


No. 16-  6-6387

IN THE  
SUPREME COURT OF THE UNITED STATES

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ERIC L. LOOMIS,

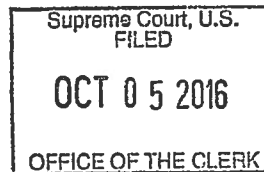
Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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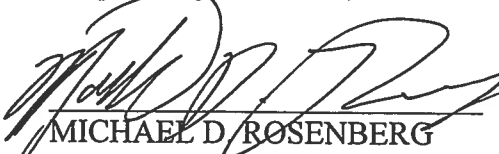
Petitioner, Eric L. Loomis, respectfully moves this Court, pursuant to Supreme Court Rule 39, for leave to proceed *in forma pauperis* without prepayment of costs on his attached petition for a writ of certiorari.

By Order dated July 21, 2016, the Wisconsin State Public Defender appointed undersigned counsel to represent Mr. Loomis on his appeal pursuant to Wis. Stat. Chapter 977.

A copy is attached.

Dated this 4<sup>th</sup> day of October, 2016.

Respectfully submitted,

  
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# ORDER APPOINTING COUNSEL

**Client's Full Name:**

L Loomis

**Client ID:**

MAP1253420

**Address:**

Dodge Correctional Inst.  
PO Box 700, One West Lincoln St  
Waupun, WI 53963 0700

**SPD ID:**

163201950Z

**File No:**

16P-32-L-F01950

**Case Group #:**

1648031

**Date of Birth:**

7/27/1981

**DOC #:**

00429694

**Statutes:**

**Nature of Case:**

346.04(3) Vehicle Operator Flee/Elude Officer FU 1 Cnts:  
Charge Modifier 939.62(1)(b) Habitual Criminality (Prison <= 10 yrs)  
943.23(2) Take and Drive Vehicle W/o Consent FD/MA 1 Cnts:  
Charge Modifier 939.05 Party to crime

**County and Court:**

La Crosse Circuit Court Br. 4

**Case No:**

**Other Information:**

**Judge:**

Horne, Scott L.

13-CF-98

**Record Created:**

July 21, 2016

**Judgment Entered:**

August 12, 2013

**Type:**

Re-Opening: U.S. Supreme Court

IN ACCORDANCE WITH CHAPTER 977 OF THE WISCONSIN STATUTES, I HEREBY APPOINT THE FOLLOWING ATTORNEY TO REPRESENT THE ABOVE NAMED INDIVIDUAL IN RELATION TO THE ABOVE ENTITLED PROCEEDINGS.

**Attorney's Name:**

Michael D Rosenberg

Local Counsel

**Address:**

214 N Hamilton St Ste 101  
Madison, WI 53703 2178

SPD Office Handling: Madison

**Appointed By:** Joseph N. Ehmann

**State Bar No:**

1001450

**Dated:** July 21, 2016

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When an attorney represents an individual, s/he makes and keeps a file of the documents and work done on the case. Attorneys on staff with the Office of the State Public Defender (SPD) create and maintain such files for each case. This notice applies only to cases handled by staff attorneys of the Office of the State Public Defender. If your case has been assigned to a private attorney, please consult that attorney about his or her file retention policy. Upon the conclusion of the representation in this case, the SPD will, upon your request, deliver the original file or any portion requested, to you, along with any of our original documents or other property that the SPD has in its possession. If you do not request your file, the SPD will retain it for a period of at least five years after the matter is closed. At any point during this period, you may request delivery of the file. If you do not request the file before the end of the five-year period, the SPD may, in its discretion, destroy the file and its contents without further notice to you.

