In the

Indiana Supreme Court

No. 79S02-0908-CR-00365

Anthony MALENCHIK,	)	Appeal from the Tippecanoe
	)	Superior Court No. 5
Appellant,	)	
	)	
vs.	)	Trial Court Case No.
	)	79D05-0711-FD-628
State of INDIANA,	)	
	)	The Honorable Les A.Meade,
Appellee.	)	Judge

Brief of
Amicus Curiae
Indiana Judicial Center

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Table of Contents

	Page
Table of Authorities	ii
Statement of Interest of Amicus Curiae.....	1
Summary of Argument	1
Argument	2
Conclusion	11
Word Count Certificate	13
Certificate of Service	14

Table of Authorities

	Page
I.C § 33-38-9-4	1
I.C. § 11-13-1-8	2
I.C. § 35-38-1-8.5	2
I.C § 35-38-1-9	2
Indiana Probation Standards, Standard 3.7	3
Indiana Standard Presentence Investigation Manual	3
Indiana Case Classification and Workload Measures System Manual	3
Christopher T. Lowenkamp, Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System, 71 Federal Probation (2007)	4
Faye S. Taxman, Eic S. Shepardson, Jayme Delano, Suzanne Mitchell, James M. Bryne, Adam Gelb and Mark Gornik, National Institute of Corrections & Maryland Dept. of Public Safety and Correctional Services, Tools of the Trade: A Guide to Incorporating Science into Practice (2004)	4
Substance Abuse Subtle Screening Inventory	5
Judicial Conference of Indiana Board of Directors meeting minutes, March 11, 2005	5
Elyse Clawson, Brad Bogue, Lore Joplin, Implementing Evidence-based Practices in Corrections, American Studies Journal (2004)	7
Crime and Justice Institute, Implementing Evidence-Based Principles in Community Corrections: The Principles of Effective Intervention (2004)	7
Roger K. Warren and Crime and Justice Institute, Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 29-35 (2007)	8

National Center for State Courts, Center for Sentencing Initiatives, http://www.ncsconline.org 8

Roger K. Warren, Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism, 82 Indiana L.J. 1307, 1308 (2007) 8, 9

Resolution 12 In Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism, The Conference of Chief Justices and The Conference of State Court Administrators 9

Michael A. Wolff, Brennan Lecture: Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform, 83 N.Y.U. L. Rev. 1389, 1404-1409 (2008.) 10

Kimberly Weibrecht, Esq., Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 8 (2008) 10

Jennifer A. Fahey, Esq., Using Research to Promote Public Safety: A Prosecutor's Primer on Evidence-Based Practice, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 15-16 (2008) 11

Public Safety Performance Project, The Pew Center on the States, http://www.pewcenteronthestates.org/initiatives 11

Statement of Interest of Amicus Curiae

The Indiana Judicial Center (Judicial Center) is the staff agency for the Judicial Conference of Indiana pursuant to Ind. Code § 33-38-9-4 (2009). The Indiana General Assembly has charged the Judicial Conference, through its staff agency, the Judicial Center, with promoting an exchange of experience and suggestions regarding the operation of Indiana's judicial system; promoting continuing education of judges, probation officers, and other court personnel; promoting a better understanding of the judiciary; assisting local courts in developing and improving probation services; setting standards for probation and probation officers; administering the interstate compacts regarding transfer of probationers into and out of Indiana; administering the Court Alcohol and Drug Services Programs; and providing oversight of Indiana's Drug Courts and Re-Entry Courts. In addition, the Judicial Center carries out other functions as may be assigned by the Judicial Conference Board of Directors. The Judicial Center's interest in participating in the case as *amicus curiae* is to provide the Supreme Court with background information relevant to the use of risk and needs assessment instruments in sentencing proceedings and scholarly research regarding the use of "scoring models" in sentencing, as well as information about the Judicial Center's training efforts in this area and the current project to develop new "scoring models" for use by probation officers.

Summary of Argument

A core concept of evidence-based practice in the criminal justice system is assessment of the risk and needs of criminal offenders. The Judicial Center has promoted this concept and has trained judges to use research on reducing offender recidivism to improve sentencing outcomes. The Judicial Conference of Indiana has required that probation officers complete risk and needs

assessment instruments for criminal defendants since 1995. These instruments provide trial courts with information relevant to the offenders needs prior to sentencing. Several states have incorporated the use of risk assessment instruments into sentencing decisions by judges and national research organizations have promoted the use of risk assessment methodology in sentencing practices as a way to reduce offender recidivism.

