2d 320. The trial court must articulate the basis for the sentence imposed on the facts in the record. State v. Harris, 350 N.W.2d 633, 119 Wis.2d 612 (1984).

Applying this, the court would have had to recognize that McCleary does not dispense with any obligation to consider those factors. Rather, a series of cases following McCleary sought to impress upon the courts the need to extend sentencing consideration to mitigating and aggravating factors and those factors must justify the chosen sentence.

Moreover, a proper exercise of discretion in sentencing requires a process of reasoning based on facts of record or logically inferable from the record, and a conclusion based on a logical rationale founded upon proper legal standards. Ocanas v.

State, 70 Wis.2d 179, 185, 233 N.W.2d 457 (1975). This is the standard the court was to utilize and ensure was used.

The sentence is the result of inadequately applied standards and relief is warranted, contrary to the trial court's decision.

CONCLUSION

Upon the foregoing, counsel for the appellant requests that this court grant the requested relief.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.(8)(b) and (c) for a brief and appendix produced with a proportional serif 13 point font. The length of this brief is 8799 words.

_____
Attorney Eileen Miller Carter
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CERTIFICATION OF COMPLIANCE WITH RULE Wis. Stat. sec. 809.19(12)

I hereby certify that:
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with paper copies of this brief filed with the court and served on all opposing parties.

_____
Eileen Miller Carter, Esq., S.B.W. #1001252

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with s. 809.19(2) (a) and that contains (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____
Eileen Miller Carter, Esq., S.B.W. #1001252

APPENDIX

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