8-15-16

16-6387

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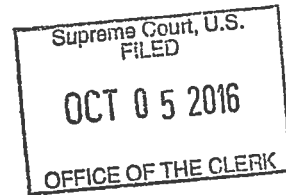
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ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF WISCONSIN

---

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**QUESTION PRESENTED FOR REVIEW**

State courts increasingly are relying on risk assessment instruments at sentencing. When the risk assessment instrument used is proprietary, as the Correctional Offender Management Profiling for Alternative Sanctions (“COMPAS”) software is, defendants have very little information about how the risk is analyzed. Is it a violation of a defendant’s constitutional right to due process for a trial court to rely on such risk assessment results at sentencing:

- a. because the proprietary nature of COMPAS prevents a defendant from challenging the accuracy and scientific validity of the risk assessment; and
- b. because COMPAS assessments take gender and race into account in formulating the risk assessment?

**PARTIES IN COURT BELOW**

Other than Petitioner and Respondent, there were no other parties in the Wisconsin Supreme Court or Wisconsin Court of Appeals.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Eric Loomis respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court.

### OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (App. A:1) is reported at 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749. The Wisconsin Court of Appeals did not issue an opinion but instead issued a certification to the Wisconsin Supreme Court.<sup>1</sup> The Certification (App. B:2) is not published.

### JURISDICTION

The Supreme Court of Wisconsin issued its opinion on July 13, 2016. This Court has jurisdiction pursuant to 28 U.S.C §1257(a) and Supreme Court Rule 13.

### RELEVANT CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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<sup>1</sup> Wisconsin appellate procedure allows the Court of Appeals to certify cases to the Wisconsin Supreme Court. *See* Wis. Stats. (Rule) 809.61. If, as happened here, the Wisconsin Supreme Court takes jurisdiction on certification, the Court of Appeals issues no opinion.

## STATEMENT OF THE CASE

### State Court Proceedings

This is an appeal from a decision of the Supreme Court of Wisconsin issued on July 13, 2016 that affirmed the order of the Circuit Court denying Petitioner's post-conviction motion for a new sentencing. (App. A:1.) That postconviction motion claimed, among other things, that the procedures used in sentencing Mr. Loomis violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Mr. Loomis appealed from a judgment of conviction entered in court on August 12, 2013 and filed on August 14, 2013 in La Crosse County, Wisconsin. An amended judgment of conviction was filed on August 15, 2013 regarding sentence credit.

This case arises out of a drive-by shooting in La Crosse on February 11, 2013 in which the State alleged that Mr. Loomis was the driver, but Mr. Loomis denied that he had any involvement in the drive-by shooting and maintained only that he later drove the car after the shooting. Mr. Loomis waived his right to a trial and pled guilty to Attempting to Flee or Elude a Traffic Officer, as a repeater, and to Operating a Motor Vehicle without Owner's Consent, as party to a crime and as a repeater. He also allowed three other charges to be "dismissed and read-in."

After accepting Mr. Loomis' pleas, the trial court ordered a presentence investigation.

## Presentence Investigation Report

The Wisconsin Department of Corrections (“DOC”) agent prepared a presentence investigation report (“PSI”) dated July 23, 2013. Like many PSIs currently in Wisconsin, it included an attached COMPAS assessment. COMPAS stands for “Correctional Offender Management Profiling for Alternative Sanctions.” “It is a fourth-generation (4G) risk-need assessment system” that according to its creators “provides decision support for correctional agencies for placement decisions, offender management, and treatment planning.” The risk assessment generated by COMPAS is in the form of a bar chart for the risks of pretrial recidivism, general recidivism, and violent recidivism. (App. A:6, ¶14.) The bar charts are on a scale of one to ten. *Id.*

According to DOC and the PSI the COMPAS assessments should not be used either to determine if a specific defendant should be sentenced to prison or the severity of the sentence:

The COMPAS is an actuarial assessment tool which has been validated on a national norming population. This means that it predicts the general likelihood that those with a similar history of offending are either less likely or more likely to commit another crime generally within the two year period following release from custody. ***The COMPAS assessment does not, however, attempt to predict specifically the likelihood that an offender will commit a certain type of offense with the same two year period.*** For that prediction, a narrow-band screener which is normed specifically for that offender population (i.e. use of screener such as the STATIC-99, VASOR, etc. for sex offenders) should be used.

