No. 16-6387

In the Supreme Court of the United States

ERIC L. LOOMIS, PETITIONER

v.

STATE OF WISCONSIN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the sentencing court's consideration of an actuarial instrument assessing petitioner's risk of recidivism violated his due process rights, either because petitioner was denied an opportunity to challenge the instrument's methodology or because the instrument accounts for gender in formulating its risk assessment.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This case involves a sentencing court's use of a risk assessment, an actuarial measure that seeks to predict an offender's risk of recidivism by scoring and statistically analyzing a set of offender-related data. Analogous instruments have long been used in the correctional setting to determine a released offender's supervision needs. See Admin. Office of the U.S. Courts, Office of Prob. & Pretrial Servs., *An Overview of the Federal Post Conviction Risk Assessment* 4 (Sept. 2011), http://www.uscourts.gov/sites/default/files/pcra_sep_2011_0.pdf ("Criminal justice agencies in the

United States began using actuarial risk assessment instruments for post-conviction supervision as early as 1923."). They have also been incorporated into the pretrial setting. See Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 Fed. Probation 30 (2011) (explaining the development and implementation of actuarial instruments in the federal system).

In recent years, some public officials and scholars have recommended that actuarial risk assessments be used in the sentencing process itself. In 2011, for example, the National Center for State Courts' Conference of Chief Justices and Conference of State Court Administrators recommended that "offender risk and needs assessment information be available to inform judicial decisions regarding effective management and reduction of the risk of offender recidivism."[1] Draft revisions to the Model Penal Code similarly advise that sentencing commissions "develop actuarial instruments * * * that will estimate the relative risks that individual offenders pose to public safety through their future criminal conduct" and incorporate such instruments "into the sentencing guidelines" when they prove reliable. Model Penal Code: Sentencing § 6B:09(2) (Tentative Draft No. 2, 2011).

Several States have embraced this statistics-driven trend, enacting legislation that either requires or permits courts to consider actuarial risk assessments at

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[1] Nat'l Ctr. for State Courts, Conference of Chief Justices and Conference of State Court Adm'rs, *Resolution 7: In Support of the Guiding Principles on Using Risk and Needs Assessment Information in the Sentencing Process* (Aug. 3, 2011), http://www.ncsc.org/~/media/Microsites/FILES/CSI/Resolution-7.ashx.

sentencing. See Pet. App. A9, ¶ 42 & nn.23-24 (citing state laws); Br. in Opp. 7 (same). And Congress has considered, although has not enacted, legislation that would require the Federal Bureau of Prisons to use risk assessments in a manner that could affect the sentences served by federal offenders. See *Recidivism Reduction and Public Safety Act*, S. 1675, 113th Cong., 1st Sess. (2014); *Public Safety Enhancement Act*, H.R. 2656, 113th Cong., 1st Sess. (2013).

Other public officials and scholars, however, have cautioned against incorporating risk assessments into the sentencing process. Some scholars, for instance, have expressed concerns that actuarial instruments that factor in group characteristics raise constitutional questions and depart from the focus on individualized considerations that is a hallmark of modern sentencing. See, *e.g.*, Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. Rev. 671 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803 (2014).

In 2014, based in part on such concerns, the Department of Justice recommended that the United States Sentencing Commission conduct a "study of risk assessment tools and their various uses in the sentencing and corrections/reentry processes" and then "issue a statement of policy about the proper role of these instruments in the federal criminal justice system in particular."[2] Shortly thereafter, the Sen-

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[2] Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legis., U.S. Dep't of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 8 (July 29, 2014), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf; see *Attorney General Eric Holder Speaks at the Na-*

tencing Commission noted its intention "to study risk assessment tools and their various uses, possibly including development of recommendations about the proper role of these tools." 79 Fed. Reg. 49,379 (Aug. 20, 2014). The Sentencing Commission has not yet released any such recommendations.

