Courts and Jails
Evidence-Based Judicial Decision Making

Supported by the John D. and Catherine T. MacArthur Foundation
Introduction

1. This EBS curriculum for those charged with misdemeanor and lower-level felony offenses first reviews and then applies RNR principles of EBP and other research to pretrial, diversion, and sentencing practices with respect to persons with mental and/or substance use disorders, and persons charged with DUI and DV offenses.

2. Jails often serve as “warehouses for people with mental health and substance abuse issues.” Almost 15 percent of men and over 30 percent of women admitted to jails have SMI, and most persons with SMI are arrested for minor offenses.

3. Nearly 75 percent of jailed persons are incarcerated on non-violent offenses, and 38 percent are convicted of a crime, typically a misdemeanor or lower-level felony offense. DUI cases are estimated to constitute over 20 percent of all misdemeanor filings, and DV cases to constitute over 8 percent of misdemeanor filings.

4. Application of RNR principles to pretrial and sentencing decisions affecting persons charged with misdemeanor or lower-level felony offenses is often quite different and even more challenging than application to felony defendants: higher volume, less leverage, fewer resources, and less information about the defendant.
Evidence-Based Practice (EBP)

Community corrections practices supported by the “best research evidence” of what works to reduce recidivism.

Evidence-Based Sentencing (EBS)

The application of Principles of EBP in community corrections to the process of sentencing jail-eligible persons for the purpose of reducing recidivism.
Purposes of Sentencing

- "Just Deserts": penalty or punishment proportionate to the gravity of the offense, blameworthiness of the defendant, & harm done to victims; accountability

- Public Safety

**Risk Management And Reduction**

- Rehabilitation
- Specific Deterrence
- Incapacitation/Control
- Avoiding sanctions that increase the risk of future criminal conduct
- General Deterrence

- Victim Protection & Restitution/Community Restoration
Principles of Evidence-Based Practice (EBP)

- Risk Principle (Who)
- Responsivity Principle (What works)
- Needs Principle (What)
The level of supervision or services should be matched to the risk level of the defendant: i.e., more intensive supervision and services should be reserved for higher risk defendants.
Potential Impact on Recidivism

- Recidivism Rates Absent Treatment
- Likely recidivism rates with effective correctional intervention
## Travis Co., Texas: Impact of Supervision by Risk

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>% Re-arrest Pre-EBP 1/06-6/06 N = 1287</th>
<th>% Re-arrest Post-EBP 7/07-10/07 N = 614</th>
<th>% Change in Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>26%</td>
<td>6%</td>
<td>-77%</td>
</tr>
<tr>
<td>Medium</td>
<td>26%</td>
<td>13%</td>
<td>-50%</td>
</tr>
<tr>
<td>High</td>
<td>34%</td>
<td>31%</td>
<td>-9%</td>
</tr>
<tr>
<td>Overall</td>
<td>29%</td>
<td>24%</td>
<td>-17%</td>
</tr>
</tbody>
</table>
Implications of the Risk Principle

- Diversion
- Pre-trial
- Supervision
- Treatment & Dosage
- Sentencing
- Incarceration
The targets for interventions should be those characteristics that have the most effect on the likelihood of re-offending.
Dynamic Risk Factors (Criminogenic Needs)

1. Anti-social attitudes
   - Anti-social friends & peers
   - Anti-social personality pattern

2. Family and/or marital factors

3. Substance abuse

4. Lack of education

5. Poor employment history

6. Lack of pro-social leisure activities
ACTUARIAL RISK NEEDS ASSESSMENT
&
CLINICAL NEEDS ASSESSMENT
Actuarial Risk/Needs Assessment

1st Generation
- subjective, professional, clinical judgment

2nd Generation
- actuarial, static risk factors

3rd Generation
- actuarial, dynamic risk factors

4th Generation
- incorporation of recommended interventions
Actuarial Risk / Needs Assessment

- The engine that drives evidence-based recidivism reduction strategies
- Much more accurate, consistent, and fair in predicting risk of recidivism
- Identifies dynamic risk factors
- Risk is dynamic; risk scores are static
- Intended to inform not replace professional judgment
Clinical vs. Actuarial Assessment

