No. 16-6387

In The Supreme Court of the United States

ERIC L. LOOMIS, PETITIONER,

v.

WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
Madison, Wisconsin 53703
(608) 267-9323
tseytlinm@doj.state.wi.us

Attorneys for the State of Wisconsin

QUESTION PRESENTED

Does a trial court violate a criminal defendant's due-process rights at sentencing when it considers—but does not base the sentence upon—an evidence-based recidivism-risk assessment?

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INTRODUCTION

The trial court sentenced Petitioner Eric L. Loomis to six years of confinement and five years of extended supervision after he pleaded guilty to two counts arising from a drive-by shooting. In determining the appropriate sentence, the trial court based the sentence upon numerous indisputably legitimate sentencing factors, including Petitioner's extensive prior recidivism. The gravamen of Petitioner's objection is that, at the end of this explanation of the sentence, the court also referenced an evidence-based recidivism-risk assessment that was included in Petitioner's Presentence Investigation Report. Petitioner contends that this Court should grant his Petition in order to decide when and whether it is proper for trial courts to consider such risk assessments.

The Petition should be denied. The use of risk assessments by sentencing courts is a novel issue, which needs time for further percolation. So far as the State is aware, the decision below is only the second decision from any state supreme court or federal court of appeals analyzing this issue in any detail. In the other decision, the Indiana Supreme Court reached the same conclusion that the Supreme Court of Wisconsin did here: a court can *consider* a risk assessment, so long as it does not base the actual sentence on that assessment. That limited use of risk assessments is entirely consistent with this Court's caselaw.

OPINIONS BELOW

The published opinion of the Supreme Court of Wisconsin (App. A) is available at 881 N.W.2d 749. The certification under Wis. Stat. § (Rule) 809.61 from the Wisconsin Court of Appeals (App. B) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on July 13, 2016. App. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. The State charged Petitioner with five criminal counts stemming from his role as the driver in a drive-by shooting. App. A-5, ¶ 11. Petitioner pleaded guilty to two counts and, as part of the plea, the other charges were dismissed but then read into the record at sentencing. App. A-5–6, ¶ 12. The trial court accepted Petitioner's plea and ordered a presentence investigation. App. A-5–6, ¶ 12.

At the end of the investigation, both Petitioner and the sentencing court received the same Presentence Investigation Report (PSI). *See* App. A-10, ¶ 56; Wis. Stat. § 972.15(2). As relevant here, Petitioner's PSI contained a report of Petitioner's risk of recidivism based on the results of an evidence-based assessment (COMPAS), which rated Petitioner at a high risk to reoffend. App. A-5–6, ¶¶ 12, 14. The Correctional Offender Management Profiling for Alternative Sanctions, or COMPAS, is a "risk-needs" assessment tool created by Northpointe, Inc., which uses information from the defendant's criminal file—such as the number of prior offenses—and from

an interview with the defendant to create both a needs assessment and a risk assessment for the defendant. App. A-6, ¶¶ 13–14. COMPAS compares the defendant's information with group data to generate a "risk score[ ]" meant to "predict the general likelihood that those with a similar history of offending are either less likely or more likely to commit another crime following release from custody." App. A-6, ¶ 15. The algorithms COMPAS uses are confidential, as Northpointe considers them to be trade secrets. App. A-10, ¶ 51. Petitioner's PSI included an explanation of what COMPAS assessments are meant to predict and how those assessments should be used. App. A-6, ¶¶ 15–16. The PSI explained that COMPAS risk assessments "do[ ] not predict the specific likelihood that an individual offender will reoffend" and that they are meant "to be used to identify offenders who could benefit from interventions and to target risk factors that should be addressed during supervision." App. A-6, ¶¶ 15–16. The PSI also cautioned that COMPAS risk assessments "are not intended to determine the severity of the sentence or whether an offender is incarcerated." App. A-6, ¶ 17.