2. a. In 2013, petitioner was charged with multiple violations of Wisconsin law for his role in driving a stolen car during a drive-by shooting. Pet. App. A5, ¶ 11; see Pet. 2. Petitioner ultimately entered into a plea agreement under which he pleaded guilty to two of the less severe charges: attempting to flee a traffic officer and operating a motor vehicle without the owner's consent. Pet. App. A5-A6, ¶ 12. The trial court accepted the guilty plea and ordered a Presentence Investigation Report (PSR). *Ibid.*

The PSR included as an attachment a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment for petitioner. Pet. App. A6, ¶ 12. COMPAS is a risk- and needs-assessment tool originally designed by Northpointe, Inc., to assist state corrections officials in making placement, management, and treatment decisions for offenders. *Id.* at A6, ¶ 13. The assessment relies on information drawn from the offender's criminal history and an interview with the offender. *Ibid.* The COMPAS program uses that information to generate risk scores

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tional Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th (observing that the Department of Justice had "tak[en] the important step of urging the Sentencing Commission to study the use of data-driven analysis in front-end sentencing").

that are displayed in the form of a bar chart containing three bars: one representing pretrial recidivism risk, another general recidivism risk, and the third violent recidivism risk. Each bar scores an offender's level of risk on a scale of one to ten. *Id.* at A6, ¶ 14.

The COMPAS report appended to petitioner's PSR indicated that he presented a high risk of recidivism on all three bar charts. Pet. App. A6, ¶ 16.[3] The report listed the 21 questions and answers about petitioner's criminal history that formed the basis for his general recidivism risk score, including factors such as the number of times that petitioner had been arrested while on probation and his total number of arrests as an adult and juvenile. *Id.* at A10, ¶ 55; see Wis. Sup. Ct. App. 201-202 (listing other questions, such as whether petitioner was a gang member or had been arrested for a felony property offense involving violence).

The PSR also described how the COMPAS risk assessment should and should not be used at sentencing. It explained that the risk scores are designed to predict the general likelihood that those with a criminal history similar to petitioner's would reoffend after release from custody, not to predict the specific likelihood that petitioner himself would reoffend. Pet. App. A6, ¶ 15. The PSR further warned the sentencing court that it was "very important to remember that risk scores are not intended to determine the severity

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[3] The United States has not been able to view the PSR and attached COMPAS report because those materials are sealed as a matter of state law. Wis. Stat. Ann. § 972.15(4) (West Supp. 2016). This brief relies on the Wisconsin Supreme Court's description of the relevant materials.

of the sentence or whether an offender is incarcerated." *Id.* at A6, ¶ 17 (citation and emphasis omitted).

b. At petitioner's sentencing, the State did not recommend a particular term of imprisonment. Supp. App. 6. In describing "aggravating factors," however, the State emphasized petitioner's prior criminal history, which included "very serious" convictions with "very serious facts." Wis. C.A. App. 145. The State also noted that petitioner "was on supervision when this incident happened." *Id.* at 146. "In addition," the State observed, "the COMPAS report * * * does show the high risk and the high needs of [petitioner]," including that he posed "a high risk of violence, high risk [o]f recidivism, [and] high pre-trial release risk." *Ibid.* Finally, the State emphasized that the crime involved "dangerous behavior" and "a number of named victims." *Id.* at 146, 147.

After hearing from petitioner, his girlfriend, and his attorney, the trial court explained that it needed to weigh "the gravity of [petitioner's] offense, the need to protect the public, [and petitioner's] rehabilitative needs[] and character." Supp. App. 5. The court reviewed at length petitioner's criminal history, his "sporadic job history," and the "treatment needs" that had been identified during petitioner's previous incarceration, including an "assessment tool" that had flagged petitioner's potential "dependency on substances." *Id.* at 8. The court then considered petitioner's offense conduct, calling his crime "an extremely serious" one and faulting petitioner for "minimizing" his role in the offense. *Id.* at 10-12. As relevant here, the court added that petitioner had been "identified, through the COMPAS assessment, as an individual who is at high risk to the community." *Id.* at 13.

The trial court "weigh[ed] the various factors" and explained to petitioner that it was "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 you['re] extremely high risk to re-offend." Supp. App. 13. The court imposed a total of six years of imprisonment, to be served consecutively to a separate term that the court imposed in revoking petitioner's previous term of probation. *Id.* at 15-16, 19.

