1. What are judicial considerations in sentencing probation-eligible felony offenders?

There are three basic judicial considerations when sentencing probation-eligible felony offenders. The first is whether imprisonment is the only appropriate sanction in light of the nature and gravity of the offense committed, the resulting injury or harm, and the defendant’s prior criminal record. Presuming the circumstances of the offense committed do not effectively foreclose the possibility of a non-prison sentence, a second consideration is whether the defendant is amenable to community supervision. If the defendant is found to be amenable to community supervision, a third consideration pertains to what constitutes the appropriate community sanctions and terms and conditions of community supervision. Although these considerations are all commonly referred to as “sentencing” decisions, imprisonment and other sanctions are primarily intended to punish and hold the offender accountable for past conduct, while the amenability determination and the terms and conditions of community supervision imposed are in essence “corrections” decisions designed to manage and reduce the risk of the defendant’s future criminal conduct and promote rehabilitation.

The remainder of this brief focuses on the use of risk and needs assessment (RNA) information by judges to inform decisions about the latter two of these three basic considerations.

2. What is “evidence-based sentencing”?

Evidence-based sentencing (EBS) refers to the incorporation into sentencing policy and practice of basic principles of evidence-based practice (EBP), i.e., community corrections practices demonstrated by scientific research to be effective in managing and reducing the risk of recidivism.

3. What is the “risk principle”?

The “risk principle” is the first basic recidivism reduction principle of EBP. It holds that the level of supervision and services provided should match the offender’s level of risk of reoffending. More intensive interventions (e.g., intensive supervision and/or treatment programs) should be reserved for higher risk offenders.
while lower risk offenders should normally receive minimal or no intervention. Whereas intensive interventions may decrease recidivism risk among high risk offenders, research has shown that the use of numerous or intensive interventions with low risk offenders can actually increase their likelihood of recidivism.

4. What is a risk assessment instrument?

Risk assessment instruments are used in many fields to predict the probability of various outcomes such as automobile accidents or medical conditions. In the criminal justice system, actuarial risk tools provide information on the probability of outcomes such as failing to appear in court after arrest, committing any new offense, or committing a specific type of re-offense (e.g., violent, sexual). Criminal justice research scientists develop risk assessment tools using sophisticated statistical methodologies to identify information that is most strongly correlated (or associated) with the specific outcome of interest such as criminal reoffending. Across numerous fields, assessments of risk informed by a formal risk assessment instrument have been found to be more accurate and reliable than those based on unstructured clinical judgment alone.

Items on criminal justice risk assessment tools vary depending on the tool’s purpose. A tool designed to assess the risk of failure to appear in court, for example, contains items that differ from a tool designed to assess risk of reoffending. Thus it is critical to specify the purpose for using risk assessment information before selecting an existing instrument or developing a new one. In addition, the predictive strength of various items to the outcome of interest may vary somewhat across different defendant/offender populations, which is why a jurisdiction should validate the use of a tool for its own population.

5. What is a risk and needs assessment instrument?

Although offender risk assessment tools have been around since the 1970’s, offender RNA tools only emerged in the 1990’s. They have reenergized the effort to not only predict the risk of recidivism but to reduce that risk, providing structured, research-based guidance to those seeking to effect change in offender behavior. RNA tools identify an individual offender’s specific “criminogenic needs” (i.e., “dynamic” or changeable risk factors, such as anti-social attitudes, anti-social peers, education/employment deficits, and substance abuse). Research demonstrates that successfully addressing an individual’s criminogenic needs through effective supervision and treatment reduces the risk of re-offense.

6. How is risk and needs assessment information used in making sentencing decisions?

RNA tools were originally developed for use by probation agencies to make community supervision decisions, and EBS includes their use by courts to inform important probation-related decisions as well. With regard to setting appropriate conditions of probation supervision, RNA information is used for two primary purposes. First, it is used to ensure that the intensity of probation supervision and treatment services is proportionate to the

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defendant’s level of risk. Provision of intensive services to low risk offenders, or less intensive services to high risk offenders, both predictably result in higher rates of recidivism. Second, it is used to allow the court to effectively manage and reduce the risk of re-offense by crafting, modifying, and enforcing terms and conditions of probation supervision that address the probationer’s specific unique set of dynamic risk factors (“criminogenic needs”). It is critical that each condition of probation be targeted at a specific relevant risk factor or other sentencing objective. Conditions of probation not properly targeted at the offender’s most critical dynamic risk factors are counter-productive, requiring both the offender and probation officer to engage in activities that are unlikely to reduce risk and distract both from focusing on the critical risk factors that do affect the likelihood of recidivism.⁴

RNA information is also used in making other important probation-related sentencing decisions: determining appropriate and effective responses to compliant and non-compliant behaviors of offenders under supervision;⁵ considering the diversion of low-risk prison-bound offenders to community supervision; and in assessing an offender’s amenability for community supervision.⁶

7. Are risk and needs assessment scores used by the courts to make decisions about the appropriate severity of punishment?