At sentencing, the trial court discussed at length the applicable aggravating and mitigating factors. Supp. App. 4–16. Petitioner had an extensive history of recidivism, including being arrested or charged four times while on probation from prior convictions. Supp. App. 7; *see also* App. A-10, ¶ 55. The trial court properly looked to the fact that Petitioner had been released from prison only two months before being arrested on the present charges, Supp. App. 5, and that Petitioner "ha[d] a fairly continuous history of serious criminal offenses," Supp. App. 7. The court also

found that Petitioner's demeanor indicated that he had not taken responsibility for his role in the drive-by shooting, Supp. App. 10, an "extremely serious" crime that "could easily have resulted in the death of" the target or "innocent bystanders," Supp. App. 12. After articulating these and other considerations—including Petitioner's chaotic upbringing, current family situation, etc., Supp. App. 4–5—the court made its only reference to the COMPAS report: "[y]ou're identified, through the COMPAS assessment, as an individual who is at high risk to the community." Supp. App. 13. "[W]eighing the various factors," the court "rul[ed] out probation because of the seriousness of the crime and because . . . [Petitioner's] history on supervision, and the risk assessment tools that have been utilized suggest that [Petitioner is] extremely high risk to re-offend." Supp. App. 13. The court sentenced Petitioner to six years of initial confinement and five years of extended supervision, which is less than the statutory maximum. App. A-7, 23, ¶ 22 & n.18.

2. Petitioner filed a post-conviction motion, arguing that the court's consideration of COMPAS violated his right to due process. App. A-7, ¶ 23. Petitioner offered expert testimony regarding COMPAS, arguing that COMPAS was not designed for decisions regarding incarceration and that the trial court has little information about how COMPAS analyzes risk. App. A-7, ¶¶ 26–27.

The trial court denied Petitioner's motion, explaining that the court had spent significant time addressing the relevant sentencing factors before mentioning the COMPAS report. App. D-54. As such, the court had made an independent evaluation that Petitioner was high risk for reoffending, and COMPAS "was noted as something

that was consistent with [t]he Court's analysis." App. D-55. COMPAS "was simply corroborative" of the other factors, and "had there been absolutely no mention of the risk assessment tool in the Presentence Report, had the COMPAS not been attached to the presentence report, [ ] *the sentence would have been exactly the same*." App. D-55–56 (emphasis added). Petitioner appealed to the Wisconsin Court of Appeals, which certified the question to the Supreme Court of Wisconsin. App. A-8, ¶ 28.

3. The Supreme Court of Wisconsin held that the trial court did not violate Petitioner's right to due process when it considered the COMPAS report because its decision was based on other considerations and the trial court had properly limited its use of the report. App. A-5, ¶ 9. Because the trial court "considered the appropriate factors," including "the gravity of offense, the character and rehabilitative needs of the defendant, and the need to protect the public," and only "considered the COMPAS risk assessment as 'an observation' to reinforce its assessment of the other factors it considered," the Supreme Court of Wisconsin decided that the "consideration of COMPAS in this case did not violate [Petitioner's] due process rights." App. A-16, ¶¶ 107–110.

As to Petitioner's argument that COMPAS included considerations based on gender, the court explained that, while the extent of COMPAS's reliance on gender was in dispute between the parties, "if the inclusion of gender promotes accuracy, it serves the interests of institutions and defendants, rather than a discriminatory purpose." App. A-13, ¶ 83. Indeed, "it appears that any risk assessment tool which

fails to differentiate between men and women will misclassify both genders." App. A-13, ¶ 83.

As for the use of COMPAS at sentencing going forward, the court decided that the assessments may be used, but carefully "circumscrib[ed]" their use. App. A-8, ¶ 35. "[A] circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed." App. A-15, ¶ 99. All PSIs containing a COMPAS risk assessment must include "a written advisement listing [its] limitations" and "should inform sentencing courts" that (1) "[t]he proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are determined," (2) "[b]ecause COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual," (3) "[s]ome studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism," (4) "[a] COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed. Risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations," and (5) "COMPAS was not developed for use at sentencing, but was intended for use by the Department of Corrections in making determinations regarding treatment, supervision, and parole." App. A-15, ¶ 100. These cautions "should be regularly updated" as new information becomes available. App. A-15, ¶ 101.