3. Petitioner filed a motion for post-conviction relief requesting a new sentencing hearing. Pet. App. A7, ¶ 23. He argued in pertinent part that the court's consideration of the COMPAS risk assessment had violated his due process rights. *Ibid.* At a hearing on the motion, the court heard testimony from, and received the expert report of, Dr. David Thompson, a forensic psychologist. Wis. Sup. Ct. App. 110-113, 170-210. Dr. Thompson expressed concerns about the use of COMPAS scores at sentencing, arguing that the instrument was not designed for that purpose. See *id.* at 111-112.

The trial court denied the post-conviction motion in an oral ruling. Pet. App. D52-D56. The court observed that risk assessments raise "legitimate issues," including in settings—such as bond determinations—where those assessments may carry substantial weight. *Id.* at D53-D54. But "[w]e don't have anything like that here," the court stated. *Id.* at D54. Instead, the court explained, it had considered at length "the sentencing factors" and had determined that petitioner "was at [a] high risk to reoffend and that the crime was an extremely serious one." *Id.* at D55. Only then had it "noted" the risk assessment "as something that

was consistent with [t]he [c]ourt's analysis" of those factors. *Ibid.* The court therefore found it "accurate and safe * * * to say that" petitioner's sentence "would have been exactly the same" had "there been absolutely no mention of the risk assessment tool" and "had the COMPAS not been attached to the presentence report." *Ibid.* It then reiterated that the use of COMPAS "was simply corroborative" and that "omitting any reference to the COMPAS would not have affected the [sentencing] decision in any way." *Id.* at D56.

4. On appeal, the Wisconsin Court of Appeals certified to the Wisconsin Supreme Court the question whether a trial court's consideration of a COMPAS risk assessment at sentencing "violates a defendant's right to due process, either because the proprietary nature of COMPAS prevents defendants from challenging the COMPAS assessment's scientific validity, or because COMPAS assessments take gender into account." Pet. App. B1. The Wisconsin Supreme Court accepted the certified question and affirmed. *Id.* at A1-A27.

a. The Wisconsin Supreme Court rejected both of petitioner's due process challenges to the use of the COMPAS risk assessment. The court first observed that, although the report attached to the PSR does "not explain how the COMPAS program uses information to calculate the risk scores," a publicly available COMPAS practitioner's guide makes clear that the "scores are based largely on static information (criminal history), with limited use of some dynamic variables" such as the offender's "criminal associates" and history of "substance abuse." Pet. App. A10, ¶ 54. Because the COMPAS report itself listed "21 ques-

tions and answers regarding" petitioner's criminal history, the court explained, petitioner "had the opportunity to verify" that the information was accurate. *Id.* at A10, ¶ 55. As a result, and unlike in the decisions that petitioner had cited, he was not sentenced based "on information [that he] did not have any opportunity to refute, supplement or explain." *Id.* at A10, ¶ 53 (citing *Gardner* v. *Florida*, 430 U.S. 349, 362 (1977) (opinion of Stevens, J.)).

The Wisconsin Supreme Court also held that consideration of the COMPAS risk assessment did not "violate[] a defendant's due process right not to be sentenced on the basis of gender." Pet. App. A12, ¶ 75. The court noted that, although the parties disputed the specific method by which COMPAS takes gender into account, they "agree[d] that there is statistical evidence that men, on average, have higher recidivism and violent crime rates compared to women," *id.* at A12, ¶¶ 76-78, and that "any risk assessment tool which fails to differentiate between men and wom[e]n will misclassify both genders," *id.* at A13, ¶ 83. The court thus concluded that, rather than serving "a discriminatory purpose," *ibid.*, "COMPAS's use of gender promotes accuracy that ultimately inures to the benefit of the justice system[,] including defendants," *id.* at A14, ¶ 86. The court further held that, in any event, petitioner had not carried "his burden of showing that the sentencing court actually relied on gender as a factor in sentencing," given the multiple other factors that the court had expressly considered in imposing the sentence. *Ibid.*

b. Although it rejected petitioner's due process challenges, the Wisconsin Supreme Court concluded that constitutional concerns required it to "circumscrib[e

