

PREVENTING PAROLE

THE EFFECT OF INNOCENCE CLAIMS ON PAROLE ELIGIBILITY

Rachel Barsky & Adam J. E. Blanchard

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I. EXECUTIVE SUMMARY

At the time of his murder trial in 1983, Phillip Tallio was 17 years old. No physical evidence implicated Mr. Tallio in the crime—the murder of his two-year-old cousin on the remote Nuxalk reserve in Bella Coola, British Columbia. No direct, or valid circumstantial evidence existed. Mr. Tallio professed that he was innocent. Yet, a guilty plea was entered on his behalf, and he was convicted of second-degree murder. He received a life sentence with parole eligibility set at 10 years, when he would have been 27 years old. It is now more than 35 years later, more than 25 years past his parole eligibility date, and Mr. Tallio remains incarcerated in a federal prison in B.C.

Mr. Tallio has missed the birth of his daughter, his granddaughters, a life with his family, and the passing of beloved relatives. In 2015, Mr. Tallio wrote a letter to his counsel asking if he would be free before his 50th birthday that December. There was no favourable way to respond. Mr. Tallio knows that unless his lawyers, Rachel Barsky and Thomas Arbogast, are successful in his application to the Court of Appeal of British Columbia to withdraw the guilty plea that was entered 35 years ago, he may spend every birthday for the rest of his life in prison. Canada's parole process has failed Mr. Tallio, because Mr. Tallio claims to be innocent.

¹ Rachel Barsky is a criminal defence lawyer practicing in Vancouver. She is a founding member and Director (Secretary) of the Criminal Defence Advocacy Society (CDAS <https://www.cdasociety.com/>). Ms. Barsky has worked on cases involving claims of factual innocence since April, 2011, both through the UBC Innocence Project and Innocence Canada. She is a graduate of the University of British Columbia's Peter A. Allard School of Law (J.D.) and the School of Journalism at Ryerson University (B.Journ, Hons.).

² Adam Blanchard is currently completing his Ph.D. in the Experimental Psychology and Law Program at Simon Fraser University. His research interests include risk assessment and risk management, as well as the perpetration of crime and violence. He completed both his B.A. (Hons.) and his M.A. under the supervision of Dr. Kevin S. Douglas in SFU's Clinical Forensic Psychology program.

Preventing Parole stemmed from the recognition of a pattern in UBC Innocence Project³ applicants' experiences with the Parole Board of Canada (PBC), in that they are being denied parole seemingly due to their innocence claims. These claims also seem to make it exceptionally difficult to obtain temporary releases, such as Escorted Temporary Absences (ETAs) and Unescorted Temporary Absences (UTAs).⁴ Even entry into, or completion of, Correctional Service Canada (CSC) programs, which are necessary for inmates to complete in order to obtain the support of their CSC Case Management Team (CMT), has been denied because the individuals maintain factual innocence.

The UBC Innocence Project (the Project) began working on Mr. Tallio's case in December, 2009, with Ms. Barsky becoming involved in April, 2011. Mr. Tallio has always maintained innocence. With his case currently before the Court of Appeal for B.C., he may soon join the unenviable ranks of Canada's recognized wrongly convicted individuals, now numbering more than 50. In the meantime, Mr. Tallio has now been unable to obtain parole for 25 years past the date that he was otherwise eligible. Inmates who are actually guilty of equal crimes were released decades earlier.

³ The UBC Innocence Project (the Project) reviews potential wrongful convictions in British Columbia. Mostly student-run, under the leadership of a part-time Project Director and the pro bono assistance of supervising lawyers, the Project reviews claims of factual innocence, like Phillip Tallio's. The Project is reviewing more than 20 active cases of men and women who claim to be factually innocent—that they did not commit the crime for which they are incarcerated. The Project's roster consists overwhelmingly of murder cases. Sometimes the Project decides to close a case, finding that the claim lacks merit, or that there is unfortunately insufficient new evidence to support the claim of innocence.

⁴ ETAs are a first step towards community integration for inmates. The Conservative government mandated that inmates serving certain life sentences ("lifers" as they refer to themselves) must be approved by the PBC for ETAs (except for medical and judicial ETAs), whereas they used to require only the warden's consent. If inmates are successful in obtaining ETAs, they are allowed to leave prison with CSC or other trained staff escorting them for a limited duration. Inmates may attend medical treatment on ETAs, visit critically ill relatives, or engage in community service, for instance. In cases of a life-sentence where the inmate was an adult at the time of the offence, they are eligible for UTAs after they have served the portion of the sentence to reach their full parole eligibility date, less three years. For indeterminate sentences, an inmate is eligible to apply for UTAs after serving the portion of his or her sentence to reach their full parole eligibility date less three years, and for other cases, inmates must serve half the period required to be served before their full parole eligibility, or six months (whichever is greater). If they obtain UTAs, inmates are released into the community for short-term durations without escort, and for work release programs. See, Correctional Service Canada, Commissioner's Directive 710-3: Temporary Absences, (Last modified June 1, 2016) <http://www.csc-scc.gc.ca/lois-et-reglements/710-3-cd-eng.shtml>

The phenomenon is not something seen very often by the PBC. With regards to Mr. Tallio's specific situation, former Vice Chair of the PBC (Pacific Region) Stuart Whitley⁵ commented in an interview with Ms. Barsky: "I've never seen anything like this and I've seen everything." Patrick Storey, a former PBC member who at the time of his interview with Ms. Barsky was Regional Manager, Community Relations and Training (PBC, Pacific Region)⁶, estimated that out of 100 inmates at parole hearings, perhaps five per cent maintain innocence. He stated that this rate would be even lower once an inmate's parole eligibility date has passed.

However, the repercussions for the inmates who do continue to maintain innocence can be devastating. Mr. Tallio's continued expression of innocence has, over the years, prevented him from successfully completing prison programming, from obtaining prison absences and from gaining the support of his case managers, all of which are necessary milestones to obtaining parole under the current system. In this report, we have attempted to explore some of the reasons why this is so by setting out the current legislative scheme and considering the current tools used by the system to review parole eligibility. Mr. Tallio's case will be utilized throughout to demonstrate the catch-22 problem inmates claiming innocence face in obtaining parole.

To advance research and analysis on the pattern viewed by the Project, the Criminal Defence Advocacy Society (CDAS)⁷ obtained a Large Project Grant from the Law Foundation of B.C. Ms. Barsky, with the consent of Project applicants who wished to be involved in the study, filed requests under the *Access to Information Act* (RSC, 1985, c A-1) to obtain their complete CSC records. The main applicants involved in the study besides Phillip Tallio are Duray Richards, "Elizabeth"⁸, "Gerry", "Wesley", and "James." All six of these applicants are inmates who were convicted of murder in B.C. They are six of the more than 3,000 inmates across Canada who are serving life sentences in federal prisons.⁹

⁵ Mr. Whitey retired from the PBC in 2017. He now acts as a member of the BC Board of Review.

⁶ Mr. Storey retired from the PBC during the spring of 2018.

⁷ CDAS is a non-profit organization which is engaged in advocacy, law reform and education in matters relating to criminal defence work in the justice system in British Columbia, <<https://www.cdasociety.com/>>.

⁸ Names changed for privacy as these applicants' cases are not yet public, unlike Phillip Tallio and Duray Richards's.

⁹ Zinger, Dr. Ivan, "Annual Report: Office of the Correctional Investigator 2016-2017" (2017) <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf>>.

Ms. Barsky interviewed these inmates and others, as well as forensic psychologists, prison lawyers, and CSC and PBC officials, among others.¹⁰ She reviewed the entirety of the CSC files regarding Mr. Tallio, Mr. Richards, Elizabeth, Gerry, Wesley, and James, disclosed by CSC's Access to Information and Privacy division. She analyzed the legislative history leading to the current framework and conducted international comparative research in various parole systems and the question of innocence. Mr. Blanchard conducted multiple violence risk assessments for *Preventing Parole*. He analyzed the methodology utilized in assessing risk and innocence claims in a violence risk assessment and in offender treatment; the incidence and purpose of denial, and whether denial increases risk of offending, among other areas explored. With Mr. Tallio's case at the centre of this research, this report publishes findings novel to Canada.

The results of this report include the following key findings and recommendations:

- i. Federal inmates' innocence claims have indeed impeded their ability to successfully complete their correctional plans; to enter and complete CSC programs and treatment; to progress in their employment, their security classifications, and in obtaining ETAs, UTAs, day parole and full parole. The impact to each inmate's progression is significant but inconsistent, varying depending on who comprises their Case Management Team, whether they have other factors to address besides their index offence; which CSC psychologist conducts their violence risk assessment, the profile of their case, the involvement of counsel, and so on.
- ii. Amendments to the *Corrections and Conditional Release Act (CCRA)* implemented by the federal Conservative government in 2012 codified and exacerbated this catch-22 problem for inmates who maintain innocence. The CCRA's requirement of taking responsibility presents sometimes insurmountable issues for inmates claiming innocence, as do the CSC's Commissioner's Directives and other policies which require expressing accountability.

¹⁰ We thank the individuals whom we consulted for this work, including Garth Barriere, Nancy Charbonneau, John Conroy, Q.C., Dr. Kevin S. Douglas, Glen Flett, Dr. Stephen D. Hart, Michael Jackson, Q.C., Dr. Peggy Koopman, Dr. Robert Ley, Jennifer Metcalfe, Dr. Bruce Monkhouse, Eric Purtzki, Howard Sapers, Karen Slaughter, Lisa Saether, Patrick Storey, Donna Turko, Q.C., Stuart Whitley, Q.C., the *Preventing Parole* participants (Phillip Tallio, Duray Richards, Gerry, Wesley, Elizabeth and James), as well as others who remain anonymous due to their positions and/or inmate status.

iii. Denial is not a major risk factor for violent, sexual or general offending. An inmate's innocence claim has not been shown to have a consistent relationship with their risk to society and does not necessarily increase their risk to society.

iv. A violence risk assessment can be completed for an offender no matter if they maintain innocence or not, and an inmate's innocence claim does not prevent them from benefiting from treatment.

v. Some of the current methodologies of assessing violence risk utilized by Canada's correctional system are flawed and should be replaced by Structured Professional Judgment (SPJ). SPJ should be utilized to assess inmates' risk to society rather than the actuarial approach and/or unstructured clinical judgment for inmates who maintain innocence.

vi. Legislative and policy changes are required in order to address this catch-22 problem. A section(s) regarding inmates who deny their index offence should be added to the *CCRA*. The legislation must convey the following facts:

a) The CSC and PBC "shall not require an admission of guilt to any crime for which an inmate was committed."

b) In determining CSC program entry and completion, treatment, security classification, employment (including pay levels), and violence risk, the fact that someone is in denial of their offence will not prevent them from progressing. It is a prisoner's commitment to rehabilitation, good behaviour and willingness to use their time in custody constructively which should determine whether they meet required standards.

c) All sections of the *CCRA*, Commissioner's Directives, or other CSC and/or PBC policies and protocols must be amended to reflect the fact that an inmate's innocence claim—therefore, their level of responsibility and accountability—does not correlate with the risk they pose to society. Such sections (i.e., ss. 4, 101 of the *CCRA*, CD 001, CD 710-1, etc.) must be amended to remove the requirement of responsibility and accountability, or amended to clearly state that taking responsibility and accountability does not pertain to the index offence itself.

Additional suggestions are made in the "Recommendations" section.

II. THE WRONGFUL CONVICTION/PAROLE DILEMMA IN CANADA AND BEYOND

In the United States, there have been 2,252 identified exonerees since 1989,¹¹ Some have been exonerated through DNA evidence. Others were the victims of jailhouse informant testimony, eyewitness misidentification, false confessions, prosecutorial and/or police tunnel vision and bias, inadequate defence counsel, and faulty forensic science, among other causes. The number of wrongfully convicted individuals is likely significantly higher than reported, as the identified cases are usually limited to sexual assault or homicide (cases in which individuals are in prison long enough to see the wrongful conviction process through), and many wrongful convictions may be undetected in less serious crimes. In Canada, guilty pleas and lack of resources including lack of access to counsel to review potential wrongful convictions—a process that can take years—exacerbate the inability to quantify the true incidence of wrongful convictions.¹²

So many wrongfully convicted individuals worldwide face the same problem as Mr. Tallio in that they cannot obtain parole, in large part, due to their innocence claim. There is a severe dearth of research on the subject in Canada; however, empirical findings in Great Britain and anecdotal accounts in the U.S. show that parole boards attach significant weight to prisoners taking responsibility for the crime for which they are incarcerated. The statistics and accounts show that prisoners' refusal to admit guilt decreases the likelihood that they will be granted parole. In the U.K., the parole board reported that, in 2003, prisoners who maintained innocence were granted parole at approximately half the rate compared to all parole applications granted.¹³ Case examples of this reality from the U.S., UK and Canada are set out below; however, this is a phenomenon seen in criminal justice systems around the world.¹⁴

¹¹ National Registry of Exonerations, University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School, Ann Arbor & Michigan State University College of Law (2018) <<http://www.law.umich.edu/special/exoneration/Pages/about.aspx>>

¹² Roach, Kent, *Wrongful Convictions in Canada*, (2013) University of Cincinnati Law Review (Vol. 80, Issue 4), <<http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1150&context=uclr>>

¹³ Medwed, Daniel S. "The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings" (2008) 93 Iowa Law Review at 514-515, <<https://globalwrong.files.wordpress.com/2013/07/medwed-parole.pdf>>, U.K. statistics citing Naughton, Michael, "Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable" (2005) 44 HOW. J. CRIM. JUST. 1, 2 at 5, <http://www.innocencenetwork.org.uk/wp-content/uploads/2011/11/michael_naughton_2005_44n1.pdf>.

¹⁴ See, for instance, Assy, Rabeea & Menashe, Doron. "The Catch-22 in Israel's Parole Law" (2014) *Criminal Justice and Behaviour*, Vol. 41, 1422-1436; Hopkins, Ruth. "Op-Ed: The contortion clause of parole," *Daily Maverick* (21 April 2017), <<https://www.dailymaverick.co.za/article/2017-04-21-op-ed-the-contrition-clause-of-parole/#.Wzvuv9hKj-Y>>.

A. UNITED STATES

In the “Central Park Jogger” case, five teenaged boys were convicted of a raping a woman in New York City. After spending between seven to 13 years in prison, the “Central Park Five” were each exonerated after Matias Reyes, a serial rapist and murderer, confessed to the crime. DNA evidence confirmed Reyes’ guilt. The young men had been denied parole before their exonerations. Three of them—Raymond Santana, Yusef Salaam, and Kevin Richards—maintained their innocence at separate parole hearings in the 1990s, and their parole records indicate that the parole board denied the men parole because of their failure to accept guilt and due to their lack of remorse. A fourth man, Kharey Wise, has severe learning disabilities. He apologized for the crimes, but refused to admit any guilt. He reported having to leave a sex offender program because the prison counsellor did not believe he was being truthful. He did not believe he needed sex offender counselling in the first place. The fifth man, Antron McCray, served his sentence in juvenile institutions, and his parole records are thus not publicly accessible.¹⁵

Other U.S. cases in which prisoners maintaining innocence were similarly denied parole include that of Alan Newton, who served 22 years in prison for a rape he did not commit. Newton insisted that he was innocent and was denied parole in each of his three hearings. He was eventually exonerated through DNA analysis.¹⁶ Charles Chatman was also convicted of a rape that he did not commit, serving 27 years in prison before being exonerated by DNA evidence. He was also denied parole three times because he refused to admit guilt.¹⁷

In the case of the “San Antonio Four”, Kristie Mayhugh, Elizabeth Ramirez, Cassandra Rivera and Anna Vasquez were convicted in 1997 of sexually assaulting two young girls in their care; a crime which never occurred. Three of the women were sentenced to 15 years in prison and one to 37.5 years. Only Ms. Vasquez was paroled

¹⁵Duru, Jeremi N. *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315 (2004). See also, Jim Dwyer, Jim & Saulny, Susan. “Youths’ Denials in ‘89 Rape Case Cost Them Parole Chances” *The New York Times*, (October 12, 2002), <<http://www.nytimes.com/2002/10/16/nyregion/youths-denials-in-89-rape-case-cost-them-parole-chances.html>>, and Weiser, Benjamin. “5 Exonerated in Central Park Jogger Case Agree to Settle Suit for \$40 Million” *The New York Times*, (June 19, 2014), <http://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-agree-to-settle-suit-for-40-million.html?_r=0>.

¹⁶ Medwed, Daniel S. “The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings” (2008) 93 Iowa Law Review. See also, Feige, David. “Innocence by the numbers” *The Boston Globe*, (July 16, 2006), <http://www.nlada.org/DMS/Documents/1153144820.99/%3Fp1%3DMEWell_Pos3>.

¹⁷ The National Registry of Exonerations, University of Michigan Law School, Ann Arbor “Charles Chatman” (2012) <<http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3794>>.

before 2013, the year that a Texas court recognized serious errors in the expert physician's testimony. The other women had refused to participate in the Sex Offender Treatment Program, thereby sacrificing their chance for parole.¹⁸

Dewey Bozella served 26 years in prison for a murder that he did not commit. Bozella was denied parole four times, with the parole board informing his lawyers that they did not want to hear claims of innocence but, rather, remorse regarding the crime.¹⁹ Anthony Capozzi served 22 years in prison for three rapes that he also did not commit. Capozzi refused to participate in sex offender programs which would require him to take responsibility for a crime which he did not commit. He was denied parole five times.²⁰ The list goes on.

B. UNITED KINGDOM

In 1974, Stephen Downing was convicted of murdering a woman in the cemetery in Derbyshire where he worked as a groundskeeper. Like Phillip Tallio, he was 17 years old at the time and had the mental capacity of an 11-year-old child. Mr. Downing was also eligible for parole after serving 10 years; however, because he refused to admit to the offence, he was classified as an "IDOM" prisoner—in denial of murder. The parole board denied Mr. Downing parole and he served 27 years in prison before his conviction was quashed by the Court of Appeal in 2002.²¹

In 1981, Raymond Gilbert and John Kamara were convicted of murdering a man during a robbery in Liverpool. Mr. Kamara's conviction was quashed in 2000 due to the discovery of more than 200 previously withheld witness statements.²² However, Mr. Gilbert was not released until 2016, because he maintained his innocence throughout

¹⁸ Medwed, Daniel. "Under Pressure: The Hazards of Maintaining Innocence after Conviction" (2014) Northeastern University School of Law Publications. Paper 46. See also, *Ex Parte Kristie Mayhugh, Applicant Ex Parte Elizabeth Ramirez, Applicant Ex Parte Cassandra Rivera, Applicant Ex Parte Anna Vasquez, Applicant*, 2016 WR-84, 700-01 (Texas Court of Criminal Appeal, November 23, 2016).

¹⁹ Pugmire, Lance. "Wrongfully convicted Dewey Bozella to make pro fight debut," *Los Angeles Times*, (October 12, 2011), <<http://articles.latimes.com/2011/oct/12/sports/la-sp-boxing-dewey-bozella-20111013>>.

²⁰ Innocence Project, "Anthony Capozzi" (2015), <<http://www.innocenceproject.org/cases-false-imprisonment/anthony-capozzi>>.

²¹ Herbert, Ian & Burrell, Ian. "Stephen Downing says he didn't do it. Nobody listened. Now, after 27 years in jail, he may be cleared of murder," (November 15, 2000) *The Independent*, <<https://www.independent.co.uk/news/uk/home-news/stephen-downing-says-he-didnt-do-it-nobody-listened-now-after-27-years-in-jail-he-may-be-cleared-of-622184.html>>; see also *R. v. Stephen Downing* [2002] EWCA Crim 263, <<http://www.bailii.org/ew/cases/EWCA/Crim/2002/263.html>>.

²² Innocent, "20 years in jail as 200 witness statements are withheld—John Kamara (2010)" <<https://innocent.org.uk/2017/07/05/20-years-in-jail-as-200-witness-statements-are-withheld-john-kamara-2010/>>.

his incarceration, after falsely confessing before trial. He served almost 36 years in prison despite the fact that he was eligible for parole at 15 years.²³

And, in 1986, Michael Shirley was convicted of murdering a woman in Portsmouth. Although he was eligible for parole after serving 15 years, he was refused parole, as he maintained his innocence. In 2003, relying on exculpatory DNA evidence, the Court of Appeal quashed Mr. Shirley's conviction.²⁴

C. CANADA

In Canada, Romeo Phillion, who served 31 years in prison after he was wrongfully convicted for murder, died in 2015. While reporting on his funeral, *Globe and Mail* journalist Sean Fine noted that that Mr. Phillion "would not accept parole if it meant falsely admitting guilt". Robert Baltovich, another of Canada's wrongly convicted in attendance at the funeral, said that what impressed him most about Mr. Phillion was his "refusal to admit guilt, even if it meant denying himself a way out of jail on parole after three decades inside. 'Most human beings would have swallowed their pride and said, 'just let me out.' He never did. To me that just makes him a giant.'"²⁵

Mr. Phillion was eligible for parole after 20 years but never applied because he knew it would be tantamount to an admission of guilt. He spent 11 more years behind bars and likely would have spent the rest of his life there had it not been for an honest corrections officer who, in reviewing his prison records, found proof of undisclosed alibi evidence and witnesses who had committed perjury.²⁶

Another case worth noting is that of Ivan Henry, who in 2016 was awarded \$8 million in compensation for the 27 years he spent behind bars. Mr. Henry had been wrongfully convicted of committing a series of rapes in Vancouver.²⁷ Journalist Sam Eifling

²³ Siddle, John. "Murderer Ray Gilbert released from prison 36 years after notorious Toxteth killing," *Liverpool Echo*, <<https://www.liverpoolecho.co.uk/news/liverpool-news/murderer-ray-gilbert-released-prison-11989227>>.

²⁴ BBC News, "Sailor freed after 16 years," (July 3, 2003), <http://news.bbc.co.uk/2/hi/uk_news/england/3041650.stm>. See also, *Shirley v. R* [2003] EWCA Crim 1976: <[http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2003/1976.html&query=\(R\)+AND+\(Shirley\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2003/1976.html&query=(R)+AND+(Shirley))>

²⁵ Fine, Sean. "Wrongly Convicted Pay Their Respects to One of Their Own at Phillion Funeral." *The Globe and Mail* (November 12, 2015) sec. A: 1+. Print.

²⁶ Levy, David. "Life Means Life? Innocence and the Parole Board." Blogpost for The Association of the Wrongly Convicted, May 29, 2015.

²⁷ *Henry v. British Columbia (Attorney General)*, 2016 BCSC 1038.

chronicled Mr. Henry's experiences regarding his parole situation in the *Tyee*.²⁸

He decided that even applying for parole would be a waste of time. "I wouldn't have [accepted parole]," he says. "Because I wouldn't want the stigma of being on parole and having charges... connected or enjoined to me by an indictment or a warrant that I wasn't guilty of." He also knew that getting out meant living under constant suspicion. "What happens if you get out... charged with 19 counts of rape?" he asks.

...

But somewhere along the way, Henry was convinced that parole was a non-starter. The board would want him to show contrition, and for him to manufacture it for rapes he didn't commit would have been, in his eyes, a crime itself. "Why would I take that?" he says. "I don't want to be condemned by history. I don't want to go down as being a real bad guy. I'd rather just die there. I didn't want to leave a history behind that wasn't true."

A final example of this phenomenon in Canada and perhaps the most well-known is the case of David Milgaard who was wrongly convicted of the rape and murder of a nurse in Saskatoon. In his article on *Henry*, Mr. Eifling relayed that Milgaard "told a newspaper reporter in 1989 that a parole board member informed him he'd never be released if he continued to profess innocence." As we will see in the case study of Phillip Tallio and others to follow in this report, this would not be the last time the Parole Board of Canada communicated this message to an inmate maintaining his innocence.

²⁸ Eifling, Sam. "The Innocence Trap." *The Tyee*, <<https://thetyee.ca/News/2013/10/23/Innocence-Trap/>> 23 Oct. 2013.

III. THE CORRECTIONAL AND PAROLE SYSTEMS IN CANADA

In order to understand the problems which Mr. Tallio and other inmates claiming innocence face in obtaining parole, it is first essential to provide an overview as to how the Canadian correctional and parole systems operate. CSC's federal incarceration population count was 14,639 during the 2015-2016 fiscal year. CSC supervised another 8,233 individuals in the community.²⁹ This figure does not include the 25,405 other individuals in provincial or territorial custody during that period.³⁰ The inmates participating in the Preventing Parole project are individuals who have been sentenced to more than two years. Thus, they are incarcerated under federal correctional jurisdiction as per section 743.1 of the *Criminal Code*. Therefore, this study will focus on the process for federal inmates to obtain parole.

A. ROLE OF THE CORRECTIONAL SERVICE CANADA

The CSC is mandated to assist the reintegration of inmates into society, while protecting the public. It runs Canada's federal prisons. The CSC assesses prisoners through case management teams and is responsible for offering programs designed to address criminal behaviour, reduce reoffending, and adequately prepare inmates for release into the community. The CSC is not the paroling authority; however, it has a great deal of influence over the length of time inmates spend in prisons, in classifying inmates' security levels,³¹ and it makes recommendations to the PBC about each individual's eligibility for parole, recommendations which have proven to be critical in determining parole eligibility outcomes.

²⁹ Correctional Service Canada, "CSC Statistics—Key facts and figures" (June 2017), < <http://www.csc-scc.gc.ca/publications/005007-3024-eng.shtml>>.

³⁰ Reitano, Julie. Adult Correctional Statistics in Canada, 2015/2016, (March 1, 2017), Statistics Canada, < <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14700-eng.htm>>.

³¹ Sapers, Howard. Annual Report of the Correctional Investigator 2013-2014 (June 27, 2014), <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20132014-eng.pdf>> at p. 11.

B. PURPOSE OF THE CORRECTIONAL SYSTEM

The primary legislation governing the operation of the correctional system in Canada is the *Corrections and Conditional Release Act* (CCRA, S.C. 1992, c. 20). The ultimate purpose of the correctional system is stated in the CCRA:

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

Additionally, referring to the operation of the CSC, the CCRA sets out that “the protection of society is the paramount consideration for the Service in the corrections process” (s. 3.1). In attempting to achieve the ultimate purpose of the correctional system described in s. 3, the CCRA outlines several overarching principles. Of the nine principles listed in s. 4 of the CCRA, three are particularly relevant to the assessment and treatment of offenders:

(a) the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and comments from the Parole Board of Canada and information obtained from victims, offenders and other components of the criminal justice system;

...

(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;

...

(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure (CCRA, 1992, section 4).

C. THE PAROLE BOARD OF CANADA

The PBC is classified as an independent administrative and quasi-judicial tribunal with “exclusive jurisdiction and absolute discretion” under section 107(1) of the *CCRA* to decide any kind of conditional release, including temporary absences and parole. Across Canada, a maximum of 60 full-time PBC Board members can be appointed. In BC—the PBC’s Pacific Regional Division—there are currently five full-time PBC Board members and three part-time PBC Board members.³² The PBC Board members are not all present at each hearing—one or two may be present at one time. All PBC Board members are appointed by the Governor in Council, on the recommendation of the Minister of Public Safety. PBC Board members are typically appointed for terms of three to five years, with a possibility for reappointment.³³ Coming from diverse backgrounds, PBC Board members are not required to have particular educational or work experience.³⁴

The PBC can grant, deny, cancel, terminate, or revoke day parole or full parole. In 2015-2016, the PBC reviewed 15,126 federal cases, granting day parole in 75% of federal day parole hearings, and full parole in 37% of federal full parole reviews.³⁵ From 2005 to 2015, the day parole grant rate declined by 14% and full parole grant rate declined by 40%. Of the inmates who were released into the community in 2013-2014, 54% were released statutorily (at two-thirds of their sentence) rather than on day or full parole.³⁶

While parole grant rates have declined, the cost of incarceration has increased. Aside from all of the other problems that accompany reducing resources spent on prisoners, there is a financial cost to delaying their treatment and release. On average, it costs taxpayers \$111,202 each year to keep a male prisoner in custody, and for a

³² Government of Canada, List of Parole Board of Canada Board members by region, (June 29, 2018), <<https://www.canada.ca/en/parole-board/services/board-members/list-of-parole-board-of-canada-board-members-by-region.html#wb-cont>>.

³³ Government of Canada, Roles and Responsibilities of a Board Member, (November 4, 2016), <<https://www.canada.ca/en/parole-board/services/board-members/roles-and-responsibilities-of-a-member.html>>.

³⁴ Government of Canada, Opportunities—Selection Process, April 26, 2018), <<https://appointments.gc.ca/slctnPrcls.asp?menu=1&lang=eng&SelectionProcessId=D171302E-0C29-4736-8852-3F70E1BEE98F>>.

³⁵ Government of Canada, Statistics: Parole, Pardons and Clemency, (November 20, 2016), <<https://www.canada.ca/en/parole-board/corporate/publications-and-forms/fact-sheets/statistics-parole-pardons-and-clemency.html>>.

³⁶ Sapers, Howard, Annual Report of the Office of the Correctional Investigator 2014-2015 (June 26, 2015), <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>> at 43.

federally-sentenced female inmate that number doubles to more than \$222,000.³⁷ The cost to keep an inmate in the community on parole or statutory release is \$31,534.³⁸ Mr. Tallio's incarceration alone has cost taxpayers almost \$3.9 million, with almost \$2.8 million of that sum spent over the years he has served past his parole eligibility date.

D. PAROLE HEARING PROCESS

Prisoners cannot request parole hearings at will. In fact, with their frequent inability to access and complete correctional programs necessary to increase their success in obtaining release, or even temporary absences, half of the federal incarcerated population remains incarcerated past their full parole eligibility date. The backlog is so great that some prisoners never benefit from programming prior to being statutorily released (which is automatic under the law at two-thirds of sentence without a parole hearing and is not granted by the PBC). Day and full parole hearings are also postponed and/or applications withdrawn because psychological risk assessments are not completed on time by CSC psychologists.³⁹ In 2013-2014, almost two-thirds of prisoners eligible for full parole waived or postponed their parole hearing, an indicator of CSC's inability to complete their casework and present it to the PBC on time.⁴⁰

If prisoners do have a parole hearing and are denied release, they may appeal the decision to the Appeal Division of the PBC within two months of the original decision. Section 147 of the *CCRA* (1992) identifies five issues that are grounds for an appeal:

147(1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,

(a) failed to observe a principle of fundamental justice;

(b) made an error of law;

(c) breached or failed to apply a policy adopted pursuant to subsection 151(2);

³⁷ Sapers, Howard. Annual Report of the Office of the Correctional Investigator 2015-2016 (June 30, 2016) <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20152016-eng.pdf>>

³⁸ Sapers, Howard. Annual Report of the Office of the Correctional Investigator 2013-2014, (June 27, 2014), <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20132014-eng.pdf>> at 12.

³⁹ Sapers, Howard. Annual Report of the Office of the Correctional Investigator 2009-2010, <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20092010-eng.pdf>> at 48.

⁴⁰ Sapers, Howard. Annual Report of the Office of the Correctional Investigator 2014-2015 (June 26, 2015), <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>> at 43.

(d) based its decision on erroneous or incomplete information; or

(e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.

Comprised of other PBC government appointees, the Appeal Division is to review lower level decisions for fairness, respect for the rules of fundamental justice, and PBC policies. The Appeal Division can affirm a decision or substitute its discretion in place of the original decision makers, but only where the original decision was “unreasonable and unsupported by the information available at the time the decision was made.”⁴¹

The Appeal Division, however, rarely modifies the PBC’s decisions. Between 2002 to 2008, 89% to 96% of all federal appeal cases were affirmed by the Appeal Division. In 2008, a new review was ordered in just 6% of federal appeal cases. Special conditions were changed in 1% of federal appeal cases, and only a single decision was overturned by the Appeal Division—the extraordinary case of Robert Latimer.⁴² In 2015-2016, 82% of the federal appeal cases were affirmed by the Appeal Division.⁴³ If full parole is denied and inmates are considered to be violent offenders, the PBC does not have to conduct another parole hearing for five years after the PBC denies their release.⁴⁴

Decisions made by the Appeal Division of the PBC are also subject to judicial review under subsection 18.1(1) of the *Federal Courts Act* (1985). Moreover, it has been found that judicial reviews apply not only to decisions made by the Appeal Division but also to decisions by the PBC itself. In *Cartier v. Canada* (Attorney General) (C.A.), [2003] 2 F.C. 317, the Court found that when a judge “has an application for judicial review from the Appeal Division’s decision before him, but when the latter has affirmed the Board’s decision he is actually required ultimately to ensure that the Board’s decision is lawful” (para. 10), when the Appeal Division confirms the Board’s decision (*Coon v. Canada* (Attorney General), 2016 FC 340 at paras. 18-19).⁴⁵ The court is to

⁴¹ Government of Canada, Appeals, (October 5, 2016), <<https://www.canada.ca/en/parole-board/services/parole/appeals.html>>

⁴² Martel, Joane. *Remorse and the production of truth*, Punishment & Society 12(4) 414-437 (2010) at 421.