REASONS FOR DENYING THE PETITION

I. There Is No Division Of Authority Over The Proper Use Of Evidence-Based Reports At Sentencing

In light of recommendations from bodies such as the Conference of Chief Justices, many States have begun to experiment with assessment tools at sentencing, in order to improve results for both the public and criminal defendants. App. A-5, 8, ¶¶ 1, 36–37; *see, e.g.*, Ariz. Code of Jud. Admin. § 6–201.01(J)(3); Idaho Code § 19–2517; Ky. Rev. Stat. § 532.007(3)(a); La. Stat. § 15:326(A); Ohio Rev. Code § 5120.114(A)(1)–(3); 22 Okla. Stat. § 988.18(B); 42 Pa. Cons. Stat. § 2154.7(a); Wash. Rev. Code § 9.94A.500(1); W. Va. Code § 62–12–6(a)(2). At the same time, the due process implications of reliance on these tools remains a nascent area of law in which there are "few cases." *See* Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am. Crim. L. Rev. 231, 275 (2015). So far as the State is aware, this case involves only the second decision from the highest court of a State or federal court of appeals discussing constitutional issues relating to these tools in detail. In the other case, *Malenchik v. Indiana*, 928 N.E.2d 564 (Ind. 2010), the Indiana Supreme Court approved the use of evidence-based tools at sentencing, explaining that "there is a growing body of impressive research supporting the widespread use and efficacy of evidence-based offender assessment tools." *Id.* at 572–

73. Given the paucity of caselaw in this evolving area of law, further percolation on these issues is warranted.[1]

II. The Supreme Court of Wisconsin Properly Applied This Court's Precedents

A. The Trial Court's Limited Use Of The COMPAS Report Was Consistent With Due Process

During sentencing, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Roberts v. United States*, 445 U.S. 552, 556 (1980) (citations omitted). This freedom of inquiry must be balanced with a convicted defendant's "diminished" right to due process at the sentencing phase (as opposed to the guilt phase). *See Betterman v. Montana,* 136 S. Ct. 1609, 1617 (2016). When striking this balance, this Court has only held that a trial court violates a defendant's due-process rights at sentencing in extreme circumstances: when the court bases its sentence upon "extensively and materially false" information, *Townsend v. Burke*, 334 U.S. 736, 741 (1948), or "misinformation of [a] constitutional magnitude," *United States v. Tucker*, 404 U.S. 443, 447 (1972).

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[1] In a concurring opinion to an unpublished memorandum decision, Justice Loughry of the Supreme Court of West Virginia explained that a West Virginia statute that provided for the use of risk-assessment tools "is merely a tool that may be used by circuit judges during sentencing," the use of which is committed to "circuit judges' discretion." *West Virginia v. Rogers,* No. 14-0373, 2015 WL 869323, at *4–*5 (W. Va. Jan. 9, 2015).

In the present case, the trial court "considered the appropriate [sentencing] factors," including "the gravity of offense, the character and rehabilitative needs of the defendant, and the need to protect the public." App. A-16, ¶¶ 108–09. The court merely used COMPAS to "corroborat[e]" the evaluation it had already made using the sentencing factors, App. D-56, and was well aware of COMPAS's limitations, App. A-16, ¶ 109. As the Supreme Court of Wisconsin explained, this was consistent with Petitioner's due-process rights. App. A-10, ¶¶ 55–56; Pet. 14–15. After all, Petitioner did not argue that the COMPAS report was based upon "extensively and materially false" information, *Townsend*, 334 U.S. at 741, or "misinformation of [a] constitutional magnitude," *Tucker*, 404 U.S. at 447.

Petitioner's claim that this Court's splintered decision in *Gardner v. Florida*, 430 U.S. 349 (1977), mandates that he must have "full access" to all of COMPAS's methodology—including every detail of the algorithms used to create a risk assessment—is wrong. Pet. 13–14. In *Gardner*, the PSI contained a "confidential" portion, which was disclosed to the sentencing court but not the defendant. 430 U.S. at 353. While the jury had recommended a life sentence, the judge sentenced the defendant to death, "based on the evidence presented at both stages of the bifurcated proceeding, the arguments of counsel, and his review of the factual information contained in [the] pre-sentence investigation [report]." *Id.* (citation omitted). This Court concluded that this violated the defendant's constitutional rights, *see id.* at 362, but the case "produced seven opinions, none for a majority of the Court," *O'Dell v. Netherland*, 521 U.S. 151, 162 (1997). As this Court later explained and clarified, the

holding of *Gardner* is "a narrow one": in a death penalty case, a procedure "'which permits consideration of . . . secret information relevant to the character and record of the individual offender' violates the Eighth Amendment's requirement of 'reliability in the determination that death is the appropriate punishment.'" *Id.* (quoting *Gardner*, 430 U.S. at 363–64 (White, J., concurring) (emphasis removed)). *Gardner*'s rationale does not apply where there was "no secret evidence given to the sentencer but not to" the convict. *Id.*

