Evidence-Based Sentencing

The National Center for State Courts (NCSC) was one of the first organizations to use the term "evidence-based sentencing" (EBS). In promoting EBS, the NCSC has focused on the incorporation of evidence-based practices shown to be effective in reducing recidivism into judicial decisions regarding the terms and conditions of community supervision. In this context, EBS refers to a set of sentencing practices that include identifying offender risk factors, matching risk factors to supervision levels, and providing proven treatment services and programs tailored to an individual offender's specific characteristics such as cognitive abilities and gender. As used by the NCSC, EBS does *not* refer to the decision regarding an offender's appropriate punishment. Rather, it provides judges information to consider regarding potential supervision and treatment conditions to effectively manage and reduce an offender's risk of reoffending. This document responds to a number of questions regarding the NCSC's efforts to advance EBS.

1. ***Does the NCSC promote EBS as a strategy to reduce incarceration?*** No, the NCSC promotes EBS as a strategy to reduce recidivism. If EBS is effective in reducing recidivism, however, it will likely have a positive impact on future incarceration rates.

2. ***How does EBS address recidivism reduction?*** EBS relies on the general Risk-Need-Responsivity (RNR) model that identifies three principles for addressing offender recidivism:[1]

   a. The ***Risk*** principle holds that supervision and treatment levels should match the offender's level of risk. That is, to reduce recidivism, low-risk offenders should receive less supervision and services, and higher-risk offenders should receive more intensive supervision and services.

   b. The ***Need*** principle maintains that treatment services should target an offender's dynamic risk factors or criminogenic needs (see Question 3) to reduce an offender's probability of recidivism.

   c. The ***Responsivity*** principle contends that treatment interventions for offenders should use cognitive social learning strategies and be tailored to an individual offender's specific characteristics (e.g., cognitive abilities, gender) that affect successful program outcomes.

3. ***How is risk assessed for use in EBS?*** Risk is assessed through the use of a validated actuarial risk and needs assessment (RNA) tool. RNA tools are designed specifically to inform community corrections-related decisions regarding management and reduction of offender recidivism risk. These tools consist, in part, of static factors such as criminal history and age at first offense which are related to recidivism but cannot be altered through the delivery of services or treatment programs. Importantly, the tools also identify dynamic risk factors (also referred to as criminogenic needs) such as antisocial attitudes and antisocial peer groups that also are related to recidivism and can be addressed through services and treatment programs. The RNA helps judges and probation officers identify those specific offender risk factors that can be targeted with services and treatment programs in order to help reduce an offender's likelihood of recidivating.[2]

RNA tools used in EBS are typically designed for adult felony offenders, include 40 or more items, and focus on general recidivism.[3] These tools should not be confused with tools designed for use at other points in the criminal process (e.g., pretrial or reentry), other types of recidivism risk (e.g., risk of committing a violent or sex crime), or screening tools that consist of a few, mostly static items used to determine risk for supervision purposes only. All of these tools are referred to as risk assessments, but they are not focused on risk management *and* reduction among offenders under community supervision.

4. ***Does the RNA predict an individual's specific risk of recidivism?*** The RNA does not indicate whether a particular offender will actually recidivate; rather it identifies the "risk" or probability that the offender will recidivate. The risk probability is based on the extent to which an offender has characteristics like those of other offenders who have recidivated. For example, a RNA that results in a high risk classification means that the offender has characteristics like other offenders who have recidivated, and a low risk classification means the offender has characteristics like offenders who typically do not reoffend.[4]

5. ***How does the NCSC advise judges to use RNA information in sentencing?*** State statutes and sentencing commissions have identified several purposes for sentencing. These typically include punishment, enhancing public safety through risk reduction and management, restitution to victims and their communities, and general deterrence.

Consistent with the Indiana Supreme Court decision in *Malenchik v. Indiana* (2010), the NCSC's guiding principles for using RNA information at sentencing expressly state that RNA information should be used for decisions regarding risk reduction and management and not for decisions regarding the severity of the sanction to appropriately punish an offender:

> Risk and need assessment information should be used in the sentencing decision to inform public safety considerations related to offender risk reduction and management. It should not be used as an aggravating or mitigating factor in determining the severity of an offender's sanction.[5]
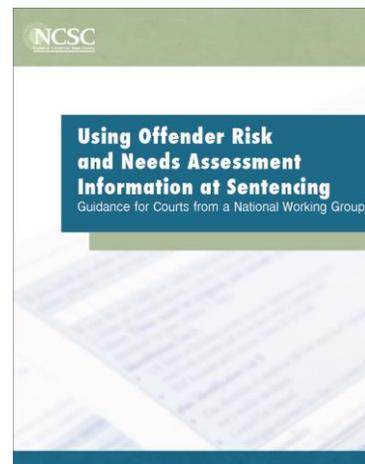
The offender's RNA, in conjunction with the local jurisdiction's capacity to supervise the offender, the availability of intermediate sanctions options (e.g., community service, work release, day reporting, and jail), and the availability of services and treatment programs that can effectively address the offender's dynamic risk factors, inform decisions regarding whether and how an offender can be safely and effectively supervised in the community.[6]

6. ***Can an offender be low risk and sent to prison or high risk and remain under community supervision?*** Yes, the NCSC's guiding principles documents explains:

> Although critically important, these risk-related factors are not necessarily determinative of whether an offender should be granted probation. They are considered within the context of the other sentencing factors…. A low risk offender may not be a good candidate for probation, for example, if the gravity of the offense committed and the offender's culpability are so great that any disposition other than prison would constitute a disproportionately lenient sentence. Likewise, a higher risk offender who has committed a less serious offense involving a relatively low level of

culpability may be a particularly good candidate for probation supervision. Even an offender deemed high risk based on the RNA who has committed a more serious offense reflecting a higher degree of culpability may be a good candidate for community supervision, if the defendant's culpability is not so great as to mandate imprisonment and the court's consideration of the risk-related factors … support a finding of amenability to probation supervision. Indeed, meta-analyses of different intervention strategies show that community supervision and treatment strategies based on evidence-based practices (e.g., those associated with the Risk-Needs-Responsivity model described earlier) are as effective or more effective in reducing recidivism than incarceration, particularly for medium- and high-risk offenders.[7]

7. ***How is judicial discretion affected by the use of EBS?*** EBS does not replace judicial discretion. EBS provides additional information for the judge to consider in crafting an offender's sentence. Judges are free to use the information as they deem best in light of all the facts of the case and the parties' presentations in court to address all the purposes of sentencing. The NCSC's guiding principles recommend that judges and other stakeholders involved in the decision-making process at sentencing receive comprehensive initial training to ensure that they fully understand the prescribed uses and limitations of the assessment information they receive and appropriately apply this knowledge in the decision-making process.[8] Periodic refresher training is often necessary to support proper use of the tool over time.

8. ***What is the evidence that RNA tools are accurate and fair?*** As discussed in the NCSC's guiding principles, a RNA tool must be capable of producing fair, accurate, unbiased assessment results for the types of offenders with whom the tool will be used.[9] This is critical for any good RNA tool used as part of an EBS approach.

   Many of the most popular RNA tools currently available have already been studied with a variety of diverse populations. Instrument developers and other scientists have conducted research to ensure that the tools are valid for use with the general populations for which they were designed. Validation research studies examine the accuracy of the tool overall and with respect to specific subpopulations (e.g., by gender, race, current offense type) by comparing the results of the assessment with actual recidivism outcomes over a defined follow-up period (usually 1-3 years following the offense). This is done to ensure that offenders in the target population and in particular subgroups of the target population are not systematically misclassified by the tool as higher or lower risk for recidivism than they truly are. This also ensures that the norms or assessment score cutoff values for classifying offenders as low, moderate, or high risk are properly calibrated for the community in which the tool will be used. Instrument developers may have validation research documentation already posted on a website or may provide this information upon request. Jurisdictions that receive professional services from a RNA instrument provider or research group should ask for information about the research evidence currently available regarding the accuracy and fairness of the RNA tool.

   The availability of evidence on the validity of tools in assessing subpopulations varies across instruments especially with regard to the availability of studies published by independent researchers in peer-reviewed journals.[10] Because some of the published studies have been criticized for various methodological flaws, such as small sample sizes for racial subgroups or improper implementation of the RNA tool under examination, they often do not provide definitive conclusions about the fairness or unfairness of a particular RNA tool.[11] Additional research is needed to clarify the results.

To ensure fairness, jurisdictions can conduct their own local validation studies. Local validation is important because differences in the local offender population, local policies, and local implementation practices may affect the validity of results produced by the RNA tool. Such differences may also appear, disappear, or otherwise change over time. For this reason, NCSC has encouraged jurisdictions that use RNA tools to conduct or commission local validation research studies, including tests of differential validity (or differences in instrument accuracy between subgroups of offenders), prior to full-scale implementation, and thereafter on a routine basis.[12] RNA instrument developers and other scientific experts have also encouraged client jurisdictions to "validate" and "revalidate" these tools locally, with several offering research support services to those jurisdictions without the internal capacity to perform such research activities on their own.[13]

For more information on evidence-based sentencing, visit the NCSC's Center for Sentencing Initiatives at www.ncsc.org/csi.

