

IN THE INDIANA SUPREME COURT

NO. 79S02-0908-CR-365

Anthony MALENCHIK)	
)	Appeal from the
Appellant (below))	Tippecanoe Superior Court
)	
v.)	Cause No. 79D05-0711-FD-628
)	
State of INDIANA)	The Honorable Les A. Meade, Judge
)	
Appellees (below))	

BRIEF OF AMICUS CURIAE
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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Indiana Prosecuting Attorneys Council is a statutory agency that serves all Indiana prosecuting attorneys. Ind. Code § 33-39-8. The Council's interest in appearing as *Amicus* is to aid the Court in determining how "scoring models" can assist the public interest in insuring that criminal sentences are appropriate to the nature of the offense and the character of the offender.

SUMMARY OF ARGUMENT

There is an interest of both the State and the defendant in having reliable evidence introduced in a sentencing proceeding. Where there is a statutory mandate for a judge to make an assessment of the risk that a defendant will commit another offense in the future there is a reason to utilize risk assessment tools and/or a clinical evaluation in making that determination. In Indiana criminal law this would include a determination that a juvenile sex offender be required to be on the sex offender registry or when a sex offender must be determined to be a sexually violent predator. *Amicus* believes this is appropriate. However, Indiana courts have been justifiably reluctant to employ psychological risk evidence in other sentencing contexts.

Risk assessment instruments may be utilized to determine the criminogenic needs of an offender – such as what kinds of programs he should be engaged in while incarcerated or on probation or parole. This may be an appropriate use. However, use of such instruments to enhance or mitigate a sentence based on factors which are already likely considered by a sentencing judge in the context of a presentence report runs the risk of "double-counting" the same evidence. The scoring instruments also would probably not reflect the case law which directs trial judges as to the proper consideration of aggravating and mitigating factors. Most disturbing, the "score" may be

based on demographic factors beyond the control of the defendant. This conflicts with our basic principles of justice.

ARGUMENT

I. Risk Assessment Tools May Appropriately Be Employed In Making Certain Sex Offender Determinations Mandated By The Legislature But Their Use As An Aggravating or Mitigating Circumstance Is Highly Questionable

Certainly, it has long been the rule in Indiana that a defendant is entitled to be sentenced only on the basis of accurate information. A sentence based on materially untrue assumptions violates due process. *Lang v. State*, 461 N.E.2d 1110, 1114 (Ind. 1984). *Amicus* believes the State, in addition to a criminal defendant, has an interest insuring that sentencing decisions are based upon accurate evidence. The Rules of Evidence do not strictly apply in sentencing proceedings. Ind. Evidence Rule 101(c)(2); *Pickens v. State*, 767 N.E.2d 530, 534 (Ind. 2002). Judges may consider any relevant evidence bearing some substantial indicia of reliability. This includes expert testimony and “scientific evidence.” However, in the absence of strict evidentiary rules judges bear a special responsibility in assessing the weight, sufficiency and reliability of evidence. *Carter v. State*, 706 N.E.2d 552, 554 (Ind. 1999); *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh’g denied*. It could certainly be argued that risk assessment tools do not satisfy the test for scientific evidence under Ind. Evidence Rule 702 or the “reliability” standard for sentencing hearings.

Unlike many states, Indiana has not enacted statutes providing for the civil commitment of sex offenders. It is in connection with such laws that there has been an analysis in other jurisdictions whether actuarial risk assessment tools are sufficiently reliable in predicting recidivism to be admissible. *In re Simons*, 821 N.E.2d 1184 (Ill. 2004); Annot., *Admissibility of Actuarial Risk*

Assessment Testimony in Proceeding to Commit Sex Offender, 20 A.L.R. 6th 607 (2002). As one author described it:

. . . [C]ourts ignore evidence rules that would otherwise exclude testimony on future violence because of a sense of imperative created by the substantive law in these areas. In short, when the law mandates clinical assessments of violence, courts are reluctant to rule that the only experts who offer such opinions are incompetent to testify.

