



# Risk & Needs Assessments: What Defenders and Chief Defenders Need to Know

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## I. INTRODUCTION

A significant movement in criminal justice is the use of actuarial risk assessments and needs assessments to make decisions about persons at various stages of the criminal justice system. This report provides basic information about these types of assessments and summarizes the potential challenges and opportunities that these assessments carry for defenders (both for individual attorneys and for chief defenders).

The risk and needs assessments employed at different decision points in the criminal process focus on different salient factors. A pretrial risk assessment seeks to measure the likelihood that a person will fail to appear for court or commit an offense while released.

Police officers may use a risk assessment to determine whether to arrest or issue a citation.

A presentence risk assessment addresses the likelihood that a person will reoffend or violate the conditions of supervision. Prosecutors may rely on an assessment to guide filing charges or referring to an alternative court. Courts may rely on presentence assessments in declaring a prison sentence or alternative to incarceration. Post-sentence risk assessments, most frequently employed by corrections and parole officials, may inform classification, programming, release, and revocation decisions.

Needs assessments evaluate the characteristics of the person that, if properly addressed, will reduce the risk of future misconduct. Needs assessments can inform decision makers whether a person in the criminal justice system requires mental health care, drug treatment, et al.

## II. POTENTIAL BENEFITS OF RISK AND NEEDS ASSESSMENTS

The increased use of risk and needs assessments reflects a growing body of research showing that “[w]hen developed and used correctly, these risk/needs assessment tools can help criminal justice officials appropriately classify offenders and target interventions to reduce recidivism, improve public safety and cut costs.”<sup>1</sup>

Assessments are the starting point for the Risk-Need-Responsivity model for the treatment of those involved.<sup>2</sup> The goals of this model are to 1. assess the risk of re-offending; 2. assess the person’s needs in relation to risk factors for re-offending; and 3. provide treatment focused on “cognitive social learning” in a manner taking individual personality and demographics into account.<sup>3</sup> Research has shown that “adherence to all three principles is associated with greatest reduction ... in the recidivism rate.”<sup>4</sup>

Research has identified specific risk factors for future criminal conduct, some of which are static (permanent) and some of which are dynamic (subject to change). Examples of static factors are age at first arrest, history of missing court (if present), and number of prior convictions (the number could change, but is generally static while the person serves a sentence).<sup>5</sup> Dynamic factors are factors associated with criminal behavior that can be changed, at least for many, through effective programming.<sup>6</sup>

An effective assessment allows justice officials to make evidence-based, informed decisions regarding programming. For example, intensive treatment programs work significantly better for those evaluated as high

1 *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders*, p. 1 (Pew Center on the States 2011).

2 See generally James Bonta and D.A. Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* (Public Safety Canada 2007); Pamela Casey, Roger Warren, & Jennifer Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, pp. 4-6 (National Center for State Courts 2011).

3 Bonta and Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, see above n. 2, p. 1.

4 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, p. 6.; D.A. Andrews and James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 *Psychology, Public Policy, and Law* 39, 47-48 (American Psychological Association 2010) (reviewing numerous studies comparing outcomes of programs using the Risk-Needs-Responsivity model to other justice programs).

5 *Risk/Needs Assessment 101*, see above n. 1, p. 2 (citation omitted).

6 *Risk/Needs Assessment 101*, see above n. 1, p. 2 (citation omitted).

risk than for those evaluated as low risk.<sup>7</sup> Therefore, if combined with the availability of effective community-based programming, risk and needs assessments may provide defense counsel with recidivism alternatives to prison for some high-risk people, while also supporting arguments to divert low-risk people without onerous conditions of supervision.

Another important component of successful treatment for those involved in the criminal justice system is the principle of responsivity, which calls for providing services in ways that match individual learning styles and personalities.<sup>8</sup> Defenders should have at least general familiarity with this principle, because an individualized approach to programming may significantly reduce the percentage of those people who face sentencing or revocation of supervision after being discharged from treatment.

### III. POTENTIAL HARM TO CLIENTS FROM RISK AND NEEDS ASSESSMENTS

Despite the potential benefits summarized above, risk and needs assessments can have detrimental effects upon people involved in the criminal justice system. This section outlines the following ways in which assessments can be harmful to an individual client:

- statements made during the assessment interview are used against the client;<sup>9</sup>
- assessment instrument is not valid for population in question;
- assessment instrument is not used for intended purpose;
- assessment instrument is not administered properly;
- assessment identifies needs for which community-based programming is not available;
- assessment instrument fails to consider how social factors (like racial discrimination) impact apparently neutral risk factors (like age at first arrest);
- assessments administered without safeguards against implicit bias, thus potentially increasing disproportionate minority confinement.

#### A. *Statements made during the assessment interview must not be used to prosecute or otherwise punish the the person*

Absent an agreement approved by the court or otherwise carrying the force of law that statements made in connection with the assessment will not be used to support criminal charges, revocation of supervision, or other adverse government action, every defendant should be advised of the Fifth Amendment right against self-incrimination before answering questions.<sup>10</sup>

<sup>7</sup> *Risk/Needs Assessment 101*, see above n. 1, p. 4. Without research demonstrating the value of providing treatment for a high-risk population, justice officials might logically assume that the best chance for success is with low-risk participants. Because the population is by definition low risk, most participants would not reoffend, thus reinforcing confidence in the program. However, the program might actually increase recidivism in a population that would do even better without treatment. Conversely, intensive treatment generally has the greatest positive impact on a high-risk population. *Risk/Needs Assessment 101*, see above n. 1, p. 4. See also Shelli Rossmann and Janine Zweig, *The Multisite Adult Drug Court Evaluation*, p. 6 (National Association of Drug Court Professionals May 2012) (treatment courts “achieve higher reductions in recidivism and greater cost savings” when participants are high-risk individuals who would otherwise serve prison time).