⁴³ Government of Canada, Statistics: Parole, Pardons and Clemency, (October 20, 2016), <<https://www.canada.ca/en/parole-board/corporate/publications-and-forms/fact-sheets/statistics-parole-pardons-and-clemency.html>>.

⁴⁴ S. 123(5.01), *Corrections and Conditional Release Act*, SC 1992, c 20, (2015) <<http://laws-lois.justice.gc.ca/eng/acts/C-44.6/page-39.html#docCont>>.

⁴⁵ See also, *Smith v. Canada* (Attorney General), 2018 FC 200 at para. 22; *Aney v. Canada* (Attorney General), 2005 FC 182 at para. 29; *Latimer v. Canada* (Attorney General), 2010 FC 806.

analyze the PBC's decision and determine its lawfulness rather than that of the Appeal Division.

Section 18.1(4) of the *Federal Courts Act* (1985) states that decisions made by federal boards, commissions, or tribunals can be appealed on several grounds:

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Though many cannot obtain release on their eligibility date, most prisoners are at least eligible for release, with federal inmates eligible for day parole six months before full parole eligibility. This is normally at the point where they have served one-third of their sentence. For inmates such as Mr. Tallio, who was sentenced to life with eligibility for parole after 10 years, eligibility for day parole does not arise until seven years have been served.⁴⁶ Further, although the majority of prisoners are now released statutorily, there are cases such as Mr. Tallio's in which life can truly mean life.

⁴⁶ Government of Canada, Correctional Service Canada: Types of Release, (December 1, 2014), <<http://www.csc-scc.gc.ca/parole/002007-0003-eng.shtml>>.

E. PAROLE CONSIDERATIONS

Although the process by which the PBC members make decisions is not fully public, involving private deliberations during hearings, the PBC is guided by various known factors and criteria besides the above legislation and case law, which Mr. Tallio and other prisoners maintaining their innocence argue that they cannot fulfill. This is largely because of the relationship between the CSC and the PBC. Sections 100, 100.1, 101 and 102 of the CCRA are particularly imperative to the decision-making process.

Purpose of conditional release

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

Paramount consideration

100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.

Principles guiding parole boards

101. The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:

(a) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;

(b) parole boards enhance their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;

(c) parole boards make decisions that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release;

(d) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and

(e) offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

Criteria for granting parole

S. 102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

As will be demonstrated, inmates who maintain innocence are unable to take responsibility as per s. 101(a). Through the CSC's current methods of risk assessment, which inform the PBC's decisions, such inmates are frequently said to be untreated, and therefore, are viewed as a risk to society. Consequently, the PBC finds that these inmates fail to meet the criteria set out in s. 102 of the CCRA.

Section 151(2)(a) of the CCRA further clarifies that the Executive committee of the PBC can "after such consultation with Board members as it considers appropriate, adopt policies" related to reviews dealing with conditional release, detention and long-term supervision. Furthermore, the PBC is directed to follow such policies, as "members of the Board shall exercise their functions in accordance with policies adopted pursuant to subsection 151(2)" (CCRA, 1992, section 105(5)). As such, the PBC has adopted a policy manual that guides much of its decision-making.

The PBC is guided by policies set out in the Decision-Making Policy Manual for Board Members (hereinafter referred to as the PBC Policy Manual). Although the PBC is statutorily authorized to develop and adopt policies relating to decisions regarding conditional release, the Federal Court has found that this policy manual cannot be “viewed as delegated legislation or ‘hard law’”⁴⁷ but instead are “more properly characterized as a ‘soft law’ instrument that does not have the full force of law.”⁴⁸ That is, “it is also settled law that policy manuals, like guidelines, are not law and, as such are not binding on the decision-maker.”⁴⁹ However, the policies within this manual, as with others, are useful indicators of the reasonableness of a decision and a decision reached contrary to the policies is a considerable factor in assessing whether a decision was unreasonable.⁵⁰

The PBC Policy Manual provides further clarification on the right to appeal a PBC decision under section 12.1.3:

3. In accordance with subsection 147(1) of the CCRA, an offender may appeal a decision on the grounds that the Board, in rendering its decision:

a. failed to observe a principle of fundamental justice, including where the Board did not respect the right to an impartial review, the right to be heard, the right to be heard by the person who renders the decision, and the right to reasons for the decision;

b. made an error in law, including where the Board did not follow or apply the law properly;

c. breached or failed to apply a policy, including where the Board did not follow or apply a section of the Policy Manual properly;

d. based its decision on erroneous or incomplete information, including where relevant information was not considered at the time of the review, or where the Board made errors of fact about the relevant information available; or

⁴⁷ *Latimer v. Canada (Attorney General)*, 2010 FC 806 at para. 42.

⁴⁸ *Latimer* at para. 48.

⁴⁹ *Sychuk v. Canada (Attorney General)*, 2009 FC 105 at para. 11.

⁵⁰ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 (SCC); *Sychuk*, *supra* note 49.

e. acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction, including where the Board made decisions it did not have authority to make or did not make decisions it had authority to make.

Similar to the PBC Policy Manual, the CSC is guided by policies referred to as Commissioner's Directives (CDs). Many of these policies expand upon and clarify the role of and practices within CSC set out in the CCRA. For instance, Commissioner's Directive 001 (CSC CD 001, 2013, section 2) outlines the values statement that guides the "behaviour, decision-making, and discretionary judgment" of its members:

Respect: Respectful behaviours honour the rationality and dignity of persons – their ability to choose their own path, within lawful order, to a meaningful life. A good test of respectful behaviour is treating others as we would like to be treated.

Fairness: A complex value in both theory and practice, fairness involves balancing conflicting interests, and exercising impartiality, objectivity, equality, and equity in interpersonal relationships. Similar to respect, a good test for fairness is to treat others as you would like to be treated.

Professionalism: Professionalism is a commitment to abide by high ethical standards of behaviour as well as relevant group standards, and to develop and apply specialized knowledge for the public good. Professionalism is anchored in a commitment to integrity – a commitment to uphold our values in even the most difficult circumstances.

Inclusiveness: Inclusiveness is a commitment to welcoming, proactively accommodating and learning from cultural, spiritual, and generational differences, individual challenges, and novel points of view.

Accountability: Accountability involves the notion of being willing and able to explain, answer to and justify the appropriateness of actions and decisions. Accountability is applicable to everyone within CSC. Accountability is also about accepting and ensuring responsibility – providing necessary support, feedback, and oversight.

F. LEGISLATIVE HISTORY: INMATE ACCOUNTABILITY AND PAROLE

It is illuminating to understand how the problematic sections 100, 100.1, 101 and 102 of the *CCRA*, as well as certain Commissioner's Directives, came to be.

From February, 2006, to November, 2015, the Conservative Party of Canada was in power, first with a minority government in the 2006 federal election and, from 2011 to 2015, with a majority government.⁵¹ On April 20, 2007, the federal government issued a mandate to the CSC Review Panel (the Panel⁵²) to review CSC operations. That October, the Panel presented a report entitled *A Roadmap to Strengthening Public Safety*⁵³ to the federal government, in which it made 109 recommendations regarding amendments to the *CCRA*, which had not been amended since 1992.⁵⁴

The Panel's recommendations were heavily criticized by human rights lawyer and law professor Michael Jackson and Graham Stewart, former Director General of the John Howard Society of Canada, in their September, 2009, report *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety*.⁵⁵ Jackson and Stewart's criticisms are numerous; only the few most directly concerning the provisions of the *CCRA* at issue in *Preventing Parole* are set out here.

Jackson and Stewart expressed great concern regarding the Panel's proposal that, prior to the warrant expiry date, an offender could only be released through a parole decision made by the PBC. Jackson and Stewart identified assumptions upon which the Panel appeared to base its recommendations. The assumptions were as follows:

⁵¹Conservative Party of Canada, Our History, <<https://www.conservative.ca/our-party/our-history/>>.

⁵² The Panel consisted of chairman Rob Sampson (a businessman who had served as a progressive conservative member of the Legislative Assembly of Ontario and as a cabinet minister in Mike Harris's government but who was forced to resign in 2000); Serge Gascon (a former Montreal police investigator), Ian Glen (former PBC chairman); Clarence Louie (chief of the Osoyoos First Nation); and Sharon Rosenfeldt (co-founded Victims of Violence after her son was murdered by Clifford Olson). See, for instance, CTV News, "Ex-Ontario Tory minister to lead review of prisons," (April 20, 2007), <<https://www.ctvnews.ca/ex-ontario-tory-minister-to-lead-review-of-prisons-1.238149>> and Ibbitson, John. "Minister quits after MPP names offenders," (December 5, 2000), <<https://www.theglobeandmail.com/news/national/minister-quits-after-mpp-names-offenders/article4169618/>>.

⁵³ Sampson, Rob et al., located online at <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/csc-scc-rvw-pnl/report-rapport/cscrprprt-eng.pdf>>

⁵⁴ Barnett, Laura et al. Library of Parliament, Legislative Summary of Bill C-10, Publication No. 41-1-C10-E, Part 6, <<https://lop.parl.ca/content/lop/LegislativeSummaries/41/1/c10-e.pdf>>

⁵⁵ Jackson, Michael & Stewart, Graham, located online: <http://www.justicebehindthewalls.net/resources/news/flawed_Compass.pdf>

- i. *the abolition of statutory release would encourage individuals to pursue their correctional plan⁵⁶ to avoid extending their time in prison,*
- ii. *having pursued their correctional plan more vigorously, the National Parole Board will be willing to release these individuals on parole,*
- iii. *the increase in newly motivated prisoners “earning” their parole will compensate for the abolition of statutory release and*
- iv. *the paramount consideration of public safety would be achieved better in a situation where the remaining “unmotivated” offenders were in jail longer and spent less, if any, time under gradual release in community based supervision.*

Jackson and Stewart stated that if any of the Panel’s assumptions were incorrect, the changes the Panel proposed would be “costly financially, while undermining, not advancing, public safety.” The authors characterized the Panel’s proposal to abolish statutory release and implement “earned parole” as “ill-conceived and inimical to public safety.”⁵⁷ They explained that earned parole had already been tried by the correctional system in Canada in the past. However, in 1992, the CCRA was amended to abolish the concept of earned parole “largely because it had become a nightmare to administer and because the failure to earn remission would conflict with the goal of ensuring that all but the highest risk prisoners would be released through community supervision.” Jackson and Stewart stated that the Panel’s apparent ignorance of the history of statutory release and the reasons for its implementation constituted a “major public policy shortfall.”⁵⁸

On page 109 of their report, Jackson and Stewart warned the Panel that its belief that earned parole would motivate inmates to “approach their correctional plan with new-found enthusiasm” is sorely mistaken and “insensitive to the onerous systemic barriers and personal disadvantages so many of these people face.” Jackson and Stewart wrote:

In fact, the circumstances of the offense, the inability to produce coherent release plans, addictions and mental illness, learning disabilities, illiteracy and many other disadvantages weigh heavily against

⁵⁶ The correctional plan is the most important document prepared for each inmate upon the initial intake assessment process which sets out proposed interventions for that inmate. Further details regarding correctional plans will be explored later in this report.

⁵⁷ Jackson & Stewart, *supra* note 55 at 101.

⁵⁸ *Ibid* at 104-105.

a successful parole application. These are not factors that most prisoners can easily compensate for or change.... Additionally, it needs to be recognized that family and community support, crucial factors for success, are not available for many prisoners and cannot be addressed through a correctional plan.

The continuous focus of the Panel on “motivation” as a primary factor that determines release on parole overlooks the enormous barriers to parole faced by so many prisoners and ignores or minimizes what would be required to overcome them. Clearly it is difficult to be “motivated” to address factors that are perceived to be beyond a person’s capacity to control. No incentive or punishment can address this perception.

On page 110 of *A Flawed Compass*, Jackson and Stewart argued that “earning” parole has nothing to do with assessing an inmate’s risk to society. They wrote:

There is nothing in the legislative criteria that suggest that applicants must do something to “earn” release. Parole is not intended as a reward for compliance with institutional rules, participation in treatment, or positive attitude although the Board should and does consider all of these factors relevant to assessing risk. In the end, however, consistent with the human rights principle of least restrictive measure, the statutory mandate of the Parole Board is to assess only the relative risk to public safety should the applicant be released under supervision now or released at a later date without supervision.

Adding criteria that are intended to meet other purposes, such as prison management or to reward “good” behaviour, introduces objectives that are not related to public safety. Indeed, if parole is denied even though it is assessed as the best way to “facilitate” reintegration, public safety is actually reduced. The legislative rationale for parole is the long-term safety of the community, not to advance any particular agenda of the correctional system. It is, therefore, quite concerning that the Panel would make recommendations for parole granting that appear to introduce a whole additional set of criteria related to “earning” parole that are not necessarily related to risk that would not only make obtaining parole even more difficult but raise serious issues of implementation. Two of these additional problematic elements of earned parole relate to adherence to the correctional plan and the prospect of community employment.

Jackson and Stewart also expressed concern about the Panel's proposed "accountability contract". On page 115, they wrote:

If completion of the correctional plan becomes an "accountability contract" that leads to a person "earning" parole, then clearly conflicts would develop with legislated principles that the Panel also appears to support. For instance, if a person was released on the basis of completion of the correctional plan but was not otherwise an acceptable risk, the principle of public safety would be violated. On the other hand if a person is denied release because they failed to complete the plan but were otherwise considered an acceptable risk, the denial of release conflicts with the principle of using the "least restrictive measure." [Emphasis added]

Jackson and Stewart's cogent warnings did not deter the federal government. On June 15, 2010, then-Minister of Public Safety Vic Toews introduced Bill C-39: *An Act to amend the Corrections and Conditional Release Act and to make consequential amendments to other Acts* (short title: "Ending Release for Criminals and Increasing Offender Accountability Act"). The Bill was read a second time on October 20, 2010 and was referred to the House of Commons Standing Committee on Public Safety and National Security for further study.⁵⁹

Ministers of Parliament (MP) from the Conservative and Bloc Quebecois parties expressed support for Bill C-39. For instance, Conservative MP Brent Rathgeber (noting that the proposed legislation followed through on changes identified by the Panel's *Roadmap* report) stated that "offenders must be held accountable for that criminal behaviour and also for their rehabilitation."⁶⁰ Bloc Quebecois MP Marc Lemay said, "the individual must be made aware that their release from prison is as much their responsibility as the crime they committed...after they are sentenced, many individuals tend to sit in prison and just wait for the end of the sentence. This bill should put an end to that."⁶¹

⁵⁹ Barnett, Laura et al. Legislative Summary of Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts. Library of Parliament Research Publications, (October 5, 2011; revised February 17, 2012), https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c10&Parl=41&Ses=1&Language=E.

⁶⁰ House of Commons (Hansard, October 19, 2010), p. 5033
<<http://www.ourcommons.ca/Content/House/403/Debates/082/HAN082-E.PDF#page=10>>

⁶¹ House of Commons (Hansard October 19, 2010), p. 5031,
<<http://www.ourcommons.ca/Content/House/403/Debates/082/HAN082-E.PDF#page=7>>.

A number of MPs from the Liberal and New Democratic parties had differing views. Citing Jackson and Stewart's report, MP Mark Holland questioned where the resources for the government's plan were. If inmates were forced to have a plan, upon which their release was contingent, but there were no resources for them to complete the programs required for their plans, then this would be "an exercise in futility and it means those people are going to be trapped in a situation where they cannot get out and cannot meet the objectives established for them."⁶²

Bill C-39 died, not because of such criticisms but because a federal election was called on March 29, 2011. After the election, however, Bill C-39 was incorporated into the Conservatives' omnibus Bill C-10 and the Panel's Roadmap report continued to be cited.⁶³ During the third reading of Bill C-10, a strong desire for increased accountability was again expressed. For instance, Conservative Senator Marjory LeBreton stated "Canadians are offended when offenders get a slap on the wrist and a trip to "Club Fed." They want to have complete confidence in our justice system. In order for this to happen, offenders must be held accountable."⁶⁴ As to concerns regarding resources for the Conservatives' plans, Senator LeBreton commented, "there is no cost that is too great to deal with criminals."⁶⁵

Bill C-10 was passed on March 12, 2012 and amended the *CCRA*, amongst numerous other *Acts*. Clauses 52-107 and 147 of Bill C-10 are very similar to the provisions in Bill C-39. Interestingly, despite the *Roadmap* Panel's focus on the abolishment of statutory release, from which its other recommendations stemmed, Bill C-10 did not abolish statutory release entirely but rather expanded the categories of inmates subject to continued incarceration after their statutory release date when they have served two-thirds of their sentence (clause 103, *CCRA*).

Clauses 54, 55, 69, and 71 of Bill C-10 had a significant impact on the *CCRA* for the purposes of *Preventing Parole*.

⁶² House of Commons (Hansard, October 18, 2010), p. 5009-5019
<<http://www.ourcommons.ca/Content/House/403/Debates/081/HAN081-E.PDF#page=51>>

⁶³ Debates of the Senate, (March 1, 2012), p. 1281
<https://sencanada.ca/Content/SEN/Chamber/411/Debates/pdf/056db_2012-03-01-e.pdf>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

i. CLAUSE 54

Clause 54 amended section 3 of the *CCRA* so that the CSC's paramount consideration is now the protection of society.⁶⁶ Further, clause 54 added the notions of the "nature and gravity of the offence" and the "degree of responsibility of the offender" to the requirement that the CSC be guided by the principle that the sentence be carried out having regard to all relevant information available (sections 4(a) and 101(a)).

As well, Bill C-10 removed the principle formerly set out in s. 4(d) of the *CCRA* that the CSC "use the least restrictive measures consistent with the protection of the public, staff members and offenders"⁶⁷ (emphasis added) and replaced it with s. 4(c), that "the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act",⁶⁸ giving the CSC considerably increased power.

ii. CLAUSE 55

The concept of correctional plans was already mentioned in the *CCRA* prior to Bill C-10's amendments. A correctional plan is "a document that outlines a risk management strategy for each offender. It specifies those interventions and monitoring techniques required to address areas associated with the risk to re-offend." Each inmate's correctional plan is different. The results of a risk assessment and the inmate's Case Management Strategy Group are incorporated within the correctional plan.⁶⁹

Correctional plans are created by the CSC upon intake of each inmate. The PBC is not obliged to adhere to the CSC's recommendations; however, the two bodies are deeply intertwined. Without success in one's correctional plan and the support of their Institutional Parole Officer (IPO) and/or case management teams (CMTs), an inmate is far more unlikely to succeed in the parole hearing process.

Legislated against Jackson and Stewart's cautioning against linking accountability with correctional plans, Clause 55 of Bill C-10 states that the commissioner of the CSC can "provide offenders with incentives to encourage them to

⁶⁶ Government of Canada, Comparison of previous *CCRA*, (2011) <<http://laws-lois.justice.gc.ca/eng/acts/C-44.6/20110328/P1TT3xt3.html>> to current *CCRA*, Government of Canada (2018) <<http://laws-lois.justice.gc.ca/eng/acts/C-44.6/index.html>>.

⁶⁷ Government of Canada (2011) <<http://laws-lois.justice.gc.ca/eng/acts/C-44.6/20110328/P1TT3xt3.html>>

⁶⁸ Government of Canada (2018) <<http://laws-lois.justice.gc.ca/eng/acts/C-44.6/index.html>>

⁶⁹ Government of Canada, The Correctional Plan, (December 12, 2012), <<http://www.csc-scc.gc.ca/parole/002007-0004-eng.shtml>>.

make progress towards meeting the objectives of their correctional plans” and that the CSC “shall take into account the offender’s progress towards meeting the objectives of their correctional plan.” As we will see in the case studies later in this report, this clause, along with various Commissioner’s Directives, make completing one’s correctional plan an uphill battle while maintaining innocence.

iii. CLAUSE 69

Clause 69 of Bill C-10 modified s. 96 of the *CCRA* to authorize the Commissioner of the CSC to make rules regarding inmates’ security classifications and sub-classifications. The clause also enables the Commissioner to make rules concerning the circumstances in which a warden may authorize escorted temporary absences and work releases—all factors which, we will see, play a major role in an inmate’s ability to obtain parole.

iv. CLAUSE 71

Clause 71 of Bill C-10 replaced the former s. 101 of the *CCRA* with s. 100.1 that states: “The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.”

G. COMMISSIONER’S DIRECTIVES

In addition to the amendments to the *CCRA*, new Commissioner’s Directives (CDs) governing the CSC were implemented following the passing of Bill C-10, including CDs focused on motivation and accountability. CD 710-1 is an example of a CD which are particularly integral to the issues in *Preventing Parole*.

CD 710-1, “Progress Against the Correctional Plan,” came into effect on September 20, 2014 and discusses accountability and motivation. Accountability is defined as “the level of involvement of the inmate in his/her Correctional Plan in relation to the obligation to modify behaviours identified as being problematic. Attitude, behaviour and insight are critical components to accountability.” CD 710-1 provides that the CSC use the following criteria to assess an inmate’s level of accountability:

- 1) *Level of acceptance of responsibility for his/her criminal behaviour;*
- 2) *Level of remorse and victim empathy;*

- 3) *Institutional adjustment and/or behaviour under community supervision;*
- 4) *Conduct that demonstrates respect for other persons and property;*
- 5) *Communication to his/her Parole Officer of his/her willingness to engage in his/her Correctional Plan;*
- 6) *Active participation in setting and achieving the objectives of his/her Correctional Plan;*
- 7) *An understanding of his/her offence cycle*
- 8) *An understanding and commitment to his/her relapse prevention the meeting of court-ordered obligations.*

It is impossible for an inmate who maintains innocence to meet factors 1, 2, 3, 5, 6, 7, and 8. Relying on the inmates' failure to meet these criteria, the CSC then provides negative assessments of the inmates to the PBC, frequently resulting in its denial of parole.

CD 710-1 states that the guidelines for establishing the overall level of accountability are:

LOW – Inmate rejects responsibility for his/her actions and fails to recognize his/her problems. Does not disclose emotional states, display guilt or victim empathy with evidence indicating a high level of denial and cognitive distortions.

MODERATE – Inmate may not fully accept responsibility for his/her actions but recognizes some of his/her problems. Displays some guilt and victim empathy with some evidence of denial and cognitive distortions.

HIGH – Inmate accepts responsibility for his/her actions and recognizes his/her problems. Willing to self-disclose, displays guilt and victim empathy with evidence indicating a low level of cognitive distortions.⁷⁰

If an inmate does not receive a rating of either medium or high in accountability and motivation, he or she will be deemed not to be engaged in his or her correctional plan (factor 6), which the PBC considers in its decision(s) regarding release.⁷¹

⁷⁰ Correctional Service Canada, Commissioner's Directive: Progress Against the Correctional Plan, (2015), < <http://www.csc-scc.gc.ca/lois-et-reglements/710-1-cd-eng.shtml>>

If an inmate is deemed not to be engaged in his or her correctional plan, particularly in “lacking accountability” this affects steps on the way to release, even penalizing them financially. For instance, during a prison visit, Mr. Richards notified Ms. Barsky (who, with Calgary lawyer Gavin Wolch, also acts as his prison lawyer) that his already minuscule pay was being cut because of CD 730: Offender Program Assignments and Inmate Payments.⁷² Because Mr. Richards maintains innocence and therefore is deemed to lack accountability, his pay level was decreased despite his exemplary institutional work performance records. The troublesome provision is 35(c) which states: “Pay reviews and decisions to increase or decrease an inmate’s pay level should be based on the following as defined in Annex B...(c) involvement in his/her Correctional Plan, including level of accountability, motivation and engagement, pursuant to CD 710-1—Progress Against the Correctional Plan.”

Other *Preventing Parole* participants’ pay has also been cut due to CD 730, including Wesley’s, Elizabeth’s and James’s. For example, James has consistently achieved “Excellent” Performance Evaluation ratings (the highest rating possible), resulting in “A” pay levels. Following the implementation of CD 730 in 2014, however, James’s pay level was suddenly decreased to “B”. The CSC Manager, Programs, wrote: “Does not meet criteria for Level A.” This is because “Offender’s Level of Accountability according to CD 710-1 is ‘Moderate,’ Level of Motivation according to CP and as defined in CD 710-1 is ‘Moderate.’”

As discussed below, accountability and motivation also play a significant role into even obtaining entry and completing CSC programs.

⁷¹ Correctional Service of Canada, *Commissioner’s Directive 705-6: Correctional Planning and Criminal Profile*, (April 1, 2014), <<http://www.csc-scc.gc.ca/politiques-et-lois/705-6-cd-eng.shtml>>.

⁷² Government of Canada, (last modified August 22, 2016), <<http://www.csc-scc.gc.ca/acts-and-regulations/730-cd-eng.shtml>>.

H. CSC PROGRAMS: ENTRY AND COMPLETION

The concepts formalized through the amendments to the CCRA and the CDs are not new. As we will see in the following excerpts from Phillip Tallio's CSC records, not accepting responsibility for one's alleged offence has been an issue for decades. It has hindered entry into the very programs that inmates must complete to obtain the support of their case management team (CMT). However, turning the concepts into law makes matters even more difficult, no matter how motivated they are to progress through their correctional plan.

i. PHILLIP TALLIO

In a 1993 statement addressing the benefits of participating in the "Genesis Group", Phillip Tallio wrote:

I have learned that this [prison] is not the place where I want to spend a majority of my life. And to be totally honest...I do not have a choice but to accept the fact that I will more than likely be here for quite some time to come. Why? Because I will not go to RPC [Regional Psychiatric Centre] and admit to something that I did not do.

This is something that I know the Parole Board does not want to hear, but I would be lying to myself and to others if I were to say that I did the crime that I am here for. If they cannot take my word for this, and accept the changes that I have made in my life already, then I can sit here until one day they won't have a choice but to accept what I have to say. I myself know that if I were to be released after my ten year review, I would not re-offend, again, because I did not do the crime in the first place. All I want is to get out of this place and start a brand new life...THAT'S WHAT I WANT TO DO."

Further, in a letter to an Aboriginal Elder employed by CSC in 2009, close to 20 years past his parole eligibility date, Mr. Tallio wrote:

Since I went up for my first parole hearing...I have been told time and time again, "You have to admit to and accept responsibility for your cousin's death...You have to take the high intensity sex offender program, and you have to show remorse for what you've done, and you have to describe the events that lead up to the time that you killed your cousin..."

...I cannot take [CSC] programs, because I cannot do what they say is required of me...SURE...I can go to RTC for their program, but I wouldn't be there for very long...Because once we reach the part where I have to tell them how my cousin was killed, I'd say, "Sorry I can't do that..." and they would send me back with an INCOMPLETE PROGRAM on my file.

Each year that my parole hearing came up, I signed the waiver papers because I know that their first statement would be. "Because you have refused to go to RTC for the SOP, [Sex Offender Program] Mr. [A], parole is being denied because you are untreated. Therefore, you remain a risk to society.

Sadly, Mr. Tallio's assessment seems to be correct. His account of what would happen is completely supported by his CSC documentation. In every year of the CSC documentation throughout more than three decades of incarceration, the focus is on Mr. Tallio's "denial." In 1992, for instance, Mr. Tallio's then-Correctional Officer (CO) wrote, not about any institutional misbehaviour or violence, but that:

"The only real concern is the fact that he denies committing the offence for which he is serving time. No institutional charges at this time."

Yet, in 1993, a CSC Progress Summary update conveys that although Mr. Tallio was low risk in all other areas:

He does represent a risk to the safety of the public due to his refusal to participate fully in his Correctional Plan."

That year, the PBC (then known as the National Parole Board) denied Mr. Tallio's application for release. In their decision, the Board members stated:

Case management team recommend full parole and day parole denied largely because of continued denial of offence....[Mr. Tallio] continues to deny guilt and refuses to talk about it and even at the hearing was most reluctant to discuss the aspects of the crime for which he is serving this sentence. Because of his denial treatment is impossible and thus intervention at Regional Psychiatric Centre is out of the question...The Board concludes his risk is not manageable at this time.

Reports from 1995, including a Risk Summary completed by CSC staff include the following:

As [Mr. Tallio] has not taken responsibility for his offences, addressed his sexual deviancy problem, or provided any plans the CMT does not recommend Full Parole.

And:

[Mr. Tallio] has been assessed as a medium security inmate, as his Institutional Adjustment and Escape Risk are rated low, while his risk to Public Safety remains high. Until [Mr. Tallio] participates in RPC to address the sexual deviant component of his offence, his risk to re-offend will remain high."

The PBC denied Mr. Tallio parole again in 1996. The three-member panel stated in their Reason for Decision:

Although [Mr. Tallio] has made some progress in his correctional plan, he continues to deny his offence and the main issue of his crime remain unaddressed. Until such time as he has received treatment/programming for his sexual deviancy and for his emotional problems, the Board concludes that his risk remains excessive for any form of conditional release. Full parole is therefore denied.

Year after year this pattern continued. In a 1999 Progress Assessment, Mr. Tallio's then-IPO wrote:

Throughout his current incarceration, [Mr. Tallio] has maintained his innocence and consequently has not cooperated with his Correctional Plan. This lack of cooperation is assessed as primarily due to attitude.

In a 2000 Progress Assessment written by a CO II, under the heading "Attitude:"

[Mr. Tallio] maintains his innocence and thus, shows little insight into the factors that have led to his behaviour. He takes no responsibility and hence, shows no remorse.

On the next page:

...[Mr. Tallio] continues to maintain his innocence for the offence that has resulted in his current incarceration. He shows little insight into the factors that have led to the present circumstances.

In a 2005 report authored by another of Mr. Tallio's former IPOs, regarding his Automatic Full Parole review that year, the IPO stated:

...the primary concern in the case is [Mr. Tallio's] complete denial of offending and the subsequent refusal to participate in any correctional programming that would assist in addressing his sexual deviance. ...given his complete denial of offending, a thorough psychological assessment has not been completed...he has not been able to address his sexual offending. As such, his risk to reoffend has not been mitigated in any way...

Under "Offender's Level of Commitment", Mr. Tallio's then-IPO wrote:

Mr. [Tallio] is not motivated for a community release at this time...Mr. [Tallio] has shown no commitment to his relapse prevention as he has not admitted to his offending, let alone come to understand his own risk to reoffend. Based on the above information, Mr. [Tallio]'s Level of Commitment is seen as Low.

The PBC denied Mr. Tallio parole in 2005, explicitly basing its decision on the fact that Mr. Tallio maintains his innocence. Mr. Tallio has waived all subsequent parole hearings.

Mr. Tallio's CMT may argue that his lack of progress in prison is due to his refusal to participate in programs; however, he did so because it was his belief that his denial of his offence would prevent any success. And, as was demonstrated earlier, it did prevent success when he tried. However, he was also denied entry into programs on this basis. For instance, a CSC psychological assessment from 1993 stated:

He understands that it is not likely that he will achieve his goal of conditional release until he receives sexual offender treatment. He further understands that he is unlikely to be admitted to sexual offender treatment until he acknowledges his offence. It is noted that he was not accepted for the institutional wellness (sex offender) program in August 1993 due to lack of motivation and claims of innocence.

Finally, in 2010, CSC made Mr. Tallio a proposal, telling him that he could now participate in the correctional programming required for him to obtain parole. In a Progress Report from that year, a CSC Program Supervisor wrote:

The MBIS [Motivational Based Intervention Strategy] facilitator met with Mr. Tallio on 2010-06-29 for almost an hour. Mr. Tallio is a long term offender who continues to claim innocence of his charges and conviction. As such he has been excluded from past program models. The new ICPM model states that an offender who claims innocence can still be accepted into a program and receive a successful completion. This change in philosophy was shared with Mr. Tallio who was in this writer's opinion sceptical of this information. Mr. Tallio is in the process of appealing his conviction through the Innocence Group and stated that he would have to confer with them to see if this would warrant his participation in a program. The Group is not functioning during the summer so I stated to Mr. Tallio that I would get back to him sometime in September to see if he had had an opportunity to meet/speak with them.