No. State courts have disapproved the use of such scores as aggravating factors in determining the severity of punishment. As discussed above, the severity of punishment is typically based on backward-looking factors, particularly the circumstances of the offense(s) committed and the offender’s past criminal record. RNA information is intended for use in making forward-looking decisions: decisions designed to reduce the risk that the person will re-offend.

RNA information may inform judicial decisions regarding imprisonment when making a corrections-related assessment of the offender’s amenability to probation supervision.⁷ The offender’s risk level may be an important, though not determinative, factor in assessing amenability. In making decisions about amenability and other placement decisions for the purpose of reducing recidivism risk, the offender’s criminogenic needs and the availability of appropriate supervision, treatment, and intermediate sanction resources in the community are also considered.⁸

Because intensive interventions such as imprisonment tend to increase and not decrease the risk that a low risk offender will reoffend,⁹ the risk principle cautions against the use of incarceration for low risk offenders. Thus RNA information may also be a factor in determining whether imprisonment should be avoided or scaled back for low risk offenders.

8. How widespread is the use of risk and needs assessment information at sentencing today?

Over the last 10 years at least 18 states have adopted, by statute, administrative policy or judicial policy, a state-wide use of RNA at the sentencing phase. There are also local jurisdictions using RNA at sentencing in at least 5 other states.¹⁰
9. Is there any evidence about the effects of providing risk and needs assessment information to the courts at sentencing?

Yes. Interviews and site visits conducted by the National Center for State Courts (NCSC) with judges, prosecutors, defense counsel, and corrections administrators in 10 local US jurisdictions using RNA at sentencing found that virtually all interviewees considered the information “helpful” or “useful.” Most of these jurisdictions are in the process of tracking data that can be used in future evaluations to determine the effects of providing RNA information to the courts at sentencing.

A 2015 report of a federally funded research project with the California Administrative Office of the Courts and California Probation Officers Association found that jurisdictions using RNA at sentencing “realized decreases in the proportion of felony offenders who were sentenced to prison and jail” and that “improved offender outcomes and reductions in recidivism can be achieved through ... the use of evidence-based PSI [pre-sentence investigation] ... reports and effective supervision and case management practices.”

Similar empirical research from the Netherlands found, contrary to the researchers’ expectations, that including RNA information in presentence reports resulted in sentencing outcomes that “are less ‘controlling’ [e.g., imprisonment] and more ‘diverting’ [e.g., standard probation, community service] than for defendants” with traditional reports not including such information. The researchers attributed the result to an “information effect,” that judges who have access to information about an offender’s criminogenic needs are more likely to focus on rehabilitative efforts. Several judges interviewed for the NCSC study reported similar experiences with the use of RNA information at sentencing.

10. Are risk and needs assessment tools biased against racial minorities?

This question must be answered with respect to the specific tool being used. To ensure that a RNA tool is free of predictive bias (i.e., that the assessed risk to reoffend is comparable for defendants from different racial or ethnic groups and, for example, the tool is not a better or worse predictor of recidivism for one group compared to another), it is critical that the RNA tool be properly validated on the local criminal justice population with whom it will be used. Researchers associated with the development of two commonly used RNA instruments, the COMPAS and PCRA, have recently conducted and published studies that examine the issue of predictive bias. These researchers reported no predictive bias inherent in these tools in the Florida and federal populations, respectively, with whom they were studied. However, additional validation research to monitor the ongoing performance of these and other RNA instruments in jurisdictions across the country is required to adequately address this important issue.

Properly validated RNA tools do not increase racial disparities in the criminal justice system, but they may to some extent reflect disparities already present in the system. African Americans as a group, for example, tend to have higher RNA scores than whites. Contrary to speculation that RNA tools may be biased because of their emphasis on risk factors related to socioeconomic indicators, in one federal study using data from 34,794 actual offenders,
researchers found that criminal history – a static factor – was the predominant reason for slightly to moderately higher RNA scores among African Americans. To the extent that RNA instruments rely on a broader set of factors than criminal history and these factors are not associated with race, the racial disparities reflected by current tools will be lessened. Currently, researchers are exploring whether the influence of criminal history can be reduced by lessening its contribution to the RNA score while increasing the weight given to other factors not associated with race without lessening an instrument’s predictability.

For more information about Evidence-Based Sentencing, visit the NCSC’s Center for Sentencing Initiatives website at [www.ncsc.org/csi](http://www.ncsc.org/csi).

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ENDNOTES


ENDNOTES cont.


10 As of the writing of this report, the following states have adopted a formal policy to provide RNA information to inform sentencing decisions: AL, AK, AZ, AR, DE, ID, IN, KY, LA, MT, NE, ND, OH, OK, TN, UT, WV, and WI. Some jurisdictions in other states (e.g., CA, CO, IA, TX, and OR) also provide this information to the court. For more information, refer to the National Center for State Courts Center for Sentencing Initiatives website for an interactive map of policies and legislation by state at http://www.ncsc.org/microsites/csi/home/In-the-States/State-Activities/RNA-Map.aspx.