2 Faigman, *et al*, MODERN SCIENTIFIC EVIDENCE, § 10.2, p. 110 (2008-2009 Ed.).

This has been true in Indiana. In *J.C.C. v. State*, 897 N.E.2d 931 (Ind. 2008), at issue were the provisions for requiring a juvenile sex offender to be placed on the sex offender registry. Ind. Code § 11-8-8-5(b) (under present law). In 2007 these provisions were amended to require the court to consider expert testimony. Ind. Code § 11-8-8-5(c). The trial court, relying on such evidence, is to make a determination whether the juvenile is “likely to repeat” certain sex acts. In *J.C.C.* the expert had relied exclusively on his application of risk assessment criteria called the “Estimate of Risk of Adolescent Sexual Offense Recidivism” (“ERASOR”) and his clinical experiences to conclude the juvenile was likely to be a repeat offender. Though the Court was careful to state that it was not holding that expert testimony could not establish the possibility of recidivism, it held that the fact that the Legislature mandated the hearing after the juvenile was released and the overall interest of the State in rehabilitation of juveniles meant that a decision whether a juvenile should be on the sex offender registry could not ignore rehabilitation efforts of the juvenile while committed and his behavior after release.

More recently, the application of actuarial tests to the determination of sexual violent predator status was considered in *Scott v. State*, 895 N.E.2d 369 (Ind. Ct. App. 2008). Present Ind. Code § 35-38-1-7.5(e) provides that if a person is not a “sexually violent predator” by having

committed a defined offense then a court may determine him to be a “person who suffers from a mental abnormality or personality disorder that makes the person likely to repeat a sex offense. . . .” Ind. Code § 35-38-1-7.5(a), (e). The trial court is to appoint two psychologists or psychiatrists “who have expertise in criminal behavior disorders” to evaluate the person and testify at a hearing. I.C. 35-38-1-7.5(e).

Two doctors provided reports in *Scott* that formed the basis of the trial court’s decision that Scott was a sexually violent predator (“SVP”). One of the doctors used the “Rapid Risk Assessment for Sex Offender Recidivism” (“RRASOR”) the “Static 99” and the “Sexual Violence Risk-20” (“SVR-20”). This doctor indicated that based on the “actuarial rates of the RRASOR and the Static 99” there were certain possible recidivism rates for “individuals with risk factors such as [Scott]” at 5 and 10 years. *Id.* at 373. The other doctor felt that the defendant was more likely to recidivate because of his admissions to two admissions to prior sex offenses. This doctor said: “The best predictor of future behavior is past behavior.” *Id.*

Three principal issues were involved in *Scott*. An earlier Court of Appeals decision, *Marlett v. State*, 878 N.E.2d 860 (Ind. Ct. App. 2007), *trans. denied*, had held that given the “conclusory” nature of the doctors’ reports leading to the decision that Marlett was a SVP, and the failure of the doctors to testify at the hearing, the case would be remanded for a further hearing. *Scott* distinguished *Marlett* on this issue, finding that the detail provided in the reports, the nature of the offense, and the fact of multiple sex crimes meant there was no necessity for the doctors to testify at a hearing. Another issue was attempting to define the word “likely” in I.C. 35-38-1-7.5(a) and the burden of proof of that issue. Finally, the Court held the evidence was sufficient to prove that defendant was a SVP. The nature of the offense committed and the past sexual misconduct was an

important factor in this decision.

Where there is no statutory imperative to consider expert evidence on possible recidivism Indiana courts have been very reluctant to consider such evidence. In *Matheny v. State*, 688 N.E.2d 883, 908-09 (Ind. 1997), *cert. denied* 526 U.S. 1040 (1999) and *Williams v. State*, 706 N.E.2d 149 *reh'g denied* 718 N.E.2d 737 (Ind. 1999), *cert. denied*, 529 U.S. 1113 (2000), a judge had utilized a questionnaire submitted to the defendants based on the “Minnesota Multiphasic Personality Inventory” (“MMPI”). The death penalty defendants challenged the use of such questionnaires. Though finding a completed MMPI interpreted by a person trained in its use might have some value in sentencing the Court excluded use of it for consideration on appeal.

In *Covington v. State*, 842 N.E.2d 345 (Ind. 2006), the defendant presented a “risk assessment” presented by a corrections expert which opined that a murder defendant would be “completely harmless” after 25-30 years in prison. The trial court refused to consider this as a mitigating factor that defendant was not a risk to commit future acts of violence if his mental health issues were properly treated, finding the defendant’s compliance with mental health treatment outside a corrections environment made it difficult to predict future behavior. The Supreme Court found it was not error to refuse to find this as a mitigator.

Finally, the Indiana Court of Appeals had ruled prior to the instant case that employing an LSI-R score as an aggravator is improper as a matter of law. *Rhodes v. State*, 896 N.E.2d 1193 (Ind. Ct. App. 2008). Nor does a defendant have a right to have an LSI-R evaluation. *Lichti v. State*, 835 N.E.2d 478 (Ind. Ct. App. 2005).