The MBIS facilitator met again with Mr. Tallio on 2010-01-15 for 15 minutes. This writer reviewed the status of Mr. Tallio's meeting with the Innocence Project. Mr. Tallio shared that they do not see his involvement with program problematic to his claim of innocence in any criminal behaviour. Mr. Tallio stated he continues to be concerned how his claim of innocence would affect his participation in ICPM. This writer reinforced that current ICPM allows for denial or innocence within program parameters and does not preclude a successful completion. Mr. Tallio agreed that he would be willing to be interviewed for participation in ICPM programs but prior to agreeing to his participation in that program he would ask facilitators to reiterate that his participation and evaluation would not be compromised by his claim of innocence of his index offence.

Mr. Tallio was interviewed for the ICPM high intensity sex offender program and agreed to participate. He completed a number of worksheets in his time in the program. These worksheets asked questions and/or noted categories such as "Where did you live and spend your time?" "Substance Abuse" "Work or School, what was going on?" "Violence" "General Crime," then asked how much Mr. Tallio's answers to questions "play[ed] a role in [his] crime lifestyle/process." Mr. Tallio gave a "2" rating for each question, meaning "None." While there were "Examples of Significant Risk Factor" checklists provided which could help inmates identify how matters affected their crime lifestyle or process, such as "Planned the next crime," "Gave into temptations to do crime," "Crime was seen as the best or only solution," "It was something to do," and "Didn't want to let down friends or others," Mr. Tallio could not select anything but "2"

because he maintains that he didn't commit the offence. How is he to explain why he committed an offence that he maintains he did not commit?

As the above excerpts demonstrate, Mr. Tallio had good reason to be skeptical of CSC's promise that he could successfully complete the ICPM while maintaining innocence. When he maintained innocence, CSC fell short on its promises that he could complete the program while doing so. The ICPM Correctional Program Officer wrote a report regarding Mr. Tallio's "Attitude and Participation" in the ICPM:

Mr. Tallio attended 8 out of 10 sessions of the ICPM Non-Intake Primer Program...his worksheets often provided little information and he indicated to the facilitators that his lifestyle leading up to his current offence did not contribute to his crime.

...Mr. Tallio did not identify risk personal risk factors as he felt it did not apply to him. This writer met with Mr. Tallio on 2010-12-15 to complete Session 10 of the program to review his Crime Process and risk factors. During this one-on-one interview, several strategies were employed in an attempt to assist him in identifying personal risk factors so that he could continue on with the ICPM SO High Intensity Program; however Mr. Tallio continued to state that he had no risk factors. Mr. Tallio verbalized that he felt that this writer was "hammering" him to have risk factors and he verbally requested to be withdrawn from the program...

Throughout the ICPM Non-Intake Primer Program, Mr. Tallio denied responsibility for his current offence which affected his ability to identify personal risk factors. Furthermore, he indicated that his lifestyle prior to his current offence did not lead to his current offence.

Due to Mr. Tallio not finishing the ICPM Non-Intake Primer Program, he will have to enrol into the program again and complete it prior to continuing on with the ICPM High Intensity Sex Offender Program as it states in his correctional plan.

In Mr. Tallio's annual Security Reclassification report from 2011, his then-IPO wrote:

...At this time Mr. Tallio has yet to complete the Integrated Correctional Program Model Sex Offender High Intensity Program at Mountain Institution. He has been offered the program on a number of occasions but has refused consistently due to his claims of innocence. On 2010-03-01 Mr. Tallio again refused to participate in a sexual offender program but after completing Motivational Based Interview Skills

sessions, it appeared as though Mr. Tallio was fully engaged in his Correctional Plan as he agreed to participate in the ICPM Non Intake Sex Offender Primer. Although he attended most of the sessions the program facilitator was unable to assess Mr. Tallio's denial of having risk factors which contributed to the index offence, and Mr. Tallio providing a limited amount of information on his worksheets. As a result the program facilitator cited having only a "minimal knowledge" of Mr. Tallio thus proving it difficult for the facilitator "to confirm and/or establish personal risk factors" for Mr. Tallio. Mr. Tallio was subsequently suspended from the Primer on 2011-01-14 and is required to repeat the Primer prior to completing further program interventions...

...Due to not having completed correctional programming to address his dynamic risk factors, Mr. Tallio's risk for recidivism has not been sufficiently mitigated to warrant a reduction to his public safety rating. While it appears he appreciates the severity of the index offence, his continued refusal to accept responsibility for this crime is problematic when trying to assess his risk for violent and/or sexual behaviours in the future. While he expresses his desire to never return to jail, the CMT cannot assess whether Mr. Tallio possesses skills to significantly reduce his risk to public safety. Mr. Tallio remains assessed as a Moderate risk to public safety.

Thus, according to CSC, inmates maintaining innocence are no longer barred from entering programs while they maintain innocence, but if they continue to maintain innocence during the program, there is a very strong likelihood they will still be unsuccessful.

There are ways, however, in which some of these inmates can work around the problematic requirement—ways do not eliminate the issue but which can make the situation slightly less impossible. Such creative problem-solving involves discussing risk factors besides inmates' alleged index offences, such as general psychological issues, drug or alcohol addiction, or poor behaviour such as harassment or making threats.

ii. WESLEY

In an interview with Ms. Barsky, Wesley offered an example of this creative problem solving. He explained that in the Integrated Correctional Program Model,⁷³ CSC wants inmates to discuss what was going on 12 months before the offence occurred and 12 months after the offence. For three months, inmates attend the ICPM each day in a classroom-like setting. Wesley said that he tried to “make CSC feel good” about his answers. He tried not to “enhance” anything, but, because he maintains innocence, he knew that to successfully complete the program, he would need to use *something* to address the five generic risk factors placed on his CSC file: solving problems, budgeting, violence towards his partner; feelings, and emotions. Wesley was able to discuss difficulties in his life around the time of the alleged murder (the victim’s body was never found in his case), and he listened to other inmates’ answers in class, so that he could input them into his own responses. CSC staff, who must accept the court’s finding of an inmate’s guilt despite their claim of innocence, made his answers fit into his correctional plan to enable him to complete the program.

The reality is that today, it is difficult for inmates to get programs at all, even though it is required by law. The programs available commonly focus on issues such as crime prevention, violence prevention, and substance abuse, for instance. There are also programs geared towards specific populations, such as sex offenders and Aboriginal offenders.⁷⁴ However, just 4.7% of CSC’s budget was allocated to correctional reintegration spending for the 2014-2015 year—\$110 million out of \$2.334 billion.⁷⁵

Prisoners, regardless of whether they claim innocence, can now only access programming and assessments when their parole eligibility date is near. In an interview with Ms. Barsky, lawyers Jennifer Metcalfe and Karen Slaughter, who work at Prisoners’ Legal Services in B.C., noted that the resources for CSC programming have simply become so scarce that CSC would not expend resources on prisoners claiming innocence when they can allot programming to another prisoner who expresses remorse and can successfully complete their correctional plan.

⁷³ CSC programs have been concentrated into one Integrated Correctional Program Model (ICPM), with three levels: high intensity, moderate intensity, and an adapted moderate level, which is a maintenance program. See, Government of Canada, “Integrated Correctional Program Model” (November 31, 2014) online: <<http://www.csc-scc.gc.ca/correctional-process/002001-2011-eng.shtml>>.

⁷⁴ Correctional Service Canada, “Correctional Programs” (October 31, 2014), <<http://www.csc-scc.gc.ca/correctional-process/002001-2001-eng.shtml>>.

⁷⁵ Sapers, Howard. “Annual Report of the Office of the Correctional Investigator 2013-2014” (June 27, 2014), <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20142015-eng.pdf>>

Ms. Metcalfe and Ms. Slaughter's observation is supported in the experiences and numerous records of the *Preventing Parole* participants. For instance, in an interview with Ms. Barsky, Gerry explained that it took seven years of waiting before he could get into the final CSC program he was required to complete to successfully transfer into a minimum security institution. In James's case, he was incarcerated for 20 years before CSC arranged a psychological assessment for him. As conveyed in a 2010 email from an IPO located in James's records, they only did so because James had a PBC hearing for day parole coming up in 2011. And, in Wesley's file, a 2005 email from a CSC staff member to two other staff members states:

As for putting him on our list of assessments to be completed it is not realistic. He will be so low in the priority list that he has very little (if any) chance to ever be picked up. Basically the demand for NPB assessments and other emergencies never lets up and in fact has increased in last years without an increase in services. No point having him on the list.

Wesley, who has been incarcerated since 2000, informed Ms. Barsky that he was first denied entry into programs because of his innocence claim. This is supported by a review of Wesley's CSC record. Several years into his sentence, Wesley was still denied entry into a Family Violence prevention program as "[h]e is appealing his conviction and at this time can not participate in programs" wrote his then-IPO. Another report by his IPO and Correctional Officer II (COII) states, "[Wesley] is still appealing his sentence and because of that he can't participate in programs. Otherwise his behaviour and work habit are excellent." And, in a program interview sheet, he was not accepted into the program solely because he is "working on appeal process."

Ultimately, Wesley approached the prison chaplain and told him that he could not get into programs. The chaplain spoke to the program director's superior at Wesley's institution and argued that the program was not about admitting guilt. Because the chaplain advocated for him, Wesley was allowed into the high intensity ICPM. It was also easier for him to gain access, however, because at that time ICPM was a pilot program.

Wesley had difficulty obtaining entry into additional programs later, however. In a 2012 psychological assessment, a CSC psychologist wrote, "Until [Wesley] accepts responsibility for his crime, I do not see any possible benefit from treatment or formal programs there for I have no treatment recommendations."

Period. No more programs for Wesley due to his innocence claim.

IV. THE DIFFICULT TASK OF ASSESSING RISK

Even if inmates who maintain their innocence are able to complete the requisite programs, they are still confronted with an enormous hurdle—the CSC’s assessment of their risk to society, which informs the PBC’s decisions. The following are just a few excerpts from each of the *Preventing Parole* participants’ CSC files.

A. ELIZABETH

Elizabeth has been incarcerated since 1998. She was eligible for day parole in 2007 and full parole eight years ago, in 2010. In its 2010 decision denying Elizabeth UTAs, day parole and full parole, the PBC noted that Elizabeth had completed programs, but:

While each of the program reports noted gains, especially related to communication and assertiveness skills, your continuing denial of listed contributing factors and the index offences raises questions of whether the actual contributing factors are known and hence, the real extent of gains addressing your risk.

And in her 2014 psychological assessment, a CSC psychologist wrote:

The dynamics of her offence are largely unknown and not understood. This is in big part because of [Elizabeth’s] denial of having committed the acts. Theories that she was under a lot of stress or was depressed leading up to the offence and could not appropriately communicate her distress, are based on generalizations...and are only speculative, unless the subject/perpetrator offers some discussion and insight into it. This is not forthcoming in [Elizabeth’s] case, and makes it hard to assess the dynamic risk for such evens in particular and risk for violence in general. Overall, her risk for future violence is low to moderate.... I am unable to say if her risk of violence is limited to similar situations as the index offence.

B. DURAY RICHARDS

Mr. Richards was convicted of first-degree murder in 1994, though he has been incarcerated for the offence since 1992. In a 2013 decision in which it denied Mr. Richards ETAs, the PBC stated:

You discussed your index offending and continue to deny the index offence. In spite of this you were found guilty by 12 peers and the verdict was upheld by the appeals court indicating that these individuals determined the conviction was warranted. The Board has no authority or mandate to determine guilt or innocence and must proceed on the basis of the verdict of the court. This makes risk assessment difficult if not impossible as there is no crime cycle identified and no way to consider and assess accountability for your actions in the index offence or skills to manage this risk as you deny the offence.

C. JAMES

In a 2011 violence risk assessment, a CSC psychologist wrote:

[James] has maintained a good employment history while incarcerated and has not been involved in extensive institutional misconduct. However, in the writer's opinion, [James's] ability to identify the factors associated with his institutional misbehaviours appears incomplete. He has successfully completed several CSC treatment programs although the effectiveness of his skill acquisition was questioned. At this time the writer is unable to offer an estimate of James's risk to offend violently due to lack of relevant information... At this time the writer can neither generate an estimate of [James's] risk to offend violently or reliably identify his dynamic risk factors for violent offending. As a result, the writer cannot make recommendations regarding additional programming for [James].

In a 2017 psychological risk assessment report by a CSC mental health clinician (reviewed by a CSC psychologist), the mental health clinician wrote:

[James's] denial of his culpability or involvement in his index offence makes it difficult to assess his level of insight with regards to his offending behaviour. When [James] was asked to identify his level of risk he responded "zero". When he was asked what could increase his risk he said nothing that he could think of. Without the ability to openly discuss the motivators for his index offence it is

impossible to fully assess or gain a full understanding of any motivators, disinhibitors or destabilizers involved in the circumstances surrounding his index offence. This gap in understanding makes it impossible to develop a comprehensive risk management plan in the community.

D. GERRY

A 2012 psychological report by another CSC psychologist stated:

[Gerry's] adamant denial of any involvement in the murder for which he has been convicted inevitably puts sharp limits to my confidence regarding opinions about risk assessment, and risk management. There is a fundamental problem posed by the gap of what he claims happened and what we must accept did happen i.e. the jury's verdict. With his continued denial of any involvement, we are in no position to critically examine the risk factors that existed at the time of the killing and compare them with current contributors to risk.

A 2013 psychological assessment by another CSC psychologist stated:

...what remains troubling in my view, is the lack of understanding of the motive and actual circumstances around the murder. Clearly knowing the actual dynamics would lead to a better understanding of future risk factors.

And, in a 2014 psychological risk assessment report, a third CSC psychologist wrote:

Results from the PCL-R suggested a moderate-low risk to reoffend, results from the VRAG suggested a low risk, and results from the HCR-20 suggested a low level. I therefore estimate [Gerry's] current risk to reoffend at the moderate-low level. This risk level would have likely been gauged at a low level had there been information as to the motives and precursors to the murder. However, in my opinion, given that [Gerry] continues to maintain his innocence, this dearth of information hampers a fuller risk probability appraisal and therefore leaving room to say that consequently it is prudent to say it raises risk level for general and violent recidivism.

E. WESLEY

A CSC psychological assessment from 2000 stated:

Actuarial assessments indicate that [Wesley] is low risk for violent re-offending. However, the extreme violence that [Wesley] perpetrated indicates that actuarial measures miss the mark, and that his risk level is actually higher. If [Wesley's] appeal is dismissed and he becomes more disclosive about his crimes, it is recommended that a full psychological assessment be conducted at that time. This should include treatment recommendations and, if warranted, a restoring of the actuarial results presented above.

F. MR. TALLIO

A psychological report regarding Mr. Tallio by a CSC psychologist stated:

He denies the offence and has maintained from the start that he has been wrongfully convicted.... He signed a statement⁷⁶ admitting to the offence but subsequently denied it... In essence, no one has challenged his denial in any systematic way, and there is no proven way to do this with outright denial... The principal barrier to his treatment is his denial. The writer cannot assess risk in this matter given the denial and lack of objective assessments tools available for assessment at the institutional level.

A few years later, in its 1996 decision denying Mr. Tallio full parole, the PBC wrote:

...admitted to the offence originally but claims this is untrue and denies committing the crime.

...refuses to acknowledge guilt and therefore Regional Psychiatric Centre sex offender treatment is not possible. Remains an untreated sex offender.

⁷⁶ This statement, allegedly given and signed by Mr. Tallio, was ruled to be involuntary and inadmissible at trial. It had allegedly been given to RCMP Corporal Garry Mydlak after Mr. Tallio had given two previous interviews with another police officer which were audio recorded and in which he maintained innocence. Cpl. Mydlak alleged that Mr. Tallio confessed during a third interview, which was unrecorded as Cpl. Mydlak claimed the recorder broke. Despite the fact that the alleged statement was found to be inadmissible, it was disclosed to the CSC and has been relied upon by the CSC and the PBC throughout Mr. Tallio's 35.5 year incarceration.

...psychological assessments indicate risk cannot be completely assessed given his denial—

...without treatment and programming to address his main problems and observed, documented evidence of change, the Board cannot conclude that risk has been reduced to the point where release plans can be considered.”

Reason for Decision(s): Although [Mr. Tallio] has made some progress in his correctional plan, he continues to deny his offence and the main issue of his crime remain unaddressed. Until such time as he has received treatment/programming for his sexual deviancy and for his emotional problems, the Board concludes that his risk remains excessive for any form of conditional release. Full parole is therefore denied.

After continued experiences such as these, Mr. Tallio began waiving his PBC hearings, knowing that he would not be released. The CSC did not conduct another violence risk assessment on Mr. Tallio until 15 years later, in 2011. In the 2011 psychological assessment, a forensic psychologist stated that Mr. Tallio scored in the low range on the PCL-R, suggesting a low risk of re-offending. He stated that Mr. Tallio was unable to “comment on the dynamics of the offence,” which, in addition to “the uncertainty over the factors of sexual deviance, is a big hindrance in providing any meaningful risk assessment for the future.”

Without a violence risk assessment, the PBC cannot determine whether an inmate’s risk can be managed in the community—whether they can be granted temporary release or released on parole. But is this notion that one’s risk cannot be assessed if they maintain innocence accurate? What is a violence risk assessment, anyway, and what are its goals? How is risk assessed? How is denial defined? Does denial correlate with risk? And how *should* risk be assessed? These questions will be discussed below.

V. VIOLENCE RISK ASSESSMENTS

In various legal, quasi-legal, and clinical circumstances, professionals are required to assess the likelihood that an individual will cause a certain type of harm under certain conditions within a certain timeframe. Individuals in various professional roles, including police and other law enforcement personnel, correctional and probation officers, and mental health clinicians, find themselves in the position of attempting to determine an individual's risk and subsequently mitigate this risk.

An assessment of an individual's risk of harming another person, or a violence risk assessment, has the potential for significant, life changing impacts on the individual being assessed. They may face a number of dire circumstances such as involuntary civil commitment, mandated treatment, denial of release, and a loss of a multitude of deep-rooted civil liberties. On the other hand, incorrectly assessing an individual as not being at risk for violence may lead to a violation of the rights and civil liberties of another individual and the general public being placed in danger.⁷⁷ Due to the serious consequences of such assessments, the significance of conducting a violence risk assessment according to the highest available standards of professional practice is indisputable.

In the past three decades, the field of violence risk assessment has seen numerous advances.⁷⁸ Since the milestone publications reporting considerable skepticism of a professional's ability to forecast violence⁷⁹, substantial progress has been made with respect to understanding the multifaceted nature of violence, the identification of theoretically and empirically robust risk factors, the development and evaluation of decision making models, and the introduction and validation of structured risk assessment instruments.⁸⁰ The original skepticism regarding professionals' inability to predict violence has been countered by hundreds, if not thousands, of independent

⁷⁷ Monahan, 1993; Murrie & Kelley, 2017, Schlesinger, 1996.

⁷⁸ See, for instance, Blanchard, Reeves, & Gibas, 2016; de Vogel & de Ruiter, 2006; Douglas & Kropp, 2002; Douglas & Ogloff, 2003; Hanson, 2005; Lavoie, Guy, & Douglas, 2009; McNeil, 1998; Monahan, 1996; Monahan & Steadman, 2001; Otto & Douglas, 2010; Steadman, 2000.

⁷⁹ For example, Ennis & Litwack, 1974; Monahan, 1981; Steadman & Cocozza, 1974.

⁸⁰ Douglas & Kropp, 2002; Douglas & Skeem, 2005; Harris, Rice, Quinsey, & Cormier, 2015; Monahan et al., 2001; Quinsey, Harris, Rice, & Cormier, 1998, 2006.

studies and dozens of meta-analyses⁸¹ that support the reliability and validity of numerous risk assessment instruments.⁸²

The professional practice of conducting violence risk assessments has been described and reviewed for several decades.⁸³ During this time, the violence risk assessment field has grown immensely, progressing from a narrow focus on the prediction of dangerousness to a comprehensive risk assessment paradigm.⁸⁴ The ultimate focal point of most risk assessments has changed from the one-time prediction of violence to the ongoing assessment of risk in order to develop and implement strategies to reduce violence.⁸⁵

A comprehensive violence risk assessment is characterized by two distinct stages. The first stage involves determining and understanding the individual's potential for future violence.⁸⁶ The goal of this stage is to develop an understanding of various features of the individual's risk for future violence, including the type(s), severity, and frequency of violence the person may perpetrate, the likely victim(s), the particular circumstances in which the individual might perpetrate violence, and the underlying reasons or factors contributing to their violence. This stage generally involves a systematic examination of the individual's history of violence and general psychosocial functioning. Typically characterized as a process of *prediction*, it is primarily concerned with making single time-point predictions of violence.⁸⁷ However, this process differs from making probabilistic estimates of violence (i.e., precise, quantitative statements regarding the probability of perpetrating violence in a certain setting over a fixed period of time), in that the focus is on developing an understanding of the individual's potential (i.e., what this individual might do in the future).

⁸¹ A meta-analysis is a type of systematic review in which the results of a number of different studies are integrated (Beaman, 1991; Borenstein, Hedges, Higgins, & Rothstein, 2008; Durlak, 1995; Glass, 1976; Glass, McGraw, & Smith, 1981; Rosenthal, 1991; Rosenthal & DiMatteo, 2002). Meta-analysis is the standard method of reviewing and summarizing the results from a number of different studies.

⁸² See, for instance, Campbell, French, & Gendreau, 2009; Guy, 2008; Hanson & Morton-Bourgon, 2009; Singh, Grann, & Fazel, 2011; Yang, Wong, & Coid, 2010.

⁸³ See, Heilbrun, 1997; Kozol, Boucher, & Garofalo, 1972; Litwack & Schlesinger, 1999; Monahan, 1981, 1984, 1996; Scott, 1977; Shah, 1978; Tardiff, 1996; Webster & Menzies, 1989.

⁸⁴ Douglas & Kropp, 2002; Dvoskin & Steadman, 1994; Haggard-Grann, 2007; McNiel et al., 2002; Monahan, 1996; Skeem, Mulvey, & Lidz, 2000.

⁸⁵ Douglas, Cox, & Webster, 1999; Douglas & Skeem, 2005; Dvoskin & Heilbrun, 2001; Dvoskin, Skeem, Novaco, & Douglas, 2012; Heilbrun, 1997; Hart, 1998; McNiel et al., 2002; Otto, 2000; Skeem, Mulvey & Lidz, 2000; Steadman, 2000; Steadman et al., 1993; Webster, Douglas, Belfrage, & Link, 2000.

⁸⁶ Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Heilbrun, 1997.

⁸⁷ McNiel et al., 2002.

The second step involves determining and understanding the factors that might mitigate the individual's potential for future violence.⁸⁸ The goal of this stage is to reduce or prevent violence. That is, the focus is on mitigating the risk of future violence by developing and implementing individualized intervention strategies. This stage generally involves a systematic examination of a broad array of factors related to the individual's future circumstances (including personal, situational, and contextual factors) in order to determine management strategies targeted to minimize or lessen the individual's risk of perpetrating violence. This stage, typically characterized as *risk management*, is focused on ongoing assessments that direct intervention strategies to prevent violence. That is, the management stage stresses the close relationship between assessment and management in that a comprehensive assessment should guide the intensity, selection, and targets of intervention strategies. In the management stage, a main focus is placed on the assessment of dynamic risk factors, especially those thought to be modifiable by targeted interventions.

There is consensus in the field that the ultimate goal of each of these stages is clearly divergent; however, professionals have long debated whether the stages can be conducted independently.⁸⁹ According to some authors, these two stages are in fact distinct models that are completely separable and independent.⁹⁰ Proponents of this view argue that the prediction stage can be conducted without consideration of the risk management stage. They claim a direct temporal relationship between the two stages, in that professionals begin with the prediction stage and then, only if needed, move on to the management stage. Moreover, these commentators hold the belief that certain legal contexts require only the prediction of violence (i.e., the relevant legal issue pertains solely to the probability than an individual will perpetrate violence), whereas some legal and clinical contexts will require the evaluator to consider both the prediction and risk management stages.

According to other professionals, these two stages are inseparable and inter-reliant.⁹¹ Proponents of this view assert that the relationship between the prediction and risk management stages is "bidirectional or recursive."⁹² Professionals begin with the prediction stage then shift into the management stage, which may result in reiteration of and changes to the prediction stage and subsequently back to the management stage.

⁸⁸ Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Heilbrun, 1997.

⁸⁹ Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Harris et al., 2015; Heilbrun, 1997; McNiel et al., 2002.

⁹⁰ Harris et al., 2015; Heilbrun, 1997; Scurich, 2016.

⁹¹ See, for instance, Cooke & Michie, 2013; Douglas, Blanchard, & Henry, 2013; Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Hart, Douglas, & Webster, 2001; McNiel et al., 2002; Murrie & Kelley, 2017.

⁹² Guy et al., p. 57.

Judgments made at one stage impact judgments made at the other. The two stages in this view are thus inseparable.

Legal, ethical, and professionally responsible prediction is not possible without systematically considering the individual's possible future circumstances and interventions. For instance, an individual's potential for violence is affected by whether they are in the community or in custody, whether they are monitored closely on probation or have no restrictions imposed, or whether they are receiving treatment for a substance abuse problem or not. Conversely, ethical and professionally responsible risk management must be informed by a systematic consideration of the individual's potential for perpetrating future violence. For instance, selection of the appropriate intervention strategies will depend on the identification of risk factors during the prediction stage. As such, commentators assert that the prediction stage is contingent upon the management stage; thus, prediction is not viable without considering management strategies.

Therefore, the main goal of a comprehensive risk assessment is thought of as "the process of evaluating individuals to (1) characterize the risk they will commit acts of violence and (2) develop interventions to manage or reduce that risk."⁹³ That is, the ultimate goal of a comprehensive violence risk assessment involves "violence *prevention* more than violence *prediction*, the aim is not only an overall risk estimate but, rather, ongoing identification and mitigation of any factors that may be conducive to violence."⁹⁴ Thus, a comprehensive assessment involves both the prediction and management stages. As discussed in more detail below, due to the nature of the actuarial approach, the sole reliance on actuarial risk assessment tools generally only allows for the completion of the prediction stage.⁹⁵ Actuarial risk assessment instruments are often limited in their ability to guide the selection of appropriate intervention strategies. On the other hand, the structured professional judgment (SPJ) approach provides the only evidence-based approach to completing both stages of a comprehensive risk assessment.⁹⁶

⁹³ Hart, 2001, p. 14; see also Douglas & Reeves, 2010; Hart, 2008; McNiel et al., 2002.

⁹⁴ Murrie & Kelley, 2017, p. 135, emphasis in original.

⁹⁵ Blanchard, Shaffer, & Douglas, 2017; Cooke & Michie, 2013; Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Heilbrun, Douglas, & Yasuhara, 2009; Heilbrun, Yasuhara, & Shaw, 2010.

⁹⁶ Guy et al., 2015.

A. CORE PRINCIPLES OF COMPREHENSIVE RISK ASSESSMENTS

A number of commentators⁹⁷ have described fundamental principles or characteristics that a comprehensive violence risk assessment should epitomize. These principles are meant to guide the development, evaluation, selection, and use of violence risk assessment instruments. Integrating the various characteristics and features of comprehensive violence risk assessments discussed in the professional literature, Lavoie and colleagues (2009) identified five core principles of a defensible, evidence-based comprehensive risk assessment.

- 1) Reliable identification of empirically supported risk factors.
- 2) Comprehensive coverage of empirically supported risk factors.
- 3) Facilitate risk management planning.
- 4) Logical method of communicating findings and recommendations.
- 5) Transparent process and available for review.

First, a risk assessment scheme should allow the evaluator to reliably identify empirically supported risk factors.⁹⁸ Decades of empirical research has focused on the accurate identification of risk factors for various types of antisocial behaviour, including violence, specific types of violence (e.g., sexual violence, spousal violence, stalking), and general criminality.⁹⁹ This research has led to a general understanding of the risk factors that are most reliability and strongly associated with various types of antisocial behaviour. A risk assessment instrument must not only include scientifically supported risk factors, it must provide clear and precise definitions, descriptions, or guidelines for each of the risk factors (i.e., operationalize the risk factors). Clear definitions of each risk factor provide the most valid conceptualization and measurement. This ensures that evaluators are accurately considering the relevant information when rating each risk factor, thus, maintaining the empirical association between the risk factor and outcome of interest (e.g., violence, sexual violence). Precise definitions are also critical in order to promote agreement between different evaluators (i.e., increase inter-rater reliability).

⁹⁷ For instance, Conroy & Murrie, 2007; Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Hart, 2001, 2008; Hart & Logan, 2011; Hart, Sturmey, Logan, & McMurren, 2011; Lavoie et al., 2009; Murrie & Kelley, 2017; Otto, 2000.

⁹⁸ Lavoie et al., 2009; see also Conroy & Murrie, 2007; Hart, 2001, 2008; Guy et al., 2015; Murrie & Kelley, 2017; Otto, 2000.

⁹⁹ Douglas et al., 1999; Monahan & Steadman, 1994; Otto, 2000.

Second, a risk assessment scheme should include comprehensive coverage of the empirically supported risk factors.¹⁰⁰ A risk assessment approach or instrument should, therefore, include most of the identified risk factors for the specific type of risk assessment. Professionals should consider a broad array of empirically supported risk factors in each assessment in order to arrive at the most informed decision. Failure to consider a comprehensive set of risk factors may result in inappropriately high or low estimates of risk and failure to identify the most important targets for risk management strategies, if the professional does not consider relevant risk factors.

Third, a risk assessment scheme should facilitate risk management planning and promote risk reduction.¹⁰¹ As discussed above, a comprehensive risk assessment paradigm involves determining various characteristics of an individual's likelihood for future violence, including the nature, severity, imminence, and likely target of violence, as well as determining management strategies that are likely to mitigate this risk. In order for a risk assessment to facilitate risk management planning, it must include dynamic risk factors that can be targeted with intervention. Dynamic risk factors have the potential to change and most importantly are amendable through intervention.¹⁰² Dynamic risk factors include recent or active problems with violent ideation, antisocial attitudes, impulsivity, instability, lack of personal support, and symptoms of major mental illness.¹⁰³

In contrast, static risk factors are relatively stable and unchanging. Static risk factors include a history of characteristics such as violent or antisocial behaviour, early maladjustment (e.g., trauma, abuse, parental issues), substance use problems, relationship instability, major mental illness, or treatment non-compliance. Scholars agree that identification of dynamic risk factors is essential as they present the best candidates for intervention.¹⁰⁴ These dynamic risk factors must also be criminogenic in the sense that change in the dynamic risk factor is associated with resultant change in the individual's level of risk for violence.¹⁰⁵

¹⁰⁰ Lavoie et al., 2009; see also Conroy & Murrie, 2007; Hart, 2001, 2008; Guy et al., 2015; Murrie & Kelley, 2017; Otto, 2000.

¹⁰¹ Lavoie et al., 2009; see also Conroy & Murrie, 2007; Guy et al., 2015; Murrie & Kelley, 2017; Otto, 2000.

¹⁰² Craissati & Beech, 2003; Douglas & Skeem, 2005; Hanson, 1998.

¹⁰³ Douglas et al., 1999; Otto, 2000.

¹⁰⁴ Andrews & Bonta, 2006, 2010a, 2010b; Douglas & Skeem, 2005; Hanson, 1998.

¹⁰⁵ Andrews & Bonta, 2010a, 2010b.

In linking the prediction and management stages of a comprehensive risk assessment, an important distinction arises between the notions of risk status and risk state.¹⁰⁶ *Risk status* refers to interindividual differences in risk level; that is, it identifies groups of individuals that pose a greater risk compared to others.¹⁰⁷ Risk status is largely informed by static, unchanging risk factors and, thus, is considered largely invariant over time.¹⁰⁸ Some individuals will always be considered to have a higher risk status due to unchangeable, historical risk factors, such as a history of serious violence or substance use problems. Risk status is, thus, limited in its applicability to ongoing monitoring or directing intervention strategies.¹⁰⁹

However, even amongst individuals identified as high risk based on risk status, a given individual's risk of violence "ebbs and flows" over time.¹¹⁰ *Risk state* indicates the intraindividual risk level of a given individual at a given moment in time. Risk state describes a particular individual's propensity for engaging in violence at a particular time based on fluctuations of the individual's biological, psychological, and social spheres.¹¹¹ Although requiring the consideration of static risk factors, it is principally derived from consideration of the individual's current standing on dynamic risk factors. As such, a given individual's risk state is thought to fluctuate over time due to both external (e.g., treatment, supervision) and internal (e.g., learning, aging) forces, whereas risk status based on point estimates of static risk factors is relatively unchanging.¹¹²

Fourth, a risk assessment scheme should provide a clear and logical method of communicating findings and recommendations.¹¹³ Some actuarial instruments offer a numerical or probabilistic estimate of violence that is applicable for a certain time frame based on the presence of certain risk factors (e.g., this individual is 76% likely to commit a violent offence over the next seven years). Communicating risk as a simple probabilistic estimate is inherently flawed (see the "Actuarial Approach" section below). Notably, probabilistic estimates provide little to no guidance on the selection of appropriate intervention and management strategies. As these probabilistic estimates do not align with specific management strategies, that is no clear, logical, or established connection between the risk communication and management strategies is offered with these actuarial tools, the opportunity to mitigate or lessen the impending risk is neglected. As such, a comprehensive assessment should guide the professional to offer

¹⁰⁶ Douglas & Skeem, 2005; Heilbrun et al., 2009; Murrie & Kelley, 2017; Skeem & Mulvey, 2002.

