STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP000157-CR

ERIC L. LOOMIS,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and
from an Order Denying Post-Conviction Relief Entered
in the Circuit Court for La Crosse County,
The Honorable Scott L. Horne, Presiding

BRIEF OF DEFENDANT-APPELLANT

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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ISSUES PRESENTED

(1) Is it improper for a trial court in sentencing a defendant to consider the COMPAS risk assessment?

The trial court did not directly address the question.

(2) Did the trial court rely on the COMPAS risk assessment in sentencing the defendant?

The trial court answered no.

(3) Did the trial court improperly give undue weight to the dismissed but read-in charges in sentencing the defendant?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs, but welcomes the opportunity for oral argument if the Court has questions not resolved by the briefs. Publication is warranted pursuant to Wis. Stat. § 809.23, because of the unique Constitutional issues and because the decision will be of substantial and continuing public interest.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered in court on August 12, 2013 and filed on August 14, 2013 in La Crosse County, The Honorable Scott Horne presiding. (R.16; A-App. 101-103.) An amended judgment of conviction was filed on August 15, 2013 regarding sentence credit. (R. 17; A-App. 104-106.)

By a criminal complaint filed on February 13, 2013, the State charged Mr. Loomis with five counts: (1) First

Degree Recklessly Endangering Safety, PTAC, as a repeater; (2) Attempting to Flee or Elude a Traffic Officer, as a repeater; (3) Operating a Motor Vehicle without Owner's Consent, PTAC, as a repeater; (4) Possession of a Firearm by a Felon, PTAC, as a repeater; and (5) Possession of Short-Barreled Shotgun or Rifle, PTAC, as a repeater. (R.4.) The State filed an information on February 26, 2013 asserting the same five charges. (R.7.)

On May 24, 2013, Mr. Eric Loomis waived his right to a trial and entered a guilty plea to counts two and three, while the three additional counts were "dismissed and read-in." (R.11). After accepting Mr. Loomis' pleas, the trial court ordered a presentence investigation. (R.40:42; R.13.) On August 12, 2013, the trial court sentenced Mr. Loomis on count two (attempting to flee) to four years, with initial confinement of two years and extended supervision of two years. (R.41:37; A-App. 169.) On count three (operating without owner's consent), the court sentenced Mr. Loomis to seven years, with four years of initial confinement and three years of extended supervision, consecutive to count two. (R.41:38, 40, A-App. 170, 172.)

Mr. Loomis timely filed a Notice of Intent to Pursue Post-Conviction Relief on August 19, 2013. (R.18.) The trial court heard the motion on two separate days: July 29, 2014 and January 6, 2015. (R.42 and 43.)[1] The trial court subsequently denied Mr. Loomis' post-conviction motion by written motion on January 7, 2015. (R.33; A-App. 107-108.) Mr. Loomis timely filed his notice of appeal in this case on January 16, 2015. (R.44.)

[1] This Court granted motions for extension of time for the trial court to decide the post-conviction motion.

STATEMENT OF FACTS

This case arises out of a drive-by shooting in La Crosse on February 11, 2013 in which the State alleged that Mr. Loomis was the driver. (R.1.) From the very beginning, however, all the way through the plea and sentencing, Mr. Loomis denied that he had any involvement in the drive-by shooting and maintained only that he later drove the car after the shooting. (See, e.g., Statement of Negotiated Plea, R.11.) This difference colored much of what later occurred procedurally and is at the heart of this appeal.

Plea Hearing

At the plea hearing on May 24, 2013, the State admitted that Mr. Loomis was not the shooter, but instead believed that Mr. Loomis was the driver of the car. (R.41:15; A-App. 147.) Mr. Loomis disagreed. He was willing to admit to the fleeing and operating without owner's consent, but he denied that he had any involvement in the drive by shooting. The trial court summed up the positions of the two parties: "So I understand from the plea agreement that you're denying that you had any role in the shooting, that you only drove the car after the shooting occurred. The State believes that you were the driver of the car when the shooting happened." (R.40:3-4; A-App. 115-116.)

The Defense position was that Mr. Loomis only later drove the car after the shooting. Mr. Loomis told the PSI author that the alleged shooter, Michael Vang, had come by his apartment earlier that evening and they went to Wal-Mart for food. Upon returning home, Mr. Loomis heated up his food, but Mr. Vang then left and came back about fifteen minutes later. (R.14:4.) Mr. Vang then asked him for a ride back to Shue Homes. (R.14:4.) It was during that trip that the police attempted to stop them and they briefly fled. (R.14:4-5.) Mr. Loomis also maintained this position at sentencing. (R.41: 17-19; A-App. 149-151.) Defendant also submitted two witness statements with his post-conviction

motion that backed up his story that Michael Vang only picked him up later after the shooting. (R.26, Exs. D and E.)

