

FEDERAL DEFENDER ANALYSIS OF CORRECTIONS ACT (S. 467)

EXECUTIVE SUMMARY

I. **The CORRECTIONS Act Would Mandate an Untested Experiment that is Unlikely to Work.**

A. The Basics of Risk Assessment

When risk assessment tools are used in criminal justice systems, they are typically used to determine the appropriate kind and level of programming or supervision corresponding to an offender's needs. We are unaware of any criminal justice system that uses risk assessment scores to determine the amount of time credits inmates can earn for participating in programming, or to deny them the ability to use such credits.

Broadly speaking, risk assessment tools rely on two categories of information: static and dynamic factors. Static factors are those that do not change over time, including such things as criminal history and age at the time of the offense. Dynamic factors are those susceptible to change, such as work history, educational achievement, and strength of social networks, or the lack thereof.

Even for the limited purpose for which risk assessments are used, they are controversial. These tools do not measure the risk of recidivism of any individual, often classify individuals inaccurately, and tend to mis-classify individuals who are low risk as moderate or high risk. Further, static factors often favor white and well-off defendants. Dynamic factors are slow changing, and highly challenging to address for people with difficult home environments, a background of poverty, lack of education or work opportunities, or cognitive or mental health deficits.

As discussed further below, the problems with risk assessment become insurmountable when applied to the prison setting for the purpose of determining time credits and the ability to use them. None of the states cited by the CORRECTIONS Act sponsors use risk assessment scores or categories for such a purpose – and with good reason.

B. The CORRECTIONS Act and the Misuse of Risk Assessment

The CORRECTIONS Act (“S. 467”) would require the development and implementation of a complex “Post-Sentencing Risk and Needs Assessment System” (“Assessment System”) that would require “consideration of dynamic risk factors” such that all prisoners not initially classified as “low risk have a meaningful opportunity to progress to a lower risk classification during the period of the incarceration . . . through changes in dynamic factors.” § 3621A(b)(1)(B); *see also* § 3621A(h)(1). It would direct the Bureau of Prisons to assess and periodically reassess every inmate within its custody, § 3621A(a) & (c), and would give maximum incentives for completion of programs to those classified as low risk (10 days per month) and fewer incentives for all others (5 days per month), § 3621(h)(6)(A)(i). Over half the prison population would not be permitted to earn time credits, § 3621(h)(6)(A)(iii), and others

would be deemed ineligible to participate by the BOP, § 3621(h)(8)(A)(ii)(I)-(II). Among those left, only those classified as low risk could use time credits to eventually transfer to community confinement, § 3624(c)(2)-(5); those classified as moderate risk could only transfer to a residential reentry center or home confinement, § 3624(c)(4)-(5)), and only if their risk scores “declined during the period of the prisoner’s incarceration,” § 3624(c)(2)(B). Those classified as high risk could not use credits at all.

The system described in the bill is novel and untested. State correctional systems, including those cited in press releases announcing the legislation, award time credits for participating in programs based on performance and/or disciplinary record, not risk assessment scores. The system described in the bill is not in use in the states, and there is no evidence from the states that it would work as described (*i.e.*, classifying inmates accurately, and reducing risk levels through changes in dynamic factors), reduce recidivism, or save taxpayer dollars. The lesson from the states is that credits for participating in programs should be awarded on a fair and equitable basis, not risk scores.

The core assumption—that all inmates can progress to a lower risk category through changes in dynamic factors while incarcerated—is untested and likely incorrect. Every extant risk assessment instrument uses static factors and gives them significant weight based on their statistical correlation with recidivism. That weight cannot be overcome by legislative decree while maintaining any semblance of statistical accuracy. There is no question that many programs and activities reduce the overall *rate* of recidivism.¹ However, as discussed below, an individual’s risk *category* is unlikely to change as the result of programs and activities in prison. No research supports this assumption.

Further, relying on this unfounded assumption, the bill would give the maximum incentive to those who are classified as low risk when they enter prison. It is well-established that practices aimed at reducing recidivism should focus scarce resources on the highest risk individuals. S. 467 would do the opposite by giving no meaningful incentive to high-risk prisoners who need the most intensive programming, and by expending significant staff time on assessments and release plans for individuals classified as low risk.

The bill also assumes that the Assessment System will predict “the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted,” § 3621A(h)(2), and on that basis, would set the number of credits the prisoner could earn, and whether the prisoner could use the credits s/he has earned, § 3621A(h)(6)(A), § 3624(c)(2). Risk

¹ “Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release.” See Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 3-4 (Aug. 1, 2012), <http://www.justice.gov/ola/testimony/112-2/08-01-12-bop-samuels.pdf>. The benefit-to-cost ratio for residential drug abuse treatment is as much \$2.69 for each dollar invested; \$5.65 for adult basic education; \$6.23 for correctional industries; and \$7.13 for vocational training. *Id.*

assessments cannot predict whether any individual will reoffend. They merely predict the statistical risk of a group with certain characteristics in common, and they often do so inaccurately. A recent meta-analysis showed that only 52% of those assessed as moderate or high risk by risk assessment tools went on to commit any offense, meaning that almost half of all persons were classified as moderate or high risk when they were actually low risk.² Current research questions whether risk assessment tools are too inaccurate even for the purpose of identifying criminogenic needs and appropriate programming.³ It would be wholly unacceptable, and likely unconstitutional, for the length of prison sentences to depend on unreliable and unreviewable risk assessments, as under S. 467.

II. The Development and Implementation of the new “Assessment System” Would Be Costly and Labor-Intensive, and Any Cost Savings Would Not Be Seen for a Decade, If Ever.

S. 467 would require the immediate expenditure of taxpayer dollars on the costly development and implementation of a new “Assessment System.” Assessment instruments “are expensive to construct and validate,”⁴ and “can take several years to complete.”⁵ Tools developed for one population or stage of the criminal justice process cannot just be taken off the shelf and used for a different population or stage of the criminal justice process. The tool must be validated for the particular population and specific to the particular stage in the criminal justice process. The bill would require development, validation, training, and implementation within six years.⁶ As explained below, we believe that this time frame is overly optimistic, given the need to collect and analyze data on actual recidivism of prisoners released over several years, and the time it would take to train and certify BOP staff to use the tool. Moreover, the bill provides that the tool need only be validated “as soon as is practicable,” § 3621A(b)(4), but a tool must be validated *before* it is implemented. Whether a valid tool can be developed for the

² Seena Fazel *et al.*, *Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 *British Medical J.* 1, 4 (2012), <http://www.bmj.com/content/345/bmj.e4692>.

³ *See, e.g., id.* at 4-5; Joselyne L. Chenane *et al.*, *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 *Crim. Just. & Behav.* 286, 296-300 (2015); James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 15-16 (2013), <http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf>; Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* v-vi (2013), <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244477.pdf>.

⁴ Edward Latessa *et al.*, *Creation and Validation of the Ohio Risk Assessment System: Final Report* 8-9 (2009).

⁵ Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 *Victims & Offenders: Int'l J. Evidence-Based Res., Pol'y, & Prac.* 203 (2010).

⁶ It would allow 30 months for the new Assessment System to be developed, and another 30 months for BOP to determine the risk level of each prisoner under the new Assessment System, for a total of five years, and six years for BOP to make programming and activities available to all eligible prisoners. *See* § 3621A(a) & (c); § 3621(h)(2).

massive and heterogeneous federal prison system is highly doubtful.

Any savings from transferring individuals from prison to prerelease custody would not be seen for a decade, if ever. After at least six years for development and implementation, it would take a low-risk prisoner three years, and a moderate-risk prisoner six years, to earn one year of credit.⁷ As noted above, only a small portion of the prison population would be able to earn and use time credits, and all or some of the prerelease custody they could earn would be spent in a residential reentry center or home confinement, *see* § 3624(c)(2)-(5), which cost more than incarceration in the low and medium security facilities from which they would be transferred. Meanwhile, during the years it would take to implement the proposal, absent front-end sentencing reform, the BOP population would grow from 32% to 55% over rated capacity. Medium and high security facilities will be hit the hardest by future growth, but S. 467 would transfer prisoners from less crowded and less costly minimum and low security facilities.

It would be a significant mistake to require the Bureau of Prisons to spend years developing and implementing a costly and labor-intensive system without solid evidence that it would benefit the taxpayers. There is no such evidence.

III. The Bill Would Have an Unwarranted Adverse Impact on the Poor and Racial Minorities.

The categorical exclusion of over half the prison population is unwarranted, and would have a disparate impact on African American and Native American inmates. Risk factors correlate with socioeconomic class and race, and studies show that African Americans are more likely to be *misclassified* as high risk than White or Hispanic offenders.

The exclusion is also contrary to the goal of increasing public safety. Many of the excluded inmates have the greatest need to participate in programming, but would have no meaningful incentive to do so. With or without time credits, they will serve lengthy sentences and then be released. By failing to encourage them to participate in programs shown to reduce recidivism before releasing them to the community, S. 467 fails to promote the stated goal of enhancing public safety.

IV. The Bill Would Be Unconstitutional.

The bill would violate the Separation of Powers, the Due Process Clause, and the Sixth Amendment by making all determinations and assessments against the inmate unreviewable in any forum; giving the government the right to judicial review of a decision to transfer, with no right to counsel and no clear right to a hearing for the inmate; denying inmates any right to judicial review of decisions to deny transfer; providing for revocation of prelease custody with no procedural mechanism, due process protections, or right to counsel; giving probation officers authority to impose and modify conditions of release and supervise inmates in BOP custody; and

⁷ Only after participating in 30 days of these programs or activities would individuals start to accrue time credits of 5 days or 10 days (only for low risk prisoners) for each 30-day period of successful completion of programming or activity. *See* § 3621(h)(6)(A)(i).

giving BOP, not courts, the authority to revoke prerelease custody and return an inmate to prison. In addition, giving the Sentencing Commission, not the courts, unreviewable authority to decide the legal question whether an inmate's offense of conviction excludes him from earning time credits would lead to error, unfairness, and impracticalities.

V. There is a Simple, Cost-effective, and Fair Alternative to this Bill.

There is an alternative, straightforward approach that would result in immediate cost savings, promote public safety, and not create unwarranted disparities or violate the Constitution. Congress should expand recidivism-reducing programs in prison and incentivize all inmates to participate on an equitable basis.

Congress should provide support for the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn and use time credits up to a certain percentage of the sentence imposed, so long as they also comply with disciplinary rules. Under this approach, individuals would earn reductions in their prison sentences, taxpayer dollars would be saved, and public safety would be enhanced.

Furthermore, and perhaps most significantly, Congress should reduce unnecessarily severe sentences on the front end. “[A]ny attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options . . . would not be sufficient. . . . [T]he only policy change that would on its own eliminate overcrowding altogether is reducing certain drug mandatory minimums.”⁸ By all accounts, the Smarter Sentencing Act would result in at least \$3 billion in cost savings in the first 10 years.⁹

⁸ Statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, before the H. Comm on Jud., Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, *Lessons from the States: Responsible Prison Reform* 10, 12 (July 15, 2014).

⁹ The Congressional Budget Office estimates that the Smarter Sentencing Act would result in a net savings of \$3 billion: \$4 billion saved through reduced incarceration less \$1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in \$3.426 billion in cost savings and another \$3.964 billion in cost aversions. See Potential Impact & Cost Savings: The Smarter Sentencing Act, <http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf>. Urban Institute estimates \$3.258 billion in cost savings. Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 3-4 (2014), <http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf>.

FEDERAL DEFENDER ANALYSIS OF CORRECTIONS ACT (S. 467)

I. The Assessment System Is an Untested Experiment, and Is Unlikely to Work as Described.

A. State correctional systems award time credits for participating in programs based on performance and disciplinary record, not risk assessment scores.

The press releases announcing S. 467 and similar legislation introduced in the House claim that “similar programs have found success” in Texas, Rhode Island, Oklahoma, Ohio, and North Carolina,¹ thus suggesting that the system described in these bills is already in use, works as described (*i.e.*, the tool classifies prisoners accurately, and risk levels are reduced through changes in dynamic risk factors), reduces recidivism, and saves taxpayer dollars.

In fact, while some state correctional systems use risk/needs assessments to identify offenders’ needs and the appropriate kind and level of programming, no state gives or denies the use of time credits for participating in programs based on risk scores. Rather, the states award time credits based on performance and/or institutional conduct. The real lesson from the states is that credits for participating in programs should be awarded on a fair and equitable basis, not risk scores.

