

IN THE
SUPREME COURT OF INDIANA

NO. 79S02-0908-CR-365

ANTHONY MALENCHIK,)	Court of Appeals Cause No.
)	No. 79A02-0902-CR-133
Appellant-Defendant,)	
)	Tippecanoe Superior Court
v.)	Cause No.
)	79D05-0711-FD-628
STATE OF INDIANA,)	
)	The Honorable
Appellee-Plaintiff.)	Les A. Meade, Judge

**BRIEF IN SUPPORT OF TRANSFER OF AMICUS CURIAE,
INDIANA PUBLIC DEFENDER COUNCIL**

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I.
STATEMENT OF INTEREST BY AMICUS CURIAE

The mission of the Indiana Public Defender Council is to improve legal representation provided at public expense in Indiana state courts. The Council fulfills its mission, in part, by providing research, training and consultation on strategy and tactics to public defenders.

The Council has an interest in obtaining clarification about when, if ever, a trial court may base its sentencing decision on the Level of Service Inventory-Revised (“LSI-R”), the Substance Abuse Subtle Screening Inventory (“SASSI”), and other standardized tests. The Council has an interest in disseminating information and analysis to its members about the Court’s position on this issue.

The Council’s interests are substantively aligned with Appellant/Defendant Anthony Malenchik.

II.
BACKGROUND

The LSI-R is a 54-item rating scale that measures static factors related to a person’s risk of recidivism and identifies dynamic areas of risk. Among other things, LSI-R evaluates a person’s criminal history, leisure/recreation, education/employment, companions, finances, substance abuse, family/marital situation, emotional/personal status, accommodation, and attitudes of the individual. *Report of the Re-Entry Policy Council*, The Council of State

Governments, Recommendation 8-A.¹ The higher an LSI-R score is, the greater is the risk of recidivism.

LSI-R is used to assess an offender's rehabilitation needs. *Rhodes v. State*, 896 N.E.2d 1193, 1195 n.4 (Ind. Ct. App. 2008). "It is an actuarial instrument that may help a probation department determine rehabilitative services for an offender." *Id.*

SASSI was designed to help those in the helping professions identify individuals with substance abuse disorders.² SASSI was created in response to the request for drug screening services by the Lehigh County (Pennsylvania) Departments of Probation, Pretrial Services, and the Office of the Court Administrator.³ SASSI is used by probation officers and prison staff to determine which offenders are at higher risk for substance dependence disorder. For example, SASSI was normed for the North Carolina prison population to identify inmates with a high probability of substance abuse problems. Virginia Price, *Substance Abuse Treatment Continuum in the North Carolina Department of Correction*, North Carolina Medical Journal, 63.⁴

¹ Available at <http://reentrypolicy.org/Report/PartII/ChapterII-A/PolicyStatement8/Recommendation8-A>.

² The SASSI Institute, available at <http://www.sassi.com/aboutus/>.

³ Substance Abuse Screening Services, Inc., available at <http://www.yoursassi.com/About.aspx>.

⁴ Available at <http://www.ncmedicaljournal.org/Jan-Feb-09/Price.pdf>.

Malenchik's pre-sentence report included an LSI-R, which covered a wide swath of factors, including criminal history, education and employment, financial status, family relations, accommodations, leisure and recreation, relationships outside the family, alcohol and drugs, emotional and personal issues, and attitudes and orientation. (Appendix, Green Volume at 8)

Malenchik scored 41 on the LSI-R, placing him in the High Risks/Needs category. Malenchik's score included:

Criminal History (+7 points);
Education and Employment (+5 pts: record of employment, highest grade completed and prior suspension from school);
Financial (+1 pt: financial difficulties);
Family (+3 pts: relationship with parents and family/significant others with criminal records);
Accommodations (+1 pt: high crime neighborhood);
Leisure and Recreation (+2 pts: lack of organized activity and poor use of time);
Companions (+4 pts: criminal acquaintances and friends),
Emotional and Personal Issues (+3 pts: past and present mental health treatment and diagnoses).