The Defense also pointed out that the neighborhoods where the shooting occurred, where Mr. Loomis lived, and where they were stopped were all close together—within a five minute drive. (R.41:19; A-App. 151.) Indeed, Mr. Loomis' residence was between the location of the shooting and where the police first observed the car. (R. 26, Ex. C.) Thus, Mr. Loomis' position was plausible. The Defense also raised the issue that because Michael Vang and the alleged target of the shooting were admittedly involved in methamphetamine dealing there could have been a delay between the time of the shooting and the time that the target called the police. (R.41:17; A-App. 149.) Unlike Mr. Vang, Mr. Loomis had no connection to the target or the methamphetamine trade. (R.41:17, 20; A-App. 149, 152.)

In addition, there was no forensic evidence supporting a conclusion that Mr. Loomis had anything to do with the shooting. DNA found on the gun was compared to Mr. Loomis' DNA and Mr. Loomis was excluded. (R.26, Ex. F.) Nor was any gunpowder residue found on Mr. Loomis. (R.26, Ex. G.) The police also found a shotgun cartridge on the passenger seat (R.26, Ex. H) suggesting that the seat was empty at the time of the shooting and that Mr. Vang would have fired from the driver's seat out the passenger window. After originally denying knowledge of the gun, Mr. Vang eventually confessed to knowing that the gun was present and described the gun in the car. (R.26, Exs. J and K.)

Because of the above facts, the impact of the read-in charges led to a great deal of discussion and disagreement at the plea hearing. Whereas Mr. Loomis understood that the court may consider the read-in charges, the trial court warned that the "read-in" charges were the more serious charges, and more importantly that the court basically would assume that Mr. Loomis was indeed the driver of the car at the time of the shooting. (R.40:4-5; A-App. 116-117.)

> The effect of this plea agreement is that I am taking into account that you were the driver of the car at the time of the shooting, that you were involved in the reckless endangerment, that you were involved in the possession of a firearm by a felon, and that you were involved as a party to the crime in the possession of a short-barreled shotgun. That's the effect of a read-in.

(R.40:5; A-App. 117.)

The Defense explained to the court that Mr. Loomis was not conceding that he was "involved" in the read-in charges. "We are relying on *State of Wisconsin v. Straszkowski* [2008 WI 65] which does hold that no admission of guilt from a defendant is required or should be deemed required for a read-in charge to be considered." (R.40:6; A-App. 118.) "[H]e's not guilty of those three [read-in charges], and that's what we're going to be explaining." (R.40:6; A-App. 118.) "The State's going to argue why you may, we're going to argue why you should not." (R.40:14; A-App. 126.) In sum, the Defense regarded the "read-in" designation as permissive, not proscriptive.

The State likewise believed that the "read-in" charges would be the subject of debate at sentencing.

> The State will give you our version of, you know, what we think the evidence shows and what happened that night. And that's why it's being read in, it allows us to tell you what we think happened, our theory of the case, at sentencing. … And Mr. Loomis I think is aware of that, that we will be saying those things at sentencing, and if you accept those, you would obviously sentence him accordingly. But he does have the opportunity at sentencing, even though he's making this agreement, to say he

> didn't do it, he wasn't part of that, he's got a different version. If you listen to that and consider that, you may not sentence him as you would otherwise if you believed what he was saying about that night.

(R.40:9-10; A-App. 121-122.)

Despite the agreement of the parties that the "read-in" charges would be debated at sentencing, the trial court persisted in regarding the "read-ins" as stipulated facts for the purposes of sentencing. The court felt that if the charges were read-in that meant that Mr. Loomis at least was involved as a conspirator or party to the crime. (R.40:7-8; A-App. 119-120.) "But he, he needs to understand that if these shooting related charges are being read in that I'm going to view that as a serious, aggravating factor at sentencing." (R.40:10; A-App. 122.)

The court placed a great deal of weight on a distinction between charges "read-in" and those "dismissed outright."

> In other words, if it's dismissed outright, then I don't consider those charges at all at sentencing. But if it's read in, then I'm accepting the notion that there was some involvement on his part, not necessarily as the shooter, but at least there was some involvement on his part that warrants consideration at sentencing.
>
> ….
>
> So I'm understanding, Mr. Loomis, that you had some connection to the shooting, even if it's a limited connection, that at least it was sufficient to justify the allegation that you were party to the crime. In other words, that you weren't an innocent bystander, that you weren't someone who was simply present with no

> understanding or intent that the crime be committed. That's what I'm understanding from the effect of your agreement on your part that these charges can be read in.

(R.40:10-11; A-App. 122-123.)

The court distinguished a "read-in" offense from one that is "dismissed outright" on the basis that the former would be considered as admitted for the purposes of sentencing, whereas the latter would not be considered at all.

> [I]f a charge is dismissed outright, I do not consider it in any way, shape or form.
>
> ….
>
> To my mind the fact that you're allowing this to be read in would tip the scale at sentencing, and it's extremely unlikely that I would treat the shooting related charges as if they were dismissed outright, okay? I mean, in essence, the position you are taking today is that they ought to be dismissed outright. … [Y]ou're asking that I not take them into account at all at sentencing because you weren't involved.
>
> And what I'm saying to you is that at a sentencing hearing I would not be treating these shooting related charges as if they were being dismissed outright.