In Texas, the Department of Criminal Justice conducts a risk and needs assessment at intake only to identify the inmate’s needs.² Inmates can earn “good conduct” time credits both for “actively engaging” in work and programs³ and for “diligently participating” in work and programs.⁴ The number of days inmates can earn ranges from zero to 45 days per month, and is set by the inmate’s “time earning class,” which is based on the inmate’s “conduct, obedience, and industry.”⁵ New inmates are placed in the time earning class that earns 35 days per month, and are automatically promoted after six months to the class that earns 40 days per month as long as they have no “major disciplinary cases.”⁶ Further promotions or demotions to a higher or

¹ Press Release from Senator John Cornyn (R-TX), Feb. 10, 2015, http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=f6840b81-c2dd-4393-8ff9-f7861e79436d; Press Release of Jason Chaffetz (R-UT), Feb. 5, 2015, <http://chaffetz.house.gov/press-release/lawmakers-introduce-bipartisan-bill-reform-federal-prison-system>.

² See Tex. Gov’t Code § 508.152(b-1); Texas Dep’t of Criminal Justice, *Offender Orientation Handbook 3* (2015), http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf.

³ Tex. Gov. Code § 498.003(a).

⁴ *Id.* § 498.003(d).

⁵ *Id.* § 498.002.

⁶ See Tex. Dep’t of Criminal Justice, *Good Conduct Time*, AD-04.80 (rev. 9), at 1, 4 (2010); Tex. Dep’t of Criminal Justice, *Review Process for Promotion in Time Earning Class*, AD-04.81 (rev. 8), at 2 (2010); Texas Dep’t of Criminal Justice, *Offender Orientation Handbook 8* (2015); see also William T. Habern, David P. O’Neil & Debra Bone, *Going to Prison in Texas in 2014*, at 14 (2014), www.paroletexas.com/articles/GTP2008.pdf.

lower time earning class, or to a non-time earning class, also depend on whether the inmate has a major disciplinary case.⁷

In Rhode Island, the Department of Corrections conducts risk and needs assessments at intake only to assess inmates' needs.⁸ The number of days of credit an inmate can earn for participating in programs is not set by the risk assessment score, and varies based only on offense of conviction. Most inmates can earn 2 days per month for working at a prison job, an additional 5 days per month for participating in programs to address the inmate's individual needs,⁹ and an additional 30 days whenever they complete a program.¹⁰ Inmates convicted of certain more serious offenses (*e.g.*, sexual assault) can earn the same 2 days per month for working at a prison job, but only 3 additional days per month, with a maximum of 36 days per year for their performance while participating in and completing programs.¹¹

In Oklahoma, the department of corrections conducts a risk and needs assessment at intake only to identify an inmate's programming needs.¹² Inmates earn a specific number of days of "achievement" time credit for completing programs,¹³ such as 200 days for earning a bachelor's degree, 70 days for successfully completing an alcohol abuse treatment program, or 30 days for completing an anger management program.¹⁴ Inmates can also earn monthly time credits for participating in assigned work, education, or programs.¹⁵ The number of days that an

⁷ *Ibid.*; see also Texas Dep't of Criminal Justice, *Disciplinary Rules and Procedures for Offenders* 21 (2012), http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf. Our understanding of the practice and procedure of earning good conduct time in Texas was confirmed in a telephone conversation with David P. O'Neil, of Habern, O'Neil & Associates, on February 3, 2015. Mr. O'Neil has co-written several articles on the operation of the Texas prison system, and is currently Co-Chairman of the Corrections and Parole Law Committee of the Texas Criminal Defense Lawyers Association.

⁸ R.I. Dep't of Corrections, *Policy & Procedure – Classification Process*, Policy No. 15.01-6 DOC, pt. III(H) (2014).

⁹ R.I. Gen. Laws § 42-56-24(a), (f), (g). These earned credits are in addition to up to 10 days per month for "good behavior." See *id.* § 42-56-24(c), (g), (f).

¹⁰ *Id.* § 42-56-24(a)-(b), (g).

¹¹ *Id.* § 42-56-24(f); *id.* § 42-56-26.

¹² Okla. Dep't of Corrections, *Policy & Operations Manual – Male Initial Custody Assessment Procedures*, OP-060102, pt. I.C.6 (2014).

¹³ Okla. Stat. tit. 57, § 138; see Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060107, at 17-18 (2013). An inmate is not eligible for earning credits if sentenced for "a criminal act which resulted in the death of a police officer, a law enforcement officer, an employee of the Department of Corrections, or an employee of a private prison contractor and the death occurred while the police officer, law enforcement officer, employee of the Department of Corrections, or employee of a private prison contractor as acting within the scope of their employment." *Id.* § 138(A).

¹⁴ See Okla. Dep't of Corrections, *Policy & Operations Manual – Programs*, OP-09101 (2014).

¹⁵ Okla. Stat. tit. 57, § 138.

inmate can earn per month ranges from zero to 60 days, and is set by the inmate's assigned "class level," which is based on the inmate's performance in work, education, or programs.¹⁶ Inmates are initially placed in the class that earns 22 days per month.¹⁷ After 3 months, an inmate can be promoted to earn 33 days per month, and after 8 months can be promoted to earn 44 days per month.¹⁸ For inmates in the top two class levels who have never been convicted of certain offenses, the number of days that can be earned is "enhanced" to 45 days and 60 days per month, respectively.¹⁹ Promotions and demotions are based on performance evaluations and institutional conduct.²⁰

In Ohio, the department of rehabilitation and correction conducts a risk and needs assessment at intake only to determine an inmate's needs.²¹ An inmate can earn either 1 day or 5 days of time credit per month for participating in work and programs, and an additional 1 day or 5 days for completing programs.²² Whether an inmate earns 1 day or 5 days depends on the offense of conviction and date of conviction, not a risk assessment score.²³

Ohio also has a procedure for release after service of 80% of the sentence, initiated by the director of rehabilitation and correction by submitting a notice to the sentencing court recommending that the court consider release and including information about the inmate's "participation while confined in a state correctional institution in school, training, work, treatment, and other rehabilitative activities and any disciplinary action."²⁴ Before granting release, the court must hold a hearing where the offender has an attorney and both prosecutor and offender have a right to be heard.²⁵ Eligibility depends on the offense of conviction.²⁶

¹⁶ *Id.* There are some exclusions and restrictions based on offense of conviction. For example, inmates convicted of certain offenses must serve a certain percentage of their sentence regardless of earned credits. See Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060211, at 10-16 (2014).

¹⁷ Okla. Stat. tit. 57, § 138(D)(1).

¹⁸ *Id.*

¹⁹ *Id.* § 138(D)(1), (D)(2)(b)-(c), (E).

²⁰ See Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060107, at 2 (2013).

²¹ See Ohio Dep't of Rehab. & Correction, *Prison Reentry Assessment and Planning*, Policy No. 02-REN-01 (2014).

²² Ohio Rev. Code Ann. § 2967.193.

²³ *Id.* § 2967.193(C), (D).

²⁴ *Id.* § 2967.19(B), (C), (D).

²⁵ *Id.* § 2967.19(F) & (H).

²⁶ *Id.* § 2967.19(B), (A), (C).

Ohio also has a front-end mechanism for some offenders to reduce the amount of time served by participating in programs, available at sentencing at the discretion of the sentencing judge.²⁷ Under this mechanism, a risk and needs assessment is used only to identify appropriate programs and treatment. An offender may be sentenced to a “risk-reduction sentence” if he agrees to the assessment and to participate in programming and treatment, and must be released upon successful completion of the prescribed programs and treatment after serving 80% of the non-mandatory prison term.²⁸ Eligibility for a “risk-reduction sentence” and the amount of time that can be earned is not determined by a risk score. Rather, it depends on the offense of conviction, the discretion of the judge, the sentence imposed, and whether and when the offender completes the prescribed programs.²⁹

In North Carolina, the number of days of credit an inmate can earn per month for working and participating in programs ranges from 3 to 9 days and is set by the “level” of the inmate’s job or program assignment, which depends on the number of hours per day, skill level, and days per week required by the job or program.³⁰ An inmate who increases skills through vocational training can be assigned to a higher level job and thus earn more credit.³¹ Inmates can earn additional time for achievements in apprenticeship training or for successfully completing job and educational training. The number of days of credit depends on the activity (*e.g.*, 30 days for completing on-the-job training, 20 days for an associate’s degree).³² Earned credit reduces the time that must be served, but cannot reduce it below the minimum sentence imposed by the court.³³

North Carolina also has a front-end mechanism for some offenders to earn a term of imprisonment less than the minimum term imposed by the court by participating in programs. “Advanced supervised release,” or ASR, is available to those convicted of less serious classes of offenses, and may be ordered by the court in its discretion at sentencing.³⁴ For an inmate sentenced to the ASR track, prison officials conduct a risk and needs assessment, but only to

²⁷ *See id.* § 2929.143.

²⁸ *Id.* §§ 2929.143, 5120.036(A)-(C). A person serving a “risk reduction” sentence is not entitled to earn time credits for participating in risk reduction programming. *Id.* § 2929.143(B).

²⁹ *See id.* § 2929.143.

³⁰ N.C. Dep’t of Public Safety, *Prison Policy & Procedure Manual – Sentence Credits*, ch. B.0113 (2013); *see* N.C. Gen. Stat. § 148-13(a1). Inmates sentenced for DWI are not eligible for earned time credits.

³¹ N.C. Dep’t of Public Safety, *Rules & Procedures – Inmate Booklet*, at 17 (2010), https://www.ncdps.gov/div/AC/inmate_rule_book2010.pdf.

³² *Id.* ch. B.0114.

³³ N.C. Gen. Stat. § 15A-1340.18(d). Under North Carolina’s structured sentencing system, the judge imposes a minimum and maximum term of imprisonment within ranges based on class of offense and criminal history. *See* N.C. Gen. Stat. § 15A-1340.17.

³⁴ N.C. Gen. Stat. § 15A-1340.18(c).

identify and assign appropriate programming.³⁵ If the inmate successfully completes the programming, the inmate is released on the specific earlier date determined at the time of sentencing.³⁶

In sum, the states do not set the number of time credits prisoners can earn or deny any prisoner the ability to use credits based on actuarial risk assessment scores. Instead, the states award time credits based on individual performance and conduct.

It has been brought to our attention, however, that some states consider an inmate's risk assessment score in connection with parole. But no state uses risk assessment scores to determine when inmates are eligible for parole, and while some state parole agencies consider parole risk assessment scores as one of many factors in exercising their discretion whether to grant parole, those scores are not determinative or even very weighty.

For example, in Pennsylvania, the Parole Board considers an inmate's risk score as one of four weighted and fifteen non-weighted "decisional factors," such as the inmate's motivation for success, his release plan, and acceptance of responsibility.³⁷ Of the four weighted factors, the inmate's risk score carries the least number of possible points.³⁸ Thus, an inmate assessed 2 points for being scored as high risk, 3 points for violence, 1 point because he has participated in but not completed risk-reduction programming, and 0 points because he has engaged in no institutional misconduct in the past year will have a total of 6 points, which "suggests" parole. The Parole Board considers this suggestion along with the other decisional factors and retains ultimate discretion whether to grant parole.³⁹

In Kentucky, the parole board must review the results of an inmate's risk and needs

³⁵ *Id.* § 15A-1340.18(b). N.C. Dep't of Public Safety, *Prison Policy and Procedures Manual – Advanced Supervised Release (ASR)*, ch. C.2601, C.2606 (2012).

³⁶ *Id.* § 15A-1340.18(c), (e).

³⁷ See Pa. Parole Decisional Instrument, <http://www.pbpp.pa.gov/Understanding%20Parole/Documents/PDI%20361%2009-2014.pdf>.

³⁸ *Id.* The other three factors are offense violence and/or likelihood of violence, whether a high or medium risk inmate has participated or completed risk-reduction programming, and institutional behavior. Each factor has a maximum score, and the cumulative score either "suggests parole" (1 to 6 points) or "suggests parole refusal" (7 or more points). An inmate's risk assessment score adds 0 to 2 points; the violence indicator adds 1 to 4 points; the institutional programming factor adds 0 to 3 points; and the institutional behavior factor adds 5 points if the inmate has committed a new crime or other institutional misconducts or has a pattern of misconduct.

