

In the  
Indiana Supreme Court

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No. 79S02-0908-CR-365

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|------------------------------|---|----------------------------------|
| ANTHONY MALENCHIK,           | ) | On Petition to Transfer from the |
|                              | ) | Indiana Court of Appeals         |
| Appellant (Defendant below), | ) | No. 79A02-0902-CR-133            |
|                              | ) |                                  |
| vs.                          | ) | Appeal from the                  |
|                              | ) | Tippecanoe Superior Court        |
| STATE OF INDIANA,            | ) |                                  |
|                              | ) | Cause No. 79D05-0711-FD-628      |
| Appellee (Plaintiff below).  | ) |                                  |
|                              | ) | The Honorable Les Meade, Judge   |
|                              | ) |                                  |

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**BRIEF OF *AMICUS CURIAE* INDIANAPOLIS BAR ASSOCIATION,  
CRIMINAL JUSTICE AND APPELLATE PRACTICE SECTIONS,  
IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER**

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**STATEMENT OF THE INTEREST OF AMICUS CURIAE**

The Criminal Justice Section is a nonpartisan section of the Indianapolis Bar Association comprising more than 230 members, including judges, prosecutors, public defenders, and private defense attorneys. The purpose of the Section includes the bringing together of members “interested in the problems of criminal law matters throughout Indiana to meet and confer upon their various problems through this Section; promote the legal education of members of the Bar and the public on the problems of criminal law through

the sponsoring of meetings, institutes and conferences and by preparing and publishing legal writings in the field of criminal law.” The Appellate Section, also a nonpartisan section of the Indianapolis Bar Association and comprising more than 100 attorneys who are members of the Bar of this Court, works generally to assist its members in facing the problems and challenges of practicing appellate law. The Section was formed in 2006 and, as stated in its bylaws, “it shall be the purpose of this Section to . . . when appropriate, be the voice of the local appellate bar.” Among its objectives is to represent the interests of its membership in matters implicating broad, significant legal and ethical issues that affect lawyers, their clients and the general public.

### **SUMMARY OF THE ARGUMENT**

The sentencing process works well without the use of scoring models. In felony cases judges are presented with a pre-sentence investigation report that includes a wealth of pertinent information. Counsel present witnesses and argument in open court, and judges provide an explanation of reasons for the sentence imposed. Although everyone in the courtroom may not agree with the sentence, no one is left wondering the reasons behind it.

The use of scoring models may undermine the sentencing process. Scoring models are often not designed to or capable of assessing an appropriate sentence. Some topics are duplicative of standard sentencing considerations while others are of questionable relevance. Moreover, the administration of complicated models requires a great deal of training to achieve reliable results. Finally, the mere recitation by judges of a numeric

result from a scoring model, without some understanding of where it came from and what it means, may raise concerns about the fairness of the process and the ability of defendants, victims, and the public to understand and have confidence in the sentencing process and, more broadly, the criminal justice system.

In light of these concerns, the ad hoc use of scoring models at sentencing should be discouraged. If this Court believes they have merit, further study with the involvement of all the relevant constituencies (judges, prosecutors, defense attorneys, and probation officers) would be desirable in selecting and administering a scoring model that furthers the important goals of consistency, transparency, and fairness at sentencing.

## ARGUMENT

### **I. Sentencing hearings work well without scoring models.**

The sentencing process works well without the use of scoring models, which are used by no judges in Marion County. Consistent with the statutory scheme and this Court's decisional law, sentencing decisions based on a wealth of pertinent information are reached and explained in open court.

An integral part of the sentencing process is the Presentence Investigation Report ("PSI") prepared by the probation department. It must include the circumstances of the offense; the defendant's history of delinquency or criminality, social history, employment history, family situation, economic status, and education; and the impact of the crime upon the victim. Ind. Code § 35-38-1-9 (2008). It may include other matters the probation officer believes relevant to the sentence. Id. The prosecutor and defense are given

an opportunity to review and make corrections to the PSI, and the defense may also submit its own report. Ind. Code § 35-38-1-11 (2008).

Beyond the PSI, the State and defense often submit additional evidence at sentencing by calling witnesses or submitting documents. Ind. Code § 35-38-1-3 (2008). Counsel also offer arguments about the appropriate sentence.