(R.40:15-16; A-App. 127-128.)

Presentence Investigation Report

The DOC agent prepared a presentence investigation report ("PSI") dated July 23, 2013. (R.14.) Like many PSIs currently, it included an attached COMPAS assessment. (R.14:14.) COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions." (R.28:1.) "It is a fourth-generation (4G) risk-need assessment system" that according to its creators "provides decision support for correctional agencies for placement decisions, offender management, and treatment planning." (R.28:1.) According to DOC and the PSI it should not be used either to determine if a specific defendant should be sentenced to prison or the severity of the sentence.

> The COMPAS is an actuarial assessment tool which has been validated on a national norming population. This means that it predicts the general likelihood that those with a similar history of offending are either less likely or more likely to commit another crime generally within the two year period following release from custody. ***The COMPAS assessment does not, however, attempt to predict specifically the likelihood that an offender will commit a certain type of offense with the same two year period.*** For that prediction, a narrow-band screener which is normed specifically for that offender population (i.e. use of screener such as the STATIC-99, VASOR, etc. for sex offenders) should be used.
>
> In addition to identifying general levels of risk to re-offend, COMPAS also identifies criminogenic needs specific to that offender which are most likely to effect [sic] future criminal behavior. For purposes of Evidence Base Sentencing, actuarial assessment tools are especially relevant to: 1. Identifying offenders

> who should be targeted for interventions. 2. Identify dynamic risk factors to target with conditions of supervision. 3. ***It is very important to remember that risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated***.

(R.14:14.)(emphasis added)

The Sentencing Hearing

At the sentencing hearing on August 12, 2013, both the State and the trial court referenced the COMPAS assessment and used it as a basis for incarcerating Mr. Loomis.

The State argued that the COMPAS report and its assessments served as the basis for the appropriate sentence.

> In addition, the COMPAS report that was completed in this case does show the high risk and the high needs of the defendant. There's a high risk of violence, high risk of recidivism, high pre-trial risk; and so all of these are factors in determining an appropriate sentence.

(R.41:14; A-App. 146.) The trial court also used the COMPAS report to justify incarceration.

> You're identified, through the COMPAS assessment, as an individual who is at high risk to the community.
>
> In terms of weighing the various factors, I'm ruling out probation because of the seriousness of the crime and because your history, your history on supervision, and the risk assessment tools that have been utilized,

> suggest that your [sic] extremely high risk to re-offend.

(R.41:35; A-App. 167.) Earlier in the hearing, the trial court also referred to the PSI writer's use of the assessment tools. (R.41:30; A-App. 162.)

Regarding the effect of the read-in charges, the State argued extensively that Mr. Loomis was the driver in the drive-by shooting. (R.41:12-15; A-App. 144-147.) The Defense reiterated Mr. Loomis' position that he was uninvolved in the shooting, and only entered the car later.

> The night of this incident Mr. Loomis did drive around in this vehicle that was somebody else's with Mr. Vang and Cody Brantner. They went to a Wal-mart, they got food, they came back. Mr. Vang left and then returned later to ask Eric to drive with him to the Schuh Homes, and in route is when they got pulled over. Mr. Loomis has maintained that this is what happened.

(R.41:17; A-App. 149).

The trial court, however, concluded that Mr. Loomis was involved in the drive-by shooting:

> In terms of your demeanor, acceptance of responsibility, remorse, I don't believe you've taken responsibility for your role here. I mean, basically, you're asking The Court to accept the notion that you weren't even present at the time of the shooting, you didn't know anything about it at the time or beforehand. You didn't know anything about any guns.

(41:32; A-App. 164.)

In assessing the facts of the shooting, the court again referenced the fact that the shooting related charges were "read-in."

> The plea agreement calls for the shooting charges to be read in. Now, what that means to me, and I'm accepting the descriptions of events that I've been given where a description of your role; and that is to say that, you were not the person who was the shooter.

(R.41:32-33; A-App. 164-165.) The court, however, again referred to the counts that were dismissed but read-in as meaning that Mr. Loomis was involved in the shooting.

> …and given the fact that the shooting related charges are being read in, I am sentencing you on the basis that you were at least in the vehicle at the time of the shooting, that you had associated yourself with Mr. Vang; that you knew full well at the time that the shooting was taking place; and that, frankly, as a result of your associations, rather than being home with Miss McShan, you're associating with this individual who is armed with guns and involved heavily in the drug trade.

(R.41:34; A-App. 166.)

The trial court ultimately sentenced Mr. Loomis on Count 2 (fleeing) to four years with two years of initial confinement and two years of extended supervision. (R.41:37; A-App. 169.) On Count 3 (operating without the owner's consent), the court sentenced Mr. Loomis to four years of initial confinement and three and a half years of extended supervision. (R.41:38; A-App. 170.) The sentences are consecutive. (R.41:40; A-App. 172.) In total, the court sentenced Mr. Loomis in this case to six years of initial confinement and five years of extended supervision.