<sup>8</sup> See Bonta and Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* see above n. 2, p. 1. A simple example of the responsivity principle is that if treatment participants are missing sessions because of work schedules or child care, the treatment provider might respond by finding a different time that is more convenient. See Bonta and Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, p. 7. Similarly, if a client has difficulty understanding abstract concepts, the treatment sessions should consist of practicing the desired behaviors, rather than of discussing broad principles. *Id.*

<sup>9</sup> The more advanced pretrial risk assessments, as employed in Kentucky and an increasing number of states, do not require interviews. See Marie VanNostrand and Christopher Lowenkamp, *Research Report: Assessing Pretrial Risk Without a Defendant Interview* (Laura and John Arnold Foundation, November 2013).

<sup>10</sup> The Constitutional privilege against self-incrimination applies to the use of risk assessment instruments because the privilege not only applies before or at a criminal trial, but also protects against self-incrimination “in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [the person] in future criminal proceedings.” *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (citation omitted). The privilege against self-incrimination extends beyond answers that would in themselves support a conviction, applying also to those that would furnish a link in the chain of evidence needed to prosecute. *Ohio v. Reiner*, 532 U.S. 17, 19 (2001). However, these cases do not fully protect the defendant from harm, as they apply the exclusionary rule prohibiting introduction of statements in the criminal justice context. Statements captured by interview based risk assessments could gravely impact a person outside of the criminal case if used, for example, in immigration court. There is no obvious court rule or statute that protects statements made in a risk assessment interview from introduction in a civil or immigration court.

A risk assessment instrument may ask about a defendant's use of illegal drugs, knowledge of drug availability, or association with drug users.<sup>11</sup> Answers to such questions may reveal incriminating evidence that authorities may use in drug offense prosecution or in other adverse government action affecting child custody, immigration or other civil consequences.<sup>12</sup>

If the purpose of using the assessment is to facilitate informed and effective decision-making in the justice system, the parties involved should agree that statements made during assessment interviews will not be used in investigations of the defendant to initiate prosecutions or in criminal prosecutions to prove specific charges or acts.<sup>13</sup> Counsel must also be able to advise whether defendant's responses could be used to impose adverse civil consequences. The responses should be used solely to complete the pertinent assessment, which in turn should be considered in light of data validating the assessment instrument for a specific purpose, such as a pretrial release decision or admission into a diversion program.

Defense counsel must consult the law in their own jurisdiction to determine what steps are necessary to render such an agreement enforceable (e.g. court order), because the person performing the assessment likely lacks the authority to bind police and prosecutors.

## *B. Assessment must be validated<sup>14</sup> for the population in question*

A major barrier to the effective use of actuarial assessments is the cost of development and implementation.<sup>15</sup> Therefore, some jurisdictions may seek to save time and expense by adopting an instrument already in use elsewhere. This practice may result in using an instrument that does not accurately predict outcomes for the population.<sup>16</sup> The assessment instrument should be validated<sup>17</sup> by testing it with the population in question before adoption for general use.<sup>18</sup> Use of an assessment instrument which has not been validated to make decisions impacting a defendant's liberty may violate due process or, if used at sentencing, the 8th amendment, see *United States v. C.R.*, 792 F. Supp. 2d 343, 461 (E.D.N.Y. 2011).

Similarly, once an instrument has been implemented, data must be maintained on the impacts and outcomes of the use of the instrument. Periodic review or revalidation should be made to determine if the instrument is indeed having the intended impact, while at the same time avoiding increasing disproportionate minority confinement by virtue of the introduction of implicit bias in the creation, scoring or implementation of the instrument.

<sup>11</sup> Note that questions about substance abuse should not refer to specific dates and times of usage. Structured risk assessment interviews (LS/CMI) do not include questions on place and time, since the goal is to identify where there is an on-going problem to address.

<sup>12</sup> See *Commonwealth v. Leclair*, 469 Mass. 777, 783 (2014) (holding that witness properly asserted privilege against self-incrimination "in response to questions regarding illicit drug use" because witness's "anticipated testimony would have been an admission of violations of the drug laws").

<sup>13</sup> Similarly, for persons on probation, parole, or other forms of formal supervision, the agreement should provide that statements made during assessment interviews may not be used to prove violations of conditions or to otherwise support revocation proceedings.

<sup>14</sup> Validation refers to examining the predictive capability of a risk assessment. A validate tool is one that has been proven thru study to distinguish significantly between risk levels.

<sup>15</sup> Christopher Lowenkamp et al., *The Development and Validation of a Pretrial Screening Tool*, p.3 (Federal Probation December 2008). See also Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment* (U.S. Department of Justice, Bureau of Justice Assistance March 2011), pp. 34-35.(noting that although a risk assessment instrument should be validated for the specific population being served, the costs of validation may deter many jurisdictions from completing the work necessary to implement a locally-validated instrument).

<sup>16</sup> Lowenkamp, *The Development and Validation of a Pretrial Screening Tool*, see above n. 9, p. 4

<sup>17</sup> Validation of instruments for use in the cases of un-consenting criminal defendants is limited and may be prohibited by federal law. See generally National Institute of Justice, *Human Subjects Protection* (updated November 27, 2013), accessible at <http://www.nij.gov/funding/humansubjects/pages/human-subjects.aspx>. 28 CFR Part 46 requires federally funded projects administered through Department of Justice, Health and Human Services and other federal agencies doing research involving human subjects (research defined in 28 CFR 46.102) to obtain prior approval by an Institutional Review Board (28 CFR 46.109) and further requires human subjects to give informed consent (defined in 28 CFR 46.101). See Federal Policy for the Protection of Human Subjects ('Common Rule'), 45 CFR part 46, accessible at <http://www.hhs.gov/ohrp/humansubjects/commonrule>.

<sup>18</sup> Lowenkamp, *The Development and Validation of a Pretrial Screening Tool*, see above n. 9, p. 4.