In addition to identifying general levels of risk to re-offend, COMPAS also identifies criminogenic needs specific to that offender which are most likely to effect [sic] future criminal behavior. For purposes of Evidence Base Sentencing, actuarial assessment tools are especially relevant to: 1. Identifying offenders who should be targeted for interventions. 2. Identify dynamic risk factors to target with conditions of supervision. 3. ***It is very important to remember that risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated.***

(Loomis PSI Report)(emphasis added).

## **The Sentencing Hearing**

At the sentencing hearing on August 12, 2013, both the State and the trial court referenced the COMPAS assessment and used it as a basis for incarcerating Mr. Loomis. The State argued that the COMPAS report and its assessments served as the basis for the appropriate sentence:

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

The trial court also used the COMPAS report to justify incarceration. Early in the hearing the trial court referred to the PSI writer's use of the assessment tools. Later it stated:

You're identified, through the COMPAS assessment, as an individual who is at high risk to the community.

In terms of weighing the various factors, I'm ruling out probation because of the seriousness of the crime and because your history, your history on supervision, and the risk assessment tools that have been utilized, suggest that your [sic] extremely high risk to re-offend.

The trial court ultimately sentenced Mr. Loomis on Count 2 (fleeing) to four years with two years of initial confinement and two years of extended supervision.<sup>2</sup> On Count 3 (operating without the owner's consent), the court sentenced Mr. Loomis to four years of initial confinement and three and a half years of extended supervision. The sentences are consecutive. In total, the court sentenced Mr. Loomis in this case to six years of initial confinement and five years of extended supervision for fleeing and operating a vehicle without the owner's consent.

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<sup>2</sup> Wisconsin's Truth in Sentencing law, Wis. Stat. 973.01, provides for the trial judge to impose a determinate sentence with a certain amount in prison and a certain amount on extended supervision following release from prison.

### **Post-Conviction Motion**

As part of his direct appeal in the Wisconsin courts, Mr. Loomis, by his counsel, filed a motion for post-conviction relief seeking resentencing, in part because Mr. Loomis' due process rights were violated by the trial court relying on the COMPAS assessment in sentencing Mr. Loomis.<sup>3</sup>

The trial court held two hearings on the post-conviction motion, the second of which concerned the COMPAS issue. At this hearing, Mr. Loomis offered the testimony of an expert witness on COMPAS, Dr. David Thompson. Dr. Thompson has a Ph.D. from DePaul University in Psychology and Clinical Psychology. He is Board Certified in Forensic Psychology by the American Board of Professional Psychology and has extensive training in COMPAS, psychometrics, and statistics. The court admitted Dr. Thompson's curriculum vitae and his report into evidence without any objection by the State. The State did not offer any witnesses or further evidence, instead arguing only that the trial court did not rely on the COMPAS report and, if it did, any reliance was harmless error.

Dr. Thompson opined that it was improper to use COMPAS at sentencing to decide whether to incarcerate a person. The main basis for Dr. Thompson's opinion is that COMPAS was not designed to be used for sentencing decisions and that by using it for such the trial court runs the risk of sentencing the defendant on inaccurate information. The court runs a "tremendous risk of over estimating an individual's risk and then mistakenly, basically, mistakenly sentencing them or basing their sentence on factors that may not apply in a situation."

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<sup>3</sup> Mr. Loomis raised two other grounds in his post-conviction motion that are not at issue in this Petition.

COMPAS is designed to assess group data and using it at sentencing detracts from the court's focus on the individual's unique circumstances.

Dr. Thompson testified and wrote in his report that COMPAS originally was designed to assist corrections departments in allocating resources needed to keep persons in the community. It did so by dividing people into a number of risk categories so that the department could estimate budgeting needs. It also allowed the departments to identify individuals who would be placed in the community, identify and assess their criminogenic needs, and channel them into specific community programs. By relying on the risk assessment bar charts generated by the COMPAS program, it is Dr. Thompson's opinion that a court at sentencing could be swayed by or overestimate the person's risks and outweigh the individual's idiosyncratic characteristics. The bar charts for risk of recidivism and violent risk are determined by only a few factors. How exactly COMPAS weighs those factors, however, is unknown because Northpointe, the developer of COMPAS, considers COMPAS a proprietary instrument and a trade secret.