³⁹ 61 Pa. Cons. Stat. § 6137(a)(3). For a nonviolent offender sentenced under Pennsylvania's recidivism risk reduction incentive (RRI) program, the inmate is entitled to "rebuttable parole" after she has served 75% or 83% of the sentence imposed (depending on the length of the sentence), if the Parole Board has certified, among other things, that the inmate has successfully completed the treatment program designed to address her needs as determined by a risk and needs assessment. *Id.* §§ 4505, 4506. The Parole Board retains the discretion to deny parole based on the inmate's conduct or for public safety reasons, but the inmate's risk score does not determine when or whether she can be released. *Id.* § 4506. Indeed, 76% of inmates in this program are assessed as medium or high risk. Pa. Dep't of Corrections, *Recidivism Risk Reduction Incentive 2014 Report*, at 4 (2014).

assessment before the parole hearing, but the risk score is not one of the 16 factors, one or more of which the parole board “shall apply to an inmate” in making the parole decision.⁴⁰ At the same time, an inmate’s institutional conduct and adjustment, “particularly evidence-based program involvement,” is such a factor, and whether parole is granted ultimately lies in the discretion of the parole board.⁴¹ The risk and needs assessment is used primarily to determine the terms and intensity of parole supervision and the inmate’s need for treatment while on supervision.⁴²

In Michigan, the Parole Board considers an inmate’s statistical risk of committing assaultive and property crimes.⁴³ These two risk scores carry differing weights in the parole guidelines depending on the length of the sentence, and their combined score is only one of eight scored categories: (1) offense characteristics and sentence; (2) prior criminal record; (3) institutional conduct; (4) statistical risk; (5) age; (6) program performance; (7) mental health; and (8) institutional housing level.⁴⁴ The total preliminary score for all eight categories is subject to adjustment depending on whether the inmate is serving a sentence for criminal sexual conduct and the inmate’s criminal record score, institutional conduct, and age, and provides only the inmate’s probability of parole.⁴⁵ Whether parole will be granted remains in the discretion of the Parole Board.⁴⁶

In Texas, the Parole Division uses a parole-specific risk assessment tool indicating the likelihood of success on parole and combines the parole risk score with a separate measure of offense severity, resulting in a parole guideline score.⁴⁷ The parole guideline score is not a “precise recommendation to either deny or grant parole” and is not presumptive.⁴⁸ The board

⁴⁰ Ky. Parole Board, *Policies & Procedures – Parole Release Hearings*, KYPB 10-01, at 3-4 (2012). The parole board is directed by statute to consider the results of an inmate’s validated risk and needs assessment before granting parole, and is authorized to adopt regulations that “utilize in part objective, performance-based criteria and risk and needs assessment information.” Ky. Rev. Stat. § 439.340(3)(b).

⁴¹ Ky. Parole Board, *Policies & Procedures – Parole Release Hearings*, KYPB 10-01, at 4 (2012); Ky. Rev. Stat. § 439.340(1), (2); see *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky. Ct. App. 1996).

⁴² The parole board must “use the results” from the risk and needs assessment “to define the level or intensity of supervision for parole, and to establish any terms or condition of supervision.” *Id.* § 439.335(2) (“The terms and intensity of supervision shall be based on an individual’s level of risk to public safety, criminal risk factors, and the need for treatment and other interventions.”).

⁴³ Mich. Dep’t of Corrections, Policy Directive 06.05.100, *Parole Guidelines* (2008); Mich. Dep’t of Corrections, Policy Directive Attachment 06.05.100A, *Parole Guidelines* (2010). The Parole Board “may” but is not required to include in the parole guidelines as a factor “the prisoner’s statistical risk screening.” Mich. Comp. Laws § 791.233e.

⁴⁴ Mich. Dep’t of Corrections, Policy Directive Attachment 06.05.100A, *Parole Guidelines* (2010).

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 1; see *In re Parole of Michelle Elias*, 811 N.W.2d 54, 522-23 (Ct. App. Mich. 2011).

⁴⁷ Texas Board of Pardon & Paroles, *Parole Guidelines Annual Report – FY 2014*, at 4 (2015).

⁴⁸ *Id.*

considers many other factors, such as institutional adjustment and participation in programming, and parole is granted in the Parole Division’s discretion to inmates at all guideline levels, and to thousands of inmates classified as highest, high, and moderate risk.⁴⁹ For inmates releasing to parole supervision, the Parole Division then uses a different risk and needs assessment tool to determine and address inmates’ needs before reentry.⁵⁰

As in Texas, Rhode Island’s parole guidelines combine the inmate’s parole-specific risk score with a separate score for offense severity, but the guidelines “are not automatic nor is the parole risk score presumptive.”⁵¹ In addition to the guidelines, the parole board considers twelve “major criteria,” including institutional adjustment and participation in rehabilitative programs.⁵²

To summarize, the states do not set the number of time credits prisoners can earn or deny any prisoner the ability to use time credits based on risk assessment scores. Thus, no experience or research shows that prisoners can change risk scores or levels through changes in dynamic factors, or that any such change would reduce recidivism.⁵³ There is an “absence of evidence” at this point that even the use of risk/needs tools to identify criminogenic needs “add[s] value to risk reduction efforts.”⁵⁴ Likewise, states do not determine *when* prisoners are eligible for parole based on risk scores, or *whether* to grant parole on the sole or predominant basis of risk assessment scores.

The lesson to be learned from the states is clear: Time credits for participating in programming should be awarded on a fair and equitable basis such as individual performance and conduct, not risk scores.

B. The idea that a person’s “risk classification” can be lowered in prison has not been tested and is most likely incorrect.

S. 467 would direct the Attorney General to ensure that all prisoners other than those classified as low risk have a “meaningful opportunity” to progress to a “lower risk classification” during incarceration “through changes in dynamic factors,” § 3621A(b)(1)(B)(i), which it defines

⁴⁹ *Id.* at 8-9.

⁵⁰ See Texas Dept. of Crim. Just., Parole Div., *Policy & Operating Procedure – Case Assessment*, PD/POP-3.2.5 (2015).

⁵¹ Rhode Island Parole Board, *2014 Guidelines*, at 2-3.

⁵² *Id.* at 4-5.

⁵³ See Joselyne L. Chenane *et al.*, *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 *Crim. Just. & Behav.* 286, 300 (2015).

⁵⁴ “There is, at this point, no evidence that instruments focusing on risk reduction produce lower recidivism rates.” Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* 130 (2013), <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244477.pdf>; *id.* at 121 (comments by Skeem, Latessa and others acknowledging the “absence of evidence” that risk assessment tools “add value to risk reduction efforts”).

as a “characteristic or attribute” that “has been shown to be relevant to assessing risk of recidivism,” and that “can be modified based on a prisoner’s actions, behaviors, or attitudes, including through appropriate programming or other means, in a prison setting,” § 3621A(h)(1).

As an initial matter, even instruments that attempt to incorporate more dynamic factors (in order to identify criminogenic needs) necessarily include and give significant weight to static factors. Static factors are included and given a certain weight based on their statistical correlation with recidivism.⁵⁵ That weight cannot be overcome by simply deciding to give overriding weight to dynamic factors. Indeed, “the exchange of dynamic factors for more predictive static factors is ill-advised.”⁵⁶ Moreover, as discussed below, risk assessment instruments are already too rough a measure for setting the length of prison sentences, and adding too many dynamic factors would make the instrument even less reliable.⁵⁷

Many programs and jobs have been shown to reduce the *rate* of recidivism,⁵⁸ but the assumption that risk *categories* can change in the prison setting, through programming or otherwise, is untested and most likely incorrect. For example, the PCRA (which is used to provide guidance on the kind and level of services for people on probation and supervised release) includes static factors and dynamic factors, with a maximum possible score of eighteen.⁵⁹ Factors related to criminal history and age at intake to supervision, none of which can change, account for nine of those eighteen points.⁶⁰ Marital status, family stressors, and lack of pro-social support, which might be changed in the community but are unlikely to change during incarceration, account for three more points. Another example is Ohio’s Prison Intake Tool (which is used only to establish treatment priorities). It includes 30 items with a maximum possible score of 37. Twenty-three points are for factors that could not possibly change in prison because they occurred in the past.⁶¹

⁵⁵ Christopher T. Lowenkamp *et al.*, *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 *Psych. Services* 87, 89 (2013).

⁵⁶ Baird *et al.*, *supra* note 54, at 105.

⁵⁷ See Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 *Victims & Offenders: Int’l J. Evidence-Based Res., Pol’y, & Prac.* 203, 212 (2010) (“Reliability is more of an issue with instruments that include dynamic factors (such as gauging the attitudes or values of the offender).”).

⁵⁸ See Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 3-4 (Aug. 1, 2012).

⁵⁹ The factors on the PCRA are number of prior misdemeanors and felony arrests; violent offense; prior offending pattern (different offense types); revocation of supervision or new crime while on supervision; institutional adjustment in state or federal prison; age at intake to supervision; education; current employment status; work history over 12 months (stability and performance); current alcohol problem; current drug problem; marital status; family stressors; current lack of pro-social support; attitude toward supervision and change. Each has complicated and subjective scoring rules.

⁶⁰ Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Release Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, 78 *Fed. Probation* 41, 42 (2014).

⁶¹ Latessa *et al.*, *Creation and Validation of the Ohio Risk Assessment System: Final Report*, Appendix A, 56-59

Moreover, dynamic factors are “slow changing,”⁶² and the dynamic factors most prevalent among individuals classified as moderate or high risk would be difficult or impossible to change in prison. A study of the PCRA showed that the most commonly occurring dynamic factors for people on federal probation and supervised release were deficits in education/employment and social networks.⁶³ Those who were able to lower their risk levels typically did so by becoming employed and having a more stable work history.⁶⁴ While vocational training is an important part of correctional programming, the ultimate success of that training and whether it truly reduces the risk of recidivism depends on whether the individual is able to obtain a job that provides a legitimate means of support over a period of time. This cannot be done in a prison setting. There was very little change in education deficits over time, and education had almost no impact on changing risk scores.⁶⁵ Under the PCRA, a person with a GED receives the same number of points as a person with any level of education less than a high school diploma. Assuming the same scoring under the “Assessment System,” obtaining a GED in prison could not reduce a person’s risk classification. There was relatively little change over time in social networks factors (*i.e.*, single, divorced or separated, unstable family situation, lack of prosocial support).⁶⁶ If these factors are slow to change in the community, it would be nearly impossible to change them from behind bars.

Even if the raw risk score could change through programming or otherwise in prison, it would be difficult, if not impossible, for inmates to move down a risk category. Unlike some instruments, like the SPIn which has up to six categories of risk “for greater sensitivity in detecting change after reassessment,”⁶⁷ or even the PCRA which has four categories, S. 467 directs only three categories. Thus, a greater change in the raw score would be necessary for an inmate to move to a lower risk category.

If prisoners participated in recidivism reduction programs, but did not see their risk categories declining, many—and particularly those in the high risk category who could not use time credits—would come to correctly believe that the incentives were illusory. And when they reached this conclusion, they may opt out of recidivism reduction programming, even though they would have participated in programming if there was no credits system at all (because the program would appear to be a sham). If so, those most in need of recidivism reduction

(2009).

⁶² David Robinson, *The Service Planning Instrument (SPIn); A New Assessment and Case Planning Model for Adult Offenders* 18 (2007), http://www.ohhaonline.ca/SPIN_Overview.pdf.

⁶³ Cohen & VanBenschoten, *supra* note 60 at 47 fig.3.

⁶⁴ *Id.* at 49 tbl.4, 50.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Robinson, *supra* note 62.

programming would return to the streets without the benefit of programming.

In addition, treating inmates differently on the basis of risk classifications that are not easily understood may appear arbitrary and unfair to the inmates and could create significant prison management issues.

C. Actuarial risk assessments are an inappropriate basis for determining the length of prison sentences because they cannot determine any individual's risk of recidivism, and often misclassify individuals as higher risk.

The bill assumes that the Assessment System will predict the “the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted,” § 3621A(h)(2), and on that basis, would set the number of credits the prisoner could earn, and whether the prisoner could use the credits s/he has earned, § 3621A(h)(6)(A), § 3624(c)(2).

This reflects a misunderstanding of the information that actuarial risk assessments are able, and not able, to provide. These tools roughly predict the statistical risk of a group with certain characteristics in common, but they do not and cannot identify whether any individual in a group will reoffend. Actuarial risk assessments tend to over-predict recidivism.⁶⁸ An important meta-analysis showed that only 52% of those judged to be at moderate or high risk by generic risk assessment tools went on to commit any offense, meaning that almost half (48%) of all persons who were actually low risk were mis-classified as moderate or high risk.⁶⁹ The researchers concluded that “risk assessment tools in their current form can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case,” and that “even after 30 years of development, the view that . . . criminal risk can be predicted in most cases is *not evidence based*.”⁷⁰

Researchers have warned that “even for well-validated tools, implementation efforts can fall breathtakingly short” and that more research is needed “to evaluate the extent to which these tools are implemented in ‘real world’ settings faithfully enough to bridge the usual divide between science and practice.”⁷¹ A recent study concluded that the power of risk assessment tools to “accurately classify offenders by risk level may have been overestimated.”⁷²

⁶⁸ Seena Fazel *et al.*, *Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 *British Medical J.* 1, 4 (2012), <http://www.bmj.com/content/345/bmj.e4692>.

⁶⁹ *Id.*; see also BMJ Group, *Concerns Over Accuracy of Tools to Predict Risk of Repeat Offending* (2012), <http://group.bmj.com/group/media/latest-news/concerns-over-accuracy-of-tools-to-predict-risk-of-repeat-offending>.

