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DISTRICT II

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Case No. 2012AP393-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORTEZ LORENZO TOLIVER,

Defendant-Appellant.

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

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BRIEF OF PLAINTIFF-RESPONDENT

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**STATEMENT ON ORAL ARGUMENT  
AND PUBLICATION**

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

## STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

On the evening of April 11, 2009, sixteen-year old Cortez Toliver and Dontai Gorman were gambling with dice in Racine (1:1-2).<sup>1</sup> Gorman was winning and had taken almost all of Toliver's money when Toliver told Gorman, "I need my money back. I've got to get to Milwaukee" (1:2). When Gorman refused, Toliver pulled out a gun (1:2). Gorman then told Toliver he could have his money, but then started to flee (1:2). Toliver ran after Gorman, shot Gorman in the back and ran away (1:2).

The State charged Toliver with attempted first-degree homicide and being a person under the age of eighteen in possession of a dangerous weapon (1). At the preliminary hearing, the court found probable cause to bind over Toliver (52).<sup>2</sup>

In November 2009, the circuit court heard argument on Toliver's "reverse waiver" petition (57:28-84; 58:3-11). Toliver argued he should be

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<sup>1</sup> The facts are taken from the criminal complaint, which Toliver agreed form the factual basis for his pleas (66:10).

<sup>2</sup> After the court heard the evidence at the preliminary hearing, the circuit court stated, "I would note, there is probable cause to believe a felony has been committed" (52:11). The court did not state on the record that it found probable cause to believe Toliver had committed the crime of attempted first-degree intentional homicide. *See State v. Kleser*, 2010 WI 88, ¶¶ 55-57, 328 Wis. 2d 42, 786 N.W.2d 144 (contrasting the probable cause requirement under Wis. Stat. § 970.03(1) and the probable cause requirement under Wis. Stat. § 970.032(1); the latter applies when the defendant is a juvenile.). Nevertheless, using the record before it, the circuit court later expressly determined the court had previously found probable cause to believe Toliver had committed attempted first-degree intentional homicide (57:9-10).

remanded from adult court to juvenile court (57:28-84; 58:3-11). The circuit court found Toliver had not met his burden to transfer jurisdiction so the court denied the petition (58:11-14).

Toliver sought a petition for leave to appeal the denial of his petition in this court (28). This court denied the petition (28).

In June 2011, Toliver pleaded guilty to first-degree reckless injury and attempted robbery with the threat of force; both counts were enhanced by Toliver's use of a dangerous weapon (3; 44; 66:4-10). On July 7, 2011, the circuit court sentenced Toliver to a total term of twenty-seven years of initial confinement to be followed by twelve and a half years of extended supervision (44).

Toliver moved for postconviction relief, arguing for sentence modification (46). Following a hearing on Toliver's motion, the circuit court denied relief (47; 68).

Toliver appeals.

## **ARGUMENT**

### **I. TOLIVER'S GUILTY PLEAS HAVE WAIVED HIS REVERSE WAIVER ARGUMENT.**

#### **A. Relevant law.**

“The general and often-stated rule is that the knowing, voluntary and intelligent entry of a guilty plea waives all ‘non-jurisdictional defects’ preceding the entry of a plea, including constitutional violations and objections to personal jurisdiction, but does not waive objections to

subject matter jurisdiction.” *State v. Schroeder*, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999) (quoting *Pillsbury v. State*, 31 Wis. 2d 87, 93-94, 142 N.W.2d 187 (1966)).

“The circuit court lacks criminal subject-matter jurisdiction *only* where the complaint does not charge an offense known to law.” *Schroeder*, 224 Wis. 2d at 714 (quoting *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994) (emphasis in *Schroeder*)).

