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**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2015AP000157-CR

ERIC L. LOOMIS,

Defendant-Appellant.

On Certification from the Court of Appeals of an 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
ARGUMENT.....	2
I. THE USE AND CONSIDERATION OF THE COMPAS ASSESSMENT AT SENTENCING VIOLATED MR. LOOMIS' CONSTITUTIONAL RIGHTS TO DUE PROCESS.....	2
A. Reliance On COMPAS Is A Violation Of Mr. Loomis' Due Process Rights Because It Includes A Consideration Of Gender.....	2
B. Reliance On COMPAS Is A Violation Of Mr. Loomis' Due Process Rights Because The Proprietary Nature Of COMPAS Prevents A Defendant From Challenging The Scientific Validity Of The Assessment.....	4
C. The Use And Consideration Of The COMPAS Assessment At Sentencing Was Not An Individualized Sentence.....	7
II. THE TRIAL COURT'S CONFUSION ABOUT THE EFFECT OF A DISMISSED BUT READ-IN CHARGE COMPELS THE NEED FOR A NEW SENTENCING.....	10
CONCLUSION.....	11

CASES CITED

Federal

<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	6
--	---

State

<i>State v. Frey</i> , 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436.....	10
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197.....	7
<i>State v. Harris</i> , 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409.....	4,7
<i>See State v. Samsa</i> , 2015 WI App 6, 359 Wis. 2d 580, 859 N.W.2d 149.....	10
<i>State v. Tiepelman</i> , 2006 WI 66, 291 Wis.2d 179, 717 N.W.2d 1.....	4

Other

<i>In re CDK</i> , 64 S.W.3d 679 (Ct. App. Tex. 2002).....	6
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CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Statutes

Wis. Stat. § 907.02.....	7
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<http://doc.helpdocsonline.com>.....5,8
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- Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan L. Rev. 803, 813 (2014).....3,8
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INTRODUCTION

The State continues to miss the import of the COMPAS issues, just as it did at the Court of Appeals level. At the circuit level the State chose to not call any expert witness or to contest defense expert's opinions. Instead it argued that the circuit court did not rely on the COMPAS report. In the Court of Appeals and now before this Court, the State has abandoned that argument, admitted that the circuit court did rely on the COMPAS assessment, but it now mainly argues that COMPAS is valid. It further questions defense expert's testimony on issues that it did not cross-examine him when he was there to explain his opinions.

This case, however, is not about the reliability or validity of COMPAS.¹ Nor is the appeal a general indictment of COMPAS or the Department of Corrections' use of COMPAS within its facilities and programs. Rather, this appeal is about the trial courts' use of COMPAS at sentencing and whether that use violated Mr. Loomis' constitutional rights. Nor is this case about the policy merits of evidence-based sentencing except to the extent that it implicates constitutional issues. As many of the secondary authorities cited by the State discuss, a primary driving force behind the push to use evidence-based sentencing and risk analyses such as COMPAS is the goal of reducing the prison population and funneling convicted defendants into alternatives to prison in hopes of reducing recidivism. *See, e.g.,* Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of*

¹ The State instead of following the issues certified by the Court of Appeals, restates its own statement of issues, but in doing so glosses over the real issues including those certified to this Court.

Evidence-Based Practice to State Sentencing Practice and Policy, 43 U.S.F. L. Rev. 585 (Winter 2009).

While reducing prison populations and recidivism are laudable goals, it cannot be at the expense of a defendant's constitutional rights. If we permit a deviation from constitutional protections in this case because of the purported reliability of COMPAS, we open the doors for any future assessment tools, including ones that are not reliable, to be used. The constitutional protections are a safeguard for abuse and there should never be a justification to circumvent them. The Wisconsin trial courts' use of COMPAS in sentencing violates a defendant's right to due process due to the proprietary nature of the assessment tool and because it is based in part of gender. Moreover, the States' arguments essentially admit that a defendant is being sentenced as part of a group. Therefore, the use of COMPAS further violates the requirement that a sentence be individualized.

ARGUMENT

I. THE USE AND CONSIDERATION OF THE COMPAS ASSESSMENT AT SENTENCING VIOLATED MR. LOOMIS' CONSTITUTIONAL RIGHTS TO DUE PROCESS.

