

STATE OF WISCONSIN
IN SUPREME COURT

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OF WISCONSIN**

No. 2015AP157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC L. LOOMIS,

Defendant-Appellant.

ON CERTIFICATION FROM THE WISCONSIN COURT OF
APPEALS DISTRICT IV AND FROM AN ORDER DENYING
POSTCONVICTION RELIEF AND JUDGMENT OF CONVICTION
ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE
HONORABLE SCOTT L. HORNE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Circuit courts must consider the need to protect the public and the rehabilitation of the offender at sentencing. COMPAS¹ provides relevant, valid, and accurate information about an offender's risks to reoffend and about the rehabilitation needs the offender has. Did the circuit court properly exercise its discretion by examining and considering the COMPAS report at sentencing?

¹COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions." *State v. Samsa*, 2015 WI App 6, ¶ 1 n.1, 359 Wis. 2d 580, 859 N.W.2d 149.

2. A defendant has a constitutionally protected due process right to be sentenced based on accurate information. Here, the court considered, among other things, a COMPAS report that contained relevant predictions of Loomis's future dangerousness. Did the circuit court rely on inaccurate information at sentencing?

3. A defendant has a constitutionally protected due process right not to be sentenced because of his or her gender. Here, the court never mentioned Loomis's gender. Loomis relies on a scientific paper that states that COMPAS considers gender in its assessment without explaining how gender factors into the assessment. Did Loomis meet his burden to prove that the circuit court sentenced him because of his gender?

4. Did the circuit properly exercise its sentencing discretion when it concluded that Loomis drove the car while his friend shot out the window of the car?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted.

SUPPLEMENTAL STATEMENT OF FACTS

Loomis faced charges of first degree recklessly endangering safety, attempting to flee a traffic officer, operating a motor vehicle without the owner's consent, possession of a firearm as a felon, and possession of a short-barreled shotgun or rifle (4:1-2). The State added the repeater enhancer to each charge and charged each crime as party to the crime except the attempting to flee (4:1-2).

Loomis and the State agreed to a negotiated plea where Loomis pled no contest to the charges of attempting to flee an officer and operating a motor vehicle without the owner's consent as repeat offenses (11). The rest of the charges would be dismissed and read-in for sentencing (11).

At the plea hearing, the court ensured that Loomis understood that the read-in charges could be considered at sentencing (40:3, A-Ap. 116). Loomis agreed and asked whether the court would consider the dismissed charges (40:4-5, A-Ap. 117-18). The court told him yes, it would consider the dismissed charges (40:5, A-Ap. 118). A lengthy discussion about the charges occurred.

Loomis planned to argue that the court should refuse to consider the dismissed charges (40:6, A-Ap. 119). The court explained that by pleading no contest, Loomis agreed that the court could find that he was party to the crime of first degree recklessly endangering safety (40:7-8, A-Ap. 120-21). The court wanted to make sure that Loomis knew the court could consider the dismissed charges (40:14, A-Ap. 127). Loomis understood that the court probably would consider the dismissed charges and asked for a few minutes to consider whether he would still plead no contest (40:16-17, A-Ap. 129-30). After the break, Loomis still wanted to go ahead with his plea (40:18-19, A-Ap. 131-32). Loomis pled no contest to operating a motor vehicle without the owner's consent and pled guilty to fleeing an officer (40:23-24).

The circuit court's sentencing comments largely addressed the standard sentencing factors. The court examined Loomis's individual characteristics. Loomis grew up in a chaotic environment that placed barriers and hurdles in Loomis's way (41:26, A-Ap. 134). The court concluded that Loomis had not made an honest effort to overcome those circumstances and become a law abiding member of the community (41:26, A-Ap. 134). The court believed Loomis's girlfriend saw potential in him and saw him as a good father to their child (41:27, A-Ap. 135). The court noted Loomis's "fairly continuous history of serious criminal offenses" (41:29, A-Ap. 137). Loomis had a sporadic job history and had treatment needs for drug addiction and for his past sex offender behavior (41:30, A-Ap. 138). The court concluded that Loomis had not taken full responsibility for his role in the crime (41:32-33, A-Ap. 140-41).

The court considered the nature and seriousness of the offense, and concluded that the crime is "extremely serious" (41:34, A-Ap. 142). The court concluded that Loomis drove the car when

Michael Vang shot from the vehicle (41:33-34, A-Ap. 141-42). The shooting might have resulted in killing one or more people (41:34, A-Ap. 142).

The court felt it needed to protect the public. The court found that the community could not tolerate these crimes and that it had a strong interest in deterrence (41:35, A-Ap. 143). The court noted that the COMPAS evaluation concluded that Loomis was a high risk to the community because of his high risk to reoffend (41:35, A-Ap. 143). The court concluded that the primary goal of the sentence was to protect the community and provide Loomis with treatment (41:35, A-Ap. 143). The circuit court rejected probation (41:35, A-Ap. 143). The court imposed consecutive sentences totaling sixteen and one half years (41:37-38, A-Ap. 145-46).