¹⁰⁷ Douglas & Skeem, 2005.

¹⁰⁸ Murrie & Kelley, 2017.

¹⁰⁹ Douglas & Kropp, 2002; Lavoie et al., 2009.

¹¹⁰ Douglas & Skeem, 2005, p. 348.

¹¹¹ *Ibid.*

¹¹² Douglas & Skeem, 2005; Dvoskin & Heilbrun, 2001; Murrie & Kelley, 2017.

¹¹³ Lavoie et al., 2009; see also Conroy & Murrie, 2007; Guy et al., 2015; Murrie & Kelley, 2017.

descriptive, categorical risk statements that are based on both the individual's estimated risk state and the individual's intensity of risk management strategies needed in order to mitigate their risk.¹¹⁴ A risk assessment approach or tool should not only require, but facilitate and articulate intervention strategies. Risk communication of this sort is considered both clinically relevant and evidence based.

Fifth, a risk assessment scheme should be transparent and reviewable.¹¹⁵ As a risk assessment may result in serious consequences for the individual being assessed, in terms of restrictions to their liberty, or the general public, in terms of potentially fatal harm, the decision-making process must be detailed and documented explicitly. Professionals are accountable for their decisions. A transparent and reviewable risk assessment allows the decision-making process to be understood, reconstructed, scrutinized, and, if warranted, contested. Transparency protects both the public and the individuals directly involved in the given case by ensuring that proper procedures were followed according to the current professional standards in the field.¹¹⁶ At a minimum, a comprehensive risk assessment should explicitly detail the set of risk factors that were considered and identified in the current case, the rules or guidelines for scoring or assessing these risk factors, and the procedures or guidelines used to combine information in order to arrive at the final decisions.¹¹⁷

In addition to these above five core principles, a risk assessment scheme must be able to address the relevant psycholegal issue at hand.¹¹⁸ Risk assessments are necessary in a variety of diverse contexts and settings for a number of purposes and determinations. The risk assessment procedure must be able to speak to the specific legal or clinical issue in question. For instance, civil commitment laws require that an individual have a mental disorder and pose a risk for violence to others, and the mental disorder must play a causal role in the individuals risk for violence.¹¹⁹ As such, any risk assessment instrument that fails to consider mental disorder as a risk factor for violence, such as the LSI family of instruments or the VRAG, is inherently unsuitable and impractical for use in these civil commitment proceedings.¹²⁰

Any method, approach, or instruments designed to assist in a violence risk assessment should be consistent with and exemplify these core principles of a scientifically valid comprehensive risk assessment. Failure to meet these standards

¹¹⁴ Guy et al., 2015; Lavoie et al., 2009.

¹¹⁵ Lavoie et al., 2009; see also Hart, 2001, 2008; Guy et al., 2015.

¹¹⁶ Hart, 2001.

¹¹⁷ Lavoie et al., 2009.

¹¹⁸ Guy et al., 2015; Heilbrun et al., 2010.

¹¹⁹ Lyon et al., 2001.

¹²⁰ Guy et al., 2015.

leaves professionals vulnerable to numerous errors and biases in the assessment process. Furthermore, an assessment that is not congruent with these core principles is likely to violate relevant legal, ethical, or professional standards. As others have noted,¹²¹ the SPJ approach is the only method of violence risk assessment that is consistent with each of these underlying features and core principles of a comprehensive risk assessment. The following section reviews the main approaches to conducting a violence risk assessment, including their overall strengths and weaknesses and fit with the core principle of a comprehensive assessment, as well as a review of the empirical research comparing the main approaches.

¹²¹ *Ibid.*

VI. METHODS OF ASSESSING VIOLENCE RISK

The method by which an offender's level of risk should be assessed has been debated by psychologists for more than 60 years,¹²² with the unstructured clinical judgment approach being pitted against the actuarial or statistical approach.¹²³

A. UNSTRUCTURED CLINICAL JUDGMENT

Although not in and of itself a model of violence risk assessment, historically, "assessments of dangerousness," as they were once called, almost invariably were conducted through the use of unstructured clinical judgment.¹²⁴ Using this approach, evaluators have absolute discretion regarding the evaluative process. This approach offers little to no guidance or rules on the decision-making process. According to Grove and Meehl, clinical prediction is "an informal, 'in the head,' impressionistic, subjective conclusion, reached (somehow) by a human clinical judge."¹²⁵ Professional discretion and intuition, based on the personal experience, qualifications, and opinions of the professional, form the foundation of the decision making process.¹²⁶ In this approach, the professional holds absolute discretion regarding the selection of information to consider, how to interpret this information, and how to amalgamate the information in order to arrive at a final decision.¹²⁷

Although this approach lacks formal rules or structure and professionals may gather whatever information they consider relevant to their assessment, it has been argued that clinical prediction is far less subjective or impressionistic than previous described.¹²⁸ Professionals should take into consideration whatever information is available to them when forming a methodical reasoned argument about the case.

This approach offers several advantages. One of the main benefits of clinical judgment is the focus on the individual case, providing it with the ability to address rare or unique circumstances.¹²⁹ The clinical approach is responsive to the individual, placing

¹²² Aegisdottir, Stefania et al., "The Meta-Analysis of Clinical Judgment Project: Fifty-Six Years of Accumulated Research on Clinical Versus Statistical Prediction" (May 2006) *The Counselling Psychologist*, Vol. 34 No. 3.

¹²³ *Ibid.*

¹²⁴ Blanchard et al., 2017; Doyle & Dolan, 2002; Hanson, 1998; Hart, 2001; Melton et al., 2007; Otto, 2000; Slobogin, 2007.

¹²⁵ Grove and Meehl (1996), p. 294.

¹²⁶ Lavoie & Douglas, 2008.

¹²⁷ Grove & Meehl, 1996; Pozzulo, Bennell, & Forth, 2006.

¹²⁸ Douglas, Hart, Groscup, & Litwack, 2013; Holt, 1970.

¹²⁹ Blanchard et al., 2017; Douglas & Kropp, 2002; Melton et al., 2007.

a focus on the most important elements (i.e., risk factors) for each individual case. This allows for the development of unique case conceptualizations and individualized risk management strategies.¹³⁰ In addition, clinical prediction is extremely flexible and extensively applicable.¹³¹ The information considered and the processes involved can be adapted for each case and it can be used in nearly any setting.¹³²

However, due to the lack of structure intrinsic to this approach, substantial weaknesses are evident. A main limitation of clinical prediction is its potential for both low reliability and validity.¹³³ Evaluators may fail to consider important empirically supported risk factors. Conversely, evaluators may pay unnecessary attention to factors that are not in fact associated with violence. Lacking any formal guidance or structure, inconsistencies across evaluators and inconsistencies within the same evaluator across cases are both likely. As a result, this decision approach will generally lead to decisions that are of inferior reliability that are less strongly associated with violence than a structured approach.

Another major limitation of unstructured clinical judgment is a lack of transparency.¹³⁴ As professionals are not required to specify the basis for their decision (i.e., their methods of selecting, combining, and weighting risk factors, and arriving at a final decision), the decision is not replicable or reviewable by other parties.¹³⁵ The inability to lend itself to review raises serious ethical and legal concerns. Moreover, the completely open process leaves the evaluator prone to bias and heuristics.¹³⁶ For instance, it has been argued that professionals either ignore base rate information or are unable to account for base rate information when making predictions about low base rate occurrences.¹³⁷

Based on this review, it is apparent that the unstructured clinical approach does not meet all of the core principles of a comprehensive risk assessment (Lavoie et al., 2009). Although the unstructured clinical approach can be used to facilitate risk management planning, in that this approach allows for the development of individualized management plans, it fails to adequately address the other core principles. The lack of structure in gathering and integrating information, as well as forming final opinions, means that this approach does not set out a broad, inclusive set of well defined risk

¹³⁰ Douglas & Kropp, 2002.

¹³¹ Douglas & Reeves, 2010.

¹³² Nikolova, Strub, & Douglas, 2009.

¹³³ Blanchard et al., 2017; Dawes, Faust, & Meehl, 1989; Douglas & Reeves, 2010; Melton et al., 2007.

¹³⁴ Douglas, Hart, Groscup, & Litwack, 2013; Hart, 1998; Guy et al., 2015.

¹³⁵ Grove, Zald, Lebow, Snitz, & Nelson, 2000.

¹³⁶ Grove et al., 2000; Melton et al., 2007.

¹³⁷ Harris et al., 2015.

factors to be considered in each case, nor does it allow for a transparent, reviewable decision that can be communicated in a valid manner.

B. ACTUARIAL APPROACH

In contrast to unstructured clinical judgment, the actuarial approach is highly structured, eliminating as much as possible the role of professional judgment.¹³⁸ Meehl described the actuarial approach as the use of an explicit method for gathering and combining information in order to arrive at a prediction, and this prediction should be connected to a probability figure based on empirical findings. That is, actuarial prediction is “a formal method [that] uses an equation, a formula, a graph, or an actuarial table to arrive at a probability, or expected value, of some outcome”.¹³⁹ Numerous actuarial violence risk assessment tools have been developed over the past few decades. Table 1, below, provides a list of the most commonly used actuarial risk tools for adults that have received the most empirical support.

The actuarial approach is typically empirically based.¹⁴⁰ That is, instruments developed under this approach use empirical item selection, meaning risk factors are identified and selected based on the strength of their statistical association with violence in a particular derivation or construction sample. The risk factors may also be assigned explicit weights, based on the strength of their combined statistical association in this sample. Finally, a fixed decision rule is statistically derived based on the combination of items that has the strongest predictive accuracy in the construction sample. Accordingly, the defining feature of the actuarial approach is “the derivation and use of replicable, routinized rules for combining or integrating predictive factors.”¹⁴¹

¹³⁸ Blanchard et al., 2017; Dawes et al., 1989.

¹³⁹ Grove & Meehl, 1996, p. 294.

¹⁴⁰ Garb, 2003; Guy et al., 2015; Heilbrun et al., 2009, 2010; Cooke & Michie, 2013; Melton et al., 2007; Rice, Harris, & Hilton, 2010; Scurich, 2016.

¹⁴¹ Douglas, Hart, Groscup, & Litwack, 2013, p. 391.

Table 1. Actuarial Violence Risk Assessment Instruments

Instrument	Intended Application	Intended Population	Number of items
BVC (Brøset Violence Checklist; Almvik, Woods, & Rasmussen, 2000)	Imminent Violence	Adult Psychiatric Patients	6
COVR (Classification of Violence Risk; Monahan et al., 2005)	General Violence	Acute Psychiatric Patients	40
LS/CMI (Level of Service/Case Management Inventory; Andrews, Bonta, & Wormith, 2004)	General and Violent Recidivism	Adult Offenders	124
LSI-R (Level of Service Inventory-Revised; Andrews & Bonta, 1995)	General and Violent Recidivism	Adult Offenders	54
ODARA (Ontario Domestic Assault Risk Assessment; Hilton et al., 2004)	Domestic Violence	Adult Males with a History of Domestic Violence	13
RM2000V (Risk Matrix 2000 for Violence; Thornton, 2007)	Sexual and Violent Recidivism	Adult Sex Offenders	7
SORAG (Sex Offender Risk Appraisal Guide; Harris et al., 2015)	Violent Recidivism	Adult Sex Offenders	14
Static-99 (Hanson & Thornton, 1999)	Sexual and Violent Recidivism	Adult Male Sex Offenders	10
VRAG (Violence Risk Appraisal Guide; Harris, Rice, & Quinsey, 1993; Harris et al., 2015)	Violent Recidivism	Adult Male Offenders and Forensic Patients	12
VRS (Violence Risk Scale; Wong & Gordon, 2000)	Violent Recidivism	Adult Male Offenders	26

Note. The risk assessment instruments listed include the most commonly used and validated actuarial instruments in alphabetical order (adapted from Douglas, Hart, Groscup & Litwack, 2013; Wilson, Singh, Leech, & Nicholls, 2016).

For instance, the Violence Risk Appraisal Guide (VRAG¹⁴²) contains 12 risk factors that were selected based on their combined statistical association with violence in the construction sample. These risk factors are set out in Table 2.

¹⁴² Harris, Rice, & Quinsey, 1993; Harris et al., 2015; Quinsey et al., 1998, 2006.

Table 2. Items on the Violence Risk Appraisal Guide (VRAG)

Items	Weighting	
	Min	Max
Psychopathy Checklist Score	-5	+12
Elementary School Maladjustment	-1	+5
DSM Diagnosis of Personality Disorder	-2	+3
Age at index offence	-5	+2
Lived with Both Parents to Age 16	-2	+3
Failure on Conditional Release	0	+3
Non-Violent Offence Score (prior to index)	-2	+3
Marital Status	-2	+1
DSM Diagnosis of Schizophrenia	-3	+1
Victim Injury	-2	+2
History of Alcohol Abuse	-1	+2
Female Victim	-1	+1

Note. Adapted from Harris, Rice, Quinsey, & Cromier, 2015.

Each of the risk factors has a numerical weight that when added together yield a total score, ranging from -26 to 38. This total score then corresponds with a probability estimate of the individual's risk of violence over the next seven to 10 years, based on the proportion of offenders with a similar score in the construction sample that perpetrated violence. An individual with a score between -21 and -15 would be assigned an 8% likelihood of committing violence over the next seven years and a 10% likelihood over the next 10 years, whereas an individual with a score between 21 and 27 would be assigned a 76% chance of committing violence over the next seven years and a 82% chance over the next 10 years.

The main advantages of this approach, in comparison to unstructured clinical judgment, hinge on the explicit, routinized procedures for selecting and combining information.¹⁴³ A strong emphasis on empirical support, operational definitions of risk factors, and explicit instructions for decision-making are important strengths of the actuarial approach.¹⁴⁴ This structure should increase the consistency across evaluators and across cases, leading to better reliability. Moreover, the actuarial approach should lead to better predictive validity compared to unstructured approaches. Additionally, this

¹⁴³ Blanchard et al., 2017; Cooke & Michie, 2013; Guy et al., 2015; Slobogin, 2007.

¹⁴⁴ Grove & Meehl, 1996; Litwack, 2001.

approach is highly transparent. The use of a priori specified combinatorial rules in order to arrive at a decision, allows for the entire process to be easily reviewable. Moreover, actuarial prediction minimizes the inclusion of bias and error.¹⁴⁵

Despite the advantages of the actuarial approach, there are a number of potential weaknesses that have yet to be addressed. Many of these weaknesses arise due to the fact that this approach is very sample dependent, which may limit the generalizability of these tools to new samples and settings.¹⁴⁶ Actuarial tools are developed by optimizing a statistical association between a number of measured variables and an outcome of interest in a derivation sample.¹⁴⁷ These measured variables, now identified as risk factors, and their statistical associations may not generalize to other samples or perform as well in other samples. This is especially true if the tool is based on only one derivation sample, as is the case for the Classification of Violence Risk (COVR¹⁴⁸), the Sex Offender Risk Assessment Guide (SORAG¹⁴⁹), the Static-99¹⁵⁰, and the VRAG.¹⁵¹ The selection of risk factors, weights of risk factors, and estimated probabilities of violence are all intrinsically linked to, and dependent upon, the construction sample and a multitude of sample specific characteristics, including the original choice of presumptive risk factors, measurement of these factors, reliability of measurement, nature of the sample, sample size, length of the follow-up period, definition of violence, and methods of detecting violence.¹⁵²

With respect to the content of actuarial risk assessment tools, the sample dependency inherent in their construction ensures that the identified risk factors have an empirical association (i.e., a predictive statistical association) with violence in the derivation sample. However, arguments have been made that actuarial tools are limited by their atheoretical nature. That is, as actuarial tools are based solely on empirical associations, they are atheoretical in the sense that they are typically not based on the current understanding of the function and manifestations of risk factors.¹⁵³ Additionally, risk factors can only be selected for inclusion on an actuarial tool if they were included in the set of variables that were measured in the construction sample.¹⁵⁴

¹⁴⁵ Garb, 2003.

¹⁴⁶ Blanchard et al., 2017; Guy et al., 2015; Melton et al., 2007; Nikolova et al., 2009; Scurich, 2016.

¹⁴⁷ Dawes et al., 1989.

¹⁴⁸ Monahan et al., 2005.

¹⁴⁹ Harris et al., 2015; Quinsey et al., 2006.

¹⁵⁰ Hanson & Thornton, 1999.

¹⁵¹ Harris et al., 1993, 2015.

¹⁵² Douglas, Hart, Groscup, & Litwack, 2013.

¹⁵³ Andrews, Bonta, & Wormith, 2006; Haggard-Grann, 2007.

¹⁵⁴ Guy et al., 2015.

Empirical item selection presupposes that all potential risk factors were included in the construction sample and made it onto the tool. It may be the case, however, that the same variables would not have shown an association with violence in a different sample or that different variables would have been more strongly associated with violence and been included on the tool if a different construction sample had been used.¹⁵⁵ Moreover, important risk factors that have strong theoretical or empirical association with violence in the broader literature may be omitted from the tools.¹⁵⁶ For instance, the VRAG does not include violent ideation or behavioural instability as risk factors and the SORAG does not include violent ideation or sexual deviation,¹⁵⁷ all of which have a strong association with violence. As these factors are not listed on the tools, evaluators should not consider them in their assessments. In addition, actuarial risk assessment tools tend not to include low base rate risk factors and other essential case specific information¹⁵⁸; thus, these potentially imperative risk factors are not considered in the assessment and vital clinical information may be ignored.¹⁵⁹ Empirical item selection can also lead to the inclusion of risk factors that are objectionable based on legal or ethical grounds (e.g., gender, ethnicity).

Another weakness of actuarial risk assessment tools is the possible overreliance on or overemphasis of static risk factors, as opposed to dynamic risk factors.¹⁶⁰ Static risk factors are relatively time-invariant; they are not capable of change over time either spontaneously or through intervention.¹⁶¹ Examples of static factors include the prisoner's age at the time of release, the number of recorded behavioural incidents in prison during the last year, their psychopathy score as calculated by the PCL-R (through which inmates are scored on whether they display facets such as "glibness" or "shallow effect"), and the prisoner's criminal history as determined by the Statistical Information on Recidivism Scale-RI (SIR-R1).

In contrast, dynamic risk factors are time-variant; they have the potential to change and are amenable to intervention. Examples of dynamic factors are family and marital support, employment, finances, accommodations, physical and mental health, and leisure time. Although it is possible for actuarial instrument to contain dynamic risk factors, they tend to include mainly static risk factors. The reliance on static factors provides little connection to risk management strategies, does not facilitate the ongoing monitoring of risk, and results in risk estimates that may be unalterable by

¹⁵⁵ Douglas, Ogloff, & Hart, 2003; Douglas & Reeves, 2010.

¹⁵⁶ Slobogin, 2007.

¹⁵⁷ Harris et al., 2015; Quinsey et al., 2006.

¹⁵⁸ Grubin, 1997; Hart, 1998, Monahan et al., 2001.

¹⁵⁹ Buchanan, 1999; Melton et al., 2007.

¹⁶⁰ Blanchard et al., 2017; Douglas & Reeves, 2010; Heilbrun et al., 2009, 2010.

¹⁶¹ Craissati & Beech, 2003; Douglas & Skeem, 2005; Hanson, 1998.

intervention.¹⁶² Regardless of the implementation of risk management strategies, a person's perceived risk according to an actuarial instrument may remain constant due to the reliance on static risk factors.

Actuarial measures are, thus, primarily relevant in decision-making processes that involve strict prediction.¹⁶³ However, half a century ago, it was recognized that much of the prediction in the context of a violence risk assessment is done in an attempt to determine intervention strategies.¹⁶⁴ With an ever-increasing focus on risk management and intervention, these instruments lack a main attribute.¹⁶⁵ These tools are not meant to identify specific factors that can be targeted by intervention, nor are they designed to assist with risk management. As such, actuarial tools are incongruent with most professional practice.¹⁶⁶

Furthermore, many legal decision-making situations require the description of variable aspects of violence, such as differing levels of severity, imminence, and frequency.¹⁶⁷ Consequently, actuarial instruments may only be practical in a minority of clinical and legal contexts.¹⁶⁸ Other factors also limit the applicability of actuarial instruments. In many situations, evaluators are concerned about predicting an outcome that is incongruent with the actuarial procedure.¹⁶⁹ For instance, an evaluator may be concerned with the likelihood of imminent violence and only have available an actuarial instrument that was based on a lengthy follow-up period.¹⁷⁰

With respect to the statistical associations used in the actuarial approach, the sample dependency inherently ensures that the tool provides the strongest predictive power in the derivation sample. However, this reliance on statistical associations found in, most often, a single sample has several potential limitations. Many actuarial risk assessment tools assign weights of varying magnitude, some quite complex in nature, to each respective risk factor. This weighting scheme is based on the assumptions that (a) those weights applied equally to all individuals in the construction sample, (b) they strengthen the predictive capabilities of the tool, and (c) that the same weighting procedures will apply equally to all individuals in all future uses of the tool.¹⁷¹

¹⁶² Douglas & Skeem, 2005; Heilbrun et al., 2010.

¹⁶³ Blanchard et al., 2017; Cooke & Michie, 2013; Heilbrun, 1997; Heilbrun et al., 2009, 2010.

¹⁶⁴ Meehl, 1959; see also Einhorn, 1986; Holt, 1986.

¹⁶⁵ Douglas et al., 2003; Heilbrun, 1997; Hart, 1998.

¹⁶⁶ Douglas & Kropp, 2002; Hart, 1998; Litwack, 2001.

¹⁶⁷ Heilbrun et al., 2010.

¹⁶⁸ Cooke & Michie, 2013.

¹⁶⁹ Hart, 1998; Litwack, 2001.

¹⁷⁰ Lavoie et al., 2009.

¹⁷¹ Douglas & Reeves, 2010; Guy et al., 2015.

Dawes, however, argued that cross-validated weighting procedures were no more accurate than unit weighting.¹⁷² Grann and Långström¹⁷³ investigated the accuracy of different weighting procedures on a sample of 404 forensic psychiatric patients followed for two years. They tested four types of weighting procedures against unit weighting (equal weighting of all variables). An inverse relationship between the complexity of the weighting procedure and cross-validated predictive accuracy was found. That is, unit weighting provided the best predictive accuracy, whereas the more intricate the weighting formula, the worse the prediction. As such, they concluded that weighting risk factors would always result in poorer predictions.

The sample dependency of actuarial tools means that the (weighted) risk factors optimized in one sample may not be equally predictive in another setting and the estimated probabilities of violence may change if the tool is used in new samples.¹⁷⁴ That is, the optimization of statistical associations in the derivation sample may cause the predictive validity of these tools to shrink in new samples. Meta-analytic evidence has shown this shrinkage of predictive validities.¹⁷⁵ For instance, Blair and colleagues (2008) investigated the stability of actuarial estimates across samples in their meta-analysis. Using the VRAG, SORAG, and Static-99, they compared the predictive validity (i.e., correlational effect sizes) across the original derivation samples for these instruments as well as cross validation samples conducted by authors of these tools and independent researchers. They observed reductions in the effect sizes from the derivation samples for all the instruments. For instance, the correlation between the VRAG and violence was .44 in the derivation sample but was reduced to .36 in cross-validations by the authors of the tools, and the weakest association (.30) was found in independent cross-validations.

The applicability of numeric estimates of violence, often given in probability terms, is misleading and has been critiqued on several fronts.¹⁷⁶ The generalizability of probability estimates is flawed in that the same probabilities may not have been found in a different derivation sample and the probabilities may not apply to future samples. That is, actuarial tools assign probabilities based on the percentage of people in a given category that committed violence in the derivation sample. Mills, Jones, and Kroner¹⁷⁷ investigated the generalizability of probability estimates associated with two instruments:

¹⁷² Dawes, 1979; see also Dawes & Corrigan, 1974.

¹⁷³ Grann and Långström, 2007.

¹⁷⁴ Heilbrun, Rogers, & Otto, 2002; McDermott, Quanbeck, Busse, Yastro, & Scott, 2008; Thomson, Davidson, Brett, Steele, & Darjee, 2008.

¹⁷⁵ Blair, Marcus, & Boccaccini, 2008; Wollert, 2002.

¹⁷⁶ Melton et al., 2007; Wilson & Douglas, 2009.

¹⁷⁷ Mills, Jones, and Kroner, 2005.

the Level of Service Inventory revised (LSI-R¹⁷⁸) and the VRAG. They compared the observed frequencies in a sample of 209 offenders to the probability estimates offered by the instruments. They found that the original probabilities associated with these actuarial tools were not generalizable to their sample. They further reported some “probability reversals” in which some categories with higher scores, and higher probability estimate of violence, in fact had lower rates of violence than categories with lower probability estimates, and vice versa. Overall, the authors argued against the use of the original probability estimates provided by these tools.

The actuarial approach is founded in aggregate, sample-based statistical relationships. An additional issue related to the precision of these statistical associations has to do with the broader issue of whether group-based probability estimates can be appropriately and accurately applied to a specific individual within that group. Several authors have noted the theoretical and empirical problems associated with the application of group-based probabilities to individual cases.¹⁷⁹ For example, Hart and colleagues¹⁸⁰ calculated confidence around the probability estimates at both the group and individual level using both the VRAG and Static-99. They found that individual level confidence intervals were so broad as to render the probability estimate meaningless. They also reported that the applicability of a group-based probability estimate to a given individual is dependent upon the margin of error. The authors concluded that when a group-derived probability is based upon a wide margin of error, the categorization of individuals into such probability estimates is essentially meaningless. However, others have questioned the calculation of individual level confidence intervals based on logical and statistical grounds.¹⁸¹

In addition, commentators have argued that actuarial tools are susceptible to cultural bias.¹⁸² That is, the extent to which it is legal, ethical, and professionally responsible to use actuarial instruments across diverse cultures has come under question. Concerns about the applicability of actuarial tools across individuals of varying cultures were raised in a recent Canadian court case. The case of *Ewert v. Canada, 2015 FC 1093* focused on the use of several actuarial risk assessment tools with aboriginal offenders in Canada (i.e., the PCL-R and VRAG). Based on a review of expert testimony, the Court found that “the assessment tools and actuarial tests are susceptible to cultural bias and therefore are unreliable”.¹⁸³ The Court’s decision was

¹⁷⁸ Andrews & Bonta, 1995.

¹⁷⁹ Allport, 1942; Cooke & Michie, 2010, 2013; Hájek & Hall, 2002; Hart & Cooke, 2013; Hart, Michie, & Cooke, 2007a, 2007b; Meehl, 1973; Slobogin, 2007.

¹⁸⁰ 2007b; see also Hart et al., 2007a; Hart & Cooke, 2013.

¹⁸¹ Hanson & Howard, 2010; Harris & Rice, 2007; Mossman, 2015; Mossman & Selke, 2007.

¹⁸² Hart, 2016; Heilbrun, et al., 2002; Olver, 2016.

¹⁸³ *Ewert v. Canada* at para. 74.

overturned by the Federal Court of Appeal. The Supreme Court of Canada¹⁸⁴ upheld the FCA's finding that Mr. Ewert's section 7 and 15 *Charter* rights had not been breached. However, the Supreme Court held that CSC did breach its obligation under s. 24(1) of the *CCRA*. At para. 80, the Supreme Court stated:

The CSC was aware of long-standing concerns as to whether the impugned tools were valid when applied to Indigenous offenders. Yet it continued to rely on the results they produced in making decisions about offenders without inquiring into their validity with respect to Indigenous offenders. This was a breach of the CSC's obligation under s. 24(1) of the *CCRA* to take all reasonable steps to ensure that any information about an offender that it uses is as accurate as possible. In these circumstances, it is appropriate for this Court to exercise its discretion to issue a declaration that the CSC has failed to meet its obligation under s. 24(1) of the *CCRA*.

Concern about the applicability of actuarial tests to aboriginal offenders was highlighted in another recent court decision. In *R. v. Haley*, 2016 BCSC 1144 at para. 261, the Court held that “there is cause to be worried about the potential for cross-cultural bias” in actuarial assessment instruments. Reviewing several meta-analyses and large sample studies, Gutierrez, Hemlous, and Hanson (2016) concluded that the available research shows that actuarial instruments have weaker predictive accuracy in aboriginal offenders. It has been further argued that the concerns regarding aboriginal offenders extend to other cultural and ethnic groups.¹⁸⁵

As others have noted, it is apparent that the actuarial approach and actuarial instruments are consistent with some of the features and core principles of defensible, evidence-based comprehensive risk assessments. Specifically, the actuarial approach is consistent with the first and fifth principle (i.e., allowing for the reliable identification of scientifically sound risk factors and providing a transparent, reviewable process); however, it is only partially consistent with the other principles (i.e., comprehensive coverage of risk factors, facilitating risk management, and communicating findings in a logical manner).

Actuarial instruments contain an identified set of empirically supported risk factors with explicit scoring guidelines for each risk factor and explicit guidelines for arriving at a final decision. As such, these tools are consistent with the first principle of reliable identification of scientifically supported risk factors. The explicit scoring rules also

¹⁸⁴ *R. v. Ewert*, 2018 SCC 30.

¹⁸⁵ Hart, 2016.

ensure that the decision-making process is transparent and reviewable by third parties. However, the sample dependency inherent in actuarial tools often limits the comprehensiveness of the set of included risk factors, as these tools may not include empirically supported risk factors that were not included in the development sample and often include a disproportion amount of static risk factors. Thus, the actuarial approach is only partially consistent with the second principle. The actuarial approach is also limited in its ability to direct risk management strategies.

As mentioned above, actuarial instruments are primarily relevant to the prediction stage of a risk assessment and typically address an individual's risk status, as opposed to their risk state.¹⁸⁶ These instruments are, thus, capable of informing the level or intensity of risk management strategies that should be implemented, but can rarely address the specific types and features of interventions that would be most effective at reducing violence. Furthermore, although the actuarial approach provides a consistent manner with which to communicate findings, probabilistic estimates are intrinsically flawed and provide little to no information about the relevant factors that contribute to violence for the given individual and which factors may increase or decrease the likelihood of violence for this individual, thus being of limited use in specifying or directing management strategies to prevent violence.

¹⁸⁶ Douglas & Skeem, 2005.

C. STRUCTURED PROFESSIONAL JUDGMENT

The structured professional judgment (SPJ) approach to violence risk assessment was introduced in the 1990s and continued development has extended ever since.¹⁸⁷ This approach was developed in attempts to rectify the limitations of the unstructured clinical judgment and actuarial approaches to risk assessment, while maintaining their strengths.¹⁸⁸ Specifically, the SPJ approach attempts to maintain the relevance and link to intervention, risk management strategies, and individual case formulation of the unstructured clinical judgment approach.

By allowing professionals to use their professional judgment at key points in the evaluation process and offering the possibility of including case specific risk factors, the SPJ approach maintains a close link with case formulation and risk management. As well, similar to the actuarial approach, the SPJ model was developed to maintain the structure and focus on sound empirical support for the model and individual instruments. By including a set number of operationally defined risk factors and explicit instruction regarding the methods for gathering information, combining information and arriving at a final decision, the structured approach was maintained. The empirical validation and structured decision-making process have allowed the SPJ model to maintain sound levels of reliability and predictive validity. Furthermore, the explicit inclusion of risk factors and the structured process have maintained the transparency of the actuarial approach.

In the SPJ model, guidelines are set out that reflects the current empirical, theoretical, and professional knowledge.¹⁸⁹ The decision making process is assisted by guidelines that have been advanced to reflect “the state of the discipline” in regards to empirical and professional knowledge.¹⁹⁰ The guidelines and procedures set out the necessary qualifications for assessors, the relevant information (i.e., risk factors) that should be considered, the manner in which information should be ascertained, effective communication strategies, and methods for implementing intervention strategies.¹⁹¹ Numerous SPJ tools have been developed over the past few decades. Table 3 provides

¹⁸⁷ See for instance, Douglas & Kropp, 2002; Douglas, Cox, & Webster, 1999; Hart, 1998, 2001; Hart & Boer, 2010; Webster, Douglas, Eaves, & Hart, 1997; Webster, Eaves, Douglas, & Wintrup, 1995; Webster, Harris, Rice, Cormier & Quinsey, 1994.