### C. *Assessment must be used for intended purpose*

Even if an assessment instrument has been validated in the jurisdiction in question, the instrument's validity may be limited to a specific purpose. For example, data analysis might show that certain data items predict failure to appear in court.<sup>19</sup> However, although those items would logically constitute an assessment used for pretrial release decisions, the same items might not be helpful in predicting the risk of a future violent offense or sexual offense.

### D. *Assessment instruments must be administered properly*

An assessment instrument that is theoretically valid may nonetheless be ineffective if not administered properly. The persons completing the assessments need to be trained so that consistency and objectivity are maximized in using the assessment instrument.<sup>20</sup> For example, prior criminal record is included as a prominent item in risk assessment instruments. However, if some evaluators include probation revocations as convictions and other evaluators do not, the assessment results will be inconsistent. Consistency may be even more problematic when assessing subjective items such as the person's family relationships, substance abuse, or work history.

### E. *Community-based programming must be available to address identified needs*

If appropriate programming exists in the community to address risk factors such as antisocial behavior, attitudes, and peer group,<sup>21</sup> a risk and needs assessment can facilitate effective community supervision. However, if programming is not available in the community, a risk and needs assessment may influence judges to impose long prison sentences that fail to address criminogenic needs and that entail great expense to the correctional system. In such a community, the assessment may become a justification for harsh and expensive sentencing practices that make it difficult to find resources for expanded community programming.

Consistent with the responsivity principle, programming must not only address the criminogenic needs of the target population, but must be delivered in a manner that takes into account the participants' personal characteristics and learning styles. For example, research shows that gender-specific programming for women is more effective than programming developed from studies of a predominantly-male population.<sup>22</sup> Similarly, research strongly suggests that multi-cultural programming, demonstrating knowledge of and respect for the values of all cultures represented in the client population, is essential to maximize effectiveness for people from racial or ethnic minority populations.<sup>23</sup>

### F. *Assessment must not introduce implicit bias into scoring or implementation, nor inadvertently increase disproportionate minority confinement*

Consistent with the necessity to validate the instrument on the population in question, care should be taken to account for or exclude dynamic risk factors that are of low or no predictive value, such as homelessness and

<sup>19</sup> See Lowenkamp, *The Development and Validation of a Pretrial Screening Tool*, see above n. 9, pp. 4-6 (describing methodology used to identify items that accurately predict failure to appear and pretrial arrest for new offense).

<sup>20</sup> *Risk/Needs Assessment 101*, see above n. 1, p. 5.

<sup>21</sup> See *Risk/Needs Assessment 101*, see above n. 1, p. 3 (identifying "seven dynamic risk factors closely associated with criminal conduct" (Citation omitted).

<sup>22</sup> See generally *Resource Brief: Achieving Successful Outcomes with Justice Involved Women* (National Resource Center on Justice Involved Women, September 1, 2011).

<sup>23</sup> See Georgia Spiropoulos, *The Neglect of Racial Responsivity: An Examination of Why Race Matters in Correctional Treatment*, pp. 53-58 (Doctoral thesis, University of Cincinnati March 30, 2007), accessible at [cech.uc.edu/content/dam/cech/programs/criminaljustice/docs/phd\\_dissertations/2007/Spiropoulos.pdf](http://cech.uc.edu/content/dam/cech/programs/criminaljustice/docs/phd_dissertations/2007/Spiropoulos.pdf) (discussing guidelines for multicultural counseling adopted by American Psychological Association and noting that a multicultural approach in correctional programs has lagged behind its incorporation into other counseling environments).



unemployment,<sup>24</sup> and that disproportionately impact those who are of minority and/or lower socioeconomic status. In considering factors such as prior convictions for drug possession, one must also account for the disproportionate drug arrests and prosecutions of blacks and Latinos<sup>25</sup> to avoid exacerbation of the injustice generated by racial profiling and other biased policies.

Knowledge of the responsivity principle may help a defense attorney explain why a client did not respond favorably to a previous treatment program. Rather than accept the inference that further community-based programming would be futile, the court may find persuasive the likelihood that a program presented in a different manner will have a better probability of successfully addressing the client's needs.

## IV. CONSIDERATIONS FOR CHIEF DEFENDERS

Chief Defenders should be knowledgeable about current practices, policies, and opportunities in their jurisdictions regarding risk and needs assessments.<sup>26</sup> Such knowledge allows the Chief Defender to provide training to defense attorneys and advocate persuasively, within the justice system, regarding the use of particular risk and needs assessments.

### A. *Training Defenders on Risk and Needs Assessments*

The Chief Defender should provide training and access to relevant materials regarding risk and needs assessments. The bibliography included in this report provides a starting point for training in this area. Training should be tailored to the instruments in use in a given jurisdiction. Training should also include information about how to use the results of risk and needs assessments to advocate for defendants' interests and how to minimize the risks posed by such assessments.<sup>27</sup>

### B. *Advocacy Regarding the Use of Specific Risk and Needs Assessments*

A Chief Defender should be actively involved in developing and implementing policies to improve the justice system.<sup>28</sup> If the Chief Defender serves on a statewide or county justice coordinating council,<sup>29</sup> he or she may be able to advance policy goals by suggesting or objecting to use of a particular risk/needs assessment as part of a treatment court, pretrial release initiative, or other community-based program.<sup>30</sup>

With regard to assessment instruments in use in a jurisdiction, the Chief Defender should seek to avoid potential harm related either to the intrinsic characteristics of the instruments or the manner in which they are being used.<sup>31</sup> General knowledge of the topic of actuarial assessments will enable the Chief Defender to seek pertinent

<sup>24</sup> Marie VanNostrand and Christopher Lowenkamp, *Research Report: Assessing Pretrial Risk Without a Defendant Interview* (Laura and John Arnold Foundation, November 2013), p.3, accessible at [http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF\\_Report\\_no-interview\\_FNL.pdf](http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_no-interview_FNL.pdf).