Argument

a. History of Judicial Conference Risk and Needs Assessments

The use of "scoring models" (also known as risk assessment instruments) in sentencing has been in practice in Indiana for almost 15 years. Since 1995, the Judicial Conference has required probation departments to assess the risk level and needs of criminal offenders. Pursuant to its authority to adopt minimum standards and recommendations for the operation of the probation system under I.C. § 11-13-1-8, the Judicial Conference of Indiana's Board of Directors has adopted the following: the Indiana Probation Standards, the Standard Indiana Presentence Investigation Report, and the Probation Case Classification and Workload Measures System for Indiana.[1] The Case Classification/Workload Measures System includes the original "scoring models" used by probation departments—the Indiana Adult Risk Assessment Instrument and the Indiana Adult Needs Assessment Instrument.

The contents of the pre-sentence investigation report are dictated by I.C. § 35-38-1-8.5 & 9. I.C. § 35-38-1-9(e) also includes the requirement that the probation officer "must include the information and comply with any other requirements established in the rules adopted [by the Judicial Conference Board of Directors] under I.C. § 11-13-1-8." Under this authority, the

[1] *Available at* http://www.in.gov/judiciary/probation/docs.html (last visited September 18, 2009).

Judicial Conference's Probation Standard 3.7 requires that a pre-sentence investigation report "shall include evaluation of treatment and dispositional alternatives... and shall address problem areas as relative to the needs of the individual." Indiana Probation Standards, Standard 3.7 (March 9, 2001). According to this standard, the pre-sentence investigation report is also required to address "supervision, treatment issues, and special conditions applicable to the individual" in the conditions of probation. *Id.* In the Standard Presentence Investigation Instruction Manual, the Judicial Conference identifies that "the primary use of the presentence investigation is to provide information to the Court which is essential to the judge in sentencing. Complete and accurate information about all aspects of the case, with a recommendation when appropriate, enhances the Court's ability to sentence fairly for both the defendant and the community." Indiana Standard Presentence Investigation Manual, p.1 (March 19, 1993). "When a pre-sentence investigation is ordered, a risk and needs assessment should be completed at that time." Indiana Case Classification and Workload Measures System Manual, p. 12. The Indiana Risk and Needs Assessment instruments provide the trial court with information relevant to the offender's potential risk to the community and areas of need, allowing the court to address treatment services and individualized probation conditions in the sentencing order.

Indiana's risk and needs assessment instruments were developed and validated based on the Wisconsin model. The Wisconsin Assessment and Classification System was developed by the Wisconsin Department of Corrections in the 1970's and was designed to measure the relative risk of offenders as well as the level of service need. The Indiana Risk Assessment Instrument measures ten (10) static risk factors to determine the person's risk to re-offend. The Indiana Needs Assessment Instrument measures nine (9) need factors to determine a person's probation conditions and supervision plan if sentenced to probation. Indiana Case Classification and

Workload Measures System, pp. 14-16. Continued advancements in criminal justice research have lead to the creation of a "third generation" of risk assessment instruments, such as the Level of Service Inventory-Revised (LSI-R) and the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS). These third generation risk assessment instruments assess dynamic risk factors and criminogenic need factors[2], in addition to static risk factors. They are widely considered to be more effective in identifying risk level and need areas of offenders, resulting in improved treatment referrals and supervision. Christopher T. Lowenkamp, Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System, 71 Federal Probation (2007). The "scoring model" at issue in this case is the LSI-R, which is a combined risk and needs assessment tool developed in Canada and whose measurements have been validated in North America. The LSI-R is a standardized actuarial instrument that produces a summary risk score that is categorized into risk levels. The LSI-R contains 54 static and dynamic items that are divided into ten (10) criminogenic domains. The offender's score suggests the likelihood of recidivism and provides information pertaining to the offender's criminogenic needs. *Id.* Community corrections agencies in Indiana were the first to use the LSI-R to assess the risks and needs of offenders, with several probation departments following suit soon after. The other assessment instrument at issue in this case is the Substance Abuse Subtle Screening Inventory

[2] Criminogenic needs are factors in an offender's life that relate directly to recidivism. Research has indentified six factors that are directly related to crime: low self-control, anti-social personality, anti-social values, criminal peers, substance abuse and dysfunctional family. Faye S. Taxman, Eic S. Shepardson, Jayme Delano, Suzanne Mitchell, James M. Bryne, Adam Gelb and Mark Gornik, National Institute of Corrections & Maryland Dept. of Public Safety and Correctional Services, Tools of the Trade: A Guide to Incorporating Science into Practice (2004).