### **B. Toliver’s guilty pleas waived his reverse waiver argument.**

Toliver pleaded guilty to first-degree reckless injury and attempted robbery with the threat of force after a full plea colloquy (66). At the plea hearing, Toliver indicated he understood the charges against him and that he was giving up his right to a trial and the rights a trial includes (66:4-7). Toliver stated he understood the penalties he faced by entering the pleas (66:7-8). He stated he had had enough time to discuss the plea offer with his attorney and that no one had coerced him into entering the guilty pleas (66:8). In short, Toliver knowingly, intelligently and voluntarily entered his guilty pleas. *See* Wis. Stat. § 971.08; *State v. Lopez*, 2010 WI App 153, ¶ 8, 330 Wis. 2d 487, 792 N.W.2d 199.

Toliver does not contend his pleas were invalid, but instead challenges the circuit court’s discretionary decision to deny his reverse waiver petition.

Toliver is not entitled to review of this claim because he pleaded guilty (44). A guilty plea precludes raising a claim related to any event



occurring before the plea was entered, unless the claim is related to subject matter jurisdiction. *See Schroeder*, 224 Wis. 2d at 711. A claim the circuit court erroneously exercised its discretion is not a claim related to the court's subject matter jurisdiction. *See id.* at 714, 718. Thus, Toliver waived review of his reverse waiver claim.

## **II. REVERSE WAIVER.**

### **A. Introduction.**

Should this court decline to apply the guilty plea waiver rule, the State asserts Toliver is not entitled to relief because his reverse waiver claim is without merit.

Toliver argues the circuit court erroneously exercised its discretion in denying his petition for reverse waiver. Toliver states, "The [circuit] 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." Toliver's Br. at 11.

### **B. Standard of review.**

This court reviews a circuit court's decision to deny a juvenile's petition for reverse waiver for an erroneous exercise of discretion. *See Kleser*, 328 Wis. 2d 42, ¶ 37. "An appellate court will affirm a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.*

### C. Relevant law.

Wisconsin law assigns to adult court original and exclusive jurisdiction over juveniles ten years old or older who are alleged to have committed or attempted to commit a violation of Wis. Stat. § 940.01. Wis. Stat. § 938.183(1)(am). If a judge determines probable cause exists to find a juvenile ten years old or older committed or attempted to commit a violation of Wis. Stat. § 940.01, the adult court “shall retain jurisdiction” unless the juvenile can satisfy the following three criteria:

1. The juvenile will not be able to receive adequate treatment in the criminal justice system;
2. Transferring the juvenile to juvenile court will not depreciate the seriousness of the offense; and
3. Retaining jurisdiction is not necessary to deter the juvenile or others from committing the offense charged.

Wis. Stat. § 970.032(2). In order to effect a “reverse waiver” – to be transferred from adult court to juvenile court – the burden is on the juvenile to demonstrate these three criteria by a preponderance of the evidence. *Id.*

In other words, Wis. Stat. § 970.032(2) “gives a juvenile under adult court jurisdiction an opportunity to prove that *notwithstanding* the court’s finding of probable cause of the offense or offenses charged, the juvenile’s case should be transferred to juvenile court for disposition.” *Kleser*, 328 Wis. 2d 42, ¶ 72 (emphasis in original).

“If the juvenile fails to meet his burden of proof, he shall be retained for prosecution in criminal court.” *Id.* ¶ 7.

**D. The circuit court properly exercised its discretion in denying Toliver’s petition.**

Toliver argues the circuit court erroneously exercised its discretion in denying his petition for reverse waiver. Toliver states, “[The circuit court] 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.” Toliver’s Br. at 13. Toliver complains,

The court did not consider [Toliver’s] 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.

Toliver’s Br. at 14-15. Toliver also states, “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.” Toliver’s Br. at 14.

The problems with Toliver’s argument are three-fold. One, Toliver largely ignores the salient fact the burden is on *him* to establish juvenile jurisdiction is more appropriate than adult jurisdiction. Two, although Toliver emphasizes some factors relevant to a proper analysis, he

neglects others. Three, Toliver improperly focuses on the facts of the crime charged.