Gardner does not support Petitioner's case. As a threshold matter, because the present case does not involve the death penalty, it is unclear whether *Gardner* has any application here at all. In any event, even if *Gardner* were extended to non-capital cases, *see* App. A-24, ¶ 49 n.26, it would not support Petitioner. This is not a case where "secret evidence [was] given to the sentencer but not to" the convict, *O'Dell*, 521 U.S. at 162: both the trial court and Petitioner received the same PSI, with the same information about COMPAS. Petitioner was free to question his assessment and explain its possible flaws. *See* App. A-10, ¶¶ 53, 55–56. And the trial court did not base its sentence on the COMPAS report. The court based its sentence entirely upon independent considerations and would have imposed the same sentence without COMPAS. App. A-16, ¶¶ 105–110.

Petitioner also appears to be asking for a *Daubert*-style inquiry at sentencing into the efficacy of the methods COMPAS employs to reach its risk-assessment results. *See* Pet. 15 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The Supreme Court of Wisconsin properly rejected this request, as "the rules of

evidence do not apply at sentencing." App. A-24, ¶ 52 n.27; *see also* Wis. Stat. § (Rule) 911.01(4)(c); Fed. R. Evid. 1101(d)(3). And, while Petitioner was not able to challenge the COMPAS algorithms themselves, he could challenge the accuracy of the questions and answers listed on his COMPAS report upon which his risk-assessment scores were based, App. A-10, ¶ 55, and could "review and challenge the resulting risk scores set forth in the report," App. A-10, ¶ 53.

B. The Trial Court Did Not Sentence Defendant Based Upon His Gender

Under the Due Process Clause, a sentencing court may not consider as "aggravating" factors characteristics of the defendant "that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example [ ] race, religion, or political affiliation." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). Although *Zant* was also a death-penalty case, the courts of appeals have extended its reasoning to all sentencing cases and have interpreted *Zant* to mean that a sentence may not be based on "constitutionally impermissible" factors like race, religion, and political affiliation. *See Bates v. Sec'y Fla. Dep't Corr.*, 768 F.3d 1278, 1289 (11th Cir. 2014); *United States v. Traxler*, 477 F.3d 1243, 1248 (10th Cir. 2007); *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). The Supreme Court of Wisconsin has also included gender on this list of impermissible factors. *Wisconsin v. Harris*, 786 N.W.2d 409, 416 (Wis. 2010). To determine whether a sentencing court's decision was "based on" an impermissible factor, courts of appeal will generally look to the sentencing court's "actual basis for imposing a [ ] sentence"—

whether the court imposed a sentence "because of" an impermissible factor, or "because of" a benign factor. *United States v. Borrerro-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989); *see also Yemson v. United States*, 764 A.2d 816, 819 (D.C. 2001); *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986).

Petitioner failed to show that his sentence was based on—"because of"—his gender. *Borrerro-Isaza*, 887 F.2d at 1352; App. A-13, ¶ 85.[2] Regardless of how COMPAS takes gender into account in calculating the algorithm—an issue on which the parties are in sharp disagreement, App. A-12, ¶ 76—the trial court did not base Petitioner's sentence on COMPAS. Instead, the court based the sentence on sentencing factors such as Petitioner's extensive history of recidivism and lack of remorse, and only mentioned COMPAS as "corroborative" evidence. App. D-54–56. As the trial court explained, "had there been absolutely no mention of [COMPAS] . . . the sentence would have been exactly the same," which is reason enough to deny relief. App. D-55, *compare with United States v. Onwuemene*, 933 F.2d 650, 652 (8th Cir. 1991) ("Because we cannot say that the district court would have imposed the same sentence absent this impermissible consideration, we must vacate [defendant's] sentence and remand for resentencing.").