<sup>25</sup> See Saki Knafo, *When It Comes To Illegal Drug Use, White America Does The Crime, Black America Gets The Time* (The Huffington Post, Sept. 17, 2013), accessible at <http://huff.to/1eVIH9E>; Patrick Langan, *The Racial Disparity in Drug Arrests* (Bureau of Justice Statistics, U.S. Department of Justice, Oct. 1, 1995), accessible at <http://www.bjs.gov/content/pub/pdf/rdusda.pdf>; Dylan Matthews, *The black/white marijuana arrest gap, in nine charts* (The Washington Post, June, 4 2013), accessible at <http://wapo.st/1datrYR>; See generally Drug Policy Alliance: Race and the Drug War at <http://www.drugpolicy.org/race-and-drug-war>.

<sup>26</sup> A chief may delegate to a staff member the task of keeping current with the pertinent research and practices. The organization's knowledge and ability to communicate effectively are critical to keep the defense bar informed and to advocate effectively for clients. Therefore, regardless of the individuals in a defender organization with the technical expertise, the chief's responsibility is to ensure that the organization's collective knowledge is readily accessible and is used strategically on behalf of clients.

<sup>27</sup> For example, if a probation agent interviews clients to complete assessments, is the agent allowed to include client statements in a presentence report subsequently presented to the court? Or are the client statements used solely for the purpose of completing the assessment instrument? If an independent entity contracts with the court system to conduct the risk assessments, the contract may include a confidentiality provision that protects any statements or information other than the results of the assessment.

<sup>28</sup> See *ABA Ten Principles of a Public Defense Delivery System*, Principle 8, Comment (American Bar Association February 2002) ("Public defense should participate as an equal partner in improving the justice system"). As part of an evidence-based approach to criminal justice, risk and needs assessments can promote community-based rehabilitation and can provide courts with effective alternatives to prison or jail.

<sup>29</sup> See *ABA Ten Principles*, see above n. 20, Principle 8 (defense counsel included as an equal partner in the justice system).

<sup>30</sup> For example, in Milwaukee County, Wisconsin, as part of the county's commitment to incorporating evidence-based practices into justice policy, a risk assessment is used to inform pretrial release decisions. Since the county justice coordinating council adopted the assessment instrument and associated policies, the number of defendants released pending trial has substantially increased.

<sup>31</sup> See above section III., regarding common areas of potential harm to clients.

information about the development and implementation of specific assessment instruments. The following are examples of some practical questions or issues to raise regarding risk and needs assessments:

- Has the instrument been validated<sup>32</sup> for the population with which it is being used? If so, what documentation is available regarding the validation process? Defenders must familiarize themselves with this documentation in order to challenge the use of the instrument when necessary.
- Is the predictive ability of the instrument matched to the purpose for which it is being used? For example, is the assessment designed to predict compliance with pretrial release conditions, recidivism, violence, sexual assault, drug use, or some other occurrence?
- Who is administering the instrument and what training has been provided? What procedures are followed to ensure accuracy and consistency in completing the assessments?
- Is programming available (or are there plans in place to enhance availability) in the community to address needs identified through the assessment process?<sup>33</sup>

## V. PRACTICE CONSIDERATIONS FOR DEFENDERS

Defenders should be knowledgeable about risk assessment instruments in use in their jurisdiction. To effectively advocate for the interests of individual clients, attorneys must possess basic knowledge regarding the type of information collected for the assessment, the potential evidentiary use of statements made during the assessment process, and the potential case-related decisions likely to flow from the assessment.

The following summary, focused on the role of defense counsel in providing information and advice, describes the major decision points within the justice system at which a person may be the subject of a risk or needs assessment.

### A. Pretrial Release Decision

In 2011, a National Symposium on Pretrial Justice produced recommendations to improve pretrial release practices.<sup>34</sup> A major recommendation is to require completion of a risk assessment for all arrestees for consideration in setting release conditions.<sup>35</sup> Three states have passed legislation requiring such assessments, which can be used in conjunction with a presumption of release from custody for defendants within a certain scoring range.<sup>36</sup> By increasing reliance upon a validated risk assessment, a jurisdiction can shift from a primary focus on ability to post bail to a focus on objective measures of risk.<sup>37</sup>

Another 2011 report documents the use of risk assessments in some jurisdictions to inform pretrial release decisions.<sup>38</sup> Summarizing numerous earlier studies, the report sets forth six risk factors that have been most commonly verified as predictive of pretrial risk: prior failure to appear, prior convictions, nature of pending case

<sup>32</sup> It is important to ensure that “validation” is defined. Validation results reveal whether an assessment instrument is able successfully to distinguish between risk levels. Revalidation studies, which are recommended practices in many instances, provide further information about the accuracy of the instrument’s ability to predict risk by gathering data from assessments given in a real world setting. Proper training is essential to ensure validity of the tool “because the efficacy of every assessment is heavily dependent upon the person who conducts the interview and scores the risk assessment.” Edward Latessa, et al., *The Creation and Validation of the Ohio Risk Assessment System* (Federal Probation, June 2010), p. 21.

<sup>33</sup> To be effective, the programming needs to be appropriate for the population served. If programming is not effective, the justice system will not experience significant reduction in recidivism, and courts are likely to turn to incarceration as preferable to unsuccessful community-based alternatives. *See above* nn. 2-4, 8 and accompanying text, regarding importance of responsibility of programming to individual client circumstances.

<sup>34</sup> *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, p. 1 (Pretrial Justice Institute January 2013).

<sup>35</sup> *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 3. A related recommendation is that a pretrial services agency use validated instruments to assess the defendant’s risk to the community and risk of non-appearance in court. *Id.*, p. 6. The agency would use the information, according to the recommendations, to make recommendations to the court and to supervise defendants who are released before trial. *Id.*

<sup>36</sup> *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 3. Kentucky’s legislation contains a presumption that all defendants scored as low risk will be released without having to post cash bail. *See Id.*

<sup>37</sup> *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, *see above* n. 25, p. 4 (citing studies concluding or implying that bond schedules put public safety at risk by relying on a defendant’s financial resources to determine whether he or she is released from pretrial custody).