¹⁸⁸ Blanchard et al., 2017; Douglas, Hart, Groscup, & Litwack, 2013; Heilbrun et al., 2009, 2010; Nicholls, Petersen, & Pritchard, 2016.

¹⁸⁹ Blanchard et al., 2017; Douglas, Blanchard, & Henry, 2013; Douglas & Kropp, 2002; Hart & Boer, 2010; Melton et al., 2007.

¹⁹⁰ Hart, 2001, p. 18.

¹⁹¹ Douglas & Kropp, 2002.

a list of the most commonly used SPJ tools for adults that have received the most empirical support.

Table 3. Select SPJ Violence Risk Assessment Instruments

Instrument	Intended Application	Intended Population	Number of items
B-SAFER (Brief Spousal Assault Form for the Evaluation of Risk; Kropp, Hart, & Belfrage, 2010)	Domestic Violence	Adults with a History of Domestic Violence	15
HCR-20 ^{V3} (Historical-Clinical-Risk Managment-20: Version 3; Douglas, Hart, Webster, & Belfrage, 2013)	General Violence	Adult Males or Females	20
RSVP (Risk for Sexual Violence Protocol; Hart et al., 2003)	Sexual Violence	Adult Males with a History of Sexual Violence	22
SAM (Guidelines for Stalking Assessment and Management; Kropp et al., 2008)	Stalking	Adults with a History of Stalking	30
SAPROF (Structured Assessment of Protective Factors For Violence Risk; de Vogel, de Ruiter, Bouman, & de Vries Robbe, 2012) ^a	General Violence	Adult Males or Females	17
SARA (Spousal Assault Risk Assessment Guide; Kropp, Hart, Webster, & Eaves, 1999)	Domestic Violence	Adults with a History of Domestic Violence	20
START (Short-Term Assessment of Risk and Treatability; Webster, Martin, et al., 2009)	Imminent Violence ^b	Adult Psychiatric Patients	20
SVR-20 (Sexual Violence Risk-20; Boer, Hart, Kropp, & Webster, 1997)	Sexual Violence	Adult Males with a History of Sexual Violence	20

Note. The risk assessment instruments listed include the most commonly used and validated structured professional judgment instruments in alphabetical order (adapted from Douglas, Hart, Groscup & Litwack, 2013; Wilson, Singh, Leech, & Nicholls, 2016).

^a. The SAPROF is intended to be used in conjunction with another tool such as the HCR-20 or SVR-20.

^b. The START is intended to assess multiple risk domains, including risk for violence, suicide, self-harm, victimization, substance use, unauthorized leave, and self-neglect.

As an example of an SPJ tool, the Historical-Clinical-Risk Management-20 (HCR-20^{V3}) was one of the first violence risk assessment tools developed under the SPJ approach.¹⁹² The HCR-20^{V3}, now its in third revision, contains twenty risk factors grouped into three domains. The items are presented in Table 4:

Table 4. Items on HCR-20^{V3}

Subscales	Items
Historical	<i>History of problems with...</i>
H1	Violence
H2	Other Antisocial Behaviour
H3	Relationships
H4	Employment
H5	Substance Use
H6	Major Mental Disorder
H7	Personality Disorder
H8	Traumatic Experiences
H9	Violent Attitudes
H10	Treatment or Supervision Response
Clinical	<i>Recent problems with...</i>
C1	Insight
C2	Violent Ideation or Intent
C3	Symptoms of Major Mental Disorder
C4	Instability
C5	Treatment or Supervision Response
Risk Management	<i>Future problems with...</i>
R1	Professional Services and Plans
R2	Living Situation
R3	Personal Support
R4	Treatment or Supervision Response
R5	Stress or Coping

Note. Adapted from Douglas, Hart, Webster, & Belfrage, 2013.

¹⁹² Webster et al., 1995, 1997; Douglas, Hart, Webster, & Belfrage, 2013.

The Historical scale consists of 10 mostly static risk factors relating to the individual's history. The Clinical scale consists of five dynamic risk factors related to current functioning. The Risk Management scale consists of five dynamic risk factors related to future considerations. Evaluators consider the presence and individual relevance of each risk factor before moving on to case formulation, scenario planning, developing risk management strategies, and arriving at summary risk judgments. However, arriving at the summary risk judgments is a secondary goal to the main effort of identifying relevant risk factors and identifying treatment or management strategies to mitigate the risk.¹⁹³

In developing SPJ instruments, risk factors were selected based on logical or rational item selection.¹⁹⁴ This method was used in contrast to the empirical item selection of the actuarial approach and subjective item selection of unstructured clinical judgment. Rational item selection entails a systematic and thorough review of the scientific, professional, and theoretical literature on the relevant topic (i.e., specific type of violence assessed on that tool). Subsequently, risk factors are selected that have shown a strong relationship across numerous samples and contexts or have a strong theoretical association. This method was used in order to arrive at a set of risk factors that reduces the likelihood of vital risk factors being excluded from the instrument or irrelevant risk factors being included. Rational item selection promotes the generalizability of this approach across diverse applications and contexts, as well as the comprehensiveness of a given assessment. Therefore, the low content validity of the unstructured approach is eliminated, as evaluators must consider a set of standard risk factors in every case, and the sample dependency of the actuarial approach is reduced, as the risk factors are not statistically derived from a single sample. In addition, the SPJ model has a strong theoretical base linking the assessment processes and violence. This type of item selection also fosters the inclusion of dynamic risk factors.

All tools developed under the SPJ approach include dynamic risk factors.¹⁹⁵ The inclusion of dynamic risk factors fosters a strong connection to risk management planning.¹⁹⁶ This connection allows the SPJ approach to guide risk management strategies, including the amount and type of interventions that should be put in place.¹⁹⁷ As discussed above, although the lack of dynamic risk factors is not inherent to the actuarial approach, most actuarial risk assessment tools tend to include primarily static

¹⁹³ Douglas & Reeves, 2010; Heilbrun et al., 2010.

¹⁹⁴ Douglas, 2008; Douglas & Kropp, 2002; Douglas, Hart, Groscup, & Litwack, 2013; Hart & Boer, 2010; Guy et al., 2015.

¹⁹⁵ Blanchard et al., 2017; Douglas & Kropp, 2002; Guy et al., 2015.

¹⁹⁶ Melton et al., 2007.

¹⁹⁷ Cooke & Michie, 2013.

risk factors.¹⁹⁸ Thus, actuarial tools are limited in the ability to monitor risk over time and direct risk management strategies. In contrast, SPJ tools tend to include various (e.g., 10 to 30) dynamic risk factors that can guide professional judgment about the types of interventions are required. As well, this approach assists professionals in determining how often to re-evaluate risk factors in a given case. Risk assessments using this model, thus, “have an ‘expiry date’ or ‘shelf life’ and must be updated” as appropriate.¹⁹⁹

The SPJ model has also reduced the over-reliance on statistical associations seen in the actuarial approach. SPJ instruments, in contrast with actuarial instruments, do not use numerical cut off scores to determine risk level, nor do they offer probability estimates of future risk for violence.²⁰⁰ In contrast, SPJ instruments require assessors to determine a categorical risk estimate of low, moderate or high risk for future violence based on the individual’s perceived level of risk and the amount of intervention that is necessary to mitigate this risk. These summary risk judgments are made based on the number and relevance of risk factors present in the given case.

A rating of high risk generally indicates that the individual is a high priority for risk management strategies, and that the evaluator is confident that the individual will commit a violent act if the individual does not receive appropriate interventions. In assisting this decision, the assumption is made that the greater the number of relevant risk factors and the greater the required intensity of intervention, the higher the risk.²⁰¹ Some authors have criticized this approach due to the lack of a precise (i.e., numerical) classification system.²⁰² However, as discussed above, there are inherent limitations with using cut-off scores, and research has found that these summary risk judgements tend to outperform the numeric use of these devices (discussed below).

In contrast to the (complex) statistically weighted risk factors used in actuarial risk assessment tools, SPJ instruments do not provide a priori weights to the risk factors.²⁰³ Most tools developed under this approach require the evaluator to judge each risk factor as present, possibly or partially present, or absent. The evaluator must then make a determination regarding the importance of a present risk factor for understanding a given person’s proneness to future violence.²⁰⁴ That is, after scoring the presence of a risk factor, evaluators must determine how that risk factors manifests for this individual

¹⁹⁸ Douglas & Skeem, 2005.

¹⁹⁹ Guy et al., 2015, p. 45.

²⁰⁰ Blanchard et al., 2017; Douglas & Kropp, 2002; Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015.

²⁰¹ Heilbrun et al., 2010.

²⁰² See, for instance, Harris et al., 2015; Quinsey et al., 2006.

²⁰³ Douglas & Kropp, 2002; Guy et al., 2015.

²⁰⁴ Heilbrun et al., 2010.

and the degree of relevance of that risk factor for this given individual. This model does not presume that each risk factor is related to violence in the same way and at the same magnitude for every individual in every sample. Consider the example of substance use problems, a well-validated risk factor.²⁰⁵ For some people, substance use plays a significant role in or is strongly related to their violence. For other, it is not. Evaluators must use their professional judgement to determine which risk factors are relevant for a given individual and the degree of relevance for that individual.²⁰⁶ Thus, evaluator are required to consider a set of nomothetically derived, empirically supported risk factors as well as the relevance of these risk factors at the idiographic level.

SPJ risk assessment tools include a variety of mechanisms designed to provide structure to the evaluation.²⁰⁷ Structure is imposed in the decision making process by (a) the inclusion of a fixed number (20 to 30) of specified risk factors for a specific type of violence (e.g., general violence, sexual violence, stalking) that are to be considered in every case, (b) operational definitions of each risk factor, (c) explicit coding rules for each risk factor on a three-point scale (present, possibly/partially present, absent), (d) explicit instructions for the determination of summary risk judgments (low, moderate, or high) about risk based on considering the presence of idiographically relevant risk factors and the necessary degree of intervention for this individual, and (e) facilitation of risk management planning.²⁰⁸

The distinguishing feature of the SPJ approach is the provision of evidence-based guidelines that structure the assessment process yet allow professionals to exercise their discretion and professional judgment in key stages, as opposed to relying on fixed, explicit algorithms to arrive at a final decision.²⁰⁹ Over the past 30 years, professionals have developed various guidelines, provisions, and instruments under the SPJ approach. During this time substantial advancements have been made to the overarching guidelines that unify this approach to risk assessment. Although there is no single, uniform set of guidelines across the various instruments developed under the SPJ approach, as they were developed for use with different populations, by diverse users, over varying timeframes, and for distinct forms of violence, the guidelines are consistent in advancing a multistage process for conducting a comprehensive evaluation of violence risk.²¹⁰

²⁰⁵ Douglas & Skeem, 2005.

²⁰⁶ Heilbrun et al., 2010.

²⁰⁷ Douglas, Blanchard, & Henry, 2013; Guy et al., 2015; Melton et al., 2007.

²⁰⁸ Douglas, 2008; Douglas et al., 2003; Douglas, Blanchard, & Henry, 2013; Heilbrun et al., 2010.

²⁰⁹ Douglas, Blanchard, & Henry, 2013; Guy et al., 2015.

²¹⁰ Guy et al., 2015.

Table 5 provides a description of the seven-step process involved in a comprehensive assessment using the SPJ approach.²¹¹ Generally, tools developed under the SPJ approach describe the process of conducting a comprehensive violence risk assessment in a consistent manner, yet the specific number of steps and considerations differs across instruments. The seven-step process described here is based on the latest SPJ instrument, the HCR-20^{V3212}, which provides the most recent and comprehensive elucidation included across all of the SPJ instruments. Outlined below, following Table 5, is a brief description of each of the seven steps.²¹³

Table 5. Major Steps in a Comprehensive SPJ Risk Assessment

Step	Description
Identify Facts	
1) Gather Information	Gather and document necessary case information
2) Presence of Risk factors	Identify the presence of a core set of risk factors
Make Meaning	
3) Relevance of Risk Factors	Evaluate the relevance of a core set of risk factors
4) Case Formulation	Integrate case information through formulation
5) Scenario Planning	Develop the most likely scenarios of future violence
Take Action	
6) Management Strategies	Develop risk management strategies tied to the scenarios
7) Final Opinions	Communicate the assessment findings

Note. Adapted from Douglas, Hart, Webster, & Belfrage, 2013.

In the first step, evaluators must gather and document the necessary case information.²¹⁴ The quality of any risk assessment is inherently linked to the quantity and quality of the available information. As such, evaluators must gather the requisite information in order to arrive at professional opinion with a reasonable degree of certainty. This necessitates the evaluator to comb through the available information in a systematic and persistent manner in order to determine the facts of the case. The information base will vary from case to case, but the primary sources of information in each assessment should comprise an interview with the evaluatee and all available file

²¹¹ Douglas, Hart, Webster, & Belfrage, 2013; see also Blanchard et al., 2017; Douglas, Blanchard, & Henry, 2013; Douglas, Hart, Groscup, & Litwack, 2013; Douglas & Reeves, 2010; Hart et al., 2003; Hart & Boer, 2010; Hart & Logan, 2011; Guy et al., 2015.

²¹² Douglas, Hart, Webster, & Belfrage, 2013.

²¹³ Douglas, Hart, Groscup, & Litwack, 2013; Douglas, Hart, Webster, and Belfrage, 2013; Guy et al., 2015.

²¹⁴ Douglas, Hart, Groscup, & Litwack, 2013.

information (e.g. criminal justice records, health care records, education and employment records, and prior assessment reports). Every assessment should also carefully consider the individual's history of perpetrating violence. The evaluator must consider the credibility of each source of information, as well as reconcile any contradictory information in forming their professional opinions and recommendations.

Step two involves identifying the presence of a core set of predefined risk factors included on the instrument, as well as any case specific risk factors.²¹⁵ Consideration of this set of risk factors ensures that the evaluator considers a broad array of empirically supported risk factors in every case. These risk factors were selected based on a systematic review of the literature, as they demonstrated a consistent association with the type of violence in question. The set of risk factors included on an SPJ instrument is meant to be broad and comprehensive, yet other factors may be of importance in a given case. Thus, evaluators should consider rare or case specific risk factors as well. The presence of each risk factor is rated on a three-point scale (present, possibly or partially present, absent or not applicable). This rating system is meant to facilitate the completion of subsequent steps; that is, the presence of a risk factor is not the only important consideration.

The third step involves rating the relevance of each of the risk factors identified in step two.²¹⁶ This step is intended to provide a link from the nomothetic level (group based associations between risk factors and violence) and the idiographic level (the role and manifestation of the risk factor in the given individual being assessed). In the preceding step, evaluators rated the presence of risk factors that have been selected based on a systematic review of the literature. These nomothetically derived risk factors may or may not be relevant in a given case. As such, evaluators must rate the relevance of each risk factor, meaning the degree to which the risk factors contributed to the individual's previous violence and the degree to which the risk factors need to be addressed in order to prevent violence. The relevance of each risk factor is also rated on a three-point scale (low, moderate, high).

In step four, evaluators integrate information gleaned during the previous steps through case formulation.²¹⁷ This step involves integrating the previous information, regarding the presence and relevance of risk factors, into "a conceptually meaningful framework that explains a person's violence."²¹⁸ Formulation essentially answers the question why has this person acted violently in the past? Formulation should include a

²¹⁵ *Ibid.*

²¹⁶ Douglas, Hart, Groscup, & Litwack, 2013.

²¹⁷ Douglas, Hart, Groscup, & Litwack, 2013; Hart et al., 2011.

²¹⁸ Douglas, Hart, Webster, & Belfrage, 2013, p. 53.

number of key characteristics or features.²¹⁹ Notably, formulation should be guided by theory, meaning the formulation should be based in one of the dominant theories of violence and criminal conduct, such as the general personality and cognitive social learning theory²²⁰ or the good lives model.²²¹ Additionally, evaluators should integrate and organize information according to overarching principles. Integrating information may also be assisted by clustering risk factors into meaning groups, creating a hierarchy of risk factors, and identifying key risk factors that act as basic underlying causes of violence or meaningful gateways to violence.

Step five requires the evaluator to consider the likely situations in which the individual may perpetrate violence in the future through scenario planning.²²² Scenario planning involves postulating several short narratives describing the most plausible circumstances in which the evaluatee may act violently in the future; thus, answering the question what might this person do in the future? Evaluators should generally consider four types of scenarios in an SPJ assessment: repeat, twist, worst-case, and best-case. In the repeat scenario, the evaluator postulates that the individual will perpetrate violence that is similar to the violence they have committed in the past. The twist scenario involves considering that the nature of the violence may change, such as a different motive or victim type. In the worst-case scenario, the evaluator posits a situation in which the violence escalates in severity. Finally, in the best-case scenario, the evaluator theorizes about the circumstances in which the violence decreases or subsides. The most plausible, informed, and consistent scenarios are then selected to guide the following steps.

In step six, the evaluator makes recommendations regarding the specific risk management strategies that should be implemented.²²³ These management strategies should be directly linked to the information and opinions formed in earlier steps. That is, the risk management plans should be based upon and follow logically from the scenarios of violence posited in step five, which were based upon an understanding of the individual arrived at through formulation in step four. In the SPJ approach, the evaluator should consider four general classes of risk management strategies: supervision/control, monitoring/surveillance, treatment/assessment, and victim safety planning. Considering these four broad categories, evaluators should explicate specific, detailed risk management plans that are tied to the unique evaluatee. These management

²¹⁹ See Hart et al., 2011 for a review.

²²⁰ Andrews & Bonta, 2010b.

²²¹ Ward, 2002.

²²² Douglas, Hart, Groscup, & Litwack, 2013.

²²³ *Ibid.*

strategies should also be consistent with the prominent risk management model used in correctional settings: the Risk-Need-Responsivity model.²²⁴

In the final step, evaluators form and document their summary risk judgments.²²⁵ In the SPJ approach, categorical risk judgments of low, moderate, or high risk are made based on the totality of information in the case. No additive or otherwise mathematical rules are provided for determining the summary risk judgments, and no cumulative or probabilistic risk estimates are provided. Professionals are required to use their professional discretion in arriving at their final opinions. The summary risk judgments are offered in clear, simple language in attempts to facilitate risk management and risk communication. Generally, evaluators are expected to make a number of summary risk judgments addressing various aspects of the case, such as the overall case prioritization, risk for future violence, risk for imminent violence, and risk for serious violence. Evaluators should also indicate the timeframe of the assessment and when the assessment should be updated. Notably, evaluators should limit and qualify their findings, opinions, and judgments at each step based on the quantity and quality of case information available to them in step one.

Based on this review, it is apparent that the SPJ approach and SPJ instruments are consistent with all of the features and core principles of a scientifically sound and valid comprehensive risk assessment.²²⁶ As detailed above, SPJ tools include a broad set of specific risk factors to be considered in each case with explicit instructions for rating each risk factor that were determined based on a systematic review of the relevant literature. This ensures that these instruments are consistent with the first two core principles (i.e., reliable identification of a comprehensive set of empirically supported risk factors). SPJ instruments are also consistent with the third and fourth principle (i.e., facilitating risk management and communicating recommendations in a logical format), as they include dynamic risk factors and specific instructions for linking the prediction stage with the management stage.

The decision-making process and summary risk judgments also allow professionals to communicate about an individual's level of risk and necessary management strategies in a logical and meaningful manner. Finally, the structured process and detailed steps ensure that the decision-making process is transparent and available for review. As others have similarly noted,²²⁷ the SPJ model is the sole available approach to conducting a comprehensive violence risk assessment that is

²²⁴ RNR; Andrews, 2012, Andrews & Bonta, 2010b.

²²⁵ Douglas, Hart, Groscup, & Litwack, 2013.

²²⁶ Lavoie et al., 2009.

²²⁷ Guy et al., 2015; Lavoie et al., 2009.

consistent with these core principles of a comprehensive risk assessment. These theoretical arguments, however, must be paralleled with empirical investigations into these approaches to violence risk assessment.

D. COMPARATIVE EMPIRICAL RESEARCH

For several decades, professionals have debated the relative merits of the unstructured clinical judgment and actuarial approaches.²²⁸ There has been spirited commentary in the professional and research literature on the supposed superiority of the actuarial approach in comparison to the unstructured clinical judgment approach.²²⁹ Some authors have gone as far to recommend that the actuarial approach completely replace all other assessment approaches.²³⁰ Others have argued that sole reliance on the actuarial approach is lacking in empirical support, professionally irresponsible, and bordering on unethical.²³¹ The following sections review the empirical research comparing the actuarial and clinical approaches, followed by a review of the research specifically focusing on violence risk assessment, and a review of research focusing on the SPJ approach.

E. THE LONGSTANDING CLINICAL VERSUS ACTUARIAL DEBATE

For more than 60 years, there has been spirited commentary on the utility of these approaches to decision making.²³² Several meta-analyses have investigated the relative performance of unstructured clinical judgment and actuarial approaches to decision making in the broader literature. Some authors have used this research to argue in favour of the superiority of the actuarial approach both outside and within the risk assessment literature.²³³

A meta-analysis is a type of systematic review in which the results of a number of different studies are integrated.²³⁴ Meta-analysis is the standard method of reviewing and summarizing the results from a number of different studies. It is a systematic, quantitative, formal method used to scientifically assess the results of number of primary

²²⁸ For instance, see Meehl, 1954, 1996.

²²⁹ de Groot, 1961; Gottfredson & Moriarty, 2006; Meehl, 1954, 1996; Sarbin, 1943

²³⁰ See, for example, Grove & Meehl, 1996; Harris, Rice, & Cormier, 2002; Harris et al., 2015.

²³¹ Cooke & Michie, 2013; Douglas, Hart, Groscup, & Litwack, 2013; Hart, 2003; Guy et al., 2015; Litwack, 2001; Skeem et al., 2005.

²³² Meehl, 1954, 1996; Grove & Meehl, 1996.

²³³ See, for instance, Egisdottier et al., 2006; Dawes et al., 1989; Gardner, Lidz, Mulvey, & Shaw, 1996; Grove & Meehl, 1996; Grove et al., 2000; Meehl, 1954, 1957; Mossman, 1994; Sawyer, 1966.

²³⁴ Beaman, 1991; Borenstein, Hedges, Higgins, & Rothstein, 2008; Durlak, 1995; Glass, 1976; Glass, McGraw, & Smith, 1981; Rosenthal, 1991; Rosenthal & DiMatteo, 2002.

empirical studies in order to derive conclusions across the entire body of research. In contrast to narrative reviews, also called box-score tabulations or bibliotherapy, meta-analysis involves the quantitative synthesis of a number of research studies. This provides for a precise, replicable estimate of the results across the entire set of studies. Researchers extract, or compute, the relevant effect size from each study in a common metric (e.g., correlation coefficients, AUC, odds ratios) and then amalgamate these effects across the studies using various meta-analytic statistical techniques in order to determine the overall or average effect. Meta-analysis also allows for the comparison of the effects found within each study across a number of other variables, such as the methodological quality of the studies, particular characteristics of the sample, or various other potentially moderating variables. The influence of these variables on the overall effect can then be seen.

An overview of the meta-analyses comparing the actuarial and unstructured clinical approaches in the broader literature is presented in Appendix I.²³⁵

In comparing the actuarial approach to the unstructured clinical judgment approach in the broader literature (i.e., not specifically focused on violence risk assessment) most professionals have reached a consensus. Heilbrun and colleagues stated that there is no debating the conclusion arrived at continuously over the past half a century: actuarial prediction performs modestly and consistently better than unstructured clinical prediction.²³⁶ Moreover, Meehl concluded, “there is no controversy in social science that shows such a large body of qualitatively diverse studies coming out so uniformly in the same direction as this one”²³⁷ Based on these empirical findings, some have recommended for the complete replacement of all other types of assessment with actuarial methods.²³⁸ These recommendations, however, deserve empirical scrutiny within the violence risk assessment field. Most of this research comes from the broader literature, including only a minority of results directly applicable to risk assessment. As well, these earlier qualitative and quantitative literature reviews did not include comparisons with the SPJ approach.

²³⁵ Appendix I is located on page 181.

²³⁶ 2009; See also Bonta, 2002.

²³⁷ Meehl, 1986, p. 373-374.

²³⁸ See for instance, Harris et al., 2015; Hilton, Harris, & Rice, 2006.

F. META-ANALYTIC EVIDENCE ON VIOLENCE RISK ASSESSMENT

More recently, the focus has been placed on how various approaches fare specifically with respect to evaluating risk for violence. As decisions made in the violence risk field are extremely significant, it is important to ensure that the instruments being used are the most appropriate for the task at hand. Moreover, as actuarial instruments have held the dominant position in terms of predictive validity in the broader literature, it is important to determine the relative merits of the SPJ approach in comparison to the actuarial approach. Literally hundreds, if not thousands, of primary empirical research studies have investigated various properties of risk assessment tools and approaches.²³⁹ These results have been synthesized in dozens of meta-analyses examining different aspects of the risk assessment tools and processes.²⁴⁰

At least 10 meta-analyses can speak directly to the accuracy of the actuarial versus unstructured clinical judgment and structured professional judgment approaches within the risk assessment field. Several other meta-analyses comparing specific risk assessment tools are also relevant to this discussion. A review of the meta-analyses specific to the violence risk assessment literature, including a summary in the form of Table 6²⁴¹, is presented in Appendix II.²⁴² This review focuses exclusively on meta-analyses that can speak to the relative utility of the different violence risk assessment approaches.

Based on the review of these risk assessment meta-analyses presented in Appendix II, several conclusions can be made. First, although some have argued that the actuarial approach is far superior,²⁴³ it is apparent that there is little to no evidence that actuarial tools are more accurate in their predictions than SPJ tools (as others have similarly noted).²⁴⁴ Second, evidence suggests that tools perform better when assessing the type of outcome that they were designed to assess. Third, the predictive accuracy of commonly used risk assessment tools seems to be fairly stable across methodological and sample differences. Nevertheless, as most of these meta-analyses fail to include the SPJ summary risk judgments and many subsequent studies have been published in the past few years, the following section will review studies that have included the summary risk judgments used in the SPJ approach.

²³⁹ Otto & Douglas, 2010; Singh, Bjørkly, & Fazel, 2016.

²⁴⁰ Singh & Fazel, 2010.

²⁴¹ Table 6 is appended at page 192.

²⁴² Appendix II is located at page 183.

²⁴³ Harris et al., 2015; Quinsey et al., 2006; Rice et al., 2010.

²⁴⁴ Blanchard et al., 2017; Cooke & Michie, 2013; Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015; Melton et al., 2007; Scurich, 2016.

G. SELECT RESEARCH ON THE STRUCTURED PROFESSIONAL JUDGMENT APPROACH

To date, hundreds of empirical studies have been published investigating different aspects of the SPJ approach; this number increases significantly if considering unpublished disseminations such as dissertations, conference presentations, and governmental and technical reports. For instance, at least 223 disseminations have reported on a single tool, the HCR-20.²⁴⁵ Of these hundreds of empirical investigations, only a portion has included analyses focused on the accuracy of the summary risk judgments, and their relative accuracy compared to the numeric use of the tool or established actuarial tools. Currently, at least 61 published studies have investigated the predictive validity of the summary risk judgments. Of the available studies, 56 (92%) found partial or full support for the use of the summary risk judgments. That is, all but five of these studies found that the summary risk judgments were predictive of violence.

In addition, several of these studies have investigated whether the summary risk judgments add incrementally to the prediction of violence over and above other indexes on the instrument or other established instruments. At least 23 published studies that examined the predictive validity of the summary risk judgments also investigated the incremental validity of these summary risk judgments over and above the numeric use of the tool (i.e., summing the present risk factors), a PCL family measure (e.g., the PCL-R), an actuarial instrument (e.g., VRAG), or unstructured clinical judgment. In total, 21 (91%) studies found mixed or full evidence for incremental validity of the summary risk judgments. Additionally, several studies have directly compared the predictive accuracy of SPJ and actuarial tools including analyses of whether the summary risk judgments add incrementally over and above the actuarial instrument.

A review of these studies focusing on the predictive and incrementally validity of the summary risk judgments used in the SPJ approach is presented in Appendix IV.

Based on the review presented in Appendix IV, it is apparent that the SPJ model has received strong empirical support. The available empirical evidence is rather consistent in supporting the use of SPJ instruments and the summary risk judgments. Hundreds of independent studies and dozens of meta-analyses have found that the numeric use of SPJ tools is related to and predictive of violence. Moreover, SPJ instruments, used as intended in professional practice (i.e., summary risk judgments), are at least as or more accurate than the numeric use of the instruments. As well, SPJ instruments and summary risk judgments are at least as or more accurate than

²⁴⁵ Douglas, Shaffer, Blanchard, Guy, Reeves, & Weir, 2014.

established actuarial instruments, unstructured clinical judgment, and the PCL family of measures. In addition, SPJ instruments are not subject to many of the above noted limitations and shortcomings of the actuarial method, and are consistent with the core principles of conducting a comprehensive violence risk assessment (as discussed above).

As other commentators have previously concluded based on reviews of the available literature,²⁴⁶ the empirical evidence concerning the different approaches and instruments for assessing violence risk from crucial primary studies and meta-analyses still “clearly indicates that there is no definitive advantage – in terms of predictive accuracy – for either actuarial or structured clinical approaches”.²⁴⁷ Although some commentators still make claims that the actuarial approach is far superior,²⁴⁸ these claims are unfounded and indefensible based on the available empirical evidence. As there is no conclusive advantage with respect to predictive accuracy for either the actuarial or SPJ approach, or instruments developed under either of these approaches, other factors should guide professionals in their selection of a risk assessment approach or instrument.²⁴⁹ Furthermore, the SPJ approach is consistent with the features and core principles of a conducting a comprehensive risk assessment, in contrast to the actuarial approach that is limited in its ability to meet these principles.

²⁴⁶ Blanchard et al., 2017; Cooke & Michie, 2013; Douglas, Hart, Groscup, & Litwack, 2013; Douglas & Reeves, 2010; Heilbrun et al., 2009, 2010; Melton et al., 2007.

²⁴⁷ Guy et al., 2015, p. 53.

²⁴⁸ See for instance, Harris et al., 2015; Rice et al., 2010.

²⁴⁹ Guy et al., 2015; Scurich, 2016.

VII. DENIAL

Several researchers have found that considerable variability exists among professionals with regards to their understanding and beliefs about the purpose of denial, the importance of denial in assessment of risk, and the implications of denial for release decision-making.²⁵⁰ For example, a study by Freeman et al.²⁵¹ examined the beliefs of 31 practicing forensic psychologists in Australia. They found considerable disagreement amongst the professionals regarding the impact and importance of denial on risk assessment and management. Approximately half of the psychologists asserted that denial would adversely impact their risk assessment, as it may indicate a lack of insight. Some respondents highlighted the need to affirm the court's decision, as the investigation and conviction processes are likely to identify truly guilty offenders. Thus, these professionals "accept that a court has found them guilty based on the evidence."²⁵²

On the other hand, some professionals asserted that denial would not influence their assessment, as denial was not believed to be a strong predictor of future offending. As well, divergent views were seen regarding the impact of denial on suitability for release. Once again, one group of psychologists believed that denial does and should affect parole eligibility, referencing the need to receive treatment prior to release and the importance of accepting responsibility for the offence. However, other psychologists believed that categorical denial would not influence their judgments regarding parole.

The importance of denial in criminal justice decision-making and the relationship between denial and offending "remains a key area of concern for both practitioners and researchers, as questions continue regarding the most effective approach to assessment, treatment, and release of such individuals."²⁵³ An offender claiming innocence for an offence complicates the ability to reliably and accurately assess and manage this individual's risk.²⁵⁴ In particular, an offender maintaining innocence for their index offence or the most serious offence for which they have been convicted poses a serious challenge to the risk assessment process, and as a result to providing the appropriate types and intensity of treatment with this offender. More generally, a comprehensive risk assessment, for violent or general offending, is complicated anytime disputed facts are present. Heilbrun²⁵⁵ asserted that issues related to response style,

²⁵⁰ Craissati, 2015; Freeman et al., 2010.

²⁵¹ Freeman et al., 2010.

²⁵² *Ibid*, p. 45.