The circuit court held a lengthy hearing on Toliver's reverse waiver petition (57; 58). At the hearing, Toliver presented testimony from three witnesses: (1) Shelley Hagan, the director of the state Office of Juvenile Offender Review, which is an office in the state Division of Juvenile Corrections; (2) Kyle Davidson, the superintendent at Ethan Allen School for Boys, an institution in the Division of Juvenile Corrections, housed under the Department of Corrections; and (3) Julianne Wurl-Koth, director of the Office of Correctional Services for the Division of Adult Supervision (57:29, 45, 62).

Hagan testified her office is responsible for overseeing the process that develops and implements a juvenile's treatment plan upon entering the juvenile justice system (57:29-30). Hagan testified, "Our goal is to, you know, apply the tenants of the balanced approach and develop a program that emphasizes accountability, safety and rehabilitation" (57:31). Hagan testified the average term of confinement for juvenile offenders who have been adjudicated delinquent for serious crimes is between eighteen and twenty-four months (57:43). Hagan stated the facilities are limited, by state statute, to housing offenders for no more than three years (57:43). Hagan stated that the juvenile population's recidivism rate – measured by offenders who return to a secure correctional facility within two years of their release from the juvenile institution – is between fourteen to eighteen percent (57:32). Hagan had no separate statistics on recidivism rates for the juveniles who had been classified as serious

offenders (57:44). Hagan also testified the ratio of social workers to children was approximately 1:25 or 1:30 and the ratio of psychologists to children was approximately 1:60 (57:38).

Davidson testified Ethan Allen has a capacity of 325 people with a then-current population of 220 (57:47). Davidson stated the facility was operating at a 1:1 ratio of staff to juvenile (57:47). Davidson testified the facility has sex offender programs, alcohol and drug education treatment, anger management, cognitive intervention programs, a victim impact program, individual and group counseling, and psychiatric services (57:48). Davidson stated the mission of Ethan Allen “is to protect the public. It’s to educate the young offenders that we have there. It’s to try to turn the lives and minds of these young men who have violated the law around” (57:53).

Wurl-Kohl testified a juvenile convicted of attempted first-degree homicide would most likely be sent to either Green Bay Correctional Institution (GBCI) or Columbia Correctional Institution (CCI) (57:63-4). Wurl-Kohl stated the designated capacity of GBCI is 749 people, but the current population there is 1087 (57:64). Wurl-Kohl testified the approximate ratio of staff to offenders is 1:3 (57:65). Wurl-Kohl stated CCI has a designated capacity of 541 people, but has a current population of 824 (57:65). According to Wurl-Kohl, CCI has a staff to offender ratio of about 1:2.45 (57:65). Wurl-Kohl stated the first priority for a juvenile offender without a high school diploma is “to complete a High School Equivalency Diploma” (57:66). Wurl-Kohl stated the juvenile would “be going to school full-time

and then we have opportunities for vocational programming” (57:67). Wurl-Kohl stated GBCI has vocational opportunities, college-type classes, anger management and a Cognitive Invention Program (57:67). Wurl-Kohl testified that no inmate completed the Cognitive Invention Program at either GBCI or CCI in 2008 because budget cuts caused the program’s suspension (57:68-70).

The State presented no witnesses at the hearing, arguing Toliver had not met his burden to show he should be transferred to juvenile court (58:3, 9-11). After hearing argument from both sides, the circuit court agreed with the State (58:3-14).

The circuit court began its oral analysis by setting forth the law on reverse waiver (58:11). The court correctly identified the three prongs Toliver needed to satisfy in order to transfer jurisdiction to juvenile court (58:11). As stated *supra*, the three relevant criteria to effect a reverse waiver are:

1. The juvenile will not be able to receive adequate treatment in the criminal justice system;
2. Transferring the juvenile to juvenile court will not depreciate the seriousness of the offense; and
3. Retaining jurisdiction is not necessary to deter the juvenile or others from committing the offense charged.

Wis. Stat. § 970.032(2).