the] use" of the COMPAS risk assessment at sentencing. Pet. App. A8, ¶ 35. The court first reiterated, as petitioner's PSR had warned, that "risk scores may not be used" either "to determine whether an offender is incarcerated" or "to determine the severity of the sentence." *Id.* at A15, ¶ 98; see also *id.* at A9, ¶ 44 (same). It authorized sentencing courts to consider the risk assessment only for matters such as "diverting low-risk prison-bound offenders to a non-prison alternative"; "assessing whether an offender can be supervised safely and effectively in the community"; and "imposing terms and conditions of probation, supervision, and responses to violations." *Id.* at A14, ¶ 88. Even in those more limited circumstances, the court stressed that "risk scores may not be used as the determinative factor." *Id.* at A15, ¶ 98.

Prospectively, the Wisconsin Supreme Court required that PSRs attaching COMPAS risk assessments "contain a written advisement listing [their] limitations." Pet. App. A15, ¶ 100. The advisement must alert 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) "risk assessment scores are based on group data" and are thus "able to identify groups of high-risk offenders" rather than "a particular high-risk individual"; (3) some studies "have raised questions about whether [COMPAS risk scores] disproportionately classify minority offenders as having a higher risk of recidivism"; (4) risk assessment tools must be constantly monitored for accuracy due to changing populations, and COMPAS in particular compares defendants to a national sample, not one specific to Wisconsin; and (5) COMPAS was developed

not for use at sentencing, but to aid the Department of Corrections in making determinations regarding treatment, supervision, and parole. *Ibid.* The court added that the advisement "should be regularly updated as other cautions become more or less relevant as additional data becomes available." *Id.* at A16, ¶ 101.

Finally, the Wisconsin Supreme Court determined that petitioner's sentencing was consistent with those limitations. Pet. App. A15, ¶ 102. The court explained that the sentencing judge had given the assessment "little or no weight" "in deciding whether [petitioner] should be incarcerated, the severity of the sentence or whether he could be supervised safely and effectively in the community," and had instead made clear that he "would have imposed the exact same sentence without" considering the report. *Id.* at A16, ¶¶ 105, 109, 110. "Notably," the court added, petitioner did not dispute that the other factors considered at sentencing supported the sentence that he had received. *Id.* at A15, ¶ 103.

c. Chief Justice Roggensack and Justice Abrahamson filed concurring opinions. Pet. App. A17-A18, A18-A19. Chief Justice Roggensack wrote separately "to clarify that" the Wisconsin Supreme Court's holding "permits a sentencing court to *consider* COMPAS" but not to "*rely* on COMPAS for the sentence it imposes." *Id.* at A17, ¶ 123. Justice Abrahamson opined that, in light of the "mixed reviews" that risk assessments had received from scholars and commentators, sentencing courts should set forth on the record an assessment's strengths and weaknesses and relevance to the individual sentence. *Id.* at A18, ¶¶ 137-138.

DISCUSSION

A sentencing court's use of actuarial risk assessments raises novel constitutional questions that may merit this Court's attention in a future case. But the Wisconsin Supreme Court's decision approving the limited use of COMPAS risk assessments does not warrant the Court's review in this case.

Petitioner contends (Pet. 13-19) that the use of the COMPAS risk assessment violated his due process rights because he did not have an opportunity to review the assessment's methodology and because it accounts for gender. The Wisconsin Supreme Court correctly rejected the first challenge. Although the lack of transparency can raise serious issues, in the circumstances of this case—in which the court approved the use of COMPAS for narrow purposes only, Pet. App. A8, A9, A14-A15, ¶¶ 35, 44, 93-94, 98—the absence of full transparency about the instrument's methodology does not violate due process. As for petitioner's second challenge, this case does not cleanly present issues of gender bias. The court declined to resolve the parties' dispute over how COMPAS accounts for gender. It then concluded that, as a factual matter, the sentencing court did not "actually rel[y] on gender as a factor in imposing its sentence." *Id.* at A13, ¶ 85.

