



# Ohio Judicial Conference Policy Statement

## POLICY STATEMENT ON THE OHIO RISK ASSESSMENT SYSTEM AND RISK AND NEEDS ASSESSMENT TOOLS

Prepared by

*Ohio Judicial Conference Community Corrections Committee*

Approved by

Ohio Judicial Conference Executive Committee

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#### What is a Policy Statement?

A Policy Statement describes as objectively and accurately as possible the position of the Ohio Judicial Conference. Typically, policy statements are developed by a standing committee of the Ohio Judicial Conference and presented to the full Executive Committee for their consideration. All policy statements are approved by the full Executive Committee of the Ohio Judicial Conference. The Ohio Judicial Conference prepares these statements to clarify and explain the position the Judicial Conference has taken with regard to a particular issue that the Judicial Conference has determined relevant to the administration of justice.

#### Ohio Judicial Conference

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*"The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary." **State ex rel. Bray v. Russell, 89 Ohio St.3d 132, 2000-Ohio-116,***

#### Summary

The Ohio Judicial Conference recognizes the value and statutory obligation for the use of a single validated Risk and Needs Assessment Tool, namely the Ohio Risk Assessment System – Community Supervision Tool (ORAS–CST) and Misdemeanor Assessment Tool (ORAS–MAT). Further, we support the use of the tool as one of several means to inform and assist judges in sentencing decisions regarding offender risk reduction and management within the community. Such tools, however, should not be used to replace or limit judicial discretion in sentencing, and are not a replacement for the judicial function of determining the length of an appropriate sentence for each offender based on the individual circumstances of the offense. They are tools that should be used to help judges make decisions, not tools to be used to make decisions for judges.

As the United States Department of Justice recently opined in a letter to the United States Sentencing Commission, "basing criminal sentences, and particularly imprisonment terms on [risk assessment] data – rather than the crime committed and surrounding circumstances – is a dangerous concept that will become much more concerning over time as other far reaching sociological and personal information unrelated to the crimes at issue are incorporated into risk tools. This phenomenon ultimately raises constitutional questions because of the use of group-based characteristics and suspect classifications in the analytics."

With these concerns in mind, the Ohio Judicial Conference has adopted the following guiding principles relative to the use of ORAS and risk and needs assessment tools:

- 1) Risk and need assessment information should be used as a tool to inform a sentencing judge of public safety considerations related to offender risk reduction and management should the offender be placed on community control. It should not be used as an aggravating or mitigating factor in determining the severity of an offender's sanction.
- 2) Risk and needs assessment information is one factor for judges to consider in determining whether an offender can be supervised safely and effectively in the community. Because risk and needs assessment information is only one factor, judicial reliance or non-reliance on risk assessment tools, such as ORAS, should

not be a performance criteria or performance standard used in the determination of grant funding to courts.

- 3) Risk and needs assessment information should be used to aid the judge in crafting terms and conditions of probation supervision that enhance risk reduction and management. It can also be used to provide assistance in determining appropriate responses if the offender does not comply with the required conditions. Again, however, because risk and needs assessment information is only one factor in an offender's overall circumstances, it should not be used by state agencies to determine which court-ordered programs or services receive funding reimbursement.

#### Evolution of the Ohio Risk Assessment System

Criminal sentencing in the United States long reflected a rehabilitative model, wherein, judges were given broad and largely unfettered discretion in matters of sentencing and punishment. Disparate sentences and uncertainties related to imprisonment, however, led to public and institutional dissatisfaction with sentencing protocols. As a result, legislative bodies shifted public policy from rehabilitative sentencing to retributive sentencing, a policy that placed the emphasis on the offense rather than the offender. The Ohio General Assembly adopted such a policy with the enactment of Senate Bill 2, "Truth in Sentencing," in 1996.

Consistent with this retributive philosophy, Senate Bill 2 established the purposes and principles of felony sentencing, so that the overriding purpose is to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. This requires the sentencing court to consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

In addition, Senate Bill 2 altered traditional probation by establishing a menu of sanctions that included community control, residential sanctions, and financial sanctions. In Ohio, the Department of Rehabilitations and Corrections began providing funding to local probation departments through grants to community corrections boards. These grants were conditioned on prison and jail diversions and led to a partnership between the Department and the University of Cincinnati to evaluate grant funded programs and treatment for effectiveness. What the University of Cincinnati discovered was a series of criminogenic factors that it opined necessary to identify and address during the sentencing stage in order to meaningfully reduce recidivism. The use of evidence-based sentencing and the mandatory statewide uniform risk and needs assessment tool thus came to Ohio.

The shift to retributive sentencing policies coincided with a dramatic drop in crime across the country, but also a concomitant and significant increase in prison populations at both the state and federal levels. The Ohio General Assembly revisited sentencing policy in Ohio in 2011 with the enactment of House Bill 86 with the hopes of addressing the costs associated with a ballooning prison population.