(SASSI), which is a psychological screening measure that helps identify individuals who have a high probability of having a substance dependence disorder.[3]

As a result of some probation departments switching to the LSI-R for offender risk and needs assessment, the Judicial Center began a study of the continued utility of the Indiana Risk and Needs Assessment Instruments in 2003. The Judicial Conference Board of Directors authorized probation departments to use third generation risk assessment instruments to assess offenders until adoption of a new instrument for Indiana. Judicial Conference of Indiana Board of Directors, March 11, 2005 meeting minutes.[4] In 2006, the Judicial Center received technical assistance from the National Institute of Corrections (NIC) which provided professional consultants to assist Indiana in determining what type of risk assessment instrument should be used by criminal justice agencies. The technical assistance from NIC required the Judicial Center to collaborate with several criminal justice partners resulting in the establishment of the Indiana Risk Assessment Task Force (Task Force). The Task Force members include representatives from probation, the Indiana Department of Correction, community corrections, reentry courts, court alcohol and drug programs, drug courts, and a trial judge representative. The Task Force, staffed by the Judicial Center, held a number of meetings from May 2006 to February 2008, including three meetings with the NIC consultants. The Judicial Conference Board of Directors, the Judicial Conference Probation Committee, the Judicial Conference Criminal Law Policy Committee, and the Probation Officers Advisory Board receive regular reports on the progress of the Task Force. As a result of these meetings, the Task Force recommended to the Judicial Conference Board of Directors and the Department of Correction

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[3] *Available at* http://www.pubs.niaaa.nih.gov/publications/Assessing%Alcohol/InstrumentPDFs?66_SASSI.pdf

[4] *Available at* http://www.in.gov/judiciary/committees/ijc-board.html

that Indiana adopt new risk and needs assessment instruments. The Judicial Conference Board of Directors authorized the Judicial Center to enter into a contract with the developers of the new public-domain[5] risk and needs assessment tools in March 2008.

The Judicial Center, the Department of Correction, and the developers are currently working on the research and validation studies for use of these tools in Indiana. The Task Force reconvenes in Fall 2009 to review evaluation reports and plan for the implementation of the instruments by criminal justice agencies. The Task Force will refer implementation plans and policy recommendations to the Judicial Conference Board of Directors and Department of Correction for approval.

In addition, the Judicial Center has trained judges in evidence-based practices as part of its mission to provide educational opportunities for judges and promote suggestions for the improvement of the operation of the judicial system. These trainings have included sessions on reducing offender recidivism and the research behind effective assessment and sentencing of criminal offenders.[6]

b. National Research and Policy Initiatives

The National Institute of Corrections (NIC) has promoted the use of evidence-based practices (EBP) to reduce offender recidivism since the mid-1990's. "Evidence-based practice is a significant trend throughout all human service fields that emphasize outcomes. Interventions

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[5] Public domain risk and needs assessment instruments are made available to the public at no cost.

[6] "What Works in Reducing Recidivism for Offenders", Spring Judicial College, April 2003; "Reducing Recidivism for Offenders: Assessment, Referral, and Effective Alternatives", Winter Conference 2003; "Effective Sentencing: What Does the Research Tell Us?", Spring Judicial College, April 2007; "Effective Sentencing: The Next Step: What You Do With What the Research Tells You", Spring Judicial College, April 2008.

within corrections are considered effective when they reduce offender risk and subsequent recidivism and therefore make a positive long-term contribution to public safety." Elyse Clawson, Brad Bogue, Lore Joplin, Implementing Evidence-based Practices in Corrections, American Studies Journal (2004). As part of its implementation strategy, NIC entered into a collaborative effort with the Crime and Justice Institute (CJI) to develop a model for implementing evidence-based practice in criminal justice systems. According to this research, one of the core principles for effective interventions is the use of a risk and needs assessment instrument. Crime and Justice Institute, Implementing Evidence-Based Principles in Community Corrections: The Principles of Effective Intervention (2004), *available at* http://www.nicic.org/ReducingOffenderRisk (under "Important Reading"). In 2007-2008, NIC and CJI presented a series of "white papers" to share information with criminal justice system stakeholders about how the implementation of EBP and a focus on reducing offender recidivism affects specific areas of the system. The Honorable Roger K. Warren, President Emeritus of the National Center for State Courts, was the primary author of a paper titled "Evidence Based Practices to Reduce Recidivism: Implications for State Judiciaries." In this paper, Judge Warren reviewed the application of the principles of EBP to the sentencing practices of judges, stating that