Post-Conviction Motion

On June 9, 2014, Mr. Loomis, by his counsel, filed a motion for post-conviction relief pursuant to Wis. Stat. 809.30 in this matter for a resentencing hearing on two grounds[2]: (1) that the trial court erroneously exercised its discretion in how it considered the read-in charges by declining to consider Mr. Loomis' explanation; and (2) Mr. Loomis' due process rights were violated by the court relying on the COMPAS assessment in sentencing Mr. Loomis.

The trial court held two hearings on the post-conviction motion. At the first hearing on July 29, 2014, the court mainly addressed the read-in charge issue and orally denied that issue. (R.42:21; A-App. 196.) Although there was some initial discussion about the COMPAS issue and the defense introduced exhibits, the State sought additional time to respond and the court set a further hearing to take testimony and evidence. (R.42:22, 35-36; A-App. 197, 210-211.)

The second hearing was on January 6, 2015. (R.43; A-App. 214-271.) At this hearing, the Defense offered the testimony of an expert witness on COMPAS, Dr. David Thompson. (R.43:5; A-App. 218.) Dr. Thompson has a Ph.D. from DePaul in Psychology and Clinical Psychology. (R.43:5; A-App. 218.) He is Board Certified in Forensic Psychology by the American Board of Professional Psychology. (R.43:5; A-App. 218.) "Forensic Psychology is the application of psychological principles and psychological science to questions of law." (R.43:6; A-App. 219.) He has

[2] There was a third ground regarding inaccurate information concerning the sale prescription pills in mistakenly stating that Mr. Loomis' actions led to the death of a person, but that aspect concerned only Case No. 12CF75. (R.26:1.) It is not directly at issue on this appeal, but there too the trial court relied on inaccurate information in sentencing Mr. Loomis as stipulated to by the parties and in modifying the sentence in that case. (R.42:3; A-App. 178.)

extensive training in COMPAS, psychometrics, and statistics. (R.43:8-9; A-App. 221-222.) The court admitted Dr. Thompson's curriculum vitae and his report into evidence without any objection by the State. (R.43:7, 11; A-App. 220, 224.) The State did not offer any witnesses or further evidence, instead solely relying on the position that the trial court did not rely on the COMPAS report and, if it did, any reliance was harmless error. (R.43:3; A-App. 216.)

Dr. Thompson opined that it was improper to use COMPAS at sentencing to decide whether to incarcerate a person. (R.43:10-11; A-App. 223-224.) The main basis for Dr. Thompson's opinion is that COMPAS was not designed to be used for sentencing decisions and that by using it for such, the court runs a "tremendous risk of over estimating an individual's risk and then mistakenly, basically, mistakenly sentencing them or basing their sentence on factors that may not apply in a situation." (R.43:12; A-App. 225.) COMPAS is designed to assess group data and using it at sentencing detracts from the court's focus on the individual and his or her unique circumstances. (R.31B:3; A-App. 111.)

COMPAS originally was designed to assist corrections departments in allocating resources needed to keep persons in the community. (R.43:10; A-App. 223.) It did so by dividing people into a number of risk categories so that the department could estimate budgeting needs. (R.43:12; A-App. 225.) It also allowed the departments to identify individuals who would be placed in the community, identify and assess their criminogenic needs, and channel them into specific community programs. (R.43:12; A-App. 225.) (See also Dr. Thompson's Report, R.31B:2; A-App. 110.) By relying on the risk assessment bar charts generated by the COMPAS program, it is Dr. Thompson's opinion that a court could be swayed by or overestimate the person's risks and outweigh the individual's idiosyncratic characteristics. (R.43:13; A-App. 226.) The bar charts for risk of recidivism and violent risk are determined by only three factors: the person's age at first offense, current age, and criminal history. (R.43:13; A-

App. 226.) How COMPAS weighs those factors, however, is unknown. (R.43:13; A-App. 226.) Northpointe considers COMPAS a proprietary instrument and a trade secret. (R.43:17; A-App. 230.)

Tim Brennan developed COMPAS originally while working in jails and agencies in London. (R.43:15; A-App. 228.) He then joined Northpointe and developed it in the United States from populations in New York, Michigan, and California. (R.43:14-15; A-App. 227-228.) The COMPAS reports say they compare to a national sample. (R.43:14; A-App. 227.) Although the department of corrections may be working on a cross-validation study for Wisconsin, at the time of the hearing in this case that had not yet been completed. (R.43:16-17; A-App. 229-230.)

The COMPAS literature and Dr. Thompson analogized COMPAS to insurance actuarial risk assessments. (R.43:18-19; A-App. 231-232.) Insurance company actuarial tables for example identify teenage male drivers with lower grade point averages as a higher risk than an older person. (R.43:19; A-App. 232.) The insurance companies then charge higher premiums for those higher risks to allocate their resources and reserve accordingly. (R.43:19-20; A-App. 232-233.) Similarly, if the Department of Corrections uses COMPAS assessments as originally intended, it can allocate resources based on the identification of different numbers of individuals in different risk categories. (R.43:20; A-App. 233.) On the other hand, COMPAS training manuals specifically state that it is not designed for and should not be used in sentencing. (R.43:20; A-App. 233.) It is Dr. Thompson's opinion that COMPAS is fine for determining these allocations of resources, but it should not be used in sentencing because it ignores individual characteristics. (R.43:23-24; A-App. 236-237.)