Finally, as to the broader issue of whether a different trial court *could* base a sentence on a risk-assessment that considered gender, that appears to be an entirely novel issue that, so far as the State can tell, no court has addressed. This question,

[2] Petitioner also argues that COMPAS is racially discriminatory, Pet. 18–19, but offers no support for this speculation and concedes that race is not an issue in this case, Pet. 13 n.4.

if it came up in the proper case, would likely turn on the *manner* in which the risk-assessment tool relied upon gender and the assessment's *justification* for doing so. As the Supreme Court of Wisconsin explained below, "if the inclusion of gender promotes accuracy, it serves the interests of institutions and defendants, rather than a discriminatory purpose." App. A-13, ¶ 83. After all, "it appears that any risk assessment tool which fails to differentiate between men and woman will misclassify both genders." App. A-13, ¶ 83. But again, here, the trial court simply did not base the sentence on COMPAS, so this novel, splitless issue is not appropriate for resolution in this case.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

Attorneys for the State of Wisconsin

Wisconsin Department of Justice
17 West Main Street
Madison, Wisconsin 53703
(608) 267-9323
tseytlinm@doj.state.wi.us

January 2017

SUPPLEMENTAL APPENDIX

Excerpts from Circuit Court Sentencing Transcript
La Crosse County Circuit Court (August 12, 2013)

STATE OF WISCONSIN LA CROSSE COUNTY

CIRCUIT COURT BRANCH 4

STATE OF WISCONSIN,

PLAINTIFF

VS.

ERIC L. LOOMIS,

DEFENDANT

SENTENCE HEARING

CASE NO: 13-CF-98
12-CF-75

AUGUST 12, 2013

BEFORE: HONORABLE SCOTT HORNE

CIRCUIT COURT JUDGE

APPEARANCES:

ATTORNEY JULIE NELSON FOR THE PLAINTIFF,
STATE OF WISCONSIN.

ATTORNEY FARHEEN ANSARI FOR THE DEFENDANT,
ERIC LOOMIS, WHO APPEARED IN PERSON.

REPORTED BY:

CHRISTINE TOELLNER,
COURT REPORTER

APPEARANCES

Attorney Julie Nelson
La Crosse County District Attorneys Office
333 Vine St. Rm. 1100
La Crosse, WI 54601

Attorney Farheen Ansari
AF Law
P.O. Box 8822
Madison, WI 53708-8822

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As far as this case goes, you know all the facts. I talked to you. We talked last time about what was going on so I don't think I need to go back to you to that. It's real heavy.

I don't know. I think, that's pretty much it.

THE COURT: All right, Mr. Loomis. Is there any reason I shouldn't go ahead and pronounce sentence?

THE DEFENDANT: No, Sir.

THE COURT: Then, before addressing the sentencing factors I just want to make a couple of comments, Mr. Loomis. Obviously it's an under statement to say that your early upbringing was chaotic with the way you were brought into the world. It was through really some poor circumstances. Obviously, you're not responsible for that and you certainly were presented, from the moment of birth, with some barriers and pretty significant hurdles that you needed to overcome. Having said that, you do have a responsibility to make an honest effort to overcome those circumstances, to become a contributing, law abiding member of the community. And your history suggests that, up to this point at least, you've not been willing to do that. You're still a young man and there's no reason that you can't do that in the future. But at least to this point, I haven't

seen any evidence that you've made an honest effort to overcome those barriers and become a good contributing member of the community.

Miss Mc Shan sees you as someone who is a good father, someone that she relies on, wants involved in her life; and I'm taking her comments at face value. And assuming that she sees potential in you and has some faith that you can become the supportive father and partner that she feels that she needs, and certainly those are factors that The Court needs to take into account. On the other hand, I'm struck by the fact that despite the fact that having a child at home, and as I'm understanding your comments, you were released from prison in December and this incident occurs in February. It's two in the morning. And I guess the question I would have is, if you're really serious about being a good father to your child and good partner to Miss Mc Shan, why is it that you're out at 2:00 in the morning with Mr. Vang, with guns in the car, and shots are fired?

