

IN THE
SUPREME COURT OF INDIANA

No. 79S02-0908-CR-365

ANTHONY MALENCHIK,)	Appeal from the Tippecanoe
)	Superior Court 5
Appellant (Defendant Below),)	
)	
v.)	Cause No. 79D05-0711-FD-628
)	
STATE OF INDIANA,)	The Honorable
)	Les A. Meade,
Appellee (Plaintiff).)	Judge.

BRIEF OF *AMICUS CURIAE*

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STATEMENT OF *AMICUS CURIAE*'S INTEREST

The Public Defender of Indiana submits this *amicus curiae* brief in this case. The Public Defender's interest is in serving the Court in determining how public policy and judicial economy can be served best regarding sentencing courts' use of standardized personality inventories administered to convicted people.

INTRODUCTION

The Indiana Supreme Court granted Anthony Malenchik's petition for transfer and has taken jurisdiction of Malenchik's case. Malenchik appeals the sentence he received following his guilty plea in the Tippecanoe Superior Court. The Court of Appeals rejected Malenchik's argument that the trial court abused its discretion in considering the results of two psychological inventories in determining Malenchik's sentence. Malenchik asks this Court to reverse the Court of Appeals decision. The Public Defender of Indiana, proceeding as *amicus curiae*, respectfully submits this brief in support of Malenchik.

SUMMARY OF THE ARGUMENT

A convicted person is entitled to be sentenced based on accurate information. The consideration of invalid or unreliable evidence violates the constitutionally protected rights of the convicted person. Therefore, that person's rights to confront adverse evidence to present favorable evidence are protected at sentencing.

Valid and reliable psychological tests, when not used properly, may be invalid and unreliable and lead to improper results. The justice system depends on the rigors of cross-examination and the adversary process to ensure proper use of such tools, and thus promotes accurate and reliable results. The system seeks to protect a convicted person from misuse, including misinterpretation, of psychological tests by guaranteeing the right of cross-examination and the right to present favorable evidence.

The use of tests by people not trained to administer the tests or evaluate the results creates great risk of error. The Court should prohibit the use of psychological tests such as those administered in this case because that risk far outweighs the cost of protecting against error.

ARGUMENT

A convicted person is entitled to be sentenced on the basis of accurate information. *Dillon v. State*, 492 N.E.2d 661, 663 (Ind. 1986). For this reason, the presentence investigation report must be provided to the convicted person “sufficiently in advance of sentencing” that he and his attorney are “afforded a fair opportunity” to review the document for its accuracy. Ind. Code § 35-38-1-12; *Lang v. State*, 461 N.E.2d 1110 (Ind. 1984).

Accuracy and reliability are best ensured through the exercise of the rights of cross-examination and compulsory process. E.g., *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, ___, 129 S.Ct. 2527, 2536 (2009) (the Sixth Amendment’s Confrontation Clause commands “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”) quoting *Crawford v. Washington*, 541 U.S. 36, 61-62, 124 S.Ct. 1354 (2004); *James v. State*, 613 N.E.2d 15, 21 (Ind. 1993) (trial court abused its discretion in denying defense request for funds to hire expert necessary to proper representation at sentencing); *Castor v. State*, 587 N.E.2d 1281, 1288 (Ind. 1992) (same). See also *Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S.Ct. 1087 (1985) (due process protection of Fourteenth Amendment is violated if the State “proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense”).

Those principles apply to sentencing procedures as well. Standard 5-5.2 of the American Bar Association Standards for Criminal Justice calls for counsel to be provided “at every stage of the proceedings, including sentencing . . .” Indiana requires that counsel provide effective representation at this crucial stage. *McCarty v. State*, 802 N.E.2d 959 (Ind. Ct. App. 2004), *trans. denied*. Effective representation demands protection of the convicted person’s right to a fair and reliable sentence. Under the cases cited above (*Melendez-Diaz*, *Crawford*, *Ake*, *Castor*,

and *James*), counsel is entitled—and, where appropriate to the case, obligated—to challenge the evidence being used against the convicted person and to present evidence supporting the convicted person’s position.

