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Implementing Pretrial Services Risk Assessment with a Sex Offense Defendant Population

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IN DECEMBER OF 2008, *Federal Probation* published an article outlining the need for a risk assessment tool designed specifically for pretrial services agencies ([Lowencamp, et al. 2008](#)). This tool would then be able to assist pretrial services officers in completing the very important and sometimes difficult task of risk assessment and determining whether or not to recommend taking away a defendant's liberty pending trial. In April 2009, Luminosity, an independent research firm, finalized a study that was tasked with analyzing this specific area to determine whether there were in fact statistically significant and policy relevant factors one could use to assess whether a defendant would likely have a successful outcome on pretrial services supervision. This study, co-sponsored by the Office of Federal Detention Trustee with the support of the Administrative Office of the United States Courts, specifically outlined nine factors that had proven statistically significant in predicting pretrial services outcomes. These included: pending charges, prior misdemeanor arrests, prior felony arrests, prior failures to appear, employment status, residence status, substance abuse type, primary charge category, and primary charge type.

A second finding of this study was that lower-risk defendants are the most likely to succeed on pretrial services supervision ([VanNostrand 2009](#)). However, if release conditions include alternatives to detention such as location monitoring and substance abuse testing, the likelihood of success is decreased; the author therefore stresses that alternatives to detention "should be imposed sparingly." The only exception to this finding occurred in mental health treatment, which, when recommended appropriately, did not increase a defendant's likelihood of failure. Additionally, the study found that alternatives to detention are most appropriate for higher-risk defendants and generally increase success for those in these risk categories. These two findings were clearly demonstrated in the research findings; however, as an officer who deals with the ever-growing population of defendants charged with sex offenses on a daily basis, I view with caution the practical application of these findings to this special population of defendant.

Currently, officers utilize the Risk Prediction Index (RPI), which was approved for use by pretrial services in October 2001 ([Hughes 2001](#)). The RPI includes factors such as age, number of prior arrests, employment status, education, drug or alcohol history, whether or not a weapon was used in the instant offense, whether or not the defendant was residing with a spouse or children and if the defendant had previously absconded from supervision. Over the course of the past several years, many officers have realized that defendants charged with sex offenses score relatively low on the RPI. The new risk prediction assessment tool expected to be developed out of Luminosity's study also scores defendants charged with sex offenses very low. Based on Ms. VanNostrand's research on a pretrial risk assessment tool in the federal courts, which captured those factors directly related to our mission of assuring defendant's appearance at court and safety of the community, I wonder if again this special population of defendants will be missed. The authors of the study acknowledged that the current population of defendants charged with sex offenses and

released on bail with alternatives to detention such as computer monitoring and sex offender treatment is too small to draw any conclusive findings at this time.

Based on the 274 defendants charged with sex offenses as defined by federal statute in New Jersey between 2001–2007, the average score of a defendant released on bail supervision was RPI=1.34. The overall violation rate for this population (combined technical, re-arrest and failure to appear) during this period was 20 percent. Many of these violations were technical (82 percent). The violation rate using an AO-defined failure (re-arrest or failure to appear only) was 18 percent. The violation rate found in a similar group of defendants in Ms. VanNostrand’s research was 2.3 percent (level 1) and 6.0 percent (level 2). Furthermore, only three defendants of the 56 violation cases had an RPI over 3, so one could assume that these defendants would all fall in a level 1 or level 2 classification. The violation rates when combining technical and AO-defined failures, as illustrated in Appendix Table A5 of the study, were 3.2 percent (Level 1); 9.7 percent (Level 2); 16.2 percent (Level 3); 22.5 percent (Level 4) and 29.5 percent (Level 5). The cases from the District of New Jersey, at an overall violation rate of 20 percent, parallel Level 4 numbers. However, based on the suggested risk tool, these individuals score very low, as seen by the average RPI score.

It is important to note that many of these “technical” violations were in fact continued criminal activity that was not charged, but disposed of by alternative means such as renegotiating the plea agreement with the new criminal activity being included as relevant conduct for guideline purposes or justification for an upward departure in the guidelines. For instance, in 2006 a defendant pending sentencing for possession of child pornography was found by our agency to be in possession of more than 600 images of child pornography. This defendant initially scored a 1 on the RPI, was professionally employed, and educated. He was in mental health treatment and his therapist described him as compliant and making progress. The defendant was deemed not repetitive, compulsive, or dangerous. However, our agency found chat logs confirming he had attempted to make contact with children online during his supervision term. The United States Attorney’s Office, in lieu of filing a new charge, subsequently reallocated the defendant’s plea and he was sentenced to 240 months imprisonment. Many involved in this case believed that the defendant’s expected term of imprisonment would have been three and one half years due to his significant “post conviction rehabilitation.”

This individual was only charged with Possession of Child Pornography, although the underlying facts of the case were that he created a MySpace account pretending to be a 15-year-old boy and contacted his stepdaughter, who was living in the same residence, groomed her into taking nude photos of herself and then proceeded to drug her so he could take additional nude photos and send them out on the internet to a friend. Without the added alternatives to detention of home confinement and computer monitoring and searches, we would never have known about his continued activity. Based on the findings of the current study at hand, this defendant should have been released without any alternatives to detention.