Now, as at any sentencing, The Court has to weigh the gravity of the offense, the need to protect the public, your rehabilitative needs, and character. Probation is to be the sentence unless The Court finds that probation, unbalanced, is not an appropriate

sentence and the court has to articulate the rationale for this, for rejecting the probation.

Now the State, in this case, is making no recommendation.

The Department of Corrections recommendations include one-and-a-half years of incarceration, initial confinement; three years extended supervision, not taking into account the enhanced penalties by virtue of the repeater allegation.

As to Count-3, the Department of Corrections is recommending two to three years of confinement with three years extended supervision. Again, not taking into account of the repeater allegation.

With respect to the revocation case, the offense of manufacture and delivery of a prescription drug, the Department of Corrections is recommending consecutive sentences. I want to make sure I state this accurately, two to three years initial confinement and two years of extended supervision.

You and Miss Ansari are recommending one-and-a-half years initial confinement concurrent to be followed by a period of extended supervision.

Miss Johnson, in the Alternate Presentence Report recommends one-and-a-half years initial confinement with two years extended supervision and then a term in the

county jail for the fleeing offense.

In terms of your criminal history, you have a fairly continuous history of serious criminal offenses. You were adjudicated, apparently, in 1998 for theft from a motor vehicle. As a juvenile, as an adult, we have a 2002 conviction for carrying a concealed weapon as well as the third degree sexual assault conviction. Now, on that offense you were confined to the State prison, Extended Supervision was revoked in 2007 and again in 2008. You were on supervision at the time of that offense for the 2012 or had just finished supervision before the 2012 conviction for delivery of a prescription substance.

There were indications of alternatives to revocation as a result of the violations even after the last release in 2008. Ultimately, you were discharged, but not without additional violations following the 2008 revocations.

Mr. Fries has referred to you as a career criminal, points out that you've been through all the community based programs, describes you as someone who is manipulative of people in the Criminal Justice System.

As I say, you're a young man so you're someone who, by virtue of age, certainly has potential to change. Apparently 32 years old. Ninth grade education. Had

obtained a GED in prison, and I give you credit for that.

You've got a sporadic job history. You've been fired from employment, quit employment, apparently. Now, are working as a tattoo artist on the side.

You, apparently, have treatment needs. You deny AODA needs, however, Miss Johnson, in the assessment tool that she utilized, concludes that you do have a high probability of dependency on substances. That's probably consistent with the continued involvement with controlled substances in form of the delivery charge and the fact that you're associating with individuals, Mr. Vang, who are very actively involved in trafficking of controlled substances.

I'm not suggesting that you're trafficking in substances. At the time of this offense, certainly that hasn't been established in any way.

You do, apparently, have sex offender needs. That's consistent with the conviction for sexual assault as well as the other antisocial conduct as referred to in the Pre-sentence Report.

What is striking and Miss Mernaine's account of the work that you did with her, it's her conclusion that you, apparently, did not invest yourself in the work that you were doing with her. And from the standpoint

of sentencing, that's significant because it leads me to question why I would expect that you would make more of an effort if you're released after a short prison term onto extended supervision. Miss Mernaine does suggest that a psychological evaluation is appropriate.

THE DEFENDANT: Who is Miss Mernaine?

THE COURT: Sandy Mernaine. She did the sex offender work with you.

THE DEFENDANT: I would just like you to take note that I've been in SOT since April 2010. I have had problems because of the range of assaults in the class, and, you know, I ask a lot of questions that probably shouldn't be asked. So I've had problems with, um, where she tells me, you know, you're not leading class; that type of thing. All of my programs I've taken: CGIP -- There was another program. It was a self-help like AODA but it wasn't AODA. I don't think I had any more suggested to me, but I completed them all. It wasn't like I fell off halfway through. I have been, ever since I've been out any time, um, had a UA sample that wasn't dirty or anything. It's very rare that I ever got in trouble for alcohol. I was learning by participation in classes and things, not to, you know, especially with mood altering substances, how it can effect, you know, the way I perform at work. I already

had an anxiety issue so I don't need to get hurt at work and then my insurance ain't paid for or I get a dirty UA while I'm going to school, and I can't go to school now because of that. You know, I pay attention and things like that. It's not like none of this stuff has helped me.