Loomis filed a postconviction motion for resentencing based in part on his claim that the circuit court erroneously exercised its sentence discretion and on his claim that the circuit court considered inaccurate information in the COMPAS assessment (26:1-2).²

As is pertinent to this appeal, Loomis argued that the circuit court should not have concluded that he drove the car at the time of the drive by shooting (42:10-11, A-Ap. 154-55). The court believed the State's explanation was more consistent with the facts, and gave that version greater weight at sentencing (42:16, A-Ap. 160). The court concluded that it was entitled to consider the read-in offense if the court concluded that the evidence supported it (42:21, A-Ap. 165). The circuit court denied Loomis's motion on that ground.

Dr. David Thompson testified at the postconviction hearing (43:4-45, A-Ap. 169-210). He told the court that COMPAS was

²The circuit court granted the motion in part and amended Loomis's sentence to three years of incarceration. At sentencing the court considered it aggravating that a person died after Loomis provided that person with pills (41:35-36, A-Ap. 143-44). Later, the parties agreed that the court relied on inaccurate information and that there was no nexus between the death and Loomis's actions (42:3-4).

originally designed to help corrections allocate resources and to identify individual needs in the community (43:10, A-Ap. 175). He believed that COMPAS should not be used as a factor in deciding whether to incarcerate someone (43:10-11, A-Ap. 175-76). He based this conclusion on the fact that COMPAS was not designed to be a factor at sentencing (43:12, A-Ap. 177), and that it is risky to use a tool for a purpose different than its original purpose (43:21-22, A-Ap. 186-87). He felt that courts could overestimate the value of the COMPAS risk predictions and assign too much weight to the conclusions (43:12-13, A-Ap. 177-78). But he agreed that courts could consider it at sentencing when identifying treatment needs (43:26, A-Ap. 191).

Dr. Thompson told the court that the risk assessment considers only the individual's age at the time of the first offense, the current age, and the criminal history (43:13, A-Ap. 178). He did not know how much each factor was weighed because Northpointe does not release its trade secrets (43:17, A-Ap. 182).³ The COMPAS evaluation considered many factors within the category of criminal history including arrest history, placement, and types of crimes (43:29, A-Ap. 194). He believed that the COMPAS tool needed to be cross-validated in Wisconsin in order to conclude that its predictions were valid using a Wisconsin population (43:16, A-Ap. 181). He also believed that COMPAS assessment ignored individual characteristics in favor of group characteristics (43:23-24, A-Ap. 188-89). He did not know how COMPAS considered gender, but believed that it did consider it (43:24, A-Ap. 189).

Dr. Thompson felt that actuarial assessment and professional judgment led to the best sentencing decisions, but courts should not consider COMPAS (43:30-31, A-Ap. 195-96). Instead, Dr. Thompson wanted courts to consider other instruments, but did not name those other instruments (43:30-31, A-Ap. 195-96). COMPAS is the most widely used risk assessment tool nationwide (43:41, A-Ap. 206). Dr.

³Northpointe, a consulting and research firm, created the COMPAS assessment software. See <http://www.northpointeinc.com/>.

Thompson agreed that all the information measured in COMPAS is relevant to sentencing (43:35-37, A-Ap. 200-02).

The circuit court denied Loomis's motion (43:52, A-Ap. 217). The court concluded that professional judgment and actuarial science together provides the best sentencing outcomes (43:53, A-Ap. 218). The court found that even if COMPAS had not been attached, Loomis's sentence would have been exactly the same (43:55, A-Ap. 220).

ARGUMENT

I. The circuit court properly exercised its discretion in sentencing Loomis.

A. Standard of review.

A circuit court properly exercises its discretion if, by reference to the relevant facts and factors, it explains how the sentence's component parts promote the sentencing objectives. *State v. Gallion*, 2004 WI 42, ¶ 46, 270 Wis. 2d 535, 678 N.W.2d 197. There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *Id.* ¶ 18; *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

A court erroneously exercises its discretion when it "imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

B. Legal principles.

The objectives of the sentence, including, but not limited to, the protection of the public, punishment, rehabilitation, and deterrence should be articulated on the record. *Gallion*, 270 Wis. 2d 535, ¶ 40. Which objectives should be given greatest weight is up to the circuit court to identify in each case. *Id.* ¶ 41. Courts must also describe, on the record, the facts relevant to the objectives. *Id.* ¶ 42.