> competent corrections services consist of thoughtful application of principles of practices based upon what is known in the profession to be most effective in correcting the behaviors of criminal offenders. Offenders cannot be assigned randomly to whatever program might happen to be available. To the contrary, the fundamental lesson we have learned about effective treatment programs is that they must be specifically targeted to address particular needs of a certain group of offenders in certain ways. The first and most important principles of EBP, therefore, answer three critical questions about rehabilitation and treatment programs that have been proven effective in reducing recidivism: (1) *who* are the most appropriate offenders to participate in these programs; (2) *what* characteristics or needs of the offenders should these programs address; and (3) *how* should the program go about addressing the needs of those offenders.... The first

> task in applying principles of EBP to a particular sentencing decision is to determine whether the defendant is a suitable candidate for a rehabilitation or treatment program.... The closely related second task in applying principles of EBP to sentencing decisions is to identify the characteristics, or needs, of the defendant that should be targeted for treatment.... Determination of the degree of risk of re-offense that an offender presents, and the offender's criminogenic needs, requires a careful assessment of relevant information about the offender.... *The availability of accurate risk- and needs-assessment information is critical to making sound judicial decisions on a variety of issues that frequently arise in sentencing felony offenders: the offender's suitability for diversion, whether the offender should be sentenced to prison, the kind of behavioral controls that should be imposed for community supervision, the kind of treatment services to be provided, and setting appropriate conditions of probation* (emphasis added). Roger K. Warren and Crime and Justice Institute, Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 29-35 (2007), *available at* http://www.cjinstitute.org.

Judge Warren spoke to the Conference of Chief Justices and the Conference of State Court Administrators Annual Meeting on August 2, 2006 in Indianapolis, Indiana, regarding the National Center for State Courts' national sentencing reform project titled, "Getting Smarter About Sentencing." As part of this effort, the National Center for State Courts is exploring the expanded use of evidence-based practices and risk assessment to help identify sentencing options that protect the public, hold offenders accountable and reduce recidivism. *See* National Center for State Courts, Center for Sentencing Initiatives, available at http://www.ncsconline.org/csi. Judge Warren's presentation, "Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism" was published in the Indiana Law Journal in 2007. In his article, Judge Warren summarized "how greater reliance on evidence-based practices would allow the state courts to improve the effectiveness of state sentencing outcomes, reduce recidivism, and, at the same time, reduce over-reliance on incarceration and promote the utilization of community-based alternatives for appropriate offenders." Roger K. Warren, Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism, 82 Indiana L.J. 1307, 1308 (2007). In particular, Judge Warren states:

> Greater conformity of state sentencing policy with evidence-based practices in corrections would serve to reduce offender recidivism and improve public safety through strategies of offender risk reduction, that is, reducing the risk that an offender will commit further crimes. The one area of state court operations whose current sentencing practices most closely conform with EBP is 'problem-solving courts,' which may explain the success that so many drug courts, mental health courts, domestic violence courts, community corrections courts and other problem-solving courts have achieved over the last fifteen years in reducing recidivism among the affected offenders. *Id.* at 1309.

In addition, at the annual meeting in August 2007, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution supporting "sentencing and corrections policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism." Resolution 12 In Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism, The Conference of Chief Justices and The Conference of State Court Administrators, *available at* http://www.ccj.ncsc.dni/resol12SentencingPracticesPromotePublicSafetyReduceRecidivism.html (last visited on September 18, 2009).