Finally, trial judges provide an explanation of reasons for the sentence imposed. Indiana Code section 35-38-1-7.1 provides a non-exhaustive list of aggravating and mitigating factors, such as the victim's age or the defendant's lack of criminal history. Trial courts cite these and other relevant factors in providing a "statement including reasonably detailed reasons or circumstances for imposing a particular sentence. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007); Ind. Code § 35-38-1-1.3 (2008). Consistent with this framework, trial courts are well-positioned to assess the likelihood to reoffend and other factors in arriving at a sentence. Although everyone in the courtroom may not agree with the sentence, no one is left wondering the reasons behind it.

## **II. The ad hoc use of scoring models at sentencing may undermine the important goals of consistency, fairness, and transparency.**

Interjecting the use of a scoring model such as the LSI-R may undermine the sentencing process for several reasons: (1) the content of scoring models may be irrelevant or duplicative of proper sentencing information; (2) those administering the scoring model may not be properly trained; (3) many scoring models are not designed to or capable of determining an appropriate sentence; and (4) the information shared in open court about the scoring model is often not "reasonably detailed" or otherwise understandable.

## Content

Many of the questions and topics explored by the LSI-R are not related to the appropriate sentence that should be imposed. “The LSI-R is a standardized actuarial instrument that contains 54 items and produces a summary risk score that can be categorized into five risk levels. . . . Higher risk levels reflect an increase in the propensity to commit future criminal acts.” Rhodes v. State, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008) (quoting 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 Fed. Probation 25, 25-26 (Dec. 2007)). As the court of appeals noted in Rhodes, the areas analyzed in the LSI-R “appear duplicative of factors already considered by the trial court in sentencing (criminal history, education, employment) and other areas appear of questionable value (leisure and recreation).” Id. at 1195. For example, it probes “emotional and personal factors or attitude and orientation,” including questions about sexual dissatisfaction. Bernard E. Harcourt, Against Prediction: Profiling, Policing and Punishing in an Actuarial Age 78-81 (2007).<sup>1</sup>

## Administration

Basic scoring instruments may be administered with relative ease by persons with little training, but complicated risk assessments like the LSI-R “require a well-structured

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<sup>1</sup> Many of the materials cited in this brief were not cited to the trial court and are not part of the record on appeal. Although Judicial Conduct Rule 2.9(C) forbids investigation of “specific facts relating to the incident upon which a lawsuit is based,” it does not “restrain appellate consideration of other general information helpful to the function of appellate courts . . . .” Stanley v. Walker, 906 N.E.2d 852, 863 n.3 (Ind. 2009) (Dickson, J., dissenting).

interview and a review of all relevant case file data. . . . Such instruments are unlikely to achieve the minimal levels of reliability and validity unless the staff is highly skilled in the application of psychometric assessment forms.” James Austin, The Proper and Improper Use of Risk Assessment in Corrections, 16 Fed. Sent’g Rep. 194, 198 (2004). Although the same topics are always covered, those administering the instrument have “some leeway in asking the questions in order to build rapport with the interviewee, but essentially ask[] questions like “How do you do in your job?” and “Do you have a lot of friends?” Harcourt, supra, at 78-80.

#### Efficacy

Many scoring models are not designed to or capable of recommending an appropriate sentence. The LSI-R “was never designed to assist in establishing the just penalty.” D. A. Andrews & James L. Bonta, The Level of Service Inventory - Revised (LSI-R) User’s Manual 3 (1999). A study in Pennsylvania of more than 1,000 prisoners “found that only eight of the LSI-R items were associated with recidivism, and they tended to be static measures related to prior criminal history or drug use.” Harcourt, supra, at 83. Finally, although this Court has not previously addressed the LSI-R, it has appropriately criticized the use of ad hoc questionnaires in another context. See Matheny v. State, 688 N.E.2d 883, 909 (Ind. 1997) (“We find this particular product, the Letsinger questionnaire, an unimpressive one. As interpreted by persons trained in its use, a completed MMPI might have some value in making certain sentencing decisions.”).

### Sentencing statements

As this Court reiterated in Anglemyer, “a sentencing statement identifying aggravators and mitigators retains its status as an integral part of the trial court’s sentencing procedure.” 868 N.E.2d at 490.

A statement by the sentencing judge explaining the reasons for commitment can help both the defendant and the public understand why a particular sentence was imposed. An acceptance of the sentence by the defendant without bitterness is an important ingredient in rehabilitation, and acceptance by the public will foster confidence in the criminal justice system.