²⁵³ Freeman et al., 2010, p. 39.

²⁵⁴ Freeman et al., 2010; Ware et al., 2015.

²⁵⁵ Heilbrun, 2009.

with the evaluatee typically underreporting relevant history, behaviour, or motivations that would otherwise increase the evaluatee's risk if known, often plague risk assessments. As well, a number of ethical considerations and implications arise when dealing with an offender who maintains innocence.²⁵⁶

No person is completely honest all of the time.²⁵⁷ Deception and dissimulation are common occurrences in many settings, particularly when the incentives are high and consequences are severe.²⁵⁸ Numerous forms of deception have been observed across a host of social interactions.²⁵⁹ The vast majority of academic and empirical literature examining the denial of a criminal offence has focused on sex offenders.²⁶⁰ In particular, it has been noted for some time that sex offender accounts of their offending often include various explanations, justifications, rationalizations, and refutations.²⁶¹ Various reports indicate that a considerable number of sex offenders deny some aspects of their conviction, minimize their responsibility for the offence, or otherwise present a distorted, mitigating account of their offence.²⁶² Within this broad category of offenders, some sex offenders present with categorical or complete denial of having ever committed an offence; that is, they maintain they are factually innocent.²⁶³

Within the criminal justice system, most decisions in which some consideration is given to offender denial rest on the assumption that denial is associated with an increased risk of violence or recidivism.²⁶⁴ However, there is considerable debate regarding the existence of a relationship between denial and recidivism, and the available empirical research has reported inconsistent results.²⁶⁵ The assumption of a link between denial and risk of offending is highlighted by Janicki²⁶⁶ "as working in a manner that does not associate denial with risk of sexual recidivism 'goes against the grain' of effective practice".²⁶⁷ The supposed link between denial and recidivism is further highlighted by Martel; "although parole boards discursively acknowledge that it is prohibited to deny release on the grounds that an offender denies guilt or is

²⁵⁶ Janicki, 2015.

²⁵⁷ Vitacco & Rogers, 2005.

²⁵⁸ Frank & Ekman, 2004.

²⁵⁹ Miller & Stiff, 1993.

²⁶⁰ Craissati, 2015; Ware et al., 2015.

²⁶¹ Langevin, 1988; Pollock & Hashmall, 1991; Scully & Marolla, 1984; Sewell & Salekin, 1997.

²⁶² Abel et al., 1989; Barbaree, 1991; Happel, Joseph, & Auffrey, 1995; Langton et al., 2008; Maletzky, 1991; Marshall, 1994; Marshall, Anderson, & Fernandez, 1999; Maruna & Mann, 2006; Thakker, Ward, & Navathe, 2007; Tierney & McCabe, 2001; Vitacco & Rogers, 2014.

²⁶³ Blagden, Winder, Gregson, & Thorne, 2014; Marshall et al., 1999; Schlank & Shaw, 1996.

²⁶⁴ Harkins et al., 2015; Ware et al., 2015.

²⁶⁵ Freeman et al., 2010; Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005; Lund, 2000; Ware et al., 2015; Yates, 2009.

²⁶⁶ Janicki, 2015.

²⁶⁷ *Ibid*, p. 410.

remorseless, they tend to work with the postulate that denial or remorselessness are adequate risk markers.”²⁶⁸ Nevertheless, it appears that any association between denial and recidivism that may exist is not as straightforward as current practice would suggest.

Some researchers and commentators have argued that denial is associated with an increased likelihood of recidivism.²⁶⁹ However, other researchers have found that denial is not associated with an increased risk of sexual, violent or general offending.²⁷⁰ More recent evidence has suggested that a complex relationship may exist between denial and recidivism that is moderated by additional factors such as offender risk level or offence type.²⁷¹ It is imperative to understand the association, if any, between denial and recidivism in order to ensure that decisions about an offender’s sentencing, conditions, management, and release are supported by the empirical research base, as well as consistent with applicable laws, policies, and ethical guidelines.

Historically, it was a common assumption to believe that an offender who maintained innocence and did not fully acknowledge their deviant behaviour would undoubtedly fail to engage in any risk reducing strategies in order to avoid future offending.²⁷² Several researchers have found that treatment programs often exclude offenders that maintain their innocence.²⁷³ For instance, the vast majority of treatment programs in the United States reported that they unconditionally exclude offenders presenting with categorical denial, with only 6% of all treatment programs surveyed allowing offenders into the program if they maintain innocence.²⁷⁴ Moreover, offenders in denial are more likely to be considered high risk.²⁷⁵ The importance of denial is further complicated by the relationship between denial and treatment completion. Many offenders in denial are not given the opportunity to participate in programs that have been shown to reduce the likelihood of reoffending; thus, these offenders are not given the option to lower their risk in this manner.²⁷⁶ However, even though many commonly held opinions presume a straightforward relationship between denial and recidivism, a number of studies and meta-analyses have failed to substantiate that such a relationship exists.²⁷⁷

²⁶⁸ Martel, 2010, p. 430.

²⁶⁹ Barbaree, 1991; Hood et al., 2002; Levenson & Macgowan, 2004; Lund, 2000; Schlank & Shaw, 1996.

²⁷⁰ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005; Kennedy & Grubin, 1992.

²⁷¹ Harkins, Beech, & Goodwill, 2010; Nunes et al., 2007; Yates, 2009.

²⁷² Salter, 1988.

²⁷³ Blagden et al., 2011b; Levenson, 2011; McGrath, Cumming, Burchard, Zeoli, & Ellerby, 2010.

²⁷⁴ McGrath et al., 2010.

²⁷⁵ Hood et al., 2002.

²⁷⁶ Harkins et al., 2015.

²⁷⁷ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2005; Harkins et al., 2015; Kennedy & Grubin, 1992.

Many individuals, both within and outside the criminal justice system, feel that admitting to an offence is a necessary part of offender rehabilitation and crucial to demonstrating remorse.²⁷⁸ The issues of denial and motivation for treatment have often been discussed in the literature as significant factors addressed in effective sex offender treatments.²⁷⁹ For instance, Blagden, Winder, Gregson, and Thorne²⁸⁰ examined the views and attitudes of highly experienced treatment providers that deliver sex offenders group programs in England. The authors found that all of the treatment professionals believed that denial was associated with an increased risk.

Professionals view denial as a significant barrier to treatment.²⁸¹ Although most professionals emphasize the need and importance of providing treatment to those that deny their offence, professionals disagree on the appropriate manner with which to manage offenders in denial. Offenders that maintain their innocence are generally considered to lack motivation for treatment²⁸² and, in many instances, are excluded from participation in treatment programs.²⁸³ As well, the reduction or elimination of denial has often been viewed as a marker of treatment progress and success.²⁸⁴ However, treatment providers often find the experience of working with offenders in denial to be difficult and frustrating²⁸⁵ argued that professionals working with offenders that deny all or some aspects of their offence might inadvertently fall into a “fixated and oppressive” style working to get a confession. Nonetheless, in current practice conquering denial in offender treatment is viewed as successful and contributing to the reduction of risk.

Rarely do professionals acknowledge that offenders presenting with categorical denial (i.e., they claim innocence) may in fact be innocent. Referring to sex offenders who categorically deny their offence, Ware and colleagues acknowledge, “of course it is possible, and even likely, that some of these offenders may be innocent”.²⁸⁶ Freeman et al. elaborated on the issue of categorical denial and acknowledged that fact that some of these offenders may be telling the truth; “notwithstanding the issue that a minority may in fact be innocent, what remains evident is that some levels of denial among a select group appear impervious to apprehension and the sentencing process, as well as lengthy incarceration periods”.²⁸⁷

²⁷⁸ Clow et al., 2012; Weisman, 2004.

²⁷⁹ Beech & Fisher, 2002; Garland & Dougher, 1991; Harkins et al., 2010; Kear-Colwell & Pollock, 1997; Miller & Rollnick, 2002; Tierney & McCabe, 2002.

²⁸⁰ Blagden et al, 2011a.

²⁸¹ Blagden et al. 2011a; Craissati, 2015; Freeman et al., 2010.

²⁸² Marshall, 1994.

²⁸³ McGrath et al., 2010.

²⁸⁴ Freeman et al., 2010.

²⁸⁵ Freeman et al., 2010; Janicki, 2015.

²⁸⁶ Ware et al, 2015, p. 216.

²⁸⁷ Freeman et al, 2010, p. 40.

Referring to the manner in which the criminal justice system deals with offenders who are defiant, Martel argued that the “those who claim their innocence must be in denial, an unsympathetic form of self-justification”.²⁸⁸²⁸⁹ Martel goes on to explain that the interpretations employed within the criminal justice system serve to place offenders in groups that impeach their character and silence their claims. However, Ware et al. asserted that it is unlikely that all offenders that categorically deny having committed an offence are in fact innocent. As such, the case of an offender that presents with categorical denial or maintains their innocence must be approached and managed with caution.²⁹⁰ When an offender claims they are innocent, regardless of whether they are in fact innocent or not, professionals responsible for their management must address those who categorically deny in an ethical and informed manner.

An offender maintaining innocence presents “one of the most controversial issues in terms of how clinicians should respond to the problem.”²⁹¹ There has been considerable debate regarding the roots and purpose of denial in offender populations.²⁹² Freeman et al.’s conclusion regarding the importance of denial in offender assessment and management highlights the inconsistencies and controversy surrounding this area:

*There are currently few firm conclusions regarding the impact of denial on estimations of recidivism risk or the appropriate actuarial and clinical processes required to determine suitable candidates for release. This uncertainty is also reflected in the limited range of treatment options currently available for sex offender deniers, although a range of hypothesis exist.*²⁹³

²⁸⁸ Martel, 2010, p. 429.

²⁸⁹ We saw this phenomenon repeatedly in reviewing the *Preventing Parole* participants’ CSC records. For instance, in a risk assessment regarding Elizabeth from 2012, CSC staff wrote: *Psychology reports specify that [Elizabeth] remains unswerving in her lack of ability to address her risk factors or her index offense [sic]. It further states that beneath her facade of control and composure she is likely overwhelmed and traumatized by what she has done and the only way for her to maintain her equilibrium and protect herself is to contain and repress what happened.*

²⁹⁰ Ware et al., 2015.

²⁹¹ Ware et al., 2015, p. 216.

²⁹² Cooper, 2005; Goleman, 1989.

²⁹³ Freeman et al, 2010, p. 49.

Substantial controversy also exists surrounding the importance placed on denial and minimization within sex offender treatment programs.²⁹⁴ However, it is near universally accepted that denial is an important consideration and has potentially serious implications for the assessment and treatment of offenders.²⁹⁵

Due to the controversial nature of denial within the criminal justice system, with regards to the appropriate manner in which to assess risk and provide treatment to an offender who maintains innocence for their offence,²⁹⁶ it is critical to evaluate the available clinical and research literature regarding denial. The current review focuses on offenders that maintain they are factually innocent; that is they categorically deny committing the offence. Other literature has referred to these offenders as being total deniers or absolute deniers, in contrast to partial deniers or minimizers.²⁹⁷

As opposed to malingering, much less is known about defensiveness and denial, and in particular categorical denial.²⁹⁸ Defensiveness, the denial or minimization of psychological symptoms or deleterious information, has been cast into the shadows in much of the research and literature on forensic assessments. Forensic assessments, in particular assessment of criminal responsibility and fitness to stand trial, have traditionally been more concerned with the potential impact of malingering, as criminal defendants may avoid punishment if successful in deceiving the expert evaluator. According to Rogers and Bender, “determinations of malingering often supersede all other clinical issues.”²⁹⁹

If an evaluatee is determined to be malingering, (i.e., a professional is of the opinion that the individual is malingering), this determination will likely nullify all other statements made by the evaluatee. The individual will be found to lack all credibility in providing accurate information. As a result, professionals must hold themselves to a higher standard when providing an opinion that an individual is malingering. Therefore, “in addition to conformation by multiple sources, forensic psychologists should systematically exclude alternative explanations ... in their determinations of malingering.”³⁰⁰ These statements are equally applicable to determinations of defensiveness or denial in a risk assessment context.

²⁹⁴ Barbaree & Cortoni, 1993; Beech & Fisher, 2002; Langton et al., 2008; Maletzky, 1996; Marshall, 1994; McGrath, Cumming, & Burchard, 2003; Salter, 1988.

²⁹⁵ Freeman et al., 2010; Gudjonsson, 1990; Richards & Pai, 2003.

²⁹⁶ Cooper, 2005; Freeman et al., 2010; Ware et al., 2015; Yates, 2009.

²⁹⁷ Craissati, 2015.

²⁹⁸ Melton et al., 2007; Rogers & Bender, 2003; Ware et al., 2015.

²⁹⁹ Rogers & Bender, 2003, p. 112.

³⁰⁰ *Ibid.*

Three main contributing factors are responsible for the limited knowledge of defensiveness.³⁰¹ Empirical forensic research has largely ignored the issue of defensiveness. It is difficult to assess defensiveness because the evaluatee simply denies or minimizes the presence of any psychological symptoms, or the presence or affect of other detrimental information. As well, it is difficult to distinguish defensiveness from a lack of insight, as many individuals with chronic mental health problems do not recognize their various symptoms or acknowledge the impact of their symptoms. However, in sentencing and post-verdict assessments, the main issue is often defensiveness.³⁰² Courts and other administrative boards, such as the PBC, are focused on ensuring that individuals are not prematurely released if they pose a significant risk to the public. As a result, risk assessments that inform and assist the courts, boards, or tribunals in making these types of determinations are much more concerned with the possibility that evaluatees minimize or deny any psychological impairments or other detrimental information. As a result, professionals must “exercise a rigorous standard in conducting these evaluations.”³⁰³

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

A. INNOCENCE CLAIMS AND CATEGORICAL DENIAL

Response style generally refers to the type, amount, and accuracy of information provided by an individual being evaluated, including information about their thoughts, beliefs, attitudes, feelings, and behaviours.³⁰⁴ Several response styles have been described in the literature some of which are relevant to an offender claiming innocence for an offence which they have been charged or convicted.³⁰⁵ Typically these response styles have been discussed in terms of the presentation of psychological or physical symptoms of a mental illness, but they are also applicable to all problematic attitudes, beliefs, or behaviours. At the broadest level, these response styles are applicable to all information obtained from an individual. The response style that an evaluatee adopts will largely depend on the given legal and assessment context.³⁰⁶

With regards to the response styles developed and described by Rogers and colleagues,³⁰⁷ two response styles are fundamental when an offender claims they are factually innocent for an offence. The distinction between these response styles depends on whether the offender is in reality innocent or not.

First, the offender may be telling the truth; they are in fact innocent and wrongfully convicted. A *reliable, honest or candid* presentation is when the evaluatee makes a genuine attempt to provide accurate information.³⁰⁸ Any factual inaccuracies or inconsistencies are the result of misperceptions, poor understanding, or genuine forgetfulness. In the case when an offender is in fact innocent and maintains this innocence while incarcerated, the offender is providing an honest and reliable report of the facts.

Second, the offender may be lying; they are in fact guilty and correctly convicted. Defensiveness, or a *defensive* presentation, involves the cognizant, deliberate denial or gross minimization of psychological symptoms or other information.³⁰⁹ This denial or minimization is considered rooted in an external goal, resulting from the individual's circumstances. Defensiveness is common in criminal justice settings, particular when a reduction in security status or lessening of conditions is being considered.³¹⁰ In the case

³⁰⁴ Rogers, 1984, 1997.

³⁰⁵ Heilbrun, Warren, & Picarello, 2003; Melton et al., 2007; Rogers, 1984, 1997; Rogers & Bender, 2003; Rogers & Vitacco, 2002; Vitacco & Rogers, 2014.

³⁰⁶ Melton et al., 2007.

³⁰⁷ Rogers, 1997; Rogers & Bender, 2003; Rogers & Vitacco, 2002; Vitacco & Rogers, 2014.

³⁰⁸ Heilbrun et al., 2003; Rogers, 1997.

³⁰⁹ Heilbrun et al., 2003; Rogers & Bender, 2003.

³¹⁰ Vitacco & Rogers, 2005.

when an offender maintains their innocence, when they actually committed the offence, they are providing a defensive presentation.

Professionals should also be aware of several additional response styles. *Malingering* involves the conscious, deliberate fabrication or gross exaggeration of psychological or physical symptoms.³¹¹ This fabrication or exaggeration is rooted in the individuals context or circumstances, rather than being attributable to a psychological desire to assume the role of the patient. That is, malingering is done for an external goal. *Feigning* is closely related to malingering, as it involves the conscious, deliberate fabrication or gross exaggeration of psychological or physical symptoms, yet no assumptions are made about the underlying goals or reasoning behind the presentation.³¹² *Irrelevant responding* involves providing information that is not relevant to the assessment and may appear random, often resulting from a failure to engage in the assessment.³¹³ That is, the evaluatee provides inconsistent and immaterial information and is generally disengaged from the evaluation process.

A *hybrid* response style is a combination of two or more of the above response styles. A hybrid response style is thought to be the most common in forensic settings.³¹⁴ For example, an evaluatee may fabricate and exaggerate certain problems (e.g., cognitive impairments during the trial process) while minimizing or denying other problems (e.g., antisocial attitudes and history of criminal activities³¹⁵). *Dissimulation* is an overarching, general term that describes an inaccurate presentation of symptoms or information.³¹⁶ This umbrella term is often used when it is not possible to determine the exact manner in which the misinformation is being given. That is, it is typically used when more precise terminology (i.e., one of the above response styles) is inapplicable or undetermined. Additional styles have been described as *uncooperative* in which the individual does not respond to the assessment questions or provides minimal information.³¹⁷ As well, *impaired* responding involves an authentic communication deficit often the result of an intellectual deficit, thought disorder, memory impairment, or young age.³¹⁸

Within the literature, researchers and academics often fail to acknowledge the possibility of miscarriages of justice.³¹⁹ Much of the literature rests on the assumption

³¹¹ Heilbrun et al., 2003; Rogers & Bender, 2003.

³¹² Rogers & Bender, 2003.

³¹³ Heilbrun et al., 2003; Rogers & Bender, 2003.

³¹⁴ Melton et al., 2007; Rogers, 1997.

³¹⁵ Melton et al., 2007.

³¹⁶ Rogers & Bender, 2003.

³¹⁷ Heilbrun et al., 2003.

³¹⁸ Heilbrun et al., 2003.

³¹⁹ Cooper, 2005.

that the criminal justice system is able to adjudicate guilt from innocence accurately and perfectly. Therefore, a convicted offender (or even an alleged offender awaiting trial) who does not admit to their offence(s) is considered to be in denial, rather than consideration of the possibility that he or she is in fact innocent.³²⁰ Clinicians and other professionals tend to readily view an individual who maintains innocence as having committed the offence and is consciously choosing to deny involvement.³²¹ The difficulty in successfully convicting an offender for a sexual offence lends some credence to the position that a convicted offender who categorically denies the offence is a guilty denier.³²²

Accordingly, many professionals faced with an offender that claims they are innocent views this claim as a defensive response style, involving the denial or minimization of offence related thoughts, feelings, and behaviours. Within the criminal justice system, the terms denial and minimization are used more frequently than defensiveness. Many different authors have attempted to define and conceptualize denial and minimization.

Denial and minimization are often conceptualized as having an inherent connection.³²³ Both involve some degree of refuting or contesting the facts of an offence; however, denial is sometimes thought to involve complete refutation of the offence, whereas minimization is considered to represent a lesser degree of refusal to fully acknowledge the offence, the seriousness of the offence, the impact and harm on the victim, and the need to be sanctioned or receive treatment.³²⁴ Restrictive definitions conceptualize denial and minimization as distinct constructs in which denial involves the absolute claim of innocence and minimization involves any other attempts to diminish the offender's responsibility, harm to the victim, or other aspects of the offence.³²⁵

In contrast, broader definitions tend to fail to differentiate between denial and minimization. From this perspective, denial and minimization are considered along a continuum from complete denial to complete acceptance with minimization in the middle.³²⁶ As well, other conceptualizations, in addition to denial and minimization of guilt, responsibility, and harm, focus on denial and minimization of offence planning, sexual deviance, risk for reoffending, and need for treatment.³²⁷

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² Darke, 1990

³²³ Jung & Nunes, 2012.

³²⁴ Jung & Daniels, 2012; Jung & Nunes, 2012; Levenson, 2011; Yates, 2009.

³²⁵ Nunes & Jung, 2012.

³²⁶ Maruna & Mann, 2006.

³²⁷ Jung, 2004; Schneider & Wright, 2001.

Commentators have presented numerous attempts to conceptualize denial from a dichotomous, all-or-nothing construct to typologies of denial to a continuum.³²⁸ Some authors have referred to denial as a dichotomous or binary construct: an offender either is in denial or they are not in denial. Conceptualized in this manner, offenders admit to everything and fully acknowledge all aspects of their offence(s), or they deny involvement in the offence(s).

Other authors have referred to different types of denial. A range of different types of denial has been thought to include the extent to which an offender admits and acknowledges the details of the behaviour, the impact of the behaviour on the victim, and their responsibility for the behaviour.³²⁹ For instance, some researchers have examined the differential impact of (a) denying the charges, (b) denying responsibility for the offence, (c) denial of sexual deviance, (d) denying of harm to the victim, (e) and denying of the need for sanction or treatment.³³⁰ Salter³³¹ discussed denial as comprising a number of distinct features, including denial of the behaviour happening, denial of responsibility for the behaviour, denial of the seriousness of the behaviour, denial of harm to others as a result of the behaviour, denial of fantasy about or planning for the behaviour, and denial of risk for future similar behaviours. Other authors have also examined the role of denying other aspects, as opposed to the offence itself, including denial of sexual deviance, offence planning, criminal attitudes, risk for violence or offending, and need for treatment.³³²

Salter argued against the dichotomous conceptualization of denial in favour of viewing denial as a continuum with varying degrees. In this conceptualization, at the one end offenders may completely deny involvement in the offence, alternatively in the middle of the range offenders may admit to the offence with some form of justification, and at the far end offenders may fully admit to the offence with complete acceptance of responsibility and feelings of guilt. Salter argued that offenders typically progress through the continuum of denial, as the offender admits to more and more aspects of their offending behaviour. As well, Happel et al.³³³ referred to the progression of denial through 12 stages, including denial of the behaviour, denial of intent, planning, and premeditation, and denial of relapse and recidivism potential.

³²⁸ Cooper, 2005; Harkins et al., 2010.

³²⁹ Craissati, 2015.

³³⁰ Gibbons, de Volder, & Casey, 2003.

³³¹ Salter, 1988.

³³² Nunes & Jung, 2012.

³³³ Happel et al., 1995.

Additional commentators have argued that it is best to consider denial as a continuum of dissimulation.³³⁴ This continuum ranges from those offenders who categorically deny the offence (i.e., the offender claims to be factually innocent) on the one extreme, through those offenders that present with mild minimizations of their offence, to the other extreme of complete admittance and acknowledgment of full responsibility.³³⁵ Thus, considered as a continuum, the scale of denial includes various degrees of denial, minimizations, and justifications. A continuum of denial has also been posited with regards to the underlying rationale for denial in which the one end is composed of offenders that deliberately lie in order to avoid or elude consequences (i.e., judicial verdict, sentence length), progressing through offenders that minimize the offence and harm in order to avoid internal discomfort, and ending with offenders that deny any wrong doing due to genuinely held distorted thoughts.³³⁶

Other academics and clinicians have discussed various typologies of deniers. For instance, Kennedy and Grubin³³⁷ identified four types of deniers amongst convicted sex offenders: rationalizers, offenders who admitted to the offence but denied any harm to the victim; internalizers, offenders who admitted to the offence and harm caused but attributed the behaviour to a temporary abnormality that was out of character; externalizers, offenders who admitted to the offence but blamed the victim or another third party; and absolute deniers, offenders that maintained they were innocent of the offence. This typology was larger replicated in another study by Gibbons et al.³³⁸ Using different language, these authors categorized four groups of deniers as least pervasive (corresponding to the rationalizers), moderately pervasive (corresponding to the internalizers), highly pervasive (corresponding to the externalizers), or absolute deniers.

Barbaree³³⁹ distinguished between three types of deniers, including offenders in complete denial of the offence, offenders that acknowledge the behaviour but denied it was an offence (i.e., admitting to sexual activity but claiming it was consensual), and offenders that acknowledge physical contact with the victim but deny sexual contact. In a similar vein, Barrett, Sykes, and Byrnes³⁴⁰ discussed four types of denial, including denial of facts, denial of awareness, denial of impact, and denial of responsibility. Finally, Laflen and Sturm³⁴¹ conceptualized denial not as distinct types of denial but rather as cyclical stages. In this view, offenders progress through the different stages

³³⁴ Barbaree, 1991; Happel et al., 1995; Laflen & Sturm, 1994; Winn, 1996.

³³⁵ Craissati, 2015.

³³⁶ *Ibid.*

³³⁷ Kennedy & Grubin, 1992.

³³⁸ Gibbons et al., 2003.

³³⁹ Barbaree, 1991.

³⁴⁰ Barrett, Sykes & Byrnes, 1986.

³⁴¹ Laflen & Sturm, 1994.

over time during treatment, and as the stages are not considered linear, the offender they may progress in any direction.

An important preliminary issue is the variable language used in the academic and professional literature to discuss denial.³⁴² It is critical to recognize the differential operational definitions that have been used by different researchers and academics. Denial has been defined and conceptualized in rather distinct manners by different authors. The failure to appropriately distinguish between these various definitions and measurements of denial has resulted in occasional confusion and contradictory or inconsistent results being reported in the literature.³⁴³ These confusions and inconsistencies are inevitable for several reasons when vastly different conceptualizations are employed.³⁴⁴ For instance, some authors differentiate between denial and minimization, whereas others do not. Some authors examine only a specific type of denial, whereas others examine broad dichotomous classifications. Finally, some authors measure denial in a static manner, whereas others view denial as a dynamic variable that is prone to change. Separating categorical denial from the other features and facets that have been lumped into the general denial construct is imperative.³⁴⁵

Empirical research focused on denial must be evaluated with this limitation in mind, as the discrepant definitions and conceptualizations present a murky picture. Denial of perpetrating an offence has been considered a serious impediment to offender research, and practice for several decades.³⁴⁶ Moreover, due to the variable definitions and measurement of denial in the literature, it is difficult to glean a clear picture of the importance of categorical denial (i.e., claims of factual innocence), compared to partial denial or minimization.

³⁴² Cooper, 2005; Craissati, 2015; Ware et al., 2015.

³⁴³ Cooper, 2005; Ware et al., 2015.

³⁴⁴ Cooper, 2005.

³⁴⁵ Ware et al., 2015.

³⁴⁶ Abel et al., 1987; Barbaree, 1991.

B. INCIDENCE OF CATEGORICAL DENIAL

Due to the above noted issues surrounding the varying definitions of denial used in the literature, it is difficult to determine the exact incidence of categorical denial.³⁴⁷ Moreover, the empirical research has focused almost exclusively on sex offenders, making it difficult to compare the rates of denial across offender groups.³⁴⁸ For instance, some studies have included offenders who admitted to having sex with the victim but denied that it was a crime within the total denial group.³⁴⁹ These offenders thus admit to committing the behaviour, but claim that the victim explicitly or implicitly gave consent. Other studies excluded these types of offenders from the total (i.e., categorical or absolute) denial group. Nevertheless, several authors have reported rates of categorical denial among different sex offender populations, including research with sex offenders receiving treatment at community clinics and research with incarcerated sex offenders. Based on reviews of the available literature some commentators have concluded that up to 60% of people accused of a sexual offence deny some aspects of the offending behaviour.³⁵⁰

Various researchers have reported rates of denial at outpatient clinics. Maletzky,³⁵¹ based on sex offenders receiving treatment at a community clinic for several years, reported that 31% of a mixed sample of sex offenders categorically denied having committed the offence(s). Barbaree and Marshall³⁵² found that 25% of their sample of child molesters receiving outpatient treatment categorically denied having committed an offence. Nunes et al.³⁵³ found that 28% of a diverse group of sex offenders attending an outpatient community clinic denied having offended. Sefarbi³⁵⁴ reported that approximately half of the adolescent sex offenders referred to an outpatient clinic initially denied the offence, but approximately one-third of these offenders admitted to the offence during treatment. Sefarbi also notes how denial is less common with other delinquent behaviours, such as substance abuse and stealing, compared to sexual offences, suggesting that denial may be related to the sexual nature of these offences.

³⁴⁷ Cooper, 2005; Ware et al., 2015.

³⁴⁸ Cooper, 2005.

³⁴⁹ Lord & Willmot, 2004.

³⁵⁰ Craissati, 2015; Janicki, 2015.

³⁵¹ Maletzky³⁵¹ (1991, 1996),

³⁵² Barbaree and Marshall³⁵² (1988)

³⁵³ Nunes et al. (2007)

³⁵⁴ Sefarbi (1990)

A major issue with studies conducted in outpatient community treatment centres is the lack of clarity with regards to the samples of sex offenders, specifically with regards to what proportion of the sample has already been convicted. Some research has found that the highest rates of denial are observed in offenders who have yet to go to trial with decreasing rates of denial seen as offenders proceed through the criminal justice system.³⁵⁵ For instance, Baldwin and Roys³⁵⁶ found that 57% of adult males accused of a sexual offence against a child categorically denied the offence. Haywood, Grossman, Kravitz, and Wasyliv³⁵⁷ also found a higher rate of categorical denial, 40%, in alleged child molesters. Similarly, Hunter and Figueredo³⁵⁸ found that juvenile males accused of a sexual offence displayed higher levels of denial compared to convicted juvenile sex offenders (i.e., higher levels of denial in non-adjudicated adolescents compared to adjudicated adolescents). These results highlight the apparent association between rates of categorical denial and the timing of measuring denial, with higher rates of denial being seen at early stages in the judicial process and lower rates being seen as offenders advance through the criminal justice system.³⁵⁹

Studies focused on incarcerated sex offenders have generally found that around 30% of sex offenders categorically deny that they had committed the offence.³⁶⁰ For instance, Barbaree³⁶¹ reported that 35% of incarcerated convicted sex offenders deny having committed the offence. Kennedy and Grubin³⁶² reported that approximately one-third of offenders completely denied involvement in the offence. Marshall³⁶³ reported similar results with 31% of the sample of convicted sex offenders categorically denying the offence. Marshall also reported that a further 32% of the sample minimized some aspect of the offence or their responsibility for the offence. Hood et al.³⁶⁴ found a comparable rate of categorical deniers (33%) in a sample of incarcerated sex offenders in the United Kingdom. Finally, Gibbons et al.³⁶⁵ found a slightly lower rate of categorical denial (21%) among incarcerated sex offenders in Ireland.

³⁵⁵ Ware et al., 2015.

³⁵⁶ Baldwin and Roys (1998)

³⁵⁷ Haywood, Grossman, Kravitz, and Wasyliv (1994)

³⁵⁸ Hunter and Figueredo (1999)

³⁵⁹ *Ibid.*

³⁶⁰ Blagden et al., 2011b; Craissati, 2015; Cooper, 2005; Ware et al., 2015.

³⁶¹ Barbaree (1991)

³⁶² Kennedy and Grubin (1992)

³⁶³ Marshall (1994)

³⁶⁴ Hood et al. (2002)

³⁶⁵ Gibbons et al. (2003)

Several studies have additionally reported on the rates of categorical denial after completing sex offender treatment. Langton et al.³⁶⁶ examined denial in a sample of 436 sex offenders in an institutional treatment program in Ontario, Canada from 1989 to 2001. The authors reported the rates of denial after treatment had been completed. They found that only 7% of offenders continued to categorically deny involvement in the offence at post-treatment, while 26% of offenders displayed no denial or minimization. Similarly, in a sample of 322 male sex offenders drawn from three treatment programs in the United Kingdom, Harkins et al.³⁶⁷ reported that only 7% of offenders categorically denied the offence after treatment. Finally, Marshall³⁶⁸ examined the rates of denial before and after treatment in a sample of 81 sex offenders attending treatment at a minimum-security penitentiary in Canada. Prior to treatment 31% of the sample categorically denied with another 32% minimizing some aspects of the offence. Post-treatment, only 2% of offenders continued to categorically deny committing the offence, while another 11% minimized some aspects of the offence.

Lord and Willmot³⁶⁹ also found that rates of total denial, including offenders who admitted to having committed the behaviour but denied that it was a crime, dropped as the offenders progressed through the criminal justice system. They found that total denial was seen in 83% of offenders when first accused, 53% of offenders at trial, 44% of offenders when first interviewed in prison, and 33% of offenders when first offered treatment in prison. Anecdotal clinical accounts support the idea that rates of denial decrease as offenders advance through the stages of the criminal justice system. Janicki³⁷⁰ reports that the majority of offenders he has seen in group treatment programs initially deny some aspects of the offence. Although some of these offenders continue to express some form of denial upon completing treatment, other offenders gradually admit to the offence and accept responsibility.