Clinical
- Low: 2%
- Low Moderate: 30%
- Moderate: 51%
- High: 17%

Actuarial
- Low: 7%
- Low Moderate: 91%
- Moderate: 7%
- High: 2%
Clinical Assessment of

Substance Use Disorder (SUD) & Mental Disorder (MD)

Determining appropriate interventions for persons with SUD or MD or Co-Occurring Disorder (COD), including some persons convicted of DUI and DV offenses, depends on:

- an accurate actuarial assessment of risk and criminogenic needs, and
- an accurate clinical screening and assessment for SUD, MD, and COD
USING ACTUARIAL RNA INFORMATION IN THE SENTENCING PROCESS
Appropriate Uses of Actuarial RNA Information at Sentencing

Not in determining the severity of the sentence

But to set terms and conditions of probation, and

Identify appropriate treatment services
**Setting Probation Conditions**

**Use RNA information**
- To set appropriate supervision level
- To set terms & conditions of probation
- To inform interactions with the probationer

**Avoid less relevant, unrealistic, or inflexible conditions**

**If probation is well-trained in EBP, and especially in the absence of reliable RNA information, the court should defer to probation on level of supervision, monitoring, and control, and with respect to appropriate probation conditions.**
The General Responsivity Principle: What Works

The most effective interventions in reducing recidivism among medium and high risk persons:

- target the person’s most critical risk factors, and
- utilize behavioral and cognitive behavioral strategies
Behavioral Strategies: The ABC’s of Behavioral Change

Positive / Pro-social behaviors

- Rewards
- Reinforcement
- Incentives

Negative / Anti-social behaviors

- Swift, certain, and fair (SCF) sanctions
- Severe sanctions are often counter-productive
- Therapeutic responses
Probability of Success

RATIO OF REWARDS TO SANCTIONS

<table>
<thead>
<tr>
<th>Ratio</th>
<th>Probability of Success</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 10</td>
<td>0%</td>
</tr>
<tr>
<td>1 to 8</td>
<td>10%</td>
</tr>
<tr>
<td>1 to 6</td>
<td>20%</td>
</tr>
<tr>
<td>1 to 4</td>
<td>30%</td>
</tr>
<tr>
<td>1 to 2</td>
<td>40%</td>
</tr>
<tr>
<td>1 to 1</td>
<td>50%</td>
</tr>
<tr>
<td>2 to 1</td>
<td>60%</td>
</tr>
<tr>
<td>4 to 1</td>
<td>70%</td>
</tr>
<tr>
<td>6 to 1</td>
<td>80%</td>
</tr>
<tr>
<td>8 to 1</td>
<td>90%</td>
</tr>
<tr>
<td>10 to 1</td>
<td>90%</td>
</tr>
</tbody>
</table>
“SCF” IS INEFFECTIVE IN REDUCING RECIDIVISM

Although SCF is effective in shaping a person’s behavior, and promoting compliance, in the short-term, research indicates it is not effective in reducing recidivism in the long term after the person is no longer subject to the threat of sanctions.

Researchers also question whether incarceration is an appropriate initial sanction for a technical violation: “We know of no empirical basis for considering jail days an optimal response under an SCF approach....” (Hawken 2016; Kleiman 2016)

Researchers have also pointed out that rewards are more effective & have longer impacts than sanctions. (e.g., Oleson 2016)
Behavioral Strategies: Skill Building

- Role models
- Demonstration
- Role play
- Feedback
- Skill practice
Behavioral v. Non-Behavioral

% Reduced Recidivism

K = 77

K = 297

Non-Behavioral

Behavioral
Cognition Model

Thoughts

Feelings

Beliefs & Attitudes

Behavior

Visible

Sometimes Aware

Beneath the Surface
T4C: Recidivism Rates

- Prob + T4C successful only: 18
- Prob + T4C all: 23
- Prob only: 35

28-50% reduction in recidivism compared to traditional probation
• Interrupt anti-social thinking patterns – restructure
• Create replacement thoughts leading to pro-social behaviors
• Provide skills to handle situations such as conflict management, problem solving
What Doesn’t Work: Non-Behavioral Strategies