The circuit court shall impose the minimum sentence consistent with the gravity of the offense, the rehabilitative needs of the offender, and the need for protection of the public. *Id.* ¶ 44 (quoting *McCleary*, 49 Wis. 2d at 276). The factors that a circuit court can consider in sentencing include: past record of criminal offenses; history of undesirable behavior patterns; the defendant's personality, character and social traits; results of presentence investigation; vicious or aggravated nature of the crime; degree of defendant's culpability; defendant's demeanor at trial; defendant's age, educational background and employment record; defendant's remorse, repentance and cooperativeness; defendant's need for close rehabilitative control; the rights of the public; and the length of pretrial detention. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984); *see also Gallion*, 270 Wis. 2d 535, ¶ 43 n.11. "An improper sentencing factor is a factor that is totally irrelevant or immaterial to the type of decision to be made." *State v. Samsa*, 2015 WI App 6, ¶ 8, 359 Wis. 2d 580, 859 N.W.2d 149 (internal quotation marks omitted).

C. The COMPAS risk assessment tool provides the circuit court with relevant information about an offender's risk of reoffending and rehabilitation needs.

Evidence based risk assessment tools, including COMPAS, give courts information relevant to two sentencing objectives: protection of the community and rehabilitation of the defendant. Sentencing courts must consider the risk that the offender will reoffend, whether treatment will help, and whether that treatment needs to be in an institution or in the community. These judgments are notoriously imperfect because they are derived from intuitions and abilities of individual decision-makers who lack professional training in the sciences of human behavior. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803, 815 (Apr. 2014).

Evidence based sentencing practices show considerable promise in helping courts achieve the objective that an individual sentence that is effective in achieving the goals of reform and minimizing recidivism. *Malenchik v. State*, 928 N.E.2d 564, 569 (Ind.

2010). These assessment instruments “can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or program, and other such corollary sentencing matters.” *Id.* at 573.

Evidence has a better track record for assessing risks and needs than intuition alone. John Stuart & Robert Sykora, *Minnesota’s Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 Wm. Mitchell L. Rev. 426, 466 (2011). Dr. Thompson acknowledged this at the postconviction motion hearing (43:30-31, A-App. 195-96). A survey of state chief justices conducted by the National Center for State Courts found that the chief justices surveyed believed that using evidence based practices to promote public safety and reduce recidivism was one of two most important sentencing reforms. Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. Rev. 585, 587 (Winter 2009).

Actuarial tools are proven by the most rigorous research to work to significantly reduce offender recidivism. Warren, 43 U.S.F. L. Rev. at 586. The research showed that effective treatment programs are ones that are “specifically targeted to address the identified needs of a certain group of offenders in certain ways.” *Id.* at 598. The first task in applying the principles of evidence based practice to a sentencing decision is to determine “whether the defendant is a suitable candidate for a rehabilitation or treatment program.” *Id.* at 599.

Risk assessment tools apply three principles in addressing recidivism: risk, need, and responsivity. Pamela M. Casey et. al., *Offender Risk & Needs Assessment Instruments: A Primer for Courts*, National Center for State Courts, at 5 (2014), http://www.ncsc.org/~media/Microsites/Files/CSI/BJA%20RNA%20Final%20Report_Combined%20Files%208-22-14.ashx. COMPAS provides circuit court’s with information relevant to the risk of reoffending, the need to protect the public, the offender’s needs to accomplish rehabilitation, and the

offender's ability to change. This relevant information should be considered by the circuit courts at sentencing.

If the court imposes a sentence inconsistent with risk-need-responsivity principles, "the correctional agency is required to implement the sentence even though it is not an effective use of resources and may even increase the offender's likelihood of reoffending." Pamela M. Casey et. al., *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, National Center for State Courts, at 7 (2011), <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx>.

The risk principle holds that length of sentence and treatment should match the offender's level of risk. *Id.* So a low-risk offender should receive less supervision and services, and higher-risk offenders should receive more intensive supervision and services. *Id.* The need principle requires that treatment services target an offender's dynamic risk factors and criminogenic needs to reduce the probability of recidivism. *Id.* Finally, the responsivity principle shows that treatment interventions for offenders should use cognitive social learning strategies tailored to an individual offender's specific characteristics. *Id.* Research has shown that when sentences and services match all three of these principles, results are that the current recidivism rates show their highest reduction. *Id.*

Loomis relies on Dr. Thompson's opinion that Northpointe developed COMPAS for allocating resources in prison and in the community and not for use at sentencing. Loomis's brief at 28. COMPAS was first developed in 1998 and has been revised over the years. *Practitioners Guide to COMPAS Core*, Northpointe, Inc., at 1 (2015), http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-_031915.pdf. The court of appeals concluded that the original purpose of COMPAS was not, by itself, problematic. Certification by Wisconsin Court of Appeals, at 5, *State v. Loomis*, No. 2015AP157-CR (Sept. 17, 2015) (A-Ap. 105). It provides relevant information at sentencing.