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

The State claims both that COMPAS does not consider gender (Br. at 21) and that gender should be taken into account due to the different recidivism rates of men and women (Br. at 22). It also states without any citation for support that DOC uses the same COMPAS assessment for men and women. (Br. at 21.) It further states, again without

any citation, that DOC does not use the assessment for women only or that it will be used for reentry and transitional purposes only. (Br. at 21 n.7.) As noted in Mr. Loomis' initial brief, COMPAS does indeed take gender into account. COMPAS' own literature cited by Mr. Loomis says so. Dr. Thompson also testified that it does so without any cross-examination from the State on the issue. (R.43:24, A-App. 189; See also his report, R:31B:3, A-App. 112.) Professor Starr also discussed this issue as cited by Mr. Loomis in his initial brief. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803, 813 (2014).

The State's authorities lend further support to Defendant's position. Dr. Hamilton in her article cited by the State asserts that failure to take gender into consideration might be "unjust."

Other parties acknowledge that the failure to take gender into consideration, at least when predicting recidivism risk, itself is unjust. As one observer comments, "[i]ndeed, there seems to be little disputing that males, particularly relatively young men, commit more crimes, particularly violent crimes, than females of any age. If so, it would be irrational not to take those factors into account when predicting future criminality."

Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am. Crim. L. Rev. 231, 255 (Spring 2015)(citation omitted).

In addition, in the 2015 Practitioner's Guide to COMPAS Core cited by the State, the authors specifically state that they developed different risk and need typologies for men and women, and that these are a standard component of COMPAS software. *Practitioner's Guide to COMPAS Core*, at 47, Northpointe, Inc. (2015),

http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-CORE-_031915.pdf. The authors then go on to list different typologies for men and women. *Id.* at 50-54.

Of course, how exactly COMPAS uses gender is unknown due to the proprietary nature of the program. (R.43:13, 17; A-App. 178, 182.) All we know is that it is a consideration. (R.43:24, A-App. 189; R:31B:3, A-App. 112.) Even if it produced accurate results by using gender, it still would be improper for a court to use it at sentencing. This Court has held that imposing a sentence on the basis of race or gender is improper. *State v. Harris*, 2010 WI 79, at ¶33, 326 Wis. 2d 685, 786 N.W.2d 409 (applying *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis.2d 179, 717 N.W.2d 1). It might very well be statistically true that persons of a certain age, gender, and/or race might have much higher risks of recidivism or violence, but it would be a violation of a defendant's constitutional rights to sentence him or her based on those factors. Yet, this is what COMPAS in part does. Therefore, by relying on the COMPAS assessment, the circuit court violated Mr. Loomis' constitutional right to due process, because it sentenced him in part based on his gender.

B. Reliance On COMPAS Is A Violation Of Mr. Loomis' Due Process Rights Because The Proprietary Nature of COMPAS Prevents A Defendant From Challenging The Scientific Validity Of The Assessment.

The State asserts that Mr. Loomis could have challenged the COMPAS findings (Br. at 18-19), but this misses the point. As Mr. Loomis argued, and as noted by the Court of Appeals, the proprietary nature of COMPAS prevents a defendant from challenging the conclusions. (A-App. 104-105.) In a narrative presentence investigation report, the defendant can question factual or historical statements in the report. However, the defendant cannot

question the COMPAS risk assessments, because a defendant does not know how his or her answers to the questions lead to the risk scores. Indeed, the very Department of Corrections officers performing the assessment do not know how the questions are weighted. In DOC's Electronic Case Reference Manual for the COMPAS PSI Process, DOC cautions the assessors that they are not trained in the weight of the questions or how they affect the assessment.

It is important to remember that, you can only testify about things you have direct knowledge about. DCC staff were trained solely as a COMPAS assessors. This training did not include question weighting and scoring calculation in terms of how a particular question will affect the overall outcome of the assessment. If you become aware that the Court would like to subpoena someone who can testify to any of the following, please consult your supervisor:

- The weights of certain questions and how they affect the assessment;
- The validation and/or norming process used by Northpointe;
- Any information related to the science behind the assessment tool

Department of Corrections, *Electronic Case Reference Manual, DCC – COMPAS PSI Process, "PSI Testimony Related to COMPAS,"* <http://doc.helpdocsonline.com>. If the PSI writer does not know how the questions are weighted and how they affect the overall assessment, how is the defendant supposed to question any of the risk assessments in COMPAS?