<sup>38</sup> Mamalian, *State of the Science of Pretrial Risk Assessment*, *see above* n. 9.



(felony or misdemeanor), employment status, history of drug abuse, and existence of other pending charges.<sup>39</sup> The report suggests that jurisdictions that rely on objective factors are less likely to have overcrowded jails than jurisdictions that rely upon subjective criteria, such as the prosecutor's recommendation or the judge's professional experience.<sup>40</sup>

A risk assessment may be used either in the field or at the local jail. If police use an assessment in the field to inform arrest decisions,<sup>41</sup> defense attorneys are generally not able to consult with the persons detained before the officers complete the assessment. Nonetheless, attorneys should have at least a general familiarity with the assessment in question (and the decisions resulting from it) because clients may ask why the police asked certain questions or may ask whether it is smart to answer the questions used in the assessment.

Assessments at the local jail may in some instances be completed before defendants have the opportunity to consult with a defense attorney.<sup>42</sup> To be prepared to argue the issue of pretrial release, defense counsel should know the purpose of the assessment and enough about its contents to be able to respond to any adverse recommendations stemming from the assessment of a specific defendant.<sup>43</sup> Counsel should also be able to review pertinent information about the client to ascertain whether the assessment may have been completed or interpreted incorrectly.

A risk assessment may inform not only the decision whether to grant pretrial release, but also the conditions of release. Although release programming ordered as an alternative to confinement may reduce pretrial misconduct (failures to appear or new violations), such programming may actually be counter-productive when required of low-risk defendants.<sup>44</sup>

## **B.** *Decisions on Admission to Diversions Programs and Treatment Courts*

Risk assessments are widely used in admission decisions for diversion programs (either pre-charging or post-charging) and for treatment courts. Needs assessments are also used either in admission decisions or in determining treatment needs for participants (or for both of these purposes). To ensure that programs serve an appropriate population, thus maximizing the positive impact, defenders must be aware of the general research findings regarding these types of assessments.

A basic, yet counterintuitive, principle regarding treatment courts is that they are most successful serving a high-risk, high-need participants.<sup>45</sup> Therefore, defenders representing individual clients seeking admission to a treatment court can cite this research to advocate for the court accepting these participants. Defenders should also be aware of the importance of validation of a risk assessment instrument to ensure that it accurately predicts outcomes for the population in question, including for racial, ethnic, and gender sub-populations served by the court.

Risk assessment instruments ordinarily seek to measure the likelihood of a defendant failing on supervision and/or committing a new criminal offense.<sup>46</sup> Aside from specialized instruments, they do not predict the risk

<sup>39</sup> Mamalian, *State of the Science of Pretrial Risk Assessment*, see above n. 9, p. 9.

<sup>40</sup> Mamalian, *State of the Science of Pretrial Risk Assessment*, see above n. 9, p. 17, n. 44 (citing a 2003 study conducted by the Department of Justice, Bureau of Justice Assistance).

<sup>41</sup> Police in Eau Claire County, Wisconsin, are using a "proxy risk assessment" to divert low-risk individuals whom they would otherwise arrest. *Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report*, see above n. 25, p. 3. Instead of an arrest, booking, and possible criminal charges, the individual may be issued a citation and be referred to a pretrial diversion program. See *id.*

<sup>42</sup> Depending on the procedures in place, the Chief Defender should advocate for the opportunity for attorneys to meet with arrestees before the assessment. See generally ABA Ten Principles, see above n. 20, Principle 3 (prompt assignment of counsel as soon as feasible after arrest); see also above section IV. If the Chief Defender perceives that defendants are being harmed by the timing of the assessment, he or she should seek a modification.

<sup>43</sup> See *Risk/Needs Assessment 101*, see above n. 1, p. 5 (although risk/needs assessments can provide guidance, professional discretion remains an important aspect of decision making).

<sup>44</sup> Mamalian, *State of the Science of Pretrial Risk Assessment*, see above n. 9, p. 9.

<sup>45</sup> See Douglas Marlowe, *Targeting the Right Participants for Adult Drug Courts*, p. 2 (National Drug Court Institute February 2012). Conversely, low-risk offenders by definition will not re-offend in large numbers; therefore, the benefits of intensive treatment are much smaller. See *id.*, p. 3 (noting that low-risk offenders are likely to be "predisposed to improve their conduct following a run-in with the law").

<sup>46</sup> Marlowe, *Targeting the Right Participants for Adult Drug Courts*, see above n. 45, p. 3.

of a violent offense.<sup>47</sup> Therefore, treatment courts should not assume a finding of high-risk means that the individual poses an abnormal risk of assaultive behavior.

A needs assessment is an evaluation to determine a person's "criminogenic" needs: disorders or behaviors that, if successfully treated, reduce the risk of recidivism.<sup>48</sup> Defenders should be aware that because screening instruments for substance abuse may be overly inclusive, a structured interview may be advisable to confirm the need for intensive treatment.<sup>49</sup>

With knowledge of risk and needs assessments, defenders can provide guidance to other justice professionals regarding successful treatment courts and other diversion programs. For example, a defender can explain that an intensive treatment-court program is inappropriate for low-risk offenders.<sup>50</sup> He or she can also advocate for effective treatment programs and other services that meet the stated wishes of a person seeking treatment.<sup>51</sup>

## C. Sentencing Decisions

Risk and needs assessments can be major components of an evidence-based approach to sentencing. Several states have expanded the use of these types of assessments in an effort to provide sentencing judges with information to assist in reducing recidivism.<sup>52</sup> Defender clients can benefit from the trend toward consideration of assessments because research shows that evidence-based treatment and supervision in the community can be at least as effective as incarceration in reducing recidivism.<sup>53</sup> Furthermore, community-based programming can be particularly effective for medium- and high-risk defendants.<sup>54</sup>

When judges increase their focus on reducing recidivism, they may rely less upon other sentencing principles, such as punishment and deterrence, which are commonly used as reasons for long prison sentences. Despite circumstances that could support a prison sentence, a judge may be convinced to impose a community-based sentence when the presentence assessment has identified risk factors to address, the probation department has capacity for effective supervision (including options for intermediate sanctions), and services are available to address the defendant's criminogenic risk factors.<sup>55</sup>

However, if the judge lacks confidence in either the probation department or the available community services, an assessment instrument may adversely affect clients by identifying risks and needs that cannot (in the judge's estimation) be effectively addressed. Therefore, defenders should not consider the potential impact of assessment instruments in isolation, but rather should also consider the importance of advocating for effective services.