The Honorable Michael A. Wolff of the Supreme Court of Missouri discussed the work of the Missouri Sentencing Advisory Commission in his Justice William J. Brennan, Jr., Lecture on State Courts and Social Justice, delivered on February 20, 2008 at the New York University School of Law. In his lecture, Justice Wolff described Missouri's development of a process to incorporate modern risk assessment methodology into traditional sentencing practices. Justice Wolff stated

> The guiding principle of the current commission's work is that 'judicial discretion is the cornerstone of sentencing in Missouri courts.'... Informed discretion can help achieve better sentencing outcomes.... I suggest we rebrand our central concept and call it evidence-based sentencing, for that is what it is: sentences by judges who have considered the evidence that informs their discretion.... Both risk and needs assessment are used to provide the recommendations found in Missouri's pre-sentence investigation report.... Taken together, these assessments are the means by which we can try to

> ascertain what sanctions and what programs are appropriate for individual offenders.... These instruments are far from perfect, which is why the severity of punishment should not be based on risk-assessment prediction.... Actuarial predictions have been found to be consistently superior to clinical or human judgments in predicting future criminal behavior. At the very least, the use of statistics can be a check on a judge's own intuitions and judgments in sentencing. The current draft of the Model Penal Code on state sentencing comes to the same conclusion: It encourages the use of risk-assessment instruments, especially to identify low-risk offenders who should be diverted from prison.... Risk assessment may help answer two crucial sentencing questions: First, are we using prison appropriately? Second, are we using community-based programs appropriately?... Risk assessment is an appropriate aid for those involved in sentencing. When we organize the information necessary to assess an individual's risk factors, we can more precisely address the individual needs of offenders and minimize the risk to public safety in allowing them to serve their sentences in the community rather than in prison.... Risk assessment is useful because it provides a statistically valid measure of factors that affect the outcome of particular sentences. But the use of risk assessment has a larger secondary purpose: to ensure that the actors involved in the sentencing process focus on both the community's safety and the offender's needs. Michael A. Wolff, Brennan Lecture: Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform, 83 N.Y.U. L. Rev. 1389, 1404-1409 (2008.).

NIC and CJI published several more "white papers" in 2008 designed to share information on how EBP and a focus on recidivism reduction affects treatment, jails, criminal defense and prosecution. In the criminal defense area, "[t]he most important benefit to defendants in an EBP system is the application of the risk-need principle in key decision-making points along the criminal justice continuum.... This enables the targeting of appropriate and effective interventions to defendants that will most benefit from them." Kimberly Weibrecht, Esq., Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 8 (2008) *available at* http://www.cjinstitute.org. On the prosecutorial side, "the principles of risk, need, and responsivity are inherently relevant to the work of the prosecutor. Diversion determinations, charging decisions, plea negotiations, sentencing arguments, and revocation requests are critical junctures in the processing of a criminal case, requiring discretionary decision-making. Assessment tools can provide objective data for prosecutors to consider when

making such determinations." Jennifer A. Fahey, Esq., Using Research to Promote Public Safety: A Prosecutor's Primer on Evidence-Based Practice, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 15-16 (2008), *available at* http://www.cjinstitute.org.

Another sentencing project involving evidence-based practices, the Public Safety Performance Project, was launched by the Pew Center on the States in 2006. According to the Pew Center's website, "the Public Safety Performance Project helps states advance fiscally sound, data-driven policies and practices in sentencing and corrections policies practices that protect public safety, hold offenders accountable and control corrections costs." Public Safety Performance Project, The Pew Center on the States, http://www.pewcenteronthestates.org/initiatives (follow "Public Safety Performance" hyperlink) (last visited September 18, 2009). The Project collaborates with five national partners: the Council of State Governments, the National Center for State Courts, the National Conference of State Legislators, the National Governors Association and the Vera Institute of Justice. *Id.* The states involved in the Pew project are: Alabama, Arizona, California, Connecticut, Illinois, Kansas, Michigan, Nebraska, New Jersey, Rhode Island, Texas and Vermont. *Id.* The amount of research in this area and the number of national organizations partnering on these initiatives illustrates the importance of risk and needs assessment to the criminal justice system.

Conclusion

The Judicial Center believes that the information provided in this brief will assist the Supreme Court in addressing the issues of the case by increasing awareness of the use of risk and needs assessment instruments in Indiana's criminal justice system and by calling attention to

relevant national research and policy initiatives on evidence-based practices in sentencing decisions.

Respectfully submitted,

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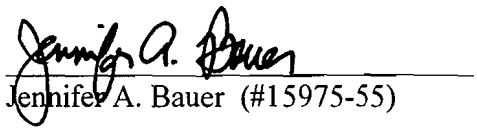

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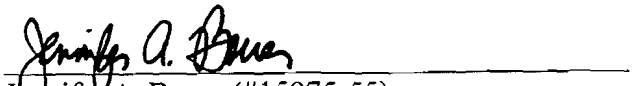

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