- Drug education programs
- Drug prevention classes focused on fear or emotional appeal
- Non-action oriented counseling
- Non skill-based education programs
- Self help groups (e.g., AA, NA)
What Doesn’t Work: Traditional Sanctions Alone

- Incarceration: specific deterrence, general deterrence, & incapacitation
- Fear-based programs, e.g., Scared Straight
- Physical challenge programs
- Military models of discipline and physical fitness - Boot Camps
- Intensive supervision without treatment
Both the intervention (treatment, supervision, or interaction), and personnel delivering the intervention, must be matched to certain critical characteristics of the individual person.

Specific Responsivity Principle
Responsivity Factors

- Gender
- Literacy & Language
- Transportation
- Poverty
- Physical & Mental Health / Developmental Disabilities
- Motivation
EVIDENCE-BASED FRAMEWORK FOR RESPONDING TO VIOLATIONS OF PROBATION
EVIDENCE-BASED RESPONSE FRAMEWORK

Goals
- Accountability
- Risk Reduction

Process
- Swift
- Certain
- Consistent
- Fair
Improved compliance and motivation when the person views the decision-making process as “procedurally fair”:

- Views decision-maker as impartial
- Has an opportunity to participate
- Is treated with respect
- Trusts the motives of the decision maker (“trustworthiness”)
<table>
<thead>
<tr>
<th>EB Response Framework</th>
<th>Goals</th>
<th>Accountability</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Risk Reduction</td>
<td></td>
</tr>
<tr>
<td>Process</td>
<td>Swift</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Certain</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Consistent</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fair</td>
<td></td>
</tr>
<tr>
<td>Tools</td>
<td>Policies, grids &amp; guidelines</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Graduated continuum of rewards, incentives, services &amp; sanctions</td>
<td></td>
</tr>
<tr>
<td>Factors</td>
<td>Nature &amp; severity of the violation</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Criminal history</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Violation/compliance history</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Current risk level</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Motivation to change</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Relationship of violation to distal/proximal objectives</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Relationship of violation to critical risk factors</td>
<td></td>
</tr>
</tbody>
</table>
Use of Incarceration in Response to Technical Violations

- Swift and certain imposition of short periods of incarceration may be an effective deterrent in reducing subsequent technical violations (e.g., HOPE) but HOPE researchers question whether it is an optimal or appropriate initial response.

- More than a dozen states now authorize swift and certain imposition of short periods of incarceration (typically 2-10 days) as an administrative sanction.

- Several research studies have found that imposing jail in response to technical violations increases the risk of later revocation, re-arrest, and reconviction.

- Increasingly, states are enacting restrictions on prison revocation and imposition of jail sentences for technical violations.
Legal Authority
- Statutory; judicially delegated; separation of powers

Federal due process
- Right to notice and hearing (judicial/administrative)
- Two models; waiver of rights
- Review/approval in lieu of hearing
- No automatic right to counsel

Administrative Sanctions: Legal Authority/Due Process
Revocation

Revocation is an appropriate response to a technical violation only when multiple appropriate responses to a series of technical violations have proven unsuccessful, or a comprehensive reexamination of risk in light of all available information determines that the person can no longer be safely and effectively supervised in the community.
Application of EBS to Pre-trial Detention and Sentencing Practices Affecting Persons Charged with DUI and DV Offenses & Persons with Mental and/or Substance Use Disorders
1. Avoid pretrial detention: use PT RA, PT Super., alcohol/drug monitoring, & driving restrictions to reduce risk of non-appearance and/or recidivism.

2. Use ignition interlock devices (IIDs) or 24/7 sobriety programs in lieu of license suspension or revocation and, where indicated, in concert with assessment and treatment.

3. Monitor substance usage through use of drug testing and/or monitoring devices.

4. Enforce compliance through use of incentives & SCF sanctions.


Persons Charged with DUI Offenses*

*focuses on drivers with BAC ≥ .15 and persons previously convicted of DUI
6. Consider specific responsivity challenges facing female defendants, e.g., mental health, trauma, child care, financial, housing, and transportation.