Loomis argues that a risk assessment tool cannot be used at sentencing because it cannot meet the *Daubert* rule for admissibility of scientific evidence. Loomis’s brief at 23-24. *See also* Wis. Stat. § 907.02. Sentencing hearings are exempt from the rules of evidence to provide courts with the widest range of relevant information to reach an informed decision. At sentencing, there is no need for information to be established beyond a reasonable doubt. *See State v. Arredondo*, 2004 WI App 7, ¶ 54, 269 Wis. 2d 369, 674 N.W.2d 647. And there is no burden of proof. *State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). When rejecting a similar challenge the Indiana Supreme Court held that a circuit court is aware of and knows the law and considers only evidence properly before the court in reaching a decision. *Malenchik*, 928 N.E.2d at 574. The same principles apply in Wisconsin. *See Arredondo*, 269 Wis. 2d 369, ¶ 54.

Actuarial tools provide courts with information about the offender’s potential response to treatment and allow the court to match treatment to offenders to achieve the best outcomes. Warren, 43 U.S.F. L. Rev. at 613-14. For treatment to be effective, it must be targeted to the individual. *Id.* at 598. Risk assessment tools provide a sentencing court with relevant information about an offender’s risk of reoffending and rehabilitation needs.

D. COMPAS provides courts with accurate, valid, and reliable information.

Wisconsin Department of Corrections (DOC) selected COMPAS as the risk assessment tool to use throughout an offender’s lifecycle in the system and is available to Wisconsin circuit courts at sentencing. *Samsa*, 359 Wis. 2d 580, ¶ 13. COMPAS provides courts with accurate, valid, and reliable information for determining potential recidivism and assessing an offender’s treatment needs. Loomis argues that COMPAS cannot be objectively tested because of the proprietary nature of the tool. Loomis’s brief at 24. But that is not the case. In fact, COMPAS has been objectively tested to determine its reliability and validity.

COMPAS is a fourth generation risk assessment instrument “designed to help criminal justice practitioners determine the

placement, supervision, and case-management of offenders in community and secure settings”.⁴ Casey et. al., *A Primer for Courts*, at A-20. COMPAS is one of the best known fourth generation assessment tools. Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am Crim. L. Rev. 231, 239 (Spring 2015). The COMPAS core assessment includes 137 items combined into risk and need scales. Casey et. al., *A Primer for Courts*, at A-21. The needs scales are divided into five categories: criminal involvement, relationships/lifestyle, personality/attitudes, family, and social exclusion. *Id.*

Dr. Thompson testified that the bar charts for risk are determined by only three factors, age at first offense, current age, and criminal history (43:13, A-Ap. 178). This is incorrect. The pretrial release risk assessment most commonly factors in current charges, pending charges, prior arrest history, previous pretrial failure, residential stability, employment status, community ties, and substance abuse. *Practitioners Guide to COMPAS Core*, at 27. The general recidivism risk assessment primarily factors in prior criminal history, criminal associates, drug involvement, and early indicators of juvenile delinquency problems. *Id.* All these factors are well known predictors of risk. *Id.* Finally, the violent recidivism risk scale measures history of violence, history of non-compliance,

⁴“The first generation of assessments consisted of clinicians conducting unstructured or semi-structured interviews to extract relevant information that, based on the professional’s experience and knowledge, constituted recidivism risk factors.” Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am Crim. L. Rev. 231, 236 (Spring 2015). The “[s]econd generation assessments were empirically-based scoring instruments of those variables that were statistically shown to correlate with recidivism.” *Id.* at 237. This generation focused only on risk, not needs. *Id.* The third generation tools “combined actuarial assessment with directed professional judgment and integrated static with dynamic factors.” *Id.* The fourth generation tools “supplemented the risk-needs combination with responsivity principles and a longer perspective on case management spanning from intake through case closure.” *Id.* at 238.

vocational/educational problems, the person's age-at-intake, and the person's age-at-first-arrest. *Id.* at 28.

The COMPAS tool takes the 137 answers and transforms the raw scores into deciles. Casey et. al., *A Primer for Courts*, at A-22. Each decile is used to determine the level of risk probability. *Id.* The deciles scores are based on a comparison of offender characteristics to a representative criminal population. *Id.* The tool applies cutoff scores to each of the need scales to determine the likelihood that the offender has that specific need. *Id.* The cutoff scores are based on a 1-10 scale where 1-5 means unlikely, 6-7 means probable, and 8-10 means highly probable. *Id.*

COMPAS provides more accurate risk and needs assessment than judicial assessment alone. Because of that, COMPAS is not just an appropriate tool to guide courts and sentencing, it will provide more accurate predictions and better outcomes for the offender specifically and for society as a whole. Dr. Thompson testified that the training manuals provided by DOC on COMPAS "specifically says that it's not designed to be used in sentencing and it should not be" (43:20, A-Ap. 185). But "COMPAS is an automated decision-support software package that integrates risk and needs assessment with several other domains, including sentencing decisions, treatment and case management, and recidivism outcomes." Tim Brennan et. al., *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 Criminal Justice and Behavior 21, 22-23 (Jan. 2009), <http://cjb.sagepub.com/cgi/content/abstract/36/1/21>. It should be used at sentencing. The State consulted with COMPAS trainers and found no specific training materials or direction indicating that COMPAS should not be used at sentencing.