Following his guilty plea, as part of the presentence investigation, Malenchik completed two psychological inventories. He completed the Level of Service Inventory-Revised (LSI-R) and the Substance Abuse Subtle Screening Inventory (SASSI) [Appellant’s Appendix, Green Volume page 8]. According the PSI report, the SASSI “indicates . . . a high probability” that Malenchik has “a Substance Dependence Disorder” [Id.]. How the SASSI came to that conclusion, what a “high” probability is, and exactly what relevance a “substance dependence disorder” has to Malenchik and/or the proper sentence for him, are unaddressed issues.

Malenchik “scored a 41 on the LSI-R” [Id.]. This number reportedly places Malenchik in the “High Risk/Needs category.” While none of these terms is explained in the report, Malenchik’s “problem areas” are detailed. For example, the report informs Malenchik and the court that Malenchik scored “+7 pts” for his criminal history. He received “+4 pts” for his companions, and “+3 pts” for his family [Id.]. The relevance of these numbers is not apparent, nor is it explained. Neither the reliability of the scores nor the validity of the tests that generated them is explored in any way.

That is not to say that the SASSI and the LSI-R are not valid or reliable. But, under Indiana Evidence Rule 702(b), expert evidence is admissible only if its reliability is demonstrated to the trial court. *Steward v. State*, 652 N.E.2d 490, 498-99 (Ind. 1995). *Steward* points out that the United States Supreme Court holding in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993), is not controlling but is “helpful” in analyzing Rule 702. 652 N.E.2d at 498. Under *Daubert*, the trial judge is responsible for

making “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” 509 U.S. 579 at 592-93. The way in which the criminal justice system evaluates the validity and reliability of information is through what *Melendez-Diaz* called “the crucible of cross-examination” and the exploration and presentation of explanatory or even contradictory evidence.

Concerns about these inventories, and their potential unfairness to a convicted person, is illuminated by information from The SASSI Institute itself. On the Frequently Asked Questions page of the Institute’s website appears this question: “Will SASSI stand up in court?” The answer begins, “If you mean will the judge always agree with the results of SASSI-3 decision rules, *we actually hope not.*” <http://www.sassi.com/services/faqs/html>, last visited September 17, 2009 (emphasis added). The Institute explains that the SASSI-3 “does not agree with clinical judgment 100% of the time” and, therefore, the Institute “encourage(s) counselors to use their judgment and other information The SASSI does not yield a clinical diagnosis but rather a screening result that can be used as one piece of information when conducting clinical diagnostic evaluations.” *Id.*

This comment is not surprising, as it merely states the well-known principle that individual tests are reliable only within the context of a complete evaluation. *See Pruitt v. State*, 834 N.E.2d 90, 106 (Ind. 2005) (score on I.Q. test is merely one factor to consider in determining whether a criminal defendant’s intellectual functioning falls in the mentally retarded range). The SASSI Institute’s own website shows that a “high probability” of a “substance dependence disorder”—whatever those terms even mean—cannot be relied upon in isolation.

The LSI-R is subject to similar limitations. According to the Council of State Governments, *Report of the Re-Entry Policy Council*, available at <http://reentrypolicy.org/Report/PartII/ChapterII-A/PolicyStatement8/Recommendation8-A>, last visited on September 17, 2009, the LSI-R has proven useful “at intake to aid in security classification and programming decisions,” and “as a supervision tool to determine and modify levels of supervision and the allocation of supervision and programming resources during the probation or parole period.” Those uses do not preclude the LSI-R from having other uses. But neither do they—nor anything else counsel have found in their research—suggest that the LSI-R is properly used to help determine the appropriate length of a convicted person’s sentence. Whether the LSI-R can be used for such a purpose should be hashed out through cross-examination and, if warranted, the presentation of opposing viewpoints for the judge’s consideration.