(Appendix, Green Volume at 8)

The pre-sentence report concluded that Malenchik's SASSI score indicated that he is at high risk for substance dependence disorder. (*Id.*)

At the sentencing hearing, the trial court noted Malenchik's criminal record and also twice referred to his LSI-R and SASSI scores. (Sentencing Tr. at 12, 38)

III. SUMMARY OF ARGUMENT

Use of standardized tests such as the LSI-R and SASSI for sentencing undermines a trial court's duty to impose an individualized sentence. Scores from

these standardized tests are based on probabilities determined from testing a pool of offenders under criteria established by others. These probabilities do not take into account the specifics of any one defendant's circumstances.

Standardized tests such as LSI-R and SASSI are unreliable and inappropriate for use at sentencing because: 1) they were not designed for sentencing; they were designed to help correctional officials determine appropriate placement, treatment, and level of supervision for offenders; 2) some of the factors it measures (*e.g.* criminal history) are already considered by Indiana judges when imposing sentences, thus resulting in undue emphasis on a particular factor; 3) LSI-R measures characteristics of dubious relevance to the sentencing decision, such as a defendant's financial status, use of time, and how far a defendant went in school; 4) problems with inter-rating and intra-rating consistency; and 5) LSI-R is of questionable reliability even for the purposes for which it was designed; one study found that the predictive validity of the LSI-R was lower for African-American and Hispanic male offenders.

Use of LSI-R and SASSI for sentencing violates a defendant's right to due process. This right includes the right to be sentenced with accurate and reliable information. LSI-R and SASSI do not provide accurate, reliable information for sentencing.

IV. ARGUMENT

A. USE OF STANDARDIZED TESTS SUCH AS LSI-R AND SASSI UNDERMINES A COURT'S DUTY TO IMPOSE AN INDIVIDUALIZED SENTENCE

A sentencing court's role is to create an appropriate, individualized sentence. *Rhodes*, 896 N.E.2d at 1195 (citing *Timberlake v. State*, 690 N.E.2d 243, 266 (Ind. 1997)). This requirement precludes the use of a one-size-fits-all assessment tool for determining an appropriate sentence. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

The use of a standardized scoring model, such as the LSI-R, undercuts the trial court's responsibility to craft an appropriate, individualized sentence. Relying upon a sum of numbers purportedly derived from objective data cannot serve as a substitute for an **independent** and thoughtful **evaluation** of the evidence presented for consideration.

Rhodes, 896 N.E.2d at 1195 (emphasis added).

This Court has also criticized a formulaic approach to sentencing.

Any effort to force a sentence to result from some algorithm based on the number and definition of crimes and various consequences removes the ability of the trial judge to ameliorate the inevitable unfairness a mindless formula sometimes produces.

Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Use of LSI-R, SASSI, and other standardized tests undermines a judge's duty to sentence a defendant according to factors particular to that defendant. These tests are based on probabilities based on criteria established by someone other than the sentencing judge. The probabilities are calculated from testing pools of offenders and have nothing to do with the particularities of any one

defendant. Plugging numbers into someone else's formula to calculate risk of recidivism falls far short of imposing a sentence that is the result of reasoned, individualized consideration. At worst, reliance on these tests could reduce trial courts to the ministerial task of "crunching the numbers" to get the "right" sentence.

Accordingly, the Court should disapprove use of standardized sentencing models because they undermine a judge's duty to impose an individualized sentence.

B. THE LSI-R AND SASSI ARE UNRELIABLE FOR SENTENCING BECAUSE NEITHER TEST WAS DESIGNED FOR SENTENCING

The LSI-R and SASSI are unreliable for sentencing because they were not designed for sentencing. LSI-R was designed to assess appropriate placements after conviction. Christopher T. Lowenkamp & Edward J. Latessa, *Validating the Level of Service Inventory Revised in Ohio Community Based Correctional Facilities*, 49.⁵ LSI-R focuses on post-conviction placement; it helps assess security risks, appropriate treatment, and helps determine the proper amount of supervision for parolees and probationers. *Report of the Re-Entry Policy Council*, *supra*, at Recommendation 8-A.⁶ The American Probation and Parole Association lists both LSI-R and SASSI as assessment instruments.⁷

⁵ Available at <http://www.uc.edu/criminaljustice/ProjectReports/OHIOCBCFLSI-R.pdf>.

⁶ Available at <http://reentrypolicy.org/Report/PartII/ChapterII-A/PolicyStatement8/Recommendation8-A>.