More recently, the District of New Jersey had a defendant who, while also aware that his computer activity was being monitored, proceeded to engage in a chat with an individual who identified himself as a 55-year-old convicted sex offender. They exchanged stories of fantasy rape of children and subsequently exchanged images of child pornography. The person the defendant was chatting with proceeded to discuss the details of his grooming of a neighbor’s child, and indicated he was getting ready to act on his urges. Our agency responded immediately, made contact with authorities in Oregon where the second individual was located, and at once conducted a home visit to our defendant’s residence. This visit turned up numerous images of child pornography and agents were able to make contact with the families of four children who were involved and potential victims. Our defendant scored a 0 on the RPI, as he was educated, employed, and had no prior criminal history. Instead of charging our defendant with the new criminal activity, at sentencing the government sought, and the court imposed, the highest end of the applicable guideline range.

As discussed in the Center for Sex Offender Management’s June 2002 report, most studies looking at sex offender recidivism rates attempt to measure recidivism by equating it to re-arrest or re-conviction. As seen in these two case illustrations, both defendants were “successful” using most sex offender recidivism research as well as the AO standard of a successful outcome. Neither defendant was rearrested or recharged, and both appeared in court as ordered, albeit by way of a

warrant. In reality, however, both defendants posed a serious risk of danger to the community by continuing to trade and view child pornography. Furthermore, both instances involved “real” children who were being victimized.

Most research on sexual offending shows that recidivism rates for sexual offenders are high. The FCC Butner study, although some may argue that it is flawed in its processes, brings to light the concern regarding prior sexual contacts with “possession” offenders. According to an article in the *Journal of Abnormal Psychology* (Seto 2006), research has found that child pornography offenses are valid indicators of pedophilia. In fact, child pornography offending may actually be a stronger indicator of pedophilia than physically sexually offending a child. The researchers point out that people are “likely to choose the kind of pornography that corresponds to their sexual interests, so relatively few nonpedophilic men would choose illegal child pornography given the abundance of legal pornography that depicts adults.” Although the researchers admit some of the study’s limitations, the study raises further concerns about the possible under-representation of the danger that these defendants may pose. Much research shows that recidivism rates drop when treatment is introduced, but treatment may be an alternative to detention that would not be applied if the risk assessment scores were the basis for this decision.

In light of this information, and in conjunction with the findings within the OFDT study, it seems prudent for agencies to use the new Risk Prediction Assessment as a guide for recommending conditions to the court and instituting supervision strategies. However, a multi-disciplinary approach, incorporating mental health treatment and alternatives to detention such as computer monitoring and restrictions, is the key to managing this special population. In 2001, the District of New Jersey Pretrial Services Agency developed and implemented a computer monitoring program to help deal with the ever-increasing numbers of defendants charged with sex offenses. Over the years, the program has slowly developed into a comprehensive program that includes remote computer monitoring and the ability to conduct manual field inspections and full forensic searches of defendant’s computers. Additionally, the program urges the collaboration among the line officer, supervisor, cyber specialist, and the district’s mental health specialists and treatment providers. The district has always stressed the importance of communication while developing this program by conducting outreach and education programs with the United States Attorney’s Office and the Defense Bar throughout the years, as well as several training programs for officers.

In January 2009, the agency invited all of the magistrate judges to a working luncheon where the cyber program was introduced to them. The judges were provided information on the current trends in child pornography cases and the computer-monitoring services that the agency can provide to the court; they also received a hands-on look at the remote-monitoring software that the agency currently uses. Additionally, the judges were introduced to the virtual world of SecondLife and presented with the growing role gaming stations play in the online luring and grooming of child victims. The feedback from the judges was excellent, with many noting a better understanding of what pretrial services does and the service it provides to the court. Additionally, many of the judges felt more comfortable about releasing defendants charged with a sexual offense on bail, realizing the myriad of supervision tools and strategies that pretrial services would employ to reasonably assure the safety of the community.

All of this work appears to be paying off. Recently, 2008 national data revealed that the District of New Jersey had an 85.1 percent release rate for the 67 defendants charged with a sex offense this past year. Comparatively, the national average for this same population was 53.9 percent. The District of New Jersey was tenth in the nation for total number of sex offense activations and one of only two districts with a release rate over 80 percent (minimum number of ten cases activated for the year). We believe these numbers illustrate the importance of educating the court about the everyday strategies and alternatives to detention that are available to judges when deciding to release or detain a defendant pending trial. As with all cases, an individualized approach to each defendant can meet these unique challenges. Additionally, agencies may wish to investigate and possibly implement a secondary risk assessment tool to assist in the evaluation process, since defendants charged with sex offenses have important criminogenic needs not shared by other defendants (Hanson 2008). Additional specialized scales, to be used in conjunction with the excellent tool developed from the Luminosity OFDT study, may be needed for a thorough risk assessment to be completed on defendants charged with sex offenses.

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