# USE OF RISK AND NEEDS ASSESSMENT INFORMATION IN STATE SENTENCING PROCEEDINGS

## 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

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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.[1]

## 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.[2]

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.[3]

## 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

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."[11]  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."[12]

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.[13]  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.[14] 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.[15]  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.[16]  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,[17]  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.[18]  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.[19]

For more information about Evidence-Based Sentencing,
visit the NCSC's Center for Sentencing Initiatives website at **www.ncsc.org/csi**.

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## ENDNOTES

**1** Lowenkamp, C. T., & Latessa, E. J. (2004). Understanding the risk principle: How and why correctional interventions can harm low-risk offenders. In National Institute of Corrections (Series Ed.), *Topics in community corrections: Assessment issues for managers* (pp. 3-8). Washington, DC: National Institute of Corrections. Available from https://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04_final_complete.pdf.

**2** See, e.g., Gottfredson, S., & Moriarty, L. (2006). Clinical versus actuarial judgments in criminal justice decisions: Should one replace the other? *Federal Probation, 70*, 15-18 ("In virtually all decision-making situations that have been studied, actuarially developed devices outperform human judgments," p. 15). Casey, P., Elek, J., Warren, R., Cheesman, F., Kleiman, M., & Ostrom, B. (2014). Offender risk & needs assessment instruments: A primer for courts. Williamsburg, VA: National Center for State Courts ("Across a number of decision making contexts... the exercise of subjective judgment by a clinician or other professional with specialized expertise in the absence of an actuarial tool or other structured decision aid, referred to as *unstructured professional judgment*, generally produces results inferior to judgments informed by these tools because humans are simply not very good at reliably and accurately identifying and weighing the complex factors that inform risk," p. 24). Available from http://www.ncsc.org/~/media/Microsites/Files/CSI/BJA%20RNA%20Final%20Report_Combined%20Files%208-22-14.ashx.

**3** Cohen, T. H., Lowenkamp, C. T. and VanBenschoten, S. W. (2016). Does change in risk matter? *Criminology & Public Policy*, *15*, 263–296. doi: 10.1111/1745-9133.12190

**4** See, generally, Casey, P. M., Warren, R. K., & Elek, J. K. (2011). *Using risk and needs assessment information at sentencing: Guidance for courts from a national working group*. Williamsburg, VA: National Center for State Courts, pp. 16-19. Available from http://www.ncsc.org/~/media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx. Elek, J. K., Warren, R. K., & Casey, P. M. (2015). *Using risk and needs assessment information at sentencing: Observations from ten jurisdictions*. Williamsburg, VA: National Center for State Courts, pp. 13-17. Available from http://www.ncsc.org/~/media/Microsites/Files/CSI/RNA%202015/Final%20PEW%20Report%20updated%2010-5-15.ashx.

**5** The use of RNA information in determining appropriate and effective responses to compliant and non-compliant behaviors of persons under supervision is discussed in a companion NCSC Center for Sentencing Initiatives brief. National Center for State Courts Center for Sentencing Initiatives (March 2017). *An evidence-based approach to promoting & enforcing compliance with conditions of probation supervision*. Williamsburg, VA: Author. Available from http://www.ncsc.org/~/media/Microsites/Files/CSI/NCSC%20CSI%20brief%203-27-17.ashx.

**6** *State of Wisconsin v. Loomis* (July 13, 2016). Available from https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=171690. *Malenchik v. State of Indiana* (June 9, 2010). Available from http://www.in.gov/judiciary/opinions/pdf/06091001bd.pdf. See also the American Law Institute's Model Penal Code: Sentencing, §9.08 (3) (requiring sentencing commissions to develop actuarial risk assessment tools to divert otherwise prison-bound low-risk offenders to community sanctions). Available from https://www.ali.org/publications/show/model-penal-code/.

**7** See *State v. Loomis* in note 6 and Elek, Warren, & Casey (2015) in note 4.

**8** See Casey, Warren, & Elek (2011) in note 4, pp. 14-15.

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**9** See Casey, Warren, & Elek (2011) in note 4. See also, for example, the Utah Sentencing Commission's Adult Sentencing and Release Guidelines, which explicitly recognize an offender's low risk score on a validated assessment as a "mitigating circumstance." Available from https://justice.utah.gov/Sentencing/Guidelines/Adult/2016%20Adult%20Sentencing%20Guidelines.pdf.

**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.

**11** Elek, Warren, & Casey (2015) in note 4.

**12** Judicial Council of California. (2015). *The California risk assessment pilot project: The use of risk and needs assessment information in adult felony probation sentencing and violation proceedings*. San Francisco: Author. Available from http://www.courts.ca.gov/documents/cj-CalRAPP-FinalReport-2015.pdf

**13** van Wingerden, S., van Wilsem, J., & Moerings, M. (2014). Pre-sentence reports and punishment: A quasi-experiment assessing the effects of risk-based pre-sentence reports on sentencing. *European Journal of Criminology*, *11*, 723-744. doi: 10.1177/1477370814525937

**14** Monahan, J., & Skeem, J. L. (2016). Assessment in criminal sentencing. *Annual Review of Clinical Psychology, 12*, 489-513. doi: 10.1146/annurev-clinpsy-021815-092945

**15** Skeem, J. L., & Lowenkamp, C. T. (2016).  Risk, race, & recidivism: Predictive bias and disparate impact. *Criminology, 54*, 680-712. doi: 10.1111/1745-9125.12123. Flores, A. W., Lowenkamp, C. T., & Bechtel, K. (2016). *False positives, false negatives, and false analyses: A rejoinder to "machine bias: there's software used across the country to predict future criminals. And it's biased against blacks." Federal Probation, 80*, 38-46. Available from http://www.uscourts.gov/sites/default/files/usct10024-fedprobation-sept2016_0.pdf. See also, William Dieterich, W., Mendoza, C., & Brennan, T. (2016). *COMPAS risk scales: Demonstrating accuracy equity and predictive parity*. Traverse City, MI: Northpointe, Inc. Available from http://go.volarisgroup.com/rs/430-MBX-989/images/ProPublica_Commentary_Final_070616.pdf?mkt_tok=eyJpIjoiTlRsbE1EY3dZVGxqWW pNMiIsInQiOiJJeis1WXZRZDIxM1ZBNFRDQldDWFlPU3 hmOGZtdzRzN3JJOENCUEo0eWlpaHY4WTFuS01WdnlKKzlkRmhHNVNiNWF4Q1dcLzdGa2RxZjE 1N0h2MXA5MzdwQVFDDNm9YdFwvK1I4SVNMekkxbk9BPSJ9

**16** On existing disparities, see, e.g., Subramanian, R., Delaney, R., Roberts, S., Fishman, N., & McGarry, P. (2015). *Incarceration's front door: The misuse of jails in America*. New York: Vera Institute of Justice. Available from https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

**17** Starr, S. B. (2014). Evidence-based sentencing and the scientific rationalization of discrimination. *Stanford Law Review, 66*, 803-872. U.S. Department of Justice, Office of Public Affairs (August 1, 2014). *Attorney General Eric Holder speaks at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference*. Available from https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th.

**18** See Skeem & Lowenkamp (2016) at note 15.

**19** See Skeem & Lowenkamp (2016) at note 15.