⁷⁰ Fazel *et al.*, *supra* note 68, at 5 (emphasis added).

⁷¹ Jennifer Skeem, *Risk Technology in Sentencing: Testing the Promises and Perils (Commentary on Hannah-Moffat, 2011)*, 30 *Justice Q.* 297, Abstract & 302 (2013), <http://www.albany.edu/scj/documents/RiskAssessmentSkeem.pdf>.

⁷² Baird *et al.*, *supra* note 54, at v. While this study focuses on risk assessment instruments used in juvenile justice, the general theory and actuarial science behind the instruments are the same, so the concerns about juvenile

Significantly, a group of experts funded by the Department of Justice concluded that “simple, actuarial approaches to risk assessment can produce the strongest results. Adding factors with relatively weak statistical relationships to recidivism – including dynamic factors and criminogenic needs – can result in reduced capacity to accurately identify high-, moderate-, and low-risk offenders.”⁷³ The more “dynamic” factors that require subjective judgment are included in the assessment, “the greater the potential for classification error.”⁷⁴

Other researchers are even more “wary of over-promising unattainable results” with risk assessments.⁷⁵ Researchers at the Center for Evidence-Based Corrections, Department of Criminology, Law & Society, University of California Irvine, found that the “overall predictive ability” of risk assessment instruments for criminal justice systems “is relatively modest” and “often falls short of the levels found in other domains.”⁷⁶ Explanations for this “comparative weakness” include: (1) “tools employed in risk assessment [that] fail to cope with complex relationships between risk factors and outcomes,” (2) “unmeasured heterogeneity across offenders and jurisdictions,” (3) inadequate assessment of “the impact of communities and the criminal justice system” on recidivism, and (4) the impact on risk assessment of factors such as neighborhood inequality, segregation, social disorder, and access to service providers.⁷⁷ Aside from those factors, “the complexity of human agency may present a challenge of irreducible heterogeneity,” which cannot be captured by a risk assessment instrument.⁷⁸

It is bad enough that inaccuracies in risk/needs assessments may misidentify appropriate services.⁷⁹ It is wholly unacceptable, and likely unconstitutional, for the length of prison sentences to depend on unreviewable and unreliable BOP-determined risk assessments, as under S. 467.

D. There is no evidence that risk assessment tools that rely on dynamic factors actually reduce recidivism.

assessments hold true for adult assessments.

⁷³ *Id.* at vi.

⁷⁴ Christopher Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System* 7 (2009), http://nccdglobal.org/sites/default/files/publication_pdf/special-report-evidence.pdf.

⁷⁵ James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 16 (2013), <http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf>.

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 15-16.

⁷⁸ *Id.* at 16.

⁷⁹ Chenane *et al.*, *supra* note 53, at 287.

There is no evidence that targeting “dynamic factors” statistically correlated with recidivism (known as “criminogenic needs”) can actually reduce recidivism. The term “‘criminogenic’ implies causation, yet needs that are considered criminogenic are simply those with a statistical relationship with recidivism.”⁸⁰ “While correlation is an adequate requirement for inclusion in risk assessment, the simple fact that a particular need exhibits a general relationship to recidivism does not mean it contributed to an individual’s offending behavior.”⁸¹ For example, a person with an alcohol disorder may have committed a fraud because he wanted to buy an expensive car to improve his status among colleagues. Treating the alcohol disorder would remove a risk factor for recidivism and lower his risk score, but would do nothing to treat the underlying cause of the criminal behavior, i.e., a need for status driven by psychological factors apart from the alcohol disorder.⁸²

Until researchers can affirmatively show that a variable is not just correlated with recidivism but that the “variable reduces [] risk when successfully changed by treatment (i.e., is a *causal* risk factor),” public policy should not be made “on the promise” that actuarial tools can “inform[] risk reduction.”⁸³ “There is, at this point, no evidence that instruments focusing on risk reduction produce lower recidivism rates.”⁸⁴

E. The Assessment System is contrary to evidence-based practices aimed at reducing recidivism.

It is well established that practices aimed at reducing recidivism should focus scarce resources on individuals classified as the highest risk.⁸⁵ S. 467 would do the opposite by giving no meaningful incentive to high-risk prisoners who need the most programming, and by expending significant staff time on assessments and release plans for individuals classified as low risk when those resources should be focused on inmates with the greatest needs. And by requiring individuals classified as low risk and without a need for programming to participate in activities including prison jobs, § 3621(h)(4)(B), it would appear to require BOP to give the

⁸⁰ Winnie Ore & Chris Baird, National Council on Crime & Delinquency, *Beyond Risk and Needs Assessments 2* (2014), http://nccdglobal.org/sites/default/files/publication_pdf/beyond-risk-needs-assessments.pdf.

⁸¹ *Id.* That correlation does not equate with cause is not a controversial proposition. Other researchers acknowledge that a risk factor is nothing more than a “correlate that precedes the outcome in time, with no implication that the risk factor and outcome are causally related.” Jennifer Skeem & John Monahan, *Current Directions in Violence Risk Assessment* 4 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793193.

⁸² See generally Muel Kaptein, *Why Do Good People Sometimes Do Bad Things?: 52 Reflections on Ethics at Work* (2012).

⁸³ Skeem & Monahan, *supra* note 81, at 11.

⁸⁴ Baird *et al.*, *supra* note 54, at 130.

⁸⁵ See, e.g., The Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* 4 (2011), <http://www.ovsom.texas.gov/docs/Risk-Needs-Assessment-101-New-Tools-to-Manage-Offenders-2011.pdf>; Chenane *et al.*, *supra* note 53, at 287; Latessa *et al.*, *supra* note 61, at 6-7.

limited number of Federal Prison Industries (FPI) (also known by its trade name, UNICOR) jobs,⁸⁶ to individuals classified as low risk even though FPI has been proven to reduce recidivism more than any other program (inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release), by giving them marketable job skills (they are 14% more likely to be employed 12 months after release), particularly for “young minorities who are at the greatest risk for recidivism.”⁸⁷

By not ensuring that individuals classified as high risk get the fullest attention and have maximum opportunity and incentive to participate in meaningful programs aimed at the true causative factors of their criminal behavior (as opposed to factors that bear nothing more than a statistical correlation with recidivism), S. 467 does not promote recidivism reduction.⁸⁸ This approach is particularly unwise since prisoners classified as high risk are housed in the most crowded and expensive federal institutions.⁸⁹

II. The Development and Implementation of the Complex “Assessment System” Would Be Costly and Labor-Intensive, and May Not Be Possible.

The development of a scientifically valid risk tool is not a simple undertaking. “[A]ssessment instruments are expensive to construct and validate,”⁹⁰ and “can take several years to complete.”⁹¹ Tools developed for one population or stage of the criminal justice process cannot just be taken off the shelf and put to use for a different population or stage of the criminal justice process.⁹² The tool must be validated for the particular population and specific to the

⁸⁶ “[P]rimarily [as a] result of efforts to compensate for declining revenues and earnings,” the program has had a drop in the number of inmates it has been able to employ in recent years. U.S. Dep’t of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates* ii (2013), <http://www.justice.gov/oig/reports/2013/a1335.pdf>. “[A]s of June 2012, FPI employed 12,394 inmates, or 7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population.” *Id.* at 1.

⁸⁷ FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf; see also Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

⁸⁸ The Pew Center on the States, *Risk/Needs Assessment 101*, *supra* note 85, at 4.

⁸⁹ U.S. Dep’t of Justice, *FY 2015 Performance Budget, Congressional Submission Federal Prison System: Buildings and Facilities 1* (2014) (high security institutions are 51 percent overcrowded; medium security facilities are 41 percent overcrowded), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/21/bop-bf-justification.pdf>.

⁹⁰ Latessa *et al.*, *supra* note 61, at 8-9.

⁹¹ Latessa & Lovins, *supra* note 57, at 217.

⁹² Unfortunately, “increasingly complex and poorly validated risk assessment tools are being sold to criminal justice agencies.” Skeem, *supra* note 71, at 302.

particular stage in the criminal justice process.⁹³ A new tool had to be developed and validated with data specific to the federal probation and supervised release population,⁹⁴ and a new tool would have to be developed and validated with data specific to the federal prison population.⁹⁵

To construct, validate, and implement an instrument that could identify dynamic factors for the federal prison population would require extensive data collection and statistical analyses over a period of years, including collecting data on outcomes after release from prison for three to five years, then a lengthy period to train BOP staff to use the tool.⁹⁶ For example, the PCRA was developed and validated based on data collected on offenders who started a term of probation or supervised release between October 1, 2005 and August 13, 2009.⁹⁷ It was then implemented in stages beginning in 2010 while probation officers were trained to use it, and was finally being implemented on 95% of offenders placed on probation or supervised release by September 2014.⁹⁸

Perhaps reflecting how difficult and time-consuming this undertaking would be, S. 467 delivers an ambiguous message: The Attorney General “may use existing risk and needs assessment tools, as appropriate,” § 3621A(b)(3), but “must statistically validate” the tool “on the Federal prison population,” but if this “validation cannot be completed” within the 30 months

⁹³ While criminal justice agencies “often use empirically derived tools developed on samples from a different population” because of resource constraints, this “assumes that the instrument is a valid predictor of recidivism for each agency’s specific population,” but because “it is unlikely for a single instrument to have universal applicability across various offending populations, validating risk assessment instruments on specific target populations is important. . . . For example, the population of defendants on pretrial supervision is likely different from the population of individuals who are released from prison.” Edward Latessa *et al.*, *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 Fed. Probation 16, 17 (2010); *see also* National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*, at 31 (to have predictive validity, a risk assessment tool must have been developed and tested for use at the same decision point in the criminal justice system), <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx>.

⁹⁴ James L. Johnson *et al.*, *The Construction and Validation of the Post Conviction Risk Assessment (PCRA)*, 75 Fed. Probation 16, 18 (2011).

⁹⁵ The PCRA could not be used for the federal prison population. The distribution of risk categories for the PCRA is heavily skewed toward lower risk offenders due in part to the fact that it includes people sentenced to probation. *See* Cohen & VanBenschoten, *supra* note 60, at 44.

⁹⁶ *See* Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416918; Latessa *et al.*, *supra* note 61, at 10-17.

⁹⁷ Johnson *et al.*, *supra* note 94, at 17. The PCRA was constructed and validated based primarily on archival data on people already on probation or supervised release to whom the PCRA was not administered when they were first placed on supervision, which allowed a follow-up period of up to 60 months, and a small prospective study (of 356 people) that tracked people from the time they were placed on supervision for over one year. Lowenkamp *et al.*, *supra* note 55, at 92-93. The only outcome tracked was whether the subjects were arrested. The authors identified their use of archival data as a limitation, and recommended “future (larger) validation in a prospective fashion,” and that “future prospective validation research should use varied measures of outcome,” including reconviction, reincarceration, and severity of offense. *Id.* at 94.

⁹⁸ Cohen & VanBenschoten, *supra* note 60, at 41.

allowed for development of the tool, it need only be completed “as soon as is practicable.” See § 3621A(b)(4). But a tool must be “well-validated before it is disseminated.”⁹⁹ Otherwise, use of the instrument is highly suspect.¹⁰⁰

Whether a valid tool can even be developed for the massive and heterogeneous federal prison system is doubtful. The districts to which federal inmates return vary widely in their availability of services and supervision practices, but “[v]ariables that predict recidivism in a jurisdiction with ample services for offenders may not predict recidivism in a resource-poor jurisdiction.”¹⁰¹ The racial composition and types and severity of crimes also vary widely among districts, but to have predictive validity, a tool must have been tested on a population with a “representative gender [and] racial composition,” and with “the same types [and] severity of offenses.”¹⁰² The higher the at-risk environment into which a person is released (as one researcher puts it, Dangertown versus Peacetown), the more likely the person will recidivate and vice versa.¹⁰³ Indeed, there is a “statistically significant variation in arrest and revocation rates across the 90 federal districts, after taking risk and protective factors into account.”¹⁰⁴ An actuarial risk assessment instrument that did not take into account these variations among districts would be inaccurate.

Even assuming that a scientifically valid instrument could be developed for the federal prison system, implementing a new assessment system for a prison population larger than any state prison population¹⁰⁵ is a “significant challenge,” which “requires the development of new

⁹⁹ Baird *et al.*, *supra* note 54, at 111 (emphasis in original).

¹⁰⁰ See Mike Eisenberg *et al.*, Justice Center, The Council of State Governments, *Validation of the Wisconsin Department of Corrections Risk Assessment Instruments 2* (2009) (“Validity of risk assessment instruments is the most important supportive principle behind the proper utilization of these instruments.”), <http://csgjusticecenter.org/wp-content/uploads/2012/12/WIRiskValidationFinalJuly2009.pdf>.