The circuit court addressed each in turn (58:11-14). As to the first, the court found,

Ms. Julienne Wurl-Kohl 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 programming that's available for all 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 these programs are currently staffed, clearly based on the testimony, if convicted, Mr. Toliver could receive adequate treatment in the criminal justice system.

(58:12-13).

With regard to the second factor, the court stated,

The second issue that the defendant has to – or the second prong, I guess, that the defendant has to prove is that transferring jurisdiction to juvenile court would not depreciate the seriousness of the offense. In this regard, [Toliver] argues that this offense was not as serious as it could be. And that on the scale of homicide cases, it's on the lower end of the seriousness scale. Stunning. Mr. Toliver pulls out a gun, points it at the victim's head. The victim is running for his life when Mr. Toliver points, shoots, and hits this victim in the back. In the spine, paralyzing him from the waist down, ruining his life

forever. It doesn't get much more serious than that. It's extremely serious. And to downplay it is offensive.

(58:13).

With regard to the final factor, the court stated,

I cannot find under any circumstances that sending Mr. Toliver to a juvenile institution where he would be out in just a few years, out even though every staff person may know that Mr. Toliver continues to be a high risk to offend, because the statute says three years max is three years max incarceration. They would have to let him go. That, as Mr. Newlun points out, would shock the conscience of this community and sends absolutely the wrong message. Absolutely the wrong message.

(58:13-14).

In conclusion, the court found Toliver had not satisfied his burden and denied the petition (58:14).

Toliver now argues the court erroneously exercised its discretion in denying his petition but he fails to show how this is so.

Toliver argues the court failed to "explain why criminal adult offender treatment and facilities were preferred over juvenile facilities which were designed to help juvenile offenders even with serious offenses." Toliver's Br. at 13. Toliver's argument is flawed, though, because the court is not obligated to make such an explanation. Instead, the burden was on Toliver to demonstrate he needed to be transferred to juvenile court because he could not get adequate treatment in adult court. Toliver failed to make



such a showing. As the circuit court stated, although some programming may not be currently available in the adult institutions, there was no showing that Toliver could not receive adequate treatment there (58:12-13). There was no showing that Toliver was somehow in need of any type of treatment that he could not receive at an adult facility. On the contrary, Wurl-Kohl testified the adult facilities allow juveniles to attend school full-time and have other educational opportunities available to them, as well (58:67). The circuit court properly exercised its discretion in finding adequate treatment options are available to Toliver in an adult institution.

Toliver argues the circuit court “was remiss in addressing his youthful age. That [Toliver] 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.” Toliver’s Br. at 13. Putting aside the State’s confusion with parts of Toliver’s statements, the State asserts Toliver’s argument is flawed and inappropriate. His continued attempt to mitigate his crime is, as the circuit court stated, “offensive” (58:13). The appropriate time to challenge the charge was at the preliminary hearing. *See Kleser*, 328 Wis. 2d 42, ¶ 65. The appropriate time to argue mitigation or for sympathy was at trial or sentencing. In addition, it is offensive for Toliver to suggest that “he did not intend to shoot the victim” when all facts in evidence suggest the contrary. After losing money gambling, Toliver pulled out a gun (1:1-2). When his victim attempted to flee, Toliver shot him in the back, paralyzing the man (1:1-2). Toliver then fled the

scene (1:1-2). Again, as the circuit court stated, “It doesn’t get much more serious than that” (58:13). Given the seriousness of the facts surrounding the crime, the circuit court properly found entering a reverse waiver order would unduly depreciate the seriousness of the offense.

Additionally, Toliver’s statement that his actions “suggest[] juvenile level treatment” is without merit or support in the record. There is no support for a statement that shooting an unarmed, fleeing man in the back suggests an offender requires “juvenile level treatment.”

Toliver does not appear to challenge the circuit court’s finding that he failed to prove that retaining adult jurisdiction over him was necessary in order to deter others.

Toliver states,

“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.”