Dr. Thompson further analogized it to the percentage of criminal defendants who go to trial being found guilty. (R.43:22, A-App. 235; R:31B:3, A-App. 111.)

Hypothetically if 95% of criminal defendants who go to trial are found guilty, it would be a mistake to say that an individual defendant has a 95% chance of being found guilty and therefore we should skip trial and just find him or her guilty. (R.43:22, A-App. 235; R:31B:3, A-App. 111.) Not only would this be unconstitutional, but it would ignore the individual features of that person's case. (R.43:22, A-App. 235; R:31B:3, A-App. 111.)

COMPAS also considers gender in formulating its risk assessments. (R.43:24, A-App. 237; R:31B:3, A-App. 111; R.28:24.) How exactly it does so is unknown because of the proprietary nature of the computer program, but it is a consideration in the assessment. (R.43:24, A-App. 237; R:31B:3, A-App. 111.)

After hearing Dr. Thompson's testimony and argument of counsel, the trial court orally denied the motion. (R.43:56; A-App. 269.) The trial court subsequently issued a written order denying the motion on January 7, 2015. (R.33; A-App. 107-108.)

ARGUMENT

I. Standard of Review and Introduction.

The appellate court reviews conclusions of law *de novo.* "An appellate court is not bound by a trial court's conclusions of law and decides the matter *de novo*." *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992). Normally, the appellate court does not upset the trial court's findings of fact unless they are against "the great weight and clear preponderance of the evidence," except when there are questions of constitutional fact. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). Questions of constitutional fact are "subject to independent review and require an independent application of the constitutional principles involved to the facts as found by the trial court." *Id.* at 344. Whether a deprivation of constitutional rights has occurred is also a question which this

Court reviews *de novo*. *State v. Fawcett*, 145 Wis. 2d 244, 250, 425 N.W.2d 91 (Ct. App. 1988). As this case involves the violation of Mr. Loomis' due process rights, this Court should review the issues *de novo*.

In addition, the appellate courts review sentencing decisions on an erroneous exercise of discretion standard. *State v. Travis*, 2013 WI 38, ¶ 16, 347 Wis. 2d 142, 832 N.W.2d 491. "A discretionary sentencing decision will be sustained if it is based upon the facts in the record and relies on the appropriate and applicable law." *Id.*

This case presents an important issue for this Court regarding the ever more frequent use of Northpointe's proprietary COMPAS assessments in sentences. Many courts are increasingly relying on it on the grounds that it is evidenced based sentencing and therefore they believe that it is more scientific and/or reliable. Yet, as the Defense's evidence established, it is full of holes, violates the requirement that a sentence be individualized, and presents gender-based constitutional issues. Both the State and the trial court after the fact would like to pretend that it really had no bearing on the sentence here, but the transcript from the sentencing hearing shows otherwise.

Similarly, after the fact the State and the trial court downplayed the court's interpretation of the read-in charges. The trial court, however, confused the significance of read-in charges versus otherwise dismissed charges. Indeed, contrary to Wisconsin law, it felt that if the charges were "outright dismissed" that it could not consider them at all in sentencing. By confusing the differences, the trial court assumed that it had to consider the more serious read-in but dismissed charges and sentenced Mr. Loomis to what would otherwise be overly harsh sentences for the charges to which he pled. This is further complicated by the fact that at the same sentencing hearing the trial court relied on inaccurate information in 12CF75 about the sale of prescription drugs causing someone's death.

II. The Use and Consideration of the COMPAS Assessment at Sentencing Relied on Inaccurate and Irrelevant Information, and Violated Mr. Loomis' Constitutional Rights.

"In exercising discretion, sentencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *State v. Harris*, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409 (citing *State v. Gallion*, 2004 WI 42, ¶ 39-48, 270 Wis.2d 535, 678 N.W.2d 197). "Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors." *Id*. at ¶ 30 (citing *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis.2d 179, 717 N.W.2d 1). "[A] defendant has a constitutional due process right to be sentenced based only upon accurate information." *Id*. at ¶ 32; *Travis*, 2013 WI 38, at ¶ 17. *See also United States v. Tucker*, 404 U.S. 442 (1972); U.S. const. amend. xiv; Wis. const. art. I, §8. If the sentence is based on "materially untrue information," it is a violation of due process "and cannot stand." *Travis*, at ¶ 17

"[A] defendant must prove that the information was inaccurate, and that the court actually relied on that inaccurate information." *Tiepelman*, at ¶ 32 (internal citations omitted). "If the defendant shows this, the burden shifts to the State to prove that the error was harmless." *Id*. The defendant must prove this by clear and convincing evidence. *Harris*, at ¶34. The Wisconsin Supreme Court interpreted this standard as meaning that the defendant "must therefore provide evidence indicating that it is 'highly probable or reasonably certain' that the circuit court actually relied on … when imposing its sentence." *Id.* at ¶35, *quoting Black's Law Dictionary*. In this case, Defendant has presented clear and convincing

evidence that COMPAS is inaccurate and inappropriate to be relied upon at sentencing and that the trial court actually relied upon it. Therefore, this Court should remand this case for a new sentencing.