7. Be aware that incarceration and sanctions have no long-term positive impact on reducing recidivism, and may increase the risk of recidivism.

8. Consider DUI Courts only for high-risk/high-need individuals. DUI Courts may increase recidivism among those who are not high risk or substance dependent.

9. Closely monitor drug use and driving activity for high-risk/low-need individuals.

*focuses on drivers with BAC ≥ .15 and persons previously convicted of DUI
Persons Charged with Domestic Violence Offenses

1. Focus on managing risk to the victim’s safety and well-being, especially at the outset.

2. Use actuarial and clinical screening and assessment tools to assess risk of both repeat domestic violence and general recidivism.

3. Consider using GPS devices to monitor compliance with no-contact orders for persons who present significant risk to the victim.
Persons Charged with Domestic Violence Offenses

4. Consider using specialized probation supervision units providing enhanced contacts, follow-up on violations, and appropriate treatment for higher risk persons.

5. Do not place low-risk persons convicted of domestic violence on low-risk probation supervision caseloads at the outset.
Persons Charged with Domestic Violence Offenses

6. Be aware that most research has found no solid empirical evidence for the effectiveness of any of the traditionally popular batterer intervention programs.

7. Consider using treatment programs that have shown more success in changing behaviors of persons convicted of domestic violence offenses.

8. Consider establishing a domestic violence docket within a coordinated community response.
Persons with Substance Use Disorder (SUD)

1. Conduct RNR and clinical assessments to determine effective supervision and treatment.

2. Base interventions on criminogenic risk and level of SUD:
   - High Risk: Intensive supervision, CBT, strict monitoring, reinforcement of compliant behavior, use of swift/certain sanctions, and treatment proportionate to level of SUD
   - Low Risk: Little to no supervision and treatment proportionate to level of SUD.
Persons with SUD

3. Include medication assisted treatment (MAT) in opioid use disorder (OUD) interventions:
   - Methadone or buprenorphine to address short-term withdrawal issues,
   - Naltrexone to block opioid/alcohol cravings and
   - Naloxone (Narcan) to administer when an opioid overdose is suspected.

4. Consider whether co-occurring and other needs also require attention.
Persons with SUD

5. Use drug court for high risk persons with moderate to severe SUD.

6. Include random, unpredictable, and frequent drug testing in supervision.

7. Consider level of SUD when addressing noncompliance:
   - For moderate to severe SUD, compliance with treatment is proximal goal; abstention is distal goal
   - For mild SUD, both compliance and abstention are proximal goals.
1. Use validated pretrial risk assessment and mental/substance use disorder screening tools to assess pretrial risk.

2. Ensure pretrial diversion includes an effective mental health services component.

3. Create effective mental health diversion programs by adopting early screening and assessment and making referrals to effective, low-demand, recovery-based services.

4. Establish relationships with behavioral health treatment providers in the community; establish engaging, firm, and fair relationships with persons with MD in the courtroom.

Persons with Mental Disorder (MD)
Persons with MD

5. Use risk/needs assessment and psychosocial screening and assessment, and focus supervision and treatment on recidivism reduction and recovery.

6. Increase intensity of supervision and integration of probation and mental health services as criminal risk and functional impairment increase; avoid threats and sanctions as they increase the risk of recidivism.
Persons with MD

7. Use promising and evidence-based clinical practices:
   - Assertive Community Treatment
   - Illness self-management and recovery
   - Supported employment & housing
   - Medications
   - Family psychoeducation
   - Integrations of families, peers, & pro-social individuals into treatment
   - Motivation to remain in the community
   - Trauma-informed care
Persons with MD

8. When available, refer to well-run mental health courts which reduce recidivism.

9. Recognize that supervision and treatment of persons with co-occurring disorders is particularly challenging as the treatment modalities are different for each disorder.
Please visit the Courts & Jails Resource Center for more information:


Supported by the John D. and Catherine T. MacArthur Foundation