[1] See pp. 279-284 in Andrews, D. A., & Bonta, J. (2006). *The Psychology of Criminal Conduct, (4th ed.)*. Cincinnati: Anderson. Also see, Bonta, J., & Andrews, D. A. (2007). R*isk-need-responsivity model for offender assessment and rehabilitation (PS3-1/2007-6)*. Ottawa: Public Safety Canada.

[2] See pp. 4-5 in Casey, P. M., Elek, J. K., Warren, R. K., Cheesman, F., Kleiman, M., & Ostrom, B. (2014). *Offender risk and needs assessment instruments: A primer for courts*. Williamsburg, VA: National Center for State Courts. Retrieved from
http://www.ncsc.org/~/media/Microsites/Files/CSI/BJA%20RNA%20Final%20Report_Combined%20Files%208-22-14.ashx.

[3] Casey, et al. (2014) at note 2, p. 2 and appendix with profiles of risk and needs assessment instruments.

[4] See pp. 29-31 in Vincent, G. M., Guy, L. S., Grisso, T. (2012, November). *Risk assessment in juvenile justice: A guidebook for implementation*. Chicago: MacArthur Foundation.

[5] *Malenchik v. State of Indiana*, 928 N.E.2d 564 (2010). Retrieved from
http://www.in.gov/judiciary/opinions/pdf/06091001bd.pdf. See p. 11 in Casey, P. M., Warren, R. K., & Elek, J. K. (2011). *Using offender risk and needs assessment information at sentencing: Guidance for courts from a National Working Group*. Williamsburg, VA: National Center for State Courts. Retrieved from
http://www.ncsc.org/~/media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx.

[6] See Casey et al. (2011) at note 5, pp. 14.

[7] See Casey et al. (2011) at note 5, pp. 14-15. Also see supporting meta-analyses. Gendreau, P., Goggin, C., Cullen, F. T., & Andrews, D. A. (2001). The Effects of community sanctions and incarceration on recidivism. *Forum on Corrections Research*, *12*(2), 10-13. Lipsey, M. W., & Cullen, F. T. (2007). The effectiveness of correctional rehabilitation: A review of systematic reviews. *Annual Review of Law and Social Science*, *3*, 297-320. doi: 10.1146/annurev.lawsocsci.3.081806.112833

[8] See Casey et al. (2011) at note 5, pp. 21-22.

[9] See Casey et al. (2011) at note 5, pp. 29-32. Also see Casey, et al. (2014) at note 2, pp. 13-19.

[10] See Casey et al. (2014) at note 2, p. 19 and appendix with instrument profiles.

[11] For example of studies and their critics, see Brennan, Dieterich, & Ehret, B. (2009). Evaluating the predictive validity of the COMPAS risk and needs assessment system. *Criminal Justice and Behavior, 36*, 21-40.
Fass, A., Heilbrun, K., DeMatteo, D., & Fretz, R. (2008). The LSI-R and the COMPAS: Validation data on two risk-needs tools. *Criminal Justice and Behavior, 35*, 1095-1108.
Olver, M., Stockdale, K., & Wormith, J. (2014). Thirty years of research on the Level of Service scales: A meta-analytic examination of predictive accuracy and sources of variability. *Psychological Assessment, 26*, 156-176.
Schlager, M. D., & Simourd, D. J. (2007). Validity of the Level of Service Inventory—Revised (LSI-R) among African American and Hispanic male offenders. *Criminal Justice and Behavior*, *34*, 545-554.

[12] See Casey et al. (2011) at note 5, pp. 29-32; Casey et al. (2014) at note 2, pp. 20-22.

[13] Some instrument developers recommend revalidating their RNA tool at fixed intervals, such as every five years (B. Lovins, personal communication, February 16, 2012). Others do not suggest a fixed interval but recommend revalidating based on a contextual analysis of how the tool is being used in a jurisdiction and whether or not changes in the target population, policies, or implementation practices have occurred since a prior validation study was conducted (R. Barnoski, personal communication, April 24, 2012). Also see Casey et al. (2014) at note 2, appendix with instrument profiles.