Northpointe originally developed COMPAS from populations in New York, Michigan, and California. The COMPAS reports say they compare to a national sample. As the Supreme Court of Wisconsin recognized, however, Wisconsin has not yet completed a specific cross-validation study for Wisconsin's population. (App. A:10, ¶58.)

The COMPAS literature and Dr. Thompson analogized COMPAS to insurance actuarial risk assessments. Insurance company actuarial tables, for example, identify teenage male drivers with lower grade point averages as a higher risk than an older person. The insurance companies then charge higher premiums for those higher risks to allocate their resources and reserve accordingly. Similarly, if the Department of Corrections uses COMPAS assessments as originally intended, it can allocate resources based on the identification of different numbers of

individuals in different risk categories. On the other hand, COMPAS training manuals specifically state that it is not designed for, and should not be used for, sentencing. It is Dr. Thompson's opinion that COMPAS is fine for determining these allocations of resources, but it should not be used in sentencing because it ignores individual characteristics.

COMPAS also considers gender in formulating its risk assessments. How exactly it does so is unknown because of the proprietary nature of the computer program, but it is a consideration in the assessment. In fact, Northpointe now has a female specific risk assessment: COMPAS Women. (See Women at <http://www.northpointeinc.com/solutions/women>.)

After hearing Dr. Thompson's testimony and argument of counsel, the trial court orally denied the motion. The trial court issued a written order denying the motion on January 7, 2015.

#### **Wisconsin Court of Appeals Certification to the Supreme Court of Wisconsin**

Mr. Loomis timely appealed to the Wisconsin Court of Appeals. In discussing the background, the Court of Appeals stated that the circuit court relied on the COMPAS assessment as a factor in sentencing. (App. B:3.) It further noted that although the State argued in the post-conviction proceeding that the circuit court did not rely on the assessment, on appeal the State had abandoned that argument. (App. B:3 n.3.)

The Court of Appeals then discussed the proprietary nature of COMPAS and raised the question whether this prevents defendants from challenging the scientific validity of the assessment. "[W]e perceive the fundamental question to be whether the proprietary nature of COMPAS, and thus the apparent limited ability of defendants to investigate the tool, unfairly prevents defendants from challenging the COMPAS assessment's scientific validity." (App. B:4.) It thus found that the "lack of transparency" presents an issue for the Supreme Court of Wisconsin. (App. B:5.)

Second, the Court of Appeals raised the issue of sentencing based on gender. Citing the Supreme Court of Wisconsin's decision in *State v. Harris*, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409, the Court of Appeals stated the law that gender is an improper factor to be relied upon "at all" in sentencing. (App. B:5.) The Court of Appeals noted that the State did not seem to dispute that different gender-based risk scales are used in COMPAS, but found the State's position that somehow Mr. Loomis was supposed to explain the differences given the proprietary nature of COMPAS difficult to grasp. (App. B:6.) Thus, it felt that the question of whether reliance on COMPAS was contrary to the Court's holding in *Harris* warranted review by the Supreme Court of Wisconsin. (App. B:6.)

Ultimately, instead of deciding the issues itself, the Court of Appeals certified two issues to the appeal to the Supreme Court of Wisconsin: (1) whether the trial court's use of COMPAS at sentencing violates a defendant's right to due process because the defendant cannot challenge the scientific validity of the assessment due to the claims of proprietary nature by the developers of COMPAS; and (2) whether the trial court's use of COMPAS at sentencing violates a defendant's right to due process because the assessments take gender into account. (App. B:1.)

### **The Supreme Court of Wisconsin Decision**

The Supreme Court of Wisconsin accepted certification from the Court of Appeals and heard the case. The Supreme Court of Wisconsin appeared to recognize problems with using COMPAS and potential misuse of the risk scores, but held that it could be used as the scores are "not considered as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community." (App. A:9, ¶44.) It raised additional cautions in order to avoid potential due process violations, but held that the scores could be considered by the courts. (App. A:9, ¶45.)