THE COURT: Well, you know, certainly Miss Mernaine's description of your work with her says you were not invested.

THE DEFENDANT: I don't know what that means though. None of that -- Oh. Yeah, yeah, yeah. Okay.

THE COURT: Mr. Loomis, I'm going to ask, I've listened to your comments and I'm going ask that I be allowed to complete this.

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.

The Plea Agreement calls for the shooting related offenses 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. It appears, from all accounts, that Mr. Vang was the person who had the relationship with Mr. [redacted] that he was supplying Mr. [redacted] with substances; and the shooting, apparently, the motivation that I've been given in all the reports and records indicates the motivation may have been stemming from an incident where Mr. [redacted] had reported Mr. Vang to the gang, so to speak, because he had been given this counterfeit substance rather than the drugs that he believed he was purchasing an earlier point in time; and I have been given no reason to be believe that you were in any way involved in that transaction. So certainly, there are differences between you and Mr. Vang in terms of level of involvement in this incident.

I need to take into account the plea agreement that's being made with Mr. Vang where the state is recommending ten years incarceration, and recognize those differences in imposing the sentence for you. However, I can not accept your explanation of your role. I believe you're minimizing. I believe the time frame between the time of the shooting and the time that you're observed in the vehicle with Mr. Vang, short chance in your apprehension, does not allow sufficient

time for Mr. Vang to do the shooting, come to pick you up, you get behind the driver's seat, and then have contact with law enforcement. That time frame is too narrow and given the fact that given that time frame, 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 Mc Shan, you're associating with this individual who is armed with guns and involved heavily in the drug trade.

The crime is an extremely serious one. Everyone seems to be in agreement on that and so the shooting incident could easily have resulted in the death of Mr. [redacted] could also result in innocent bystanders being threatened as a result of stray bullets. That's a very real possibility with this type of incident. One of the reasons that the community is so concerned about this type of incident, innocent people who are in no way involved in the transaction between Mr. Vang and Mr. [redacted] can have their lives equally placed at risk. The impact on the community is a severe one. As

I say, Mr. [redacted] even if he's involved as a customer in the drug trade, should not be put in a position where his life is threatened by bullets. There are natural consequences, but being shot at is not one of them. And in no way, shape, or form can the community tolerate or justify the notion that individuals who are involved in using substances are fair game for this type of crime. The community does have a strong interest in deterrence.

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 extremely high risk to re-offend.

The goals that I believe are the primary goals to be achieved at this sentencing include that of protecting the community while yet providing you treatment in a custodial setting. I believe you're not an appropriate candidate for treatment in the community based programs. I do believe that treatment is best provided, currently, in a custodial setting.

In terms of the length of the sentence that is to be imposed, with respect to the controlled substance

offense, I do believe it's an aggravating factor that an individual died. And in giving that person substances, your basically exploiting the vulnerability or addiction on that person's part, taking the position that once you have given prescription drugs to that individual, you have no responsibility for the outcome. You do. And you know you're exploiting that addiction for your own purposes, recognizing full well the dangers that are inherent in uncontrolled use of prescription drugs.

With represent to the shooting incident, I have addressed that. I think that you had a role. Obviously, it wasn't to the same degree as Mr. Vang.

Weighing and balancing all of those factors and what I'm going to do is, I am imposing consecutive sentences and I'm imposing consecutive sentences because they are very real values that are affected by the crimes that you've been convicted of. Certainly, the delivery offense is entirely separate from the 2013 case. As I say, is aggrivated by the fact that an individual dies as a result of that.

With respect to the two charges that you've been convicted of in the 2013 case, the fleeing charge reflects the danger to the community from individuals who are fleeing law enforcement. Now, in fairness, in that incident, it doesn't appear that the pursuit was a

lengthy one or that individuals were seriously endangered, driven off the road, or that sort of thing.

With respect to the operating without consent, that reflects the crime against Miss [redacted] the impact of that that crime had on her education also reflects the fact that the stolen vehicle was then used in a drive-by shooting in which your were present. I recognize that you didn't steel the car. Mr. Brantner was apparently responsible for stealing this car, but both you and Mr. Vang were made aware of the fact that it was stolen, apparently, prior to the time of the shooting. And obviously, the fact that it was used in the drive-by shooting is a serious aggravating incident or circumstance.