Given the statutory imperative to determine the possibility of future recidivism it is appropriate to use risk assessment tools in making determinations about requiring a juvenile to be

on the sex offender registry and whether a person is a sexually violent predator. However, their use as an aggravating or mitigating circumstance in general sentencing decisions is highly questionable. There is no statutory mandate to do so.

II. While Scoring Models May Be Appropriately Used In A Needs Assessment for Offenders, Use of Scoring Models to Enhance or Mitigate a Sentence Undermines Basic Sentencing Principles

Amicus believes that scoring models can be used for assessment of an offender's criminogenic needs, as was suggested in *Rhodes v. State*, 896 N.E.2d 1193, 1195, n. 4 (Ind. Ct. App. 2008). However, in the Preface to the LSI-R User Manual it is stated: "This instrument is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and was never designed to assist in establishing a just penalty." D.A. Andrews & James L. Bonla, *The Level of Service Inventory - Revised (LSI-R) User's Manual*, p. viii (2002).

When determining an appropriate sentence for an offender a court will consider the nature of the offense and the character of the offender. This dual evaluation is evident when one examines the aggravating and mitigating circumstances present in Ind. Code § 35-38-1-7.1, though the list of such circumstances are not exclusive. Ind. Code § 35-38-1-7.1(c). Nor is there a clear dichotomy between aggravating and mitigating circumstances as to which are "offense" factors and which are "character" factors. As an example, Ind. Code § 35-38-1-7.1(a)(1) permits a court to consider as an aggravating circumstance the extent of the harm, injury, loss or damage suffered by a victim, while Ind. Code § 35-38-1-7.1(b)(1) permits a court to consider as a mitigating circumstance that the defendant did not cause or threaten serious harm to persons or property. Indeed, when an appellate

court reviews a sentence under the authority of Ind. Appellate Rule 7(B) it considers the appropriateness of the sentence “in light of the nature of the offense and the character of the offender.” This is significant in the context of the use of scoring models in sentencing because the nature of the offense is not considered – it is generally only the character of the offender, and then often by general demographic factors.

However, even as to the character of the offender there may be significant overlap with factors that may be included in a scoring model compared with what may be in a standard pre-sentence report. As provided by statute, the pre-sentence report may include the criminal history, social history, employment history, family situation, economic status, education and personal habits. Ind. Code § 35-38-1-9(b). The LSI-R subcomponents include criminal history, education/employment, financial, family/marital, accommodation, leisure/recreation, companions, alcohol/drug problems, emotional/personal, attitude/orientation. In reaching the risk assessment score for Malenchik was something “double-counted”? How would we know?

As an example of how this can occur, let us say that an offender had a prior criminal history consisting of juvenile adjudications, adult convictions, and arrests. In recent years Indiana has developed a nuanced approach to evaluation of criminal history. The weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense. *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2005); *Richardson v. State*, 906 N.E.2d 241, 247 (Ind. Ct. App. 2009). The first 10 of the 54 questions of the LSI-R relate to criminal history. If a judge properly evaluates the weight of the criminal history under Indiana law but counts the score on an LSI-R as an aggravator, a high score could be due in large part to criminal history. Wouldn't that be using the same evidence twice?

This is particularly problematic given the case law in Indiana which states that a judge who says in a sentencing statement that previous punishment had failed to rehabilitate and the offender poses a significant risk to re-offend are properly classified as conclusory observations about the weight to be given to facts. As such, they “merely describe the moral or penal weight of actual facts” and should not serve as separate aggravators when the factual basis that supports that conclusion also serves as an aggravator. *Neff v. State*, 849 N.E.2d 556, 560 (Ind. 2006); *Haas v. State*, 849 N.E.2d 550, 553 (Ind. 2006). If a judge cannot state a risk to re-offend as an aggravator when there are already underlying facts such as criminal history to support it how can it be used in a scoring instrument to achieve the same effect? The same could be true of any number of aggravating or mitigating factors contained in a presentence report. It should not require citation of authority to remark that, as with criminal history, a significant body of case law has developed in recent years regarding the proper assessment of aggravating and mitigating factors. How will that compare to “scoring” in a risk assessment instrument?