The Court rejected Mr. Loomis' and the Court of Appeals' concerns that the proprietary nature of COMPAS violated a defendant's due process rights. The Court relied on the fact that Mr. Loomis, and other defendants, knew what questions were asked and they could challenge the accuracies of the reported answers. (App. A:10, ¶55.) The Court also stated that Mr. Loomis could challenge his risk scores. (App. A:10, ¶56.) In so doing, however, the Court ignored the fact that due to the proprietary claims by Northpointe, that neither Mr. Loomis nor even the DOC has any idea how his answers lead to the risk scores generated by COMPAS. A defendant might know what goes into the program and knows what comes out, but has no way of verifying that what comes out is indeed accurate.

The Court also dismissed the gender issue on the grounds that Mr. Loomis' did not meet his burden of proving that the trial court relied on gender in sentencing him (¶85) and that there is a factual basis for COMPAS using gender (¶83). (App. A:13.) Indeed, the Supreme Court of Wisconsin specifically endorsed COMPAS' use of gender in determining risk scores: "We determine that COMPAS' use of gender promotes accuracy that inures to the benefit of the justice system including defendants." (App. A:14, ¶86.)

The Court after rejecting Mr. Loomis' constitutional concerns about the use of COMPAS, placed certain limitations on the use and made cautions about the use of COMPAS:

¶ 98 Thus, a sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.

¶ 99 Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.

¶ 100 Any Presentence Investigation Report (“PSI”) containing a COMPAS risk assessment filed with the court must contain a written advisement listing the limitations. Additionally, this written advisement should inform sentencing courts of the following cautions as discussed throughout this opinion:

- The proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are determined.
- Because 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.
- Some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism.
- 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.
- 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.

¶ 101 It is important to note that these are the cautions that have been identified in the present moment. For example, if a cross-validation study for a Wisconsin population is conducted, then flexibility is needed to remove this caution or explain the results of the cross-validation study. Similarly, this advisement should be regularly updated as other cautions become more or less relevant as additional data becomes available.

(App. A:15, ¶¶98-101, footnotes omitted.) None of these limitations were in place when the trial court sentenced Mr. Loomis based in part on the COMPAS assessment.

The Supreme Court issued its decision affirming the trial court on July 13, 2016. (App. A.)

## REASONS FOR GRANTING THE WRIT

### **SUPREME COURT REVIEW IS APPROPRIATE TO DECIDE THE IMPORTANT QUESTION WHETHER THE USE AND CONSIDERATION AT SENTENCING OF RISK ASSESSMENT INSTRUMENTS SUCH AS THE COMPAS ASSESSMENT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.**

This Court should grant certiorari review to consider the due process implications of the increasingly common practice of using proprietary risk assessment instruments in sentencing defendants because the refusal of the companies producing those instruments to disclose significant information deprives defendants of the ability to assess the accuracy and validity of the information being used, because they rely on such impermissible sentencing factors as gender, and because they result in sentencing which is not individualized. This Court long ago held that due process was violated when a sentence is founded, at least in part, upon significantly inaccurate information. *See United States v. Tucker*, 404 U.S. 443, 447 (1972); *see also Townsend v. Burke*, 334 U.S. 736, 741 (1948) (due process was violated when defendant was sentenced on information that was “materially untrue”).

Resolution of this matter is becoming more and more urgent. States increasingly are using data analysis, usually in the form of risk assessment instruments, at sentencing. *See, e.g.*, Idaho Code §19-2517 (2016) (requiring that presentence investigation reports for any offenders sentenced to prison and certain other offenders include current recidivism rates differentiated by offender risk levels); *Malenchik v. State*, 928 N.E.2d 564, 566, 571-73, 575 (Ind. 2010) (encouraging the use of such assessments at sentencing); Ky. Rev. Stat. Ann. §532.007(3)(a) (2016) (mandating consideration of a risk and needs assessment at sentencing); La. Stat. Ann. §15:326(A)(2016) (allowing the use of validated risk assessment tools prior to sentencing in some cases); Ohio Rev. Code Ann. §5120.114(A)(1)-(3) (2015-16) (requiring the Ohio