¹⁰¹ John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sentencing* 14 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332165.

¹⁰² National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*, *supra* note 93, at 30-31.

¹⁰³ National Institute of Justice, Office of Justice Programs, *Measuring Recidivism* (2008). See also Jay P. Singh *et al.*, *Rates of violence in patients classified as high risk by structured risk assessment instruments*, 204 *British J. of Psych.* 180, 184 (2014) (finding substantial variation in actual rates of violence among individuals judged to be high risk and that different rates depended on local factors).

¹⁰⁴ For example, districts with large populations had lower arrest and revocation rates; districts with a larger proportion of Native Americans had higher revocation rates. William Rhodes *et al.*, *Recidivism of Offenders on Federal Community Supervision* 3, 16 (2013). Household income also had an effect on revocation rates such that persons with higher average family income had fewer revocations than those with lower income. “Offenders who return to neighborhoods that are seen as impoverished and transient have higher failure rates.” *Id.* at 18.

¹⁰⁵ Bureau of Justice Statistics, *Corrections Statistical Analysis Tool (CSAT) – Prisoners* (in 2013, 214,989 inmates were in the custody of federal correctional facilities, including private prison facilities; Texas and California followed with 155,377 and 134,330), available at <http://www.bjs.gov/index.cfm?ty=nps>.

staff skills, (re)certification and quality assurance policies, performance metrics, and the establishment of a system for providing coaching and feedback for assessors in the field.”¹⁰⁶ The training that would be necessary would be extensive. Each staff using the Assessment System would have to be certified via standardized training, and retrained (along with testing and recertification) every two years “to guard against rater drift and knowledge decay.”¹⁰⁷ To train one person would require three to four days, and recertification every two years in a one-to-two day workshop.¹⁰⁸ In addition, a “[q]uality assessment generally requires an hour with the individual being assessed.”¹⁰⁹ As the National Institute of Corrections observes, “[t]he staff time necessary to do this may be the scarcest resource in a jurisdiction.”¹¹⁰

To expect BOP staff to undertake the training necessary to reliably implement a risk assessment and to administer the assessments to every inmate, multiple times, is unrealistic. As of April 2014, BOP was operating at 32 percent over its rated capacity.¹¹¹ The inmate-to-staff ratio is so high that staff cannot “effectively supervise prisoners and provide inmate programs.”¹¹² Instead of working with inmates and formulating programs, unit staff is often called upon to perform the function of correctional officers in maintaining security.¹¹³

III. Any Savings from Reduced Incarceration Would Not Be Seen for a Decade, if Ever.

S. 467 would require the immediate expenditure of taxpayer dollars on the costly development and implementation of the “Assessment System,” but it would be at least a decade before anyone was released. The bill directs that the “Assessment System” be developed within 30 months (which is likely not enough), that BOP train staff to use it and determine each prisoner’s risk level within another 30 months (also likely not enough), and that BOP make programming and activities available to all eligible prisoners within six years. *See* § 3621A(a), (c)(1) & (e); § 3621(h)(2). Thereafter, it would take three years for a low-risk prisoner, and six

¹⁰⁶ Justice Research and Statistics Association, *Ensuring the Fidelity of Offender Risk-Assessment in Large-Scale Correctional Settings: The Quality Assurance-Treatment Intervention Programs and Supervision Initiative (QA-TIPS)*, <http://jrja.org/webinars/index.html#qa>.

¹⁰⁷ Lowenkamp *et al.*, *supra* note 55, at 95.

¹⁰⁸ *See* Justice Research and Statistics Association, *supra* note 106.

¹⁰⁹ National Institute of Corrections and Urban Institute, *The Role of Screening and Assessment in Jail Reentry* 6 (2012).

¹¹⁰ *Id.*; *see also* Hess & Turner, *supra* note 75, at 9 (noting that assessment places demands on staff time), <http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf>.

¹¹¹ Statement of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies, Federal Bureau of Prisons FY 2015 Budget Request 2 (April 10, 2014).

¹¹² *Id.* at 3.

¹¹³ *Id.*

years for a moderate-risk prisoner, to earn one year of credit. *See* § 3621(h)(6)(A)(i). And because prisoners could not receive time credits for successfully completing recidivism reduction programs before the date of enactment or during official detention before the sentence commenced, § 3621(h)(6)(A)(ii), they would have to repeat programs they had already completed.¹¹⁴

The savings, if any, would be small. First, well over half the prison population would be unable to earn time credits. The proposal would categorically exclude inmates convicted of “a second or subsequent conviction for a Federal offense”; anyone in criminal history category VI at the time of sentencing; and anyone serving a sentence for specified offenses. *See* § 3621(h)(6)(A)(iii). The percentage of inmates in the categories for which data is available is 52.9%: 23.3% who were in Criminal History Category VI at the time of sentencing¹¹⁵ (there should be very little overlap between this and other excluded categories because most in Criminal History Category VI are drug offenders¹¹⁶), 22.6% who were convicted of federal crimes of violence (which may be less or more depending on how the term is defined¹¹⁷), 6.8% who were convicted of sex offenses,¹¹⁸ and .2% who were convicted of violating 21 U.S.C. § 848 (CCE).¹¹⁹ No data are available on the percentage who have a second or subsequent federal offense, or were convicted of a federal crime of terrorism, of violating 18 U.S.C. § 1962 (RICO), or of a federal fraud offense who were sentenced to more than 15 years, in part because the numbers are so small, but they may add up to one or two percentage points.

Inmates serving life without parole, another 2.5%,¹²⁰ would be unable to use time credits

¹¹⁴ Further, apparently referring to the residential drug treatment program (RDAP), “a prisoner shall not be eligible for the time credits described in [§ 3621(h)(6)(A)] if the prisoner has accrued time credits under another provision of law based solely upon participation in, or successful completion of, such program,” § 3621(h)(6)(D). Yet, confusingly, BOP “may, in the Director’s discretion, reduce the credit awarded under subsection (h)(6)(A) to a prisoner who receives a reduction under” § 3621(e)(2)(B) for participating in RDAP, “not [to] exceed one-half the amount of the reduction awarded to the prisoner under [§3621(e)(2)(B)].” *See* Section 7(b).

¹¹⁵ U.S. Sent’g Comm’n, Quick Facts – Federal Offenders in Prison – January 2015.

¹¹⁶ In 2013, 1,685 people sentenced for drug offenses were in criminal history category VI, compared to 464 violent or firearms offenders, 6 sex offenders, 2 fraud offenders, and 72 RICO offenders. *See* U.S. Sent’g Comm’n, 2013 *Sourcebook of Federal Sentencing Statistics*, tbl.14.

¹¹⁷ Bureau of Prisons, Statistics, Offenses, last updated December 27, 2014. This includes homicide, aggravated assault, kidnapping, weapons, explosives, arson, and robbery. It does not include burglary, though burglary of a dwelling is considered a crime of violence. *See* USSG § 4B1.2(a)(2). It includes unlawful possession of a firearm (as distinct from use); this offense is not a crime of violence under the guidelines, USSG § 4B1.2, comment. (n.1), but is treated as violent by BOP, 74 Fed. Reg. 1892, 1895 (2009). All robbery and arson offenses are included, but do not necessarily have to be included. *See* 18 U.S.C. § 3559(c)(3)(excluding unarmed robbery and arson that did not pose a threat to human life from the definition of “serious violent felony”).

¹¹⁸ Bureau of Prisons, Statistics, Offenses, last updated December 27, 2014.

¹¹⁹ *Id.*

¹²⁰ U.S. Sent’g Comm’n, Quick Facts – Federal Offenders in Prison – January 2015.

by operation of existing statutes and the act.¹²¹ Each life sentence costs over \$1.1 million today.¹²²

Those classified as high risk, § 3624(c)(2)(A), and those classified as moderate risk unless their “risk of recidivism has declined” during incarceration, § 3624(c)(2)(B), could not use their time credits. Those deemed by BOP to be ineligible to participate in programs, § 3621(h)(8)(A)(ii)(I)-(II), could not earn or use time credits.

Second, for those who could use time credits, moderate risk prisoners would spend all of their prerelease custody, and low risk prisoners would spend part of it, in a residential reentry center (RRC), which costs more or the same as imprisonment in the minimum, low, or medium security facilities from which they would be transferred,¹²³ or home confinement, which costs more under current contract arrangements than the marginal average cost of imprisonment.¹²⁴ See § 3624(c)(3)-(5). Only low risk prisoners would spend even part of prerelease custody in community supervision. See § 3624(c)(5).

Third, during the years it would take to develop and implement the system, absent sentencing reform or construction of new facilities, the BOP population would grow from 32% to 55% over rated capacity by 2023.¹²⁵ Medium and high security facilities will be most hard hit

¹²¹ Prisoners serving life sentences could not be transferred to prerelease custody because they have no “release date.” A prisoner “shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.” 18 U.S.C. § 3621(a). Under § 3624(a), which would not be changed, a prisoner “shall be released” by BOP “on the date of the expiration of the prisoner’s term of imprisonment, less any time credited toward the service of the prisoner’s sentence as provided in subsection (b).” Subsection (b), which also would not be changed, governs “[c]redit toward service of sentence for satisfactory behavior.” Prisoners serving a “term of imprisonment for the duration of the prisoner’s life” are expressly excluded from earning credit for satisfactory behavior. *Id.* § 3634(b). They have no “release date” based on “expiration of the term imposed,” or earlier “for satisfactory behavior.” Earning time credits does not affect the prisoner’s “release date,” but only the “portion of the final months” s/he can spend in some form of “pre-release custody” under § 3624(c)(2)-(5). For persons serving life, there is no “release date,” and thus no “final months.”

¹²² The annual cost of incarceration in fiscal year 2013 was \$29,291.25. See Bureau of Prisons, *Annual Determination of Average Cost of Incarceration*, 79 Fed. Reg. 26,996 (May 12, 2014). The Sentencing Commission reports life sentences as 470 months (39.16 years) “consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.” U.S. Sent’g. Comm’n, *2013 Sourcebook of Federal Sentencing Statistics*, Appendix A.

¹²³ “Annual costs per inmate are \$21,694 for minimum security, \$27,166 for low security, \$26,686 for medium security, and \$34,046 for high security. . . . Average annual cost per inmate housed in a [RRC] for the BOP is \$27,003.” Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 313 (2014), <http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf>.

¹²⁴ Because “much of the average costs of housing an inmate are fixed . . . the average marginal cost of increasing or decreasing the population by one inmate is \$10,363.” BOP reimburses contractors for each inmate in home confinement at a rate of “over \$13,500 annually.” *Id.* The rate BOP pays its contractors for home confinement is not necessarily the actual cost of home confinement. *Id.* at 13-14 & n.45 (estimating that “traditional probation with electronic monitoring to verify home confinement would cost a total of \$5,890 annually”).

¹²⁵ See U.S. Dep’t of Justice, *FY 2015 Performance Budget*, *supra* note 89, at 1, 5 (system-wide crowding in FY

by future population growth,¹²⁶ but S. 467 would transfer prisoners from less crowded and less costly minimum and low security facilities.¹²⁷

We recognize that the bill allows the Bureau of Prisons to “use the existing Inmate Classification System,” which is not an actuarial risk assessment tool, “[b]efore the development of the Assessment System.” See § 3621A(b)(5). Thus, inmates with a low security classification at intake could be released immediately, and others could be released if and when their security classifications declined to low. But the facts remain that during this interim period, over half the prison population could not earn time credits, and those who could earn and use credits would be transferring from less expensive and less crowded BOP facilities to as or more expensive RRCs or home confinement. Meanwhile, the Attorney General and BOP would still be required to develop and eventually implement an expensive actuarial risk assessment tool, which is highly unlikely to work as described in the bill.

IV. S. 467 Would Have an Unwarranted Adverse Impact on the Poor and Racial Minorities.

A. Risk assessments have an adverse impact on the poor and racial minorities.

Risk factors correlate with socioeconomic class and race.¹²⁸ The factors with the heaviest weight – arrests and convictions – are more prevalent for African Americans than for any other race.¹²⁹ Other factors, such as negative attitudes toward law enforcement, are more prevalent in the lower socioeconomic population, as are lack of steady employment and lower educational levels.¹³⁰

2014 was at 32 percent over rated capacity, projecting net increase of 2,500 inmates in FY 2015 and more for years to come); Urban Institute, *Stemming the Tide*, *supra* note 123, at 1 (absent sentencing reforms or construction of new facilities, overcrowding is expected to rise to 55 percent by 2023).

¹²⁶ U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743, Appendix II (Sept. 2012), <http://www.gao.gov/assets/650/648123.pdf>.