Toliver’s Br. at 14-15. Toliver’s litany of complaints ignores the law. The burden was on *Toliver* to show that he could not get the

treatment he needed in adult institutions;<sup>3</sup> that transfer would not depreciate the offense; and that retention was not needed to deter others. *See* Wis. Stat. § 970.032(2). Toliver simply did not meet this burden.

The circuit court properly exercised its discretion in denying Toliver’s petition for reverse waiver.

### **III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN SENTENCING.**

#### **A. Standard of review.**

A circuit court’s sentencing decision is reviewed for an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Reviewing courts adhere to “a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *Id.*, ¶ 18 (quoting *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). “Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge’s position, they would have meted out a different sentence.” *McCleary*, 49 Wis. 2d at 281.

A circuit court commits an erroneous exercise of discretion when its sentencing

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<sup>3</sup> Toliver spends a portion of his brief arguing that information set forth in the PSI demonstrates his need for “juvenile programming.” Toliver’s Br. at 14. Toliver fails to explain how information elicited in a PSI that was drafted more than a year and a half after the reverse waiver hearing could show the circuit court erroneously exercised its discretion at the hearing.

explanation is unreasonable or unjustifiable. *State v. Bizzle*, 222 Wis. 2d 100, 105, 585 N.W.2d 899 (Ct. App. 1998). The reviewing court is “obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *McCleary*, 49 Wis. 2d at 282. Accordingly, as long as the circuit court sets forth its objectives and explains its reasoning on the record, the trial court exercised proper discretion and did not commit error. *Id.* at 281.

### **B. Relevant law.**

In sentencing a defendant, the trial court must enumerate the objectives of its sentence on the record. *Gallion*, 270 Wis. 2d 535, ¶ 39. The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. *State v. Mosley*, 201 Wis. 2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996). In addition to the primary factors, the trial court may consider a number of other factors, including: the defendant’s criminal record; history of undesirable behavior patterns; personality, age, educational background, employment record and social traits; the results of a presentence investigation; the aggravated nature of the crime; the defendant’s degree of culpability; the defendant’s remorse and cooperativeness; the need for close rehabilitative control; and the rights of the public. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). After setting forth the objectives, the court must then identify the facts it considered in arriving at its sentence and explain how those facts advance the objectives of its sentence. *Gallion*, 270 Wis. 2d. 535, ¶¶ 41-42.

The circuit court does not have to passionately or eloquently provide a detailed analysis of how each individual factor affected the calculation of the sentence. *See State v. Fisher*, 2005 WI App 175, ¶¶ 21-24, 285 Wis. 2d 433, 702 N.W.2d 56 (explaining that *Gallion* does not require a comparative analysis of the affect of any given factor on the length of the sentence.). If the court identified the primary factors, and identified the facts relevant to those factors, the sentence process satisfies *Gallion* and its progeny. *Gallion*, 270 Wis. 2d. 535, ¶ 42. *Gallion* warns that there is no specific amount of analysis that will fulfill its requirements; rather the circuit court is required only to provide a rational and explainable basis for the sentence imposed. *Id.* ¶ 39.

**C. The circuit court properly exercised its sentencing discretion.**

Toliver argues the circuit court erroneously exercised its discretion because “[t]here were many mitigating factors with which the court should have been concerned but were [sic] not.” Toliver’s Br. at 16. Toliver argues “[t]he sentencing decision provided little meaningful sentencing rationale within the meaning and intent of the Supreme Court in *State v. Gallion*[.]” Toliver’s Br. at 23. Toliver complains the sentence was not particularized to consider his character. Toliver’s Br. at 23. The State disagrees.

Toliver notes the circuit court correctly set forth the three primary factors it must consider at sentencing: the character of the offender, the seriousness of the crime and the protection of the public (67:35-36). Toliver’s Br. at 21. The circuit court explained its sentence after hearing

argument from both parties, a statement from the victim and after the court had reviewed the presentence reports that had been presented (67:2-28).