department of rehabilitation and correction to “select a single validated risk assessment tool” which will be used for sentencing, among other things); Wash. Rev. Code §9.94A.500(1)(2016) (requiring consideration of risk assessment reports at sentencing if available); *State v. Rogers*, No. 14-0373, 2015 WL 869323, at \*4 (W. Va. Jan. 9, 2015) (Loughry, J., concurring) (explaining that although conducting standardized risk and needs assessments is statutorily required, the use of the information at sentencing is in the discretion of the court).

And the reach of risk assessment instruments at sentencing is likely to expand. Others are being urged to follow suit. For example, the Model Penal Code currently is being revised to direct sentencing commissions to “[d]evelop actuarial instruments or processes...that will estimate the relative risk that individual offenders pose to public safety...and to incorporate them into the sentencing guidelines.” Model Penal Code: Sentencing §6B.09(2)(Tentative Draft No. 3, 2014).

As the reach of risk assessment instruments expands, so does the reach of commercial risk assessment tools. See John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 *Annu. Rev. Clin. Psychol.* 489, 499 (2016). In addition to the COMPAS instrument at issue in this case, there are at least two other proprietary risk assessment instruments readily available: the Inventory of Offender Risk, Needs and Strengths (IORNS), various versions of the Level of Service Inventory-Revised (LSI-R). See Patricia M. Casey, Roger K. Warren & Jennifer K. Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group* National Center for State Courts (2011) at Appendix A, [http://www.ncsc.org/~media/Files/PDF/Services\\_and\\_Experts/Areas\\_of\\_Experience/Areas\\_of\\_expertise/Sentencing\\_Probation/RAN\\_Appendix\\_A.ashx](http://www.ncsc.org/~media/Files/PDF/Services_and_Experts/Areas_of_Experience/Areas_of_expertise/Sentencing_Probation/RAN_Appendix_A.ashx) .

Moreover, regardless whether the risk assessment instrument is proprietary or not, these instruments have certain limitations which involve consideration of such impermissible sentencing factors as race and gender.<sup>4</sup> Sentencing on the bases of such considerations as gender or race violates due process. Various studies of these instruments have noted the extent to which these instruments rely on such impermissible factors such as gender. *See, e.g.*, Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am. Crim. L. Rev. 231 (2015); *see also* Pro Publica, *Machine Bias* (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (race); Shaina D. Massie, Note: *Orange is the New Equal Protection Violation: How Evidence-Based Sentencing Harms Male Offenders*, 24 Wm. & Mary Bill Rts. J. 521 (2015) (gender); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 Notre Dame L. Rev. 537, 577 (2015) (noting that such instruments “disproportionately classify minorities and the poor as higher risk”); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803, 813 (2014) (gender & race).

**A. 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.**

A defendant’s right to due process is violated when he or she is denied access to information used at sentencing. *Gardner v. Florida*, 430 U.S. 349, 351 (1977). That is exactly what happens when a trial court uses the COMPAS assessment in sentencing a defendant. In *Gardner*, the defendant was convicted of first degree murder and the trial court sentenced him to death. The defendant appealed because the trial court deemed certain portions of the presentence investigation report to be confidential and refused to disclose the information to counsel. 430

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<sup>4</sup> Racial bias is not directly at issue in this case.

U.S. at 351. This Court noted that it was well-established that the sentencing process also must satisfy the requirements of the Due Process Clause. *Id.* at 358. It then held that the defendant was denied his right to due process because the trial court imposed a sentence “at least in part, on the basis of information which he had no opportunity to deny or explain.” *Id.* at 362.