Tests like the LSI-R look prospectively to determine how correctional facilities should place, treat, and supervise offenders. A judge, however, looks retroactively to determine an appropriate sentence based on the offense and the defendant's particular history, criminal and otherwise.

The fact that the LSI-R considers some factors Indiana judges also consider in sentencing (*e.g.* criminal history) also undermines accuracy and reliability in sentencing. Judges using the LSI-R could unwittingly twice count a defendant's criminal history against the defendant.

Here, the trial court used the LSI-R score as an aggravator in addition to performing an independent evaluation of the evidence. This is also problematic, because areas analyzed in this psychological inventory *appear duplicative of factors already considered by the trial court in sentencing (criminal history, education, employment)* . . .

Rhodes, 896 N.E.2d at 1195 (emphasis added). *See also Haas v. State*, 849 N.E.2d 550, 553 (Ind. 2006).

These tests are also unreliable to the extent judges and probation officers have not been trained in the proper administration and interpretation of such tests. Studies have shown that proper training is essential to properly administer the LSI-R and to interpret results. Christopher T. Lowenkamp & Edward J. Latessa, *Validating the Level of Service Inventory Revised in Ohio Community Based Correctional Facilities*, 49. Another study found that even after intensive training, reliability with subjective factors such as finances and family/marital was still low.

⁷ Available http://www2.courtinfo.ca.gov/probation/documents/adult_app2.pdf.

James Austin, Ph.D., *et al.*, *Reliability and Validity Study of the LSI-R Risk Assessment Instrument*, The Institute on Crime, Justice, and Corrections, 12.

One goal of training is to improve inter-rater and intra-rater consistency. Inter-rater consistency deals with whether two people computing the LSI-R on the same person reach the same rating. (Austin, *supra*, at 6) Intra-rater consistency refers to whether a single scorer for the LSI-R of one inmate will calculate the same LSI-R score on repeated applications. (*Id.*) At least one study shows that without significant training, inter-rater and intra-rater consistency is poor. (*Id.* at 16).

Further, the LSI-R is not reliable because it includes information of “questionable value,” such as “leisure and recreation.” *Rhodes*, 896 N.E.2d at 1195. Some of the questionable factors contributing to Malenchik’s score are: 1) a school suspension; 2) financial difficulties; 3) the criminal records of Malenchik’s family and friends; 4) the high crime rate in his neighborhood; and, 5) his “lack of organized activity and poor use of time.” (Appendix, Green Volume, at 8).

Finally, the LSI-R is not a reliable tool because only 11 of the 54 factors have a statistical association with recidivism. Austin, *supra*, at 18.

LSI-R’s lack of reliability makes it inappropriate for use in sentencing.

C. THE RELIABILITY OF THE LSI-R IS DOUBTFUL EVEN FOR THE PURPOSES FOR WHICH IT WAS DESIGNED, FURTHER UNDERSCORING THAT COURTS SHOULD NOT USE THE LSI-R IN SENTENCING

Some studies laud the LSI-R for its reliability in helping to decide placement, treatment, and of offenders. Christopher P. Lowenkamp, Ph.D.,

Kristin Bechtel, *The Predictive Validity of the LSI-R on a Sample of Offenders from the Records of the Iowa Department of Corrections Data Management System*, *Federal Probation*, Volume 71, No. 3.⁸

Other studies, however, have shown that the LSI-R is not completely reliable even for these purposes. For example, a report to the Pennsylvania Board of Probation and Parole found that the LS-R had “problematic reliability” for “assessing risk [of recidivism] at the time of a parole interview,” although intensive training can help improve reliability. Austin, *supra*, at iii, 9, 12, 15, 16. The same study found that reliability was still low after training for subjective factors such as family life and finances. (*Id.* at 12) This study recommended against using the LSI-R in parole consideration decisions in assessing risk. (*Id.* at 22) However, the study found that a “more succinct” instrument, the LSI-SV, which incorporates some elements of the LSI-R, would be more effective in assessing risk of recidivism. (*Id.*)

Another study showed that the LSI-R has less predictive validity for African-Americans and Hispanics, although it is still useful. Melinda D. Schlager and David J. Simourd, *Validity of the Level of Service Inventory-Revised (LSI-R) Among African-American and Hispanic Male Offenders*, *Criminal Justice and Behavior*, 545, 553.⁹ (“While the predictive validity of the LSI-R in this instance was weak, compared with other published research on the LSI-R, the relatively

⁸ Available at http://www.uscourts.gov/fedprob/December_2007/predictiveValidity.html.