A. COMPAS is Inaccurate and Inappropriate Information and should not be Considered at Sentencing by the Trial Court.

As Dr. Thompson explained in his testimony and in his report, relying on COMPAS in sentencing is a grave mistake and fraught with danger. First, and foremost, the use of COMPAS violates the defendant's due process rights to be sentenced on individualized information. *See Harris*, 2010 WI 79, ¶ 29. COMPAS is an actuarial type risk assessment, similar to insurance actuarial tables. Based on limited information, it places the defendant within a group and assesses risk based on the defendant's certain shared characteristics with others in that group. Moreover, as Dr. Thompson testified, it bases the risks of recidivism and violence on only three characteristics: the person's age at first offense, current age, and criminal history. (R.43:13; A-App. 226.) Thus, there is a danger of overestimating the risk of an individual defendant based on limited information.

It is the character of the offender that the court must consider, not the class of people with whom he is similar. Reliance on the COMPAS evaluation to make punitive sentencing decisions unfairly imposes a penalty upon Mr. Loomis simply for being a member of a class of people (as defined by COMPAS), some of whom might reoffend. This is why the COMPAS evaluation warns courts that it should not be used for the purposes of deciding a sentence. The trial courts are ignoring this proscription.

The fact that Mr. Loomis' classification in several of risk categories was "highly probable" means only that many of the people in the class will reoffend (specific data are not provided about how many). COMPAS does not provide a

quantitative value for the likelihood of certain populations to reoffend.[3] We are left to interpret "probable" and "highly probable" on our own. Whatever actual numbers they represent, they nonetheless can make no specific predictions about Mr. Loomis. They simply indicate percentages of populations which will reoffend, and tell us nothing about Mr. Loomis himself for the purpose of sentencing other than that under COMPAS' proprietary software he falls within this class based on certain shared characteristics.

The specific due process problem with this is that reliance on the COMPAS amounts not to sentencing Mr. Loomis based on his unique character and crime, but rather on membership in a class. This is not a sentence "individualize[d] … to the defendant." *State v. Gallion*, 2004 WI 42. This is a sentence based on generalizations about groups of other persons. Thus, this is a violation of Mr. Loomis' due process rights and the sentence should not stand.

Second, even if the COMPAS software was somehow otherwise an appropriate factor, it was not developed for use in sentencing. It was developed to be used by departments of corrections in allocating resources in prisons and in the community. (R.43:10, A-App. 223; R.31B:2, A-App. 110.) Again, this is why the report warns that it not be used for determining whether to incarcerate someone and for how long. Thus, if a court relies on COMPAS in sentencing it is relying on inaccurate information. It would be no different than a court relying on the color of a car a defendant drives as a basis for determining a sentence. While color might be

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[3] This is one of the specific criticisms levied upon the COMPAS. See Jennifer L. Skeem, Ph.D. & Jennifer Eno Loudon, M.A., *Assessment of Evidence on the Quality of Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)*, Prepared for the California Department of Corrections and Rehabilitation, p. 28 (2007), which can be found at:
http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/COMPAS_Skeem_EnoLouden_Dec_2007.pdf

relevant for certain things, it is presumably irrelevant and inaccurate as a sentencing factor.

Despite the warning in the COMPAS assessment itself not to use it to determine whether or not a defendant should be incarcerated, the trial court stated that it had received training to use it for such. "And we have been trained in the fact that COMPAS is to be a tool that's utilized at sentencing in determining the need for community supervision…. We utilize the COMPAS and we consistently get training to make decisions about prison incarceration versus community supervision …." (R.42:27; A-App. 202.) The trial court and apparently others like it are using COMPAS for an improper purpose.

Third, COMPAS had not yet been cross-validated in Wisconsin at the time of the hearing. Therefore, even setting aside the constitutional issues, there is no way to know if the risk assessments derived from other states are even appropriate for use in Wisconsin. Also, overriding all of this is that Northpointe, which develops and owns the software, considers it a trade secret and proprietary information. We have no way of testing it, knowing how it is weighing the factors, or how it in essence works. Thus, the trial courts in using this at sentencing are using a secret non-transparent process.

In sum, using COMPAS at sentencing is inappropriate and improper. It also uses inaccurate information to the extent that it assumes that a specific defendant is a high risk based on comparison with others in the group as determined by COMPAS. Therefore, it is a violation of a defendant's right to due process and this Court should remand this case for a new sentencing.