The situation here (and in any other case where COMPAS is used in sentencing) is similar to that in *Gardner*. In essence, the defendant is being denied full access to information in the presentence investigation report and upon which the trial court relied at sentencing. Northpointe’s claims of the software being proprietary in nature prevent the defendant from fully being able to review the information and respond to it. It would be a violation of due process if a presentence investigation report is prepared containing findings of fact that form the basis for a sentence recommendation, but all the defendant can review is the actual sentence recommendation. That is what the situation is with COMPAS. How the various criminogenic factors are weighted and how the risk scores are determined is proprietary and the defendant has no access to this information. All he or she has access to is the final “risk assessment.” Therefore, like in *Gardner*, this was a violation of Mr. Loomis’ rights to due process.

The Supreme Court of Wisconsin’s claim that the defendant knows what questions are asked, does not cure this problem. A defendant knows the questions, knows the answers, but has no idea of how the answer was derived. Thus, the defendant has no basis on which to challenge the answer, i.e., the risk assessments. If an agent reports that a defendant has a background that includes certain crimes and other history, and therefore concludes that the defendant should not be placed on probation, the defendant at sentencing can argue that the agent perhaps has relied too heavily on certain stated factors. Yet, with COMPAS, a defendant cannot do so because the defendant (nor anyone else in the process) does not know how COMPAS is weighing any

factors. Instead, what is presented to the trial court basically is that  $2 + 2 = 4$ . The proprietary nature of COMPAS prevents the defendant from know what the “+” means. Therefore, the defendant’s due process rights as this Court enunciated in *Gardner* are violated.

Furthermore, if this was actual evidence being used at trial, it very likely would be excluded under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which Wisconsin adopted in 2011 in Wis. Stat. §907.02,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.*

Wis. Stat. § 907.02(1)(emphasis added).

Yet, COMPAS seems unlikely to meet the standards under current rule 907.02 or *Daubert*. It cannot be objectively tested, because of the claim of it being proprietary. The Defense cannot test its conclusions because how it draws those conclusions is secret. In addition, Wisconsin has not completed a cross-validation study on its population to determine if the unknown and proprietary formulae are even accurate in Wisconsin. Although COMPAS might not be subject to Rule 907.02 because evidence rules do not apply at sentencing in Wisconsin, it is further evidence of the lack of transparency.

A study reviewing COMPAS for the California Department of Corrections and Rehabilitation (“CDCR”) concluded that although COMPAS appears to be assessing criminogenic needs and recidivism risk, “there is little evidence that this is what the COMPAS actually assesses.” Jennifer L. Skeem and Jennifer Eno Loudon, *Assessment of Evidence on the Quality of Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)*,

Prepared for the California Department of Corrections and Rehabilitation, p. 5 (2007) (which can be found at: [http://www.cdcr.ca.gov/Adult\\_Research\\_Branch/Research\\_Documents/COMPAS\\_Skeem\\_EnoLouden\\_Dec\\_2007.pdf](http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/COMPAS_Skeem_EnoLouden_Dec_2007.pdf).)

Skeem and Loudon also noted deficiencies that would fail the objective test requirement: “There is no sound evidence that the COMPAS can be rated consistently by different evaluators, that it assesses the criminogenic needs it purports to assess, and (most importantly) that it predicts inmates’ recidivism for CDCR offenders.” *Id.* Thus, the authors of the study could not recommend that CDCR use it for individuals. *Id.* See also Klingele, *supra*, at 555-58, 576 (regarding “paucity of reliable evidence that now exists” for evidence-based corrections assessments in general).

In short, about the only basis for COMPAS are the *ipse dixit* statements from Northpointe that it does what it says; that although we do not know how it weighs the criminogenic factors, we should just take the risk assessment as true. To do so, however, violates Mr. Loomis’ (and other defendants’) right to due process because information upon which the trial court is relying for sentencing is secret and confidential. As the Wisconsin Court of Appeals noted, there is a lack of transparency.