Prudential factors also weigh against this Court's review. The Wisconsin Supreme Court's conclusion accords with that of the only other state court of last resort to consider a similar question. See *Malenchik* v. *State*, 928 N.E.2d 564, 575 (Ind. 2010). In light of the recent emergence of actuarial risk assessments at sentencing, further development of the factual and legal implications would be beneficial. At the very

least, this case is an unsuitable vehicle for review because the Wisconsin Supreme Court concluded, as the sentencing judge stated, that the trial court would have imposed the same sentence absent any consideration of petitioner's COMPAS risk scores. The petition therefore should be denied.

1. Petitioner first contends (Pet. 13-17) that consideration of the COMPAS risk assessment at sentencing violated due process because COMPAS's proprietary nature prevented him from challenging the assessment's accuracy. Although transparency can avoid potential constitutional concerns, the Wisconsin Supreme Court correctly rejected that contention on the record here. Pet. App. A9-A10, ¶¶ 46-56.

"Sentencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence." *Dean* v. *United States*, 137 S. Ct. 1170, 1175 (2017). Although the Constitution places certain factors off limits for a sentencing court, see p. 19, *infra* (discussing race and gender), the Due Process Clauses of the Fifth and Fourteenth Amendments impose few other constraints on the type of information that may bear on an appropriate sentence. See *Williams* v. *New York*, 337 U.S. 241, 250-252 & n.18 (1949). Due process protects a defendant from being sentenced based on certain "materially false" information that he did not have an effective "opportunity to correct." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); see *Roberts* v. *United States*, 445 U.S. 552, 556 (1980) (explaining that the Court has "sustained due process objections to sentences imposed on the basis of 'misinformation of constitutional magnitude'") (quoting *United States* v. *Tucker*, 404 U.S. 443, 447 (1972)). Otherwise, however, the sentencing

judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Tucker*, 404 U.S. at 446; see *Williams*, 337 U.S. at 246 (noting historical practice "in this country and in England * * * under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law").

Petitioner contends that due process guarantees a defendant full "access to information used at sentencing." Pet. 13 (citing *Gardner* v. *Florida*, 430 U.S. 349 (1977) (opinion of Stevens, J.)). This Court's decisions do not sweep so broadly. *Gardner* was a capital case in which the trial judge based his decision to impose the death penalty "in part on information in a presentence investigation report" that was not disclosed to the parties. 430 U.S. at 351. In a divided opinion, the Court vacated the defendant's death sentence. *Ibid.*; *id.* at 364 (White, J., concurring in the judgment); *ibid.* (Blackmun, J., concurring in the judgment). Although the plurality applied due process principles, Justice White's concurrence—which the Court has since clarified is the controlling opinion—turned on "the Eighth Amendment's requirement of reliability in the determination that death is the appropriate punishment." *O'Dell* v. *Netherland*, 521 U.S. 151, 162 (1997) (citation and internal quotation marks omitted).

Even assuming that *Gardner* applies to non-capital cases, petitioner did not suffer a due process violation. The plurality and Justice White shared two premises: (1) that the sentencing judge had selected a sentence at least "in part" because of undisclosed information, *Gardner*, 430 U.S. at 351 (opinion of Stevens, J.); *id.* at

363 (White, J., concurring in the judgment); and (2) that the undisclosed information was "factual information," *id.* at 353 (opinion of Stevens, J.) (citation omitted), "relevant to the character and record of the offender," *id.* at 364 (White, J., concurring in the judgment) (citation and internal quotation marks omitted). Because of those two factors, defense counsel was excluded from "the process of evaluating the relevance and significance of aggravating and mitigating facts" at sentencing. *Id.* at 360 (opinion of Stevens, J.).

Neither of those two factors is present here. First, petitioner's sentence was not based—even in part—on undisclosed information. The COMPAS risk assessment was (and could have been) used only for the limited purposes stated in the PSR and adopted by the Wisconsin Supreme Court. See Pet. App. A14-A15, ¶¶ 87-101. Specifically, the PSR advised the sentencing judge that he could not use the risk scores to determine whether to incarcerate petitioner or to determine the severity of any term of imprisonment imposed. *Id.* at A6, A15, ¶¶ 17, 98. The Wisconsin Supreme Court found, as a fact, that the sentencing judge adhered to those limitations by considering the COMPAS assessment only to "reinforce" his independent evaluation of the traditional sentencing factors. *Id.* at A16, ¶ 107. So while petitioner may have lacked access to the assessment's methodology, that information did not, on the record here, affect the severity of his sentence. *Id.* at A9, A15, ¶¶ 44, 98.