The court considered Toliver's character (67:26, 28-36). The court noted Toliver's young age – sixteen at the time of the offense – as well as his significant juvenile record (67:26, 28-30). The court noted Toliver had no adult criminal record because of his young age (67:28). The court found Toliver had been first arrested in June 2005, at age thirteen, and was adjudicated delinquent on a count of criminal trespass and criminal damage to property (67:28). While Toliver was on supervision for that delinquency, he was arrested for throwing a glass bottle at a bus (67:28-29). While on supervision for that delinquency, Toliver was arrested for carrying a concealed weapon (67:29). During his periods of supervision, Toliver completed some programming, but failed to participate in counseling and mentoring (67:29-30).

Also in its consideration of Toliver's character, the court examined Toliver's family and school history (67:30-34). The court noted the reports contained some discrepancies (67:30).<sup>4</sup> The court noted Toliver's father was currently in prison for a sexual assault conviction (67:30). The court observed that Toliver attended five different elementary schools, two middle schools and two high schools (67:32-33). The court found Toliver

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<sup>4</sup> Toliver argues “[t]he court criticized [Toliver] for discrepancies in his report to PSI and defense regarding who reared him and for what period of time.” Toliver's Br. at 19. The State does not read the circuit court's remarks regarding the discrepancies as critical of Toliver.

had been suspended from school and had been truant and tardy (67:33-34). The court noted the presentence investigation (PSI) author felt “that Mr. Toliver has lied so much in his life that he can no longer tell the difference between a lie and the truth” (39:6; 67:35). The author stated, “[Toliver] is a young man who lost his way in such a short time and it will be very difficult for him to recover and be a productive person in society when released from prison” (39:6; 67:35).

The court acknowledged Toliver had been diagnosed with ADHD and prescribed medication for it (67:33). The court noted Toliver told the PSI author that when he was in the eighth grade he no longer felt he needed the medication so he stopped taking it (67:33).

With regard to Toliver’s age, the court stated,

I can appreciate to a certain extent [Toliver’s] quote/unquote brain development theory, but here’s the thing, I don’t care whether you are 16 or whether you are 6, there’s a basic understanding that guns kill, that bullets kill, that bullets, even if they don’t kill, can permanently incapacitate and change a person’s life, and even at that age you had that understanding.

(67:36-37).

The court considered the severity of the offense (67:35). The court found the crimes to which Toliver pleaded guilty to be “very, very serious crimes for which [Toliver] need[s] to be punished. There’s no doubt about that” (67:35). In reviewing the facts of the crimes, the court told Toliver,

You had an opportunity, Mr. Toliver, and this is what makes this case so egregious, the victim ran away, he ran. He left all of the money on the table and he ran.<sup>5</sup> You could have stopped it right there. Yeah, you still would have been in trouble, you still would have been in trouble, but you had to get up; you had to chase after him and you had to fire the gun. And you knew even at age 16 what the consequences could be, and you shot him anyway.

And as a result Mr. Gorman appears today in a wheelchair paralyzed forever from the waist down.

(67:37).

The court considered the need to protect the public (67:36). The court stated, “[Q]uite honestly, Mr. Toliver, it is my duty today to protect the community from you; to protect other people such as Mr. Gorman from your reckless behavior” (67:36). The court noted the PSI author’s conclusion that Toliver posed a high risk to reoffend (67:35).

Having considered Toliver’s character, the severity of his offense, and the need to protect the public, the court turned to its consideration of any mitigating factors. The court stated, “Really, there are no mitigating factors here. I don’t consider [Toliver’s] age a mitigating factor” (67:36).