The preceding discussion suggests the numerous problems inherent in the practice engaged in by the Tippecanoe Superior Court. If either the SASSI or the LSI-R (or both) are invalid or unreliable, a sentencing judge’s reliance on them to aggravate a sentence violates the convicted person’s rights under Indiana statutory law, under Article One, Section Thirteen of the Indiana Constitution, and under the Sixth Amendment to the United States Constitution. The proper forum for determining the validity and reliability of the instruments is not a sentencing hearing following the administration of the inventories by a person whose qualification to administer the tests is unknown, and the interpretation of results by a person whose qualification to interpret the results is unknown. This is most acutely true if, as it appears is the case here, the interpreter of the results is the sentencing judge.

The issues which counsel for the convicted person, in order to provide reasonably effective representation, must address with the probation officer and/or the judge, include the following:

1. Who determined which tests were to be administered, and how was that decision made? In order to gather this information, counsel must conduct discovery and, perhaps, seek an evidentiary hearing.

2. In many, if not most, cases, counsel will have to familiarize himself or herself with the tests used. If the convicted person maintains his or her innocence, the test will have to be reviewed for questions which might incriminate him or her. Even if the convicted person does not contest his or her guilt in the present case, the test must be reviewed for questions which might incriminate him or her regarding other illegal activity. If so, consultation with the client is mandated, so that the client can come to an informed decision about whether to submit to the inventory.

3. Closely related to the preceding question is, what is the effect of unanswered questions? What implications are drawn from that, if any? What implications might the evaluator draw from a refusal to complete the inventory at all? Again, an evidentiary hearing may well be needed to find out how the convicted person would best look out for his or her interests.

4. Counsel is unlikely to be able to intelligently assess the information he or she will obtain through the discovery conducted to learn answers to those questions. Therefore, counsel will need the assistance of an expert to help him or her understand the SASSI and the LSI-R. Are those tests appropriate under these circumstances? Are they appropriate for this client? What other tests might be given instead, or in addition?

5. What training is required to administer and score the test? In a 2004 paper presented to the National American Indian Court Judges Association, Professors Christopher Lowenkamp, Edward Latessa, and Alexander Holsinger concluded that it is “extremely important that (the LSI-R) be accurately administered and scored . . .” *Topics in Community Corrections: Empirical Evidence on the Importance of Training and Experience in Using the Level of Service Inventory-Revised*, available at <http://www.naicja.org/events/evidenceonimportanceoftraining.pdf>, last visited September 17, 2009. Does the person who administered it have appropriate training? If so, were the test protocols followed?

6. How is the test evaluated? What, in fact, does a “high probability” of a “substance dependence disorder” mean? Does it have any meaning at all regarding the proper length of a convicted person’s prison term? What does being in the “high risk/needs category” mean? What does it mean in the context of setting a prison sentence? What training is needed to make those determinations? And, most troublingly, how is an attorney to provide competent representation, by ferreting out this information, when it appears that the judge is the one interpreting this data?

These are some of the many constitutional implications of off-handed administration and interpretation of tools designed for professional use. Individual cases will raise some of these concerns and not others. But individual cases will also raise concerns not listed here. Attorneys seeking to protect the rights of particular clients may, in any given case, have to engage in discovery, request evidentiary hearings, hire experts to educate the attorney about the tests, hire (the same or other) experts to testify about the reliability and validity of the tests, and cross-examine the test administrator and the evaluator. The Indiana and United States Constitutions demand that counsel provide that service. If trial counsel fails to provide it, the ethical and

statutory duties of post-conviction counsel demand that those areas be explored on collateral review.

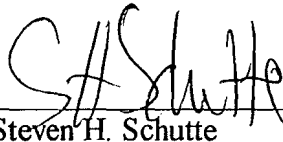
CONCLUSION

For the reasons given in this brief, the Public Defender of Indiana believes that the administration of tests such as those involved in this case creates more problems than the information gathered could possibly be worth. As a matter of public policy and in the interest of judicial economy, the Public Defender asks the Court to direct that lower courts not use psychological inventories in sentencing, without adequate protection of the convicted person's rights under the Indiana and United States Constitutions. The Public Defender believes Anthony Malenchik's sentence should be vacated and the case remanded for resentencing.