Loomis asserts that COMPAS cannot be objectively tested without knowing how it works. Loomis's brief at 24. This is not true. COMPAS has been tested for reliability and validity. Loomis, in fact, relies on one such study in the next paragraph of his brief. *See id.*, (citing Jennifer L. Skeem & Jennifer Eno Loudon, *Assessment of Evidence on the Quality of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)* (Dec. 2007), http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/COMPAS_Skeem_EnoLouden_Dec_2007.pdf).

It is important to note that one or more people simply analyzing the underpinnings of the COMPAS instrument would not yield information about its validity. The determination of predictive validity occurs through the scientific process of tracking individuals over time and conducting recidivism follow-up related to the individual risk score. This process exposes the accuracy of the assessment by providing the true failure rate by risk level. It allows the researcher to establish a correlation coefficient between the predictive behavior measured by the instrument and the actual outcome. The propriety methodology behind COMPAS is not needed to complete such a validation study.

The National Center for State Courts articulates standards for determining whether a risk need assessment tool is a good tool. Casey et. al., *A Primer for Courts*, at 13.

First, is the tool reliable? *Id.* Reliability is whether it produces consistent results if re-administered by the same person a second time or by a different person. *Id.* A good reliability score is 0.60-0.74 and an excellent score is 0.75-1.00. *Id.* In testing, COMPAS scored 0.70 for internal consistency and 0.70-1.00 for test-retest reliability. *Practitioners Guide to COMPAS Core*, at 24-25. Both scores placed COMPAS in the good to excellent category for reliability.

Second, is the tool valid overall? Casey et. al., *A Primer for Courts*, at 14. This requires consideration of the tools ability to measure what it purports to measure. *Id.* Validity is measured as the area under the curve, which represents the computed probability of the number of correct classifications versus the number of incorrect

classifications. *Id.* at 17. If the area under the curve is 0.50 then the assessment tool is no better than chance. *Id.* The closer the area under the curve is to 1.00, the more effective the tool is at discriminating between recidivists and non-recidivists. *Id.* COMPAS has an area under the curve score for risk predictability of 0.66 to 0.73. *Id.* at A-23. This places COMPAS in the moderate predictability range. *Id.* at 17.

Third, is the tool valid with all subpopulations of local offenders? COMPAS showed no systematic differences by race or gender in tests of internal consistency. *Id.* at A-23.

Fourth, is the tool easily susceptible to manipulation? *Id.* at 18. The test contains a lie scale and random responding test to determine whether the respondent answering dishonestly or providing random responses to the questions. *Practitioners Guide to COMPAS Core*, at 45-46. It will detect manipulation with these tools.

Fifth, has the tool been independently evaluated? Casey et. al., *A Primer for Courts*, at 19. Independent evaluations have resulted in mixed findings. *Id.* at A-24. One test found high test-retest reliability and acceptable predictive validity. *Id.* A second found COMPAS most predictive with Caucasian recidivism and least predictive of African-American recidivism. *Id.* Finally, a third test found COMPAS easy to apply with internal consistency reliability, but concluded there was no sound evidence to indicate predictive validity, construct/content validity, or high inter-rater reliability in COMPAS. *Id.* COMPAS has been independently tested.

Also, the National Drug Court Institute identifies COMPAS as a “recommended instrument” and was the only assessment tool to receive a “Good-Excellent” grade in terms of predictive validity. Ralph C. Serin & Christopher T. Lowenkamp, *Drug Court Practitioner Fact Sheet: Selecting and Using Risk and Needs Assessments*, National Drug Court Institute (December 2015), http://www.ndcrc.org/sites/default/files/selecting_and_using_risk.pdf.

And sixth, what are the limitations in what is empirically known about the tool? Casey et. al., *A Primer for Courts*, at 19. The

National Center for State Courts does not list any limitations empirically with COMPAS. *Id.* at A-19-29.

Based on these measures, COMPAS is a reliable and valid tool for measuring risk of reoffending and the needs of the offender. COMPAS allows courts to create smarter sentences and more carefully target those individual offenders who should be imprisoned and those who are most appropriate for treatment or community corrections. This leads to the most effective and efficient sentences.