⁹ Available at <http://cjb.sagepub.com>.

high means observed for both the African American and Hispanic subsamples suggest that the LSI-R is still effective. Certainly, further analysis of the use of LSI-R on minority offender populations is warranted and encouraged.” (*Id.*)

The LSI-R’s mixed record of reliability for the purposes for which it was designed casts more doubt on its reliability for sentencing.

D. USE OF UNRELIABLE STANDARDIZED SENTENCING MODELS VIOLATES A DEFENDANT’S RIGHT TO DUE PROCESS

Due process requires that sentences be based upon accurate and reliable information. *Gardner v. State*, 270 Ind. 627, 388 N.E.2d 513, 520 (1979); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204 (1977) (“[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.”) A sentence based on materially untrue assumptions violates due process. *Gardner*, 388 N.E.2d at 520.

As discussed above, there are many reasons that standardized tests like LSI-R and SASSI are not appropriate or reliable for sentencing. Thus, the use of LSI-R and similar tests in sentencing decisions will create due process concerns in *any* sentencing decision that relies, even if only in part, on standardized test scores.

Here, due process concerns are apparent because Malenchik’s LSI-R score was based on the fact that he lives in a high crime neighborhood, has friends and family who have criminal records, and does not efficiently use his time.

(Appendix, Green Volume, at 8) These factors are not appropriate or reliable for sentencing.

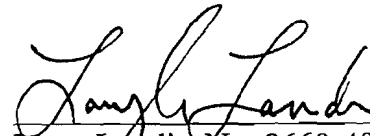
**E. THE COUNCIL ACKNOWLEDGES MOVEMENT TOWARD EVIDENCE
BASED SENTENCING PRACTICES BUT THIS MOVEMENT DOES NOT
SUGGEST TOOLS LIKE LSI-R SHOULD BE USED TO DETERMINE THE
LENGTH OF A SENTENCE**

Finally, the Council acknowledges efforts of the Indiana Judicial Center as part of a national initiative to adopt evidence based sentencing practices. The Council would note, however, that the focus of these efforts is to identify offenders who should be diverted from prison and to promote the use of community-based alternatives and services for appropriate offenders. (*See* Amicus Curiae Brief of the Indiana Judicial Center, Judge Warren quotation, at 7-8) Nothing in the movement toward evidence-based sentencing practices suggests that instruments like LSI-R should be used to determine the length of a prison sentence.

**V.
CONCLUSION**

Wherefore Amicus Curiae, the Indiana Public Defender Council, substantially aligned with the Appellant, Anthony Malenchik, respectfully requests that this Court bar the use of standardized test scores such as the LSI-R and SASSI in sentencing decision. The Public Defender Council also respectfully requests the Court to remand the matter to the Tippecanoe Superior Court for re-sentencing.

Respectfully submitted,



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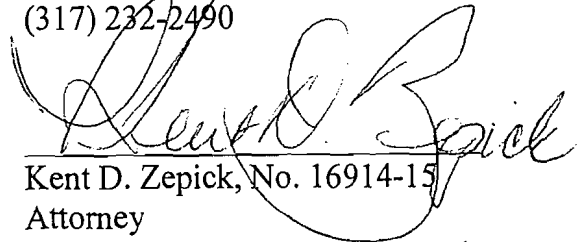
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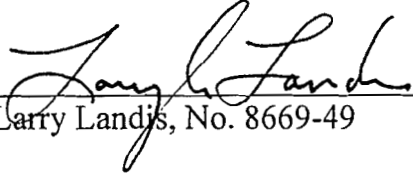
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WORD COUNT CERTIFICATE

I certify that this amicus curiae brief does not exceed 3,750 words.


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CERTIFICATE OF SERVICE

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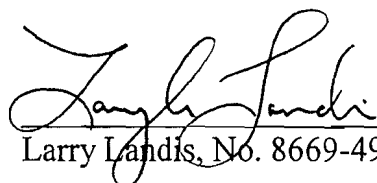
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