Second, petitioner does not claim that he lacked access to "historical evidence about his 'character and record.'" *O'Dell*, 521 U.S. at 162 (quoting *Gardner*, 430 U.S. at 364 (White, J., concurring in the judgment)) (emphasis omitted). Petitioner contends (Pet.

14) that he lacked information about the COMPAS scoring *formula*, including "[h]ow the various criminogenic factors are weighted and how the risk scores are determined." He admits (*ibid.*), however, that he knew the factual questions and does not argue that he lacked access to the underlying factual data. A publicly available practitioner's guide to COMPAS explains the factors on which the risk scores are "largely" based, including the offender's "criminal history." Pet. App. A10, ¶ 54. The COMPAS report appended to petitioner's PSR, in turn, listed the 21 relevant questions and answers about petitioner's criminal history. *Id.* at A10, ¶ 55. Petitioner thus "had the opportunity" to "verify" the accuracy of that data. *Ibid.*[4] He likewise had the opportunity, as do all defendants, "to diminish the weight to be given such [risk scores] by presenting contrary evidence or by challenging the * * * usefulness of the assessment in a particular case." *Malenchik*, 928 N.E.2d at 575.

Petitioner suggests (Pet. 14) that those opportunities were insufficient and that he was entitled to "full access" to the formula that COMPAS uses to produce risk scores from the relevant data. On the one hand, the Due Process Clause has never been understood to "require[] full disclosure of all the information relied on by a court at sentencing." *United States* v. *Eyraud*, 809 F.3d 462, 471 (9th Cir. 2015) (collecting cases). For example, the Federal Rules of Criminal Procedure allow district courts to authorize the Pro-

[4] The record does not disclose whether the COMPAS report attached to petitioner's PSR included all of the underlying information about petitioner's background and criminal history that factored into his scores, see Pet. App. A10, ¶ 55, but petitioner has not contested his ability to obtain that information, see Pet. 14.

bation Office that prepares the PSR to submit a sentencing recommendation to the court without disclosing it to the parties. Fed. R. Crim. P. 32(e)(3). The courts of appeals have uniformly held that the sentencing court's consideration of that confidential recommendation comports with due process so long as the defendant had the opportunity to review the underlying factual information relied upon in the recommendation. See, *e.g.*, *United States* v. *Peterson*, 711 F.3d 770, 777-779 (7th Cir.), cert. denied, 134 S. Ct. 362 (2013); *United States* v. *Baldrich*, 471 F.3d 1110, 1113 (9th Cir. 2006); *United States* v. *Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988). On the other hand, a court's use of a risk assessment based on an undisclosed scoring methodology creates at least the possibility not only of scoring error, but of a flawed actuarial approach that a defendant cannot effectively counter through other types of evidence.[5]

That said, a potentially flawed actuarial model differs from the type of false sentencing information barred under *Townsend*, 334 U.S. at 741, and *Tucker*, 404 U.S. at 449. See Br. in Opp. 9. The sentencing proceedings in those cases involved "misinformation

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[5] Several other States have avoided this problem by developing and validating publicly available risk-assessment measures for consideration at sentencing. See, *e.g.*, Edward Latessa et al., *Creation & Validation of the Ohio Risk Assessment System: Final Report* (July 2009), http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf; Edward Latessa et al., *Validation of the Indiana Risk Assessment System: Final Report* (Apr. 2013), http://www.in.gov/judiciary/cadp/files/prob-risk-iras-final.pdf; Mo. Sentencing Advisory Comm'n, *Recommended Sentencing: Biennial Report 2009* (Dec. 2009), http://www.mosac.mo.gov/file.jsp?id=45469. Publicly available tools inform defendants exactly which variables factor into their risk scores and how those variables are weighed.