Knowledge of the Risk-Needs-Responsivity model<sup>56</sup> will help defenders assess community-based resources and advocate for improvements that are likely to reduce recidivism. Defenders can cite research showing the

47 Marlowe, *Targeting the Right Participants for Adult Drug Courts*, see above n. 45, p. 3.

48 See Marlowe, *Targeting the Right Participants for Adult Drug Courts*, see above n. 45, pp.3-5.

49 See Marlowe, *Targeting the Right Participants for Adult Drug Courts*, see above n. 45, p. 5 (noting the risk that without such follow-up clinical evaluations, individuals with dependency may be placed in the same program with others who have episodes of abuse, but do not have true substance dependency).

50 See Marlowe, *Targeting the Right Participants for Adult Drug Courts*, see above n. 45, p. 7 (recognizing that some jurisdictions may lack the numbers of participants to develop distinct diversion programs for drug-involved defendants). If practical limitations require serving low-risk and high-risk individuals within the same treatment court, the court can provide different services (for example, separate tracks) that take into account the varying needs of the participants. *Id.*; see also Douglas Marlowe, *Alternative Tracks in Adult Drug Courts: Matching Your Program to the Needs of Your Clients*, pp. 3-8 (National Drug Court Institute March 2012) (describing four separate potential treatment-court tracks to take into account the participants' varying levels of risk and need).

51 For a client with higher risk and more criminogenic needs to address, a defender can advocate persuasively for admission to an intensive treatment-court program in lieu of a prison sentence. See Marlowe, *Alternative Tracks in Adult Drug Courts: Matching Your Program to the Needs of Your Clients*, see above n. 50, p. 1 (drug courts that focus on high-risk/high-need participants "reduce crime approximately twice as much as those serving less serious offenders and return approximately 50 percent greater cost-benefits to their communities"). For a client with lower risk and fewer criminogenic needs, a defender can advocate persuasively for diversion (either outside of a treatment court or as an alternative track in such a court) of the case without the intensive treatment and supervision components appropriate for high-risk/high-need individuals. See Marlowe, *Alternative Tracks in Adult Drug Courts: Matching Your Program to the Needs of Your Clients*, see above n. 41, pp. 7-8 (stating that diversion may be the best course of action and that "the intensive requirements of a drug court" may be counter-productive).

52 See Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, see above n. 2, pp. 39-41 (National Center for State Courts 2011) (describing initiatives in nine states).

53 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, p. 15. See also *State Efforts in Sentencing and Corrections Reform*, pp. 4-8 (National Governors Association October 2011) (summarizing initiatives in many states to reduce prison populations, including several initiatives that incorporate risk assessments into sentencing and/or correctional policies).

54 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, p. 15.

55 Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, p. 14.

56 See generally Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, pp. 4-8.

effectiveness of intensive community-based services for those who are higher-risk,<sup>57</sup> many of whom would otherwise be likely candidates for prison sentences on the basis of (for example) the prior criminal records that often correlate with the higher-risk categories. Also, when representing lower-risk people, defenders can show that intensive supervision and treatment requirements are counter-productive.<sup>58</sup>

As in other contexts, defenders need to understand the use of risk and needs assessments in sentencing so that they can advise clients properly. Statements made in the course of an assessment may be reported in a presentence report (or in another manner), unless there is an agreement limiting the use of any such statements. Clients should understand the potential impact of their statements. Conversely, the failure to cooperate with the administration of a risk assessment might have adverse effects: the presentence report might characterize the client as uncooperative, and/or the lack of a completed assessment might reduce the likelihood of the client receiving probation or another community-based disposition.

Knowledge of the assessments in use will not by itself lead to the best advice in each case, but such knowledge will allow defenders and their clients to weigh potential advantages and disadvantages of cooperation with assessment interviews. Also, a knowledgeable defender will be able to incorporate the results of an assessment into sentencing advocacy. This advocacy may consist of recommending effective alternatives to incarceration that are suggested by the assessment instrument(s). If the judge in question is inclined to equate high risk to a need for incarceration, effective advocacy may consist of challenging the results and/or the validity of the assessment(s).

## VI. CONCLUSION

This paper provides basic information regarding the use of risk and needs assessments in the justice system. The use of these assessments is increasing as state and local justice systems focus on evidence-based approaches to reducing crime. Risk and needs assessments can benefit defender clients by matching those clients who seek them with appropriate services in their communities. Defenders can best serve them if they understand the rationale of the Risk-Needs-Responsivity model and can argue the effectiveness of risks and needs assessments.

As discussed in Section III., there are a number of potential ways in which assessments can be detrimental to clients. However, many clients may benefit if courts focus less on punishment for past conduct than on strategies to shape future conduct.

<sup>57</sup> Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, pp. 5-6 (citing large-scale studies showing that behavioral approaches to treatment can substantially reduce recidivism, in contrast to incarceration, boot camp, or other sanctions not supplemented with behavioral treatment).

<sup>58</sup> See Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, p. 4. Intensive programming can actually increase recidivism for low-risk clients, probably because these clients may be mixed with higher-risk individuals and because the programming requirements may disrupt the prosocial aspects of life (such as employment and family support). See *id.* (citing a 2004 study).