Based on these reports, it appears that rates of categorical denial vary depending on the offender's stage in the criminal justice system.³⁷¹ The largest rates of denial have been observed in alleged offenders that have yet to be adjudicated, whereas the lowest rates of denial have been observed in incarcerated offenders that have completed treatment programs. This pattern of results suggests that the specific type and purpose of denial may differ prior to conviction compared to post-conviction.³⁷² However, more

³⁶⁶ Langton et al. (2008)

³⁶⁷ Harkins et al. (2010)

³⁶⁸ Marshall, *supra* note 483.

³⁶⁹ Lord and Willmot (2004)

³⁷⁰ Janicki (2015)

³⁷¹ Ware et al., 2015.

³⁷² *Ibid.*

research is needed in order to fully understand the incidence of categorical denial at different stages of the criminal justice system.

Statistics as to the rate of denial past an offender's eligibility for temporary release and/or parole do not appear to be available. Studies providing these numbers simply do not appear to have been conducted. However, anecdotal experience indicates the numbers are very low.

C. THE PURPOSE BEHIND AND INTERPRETATIONS OF DENIAL

When presented with an individual accused of committing a criminal offence that maintains their innocence, a basic question arises as to why the individual would categorically deny responsibility for the offence. When accused of an offence, especially a sexual offence, it seems natural that some people would seek to deny responsibility of some or all aspects of the offence.³⁷³ However, the context and circumstances in which an individual would choose to categorically deny involvement in an offence are not clear, especially when an individual maintains innocence after being convicted of an offence and possibly serving years in prison. There is an extensive literature regarding the underlying purpose or functions of denial in sex offenders.³⁷⁴ The extant theories of denial all rest on the same basic assumption implied by the word choice used in the literature; the offender is denying their true guilt. However, it must be noted that an offender may categorically deny committing an offence due to the simple reason that they are factually innocent.

It should come as no surprise that some individuals will maintain their innocence, as the potential consequences of being accused of a serious offence, especially a sexual offence are vast and extensive.³⁷⁵ Laws commented that "any person who has been apprehended in a criminal act and has something to lose in income, family, status, or personal relationships has sufficient motivation to deny."³⁷⁶ Denial has also been theorized to prevent offenders from various adverse consequences, such as loss of income, personal support, status, and integrity, and lowered self-esteem.³⁷⁷ Denial has also been thought to be a viable strategy for avoiding possible physical harm, at the hands of other inmates, friends or family of the victim, or others.³⁷⁸ The list of potential adverse consequences can affect an individual at any stage of the criminal justice

³⁷³ Maruna & Mann, 2006; Ware et al., 2015; Yates, 2009.

³⁷⁴ Ware et al., 2015.

³⁷⁵ *Ibid.*

³⁷⁶ Laws, 2002 at p. 179.

³⁷⁷ Salter, 1988; Stevenson, Castillo, & Sefarbi, 1989.

³⁷⁸ Stevenson et al., 1989.

system from the original accusation, through the judicial proceedings, and even after being sentenced and incarcerated.

Denial is considered by some to be a normative cognitive process that everyone engages in as an attempt to protect and maintain self-esteem.³⁷⁹ Denial is thought to allow an individual to cope with dissonance between their attitudes, thoughts, and behaviours.³⁸⁰ Under this framework, making excuses is a normal process for anyone who has engaged in some form of misconduct. When confronted with a behaviour that an individual is not proud of, denial is considered a natural reaction.³⁸¹ Excuses are thus, “in many ways, a healthy and functional trait.”³⁸² When an individual makes excuses, including denying involvement in an offence, it is theorized to indicate that the individual is consciously aware that the behaviour was wrong, immoral, or at a minimum prohibited by society.³⁸³ Thus, according to this view, denial is seen as a self-preservative strategy utilized in order to reduce negative emotions and cognitions. Categorical denial is, thus, an understandable strategy used by some offenders to cope with the high stakes situation of being convicted of an offence and incarcerated.³⁸⁴

Although some view denial as a normal process, other clinicians and researchers have posited various theories regarding the underlying driving mechanisms for denial. Many of these theories focus on the negative consequences associated with admissions of guilt. For instance, Salter³⁸⁵ described denial as a form of “magical thinking” in which offenders are attempting to distance themselves from the negative consequences of their offence. At page 186, Salter postulated that admitting to the offence carried with it many consequences:

For many, sexual deviance does not occur when they commit the act, it occurs when they admit it. A sex offender is not a sex offender until he tells you he is. He really is, in some sense, a wrongly accused innocent until he says the words, “Yes, I did do it”.

³⁷⁹ Maruna & Mann, 2006; Yates, 2009.

³⁸⁰ Yates, 2009.

³⁸¹ Maruna & Mann, 2006.

³⁸² Craissati, 2015, p. 396.

³⁸³ Brown, Walker, Gannon, & Keown, 2013.

³⁸⁴ Blagden et al., 2011a; Harkins et al., 2015.

³⁸⁵ Salter (1988)

Rogers and Dickey³⁸⁶ offered several broad explanatory models of defensiveness or denial in sex offenders. These explanatory models were extrapolated from prior models focused on malingering in attempts to explain why an individual may attempt to fabricate psychological or other impairments.³⁸⁷ Rogers and Dickey detailed three explanatory models of denial: pathogenic, criminogenic, and adaptational.

The *pathogenic model* claims that the primary motivation for defensiveness is internal. Rooted in the psychoanalytic tradition, individuals are driven by unconscious forces to deny problematic behaviour. Denial is an unconscious defence mechanism in which an individual represses unacceptable impulses.³⁸⁸ That is, “psychodynamic formulations have suggested that a loss of ego functions may result in unconscious denial.”³⁸⁹ Under this model, denial and defensiveness serve a self-protective function, buffering offenders from the gravity of their offences and potential negative self-evaluations.³⁹⁰ Ward and several colleagues³⁹¹ further elaborated on the manner in which denial may function to defend against deleterious self-evaluative thoughts. However, the pathogenic model has little support and has generally been dismissed.³⁹²

The *criminogenic model* claims that the primary motivation is characterological. That is, individuals with antisocial attitudes or a general criminal orientation are more likely to deny or minimize their problematic behaviour. Involvement with the criminal justice system is thought to increase the likelihood of defensiveness, as these individuals try to garner advantages or avoid negative repercussions. This model suggests that offender with antisocial personality disorder and general antisocial attitudes are more likely to display a defensive response style. However, Rogers and Dickey note that many offenders with antisocial personality disorder do not deny their offences, which limits the utility and applicability of this model. Moreover, this model is believed to account for only a small number of distortions evident in offender assessments.³⁹³ Adherence to this model can also promote cynicism, which has the potential to interfere with comprehensive assessments and interventions.³⁹⁴

The *adaptation model* claims that the primary motivation is contextual. Individuals that find themselves in adversarial situations make a rationale decision to deny or

³⁸⁶ Rogers and Dickey (1991)

³⁸⁷ Rogers, 1990a, 1990b, 1997; Rogers & Bender, 2003.

³⁸⁸ Laughlin, 1970.

³⁸⁹ Rogers & Bender, 2003, p. 111.

³⁹⁰ Vitacco & Rogers, 2014.

³⁹¹ Ward, Hudson, & Marshall, 1995; Ward, Louden, Hudson, & Marshall, 1995.

³⁹² Quinsey, 1984.

³⁹³ Vitacco & Rogers, 2014.

³⁹⁴ Vitacco & Rogers, 2005, 2014.

minimize problematic attitudes, beliefs, or behaviours. In this model, defensiveness is consciously chosen as the best alternative based on a cost-benefit analysis; the greater the anticipated benefit compared to the cost of denial, the more likely a defensive presentation is used. As there may be much to lose from admitting to an offence and much to gain from denial, dependent on the stage of the criminal justice system, offenders may consciously and rationally make the decision to deny. The likelihood of denial is influenced by the perceived costs and benefits of admitting versus denying. Thus, under this model denial is used as a strategy to seek a preferred outcome.

A similar *socioevaluative model* has also been proposed.³⁹⁵ This model posits that defensiveness results from the fear of punishment or negative consequences in admitting to or fully acknowledging problematic attitudes or behaviour, resulting in a generalized response of defensiveness. According to Sewell and Salekin, “dissimulation is a learned response to any evaluative stimulus.”³⁹⁶ In this model, the close link between assessments and punishment or ostracism is recognized. Thus in adversarial settings, defensiveness is most likely to present. Additionally, this model posits that defensiveness is seen in less consequential settings due to past learning.

Under the framework of the adaptational model, an offender will continue to deny the offence until the perceived benefits of admitting guilt and accepting responsibility outweigh the perceived benefits of maintaining innocence.³⁹⁷ Some have argued that the adaptational model fails to explain the maintenance of denial post-conviction, as maintaining innocence can present serious obstacles for the offender while incarcerated in terms of opportunities for treatment and early release.³⁹⁸ Thus, it is thought that denial cannot be serving the offender’s best interest, as the costs of maintaining innocence after being incarcerated for some time must outweigh the benefits. However, the costs of admitting guilt for some offenders may still be high even after a verdict has been rendered. For instance, some researchers have found that incarcerated sex offenders that categorically deny their offence indicated that denial was used to reduce the fear of stigma and possible assaults while incarcerated due to the offender being labeled as a sex offender by the other inmates.³⁹⁹

Some researchers have attempted to explain the reasons for denial by empirically investigating sex offenders that previously denied offences. Lord and

³⁹⁵ Sewell & Salekin, 1997.

³⁹⁶ *Ibid.* at p. 332.

³⁹⁷ Blagden et al., 2011a, 2011b; Lord & Willmot, 2004; Rogers & Dickey, 1991.

³⁹⁸ Ware et al., 2015.

³⁹⁹ Mann, Webster, Wakeling, & Keylock, 2013.

Willmot⁴⁰⁰ conducted focus groups with 24 convicted sex offenders and interviewed 36 convicted sex offenders that had previously denied some or all aspects of their offence in order to explore the factors that influence an offender's decision to deny or admit. The authors concluded that their results provided support for Rogers and Dickey's adaptational model. The results identified three psychological processes that appear to underpin denial: "motivational/insight; threats to self-esteem; and fear of negative, extrinsic consequences."⁴⁰¹ The motivational processes included a desire to continue offending and a lack of insight into the offence. Intrinsic factors also played a role in denial such as threats to one's self-image and self-esteem and fear of negative evaluations. Extrinsic factors included a fear of victimization in prison, a fear of losing social support, and general fear of negative consequences.

Bladgen et al.⁴⁰² also examined sex offenders that had previously categorically denied offending but now admitted to the offence. They found that the fear of losing the support of family and friends was a common reason underlying denial. As well, they reported that maintaining a viable identity was also a major underlying reason for denial (i.e., offenders not wanting be labeled a sex offender), suggesting that offenders were attempting to reduce shame in order to protect their self-image.⁴⁰³ This is consistent with Ware and Mann's⁴⁰⁴ conclusion that one of three main reasons for denial is to function as a protective strategy for one's sense of identity.

Blagden, Winder, Gregson, and Thorne⁴⁰⁵ also conducted a qualitative study examining the role and function of categorical denial in 10 incarcerated sex offenders. They found that reducing the stigma of being labelled a sex offender was a principle reason for denying an offence. Denial thus allowed the offenders to manage the feelings of shame and stigma associated with being labelled a sex offender by providing them with the opportunity to maintain a viable identity. Denial offers the offender a strategy to maintain a stable narrative of their core identity. Offenders also reported that the fear of losing the support of family members was a driving force in categorical denial, as well as concern about attacks by other inmates while incarcerated. Many of the deniers in this study also viewed sex offenders as "sick, dirty, or perverted in some way," but they did not view themselves in this way. The authors conclude that categorical denial may serve to protect the offender's self-image by "allowing offenders to keep a coherent and positive sense of self."⁴⁰⁶

⁴⁰⁰ Lord and Willmot (2004)

⁴⁰¹ Rogers & Dickey, 1991 at p. 51.

⁴⁰² Bladgen et al. 2011b.

⁴⁰³ Ware et al., 2015.

⁴⁰⁴ Ware & Mann, 2012.

⁴⁰⁵ Blagden et al., 2014.

⁴⁰⁶ *Ibid*, p. 1708.

Freeman et al.⁴⁰⁷ also attempted to explain the reasons for denial, using interviews with psychologists that work with sex offenders. They found that psychologists tend to hold three core beliefs regarding the underlying purpose of denial in sex offenders. The three beliefs related to self-esteem, antisocial attitudes, and punishment. First, Freeman et al. found that some psychologists recognized that accepting responsibility for an offence, especially one that is generally considered deviant, can result in negative self-evaluations, lower self-esteem, and damage one's sense of self. Second, some psychologists highlighted the possibility that denial may originate in some offenders from underlying antisocial attitudes and a general lack of concern for social customs and values. Finally, some psychologists believed that denial might originate from a basic fear of punishment or reprisals while incarcerated or in the community.

For several decades, commentators have advanced various theories regarding the functions of denial. Some of these theories are consistent with Rogers and Dickey's 1991 adaptational model. Happel et al. posited that sex offenders "dance with denial to avoid feelings of shame, confusion, embarrassment, inadequacy, responsibility, and guilt."⁴⁰⁸ Others have argued that categorical denial should be viewed as a strategy that is used in particular contexts and under certain conditions. For instance, Ware and colleagues claimed that categorical denial "may be seen in most of these offenders as perhaps a fluctuating strategy to achieve some advantage rather than as an expression of their true belief."⁴⁰⁹ Under this view, categorical denial is considered a situational based strategy, as opposed to a dispositional or pathological characteristic.⁴¹⁰

Some have argued that the possible loss of support from family and friends is a central factors underlying categorical denial.⁴¹¹ O'Donohue and Letourneau⁴¹² found that categorical denial was more common when family and friends initiated the claim of innocence. Lord and Willmot,⁴¹³ based on interviews conducted with sex offenders who had previously categorically denied committing an offence, found that 67% of the offenders reported that the primary reason for maintaining their categorical denial was the fear of losing support of family and friends. Blagden et al.⁴¹⁴ also found that concern for the loss of support from family and friends was a crucial reason underlying denial in

⁴⁰⁷ Freeman et al., 2010.

⁴⁰⁸ Happel et al, 1995 at p. 6.

⁴⁰⁹ Ware et al, 2015 at p. 217.

⁴¹⁰ Friestad, 2011; Vanhoeck & van Daele, 2011; Ware & Mann, 2012.

⁴¹¹ Craissati, 2015.

⁴¹² O'Donohue & Letourneau, 1993.

⁴¹³ Lord & Willmot, 2004,

⁴¹⁴ Blagden et al., 2014.

sex offenders that previously denied their offences. In addition, Sefarbi⁴¹⁵ provided some support for this notion. In this study, adolescent categorical deniers were more likely to be living in enmeshed, supportive family relations, whereas adolescent admitters were more likely to be living in detached, unsupportive family relations. Stevenson et al.⁴¹⁶ postulated that denial might offer the offender and their family the opportunity to prolong the adjustment period in order to accommodate the truth that the offender was in fact guilty. As well, Stevenson et al. highlighted that denial may serve to assist the offender in securing or maintaining an intimate relationship.

Denial may also allow the offender to maintain relationships with individuals that would otherwise be ashamed or angered by their offence. Alternatively, denial may serve to protect the offender's family from stress and embarrassment.⁴¹⁷ Some researchers have also found that the families of offenders that categorically deny the offence often continue to support the offender in their claim of innocence.⁴¹⁸ These theories all suggest that categorical denial would be more common in the earlier stages of the criminal justice system,⁴¹⁹ which is consistent with the reported incidence of denial. Within this view, a shift away from categorical denial may be seen following the death or breakdown of a significant personal relationship.⁴²⁰

Several researchers and commentators have focused on the importance of shame, guilt, and the preservation of self-image as underlying mechanisms for categorical denial in sex offenders.⁴²¹ In this view, denial is seen as a defense mechanism intended to protect the individual's sense of self.⁴²² Sex offenders typically have some degree of conscious awareness that their offence was wrong or immoral.⁴²³ Research has found that sex offenders characteristically present with low self-esteem⁴²⁴ and substantial feelings of shame.⁴²⁵ However, the impact of these variables on categorical denial remains unknown.⁴²⁶

⁴¹⁵ Sefarbi, 1990.

⁴¹⁶ Stevenson et al., 1989.

⁴¹⁷ *Ibid.*

⁴¹⁸ Laflen & Sturm, 1994; Sefarbi, 1990

⁴¹⁹ Ware et al., 2015.

⁴²⁰ Craissati, 2015.

⁴²¹ Craissati, 2015; Gudjonsson, 2006; Ware et al., 2015.

⁴²² Cooper, 2005.

⁴²³ Craissati, 2015.

⁴²⁴ Marshall, Anderson, & Champagne, 1996.

⁴²⁵ Marshall, Anderson, & Fernandez, 1999.

⁴²⁶ Jackson & Thomas-Peter, 1994; Ware et al., 2015.

Denial may serve to protect the offender's self-image. It may facilitate the offender from avoiding feeling perverted or deviant and unable to maintain intimate relationships.⁴²⁷ Consistent with this notion, Neugent and Kroner⁴²⁸ found that the largest difference between rapists that admit to their offence versus those that categorically deny the offence was the general tendency for deniers to refute their negative characteristics. Jenkins-Hall and Marlatt⁴²⁹ asserted that denial functions to prevent and impede recognition of the severity of the offence, the impact of the offence on the victim, and the potential consequences of the offence on the offender. Janoff-Bullman and Timko⁴³⁰ asserted that denial of responsibility for a wrongdoing is a transitional strategy used to protect an individual's self-concept during periods of change.

Marshall, Marshall, and Ware⁴³¹ proposed that a number of key psychological differences may exist between categorical deniers and other sex offenders, including higher levels of shame and guilt and lower self-esteem. Happel et al.⁴³² argued that sex offenders categorically deny in order to avoid feelings of shame, guilt, inadequacy, and humiliation. Blagden et al.⁴³³ claimed that denial might assist in protecting and maintaining a coherent self-identity while reducing shame and stigma. Thornton and Knight⁴³⁴ stated that categorical denial may function differently in different types of offenders. They concluded that denial in rapists constitutes a manifestation of the broader psychopathic character, whereas denial in child molesters serves a more self-protective function avoiding shame and stigma. Blagden et al.⁴³⁵ highlighted how denial can often result in an internal struggle that can paradoxically increase negative feelings such as shame and guilt.

According to labeling theory, individuals that are ascribed a negative label, such as a sex offender, will utilize various coping mechanisms in attempts to reduce and manage the stigma that accompanies the label.⁴³⁶ Evans and Cubellis defined stigma as "the ascription of deviance upon an individual that leads others to judge that individual as illegitimate for social participation."⁴³⁷ Based on interviews with 20 registered sex offenders, Evans and Cubellis analyzed the strategies that sex offenders used to cope

⁴²⁷ Stevenson et al., 1989.

⁴²⁸ Neugent & Kroner, 1996.

⁴²⁹ Jenkins-Hall & Marlatt, 1989.

⁴³⁰ Janoff-Bullman & Timko, 1987.

⁴³¹ Marshall, Marshall, & Ware, 2009.

⁴³² Happel et al., 1995.

⁴³³ Blagden et al., 2011b.

⁴³⁴ As cited in Ware et al., 2015.

⁴³⁵ Blagden et al., 2011a, 2011b.

⁴³⁶ Becker, 1963; Goffman, 1963.

⁴³⁷ Evans & Cubellis, 2014, p. 595; see also, Elliott, Ziegler, Altman, & Scott, 1982.

with and manage being stigmatized. They found that offenders used a variety of coping mechanism, including honesty, concealment, and isolation, as well as grouping and denial. With regards to denial, they found that offenders used denial as a process whereby they were trying to reject the sex offender label that had been ascribed to them. The offenders subjectively reframe their self-perceptions as being separate from the sex offender label. The authors found evidence of offenders expressing both partial and total denial of their offences as strategies to differentiate themselves from sex offenders. For instance, many offenders did not classify themselves as sex offenders because they defined a sex offender as someone who repeatedly commits sexual offences when they committed only one offence.

On the other hand, several commentators have posited that categorical denial in sex offenders indicates a conscious intent to reoffend.⁴³⁸ It has been suggested that some forms of denial may be characterological manifestations of underlying antisocial attitudes and tendencies.⁴³⁹ For instance, Friestad⁴⁴⁰ proposed that denial offers sex offenders a strategy to continue offending without extensive feelings of shame or guilt. Examining the reasons for denial among low-risk incestuous sex offenders, Nunes et al.⁴⁴¹ found that some offenders endeavoured to convince other people of their innocence in order to gain and secure further access to potential victims. Some have argued that certain cases of denial may be evidence of deeper rooted or habitual lack of responsibility.⁴⁴² Wright and Schneider⁴⁴³ hypothesized that sex offenders use repeated justifications, such as the continued denial of an offence, as a deliberate means to rationalize continued involvement in sexual offences. Wright and Schneider claim this self-deception process is conscious and deliberate; however, other commentators have highlighted that self-deception is typically a non-conscious and non-deliberate process.⁴⁴⁴

Other authors suggest that offender may be engaging in a cognitive deconstruction process while maintaining their categorical denial.⁴⁴⁵ In this process, offenders do not focus on the outcome of the behavioural sequence (i.e., the sexual offence), as this outcome does not fit with the offenders' self-identity. Offenders, instead, focus on each particular step in the behavioural sequence individually and consecutively, while curbing thoughts about the final outcome. Some commentators

⁴³⁸ Abel et al., 1989; Salter 1988.

⁴³⁹ Langton et al., 2008.

⁴⁴⁰ Friestad, 2011.

⁴⁴¹ Nunes et al., 2007.

⁴⁴² *Ibid.*

⁴⁴³ Wright & Schneider, 1999.

⁴⁴⁴ Ware et al., 2015.

⁴⁴⁵ Baumeister, 1991; Ward, Hudson, & Marshall, 1995; Ware et al., 2015.

have gone as far as to say that “offence-denial is generally understood to emanate from offence supportive beliefs and values.”⁴⁴⁶

Several commentators have also pointed to the purported link between psychopathy and minimization or denial.⁴⁴⁷ There is an inherent connection between psychopathy and deception, as deception is considered a core feature of the prototypical psychopath.⁴⁴⁸ Original conceptualizations of psychopathy by Cleckley⁴⁴⁹ listed “untruthfulness and insincerity” as core features of the disorder. As well, Hare’s⁴⁵⁰ model of psychopathy contains the feature “pathological lying.” However, several studies have found that individuals with greater levels of psychopathic traits are not more successful in their deception than individuals with lower levels of psychopathic traits, although those high in psychopathic traits may attempt to use deception more frequently.⁴⁵¹

Other authors have proposed that categorical denial stems from distorted underlying attitudes and beliefs.⁴⁵² For some individuals that categorically deny an offence, the denial is considered to stem from troubled developmental experiences and unsupportive, distorted relationships, leading the individual to sincerely believe that no offence took place. Research has found some support for these notions. Nunes and Jung,⁴⁵³ using three samples of rapists and child molesters, examined the relationship between cognitive distortions and denial/minimization. They found that greater levels of general cognitive distortions about sex offending were associated with greater levels of denial/minimization of guilt, responsibility, sexual deviance, harm to the victim, and need for treatment. The authors concluded that although these constructs were correlated, they appear to be tapping into two distinct constructs and should not be used interchangeably.

Moreover, denial and minimization were seen as an attempt to reduce shame and increase the acceptability of their own offences, whereas cognitive distortions were seen as an attempt to reduce the shame and increase the acceptability of sex offences in general.⁴⁵⁴ Relatedly, Brown et al. examined the association between empathy and

⁴⁴⁶ Xuereb et al., 2009, p. 642; see also Ward, Gannon, & Keown, 2006.

⁴⁴⁷ Freeman et al., 2010; Langton et al., 2008.

⁴⁴⁸ Cleckley, 1941; Gillard & Rogers, 2015.

⁴⁴⁹ Cleckley, 1941.

⁴⁵⁰ Hare, 1991, 2003.

⁴⁵¹ Clark, 1997; Lykken, 1978; Patrick & Iacono, 1989; Raskin & Hare, 1978.

⁴⁵² Barbaree, 1991; Craissati, 2015.

⁴⁵³ Nunes & Jung, 2012.

⁴⁵⁴ Blumenthal, Gudjonsson, & Burns, 1999; Maruna & Mann, 2006; Schneider & Wright, 2004; Yates, 2009.

cognitions in a qualitative study of 50 interviews with incarcerated sex offenders.⁴⁵⁵ The authors concluded that these offenders utilized a range of strategies to achieve “psychologically comfortable positions” that facilitated their continued offending. The main strategies that were identified included complete denial of the offence, partial denial, and justifications. Brown et al. claimed that categorical denial was a cognitive strategy that enabled offenders to avoid feelings of empathy entirely.

Ware et al. argued that, although it is plausible to claim that categorical denial in sex offenders is used as a tool with the intention to continue sexual offending, “the idea that the motivation for denying guilt is to facilitate continued reoffending appears to be on shaky grounds.”⁴⁵⁶ These commentators pointed to the difficulty in determining whether an offender intends to continue offending, unless the offender directly admits to it, and the bearing of this intention on their decision to categorically deny. They also highlighted that there is a lack of persuasive evidence in support of the causal association between the intent to continue offending and categorical denial.⁴⁵⁷ As well, there is little evidence that denial actually allows sex offenders to continue offending without feelings of shame or guilt. Moreover, as discussed below, the empirical literature has failed to consistently demonstrate a relationship between denial, or specifically categorical denial, and recidivism.⁴⁵⁸

Recent reviews have concluded that the underlying purpose behind categorical denial among sex offenders remains uncertain and further research is needed in this area.⁴⁵⁹ However, from the available research some conclusions have been drawn. Ware and Mann⁴⁶⁰ posited three broad reasons for which a sex offender might choose to categorically deny committing an offence. They asserted that a sex offender may claim innocence because they are attempting to (a) preserve their liberty, status, and the support of family and friends, (b) protect their self-esteem and lessen feelings of shame and stigma, or (c) maintain their deviant sexual attitudes and fantasies and continue offending. Based on a review of the limited available literature, Ware et al. concluded that the evidence suggested two principles reasons for categorical denial: “avoiding feelings of shame and the potential consequences of being identified as a sex offender, as well as a desire to maintain family and friends.”⁴⁶¹

⁴⁵⁵ Brown et al., 2013, p. 279.

⁴⁵⁶ Ware et al. (2015), p. 218.

⁴⁵⁷ Ciardha & Gannon, 2011; Ware et al., 2015.

⁴⁵⁸ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005.

⁴⁵⁹ Ware et al., 2015; Yates, 2009.

⁴⁶⁰ Ware and Mann, 2012.

⁴⁶¹ Ware et al., 2015, p. 218.

Notably, there is a critical association between categorical denial and motivation for treatment.⁴⁶² Motivation for treatment is generally considered a dynamic risk factor involving a complex interaction of factors that lead to a readiness to change one's attitudes, beliefs, and behaviours.⁴⁶³ A number of studies have shown that failure to complete treatment and treatment non-compliance are associated with reoffending, including violent, sexual, and general offending.⁴⁶⁴ Problems with treatment and supervision are also included as risk factors on a number of risk assessment instruments.⁴⁶⁵

According to some authors, denial and motivation are inherently linked as they are tapping into the same construct. For instance, some have argued that motivation for treatment is best conceptualized as a combination of acceptance of responsibility for the problematic behaviour and willingness to engage in treatment in order to change the problematic behaviour.⁴⁶⁶ Others have based their conceptualization within Prochaska and DiClemente's⁴⁶⁷ transtheoretical model of change, with the lowest level of treatment motivation manifesting as a lack of acknowledgement of the core problem.⁴⁶⁸ Similarly, Kennedy and Grubin⁴⁶⁹ suggested that if motivation is considered on a continuum then the lowest state on that continuum is denial of the problem.

Clinical lore has suggested and research has supported an association between denial and treatment motivation.⁴⁷⁰ Offenders that admit culpability for their offences have generally been found to have greater levels of motivation for treatment.⁴⁷¹ Hunter and Figueredo⁴⁷² found that an offenders self-reported degree of denial was related to a decreased likelihood of remaining in and completing treatment, in a sample of 204 juvenile sex offenders referred to a community based sex offender treatment program. Denial is also associated with treatment progress and treatment success.⁴⁷³

Jung and Nunes⁴⁷⁴ highlighted the apparent association between denial and treatment motivation. "In practice and research there seems to be a belief – implicit or

⁴⁶² Jung & Nunes, 2012; Levenson & Macgowan, 2004.

⁴⁶³ Jones, Pelissier, & Klein-Saffran, 2006; Tierney & McCabe, 2002.

⁴⁶⁴ Hanson et al., 2002.

⁴⁶⁵ Douglas et al., 2014; Hart et al., 2003.

⁴⁶⁶ Tierney & McCabe, 2002.

⁴⁶⁷ Prochaska & DiClemente, 1986.

⁴⁶⁸ Kear-Colwell & Pollock, 1997.

⁴⁶⁹ Kennedy & Grubin, 1992.

⁴⁷⁰ Jung & Nunes, 2012; Levenson & Macgowan, 2004.

⁴⁷¹ Gibbons et al., 2003.

⁴⁷² Hunter & Figueredo, 1999.

⁴⁷³ Wright & Schneider, 2004.

⁴⁷⁴ Jung & Nunes, 2012.

explicit – that denial and minimization are strongly linked with treatment engagement, motivation, and progress.”⁴⁷⁵ Jung and Nunes examined a sample of 185 sex offenders that were mandated for assessment and treatment at a forensic outpatient clinic. They found that greater denial and minimization was associated with greater treatment refusal and less treatment engagement. However, the association between denial and treatment motivation may be an artifact of the measurement of these variables. Jung and Nunes stressed the conflation of denial and treatment readiness on existing measures that tend to include overlapping items. As a result, the research findings may simply indicate overlapping item content rather than meaningful association between distinct constructs.

The confounding of denial and treatment motivation may in part be due to the conceptualization and measurement of each construct in the literature. Jung and Nunes pointed to the close association between these constructs and the common manner in which they are assessed. The authors noted how many conceptualization of denial include aspects of treatment motivation and treatment readiness⁴⁷⁶ and similarly many conceptualizations of treatment motivation include some aspect of disclosure.⁴⁷⁷ Additionally, several researchers have found that greater levels of denial and minimization are associated with lower levels of treatment motivation and greater levels of negative opinions of treatment.⁴⁷⁸ Jung and Nunes concluded that a close relationship exists between denial and treatment motivation, as “denial and minimization are often considered key aspects of treatment engagement, motivation, and progress, and vice versa.”⁴⁷⁹

Importantly, regardless of the underlying reasons for an offender to categorically deny involvement in an offence, the criminal justice system must deal with these offenders. Ware et al. commented on the assessment of risk with an offender that categorically denies committing an offence:

*Whatever the reasons are for categorically denying having committed an offense, those held responsible for dealing with and rehabilitating sex offenders, need to assess the risk of reoffending among these clients in order to allocate them to an appropriate intensity of treatment, and to determine the intensity and conditions of post-discharge management.*⁴⁸⁰

⁴⁷⁵ Jung & Nunes, 2012, p. 486; see also Levenson, 2011.

⁴⁷⁶ Jung & Daniels, 2012.

⁴⁷⁷ Levenson & Macgowan, 2004; Tierney & McCabe, 2002.

⁴⁷⁸ Harkins et al., 2010; Jung & Nunes, 2012; Levenson & Macgowan, 2004; Nunes & Jung, 2011.

⁴⁷⁹ Jung & Nunes, 2012, p. 487.

⁴⁸⁰ Ware et al., 2015, p. 218.