of constitutional magnitude." *Tucker*, 404 U.S. at 447. In *Townsend*, the Court found a due process violation where an uncounseled defendant "was sentenced on the basis of assumptions concerning his criminal record [that] were materially untrue" and that could have been "prevent[ed]" had he had the assistance of counsel. 334 U.S. at 740, 741. And in *Tucker*, the sentencing judge mistakenly relied on prior uncounseled "convictions [that] were wholly unconstitutional under *Gideon* v. *Wainwright*, 372 U.S. 335 [(1963)]." 404 U.S. at 447. Petitioner does not allege constitutional defects in his prior convictions or right-to-counsel concerns that plagued his sentencing. Again, he was afforded the opportunity, with the assistance of counsel, to correct any mistakes about the prior convictions that informed his risk scores. See p. 16, *supra*.

Given the highly limited purpose for which petitioner's risk assessment was considered and petitioner's ability to counter the factual information on which the assessment relied, the Wisconsin Supreme Court correctly declined to find a due process violation. But that is not to say that the use of actuarial risk assessments at sentencing will always be constitutionally sound. Some uses of an undisclosed risk-assessment algorithm might raise due process concerns—if, for example, a defendant is denied access to the factual inputs about his criminal and personal history, or if his risk scores form part of a sentencing "matrix" or establish a "presumptive" term of imprisonment. See Pet. App. D53-D54 (distinguishing the use of COMPAS at sentencing from its use in bond determinations and other settings). As this Court has often recognized, "due process is flexible and calls for such procedural protections as the particular situation demands."

Morrissey v. *Brewer*, 408 U.S. 471, 481 (1972). Whether due process would permit a broader use of COMPAS risk scores without additional opportunities for a defendant to test the instrument's accuracy is beyond the scope of this case.

2. Petitioner next contends (Pet. 17-19; Cert. Reply Br. 4-5) that the use of the COMPAS risk assessment at his sentencing violated due process because COMPAS accounts for gender and has racially discriminatory effects. Although the use of actuarial risk assessments might raise issues of gender or racial bias, this case presents no occasion for the Court to address them.

a. Petitioner argues, and the United States agrees, that principles of due process (and equal protection) protect a defendant from being sentenced based on an impermissible use of considerations such as race or gender. Pet. 17 (citing *United States* v. *Traxler*, 477 F.3d 1243, 1248 (10th Cir.), cert. denied, 552 U.S. 909 (2007)); see, *e.g.*, *Buck* v. *Davis*, 137 S. Ct. 759, 775 (2017) (citing *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983)); *Pepper* v. *United States*, 562 U.S. 476, 489 n.8 (2011).[6] It is a serious constitutional question, however, the extent to which actuarial assessments considered at sentencing may take account of statistical differences for male and female offenders, such as, for example, in recidivism rates. That question may warrant the Court's attention in the future in an appropriate case.

This case, however, is not a suitable vehicle. Initially, it is unclear *how* COMPAS accounts for gender —a fact of relevance to the constitutional analysis. Petitioner argues (Pet. 18) that gender is treated as a

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[6] As the Wisconsin Supreme Court noted, petitioner has not raised an equal protection challenge. Pet. App. A13, ¶ 80.

"criminogenic factor[]," or a consideration that independently increases the likelihood of recidivism and therefore generates higher risk scores for men. Respondent disagrees, contending (Pet. App. A12, ¶ 76) that gender is used only for statistical "norming," or comparing an offender to a group of the same gender for purposes of determining the offender's relative level of risk. Any use of gender for norming purposes could have the effect of *decreasing* petitioner's risk scores, as compared to the risk scores that he would have received with a gender-neutral norming group. Resp. Wis. Sup. Ct. Br., 2016 WL 485419, at *22. As the State explains (Br. in Opp. 12), though, the Wisconsin Supreme Court did not resolve the parties' "sharp disagreement" over precisely "how COMPAS takes gender into account in calculating the" risk scores. See Pet. App. A11, ¶¶ 76-78.