#### House Bill 86 and the Integration of ORAS into Judicial Sentencing

When House Bill 86 emerged from the General Assembly, it, among other things, created a constitutionally and canonically suspect entanglement between the Department of Rehabilitation and Corrections, local community corrections board, and participating courts of common pleas by directing the DRC to establish and administer probation improvement and probation incentive grants for courts of common pleas that supervise felony probationers. The bill tied eligibility for grants to the court's compliance with statutory probation duties and its implementation of ORAS. The tool is to be applied and integrated into the operation, supervision, and case planning of virtually every sector of the criminal justice system, including by judges, at sentencing.

The integration of ORAS in this manner has created a tension between the purposes and principles of sentencing outlined above, that establish offender accountability for past criminal behavior, and evidence-based sentencing that employs risk and needs assessment tools to statistically predict the likelihood of recidivism and dictate judicial sentencing. The purposes and principles of sentencing require a qualitative analysis of the seriousness of the crime, recidivism factors that focus on the offense, the harm to the victim, and the offender's criminal history. The ORAS emphasizes criminogenic and sociological factors that establish a quantitative profile of the offender that actuarially predicts future behavior. The tension arises because under this model, the ORAS interferes with the exercise of judicial discretion in criminal sentencing.

### Guiding Principles for the use of ORAS and Risk and Needs Assessment Tools

The National Center for State Courts (NCSC) has developed and published a guide for courts titled “Using Offender Risk and Needs Assessment Information at Sentencing.” The guide promotes evidence-based sentencing as means of reducing recidivism, not as a means of reducing incarceration, and states that risk and needs assessment tools should be used to inform the sentencing judge, not to replace judicial discretion or to determine an offender’s sentence. The Ohio Judicial Conference has adopted the following three guiding principles and explanations directly from the NCSC Guide:

**Risk and need assessment information should be used as a tool to inform a sentencing judge of public safety considerations related to offender risk reduction and management should the offender be placed on community control. It should not be used as an aggravating or mitigating factor in determining the severity of an offender’s sanction.**

Whereas punishment seeks to hold the offender accountable for *past* criminal conduct, general deterrence and risk reduction management seek to promote public safety by deterring and preventing *future* criminal conduct. Risk and Needs Assessment information is, therefore, relevant to the sentencing objective of effectively reducing and managing the offender’s future risk to the community. It is not relevant to determining the severity of the sanction that will appropriately punish the offender for his or her prior criminal conduct. To the contrary, the nature and extent of the penalty or sanction to be imposed for the purpose of punishing the offender depends upon factors such as the culpability of the offender, the gravity of the offense committed, the offender’s prior criminal record, and the nature and extent of the resulting harm to the victims and community.<sup>1</sup>

**Risk and needs assessment information is one factor for judges to consider in determining whether an offender can be supervised safely and effectively in the community. Because risk and needs assessment information is only one factor, judicial reliance or non-reliance on risk assessment tools, such as the ORAS-CST and ORAS-MAT, should not be a performance criteria or performance standard used in the determination of grant funding to courts.** It is not the risk of re-offense at the specific time of sentencing that will ultimately determine whether an offender reoffends, but choices made by the offender after sentencing. For example, a low risk offender may not be a good candidate for probation if the gravity of the offense committed and the offender’s culpability are so great that any disposition other than prison would constitute a disproportionately lenient sentence. Likewise, a higher risk offender who has committed a less serious offense involving a relatively low level of culpability may be a particularly good candidate for probation supervision.<sup>2</sup> Because other criteria are relevant to the risk determination, reliance or non-reliance on risk assessment tools should not be used to determine grant funding to courts. While aggregate risk and needs data is valuable in assessing offender behavior, it is not valuable, and should not be used to assess judicial behavior. Grant funding should be court and community needs based, and evaluation standards should be based on the court’s use of the funds to implement the program(s) in the grant proposal rather than as an effort to influence judicial behavior and sentencing outcomes.

**Risk and needs assessment information should be used to aid the judge in crafting terms and conditions of probation supervision that enhance risk reduction and management. It can also be used to provide assistance in determining appropriate responses if the offender does not comply with the required conditions. Again, however, because risk and needs assessment information is only one factor in an offender’s overall circumstances, it should not be used by state agencies to determine which court-ordered programs or services receive funding reimbursement.** Risk and Needs Assessment information and the pre-sentence investigation report and recommendations both inform the judge’s exercise of discretion in crafting appropriate conditions of probation. They are, however, only one source of information that should be considered in the context of an offender’s overall circumstances.<sup>3</sup>

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<sup>1</sup> National Center for State Courts: Using Offender Risk and Needs Assessment Information at Sentencing, pgs. 11 – 13.

<sup>2</sup> Id. at 14 – 15.

<sup>3</sup> Id. at 16 – 17.