Abercrombie v. State, 275 Ind. 407, 412, 417 N.E.2d 316, 319 (1981). Simply saying that a defendant scored a 41 on the LSI-R is unlikely to accomplish this. Rather, it likely leaves the defendant, the victim, the public, and perhaps even the prosecutor and defense lawyer confused.

The confusion created by scoring models stands in stark contrast to requirements from this Court’s sentencing jurisprudence. This Court has long held that a trial court merely reciting statutory factors is insufficient. Montgomery v. State, 694 N.E.2d 1137, 1142 (Ind. 1998). For example, trial courts may not simply state a defendant has a criminal history but must explain the specific convictions and facts underlying the otherwise “conclusory” statement. Mayes v. State, 744 N.E.2d 390, 396 (Ind. 2001). Nevertheless, remand is sometimes viewed as “pointless and unnecessary because the specific facts underlying the aggravating factor were readily discernible from the record.” Id. (citing Adkins v. State, 532 N.E.2d 6, 9 (Ind. 1989)).

A bottom-line number from a scoring model is less meaningful to those in the courtroom or to an appellate court reviewing the case than the simple mention of a statutory aggravating circumstance. More troubling, the facts underlying that score are not readily discernible. Even if the score sheet were available, trying to figure out the basis of that score or its validity would be a challenge in light of the content, administration, and efficacy of the LSI-R.

The use of scoring models may create a considerable amount of litigation in both trial and appellate courts. Defense lawyers faced with a high LSI-R score that threatens to enhance their client's sentence may seek to mitigate the damage by securing the testing instrument, questioning the person who completed it, submitting contrary evidence, and perhaps even calling expert witnesses to testify about the nuances and efficacy of the particular scoring model. The State, faced with a particularly low score and the possibility of a short sentence, may seek to do the same. This could well become a sideshow far removed from the statutory sentencing considerations and those that have commonsense meaning in courtrooms across the state. The litigation could well continue (or even begin) at the appellate level. See generally Kincaid v. State, 837 N.E.2d 1008, 1010 (Ind. 2005) (observing this Court "reviews many claims of sentencing error . . . without insisting that the claim first be presented to the trial judge"). Finally, if trial or appellate counsel have been perceived to have dropped the ball at any point in all of this, the issue is likely to surface as an ineffective assistance of counsel claim in a post-conviction proceeding.

As this Court recently observed in another context, “[a]ny 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). The same principle can be applied here and counsels against the use of scoring models as part of the sentencing process.

**III. Further study and consultation with key constituencies would be desirable before scoring models are used at sentencing.**

This Court has long worked toward reducing the inconsistency of sentences in different counties or by individual judges. Every judge doing their own thing with scoring instruments will likely exacerbate the problem.

Article 7, Section 4 grants this Court “supervision of the exercise of jurisdiction by the other courts of the State,” which has been applied in a variety of contexts. See, e.g., Williams v. State, 690 N.E.2d 162, 169-70 (Ind. 1997) (courtroom security procedures); Winegeart v. State, 665 N.E.2d 893, 902 (Ind. 1996) (reasonable doubt instruction). That power could be appropriately exercised to disapprove the ad hoc use of scoring models like the LSI-R.

This is not to say scoring models could not have an important role to play in the future. The collection and use of relevant information at sentencing should be encouraged. Seldom can a court can have too much information when deciding the fate of another human being. As it stands, though, the pitfalls of the LSI-R outweigh its promise.

If a committee of this Court or the Indiana Judicial Conference, in consultation with the key constituencies (prosecutors, defense lawyers, and probation officers), worked toward standardizing evaluations and treatment of defendants, a scoring model may well contribute to the important goal of equal and consistent justice at sentencing.

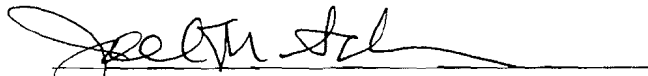
**CONCLUSION**

For the foregoing reasons, the Criminal Justice and Appellate Practice Sections of the Indianapolis Bar Association respectfully request this Court issue a decision that discourages the ad hoc use of scoring models in sentencing.

**WORD COUNT CERTIFICATE**

I affirm under penalties for perjury that this brief contains no more than 3750 words.

Respectfully submitted,



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