As to Count-1 in 12-CF-75, the total length of the sentence for Count-1 will be five years and six months. The initial period of confinement, is two years and six months. The time that's served on extended supervision is three years and zero months.

As to 13-CF-98, Count-2, the offense of attempting to flee or elude an officer as a repeat offender, the total length of confinement is four years an zero months. The initial period of confinement is two years and zero months. The time he will serve on extended supervision is two years and zero months.

As to Count-3, operating without consent as a repeat offender, both as a party to the crime, the total length of the sentence is seven years and zero months. The initial term of confinement in prison is four years and zero months. The time you'll serve on extended supervision is three years and zero months.

I believe those sentences reflect the gravity ofthe crime, the risk that you pose to the public, butalso putting your sentencing in the context of therecommended sentence. As to Mr. Vang, I don't believeit's appropriate that you be given the same sentence asMr. Vang, given his greater role in the offenses. I amgoing to find that you're eligible for ChallengeIncarceration and the Earned Release Program.

The Court has the discretion to set eligibility. I believe given your criminal history and the seriousness of the offenses that the simply setting eligibility at the minimum period is not appropriate. I'm going tofind that you're eligible for the ChallengeIncarceration and the Earned Release Program afterhaving served 50 percent of the sentencing.

As conditions of extended supervision, you'll undergo and complete a psychological evaluation, undergo and complete an AODA assessment, comply with recommended treatment from both evaluations; that you not possess or

consume any controlled substances without a prescription; that you be subject to random testing as the agent deems appropriate; that you not associate with any individuals who are involved in using or trafficking in controlled substances; that you have no contact with Miss [redacted] no contact with Mr. Vang, no contact with Mr. [redacted] not enter into any bars or taverns; actively seek full time employment as determined by the agent; have no contact with any children under the age of 18 unless authorized by the agent; be required to submit to a DNA test; register with law enforcement within ten days.

I assume he is already on the registry, is he not?

MISS NELSON: Yes.

THE COURT: Be required to continue to register under the sex offender registry.

You will be given credit for 183 days in 13-CF-98 and 169 days credit in 12-CF-75.

Is there anything further from the State's perspective?

MISS NELSON: Judge, restitution?

THE COURT: Restitution in the amount of $2,074.99 to [redacted] as well as the 10 percent surcharge of $207.

Miss Ansari, anything further from the defense perspective?

MISS ANSARI: Your Honor, the two counts in the 13 case, are those concurrent to each other?

THE COURT: No. Each is consecutive, and I've set forth the rationale for that.

MISS NELSON: Then, so they're each consecutive with each other, and in 13-CF-98 that's consecutive to 12-CF-95?

THE COURT: Each of the three counts is consecutive to one another.

Yes, Mr. Loomis?

THE DEFENDANT: How much time did you just give me in? And before that, okay, if my charges are running consecutive and you only give me 50 percent of my time before I'm eligible for boot camp, I don't believe that I will be able to get into boot camp if I'm not on the last bit of consecutive because I'm still -- Even if I complete camp, I'll still have to come back to prison to complete the consecutive term at the end.

THE COURT: I'm not sure I understand. Miss Ansari --

THE DEFENDANT: You said I only have four years on the first half as consecutive with the last half.

THE COURT: You have eight-and-a-half years initial confinement and you'd been eligible for -- It's my intent that you would be eligible for Earned Release and Challenge Incarceration after four years and three months.

THE DEFENDANT: So what you did is, you just gave me eight years in prison for operating a motor vehicle --

THE COURT: Mr. Loomis, I've going to give you a copy of the written explanation of determinant sentence.

Now, Miss Ansari, will go over with you your appellate rights if you believe The Court has abused it's discretion in any fashion. That process would have to be commenced within 20 days.

THE CLERK: As to restitution?

THE COURT: It will be joint and several with Mr. Vang; and I believe that was ordered as a condition of Mr. Brantner's sentence as well.

MISS NELSON: Thank you, Judge.

END OF PROCEEDINGS