E. The circuit court properly exercised its discretion at sentencing and did not rely on an improper factor.

Loomis argues that the circuit court should not have relied on the COMPAS assessment at sentencing. Loomis's brief at 16-25. The State agrees that the circuit court did rely on COMPAS at sentencing, but believes that the circuit court did not erroneously exercise its discretion. It considered relevant sentencing factors and sentenced Loomis within the maximum allowable penalties. The information from COMPAS is one such relevant sentencing factor. Accordingly, this court should affirm Loomis's sentence.

Courts can use the COMPAS assessment in sentencing. *Samsa*, 359 Wis. 2d 580, ¶ 13. It provides relevant information about protecting the public and the offender's rehabilitation needs and outlook. For courts to exclude the use of the COMPAS assessment at sentencing would be to treat it different than other relevant evidence.

The COMPAS evaluation places the defendant in a category of offenders, but is still individualized to each defendant. The COMPAS assessment asks many questions employing an assessment protocol termed multi-modal assessment. That is, it compiles individualized information about the defendant from several sources including official records, defendant interview and self-report. This best practice in assessment allows the instrument then to generate the most thorough, accurate and individualized profile, assessing overall risk in five areas and criminogenic needs in 19 areas. Casey

et. al., *A Primer for Courts*, at A-21. It is possible that two offenders might answer all questions the same, but it is unlikely.

Loomis states that the COMPAS assessment warns courts not to use it to decide a sentence. Loomis's brief at 29. Loomis's COMPAS evaluation states, "risk scores are not intended to determine the severity of the sentence or whether the defendant is incarcerated" (43:25, A-Ap. 190). This is the same disclaimer in all COMPAS evaluations. *See Samsa*, 359 Wis. 2d 580, ¶ 12.

The statement explicitly addresses only the risk scores, and does not apply to any of the other parts of the COMPAS assessment. The COMPAS assessment discusses a variety of factors that are relevant to the court's sentencing decision. The assessment discusses areas where the defendant will need to improve to lessen his risk for re-offense. That discussion is important information that the court can and should consider at sentencing. Much of this information is already available to the court in the rest of the PSI.

The risk score should not determine the severity of the sentence or whether an offender is incarcerated. But it does not mean that a risk score cannot be considered at all by the court at sentencing. Instead, the score alone cannot be used to make those decisions. It also means that a high score should not automatically mean that an offender must be sentenced to incarceration. The statement does not preclude using the score as a factor among the many others a sentencing court considers at sentencing. It is particularly relevant when considering the need to protect the public.

A court cannot decide to place a defendant in prison solely because of his score on COMPAS, but also cannot ignore the COMPAS score completely. COMPAS has a role at sentencing. COMPAS provides individualized relevant information based directly on how the defendant responded to questions. The COMPAS assessment is one of many factors a court can consider at sentencing. Here, the circuit court considered all the relevant sentencing factors and drew a reasonable conclusion based on those factors.

II. The circuit court did not violate Loomis's due process right to be sentenced on accurate information.

A. Standard of review.

Whether a defendant has been denied this due process right is a constitutional issue that a reviewing court decides independently from the circuit court. *State v. Travis*, 2013 WI 38, ¶ 20, 347 Wis. 2d 142, 832 N.W.2d 491.

B. Legal principles.

"A defendant has three due process rights at sentencing: (1) to be present at the hearing and to be afforded the right to allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information." *State v. Borrell*, 167 Wis. 2d 749, 772, 482 N.W.2d 883 (1992).

A sentence based "upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand." *Travis*, 347 Wis. 2d 142, ¶ 17. A defendant who moves for resentencing based on the circuit court's use of inaccurate information at the sentencing hearing must show both that: (1) the information was inaccurate and (2) the court actually relied on the inaccurate information in the sentencing. *Id.* ¶ 21 (citing *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis. 2d 179, 717 N.W.2d 1). If a defendant can meet both requirements, then the burden shifts to the State to prove that the error was harmless. *Id.* ¶ 23.

C. Loomis fails to show that the circuit court's reliance on the COMPAS report violates his due process rights.

Loomis claims the COMPAS report may have been inaccurate, but he cannot prove it because he does not know how COMPAS calculates risk. Loomis's brief at 22-23. Loomis does, of course, have a due process right to be sentenced based on relevant, reliable, and accurate information. *See Travis*, 347 Wis. 2d 142, ¶ 17. He also must

be given the factual information that the sentencing court relies upon and be given a meaningful opportunity to rebut it. He had that opportunity at the outset of a sentencing hearing. Loomis did not dispute the accuracy of the PSI or the COMPAS assessment except to tell the court he had a job (41:5).⁵

Loomis knew what questions the COMPAS evaluation asked. He knew the answers to the questions. Loomis could contest the answer to specific questions on the COMPAS evaluation if he thought that the correct answer was different than the answer entered. Loomis then saw the results of the questioning. This procedure satisfies due process.