Respectfully submitted,

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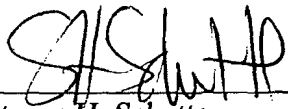
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VERIFIED CERTIFICATION OF WORD COUNT

Anthony Malenchik, by counsel, and pursuant to the Indiana Supreme Court Order dated August 10, 2009, files this verified certification that the total amount of words in the Brief Of *Amicus Curiae* has not exceeded 3,750 words and the word count is 2,282. The word count was determined by utilizing the document information feature of Microsoft Word.

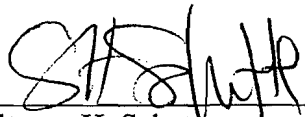
Respectfully submitted,

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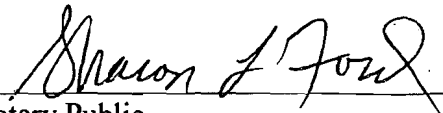
VERIFICATION

I affirm under the penalties for perjury that the foregoing representations are true to the best of my knowledge and belief.


Steven H. Schutte
Deputy Public Defender

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

SUBSCRIBED AND SWORN to before me, a Notary Public, this 21st day of September, 2009.


Notary Public
Sharon L. Ford

County of Residence:
Johnson

My Commission Expires:
December 10, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 21st day of September 2009, served upon Mr. Michael Bryan Troemel, Attorney at Law, pursuant to Appellate Rule 24(C)(2), by depositing it in the United States Mail, first class postage affixed, to his address at Post Office Box 1496, Lafayette, Indiana 47902, a copy of the above and foregoing **BRIEF OF AMICUS CURIAE**, filed in the Supreme Court of Indiana in the above-entitled cause of action.

I further certify that I have, this 21st day of September 2009, served upon Mr. Henry Flores, Jr., Deputy Attorney General of the State of Indiana, pursuant to Appellate Rule 24(C)(2), by depositing it in the United States Mail, first class postage affixed, to his address at 302 West Washington Street, Indiana Government Center South, 5th Floor, Indianapolis, Indiana 46204, a copy of the above and foregoing **BRIEF OF AMICUS CURIAE**, filed in the Supreme Court of Indiana in the above-entitled cause of action.

I further certify that I have, this 21st day of September 2009, served upon Ms. Jane Ann Seigel, Indiana Judicial Center, pursuant to Appellate Rule 24(C)(2), by depositing it in the United States Mail, first class postage affixed, to her address at 30 South Meridian Street, Suite 900, Indianapolis, Indiana 46204, a copy of the above and foregoing **BRIEF OF AMICUS CURIAE**, filed in the Supreme Court of Indiana in the above-entitled cause of action.

I further certify that I have, this 21st day of September 2009, served upon Mr. Stephen J. Johnson, Indiana Prosecuting Attorneys Council, pursuant to Appellate Rule 24(C)(2), by depositing it in the United States Mail, first class postage affixed, to his address at 302 West Washington Street, Room E-205, Indianapolis, Indiana 46204, a copy of the above and foregoing **BRIEF OF AMICUS CURIAE**, filed in the Supreme Court of Indiana in the above-entitled cause of action.

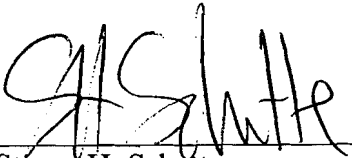
I further certify that I have, this 21st day of September 2009, served upon Mr. Joel M. Schumm, Indianapolis Bar Association, pursuant to Appellate Rule 24(C)(2), by depositing it in the United States Mail, first class postage affixed, to his address at 530 West New Street, #210C, Indianapolis, Indiana 46202, a copy of the above and foregoing **BRIEF OF AMICUS CURIAE**, filed in the Supreme Court of Indiana in the above-entitled cause of action.

I further certify that I have, this 21st day of September 2009, served upon Mr. Larry Landis, Indiana Public Defender Council, pursuant to Appellate Rule 24(C)(2), by depositing it in the United States Mail, first class postage affixed, to his address at Room 401, 309 West Washington Street, Indianapolis, Indiana 46204, a copy of the above and foregoing **BRIEF OF AMICUS CURIAE**, filed in the Supreme Court of Indiana in the above-entitled cause of action.

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