A Texas court in considering a sex offender risk analysis that also was proprietary compared it to Harry Potter and Hogwarts.

In short, of what the formulas applied by [Dr.] Abel consist, how they were derived, and whether they have ever been subjected to analysis or testing goes utterly unmentioned by [the witness] or anyone else. For all we know they and their components could be mathematically based, founded upon indisputable empirical research, or simply the magic of young Harry Potter's mixing potions at the Hogwarts School of Witchcraft and Wizardry. Again [the witness] simply interpreted the "information" returned from Atlanta. How that undeniably pivotal "information" was contrived, or applied by those in Atlanta remains a mystery, given the record before us and the trial court.

In re CDK, 64 S.W.3d 679, 683-84 (Ct. App. Tex. 2002). Although as the State notes there have been some outside validation studies of COMPAS and hence that is not the issue, this is similar to Dr. Abel's tests in that the defendants do not have access to how the questions are weighted and how the assessment conclusions are thereby derived. It may be math or it might be magic. Presumably it is math, but a defendant is not able to challenge the conclusions as he or she could with a prior presentence investigation report that did not rely on COMPAS assessments.

The State also attacked Mr. Loomis' arguments by incorrectly asserting that he argued that a risk assessment tool cannot be used at sentencing if it does not meet the standards set for in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). (See State Br. at 10.) Yet, that was not the argument. Rather, Mr. Loomis drew an analogy to Wisconsin's adoption of the *Daubert* standard in Wis. Stat.

§907.02 in that it was doubtful if the standard applied the COMPAS assessment could comply. (Br. at 23-24.) Mr. Loomis' stated point was that although COMPAS was not subject to Wis. Stat. §907.02, it was "further evidence of the lack of transparency." (Br. at 24.)

In sum, the trial court's reliance on the COMPAS risk assessments in sentencing violates Mr. Loomis' right to due process, because the information is secret and confidential. As the Court of Appeals noted, there is a lack of transparency.

C. The Use And Consideration Of The COMPAS Assessment At Sentencing Was Not An Individualized Sentence.

The State focuses on trying to buttress the accuracy and validity of COMPAS, but misses the more important problem that by relying on COMPAS a court is not giving an individual sentence. Instead, it is sentencing a defendant as part of a hypothetical risk group. At sentencing, the trial court must fashion an individualized sentence that is based on accurate information. *Harris*, 2010 WI 79, ¶29 (citing *State v. Gallion*, 2004 WI 42, ¶¶39-48, 270 Wis.2d 535, 678 N.W.2d 197). That did not happen here.

The specific due process problem is that reliance on the COMPAS amounts to sentencing Mr. Loomis not based on his unique character and crime, but rather on membership in a class. This is not an individualized sentence as required under Wisconsin law. 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. The State's arguments and its sources support the conclusion that by relying on COMPAS the circuit court was sentencing Mr. Loomis not as an individual, but rather as a member of a group.

First, the developers of COMPAS freely admit that the program is not identifying individual risk. In the 2015 Practitioner's Guide cited by the State, the authors state: "Risk assessment is about predicting group behavior ... it is not about prediction at the individual level." Guide, *supra*, at 31. "Our risk scales are able to identify groups of high-risk offenders – not a particular high-risk individual." *Id.* This is why, as Dr. Thompson testified, COMPAS was designed to assist corrections departments in allocating resources for its prison and community populations. (R.43:10, 12; A-App. 175, 177.) Moreover, the authors state that they expect staff to disagree with the assessment in approximately ten percent of the cases and encourage staff to override the COMPAS score. Guide, at 31.

Second, as noted above, the State in its arguments about gender, along with some of its sources, assert that gender should be considered dividing the defendants into groups. By doing so, in essence they are arguing that the defendant is a member of a group with a higher risk and should be sentenced on that evidence, not that Mr. Loomis himself is a high risk.