Due process does not require disclosure of the formulas used to determine risk. As discussed above, in order to be used at sentencing, the tool must be relevant to the court's sentencing objectives and it must be reliable and valid. COMPAS meets those requirements. COMPAS has been independently, scientifically tested for reliability and validity. The formulas are not needed for that testing.

Loomis could have challenged the conclusions of the COMPAS report, but did not. The Supreme Court upheld psychiatric testimony about future dangerousness at sentencing. *See Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). A court considering a COMPAS report containing conclusions about the defendant's risk of recidivism is similar to a court considering psychiatric testimony about future dangerousness. In neither case can the defendant know the weight given to each factor in reaching the conclusion. But just because Loomis does not know exactly how the conclusion was reached does not preclude him from challenging that conclusion.

Loomis's reliance on *Gardner v. Florida*, 430 U.S. 349 (1977), is misplaced. Loomis's brief at 22-23. In *Gardner*, the court withheld

⁵Neither the PSI report nor the COMPAS evaluation is contained in the appellate record. Record number 14 is labeled as the PSI, but only contains the alternative PSI (14).

portions of the presentence investigation report from the defendant. *Gardner*, 430 U.S. at 351. The court held that a defendant is denied due process when the death sentence is imposed in part because of information which he had no opportunity to deny or explain. *Id.* at 362. Wisconsin has applied this holding to all cases. *See State v. Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989).

These cases are completely different from Loomis's case. Loomis knew what questions he was asked as part of the COMPAS assessment. He knew the results of the COMPAS evaluation. He had the ability to challenge those conclusions. He had the ability to challenge the answers to the COMPAS evaluation. The court did not withhold any information from Loomis. Loomis's due process rights have not been violated.

D. The COMPAS measurement of risk is more accurate than any other method of risk assessment.

Likewise, Loomis argues that because the COMPAS report is not an individualized assessment but rather a comparison to a class of offenders, it may have overestimated his risk to reoffend. Loomis's brief at 27. Some commentators also argue that risk assessment tools should not be used because the error rate is too high. *See Starr*, 66 Stan. L. Rev. at 846-47.

Currently, no method of risk assessment is without error. And courts are already required to assess risks and needs at sentencing. The best assessment requires use of an actuarial tool and professional judgment because actuarial tools are far better predictors of risk than professional judgment alone. *Warren*, 43 U.S.F. L. Rev. at 603.

Simply because the conclusions in the COMPAS report have the potential to incorrectly predict the risk of a future offense by the individual offender does not mean the information is inaccurate. It is not. A circuit court is presumed to know the law and consider only evidence properly before the court in reaching a decision. *See Malenchik*, 928 N.E.2d at 574. Circuit courts know that the risk score on the COMPAS report is not a guarantee of future action, but

instead a prediction based on the information available at the time. As such, it is not inaccurate because it is not a guarantee of a result, but a prediction. Reliance on COMPAS does not violate a defendant's due process rights.

III. Loomis fails to meet his burden to prove that the circuit court relied on his gender at sentencing.

A. Standard of review.

Whether a defendant has been denied this due process right is a constitutional issue that a reviewing court decides independently from the circuit court. *Travis*, 347 Wis. 2d 142, ¶ 20.

B. Legal principles.

A defendant has a due process right not to be sentenced on the basis of gender. *State v. Harris*, 326 Wis. 2d 685, ¶ 33. The defendant has the burden to prove by clear and convincing evidence that the circuit court actually relied upon gender. *Id.* ¶¶ 33-35.

Different treatment of sexes requires the classification to bear a substantial relationship to important governmental objectives. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The different treatment cannot be based on overbroad generalizations based on sex that are entirely unrelated to any differences between men and women or that demean the ability or the social status of the affected class. *Parham v. Hughes*, 441 U.S. 347, 354 (1979). Gender based classifications based on administrative convenience or outworn clichés that reflect archaic and overbroad generalizations are prohibited. *Id.* at 355.

Women commit violent acts at a much lower rate than men., John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoner, Predators, and Patients*, 92 Va. L. Rev. 391, 416 (May 2006). This has been known for as long as official records have been kept. *Id.* Men and women have different rates of recidivism and different rehabilitation potential. Hamilton, 52 Am. Crim. L. Rev. at 251. For example, in a Florida study, researchers found that

imprisonment had a greater deterrence effect for women. *Id.* Researchers concluded that a long sentence was a negative predictor of violent recidivism for male offenders, but a positive predictor for women. *Id.*

The COMPAS assessment does not ask for the gender of the offender. Gender is not one of the criminogenic factors used in assessing risk.⁶ Instead, COMPAS has a different automated risk and needs assessment specifically for women offenders. *See Northpointe Institute for Public Management, Inc., COMPAS Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies*, at 3 (Jan. 14, 2010), http://www.northpointeinc.com/files/technical_documents/Selected_Compas_Questions_Posed_by_Inquiring_Agencies.pdf. This assessment is not currently used by the DOC when preparing PSI reports.⁷

Currently DOC uses the same COMPAS assessment on both men and women. The only different treatment between the sexes is that when comparing the output from the assessment to the data from the group of offenders, COMPAS compares women to women and men to men. Simply having two different risk scales does not mean that the COMPAS assessment improperly considers gender.