¹²⁷ See Urban Institute, *Stemming the Tide*, *supra* note 123, at 13; U.S. Dep’t of Justice, *FY 2015 Performance Budget*, *supra* note 89, at 1 (system-wide crowding in FY 2014 was at 32 percent over rated capacity with 51 percent and 41 percent at high and medium security institutions respectively).

¹²⁸ See generally Glenn D. Walters, *Relationships Among Race, Education, Criminal Thinking, and Recidivism: Moderator and Mediator Effects*, Assessment (2012) (online version) (discussing relationships among three variables commonly associated with recidivism and the difficulty of measuring their effects).

¹²⁹ See ACLU, *School to Prison Pipeline: Talking Points* (2008) (discussing how people of color are disproportionately represented at every stage of the school to prison pipeline).

¹³⁰ See NACCP, Legal Defense Fund, *Bad Times in Tulia, Texas* (2000) (discussing an African-American community in Texas that was victimized by the “war on drugs” and how that “war” disproportionately targets minorities), <http://www.naacpldf.org/case-issue/bad-times-tulia-texas>; Testimony of Chief Judge Patti B. Saris, Chair, U.S. Sent’g Comm’n, for the Public Meeting of the Charles Colson Task Force on Federal Corrections (Jan. 27, 2015) (“Risk assessment tools may use factors that some believe are inappropriate such as education, marital status, and even geographical area of residence.”).

Further, as discussed above, risk assessments often classify people incorrectly.¹³¹ Studies show that there are “more classification errors for African Americans,”¹³² and that Black offenders are more likely to be misclassified as high risk than White or Hispanic offenders.¹³³ This is particularly problematic if such classifications are used to determine the length of incarceration.

B. The exclusions would have a disparate impact on racial minorities, and are contrary to the stated goal of promoting public safety.

Many of the excluded inmates have the greatest need to participate in programming, but would have no meaningful incentive to do so. Thus, S. 467 would not promote the stated goal of increasing public safety. At the same time, the exclusions that would apply to any significant number of inmates would have a disparate impact on racial minorities.¹³⁴ “[I]f a rule has a significant adverse impact, and there is insufficient evidence that the rule is needed to achieve a [legitimate goal], then the rule [is] considered unfair toward the affected group.”¹³⁵

Criminal History Category VI. Forty-six percent of defendants sentenced from 2006 to 2013 who were in criminal history category VI were Black; 26% Hispanic; 26% White; and 2% other race.¹³⁶ Thirty-two percent of defendants in criminal history category VI were in that category not based on their number of criminal history points, but by operation of the “career offender” guideline,¹³⁷ which artificially places a defendant who is in a lower criminal history category into category VI if s/he has two prior convictions for either a “controlled substance

¹³¹ See Latessa & Lovins, *supra* note 57, at 212 (“actuarial risk assessment . . . is not a perfect science”).

¹³² Kevin Whiteacre, *Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias*, 17 *Crim. Just. Pol’y Rev.* 330 (2006); see also Matthew Fennessy & Matthew T. Huss, *Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity*, 40 *Crim. Just. & Behav.* 40, 53 (Jan. 2013) (“It is arguable that indiscriminate screening of all ethnic groups as opposed to each ethnic group as unique from one another can lead to misrepresentation and inaccurate decision making” as “bolster[ed]” by “[t]he fact that certain variables were pertinent for Black defendants but not Whites and vice versa.”).

¹³³ Tracy L. Fass *et al.*, *The LSI-R and the COMPAS Validation Data on Two Risk-Needs Tools*, 35 *Crim. Just. & Behav.* 1095 (2008); see also Chenane *et al.*, *supra* note 53, at 299 (“Consistent with previous research, our findings generally indicate that the LSI-R and its subcomponents do a better job at predicting institutional misconduct for White inmates than for non-Whites.”).

¹³⁴ While 66.9% of defendants convicted of fraud and sentenced to more than fifteen years from 1999 through 2013 were white, there were only 301 such defendants and they comprised only .03% of all 941,794 defendants sentenced in those fourteen years. USSC, Monitoring Datafiles FY 1999-2013.

¹³⁵ U.S. Sent’g Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113-14 (2004).

¹³⁶ USSC, Monitoring Datafiles FY 2006-2013.

¹³⁷ USSC, Monitoring Datafiles FY 2006-2013.

offense” or a “crime of violence.”

Although Black offenders comprised only 20.4% of all federal offenders in 2012, they were 61.9% of those subject to the career offender guideline.¹³⁸ Most offenders are subject to the career offender guideline,” not because of crimes of violence, but “because of ... drug trafficking crimes.”¹³⁹ African Americans “have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers” because of the “relative ease of detecting and prosecuting offenses that take place” on the streets “in impoverished minority neighborhoods.”¹⁴⁰ The recidivism rate of offenders who are subject to the career offender guideline based on drug convictions is *half* that of offenders in criminal history category VI under the normal criminal history rules.¹⁴¹ Thus, the career offender guideline has an “unwarranted adverse impact” on Black offenders.¹⁴² Likewise, denying career offenders the opportunity to earn time credits would have an unwarranted adverse impact on Black offenders.

Moreover, prisoners in Criminal History Category VI are serving sentences double or triple the sentences of others because their guideline ranges were increased based on criminal history points or the career offender guideline.¹⁴³ With or without time credits, they will serve lengthy sentences and will then be released. It does not promote public safety to refuse to incentivize them for participating in programs shown to reduce recidivism before releasing them to the community.

Federal Crime of Violence. Because of federal jurisdiction over tribal territories, Native Americans are prosecuted in federal court for ordinary crimes of violence, while people of other races are prosecuted for such crimes in state court.¹⁴⁴ Thus, Native Americans comprised only 4.1% of federal defendants sentenced in 2013, but were 36.8% of those sentenced for murder; 85.7% of those sentenced for manslaughter; 34.5% of those sentenced for sexual abuse; 46.3% of those sentenced for assault; and 64.9% of those sentenced for burglary.¹⁴⁵

If all kinds of robbery and firearms offenses are considered crimes of violence, this exclusion would also have an adverse impact on Black offenders. Black offenders comprised

¹³⁸ See U.S. Sent’g Comm’n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 4; U.S. Sent’g Comm’n, Quick Facts, Career Offenders.

¹³⁹ U.S. Sent’g Comm’n, *Fifteen Years of Guidelines Sentencing*, *supra* note 135, at 133.

¹⁴⁰ *Id.* at 134.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ U.S. Sent’g. Comm’n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.14.

¹⁴⁴ See 18 U.S.C. § 1153.

¹⁴⁵ U.S. Sent’g Comm’n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.4. The “other” race category includes Native Americans, Alaskan natives, Asians and Pacific Islanders, but the vast majority are Native Americans.

only 20.6% of federal defendants in 2013, but 35.5% of robbery offenders and 47.3% of firearms offenders.¹⁴⁶ Notably, repeated analyses have shown that prosecutors' choices to charge a § 924(c) firearm count in addition to a drug trafficking count rather than rely on a two-level increase in the guideline range for a firearm has a racially disparate impact on Black offenders.¹⁴⁷ Again, it is difficult to see how it promotes public safety not to incentivize these offenders to participate in programs shown to reduce recidivism before releasing them to the community.

Second or Subsequent Conviction for a Federal Offense. This exclusion would have an adverse impact on Native Americans. While there is no available data on who has prior federal convictions, in our experience, few federal defendants have prior federal convictions, *except* for Native Americans, because they are prosecuted in federal court for crimes for which people of other races are prosecuted in state court, as noted above.

Continuing Criminal Enterprise. A person who violated the drug laws as part of a series of such violations undertaken in concert with five or more others with respect to whom the defendant was an organizer, supervisor or manager, and from which s/he obtained substantial income or resources, can be charged under 21 U.S.C. § 848, or s/he can be charged under 21 U.S.C. § 841 and receive an enhancement under the guidelines for a leadership role and any other applicable guideline enhancements. Seventy-seven percent of the 239 defendants charged and convicted of violating 21 U.S.C. § 848 from 2006 to 2013 were Black or Hispanic.¹⁴⁸

Inmates Serving Life Without Parole. Over 73% of federal prisoners serving life are African American.¹⁴⁹ Studies show that lifers are half as likely to commit disciplinary violations as other inmates, and that when they are released early, and indeed when any inmate is released at age 50 or older, they have recidivism rates as low as 0 to 1%.¹⁵⁰

V. Giving BOP Unreviewable Discretion to Decide that Certain Inmates Are Ineligible to Participate in Programming is Likely to Result in Unintended Exclusions.

The proposal would give BOP broad discretion, with no right to any kind of review, to exclude inmates from participating in programs if BOP decides they are “medically unable to

¹⁴⁶ *Id.*

¹⁴⁷ See U.S. Sent’g Comm’n, *Fifteen Years of Guideline Sentencing*, *supra* note 135, at 90; Paul J. Hofer, *Review of the U.S. Sentencing Commission’s Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 Fed. Sent. Rep. 193, 198 (2012).

¹⁴⁸ USSC, Monitoring Datafiles FY 2006-2013.

¹⁴⁹ Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Fed. Sent’g. Rep. 27, 28 (2010).

¹⁵⁰ *Id.* at 28-29 (discussing studies showing that individuals released from a life sentence were less than one third as likely to be rearrested as all released individuals; that 21 people released at age 50 or older and had served 25 or more years committed no new crimes three years after release; that 1.4% of offenders released at 50 or older were convicted of new crimes in the first 22 months; and that 1% of 285 offenders whose life sentences were commuted were convicted of a new crime).

successful complete recidivism reduction programming or productive activities” or “would present a security risk if permitted to participate in recidivism reduction programming.” § 3621(h)(8)(A)(I)-(II); § 3621A(g).

This is likely to exclude more inmates than intended, given BOP’s historical tendency to construe its early release authority more narrowly than required. For example, though Congress authorized sentence reductions for persons convicted of “nonviolent offenses” who participate in the Residential Drug Abuse Program, 18 U.S.C. § 3621(e)(2)(B), and unlawful possession of a firearm is not a “crime of violence,”¹⁵¹ BOP categorically denies early release to those convicted of that offense, and those who did not themselves possess, carry, or use a firearm but were convicted for the conduct of others on a conspiracy or aiding and abetting theory.¹⁵² Accordingly, it is reasonable to expect that BOP would exercise its discretion to deny programming to inmates who do not actually present a “security risk.” Similarly, BOP may rely on its authority to deny programming to those who are “medically unable to successfully complete recidivism reduction programming” to exclude individuals with mental illness that may interfere with their ability to participate in programs. People with serious mental illness “may have difficulties with activities of daily living, including maintaining their hygiene, complying and rules and adhering to routines, and concentrating and learning.”¹⁵³ It would be counterproductive, illogical, and contrary to evidence-based practices to deem them ineligible to participate in recidivism reduction programming,¹⁵⁴ yet that is the likely result of S. 467.

VI. S. 467 Would Be Unconstitutional.

A. Making all determinations and assessments “while implementing or administering” the Assessment System unreviewable in any forum, § 3621A(g), would be unconstitutional.

Subsection (g) of § 3621A would state that “[s]ubject to any constitutional limitations, there shall be no right of review, right of appeal, cognizable property interest, or cause of action, either administrative or judicial, arising from any determination or classification made by any Federal agency or employee while implementing or administering the Assessment System, or any rules or regulations promulgated under this section.”

“[I]mplementing or administering the Assessment System” under § 3621A would include the initial assessment and assignment of the risk level for an inmate, as well as reassessments and

¹⁵¹ See USSG § 4B1.2. comment. (n.1).

¹⁵² While BOP originally failed to provide any rationale for this decision, *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), it later asserted without statistical support that such persons present a significant potential for violence. 74 Fed. Reg. 1892, 1895 (2009).

¹⁵³ Fred Osher *et al.*, Council of States Governments Justice Center, *Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery* 15 (2012), https://www.bja.gov/Publications/CSG_Behavioral_Framework.pdf.

¹⁵⁴ *Id.* at 16 (individuals with the highest impairment should be given priority in treatment).

any changes in risk level. *See* § 3621A(a)(1), (a)(3), (a)(4). The assigned risk level, in turn, would determine whether the inmate is eligible for time credits under § 3621(h)(6), how many days of time credit he may receive, and whether and when an inmate may be transferred to prerelease custody under § 3624(c)(2). Yet, § 3621A(g) would explicitly deny administrative and judicial review of these determinations and deny judicial review of any rules or regulations governing them.

Subsection (g) would also appear to deny any administrative or judicial review of determinations made under other sections “while implementing or administering the Assessment System,” including, *inter alia*, a determination that an inmate is excluded from earning time credits, § 3621(h)(6)(A)(iii), that an inmate is ineligible to participate in programs, § 3621(h)(8)(A)(ii)(I)-(II), to reduce time credits for a disciplinary violation, § 3621(h)(6)(C), to deny an inmate transfer to prerelease custody or place him in a more restrictive type of prerelease custody, § 3624(c)(2), and that an inmate has violated a condition of community supervision such that he will be returned to prison, § 3624(c)(6).