B. Reliance On COMPAS Is A Violation Of Mr. Loomis' Due Process Rights Because It Includes A Consideration Of Gender.

As noted above, it is unknown exactly which "criminogenic factors" COMPAS utilizes and how it weighs them when defining the reference class. This is problematic for the courts because there may be (and indeed are) factors being accounted for which would be inappropriate for the court to consider at sentencing. For example, gender is one of the "criminogenic factors" that COMPAS uses in predicting the risk of an offender to reoffend. COMPAS develops gender specific risk assessments. (See R.28:24.) The developers tout this as an improvement over earlier approaches. (Id.) However, it presents significant constitutional problems for the sentencing court.

In reference class terms, while X% of offenders with certain "criminogenic factors" ABCM (male) will reoffend, only Y% of offenders with certain "criminogenic factors" ABCF (female) will reoffend. The difference between X and Y will be in most cases very significant. Thus, that factor is significant in determining risk, which is what COMPAS determines and it could not do so without considering gender. Therefore, gender is significant in COMPAS' risk assessment.

When the DOC is working with offenders and determining treatment and supervision needs, this may be critical information for the DOC to contemplate. However, for the circuit court this is a significantly problematic constitutional issue. If the gender of the offender has been a critical factor in assessing this risk under COMPAS, then relying on it amounts to punishing the offender for being male because the risks are higher. The Wisconsin Supreme Court recently held that defendants have a due process right not to be sentenced based on gender.

> No Wisconsin case has held that defendants have a due process right not to be sentenced on the basis of gender. We now so hold because to do so is in conformity with our understanding of the basic tenets of due process. Everyone agrees, then, that race and gender are improper factors, and that imposing a sentence on the basis of race or gender is therefore an erroneous exercise of discretion. Consequently, [the defendant] has the burden to prove that the circuit court actually relied on race or gender in imposing its sentence.

Harris, 2010 WI 79, ¶ 33 (applying *Tiepelman*). Yet, by relying on COMPAS risk assessments a court is impliedly relying on gender as a factor. Therefore, for this reason too, it is a violation of the Mr. Loomis' due process rights to rely on COMPAS.

C. The Trial Court Materially Relied On The COMPAS Assessment.

For the above reasons, the COMPAS assessment is inaccurate and inappropriate for the court to rely upon. It should not be used at sentencing in any fashion whatsoever. The State basically conceded at the post-conviction motion hearing that it is inappropriate to rely on COMPAS, but argued instead that the court did not rely on it. The second prong in this Court's analysis is whether the trial court actually relied on the information. *Tiepelman*, at ¶ 32; *Travis*, at ¶ 28. To so determine, the Court should look at whether the trial court gave explicit or specific attention to the information. "Whether the circuit court 'actually relied' on the incorrect information at sentencing, according to the case law, turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed a part of the basis for the sentence.'" *Travis*, at ¶ 28.

Both the trial court and the State at sentencing explicitly referenced the COMPAS assessment as a reason for incarcerating Mr. Loomis as opposed to probation. The trial court specifically stated: "I'm ruling out probation because of the seriousness of the crime and because your history, your history on supervision, ***and the risk assessment tools*** that have been utilized, suggest that your [sic] extremely high risk to re-offend." (R.41:35; A-App. 167.)(emphasis added) The only risk assessment tool was the COMPAS assessment that the court had immediately prior mentioned as finding that Mr. Loomis was a high risk. The trial court clearly relied upon the COMPAS assessment and there is no way to untangle it from any proper information that the court cited as a basis for the sentence.

At the post-conviction motion hearing, the trial court dismissed this conclusion by stating that it merely mentioned COPMPAS as "corroborative" of its findings and that it would have made the same sentence without it. (R.43:56; A-App. 269.) The trial court's language, however, at sentencing tells a different story. Its after-the-fact explanation does not defeat the explicit reliance. "A circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance." *Travis*, at ¶48. Nor does the fact that there might be other bases for the trial court's sentence overcome the error of relying on the COMPAS assessment. "'[T]he fact that other information might have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as part of the basis of the sentence.'" *Id.* at ¶47, *quoting United States ex rel. Welch v. Lane*, 738 F.2d 863, 867 (7th Cir. 1984)(emphasis in original). The trial court's explicit references to the COMPAS risk assessment establish that it erroneously relied on that improper evidence in sentencing Mr. Loomis.

Nor can this just be dismissed as harmless error. For an error to be harmless in sentencing, this Court must find that the error did not affect the trial court's "selection of the

sentence imposed." *Travis*, at ¶ 69. In *Travis*, the Supreme Court reversed the sentence and found that there was not harmless error because the trial "gave explicit attention to the inaccurate information [that there was a mandatory minimum sentence]." *Id.* at ¶76. Although the trial court here did not repeat the COMPAS reference to the extent that the trial court in *Travis* repeated the inaccurate information, like that court it also explicitly referenced the COMPAS assessment and indeed gave it as a reason for the sentence. Also, like in *Travis*, the prosecution and the PSI also referenced the COMPAS risk assessment. *See, Travis*, at ¶82. The trial court's reliance on COMPAS is too intertwined with all of the other factors to somehow separate it out and say it was harmless. The egg cannot be unscrambled.