⁶Loomis states that gender is a criminogenic factor used in COMPAS. Loomis's brief at 20. As support, Loomis cites to Tim Brennan, *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 Criminal Justice and Behavior 21 (Jan. 2009) (28:1-10). Nothing in that document states that gender is a criminogenic factor used in COMPAS. A criminogenic factor is something that if left unaddressed or untreated has been proven through research to contribute to future crime. *See Criminogenic*, The Free Dictionary, <http://www.thefreedictionary.com/criminogenic> (last visited January 13, 2016). Gender is not criminogenic and is not a part of the risk assessment at all. Gender is used in COMPAS only to compare the individual offender to a "norming" group of his or her own gender.

⁷The DOC never plans to use the assessment in PSIs. Instead, once it is used in Wisconsin, it will be used for reentry purposes and transitional case planning.

C. Use of the COMPAS tool at sentencing did not violate Loomis's due process rights.

Loomis asserts that the court violated his due process rights by sentencing him based on his gender. Loomis's brief at 21. Loomis's argument stems from the fact that the developers of COMPAS have gender-specific risk assessments. *Id.* He fails to meet his burden.

Given the statistical evidence that men and women reoffend at different rates, it would overestimate an individual man's risk to compare him to a mixed gender group. This would result in less accurate predictions and would make COMPAS less reliable. In order to be accurate, COMPAS must compare profiles of women to other women and men to other men.

Using gender-neutral tools would artificially inflate or deflate risk. Consider the following example: Assume the average male height is 5'10" tall. Then compare a 6' tall male to a norm group of men and he looks a little taller than the norm. On the other hand, assume the average female height is 5'6" tall. The new group with equal numbers of women and men has an average height regardless of gender is 5'8" tall. Then comparing the same 6' tall male to a group of 5'8" tall people, he would be considered significantly taller than the norm group average.

The same is true for reoffense risk. Because men reoffend at a greater rate than women, to compare men to men in effect tempers the individual's risk score. Loomis's risk score would go up if COMPAS had compared him to a gender-neutral group of offenders, and not just to other men.

The circuit court did not violate Loomis's due process rights at sentencing. Loomis fails to meet his burden.

IV. The circuit court properly exercised its discretion when it concluded that Loomis drove a car while his friend shot out of the car window.

The circuit court can consider uncharged and unproven offenses regardless of whether the defendant consented to having the charge read-in or dismissed outright. *State v. Frey*, 2012 WI 99, ¶ 47, 343 Wis. 2d 358, 817 N.W.2d 436. Loomis knew that the court could consider his dismissed charges. At sentencing, the court believed the State's version of the events, and found Loomis's role to be an aggravating factor. The circuit court properly exercised its discretion.

Loomis argues that the circuit court instead simply concluded that Loomis committed the crime of recklessly endangering safety because that charge was read-in at sentencing. Loomis's brief at 34.

At the plea hearing, Loomis did not admit to driving the car during the shooting and the court wanted to ensure that Loomis understood that it could disagree and then consider the crime. At the end of the hearing, Loomis understood that the court probably would consider the dismissed charges and asked for a few minutes to consider whether he would still plead no contest (40:16-17, A-Ap. 129-30). Loomis wanted to go ahead with his plea (40:18-19, A-Ap. 131-32).

At sentencing, the court concluded that Loomis drove the car when Michael Vang shot from the vehicle (41:33-34, A-Ap. 141-42). The shooting might have resulted in killing one or more people (41:34, A-Ap. 142). The court believed the State's explanation was more consistent with the facts, and therefore gave that version greater weight at sentencing (42:16, A-Ap. 160). The court concluded that it was entitled to consider the read-in offense if the court concluded that the evidence supported it (42:21, A-Ap. 165). The circuit court properly exercised its discretion.

The circuit court imposed the sentence that it felt was necessary given the priority the court placed on protecting the public and treatment. The court sentenced Loomis within the statutory

limits and weighed the proper sentencing factors when fashioning a sentence. The court properly exercised its discretion at sentencing. This court should affirm that exercise of discretion.

CONCLUSION

The State requests this Court affirm the circuit court's order denying postconviction relief and the judgment of conviction.

Dated this 19th day of January, 2016.

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 7,112 words.

Dated this 19th day of January, 2016.

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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 19th day of January, 2016.

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