Defenders may face push-back from judges, prosecutors, and treatment providers regarding the concept that community resources should be focused on higher-risk clients. The desire to maximize successful outcomes in any program is natural, and (by definition) a low-risk individual is less likely to re-offend than is a high-risk individual. However, the Risk-Needs-Responsivity model is based on research showing that positive results for a low-risk population are probable *despite* intensive programming, not because of such programming. See Casey, Warren, & Elek, *Using Offender Risk and Needs Assessment Information at Sentencing*, see above n. 2, p. 17 (conditions of probation are counter-productive when not targeted at the individual's critical risk factors; therefore, excessive structure, intensity, and conditions of supervision for low-risk individuals are actually harmful and hinder achieving success; over-supervision also wastes precious justice-system resources).

## APPENDICES

## **Appendix I: Bibliography of Resources Available Online**

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### ***Risk and Needs Assessments***

Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders (Pew Center on the States, 2011), accessible at <http://bit.ly/1HULNL8>

D.A. Andrews and James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 *Psychology, Public Policy, and Law* 39 (American Psychological Association 2010), accessible at <http://bit.ly/1L5SOKM>

James Bonta and D.A. Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* (Public Safety Canada, 2007), accessible at <http://bit.ly/1EvsSUK>

Edward Latessa, et al., *The Creation and Validation of the Ohio Risk Assessment System* (Federal Probation, June 2010), accessible at <http://bit.ly/1EUwxyR>

James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections* (Federal Probation, Vol. 70, No. 2, p. 97, September 2006), accessible for download at <http://bit.ly/1Ljvkmx>

### ***Pretrial Risk Assessments***

Pretrial Risk Assessment 101: Science Provides Guidance on Managing Defendants (Pretrial Justice Institute, 2012), accessible at <http://bit.ly/1Bo6D5s>

Implementing the Recommendations of the 2011 National Symposium on Pretrial Justice: A Progress Report (Pretrial Justice Institute, 2013), accessible at <http://bit.ly/1bYQBDC>

Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment* (U.S. Department of Justice, Bureau of Justice Assistance, March 2011), accessible at <http://bit.ly/1GzlQwu>

Kristin Bechtel, et al., *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research* (Pretrial Justice Institute, 2012), accessible at <http://bit.ly/1bYRiNh>

Arthur Pepin, *Evidence-Based Pretrial Release* (Conference of State Court Administrators, 2013), accessible at <http://1.usa.gov/1bilGAV>

Marie VanNostrand and Christopher Lowenkamp, *Research Report: Assessing Pretrial Risk Without a Defendant Interview* (Laura and John Arnold Foundation, November 2013), accessible at <http://bit.ly/1J7QN1q>

Christopher Lowenkamp et al., *The Development and Validation of a Pretrial Screening Tool*, (Federal Probation, December 2008), accessible at <http://bit.ly/1GKIBTE>

### ***Risk Assessments and Treatment Courts***

Shelli Rossman and Janine Zweig, *The Multisite Adult Drug Court Evaluation* (National Association of Drug Court Professionals, May 2012), accessible at <http://bit.ly/1OJ7S4P>

Douglas Marlowe, *Research Update on Adult Drug Courts* (National Association of Drug Court Professionals, December 2010), accessible at <http://bit.ly/1JbZB2v>

Douglas Marlowe, *Targeting the Right Participants for Adult Drug Courts* (National Drug Court Institute, February 2012), accessible at <http://bit.ly/1QPhj13>

Douglas Marlowe, *Alternative Tracks in Adult Drug Courts: Matching Your Program to the Needs of Your Clients* (National Drug Court Institute, March 2012), accessible at <http://bit.ly/1HUPjoA>

*Instruments for Screening and Assessment of Drug Court Participants to Determine Risk, Need, and Level of Care* (BJA Drug Court Technical Assistance/Clearinghouse Project, updated May 15, 2015), accessible at <http://www.american.edu/spa/jpo/initiatives/drug-court/faq.cfm>

### ***Risk Assessments and Sentencing***

Pamela Casey, Roger Warren, and Jennifer Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group* (National Center for State Courts, 2011), accessible at <http://bit.ly/1DZ9Lip>

*State Efforts in Sentencing and Corrections Reform* (National Governors Association, October 2011), accessible at <http://bit.ly/1OJ91Jz>



## Appendix II: How to Argue the Risk Assessment Instrument in Your Case<sup>1</sup>

Though the issues addressed below are not universal in application, here are some helpful tips for effective defender advocacy regarding risk assessments.

- Get a copy of the risk assessment user guide. Learn proper administration of the risk assessment scoring system.
  - Assess complexity
    - Generally, the more simplistic the risk assessment (10-12 items), the easier to administer properly. The more complex the risk assessment, (the Level of Services/Case Management Inventory (LS/CMI) has 43 questions with many sub-questions) the more room there is for error.
    - Complex instruments are not likely to be minimally reliable or valid without a staff “highly skilled in the application of psychometric assessment forms. Unless the agency has such a staff, the use of these instruments is not recommended.”<sup>2</sup>
  - Argue individual facts
    - Zealous advocacy still demands arguing facts unique to the client that bear on risk factors but may not have been included in the assessment. (for example, for risk assessments that take into account prior arrests, where applicable, argue statistics on race and the likelihood of arrest as bearing on the outcome of the risk score).
  - Find out the scoring range
    - Reference the limit of scoring and use the numbers, avoiding the words “low,” “moderate,” or “high” when the category is negative for your client. In the alternative, argue that your client is, for example, only a 15 out of 34.
    - If the risk assessment has a minimum score other than zero, ensure the judge does not assume that getting a zero is possible and argue that if a person starts at, say two, then the risk score should be treated as zero, with corresponding adjustments for persons with higher scores.
- Argue that no risk assessment can predict or claim to predict behavior in any individual instance. The assessment of risk is statistical, and it is always appropriate and encouraged to remind the court that the risk instrument is an evidence-based tool to assist justice stakeholders in assessing each case individually. The assessment is intended to inform, not replace, the court’s discretion.
- Risk assessments should weigh dynamic factors more heavily than static factors because dynamic factors are more predictive statistically. If the risk assessment puts too much weight on the static factors, argue that the assessment is being used to punish status.
  - For example, more men commit crimes than women. Should gender be a basis for assessing risk with regard to the criminal justice system (despite the significant role gender plays in actuarial risk models for car insurance)?