The trial court's reliance on the COMPAS risk assessment violated Mr. Loomis' due process right to an individualized sentence and to a sentence not based on gender. Therefore, this Court should reverse and remand this matter for a new sentencing.

III. THE TRIAL COURT'S CONFUSION ABOUT THE EFFECT OF A DISMISSED BUT READ-IN CHARGE COMPELS THE NEED FOR A NEW SENTENCING.

The trial court appeared to misunderstand the difference between dismissed charges and those that are dismissed but read-in. First, the court stressed that if they were dismissed but read-in it meant it was going to assume that the factual basis for those charges was true. Yet the only time when that is truly the case is for restitution purposes. *See State v. Frey*, 2012 WI 99, ¶43, 343 Wis. 2d 358, 817 N.W.2d 436. Rather, it is only that the court "may" consider the dismissed charges at sentencing. *Id.* at ¶68-70. The charges are indeed expected to be considered at sentencing with the understanding that they could increase the sentence up to the maximum for the charges to which the defendant is pleading. *Id.* at ¶68. This is what Mr. Loomis expected, but

what he did not expect is that the trial court would automatically consider them true.

Second, the trial court by stressing a distinction between read-in and "dismissed outright" charges, erred. There is no special significance to "dismissed outright" charges. *Id.* at ¶62. Indeed, the Wisconsin Supreme Court in July 2012 stated that the term should be discontinued and that it leads to misunderstandings. *Id.* at ¶88. Yet almost a year later the trial court was still using the term and stressing an erroneous significance to the term, stating that it cannot consider charges dismissed outright. In fact, the court can consider even uncharged and unproven offenses. *Id.* at ¶47. The whole point is that the court should discuss and weigh all charges and allegations in fashioning a sentence.

> Consequently, we think it is better practice for the court to acknowledge and discuss dismissed charges, if they are considered by the court, giving them appropriate weight and describing their relationship to a defendant's character and behavioral pattern, or to the incident that serves as the basis for the plea.

Id. at ¶54. The trial court here failed to follow the Supreme Court's guidance.

Instead of keeping an open mind and fully weighing all of the facts, the trial court seemed to take the position from the start that if they were read-in, then they must be true. This is despite the fact that as the court noted they were the most serious charges that the State was dismissing—something that the court found strange. One would not expect the State to dismiss much more serious charges in exchange for a plea to less serious charges unless the State had concerns about the strength of its case. However, instead of considering that the State might have had a weak case on those charges, the trial court took them as true and sentenced

Mr. Loomis to much more severe sentences than he probably otherwise would have received if the court only looked at the charges to which he pled guilty.

At the post-conviction motion hearing, similar to the COMPAS issue, after the fact the trial court stated that it did not assume Mr. Loomis was guilty of the dismissed charges, but instead weighed all of the evidence and dismissed Mr. Loomis' story. (R.42:9; A-App. 184.) The court also stated that during the plea hearing it took a break and read the *Frey* decision. (R.42:13; A-App. 188.) Although the court did take a break and came back on the record to say that it read the *Frey* decision, there is nothing on the record by the court that it changed its position on the significance of a read-in versus an outright dismissed charge. The court read into the record paragraphs 69-73 of *Frey* about how dismissed but read-in charges are beneficial for both the prosecution and the defense. The court then stated:

> So you're limited in this agreement to a sentencing range within -- up to the maximums for the charges that you're pleading guilty. You're agreeing, as the Supreme Court decision indicates, that the charges can be read in and considered, and that has the effect of increasing the likelihood, the likelihood of a higher sentence within the sentencing range. You understood that?

(R.40:19; A-App. 131.) Mr. Loomis indicated that he understood. Yet, the court never went back to clarify or change any of its earlier comments about the supposed difference between read-in charges and "dismissed outright" charges, and the sentencing still seemed to have been affected by this misunderstanding, because the trial court still accepted as true that Mr. Loomis had a role in the shooting. (R.41: 32-34; A-App. 164-166.)

For these reasons, the court's confusions and assumptions created a situation where it is impossible to separate out what the court might have properly relied upon and what the court improperly relied upon (the assumption that Mr. Loomis was guilty of the dismissed charges). The court also mistakenly thought that Mr. Loomis was involved in the death of the person to whom he sold the prescription drugs in 12CF75, but the State and defense stipulated that this was an error and the sentence was modified. Thus, we have multiple inaccuracies upon which the trial court relied in crafting the sentence. The only way to cure all of these intertwined errors is to reverse and remand this matter for a new sentencing.

CONCLUSION

For the above reasons, Defendant Eric Loomis respectfully requests that this Court reverse the trial court and remand this matter to the Circuit Court for a new sentencing.

Dated this 2nd day of April, 2015.

Respectfully submitted,

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7542 words.

Dated this 2nd day of April, 2015.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 2nd day of April, 2015.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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.

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Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org