Because these decisions directly affect an inmate’s liberty interests, they must be subject to administrative and judicial review under rules already in place, which are based on the Due Process Clause and the historic purpose of the writ of habeas corpus (which may not be suspended, U.S. Const. art. I, § 9, cl. 2).¹⁵⁵ Under the BOP’s “Administrative Remedy Program,” inmates may “seek formal review” of grievances relating to “any aspect” of their confinement.¹⁵⁶ Inmates may seek review of their grievances at the institutional, regional, and national levels.¹⁵⁷ Inmates are afforded a hearing when charged with misconduct that could lead to sanctions, including disallowance of good time credit,¹⁵⁸ and may appeal the determination and sanction imposed within the agency through its administrative review process.¹⁵⁹ They may seek review of the final administrative decision in the district court by filing a writ of habeas

¹⁵⁵ *See Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454 (1985) (due process requires, where a prison disciplinary hearing may result in the loss of good time credits, that the inmate receive notice, an opportunity to be heard, call witnesses, and present evidence, a written statement of evidence relied on and reasons for the action, and the findings must be supported by some evidence); *id.* at 450 (suggesting that the Constitution precludes granting “an administrative body the unreviewable authority to make determinations implicating fundamental rights”); *see also Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (in order to avoid “serious constitutional concerns,” construing statute regarding detention of alien to contain an “implicit ‘reasonable time’ limitation, the application of which is subject to federal court review”); *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (“When [] a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication – and federal courts will review the application of those constitutionally required procedures.”); *cf. INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001) (“[A] serious Suspension Clause issue would be presented if we were to accept [that statutes limiting judicial review of removal orders] have withdrawn [the power to issue a writ of habeas corpus under § 2241] from federal judges and provided no adequate substitute for its exercise.”).

¹⁵⁶ 28 C.F.R. § 542.10(a).

¹⁵⁷ 28 C.F.R. § 542.14-15.

¹⁵⁸ *See* 28 C.F.R. §§ 541.7, 541.8.

¹⁵⁹ *See* 28 C.F.R. §§ 541.7(i), 541.8(i).

corpus under 28 U.S.C. § 2241.¹⁶⁰ And inmates may challenge BOP's rulemaking to ensure that it is not arbitrary or capricious, or otherwise unlawful.¹⁶¹

The serious problems with subsection (g) are not solved because it is “subject to any constitutional limitations.” Indeed, this phrase suggests that it would be unconstitutional to deny any and all “right of review, right of appeal, cognizable property interest, or cause of action, either administrative or judicial, arising from any determination or classification made by any Federal agency or employee while implementing the Assessment System, or any rules or regulations promulgated under [section 3].” With a statute that expressly states that “there shall be no right” to administrative or judicial remedy of any sort, it is most unlikely that inmates would attempt to test the constitutional limits of the denial of review. Even if some attempted to test the limits by filing a habeas corpus action under 28 U.S.C. § 2241, there would be no record below for the district court to act upon. Presumably, the Judicial Conference would object to a procedure that would so obviously hinder judicial review.¹⁶² And it would be entirely unnecessary. The already constitutional approach would be to permit ordinary administrative review of decisions made “while implementing or administering the Assessment System” under BOP's established administrative and disciplinary review systems, subject to judicial review under 28 U.S.C. § 2241,¹⁶³ or if the decision involves rulemaking, review under the APA.¹⁶⁴

B. Providing the government the right to judicial review of a decision to transfer—with no right to counsel and no clear right to a hearing for the inmate—while denying inmates any right to judicial review of decisions to deny transfers, § 3624(c)(14)(D), would be unconstitutional.

Under § 3624(c)(14)(A), BOP would be required to provide prior notice of a decision to transfer a prisoner to prelease custody to the U.S. Attorney's Office for the district in which the prisoner was sentenced. Under § 3624(c)(14)(D), the government would have a right to file a motion “seeking a hearing” to “request that the prisoner's transfer be denied or modified,” which

¹⁶⁰ See, e.g., *Howard v. Bureau of Prisons*, 487 F.3d 808, 811 (10th Cir. 2007); see also *Setser v. United States*, 132 S. Ct. 1463, 1473 (2012).

¹⁶¹ See, e.g., *Lopez v. Davis*, 531 U.S. 230, 240 (2001); *Barber v. Thomas*, 560 U.S. 474 (2010).

¹⁶² See *McKart v. United States*, 395 U.S. 185, 194 (1969) (“[J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise.”); see also *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (“[Administrative] [e]xhaustion gives an agency ‘an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court’” and “promotes efficiency” because administrative claims “generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court”); *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (administrative remedies “aid[] judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding [and] promote[] judicial economy by avoiding needless repetition of administrative and judicial factfinding”).

¹⁶³ *Setser*, 132 S. Ct. at 1473.

¹⁶⁴ See, e.g., *Gatewood v. Outlaw*, 560 F.3d 843, 846-47 & n.2 (8th Cir. 2009) (conducting APA review of BOP rulemaking).

“shall not require the Court to conduct a hearing,” and makes no mention of any right to counsel, or any notice to the prisoner’s counsel. The inmate would have no right to any form of review of a BOP decision to deny a transfer.

This would be unconstitutional for two reasons. First, if the government has the right to judicial review of a decision by BOP to transfer an inmate to prerelease custody, inmates must have the right to judicial review of decisions by BOP officials not to transfer inmates to prerelease custody. Once an appeal right is established by Congress, it “must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”¹⁶⁵ There is no conceivable reason the government would have an immediate right to review of a decision to transfer, while the inmate would never have the right to review of a decision not to transfer.

Second, inmates are entitled to the fundamentals of due process in proceedings involving review of a decision about whether they should be released or remain in prison.¹⁶⁶ It is entirely unclear whether or not a hearing is required when the government seeks denial or modification of a transfer. While subparagraph E states that the court may deny the transfer “if, after conducting a hearing . . . pursuant to subparagraph D,” subparagraph D states that the government’s motion “shall not require the Court to conduct a hearing.” These provisions are in conflict. Moreover, prosecutors cannot be permitted to argue and provide information in support of requests that inmates’ transfers be denied or modified without inmates having “the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the [inmate] to present his case.”¹⁶⁷ Other statutes clearly state that counsel must be provided at hearings where liberty is at stake.¹⁶⁸

C. Providing no procedural mechanism or due process protections for the revocation of prerelease custody, § 3624(c)(6), would be unconstitutional.

Under § 3624(c)(4) and (c)(5)(C), an inmate released to home confinement or community supervision based on earned time credits would be subject to such “conditions as the Director of the Bureau of Prisons deems appropriate.” Under § 3624(c)(5)(C)(ii), an inmate may remain on community supervision only if he “remains current on any financial obligations imposed as part

¹⁶⁵ *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); see also *Johnson v. Avery*, 393 U.S. 483 (1969). Cf. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (“[A] State may not ‘bolt the door to equal justice’ to indigent defendants.”).

¹⁶⁶ See *Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974).

¹⁶⁷ *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).

¹⁶⁸ See 18 U.S.C. § 3565(a) (hearing must be conducted “pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure,” under which the person is “entitled to” “to request that counsel be appointed if the person cannot obtain counsel”); *id.* § 3583(e) (hearing must be conducted “pursuant to” Rule 32.1); 18 U.S.C. § 3006A(a)(1)(C), (E) (“Representation shall be provided for any financially eligible person who . . . is charged with a violation of probation” or “a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release”).

of the prisoner's sentence," such as fines and restitution. Under § 3624(c)(6), the Director of BOP "may revoke the inmate's prerelease custody and require the inmate to serve the remainder of the prisoner's term of incarceration, or any portion thereof, in prison, or impose additional conditions" on the inmate's prerelease custody. If the violation is "non-technical," the Director of BOP "shall revoke the prisoner's prerelease custody." *Id.*

Taken together, these provisions mean that the Director of BOP "may revoke" an inmate's prerelease custody (halfway house, home confinement, or community supervision) if he violates any condition of prerelease custody and "shall revoke" an inmate's prerelease custody if the violation is "non-technical." Thus, for example, for an inmate on community supervision, prerelease custody could automatically be revoked, and the inmate returned to prison, if he was not "current" on payments toward a fine or restitution ordered as part of the sentence. Yet, there is no mechanism for notifying the inmate of the alleged violation, for a hearing to establish the violation, or for providing counsel to the inmate. And it requires automatic revocation if the inmate fails to "remain[] current" on court-ordered financial obligations, regardless of the inmate's efforts or ability to pay. As such, § 3624(c)(6) fails to provide the fundamental due process protections required by the Constitution.

The loss of liberty associated with revocation of prerelease custody, just like the revocation of parole, probation, or supervised release, is a "serious deprivation requiring that the [person] be accorded due process."¹⁶⁹ The Supreme Court long ago established minimum due process standards for the revocation of parole, including:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.¹⁷⁰

An indigent person on parole, supervised release, or probation also has a due process right to counsel when she has a legitimate claim that she did not commit the violation or the violation can be justified or mitigated.¹⁷¹ And because federal parolees, just like those on supervised release and probation, have a statutory right to counsel when facing a loss of their liberty for a violation of release conditions,¹⁷² it would be a violation of equal protection to

¹⁶⁹ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

¹⁷⁰ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

¹⁷¹ *Scarpelli*, 411 U.S. at 790.

¹⁷² See 18 U.S. C. § 3565(a) (probation); *id.* § 3583(e) (supervised release); *id.* § 3006A(a)(1)(C), (E) ("Representation shall be provided for any financially eligible person who . . . is charged with a violation of probation" or "a violation of supervised release or faces modification, reduction, or enlargement of a condition, or

deprive a person in prerelease custody of the same protections. Finally, a decision to modify or revoke probation or supervised release is subject to appellate review on both procedural and substantive grounds.¹⁷³

Because a person may not be constitutionally imprisoned solely because of a lack of financial resources, special procedures must be followed before a person may be incarcerated for failing to pay financial obligations.¹⁷⁴ “[A] sentencing court must inquire into the reasons for the failure to pay.”¹⁷⁵ If a person “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment.”¹⁷⁶ If, however, the “probationer could not pay despite sufficient bona fide efforts . . . the court must consider alternate measures of punishment other than imprisonment,” and if those alternatives are not adequate, only then may the court imprison a probationer for non-payment.¹⁷⁷

Revoking prerelease custody under § 3624(c)(6) would be constitutionally indistinguishable from revoking parole, probation or supervised release. Each results in the “immediate disaster” that the inmate will not be free but in prison, requiring all of the due process protections described above.¹⁷⁸

BOP recognizes these constitutional requirements for inmates released to home confinement who have allegedly violated program rules. *See* BOP Program Statement 7320.01(9) (requiring providers of home detention services to use a system for handling program violations that meets the requirements of due process).

extension or revocation of a term of supervised release”); Fed. R. Crim. P. 32.1; *see also* 18 U.S.C. § 3006A (1986) (providing for right to counsel at parole proceedings; provision remains in effect under the saving clause of the U.S. Parole Commission Extension Act of 2008) (Pub. L. No. 110-312, 122 Stat. 3013 (Aug. 12, 2008)). *See generally* Guide to Judiciary Policy, Vol. 7A 4 (2015).

¹⁷³ *See* 18 U.S.C. § 3742(a)(4); *United States v. Clark*, 726 F.3d 496 (3d Cir. 2013).

¹⁷⁴ *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983).

¹⁷⁵ *Id.* at 672.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; *see, e.g., United States v. Holt*, 664 F.3d 1147 (8th Cir. 2011) (applying these principles); *see also* 18 U.S.C. § 3613A (a defendant found to be in default on a payment of fine or restitution may not be revoked and returned to prison without the due process protections set forth in Fed. Rule Crim. P. 32.1); *id.* § 3614 (“In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payment because the defendant is indigent.”).

¹⁷⁸ *Cf. Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974).

D. Giving probation officers authority to impose and modify conditions of release and supervise inmates in BOP custody, § 3624(c)(4)(B)-(C), (5)(C), (8), (12), would be unconstitutional.

Section 3624(c)(8) provides that the BOP “shall, to the extent practicable, enter into agreements with” probation “to supervise prisoners placed in home confinement or community supervision.” These agreements “may authorize” probation “to exercise the authority granted” to BOP to determine the “appropriate” conditions of home confinement and community supervision, § 3624(c)(4)(A)(iii), (c)(5)(C), to “modify” the conditions of home confinement for “compelling reasons,” § 3624(c)(4)(C), and to decide when an inmate’s prerelease custody will be subject to “less restrictive conditions” due to “demonstrate[d] continued compliance with the requirements” of prerelease custody, § 3624(c)(12).