Toliver’s argument that the court erroneously exercised its discretion is more properly characterized as Toliver’s disagreement

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<sup>5</sup> Toliver states, “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.” Toliver’s Br. at 20. The criminal complaint, however, alleges Toliver “produced a gun and racked the slide. Gorman felt he was about to be robbed so *he told [Toliver] he could have the money*” (1:2) (emphasis added).



with the court's exercise of discretion. Toliver continues to emphasize his youth, his academic challenges and his ADHD. Toliver's Br. at 19-20. The court, however, considered all of these factors – noting each of them – but simply did not find that they mitigated evidence of Toliver's poor character, the need to protect the public and the extraordinary severity of the crimes he committed (67:26-37). Toliver argues, "The court bluntly denied the existence of any mitigating factors." Toliver's Br. at 23. This is not the case. The circuit court, instead, did not find the evidence Toliver emphasizes to mitigate Toliver's overall character or the severity of the crime and the need to protect the public (67:36).

Toliver argues, "Rehabilitation of a juvenile offender is intended to be the primary goal of the juvenile system." Toliver's Br. at 18. Toliver seems to forget, though, that he was not adjudicated delinquent; he was convicted of criminal charges. Furthermore, Toliver's repeated emphasis on his age is misplaced. While a circuit court is free to consider a defender's age and, in fact, the circuit court did so here, "[t]he trial court is not required to consider a defendant's age." *State v. Davis*, 2005 WI App 98, ¶ 18, 281 Wis. 2d 118, 698 N.W.2d 823. "[M]oreover, even if age is addressed, the trial court determines whether it should carry any weight." *Id.*

Without citation, Toliver asserts, "A trial court must abide by more exacting requirements when imposing the maximum sentence or near maximum sentence." Toliver's Br. at 27. While the State is not aware of any statute or case law that supports Toliver's assertion, the State argues the circuit court expressly set forth its reasoning

regarding Toliver's sentence in this case. The court found Toliver's crime "very, very serious" and the specific facts surrounding the crime – shooting a fleeing man in the back and rendering the man paralyzed – to be "so egregious" (67:26-27, 35, 37). The court noted Toliver had a lengthy juvenile record, as well as a poor academic behavior and attendance record (67:28-33). The court noted the PSI author found Toliver had difficulty telling a truth from a lie and the author felt it would be hard for Toliver to become a productive member of society (67:35). The court felt protecting the public from Toliver was its duty (67:36).

Toliver also complains of the circuit court's decision to give him consecutive sentences. Toliver's Br. at 28-31. Toliver states, "There was one gunshot, one victim, one argument." Toliver's Br. at 29. Toliver again appears to downplay the severity of the offense, his serious character flaws and the need to protect the public from his behavior. The circuit court, as noted *supra*, properly considered the factors relevant to Toliver, the crimes charged and sentencing and arrived at a sentence well within its discretion.

Despite Toliver's protestations to the contrary, the record demonstrates the circuit court properly exercised its discretion in sentencing Toliver.

#### **IV. THE CIRCUIT COURT PROPERLY DENIED POSTCONVICTION RELIEF.**

Finally, Toliver argues the circuit court's decision to deny his postconviction motion for sentence modification was an erroneous exercise of discretion. Toliver had moved the circuit court for

sentence modification, arguing the circuit court erroneously exercised its discretion at sentencing.<sup>6</sup> Because the State has demonstrated, *supra*, the circuit court properly exercised its discretion in sentencing Toliver, the circuit court's decision to deny Toliver's motion for sentence modification based on an erroneous exercise of discretion is inherently proper.

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<sup>6</sup> Toliver asserts his postconviction motion also argued his sentence should be modified because it was excessive. Toliver's Br. at 32. In reviewing Toliver's postconviction motion and the hearing held on it, the State cannot find Toliver's argument that his sentence was excessive in the legal sense of the word 'excessive.' See *State v. Grindemann*, 2002 WI App 106, ¶ 31, 255 Wis. 2d 632, 648 N.W.2d 507 (reciting the law on excessive sentences).

## CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm Toliver's judgment of conviction and the decision and order denying postconviction relief.

Dated this 7<sup>th</sup> day of September, 2012.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,363 words.

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Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7<sup>th</sup> day of September, 2012.

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