Beyond that, the Wisconsin Supreme Court rejected petitioner's due process challenge in part because petitioner had "not met his burden of showing" that the sentencing court "actually relied on gender as a factor in imposing its sentence." Pet. App. A13, ¶ 85. That determination—which relied on the sentencing court's factual findings made after an evidentiary hearing, *id.* at D54-D56—alone supports the rejection of petitioner's due process claim. And petitioner offers no meaningful response. See Cert. Reply Br. 4-5. As the case comes to this Court, then, petitioner was not sentenced "base[d] * * * on" or "because of" gender. *Traxler*, 477 F.3d at 1248-1249. In view of that alternative holding, this is not an appropriate case for reviewing the court's statement that the consideration of gender is permissible where, "rather

than [serving] a discriminatory purpose," it "promotes accuracy." Pet. App. A13, ¶ 83.

b. This case also does not present the question whether the COMPAS risk assessment disproportionately classifies offenders as high-risk based on race. Petitioner occasionally suggests otherwise (Pet. 18-19; Cert. Reply Br. 5), including in his question presented (Pet. i). But before the Wisconsin Supreme Court, petitioner conceded that "potential issues of socioeconomic class and possible racial discrimination * * * are not before the [c]ourt in this appeal." Pet. Wis. Sup. Ct. Br., 2015 WL 9412098, at *20 n.4. The court consequently mentioned the issue only in passing. Pet. App. A11, ¶¶ 62-63. And petitioner acknowledges (Pet. 13 n.4) that "[r]acial bias is not directly at issue in this case."

3. The issues that this petition raises are important and, in the appropriate case, may someday merit the Court's consideration. At this point, however, they would benefit from further percolation. Most of the developments related to the use of actuarial risk assessments at sentencing have emerged within the last several years. See pp. 2-4, *supra*. As a result, due process and other constitutional issues have not yet been fully aired in state courts and lower federal courts.

Only one other state court of last resort has evaluated the use of actuarial risk assessments at sentencing, and its conclusion mirrors that of the Wisconsin Supreme Court. In *Malenchik*, the Supreme Court of Indiana asked whether, as a matter of state law, a sentencing court had appropriately considered two risk-assessment instruments. It concluded that such instruments "do not replace but may inform a trial

court's sentencing determinations." 928 N.E.2d at 566. The court thus affirmed "the trial court's consideration of the defendant's assessment model scores," where they were "only supplemental to other sentencing evidence that independently supported the sentence imposed." *Ibid.* The court then articulated a standard similar to the Wisconsin Supreme Court's: "These evaluations and their scores are not intended to serve as aggravating or mitigating circumstances nor to determine the gross length of [a] sentence, but a trial court may employ such results in formulating the manner in which a sentence is to be served." *Id.* at 575; see Pet. App. A14, ¶¶ 92-94.

The United States is not aware of any federal court of appeals or state court of last resort, other than the Wisconsin Supreme Court, that has confronted the federal due process issues that petitioner raises here. In addition, the Sentencing Commission has not yet issued any recommendation about the proper role of risk-assessment tools in the federal system. 79 Fed. Reg. at 49,379. With more time, lower courts and government agencies may develop a fuller picture of the legal and factual implications of employing evidence-based practices at sentencing.

4. Finally, even if this case cleanly presented due process questions that otherwise warranted review, it would be an unsuitable vehicle for another reason: Any constitutional error in considering petitioner's COMPAS score was likely harmless.

Constitutional errors at sentencing can be found harmless if "the record makes clear that the [d]istrict [c]ourt would have imposed the same sentence," absent the error. *Peugh* v. *United States*, 133 S. Ct. 2072, 2088 n.8 (2013). As explained above, the sen-

tencing court determined—and the Wisconsin Supreme Court accepted—that it "would have imposed the exact same sentence without" any consideration of petitioner's COMPAS risk scores. Pet. App. A16, ¶ 110; *id.* at D56 (concluding that "omitting any reference to the COMPAS would not have affected the decision in any way"); *id.* at D55 (explaining that "the sentence would have been exactly the same because of [t]he [c]ourt's evaluation of the sentencing factors that are required under the case law"). That determination accords with the sentencing court's heavy emphasis on petitioner's criminal history and the seriousness of his offense. Supp. App. 8, 12. Petitioner would thus be unlikely to benefit from a decision in his favor on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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