<sup>1</sup> Special thanks to Ed Monahan, B. Scott West, and the entire Kentucky Department of Public Advocacy for their groundbreaking work on pretrial reform and for their contribution of this appendix, which may serve as a tool for defenders seeking to employ zealous advocacy and due diligence with respect to risk assessment instruments.

<sup>2</sup> James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections* (Federal Probation, September 2006), p.2

- Determine whether the relevant risk assessment literature includes recommended dispositions by risk-category.
  - Low and moderate risk clients will generally benefit from the recommended dispositions. In a validated risk assessment model, only the highest risk should garner intensive supervision either pretrial or post-sentencing.
- Gather information that will assist you in challenging the fidelity of use of the risk assessment instrument in your jurisdiction and possibly cross-examining the person who conducted the risk assessment.
  - For interview-based assessments:
    - Determine whether questions should be asked in a certain manner. Deviation from protocol underlying the risk assessment undermines its validity.
    - Ask whether the assessment tool provides for immediate recording of the answers or whether the assessors note the responses and score after the interview.
    - Inquire about the length of the interview. Assessment tools typically proscribe the appropriate interview length.
    - Find out if the interviewer took any steps to confirm independently the information gathered in the assessment interview. Most current risk assessment user guides recommend this process.
    - Find out how the assessment is scored.
      - What kind of answers indicate low risk vs. high risk? What differentiates a low-risk answer from a moderate-risk or high-risk answer? Who makes that determination?
  - Seek a standing court order that makes assessor training materials, validation studies, and user manuals available to defense counsel in every criminal case, including those in which a risk assessment is not used. (If there is not uniformity in the use of risk assessments in your jurisdiction, there may be cases in which you want to argue for the use of an assessment).
- Educate the court and other stakeholders that the most accurate risk assessments continue to be refined and periodically revalidated.
  - Continue to educate yourself and your colleagues on the development and improvement of risk assessments.
  - For your jurisdiction, determine whether the current risk assessment has been refined for changing population demographics and whether the current risk assessment was developed in partnership with researchers or purchased commercially. (With risk assessments purchased commercially, buyers are not able to make refinements).

## Appendix III: Lessons Learned from Juvenile Detention Risk Assessments<sup>3</sup>

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Miami-Dade County does not utilize a pretrial risk assessment tool in their adult criminal court, but the Public Defenders offer some of their lessons learned from working with the Defender Risk Assessment Instrument (DRAI) used to screen youth for juvenile detention determinations.

- Defenders need to be well-trained on the assessment tool and scoring.

Issues with the DRAI arise when the assessment is completed by probation officers who are undertrained in scoring. Defenders must be well-trained in the DRAI and the scoring in order to identify errors in the scoring and establish credibility in arguing for the score to be adjusted, thus enabling the best chance for a client's release.

- Those conducting risk assessments must be objective parties.

Errors may occur if the risk assessment official improperly influences the score based on a prior experience with a defendant. Factors such as personality and implicit bias can incorrectly influence the risk assessment and thus the detention determination. Given the critical importance of objectivity, those conducting the risk assessment should not have an enforcement approach, but rather a neutral position in completing the risk assessment.

- Early entry of counsel, prior to completion of risk assessment, is essential.

Without counsel to ensure that the risk assessment is conducted properly and to ensure that clients are informed of their rights, clients are exposed to an ultimately unfair detention determination that may also be difficult to argue for changing at a later phase. Early entry of counsel is a check on the other powers that influence detention determination. Without meaningful counsel at the initial detention determination, there is no one specifically advocating for release, and thus the scales of justice are unbalanced.

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<sup>3</sup> Special thanks to Carlos Martinez, Miami-Dade County Public Defender, and his Assistant Public Defenders, Michelle Rosengarten and Christopher Brochyus, for sharing their valuable insights.

## Appendix IV: Pre-Adjudication Risk-Needs Assessment – An Overview of Early

### Implementation<sup>4</sup>

As part of the criminal justice reforms enacted upon Oregon's participation in the Justice Reinvestment Initiative<sup>5</sup> completed in 2013, Multnomah County, Oregon (Portland) now employs a risk and needs analysis pre-adjudication to help determine which defendants, presumptively slated to receive prison sentences, may be safely diverted to an incarceration alternative. It is still early in the implementation project, but initial impressions of the use and impact of the risk-needs assessment are mixed.

One key point from the public defender perspective: justice stakeholders have agreed to prevent use of interview answers outside the scope of the risk-needs assessment. Additionally, the defender perspective includes the following:

- One potential downside of the tool is in recommending programs that do not exist or to which defendants do not have access. In Oregon, there is a focus on documenting what programs are needed and sharing that information with local and state policy makers. On the individual client level, defenders are able to identify for the court instances in which lack of resources, and not willful criminality, lead to failure on probation.
- All practitioners involved with use of the risk-needs tool need to become conversant on the science. For instance, the LSCMI tool, which is the risk-needs assessment instrument used in Multnomah County, is not validated for prison sentence length. Thus, under the LSCMI, a determination of high risk does not correspond with a long prison sentence, if probation is not given.

<sup>4</sup> Thank you to Lane Borg, Executive Director of the Metropolitan Public Defender, Portland, OR. Please see Multnomah County Justice Reinvestment Project page, including data reports, <https://multco.us/lpscc/mcjrj>

<sup>5</sup> Justice Reinvestment Initiative - Background (Bureau of Justice Assistance), accessible at <https://www.bja.gov/programs/justicereinvestment/background.html>. Justice Reinvestment Initiative – Oregon (Bureau of Justice Assistance), accessible at <https://www.bja.gov/programs/justicereinvestment/oregon.html>.





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