Amicus will not devote time in this brief to address further any specific issues that may relate to the risk assessment tools employed in the present case. It is the belief of *Amicus* that this Court was more interested in the use of scoring models in general, though the LSI-R is a fairly typical and widely-used instrument. Instead, let us pose the following hypothetical. Two criminal defendants are graded on a scoring model. Evidentiary hearings are held where the results of the tests are disclosed and challenged. The person who scored the instruments is present and available for cross-examination. The persons who developed the scoring model testify and are available for cross-examination. Both sides call their own experts to provide whether the scoring model has been properly “validated.” After hearing all the evidence the trial judge in each case determines that the

scoring model is “reliable” in predicting future recidivism and let us assume the judge is correct in his ruling. There should be no legal issues about disclosure of results, theories used in creating the test, how it was scored, confrontation or cross-examination. One defendant is a young, unemployed male. The other defendant is an older married and employed woman. Both have committed the same crime and there are no other differences in aggravating or mitigating circumstances. Would they “score” the same? *Amicus* believes they would not. Do we use the “score” to determine the length of sentence for each defendant?

“Yes” would seem to be the answer of some scholars. Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 Ind. L.J. 1307 (2007); Michael A. Wolff, *Brennan Lecture: Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U.L. Rev. 1389 (2008). The “evidence-based practices” advocates generally reference the use of “scoring models” to predict what offenders are likely to recidivate and sentence accordingly.

Of course, Indiana sentencing decisions are based on “evidence” – the presentence report and other evidence related to the nature of the offense and the character of the offender. *Rhodes v. State*, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008). “Scoring models,” however, go further and base risk assessment on demographic factors. As Professor Paul Robinson has said, relying even on scientifically validated risk factors for future violence that do not index blameworthiness “would be offensive to a system of just punishment. A person does not deserve more punishment for an offense because he . . . is young, or has no father in his household.” Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429, 1440 (2001). Another author stated, “to allow a criminal defendant’s sentence to be determined to any

degree by his unchosen membership in a given [group] denies the very premise of self-determination upon which our criminal justice system is built.” Daniel S. Goodman, *Demographic Evidence in Capital Sentencing*, 39 Stan. L. Rev. 499, 521 (1987), quoted in an article by John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 Va. L. Rev. 391, 428 (2006).

Virginia is often cited as an example as one possible model to follow by those supporting a greater role for risk assessment in sentencing because Virginia incorporated risk assessment into its sentencing statutes. Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F.L. Rev. 585, 608 (2009). However, one commentator reviewing the Virginia system stated:

Supporters of statistical risk assessment would question whether a judge, acting alone, could do any better. There are two responses. First, it is socially acceptable to analytically study the future behavior of offenders who commit certain crimes, who have certain criminal histories, or whose crimes included certain characteristics. However, marginal improvements that can be gained by adding demographic considerations must be balanced against the sizable equitable costs of imposing such a regime. There is a risk in detaching punishment from the punishable act. There is a risk in segmenting the population into these predictive groups. And there is the risk of false positives. To be sure, there will always be false positives, and jail time will frequently be served by those who pose little or no threat to society. But that penalty is justifiable only if it can be tied to the initial act and state retribution. Paying a penalty justified only by an immutable personal characteristic runs counter to nationwide trends in equity and imposes serious societal costs that Virginia has simply neglected.

Brian Netter, *Criminal Law: Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. Crim. L. & Criminology 699, 728 (2007).

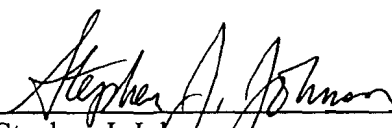
Although this Court was speaking about sentencing guidelines when it said that Indiana has never adopted a mechanical approach to sentencing and disapproved of sentences resulting from an

algorithm that removed the ability of a trial judge to ameliorate the “unfairness a mindless formula sometimes produces,” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008), the same could also be said for scoring models that rely in large part on demographic characteristics beyond the offender’s control. They are simply inappropriate for use as an aggravating or mitigating factor in setting a sentence.

CONCLUSION

For the foregoing reasons the Indiana Prosecuting Attorneys Council believes it is appropriate to use risk assessment models where the Legislature has required judicial evaluations of future recidivism. We also believe those tools may be appropriate to evaluate the needs of a criminal defendant. We are not opposed to evidence-based practices that generally address what “works” in sentencing. We do not believe scoring models are properly employed to determine a sentence.

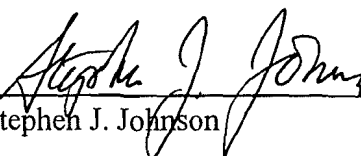
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WORD COUNT CERTIFICATE

I affirm under penalties for perjury that this brief contains no more than 3,750 words. The word count is 3,346 words, as determined by the word count of the WordPerfect processing system used to prepare the brief.



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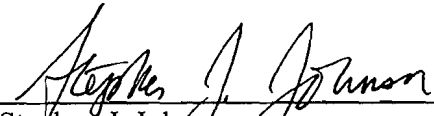
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