The due process problem with the above is that the court is not sentencing the defendant on the basis of the defendant's individual characteristics, but rather as being part of a group. As Professor Starr noted, the court is missing the important piece of the puzzle of a specific prediction of Mr. Loomis' individual risk of recidivism. *See Starr, supra*, at 842. Instead, Mr. Loomis (and other defendants) are being sentenced based on a handful of characteristics that places them into certain risk groups by COMPAS. The DOC assessor is then to integrate that risk score into the sentencing recommendation to be given to the court. *See Electronic Case Reference Manual, supra*, DCC Pre-Sentence Investigation, "Truth in Sentencing Recommendations."

The inaccuracy aspect of Mr. Loomis' argument is not that COMPAS is inherently unreliable, but that it was not

designed for sentencing purposes. Therefore using it at sentencing (in addition to the above issues) runs the risk of sentencing a defendant on inaccurate information. As Dr. Thompson testified, by using COMPAS a court may be overestimating risk because it is not focusing on the individual characteristics of the defendant. (R.43:12, A-App. 177; R.31B:3, A-App. 112.) As argued above, COMPAS assesses group data and using it at sentencing detracts from the trial court's required focus on the individual and his or her characteristics. (R.31B:3; A-App. 112.) It is not that COMPAS is overestimating risk, but that the trial court's use of it may do so.

Well COMPAS itself may not overestimate somebody's risk, but the court that is using COMPAS or trying to consider the COMPAS scales may over estimate risk because the COMPAS is designed to inform the Department of Corrections in general, as a group, about financial decisions, resource allocation and things like that, and it's designed to inform an individual probation agent about programming that a specific defendant may benefit from in the community. So it's designed for these very specific purposes, but when we look at the risk factors that the COMPAS presents to us, which are based on very, very few individual characteristics it's easy for a court to be swayed by the ink at the top of the COMPAS report: With the bar charts. It's very easy to be swayed by that and not to consider first of all how those bar charts got there, what they're comparing them with, if that's even known. It's also, then, that may outweigh or over shadow the court's consideration of more individual factors of things that are idiosyncratic to that individual that the court might generally consider otherwise.

(Dr. Thompson's testimony, R.43: 12-13; A-App. 177-178.) On the other hand, some trial courts have found it understating the risk. *See State v. Samsa*, 2015 WI App 6, ¶5, 359 Wis. 2d 580, 859 N.W.2d 149.

In summary, by using and relying on the COMPAS report at sentencing, a trial court is sentencing the defendant based on belonging to a group and not as an individual. Therefore, using COMPAS at sentencing is inappropriate and improper.

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

Ignoring this Court's prior holdings and cautions, the trial court misunderstood the difference between dismissed charges and those that are dismissed but read-in. The State in its response brief ignores the trial court's misunderstandings. Instead, it simply argues that a trial court can take into account even uncharged or unproven offenses regardless of whether the defendant consents to a charge being read-in, citing *State v. Frey*, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. (State Br. at 23.) The State is correct in that limited statement of the law, but completely ignores the issue here. The issue was not whether the trial court could consider the read-in charges, but rather whether the trial court made misstatements about the difference between read-in and supposedly dismissed outright charges, and whether those mistakes affected Mr. Loomis' sentence. As set forth in detail in Defendant's initial brief, the trial court appeared to misunderstand this Court's pronouncements in *Frey* about the significance of read-in charges and its caution not to use the term dismissed outright. (See Br. at 33-35.)

The trial court's misunderstanding is more than harmless error. The trial court initially thought that it must consider the dismissed but read-in charges as true and never truly corrected itself. The court also mistakenly thought that Mr. Loomis was involved in the death of the person to whom he sold the prescription drugs in Case No. 12CF75, something that both the State and defense stipulated was an error and led to a modified sentence in that case. Therefore, the trial 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 only way to cure these errors is to remand this matter for a new sentencing.

CONCLUSION

For the above reasons and those set forth in his initial brief, 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 4th day of February, 2016.

Respectfully submitted,

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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 2993 words.

Dated this 4th day of February, 2016.

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**CERTIFICATE OF COMPLIANCE
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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 4th day of February, 2016.

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