Moreover, whatever proprietary risk calculations COMPAS does make, they are not for individual risk. The developers of COMPAS freely admit that the program is not identifying individual risk. In the 2015 Practitioner’s Guide, the authors state: “Risk assessment is about predicting group behavior ... it is not about prediction at the individual level.” “Our risk scales are able to identify groups of high-risk offenders – not a particular high-risk individual.” Practitioner’s Guide to COMPAS Core, Northpointe, Inc. (2015), at 31, (which can be found at <http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-CORE->



\_031915.pdf.) The scores simply indicate percentages of populations which will reoffend, and tell us nothing about Mr. Loomis himself (or any other specific defendant) for the purpose of sentencing other than that under COMPAS' proprietary software he falls within this class based on certain shared characteristics. It does not provide a specific prediction of Mr. Loomis' individual risk of recidivism. *See Starr, supra*, at p. 842. Indeed, as Professor Starr noted, risk assessments like COMPAS do not give the trial judge the information that he or she really needs: how will the sentence affect the defendant's recidivism risk. "What judges need to know is not just how 'risky' the defendant is in some absolute sense, but rather how the sentencing decision will affect his recidivism risk." *Starr, supra*, at 807 (emphasis in original).

Overriding all of this is that Northpointe, which develops and owns the software, considers it a trade secret and proprietary information. We have no way of testing it, knowing how it is weighing the factors, or how it in essence works. Thus, the trial courts in using this at sentencing are using a secret non-transparent process that is a violation of a defendant's due process rights.

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

Defendants have a due process right not to be sentenced based on impermissible considerations such as gender, race, or religion. *United States v. Traxler*, 477 F.3d 1243, 1248 (10<sup>th</sup> Cir. 1977), *citing Gardner v. Florida*. This Court also has rejected the use of gender classification based on statistical generalizations of gender groups. *See, e.g., Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (holding that Oklahoma law prohibiting the sale of 3.2% beer to males under 21, but only to females under 18 constituted gender based discrimination despite statistical evidence of higher male drunk driving rates in the 18-20 year old age group). Yet, by relying on COMPAS risk assessments the sentencing court is in part relying on gender as a factor.

It is unknown exactly which “criminogenic factors” COMPAS utilizes and how it weighs them when defining the reference class in large part because of the claim of the proprietary nature of the software. This is problematic for the courts because there are factors being accounted for which would be inappropriate for the court to consider at sentencing, including gender. Gender is one of the “criminogenic factors” that COMPAS uses in predicting the risk of an offender to reoffend and COMPAS develops gender specific risk assessments. The developers tout this as an improvement over earlier approaches. COMPAS also now has a separate risk assessment for women. All of this presents significant constitutional problems for the sentencing court.

As one commentator has noted, if the risk assessment tool includes gender (as COMPAS does), “men will *always* receive higher risk scores than otherwise-identical women (because, averaged across all cases, men have higher recidivism rates), even if the context is one in which men and women tend to have similar recidivism risks or in which women have higher risks.” Starr, *supra*, at 813. Although there may be a statistical basis to assert such in regard to gender generalizations, it is an unconstitutional violation of a defendant’s right to due process to apply it in sentencing. The Wisconsin Supreme Court also recognized this, but seemed to accept that it was a good thing to rely on gender. (App. A: 13, 14, ¶¶83, 86.)

In addition, although not at issue in Mr. Loomis’ case, commentators and studies have raised the issue of racial bias in the use of COMPAS and other risk assessments. A study conducted by Pro Publica found African-Americans disproportionately assessed as high risk versus white defendants. See Pro Publica, *Machine Bias* (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>. Other

commentators also have raised potential issues of socioeconomic class and possible racial discrimination See, e.g., Starr, *supra*, at 830-36; Klingele, *supra*, at 577.


Thus, the use of COMPAS or any similar risk assessment presents significantly problematic constitutional issues for the sentencing courts. If the gender of the offender has been a critical factor in assessing this risk under COMPAS, then relying on it amounts to punishing the offender for being male because the risks are higher. If it likewise disproportionately determines that racial minorities or persons of a certain national origins are high risks, it also is constitutionally infirm. Therefore, by relying in part on the COMPAS assessment, the circuit court violated Mr. Loomis' constitutional right to due process.

#### CONCLUSION

For the above reasons, Defendant Eric Loomis respectfully requests that this Court grant a writ of certiorari to review the decision of the Wisconsin Supreme Court.

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Respectfully submitted,

  
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