Probation officers, thus, would be responsible for imposing conditions of home confinement and community supervision, for supervising inmates, and for making decisions about when an inmate may be transferred from home confinement to community supervision. They also would be responsible for reporting violations to the BOP for purposes of revocation. This means that probation officers would be making executive decisions while inmates are in custody, and that probation officers would be deciding that an inmate in custody will remain subject to more onerous conditions, all without administrative or judicial review.

This would be unconstitutional. Probation officers cannot make executive branch decisions. Probation officers are administrative units of Article III courts, appointed by the court and removable by the court.¹⁷⁹ Congress may not enlist an administrative arm of the Judicial Branch, subject to removal by the Judicial Branch, to do the work of the Executive.¹⁸⁰

E. The constitutionality of giving BOP, not courts, the authority to revoke prerelease custody and return an inmate to prison, § 3624(c)(6), is questionable.

If BOP were to revoke an inmate’s prerelease custody under § 3624(c)(6) and return him to prison, it would be deciding how long an inmate actually spends in prison. In this context, and in light of the legislative history of the Sentencing Reform Act and Supreme Court law, putting such power in the hands of the Executive may violate the separation of powers.

It is “indisputable” that the “right to impose the punishment provided by law is judicial”

¹⁷⁹ See 18 U.S.C. § 3602; *United States v. Bernardine*, 237 F.3d 1279, 1282-83 (11th Cir. 2001) (the probation officer “is appointed by the district court and acts . . . under the discretion of the appointing court,” is an “arm of the court,” is “a liaison between the [district] court . . . and the defendant,” and though “statutorily mandated to perform any other duty that the court may designate,” that authority is limited by Article III of the Constitution which prohibits the delegation of judicial functions).

¹⁸⁰ Cf. *Bowsher v. Synar*, 478 U.S. 714 (1986) (separation of powers violated by placing responsibility for the performance of an executive function in the hands of the Comptroller General, an officer controlled by Congress through its power of removal).

and that “the right to relieve from the punishment” imposed belongs to the Executive Branch.¹⁸¹ *Ex Parte United States*, 242 U.S. 27, 41-42 (1916). While granting earned time credits and releasing an inmate to the community would “relieve [an inmate] from the punishment” imposed, sending him *back* to prison after he has been released to the community (regardless of whether he remains in the “custody” of the BOP), based on the BOP’s determination that the inmate has violated a condition of release, would not be any sort of relief from punishment. It would be the “immediate disaster” of no longer being free, but in prison.¹⁸² And it would be based on the BOP’s unreviewable determination that the inmate violated release conditions imposed and supervised by a probation officer, *see* § 3624(c)(4), (5), whose function is entirely judicial. Such power is properly exercised by a court.

When Congress enacted the Sentencing Reform Act of 1984, it recognized that by putting in the hands of the Executive the determination of how long an inmate actually spends in prison, the federal parole system “arguably usurped a function of the judiciary,” and that “the better view is that sentencing should be within the province of the judiciary.”¹⁸³ In *United States v. Setser*, the Supreme Court considered whether the court has the authority to decide whether, under 18 U.S.C. § 3584(a), a federal sentence is to run concurrently with, or consecutively to, a state sentence that has not yet been imposed, or whether that authority is exclusively committed to the BOP.¹⁸⁴ Relying on “our tradition of judicial sentencing” and the requirement “that sentencing not be left to employees of the same Department of Justice that conducts the prosecution,”¹⁸⁵ the Court held that the decision belongs with the court. This was true even though a decision by BOP to run the federal sentence consecutive to a state sentence does not alter the term of imprisonment imposed by the federal court for the federal offense, because it increases the amount of time the federal prisoner physically remains in prison. Noting that one of the principle purposes of the Sentencing Reform Act of 1984 was to eliminate the Executive’s power, through parole, to decide the actual length of a term of imprisonment, the Court declined to interpret the statute in a manner that would “giv[e] to the Bureau of Prisons what amounts to sentencing authority.”¹⁸⁶

Because § 3624(c)(6) would permit BOP to send an inmate back to prison, it would give BOP what amounts to sentencing power. This is a matter for a court to decide.

F. Giving the Sentencing Commission, not the courts, unreviewable authority to decide the legal question whether an inmate’s offense of conviction

¹⁸¹ *Ex Parte United States*, 242 U.S. 27, 41-42 (1916).

¹⁸² *McDonnell*, 418 U.S. at 561 (internal quotation marks omitted).

¹⁸³ S. Rep. No. 98-225, at 54 (1983).

¹⁸⁴ 132 S. Ct. 1463, 1467 (2012).

¹⁸⁵ *Id.* at 1472.

¹⁸⁶ *Id.* at 1471 & n.5.

excludes him from earning time credits, § 3621(h)(6)(A), would lead to error, unfairness, and impracticalities.

Section 3621(h)(6)(A)(iii) would exclude an inmate from earning time credits if he was convicted of a “crime of violence, as defined under section 16.” Section 16 defines “crime of violence” as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

The determination whether an offense is a “crime of violence” under § 16 requires application of the elements-based “categorical approach” set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), and recently clarified in *Descamps v. United States*, 133 S. Ct. 2276 (2013). If the statute of conviction is “divisible,” i.e., sets forth elements in the alternative, some of which describe a “crime of violence” and some of which do not, application of the “modified categorical approach” may be required to determine which was the offense of conviction. This may require consideration of a limited set of case-specific documentation—i.e., the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial,¹⁸⁷ or the plea agreement and plea colloquy transcript (or “some comparable judicial record of this information”) if the defendant pled guilty¹⁸⁸—to determine the elements of the offense of which the defendant was convicted.¹⁸⁹ If the elements of the offense of conviction cannot be determined from these documents, it must be assumed that the conviction was for the least culpable crime, i.e., the non-qualifying offense.¹⁹⁰ The Supreme Court adopted the categorical approach to avoid practical difficulties, unfairness to defendants, and Sixth Amendment violations.¹⁹¹

The categorical approach may require extensive legal analysis of issues without clear precedent. Further complicating matters, the “force” clause under § 16(a) and the “residual clause” under § 16(b) each require additional analysis implicating yet another line of Supreme Court cases.¹⁹² Even that law is uncertain and may be changed, which will trigger yet another

¹⁸⁷ *Taylor*, 495 U. S. at 602.

¹⁸⁸ *Shepard*, 544 U. S. at 25-26.

¹⁸⁹ *Descamps*, 133 S. Ct. at 2283-84.

¹⁹⁰ *Johnson v. United States*, 559 U.S. 133, 137 (2010).

¹⁹¹ *See Descamps*, 133 S. Ct. at 2287-89.

¹⁹² *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson*, 559 U.S. at 140.

wave of interpretive caselaw, as the Supreme Court is now considering whether the “residual clause” is unconstitutionally vague.¹⁹³

In any event, the categorical approach must be applied at sentencing as well as in administrative settings, such as when deciding whether a conviction is an “aggravated felony” for purposes of deportation, where it is subject to both administrative and judicial review.¹⁹⁴ Yet, under § 3621(h)(6)(A)(iv), the U.S. Sentencing Commission, not a court, would identify all “Federal crime[s] of violence” (as well as other offenses not specified by statute, such as “Federal fraud offenses”), and its decisions are not subject to any review. It is unclear what would happen if the inmate was convicted under a “divisible” statute, which requires examination of case-specific documents.

It is up to courts “to say what the law is,”¹⁹⁵ and the Sentencing Commission is not a court.¹⁹⁶ It has no experience applying the categorical approach. Moreover, its decisions would not even be subject to judicial review. By delegating these decisions to the Commission, § 3621(h)(6)(A) would invite legally erroneous exclusions that could unfairly affect entire classes of inmates with no recourse. Practical difficulties would also arise in cases requiring examination of case-specific documents. This is a determination for a court.

VII. There Is a Simple, Cost-Effective, Practical and Fair Approach.

The approach that would result in immediate cost savings, promote public safety, and not create unwarranted disparity or violate the Constitution would be to expand recidivism-reducing programs in prison and incentivize all inmates to participate on an equal basis.

Congress should support the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn time credits up to a certain percentage of the sentence imposed, so long as they comply with disciplinary regulations.¹⁹⁷ Under this approach, individuals would earn reductions in their

¹⁹³ See Order, *United States v. Johnson*, No. 13-7120 (Jan. 9, 2015).

¹⁹⁴ See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

¹⁹⁵ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁹⁶ *Mistretta v. United States*, 488 U.S. 361, 393 (1989).

¹⁹⁷ The proposal advanced by DOJ and reported out of the Senate Judiciary Committee in the 112th Congress, would award the same number of credits and percentage of the sentence imposed to all prisoners (except those with more than one conviction for an offense involving rape or who have been convicted of a sex offense against a minor) who successfully participate in programs demonstrated to reduce recidivism, and comply with disciplinary regulations. See S. 1231, § 4(g)(1). We agree with this general approach. However, particularly if mandatory minimums are not reduced, we do not agree with the limit on the amount of credit in the DOJ bill. It would limit the maximum total reduction to 33% of the sentence imposed, including credits for program participation, good time credits for compliance with disciplinary regulations, and any reduction for participation in the residential substance abuse treatment program (RDAP). Since good time credit would be 15% under Section (f) of the DOJ bill, this would mean that a prisoner would earn only 18% off the sentence imposed for participating in programs, and less (or in

prison sentences, taxpayer dollars would be saved, and public safety would be enhanced.

BOP currently provides programming that has been proven to reduce recidivism.¹⁹⁸ These programs do not require the costly and time-consuming development and implementation of a complex Assessment System, and have been proven to be cost-effective.¹⁹⁹ But many of these programs have long waiting lists and cannot accommodate all who need them. For example, even after BOP added new slots from 2009 to 2011, the residential drug abuse treatment program (RDAP) still has long waiting lists, thus constraining BOP's ability to admit participants early enough to allow a full year reduction for completing the program.²⁰⁰ Likewise, there are long waiting lists for non-residential drug treatment, drug education, literacy programs, the Life Connections and Threshold programs, and perhaps most important, meaningful work.²⁰¹ As noted above, FPI jobs are proven to reduce recidivism more than any other program, particularly for young minority inmates who are at the greatest risk of recidivism, by giving them marketable job skills.²⁰² But because FPI must generate operating revenue to remain a self-sustaining program, and has had to compensate for declining revenues and earnings in recent years, as of June 2012, it employed "7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population."²⁰³ Support for the development of meaningful work opportunities, as well as other recidivism-reducing programs, is clearly needed.

Lastly, and perhaps most significantly, to truly address the historically unprecedented

some cases nothing) if he also participated in RDAP.

¹⁹⁸ "Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release." See Statement for the Record of Charles E. Samuels, Jr., *supra* note 58, at 3-4.

¹⁹⁹ The benefit-to-cost ratio for residential drug abuse treatment is as much \$2.69 for each dollar invested; \$5.65 for adult basic education; \$6.23 for correctional industries; and \$7.13 for vocational training. *Id.*

²⁰⁰ U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, *supra* note 126, at 69-73.

²⁰¹ *Id.* at 73-75.

²⁰² Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp. Inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release compared to similarly situated inmates who did not participate, and are 14% more likely than non-participants to be employed 12 months following release from prison. "Work programs especially benefit young minorities who are at the greatest risk for recidivism." See FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf.

²⁰³ U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates*, *supra* note 86, at ii, 1.

high levels of incarceration, Congress should reduce unnecessarily severe sentences on the front end. “[A]ny attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options . . . would not be sufficient. . . . [T]he only policy change that would on its own eliminate overcrowding altogether is reducing certain drug mandatory minimums.”²⁰⁴ By all accounts, the savings under the Smarter Sentencing Act would be large, direct, and swift. The Congressional Budget Office estimates that it would result in a net savings of \$3 billion in the first ten years: \$4 billion saved through reduced incarceration less \$1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in \$3.426 billion in cost savings and another \$3.964 billion in cost aversions in the first 10 years.²⁰⁵ The Urban Institute estimates that it would result in \$3.258 billion in cost savings in the first 10 years.²⁰⁶

The need for reform in the federal corrections system is real and urgent. Congress should pass legislation that would meaningfully and equitably achieve significant reductions in the prison population. Unfortunately, in its present form, the Corrections Act does not do so.

²⁰⁴ Statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, before the H. Comm on Jud., Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, *Lessons from the States: Responsible Prison Reform* 10, 12 (July 15, 2014).

²⁰⁵ Potential Impact & Cost Savings: The Smarter Sentencing Act, <http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf>.

²⁰⁶ Urban Institute, *Stemming the Tide*, *supra* note 123, at 3-4.