D. DENIAL AND RISK FOR SEXUAL, VIOLENT AND GENERAL OFFENDING

As highlighted by the previous statement by Ware et al., regardless of why and how often offenders claim innocence, professionals must continue to assess the risk posed by these offenders and subsequently provide them services. The apparent weight and consequence attached to denial, in particular categorical denial or claims of innocence, in decision making regarding offender sentencing, management, and release appears to be largely based on the idea that denial is a significant indication of elevated risk to reoffend.⁴⁸¹ As a result, it is imperative to first consider the empirical support for the relationship between categorical denial and risk for offending. There has been spirited debate in the academic and professional literature for decades regarding the purported association between denial and risk for violent, sexual, and general offending.⁴⁸²

Various academics and clinicians have purported that in certain instances denial reflects an offender's underlying antisocial attitudes and beliefs that offending is acceptable.⁴⁸³ In order for this view to be substantiated, research would need to find that offenders that categorically deny their offence have high rates of reoffence, as these offenders would have strong antisocial attitudes and lack the deterring moral views that offending is wrong.

Several commentators have claimed that denial, including categorical denial, is associated with an increased risk of offending.⁴⁸⁴ Many in the criminal justice system hold the view that categorical denial is a factor that increases risk.⁴⁸⁵ For instance, Hood and Shute⁴⁸⁶ examined English Parole Board decisions for 254 offenders from 14 prisons in the United Kingdom. Their sample included 54 offenders that categorically denied committing the offence, including 37 sex offenders. The authors found that the parole board rarely grants parole to offenders that maintain innocence for an offence for which the court found them guilty. Only 16.7% of offenders that categorically denied were paroled compared to 35.9% of offenders that admit to their offences. This was particularly true of sex offender in denial with only 2 offenders (5.4%) being paroled. Comparatively, of the 17 non-sex offenders, seven (41.2%) were granted parole.

⁴⁸¹ Craissati, 2015.

⁴⁸² Barbaree, 1991; Endres & Breuer, 2014; Hanson & Bussiere, 1998; Lund, 2000; Mann, Hanson, & Thornton, 2010.

⁴⁸³ Blumenthal et al., 1999; Schneider & Wright, 2004.

⁴⁸⁴ Barbaree, 1991; Hanson & Harris, 1998; Lund, 2000; Salter, 1988; Theriot, 2006.

⁴⁸⁵ Ware et al., 2015; Hood et al., 2002.

⁴⁸⁶ Hood & Shute, 2000.

Hood et al.⁴⁸⁷ also examined English Parole Board decisions between 1992 and 1994 for 192 offenders convicted of a serious sex offence. They found that “deniers” were more often identified as high risk by the parole board than “non-deniers.” Specifically, two-thirds of offenders that denied the offence were judged to be high risk compared to half of the offenders that admitted to their offence. The authors also examined the reconviction rates across four and six year follow up periods. Only one offender of the 47 that were classified as deniers was reconvicted during the follow-up period compared to 17 of the 97 offenders that admitted ($X^2 = 6.86$).

Providing what are considered perhaps the most seminal works in this area, Hanson and colleagues⁴⁸⁸ conducted several meta-analyses investigating the risk factors for offending. Hanson and Bussière⁴⁸⁹ conducted a meta-analysis of 61 studies ($n = 23,393$), examining the risk factors for sexual, violent, and general recidivism. They found that denial of a sex offence was not related to sexual recidivism across 762 offenders in six studies. However, denial was associated with a broad treatment failure outcome that included sexual recidivism in one outlying study excluded from the above analysis.⁴⁹⁰ Hanson and Bussière did not report on the association between denial and violent offending, although denial of a sex offence was found to be a predictor of general recidivism ($r = .12$) across 408 offenders in three studies. Notably, failure to complete treatment was found to be a risk factor for sexual recidivism ($r = .17$, $n = 806$, $k = 6$) and general recidivism ($r = .20$, $n = 887$, $k = 7$) but not violent recidivism. Low motivation for treatment was found to be a risk factor for general recidivism ($r = .11$, $n = 614$, $k = 4$) but not sexual recidivism.

Several commentators questioned the results reported in the Hanson and Bussière meta-analysis.⁴⁹¹ For instance, Lund⁴⁹² critically examined all seven of the studies included in Hanson and Bussière’s meta-analysis that examined denial. Lund commented on several methodological and statistical issues with Hanson and Bussière’s meta-analysis, including lack of consistent definitions, low base rates, and small sample sizes with corresponding low statistical power. Lund reported how the definition and measurement of denial varied considerably across the seven studies, and three of the studies did not include any categorical deniers in the sample. Many of the studies used dichotomous classifications of denial that were unlikely to adequately assess the intricacies inherent to denial. Several studies also measured denial at

⁴⁸⁷ Hood et al., 2002.

⁴⁸⁸ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005.

⁴⁸⁹ Hanson & Bussière, 1998.

⁴⁹⁰ Maletzky, 1993.

⁴⁹¹ Lund, 2000; Schneider & Wright, 2001.

⁴⁹² Lund, 2000.

admission, prior to treatment, without any reassessment before release. Lund concluded that Hanson and Bussière's meta-analysis did not clarify the role of denial in offending.

In an attempt to update the previous meta-analysis, Hanson and Morton-Bourgon examined the risk factors for recidivism for sexual offenders across 95 studies involving more than 31,000 offenders. They found that denial of a sex offence was not related to sexual recidivism based on 9 studies including 1,780 offenders or violent recidivism based on 5 studies including 1,294 offenders, but denial was related to general recidivism ($d = .12$) based on seven studies including 1,918 offenders. Of note, they also found that minimizing culpability and low motivation for treatment were not related to sexual, violent, or general recidivism. Lack of victim empathy was related to general recidivism ($d = .12$), but not sexual or violent recidivism. The authors concluded that the "clinical presentation variables (e.g., denial, low victim empathy, low motivation for treatment) had little to no relationship with sexual or non-sexual recidivism."⁴⁹³ Based on a subset of samples used in this study, Hanson and Morton-Bourgon⁴⁹⁴ meta-analyzed 82 recidivism studies involving 29,450 sex offenders for the predictors of recidivism. Once again, they found that denial of a sex offence was not related to sexual reoffending. The authors arrived at a similar conclusion as their previous report: "many of the variables used in clinical assessments had little or no relationship with recidivism (e.g. denial, low victim empathy, low motivation for treatment)."⁴⁹⁵

Several commentators again questioned the results of Hanson & Morton-Bourgon's⁴⁹⁶ meta-analyses.⁴⁹⁷ For instance, Langton et al.⁴⁹⁸ pointed out that many of the studies included in the Hanson and Morton-Bourgon meta-analysis measured denial prior to entry into treatment. Thus, this measurement may not accurately reflect any change or impact on denial brought about during treatment, as some researchers have found that some offenders stop maintaining their innocence during the course of treatment.⁴⁹⁹ As well, Langton et al. highlighted that denial was conceptualized as a dichotomous variable in most of the studies included in the meta-analysis. As well, Nunes et al.,⁵⁰⁰ concluded, consistent with Hanson and Morton-Bourgon, that the small association between denial and general recidivism suggests that denial is not an important risk factor for any type of offending. Nevertheless, Hanson and Morton-Bourgon's meta-analyses provide a valuable contribution to the literature on denial and

⁴⁹³ Hanson and Morton-Bourgon, 2004, p. 17.

⁴⁹⁴ Hanson and Morton-Bourgon, 2005.

⁴⁹⁵ Hanson & Morton-Bourgon, 2005, p. 1159.

⁴⁹⁶ Hanson & Morton-Bourgon's, 2004, 2005.

⁴⁹⁷ Langton et al., 2008; Ware et al., 2015.

⁴⁹⁸ Langton et al., 2008.

⁴⁹⁹ Lord & Willmot, 2004.

⁵⁰⁰ Nunes et al., 2007

recidivism. The results of these large-scale evaluations have yet to make a considerable impact on the practices of most decision makers and treatment providers.⁵⁰¹

A number of more recent studies have attempted to clarify the association between categorical denial and offending.⁵⁰² Overall, consistent with the meta-analyses by Hanson and colleagues,⁵⁰³ these studies generally found that denial was not related to sexual recidivism. However, two studies⁵⁰⁴ found that denial may play a role in increasing risk for low-risk offenders while playing a protective function in high-risk offenders.

Nunes et al.⁵⁰⁵ investigated potential moderating effects on the association between denial and recidivism in three samples of sex offenders. They defined denial using the item “Extreme Minimization or Denial of Sexual Offense” from the Sexual Violence Risk-20,⁵⁰⁶ thus including more than only categorical denial. In the first sample of 489 sex offenders, they found that denial was not related to sexual or violent recidivism, nor was denial related to ratings of psychopathy or actuarially determined risk level. However, the authors found that denial interacted with risk level for predicting sexual recidivism with denial increasing the risk to reoffend in low-risk offenders and decreasing the risk to reoffend in high-risk offenders. Specifically, 15.5% of the low-risk deniers sexually recidivated compared to 9.1% of the low-risk admitters, while 15.7% of the high-risk deniers sexually recidivated compared to 26.6% of the high-risk admitters.

Although the authors found that denial interacted with risk level, the differences in recidivism rates between low-risk admitters and deniers (and high-risk admitters and deniers) were not statistically significant. Moreover, this pattern was not found for violent recidivism. In follow-up analyses, the authors also found that denial interacted with the type of offender based on victim relationship. For incest offenders, denial was found to increase the risk of sexual recidivism; 16.7% of deniers reoffended compared to 6.3% of the admitters. For offenders with unrelated victims, denial was found to decrease risk of sexual recidivism; 14.8% of the deniers reoffended compared to 24.2% of the admitters.

Nunes et al. also examined the generalizability of the results from their first sample in two replication samples consisting of 490 and 73 additional sex offenders. They found that denial interacted with risk level in all three samples with low risk

⁵⁰¹ Levenson, 2011; Ware et al., 2015.

⁵⁰² Harkins et al., 2010, 2015; Langton et al., 2008; Nunes et al., 2007.

⁵⁰³ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005.

⁵⁰⁴ Harkins et al., 2010; Nunes et al., 2007.

⁵⁰⁵ Nunes et al., 2007.

⁵⁰⁶ Boer, Hart, Kropp, & Webster, 1997.

offenders in denial showing a slight (and non-significant) increase in sexual recidivism compared to low-risk admitters, and high-risk offenders in denial showing a slight (and non-significant) decrease in sexual recidivism compared to high-risk admitters.

Thornton and Knight⁵⁰⁷ also explored the association between denial and recidivism in a sample of over 250 sex offenders that were referred for civil commitment assessments. The authors found that the relationship between denial and recidivism varied according to the type of offender. Specifically, they found that denial was predictive of increased recidivism for sex offenders with adult victims, whereas denial was predictive of decreased recidivism for sex offenders with child victims. However, in further analyses controlling for actuarial based static risk level and psychopathic traits, these relationships were no longer present.

Langton et al.⁵⁰⁸, using a sample of 436 sex offenders, investigated the association between sexual recidivism and ratings of denial and minimization made after participating in an institutional treatment program. They operationalize denial broadly using a dichotomous denial variable (i.e., no denial versus some denial). Based on several multivariate regression analyses, they found that denial was not predictive of sexual recidivism and this was also true after controlling for actuarial based risk level and psychopathic traits. Conversely, Langton et al. found that although minimization was not related to sexual recidivism in isolation, the interaction between minimization and actuarial based risk level was related to sexual recidivism. Subsequent analyses revealed that higher levels of minimization were associated with sexual recidivism in high-risk offenders. The authors also found that failure to complete treatment predicted sexual recidivism across several different regression models. These results should be interpreted cautiously as denial was measured broadly and included a small number of offenders that categorically denied the offence.⁵⁰⁹

Harkins et al.⁵¹⁰ examined the relationship between denial, motivation for treatment, and sexual recidivism, as well as the moderating effect of static risk level in sample of 180 sex offenders followed for 10 years. They measured denial in three ways: an overall denial index formed by combining measures of several aspects of denial, denial of risk for offending, and absolute denial. Absolute denial was found to be unrelated to sexual recidivism ($r = .03$, $OR = 1.02$). The authors found that the denial index ($r = -.19$, $OR = 0.29$) and denial of risk ($r = -.25$, $OR = 0.30$) were negatively related to sexual recidivism, meaning that the odds of committing sexual offences were

⁵⁰⁷ As cited in Ware et al., 2015.

⁵⁰⁸ Langton et al, 2008.

⁵⁰⁹ Ware et al., 2015.

⁵¹⁰ Harkins et al., 2010.

lower for those offenders who presented with higher denial on these measures. Conversely, treatment motivation was found to be a risk factor for sexual offending ($r = 0.19$, $OR = 0.34$). The authors additionally examined the effects of denial across low and high-risk offenders to investigate any potential moderating effect of risk level. They found that absolute denial interacted with risk level in that low-risk deniers were more likely to reoffend than low-risk admitters (16.7% versus 10.1%, respectively) and high risk deniers were less likely to reoffend than high risk admitters (0% versus 33%, respectively).

With regards to the overall denial index, an interaction with risk level was also seen with denial playing a protective role in high-risk offenders; 5.9% of high-risk offenders high in denial reoffended compared to 52% of high-risk offenders low in denial. Overall, the authors reported that denial was not associated with recidivism as “for two of the three measures, high levels of denial were associated with decreased recidivism.”⁵¹¹ Although an inconsistent relationship between denial and recidivism was seen for low-risk offenders, denial was consistently associated with decreased recidivism among high-risk offenders. These results should be interpreted cautiously, as Harkin et al.’s sample only included 13 offenders that presented with absolute denial, as measured in this study, and only 2 of these offenders reoffended during the study timeframe.

Endres and Breuer⁵¹² also sought to understand the association between denial and recidivism. The authors examined a sample of 1,381 sex offenders that were released from prison in Bavaria since 2004, as well as a subsample of 833 offenders that were followed in the community for between five to nine years. In the full sample, Endres and Breuer found that offenders who categorically denied their offence rarely participated in treatment programs. Compared to offenders that admitted to their offences, deniers were also rarely granted temporary absences or early release. Additionally, based on the subsample with outcome reconviction data, the authors reported that denial was not related to sexual, violent, serious, or general reoffending.

Harkins et al.⁵¹³ attempted to further clarify the relationship between denial and recidivism. Denial was defined broadly based on whether the offender accepted responsibility for the offence. They examined the relationship between denial and both sexual and violent recidivism across a sample of 6,891 sex offenders followed up for over two years, as well as examining the relationship in specific offender types and

⁵¹¹ Harkins et al., 2010, p. 89.

⁵¹² Endres & Breuer, 2014.

⁵¹³ Harkins et al., 2015.

controlling for actuarial based static risk level. They found that in the full sample, denial was associated with lower levels of sexual recidivism (Hazard ratio = 0.73) independent of static risk level with 3.5% of offenders that accepted responsibility reoffending compared to 2.7% of offenders that denied responsibility.

When examined within specific types of sex offender (separated by contact and non-contact offences as well as type of victim), denial was not related to sexual recidivism in any of the six offender categories. Additionally, the authors found that denial was not related to violent recidivism in the full sample when controlling for static risk level. That is, 2.3% of offenders that accepted responsibility reoffended compared to 2.5% of offenders that denied responsibility. The lack of relationship was also found across each of the six types of offenders.

Notably, some of the older studies included in Hanson and colleagues' meta-analyses⁵¹⁴ reported that categorical denial was associated with lower rates of recidivism compared to offenders that admit to their offence. For instance, Barbaree and Marshall⁵¹⁵ examined 170 men referred to a sex offender clinic because they were accused of child molestation. Included in their sample were 43 men that denied their guilt. Regarding reoffence rates over an average of follow up period of four years, they found that 14% of the men that denied offending committed a new offence, compared to 23% of the men that admitted to their offences and agreed to participate in treatment and 34.5% of the men that admitted to their offences but did not receive treatment.

The results of empirical studies attempting to determine the relationship between denial and recidivism have been largely inconsistent.⁵¹⁶ In the meta-analyses that have addressed denial as a potential risk factor by Hanson and his colleagues,⁵¹⁷ although they found that denial was not related to sexual or violent recidivism, denial yielded a small positive relationship with general offending. Nevertheless, Hanson and Morton-Bourgon⁵¹⁸ concluded that denial of a sexual offence was not a risk factor for future offending. Comparatively, a number of studies have found that categorical denial is associated with a reduction in recidivism.⁵¹⁹ Several studies also found that denial is associated with lower rates of recidivism among high-risk sex offenders and sex offenders with unrelated victims.⁵²⁰ Conversely, some studies have found that denial may increase risk for recidivism among low-risk offenders, determined using static

⁵¹⁴ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005.

⁵¹⁵ Barbaree & Marshall, 1988.

⁵¹⁶ Craissati, 2015; Ware et al., 2015; Yates, 2009.

⁵¹⁷ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005.

⁵¹⁸ Hanson & Morton-Bourgon, 2005.

⁵¹⁹ Barbaree & Marshall, 1988; Harkins et al., 2010, 2015.

⁵²⁰ Harkins et al., 2010; Nunes et al., 2007.

actuarial risk scales.⁵²¹ On the other hand, several studies have found that denial did not interact with risk level.⁵²²

A number of limitations have afflicted many of the studies examining the relationship between denial and risk of offending.⁵²³ Many of the studies included in Hanson and colleagues' meta-analyses⁵²⁴ included small sample sizes, and many of the newer studies have included few offenders that claim they are factually innocent. Studies in this area have also suffered from low base rates of recidivism that can impact the statistical analyses.⁵²⁵ Few studies have examined the relationship between categorical denial and recidivism among specific types of sex offenders. Nunes et al.⁵²⁶ found that denial increased risk for incest offenders, but not offenders with unrelated victims. Harkins et al.⁵²⁷ found that denial was not related to recidivism across a number of different types of sex offenders. A number of studies have found that rates of denial vary across different offender types, such as categorical denial being more common in rapists than child molesters.⁵²⁸ As such, it is imperative to determine role of categorical denial in offending across groups in which denial may manifest differently.

Due to the inconsistent evidence in support of a relationship between denial and offending, several reviewers have concluded that denial may play a different role for different offenders.⁵²⁹ Mann et al.⁵³⁰ concluded that it is most likely the case that denial plays a genuine protective function for some offenders, as denying their offence allows them to maintain self-esteem and distance themselves from their wrongdoings; whereas it plays a criminogenic function in other offenders, as denying is motivated by the desire to avoid punishment, continue offending, or lack of insight into the offence. Harkins et al. also discussed the variable role that denial may play for an offender in terms of their likelihood to reoffend. Based on a review of the literature, they concluded "that denial may have a different function for different offender types; in some cases, it seems to act in a protective manner (i.e., reducing risk in spite of other relevant risk factors) and in others as a risk factor."⁵³¹

⁵²¹ Nunes et al., 2007; Harkins et al., 2010.

⁵²² Harkins et al., 2015; Langton et al., 2008.

⁵²³ Lund, 2000; Ware et al., 2015.

⁵²⁴ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005.

⁵²⁵ Ware et al., 2015.

⁵²⁶ Nunes et al., 2007.

⁵²⁷ Harkins et al., 2015.

⁵²⁸ Kennedy & Grubin, 1992; Neugent & Kroner, 1996.

⁵²⁹ Harkins et al., 2015; Mann et al., 2010; Ware et al., 2015.

⁵³⁰ Mann et al., 2010.

⁵³¹ Harkins et al., 2015, p. 158.

A number of commentators have pointed to the importance of considering when in the criminal justice process an offender categorically denies committing the offence.⁵³² Several authors have claimed that categorical denial is more likely to occur in first time offenders.⁵³³ Basically, it is much more difficult to maintain innocence for one offence when faced with multiple previous convictions compared to maintain innocence for a single offence. Importantly, if categorical denial is associated with first time offenders who generally present as lower risk to reoffend, then categorical denial will more often be seen in low-risk offenders. Consistent with this theory, researchers have found that categorical denial was negatively related to scores on an actuarial risk assessment instrument.⁵³⁴ Furthermore, research has found that sex offenders more often categorically deny committing an offence when they are first accused, and many change their position and admit to some or all aspects of the offence at a later point in time.⁵³⁵ Some have interpreted this to support the notion that denial is largely situational, based on contextual factors leading an offender to choose to claim they are innocent.⁵³⁶

Although the empirical evidence is controversial, some professionals still consider denial and minimization to be an important risk factor, as evidenced by its presence in a number of risk assessment tools for sexual violence.⁵³⁷ However, Ware et al., based on a review of the role of denial in the criminal justice system with sex offenders, concluded “deniers appear, on the basis of most of the evidence, to be at low risk to reoffend.”⁵³⁸ Other clinicians and researchers have arrived at similar conclusions based on reviews of the available literature. Harkins et al. concluded that denial should not be the focus in offender management:

*In conclusion, the presumption that denial represents increased risk, which is common in much of the decision-making surrounding sex offenders, should be reconsidered. Instead, important decisions regarding sentencing, treatment, and release decisions should be based on empirically supported factors.*⁵³⁹

⁵³² Ware et al., 2015.

⁵³³ Dean, Mann, Milner, & Maruna, 2008; Langton & Marshall, 2000; Maruna & Mann, 2006; Ware & Mann, 2012.

⁵³⁴ Kingston, Yates, & Firestone, 2010.

⁵³⁵ Ware et al., 2015.

⁵³⁶ Rogers & Dickey, 1991; Ware et al., 2015.

⁵³⁷ Boer et al., 1997; Langton et al., 2008.

⁵³⁸ Ware et al., 2015., p. 219.

⁵³⁹ Harkins et al., 2015, p. 157.

VIII. METHODOLOGY TO UTILIZE IN THE CONTEXT OF DENIAL: SPJ

Based on a review of the broad domains of authority relevant to risk assessment, including the relevant law, policy, ethics, practice standards, and empirical science, a number of key themes can be identified that are relevant to conducting a comprehensive risk assessment with an offender that maintains innocence for one or more of their offences. Several fundamental qualities of a risk assessment are discussed across the various domains of literature. These themes are competence, integrity and accuracy, objectivity and fairness, reasonableness, and structure. In conducting a comprehensive risk assessment, professionals must ensure that they (a) have the requisite competence, (b) strive for integrity and accuracy, (c) while remaining objective and fair, and (d) offer a reasoned opinion, (e) based on a structured approach.

As discussed below, the actuarial approach and risk assessment instruments based upon this approach are not able to effectively address the fundamental qualities of a risk assessment involving a claim of innocence. Although CSC frequently uses actuarial tools, the actuarial approach fails to address the key themes necessary in a risk assessment with an offender that claims innocence. An approach or instrument that does not allow an evaluator to address each of these themes within their comprehensive risk assessment may be considered unethical and professionally irresponsible. Conducting a comprehensive risk assessment using the SPJ approach offers the evaluator a structure and process that facilitates addressing each of these key themes.

A. KEY THEMES OF A COMPREHENSIVE RISK ASSESSMENT

Prior to discussing each of these themes, it must be noted that professionals cannot conduct an assessment to determine or offer an opinion regarding the guilt or innocence of an offender. Numerous commentators have unequivocally stated that there are no grounds for using interview or instrument data to make claims regarding the guilt or innocence of an accused offender.⁵⁴⁰ Many of these reviews have been based on critical evaluations of the psychometric properties and empirical support regarding the utility of assorted psychological instruments that have been used in court proceedings.⁵⁴¹ For instance, Marshall et al. noted that a professional “cannot offer assistance in the determination of the guilt or innocence of an alleged sex offender.”⁵⁴²

⁵⁴⁰ Barbaree & Peacock, 1995; Marshall, 1996; Marshall et al., 2013; McAnulty, 1993; Simon & Schouten, 1992.

⁵⁴¹ Barbaree & Peacock, 1995; Marshall, 1996; McAnulty, 1993; Simon & Schouten, 1992.

⁵⁴² Marshall et al, 2013, p. 845.

Marshall et al. went on to comment that “responsible clinicians will, therefore, refuse to conduct appraisals aimed at determining culpability.”⁵⁴³

i. COMPETENCE

Incompetent professional conduct is considered to be unethical in and of itself.⁵⁴⁴ Numerous ethical principles for psychologists and psychiatrists emphasize the importance of professional competence.⁵⁴⁵ Professionals are required to maintain competence in all areas of practice.⁵⁴⁶ Competence is based on various sources of knowledge including education, training, professional experience, and supervised experience.⁵⁴⁷ In particular, professionals are mandated to be knowledgeable of the relevant laws, policies, and regulations that govern their professional conduct.⁵⁴⁸

Competence is important in conducting forensic mental health assessments and specifically risk assessments.⁵⁴⁹ At the broadest level, professionals need to be knowledgeable of the “relevant legal, ethical, scientific, and practice literatures.”⁵⁵⁰ As a complex endeavour, risk assessment requires competence in a number of diverse areas. At a minimum, professionals must be competent in both how to gather information and what information to gather when conducting a risk assessment.⁵⁵¹ That is, professionals must be familiar with the empirical risk factors for the given type of risk assessment (e.g., violent, sexual, or general offending), and familiar with individual assessment procedures in order to access information regarding these factors.

When faced with an offender that claims innocence during a risk assessment, competence is even more critical. Professionals that are adequately competent to engage in conducting comprehensive risk assessment may lack competence in the particular aspects of denial that are likely to affect the risk assessment process. Professionals must be knowledgeable about the various types of denial, the incidence and purpose of denial, and the debated relationship between denial and recidivism. Professionals must be aware of the intricate manner in which denial can be conceptualized and the impact of this conceptualization on the relationship between denial and other key factors, such as treatment motivation, antisocial attitudes, or lack of

⁵⁴³ *Ibid*, p. 846.

⁵⁴⁴ CPA, 2017.

⁵⁴⁵ AAPL, 2005; APA, 2010, 2013; CMA, 2004; CPA, 2017.

⁵⁴⁶ APA, 2010, 2013; CPA, 2017.

⁵⁴⁷ APA, 2010.

⁵⁴⁸ APA, 2010, 2013; CPA, 2017.

⁵⁴⁹ Heilbrun, 2001, 2009; Heilbrun et al., 2009.

⁵⁵⁰ Heilbrun & LaDuke, 2015, p. 10.

⁵⁵¹ Monahan, 1993.

insight. A lack of competence regarding one or more of these key aspects of denial may result in a risk assessment that is inappropriate, biased, or unethical.

ii. INTEGRITY AND ACCURACY

Law, policy, ethics, and practice standards all speak to the need for risk assessments to be done with integrity and accuracy. Integrity involves a commitment to truthfulness with a focus on accuracy, honesty and openness.⁵⁵² CSC policies highlight professional integrity as a core feature of all staff.⁵⁵³ Specifically, CSC policies indicate that decision-making must “be made in a forthright and fair manner.”⁵⁵⁴ As well, numerous ethical standards refer to integrity and accuracy.⁵⁵⁵ A central aspect of striving for accuracy is the reliance upon all available information.

The relevant law is clear that the PBC must consider all relevant information in forming a decision regarding the risk posed by an offender applying for conditional release. The importance of basing opinions on all available information is highlighted throughout the *CCRA*. The *CCRA* directs the PBC to consider “all relevant available information” when determining whether an offender presents an undue risk to society.⁵⁵⁶ Additionally, PBC decisions can be appealed if they were based on “erroneous or incomplete information”⁵⁵⁷ or if they were based on “an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.”⁵⁵⁸ Numerous sections of the *CCRA* expand on the need to consider all relevant information in the context of a risk assessment. This requirement has been further highlighted in case law.⁵⁵⁹

The PBC Policy Manual also lists basing a decision on “erroneous or incomplete information” as grounds for appeal, including “where relevant information was not considered at the time of the review, or where the Board made errors of fact about the relevant information.”⁵⁶⁰ Furthermore, PBC policy states directly that accessing all information is vital, as “quality conditional release decision-making requires all relevant available information that is reliable and persuasive.”⁵⁶¹ Numerous ethical codes further

⁵⁵² CPA, 2017.

⁵⁵³ CSC CD 001, 2013.

⁵⁵⁴ CSC CD 700, 2017, section 20.

⁵⁵⁵ APA, 2010, 2013; CMA, 2004; CPA, 2017.

⁵⁵⁶ *CCRA*, 1992, p. 56.

⁵⁵⁷ *CCRA*, 1992, section 147.

⁵⁵⁸ *Federal Courts Act*, 1985, section 18.1(4)(d).

⁵⁵⁹ *Aney v. Canada (Attorney General)*, [2005] F.C.J. No. 228; *Mooring v. Canada (National Parole Board)* [1996] 1 S.C.R. 75.

⁵⁶⁰ PBC Policy Manual, 2017, s. 12.1.3.

⁵⁶¹ PBC Policy Manual, 2017, s. 3.

clarify the need to access all available information in conducting a forensic assessment.⁵⁶² Ethical codes also clarify that professionals must not distort or withhold relevant information or opinions. For instance, “practitioners do not, by either commission or omission, participate in misrepresentation of their evidence, nor do they participate in partisan attempts to avoid, deny, or subvert the presentation of evidence contrary to their own position or opinion.”⁵⁶³ Accordingly, it is universally accepted that competent risk assessments necessitate the use of a multisource, multimethod approach.⁵⁶⁴

Risk assessments, as a subclass of forensic assessments, are often based on the assumption that evaluatees are not reliable sources of information.⁵⁶⁵ Due to the complex nature of conducting a risk assessment, evaluators need to employ a low threshold for suspecting anything other than honest or candid responding.⁵⁶⁶ However, due to the importance and potential implications of assigning a label used to describe response styles (e.g., denier, malingerer), “the low threshold for suspecting dissimulation should be accompanied by a conservative stance with respect to reaching conclusions on that issue.”⁵⁶⁷ As a result, professionals must conduct an extensive review of information in order to have an accurate understanding of the facts of the case. Thus, within the risk assessment context, a central facet of maintaining integrity and striving for accuracy is the need to consider an abundance of information in arriving at an opinion.

When an offender maintains that they are innocent of an offence during the process of conducting a risk assessment, professionals must ensure they strive for integrity and accuracy. This necessitates the gathering of information from multiple sources across many life domains using a variety of methods. Accordingly, professionals can consider all the relevant information to the case at hand. Evaluators are not required, however, to determine the facts of the case or resolve all disputed facts. Instead, professionals must determine which accounts are plausible and base their opinions on those accounts. While gathering information during a risk assessment with an offender that maintains innocence, professionals must pay particular attention to the potential effects of confirmation bias. Professionals may fail to consider relevant information if they gather information in a manner presuming certain information about

⁵⁶² AAPL, 2005.

⁵⁶³ APA, 2013, p. 16.

⁵⁶⁴ Bush et al., 2006; Denney & Wynkoop, 2000; Hart, 2001; Heilbrun, 2001; Heilbrun et al., 2003; McLearn, Pietz, & Denney, 2004.

⁵⁶⁵ Heilbrun, 2001; Heilbrun et al., 2003; Melton et al., 2007.

⁵⁶⁶ Melton et al., 2007.

⁵⁶⁷ *Ibid*, p. 57.

the offender. In considering all the information, professionals must ensure to actually reflect and deliberate on the possibility that the offender is actually telling the truth.

iii. OBJECTIVITY AND FAIRNESS

Objectivity is a fundamental aspect of all forensic mental health evaluations.⁵⁶⁸ Objectivity is stressed within across all domains of authority: law, policy, ethics, science and practice. Several ethical codes stress the importance of remaining objective, impartial, fair, and unbiased.⁵⁶⁹ For instance, professionals must avoid “undue bias in the selection and presentation of information.”⁵⁷⁰ As well, “practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.”⁵⁷¹ In addition, professionals “strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.”⁵⁷² Being cognizant of and actively avoiding bias is a central aspect of impartiality and objectivity. The importance of considering one’s own biases and values is expressly stated in various ethical codes.⁵⁷³

Additionally, fairness is a fundamental value within CSC. Fairness is described as involving “exercising impartiality, objectivity, equality, and equity.”⁵⁷⁴ Additional CSC policies clarify that decisions should “be impartial and timely based on all available information including dissenting opinions.”⁵⁷⁵ The need to acknowledge, clarify, and explain discordant information and dissenting opinions is a central aspect of impartiality. The PBC Policy Manual⁵⁷⁶ indicates in abundant policies that discordant information must be inculcated into and addressed within decisions. For instance, the PBC Policy Manual instructs professionals to ensure that they adequately address discordant information within any given assessment. CSC policies further clarify that discrepancies between different sources of information, assessments, and opinions must be clarified. CSC policies also indicate that all dissenting facts and opinions be clearly documented and clarified.⁵⁷⁷ Ethical codes also require professionals to acknowledge disconfirming and contradictory evidence, as well as alternative explanations and hypotheses.⁵⁷⁸

⁵⁶⁸ Heilbrun et al., 2003; Melton et al., 2007.

⁵⁶⁹ APA, 2010, 2013, CPA, 2017.

⁵⁷⁰ CPA, 2017, p. 27.

⁵⁷¹ APA, 2013, p. 9.

⁵⁷² APA, 2013, p. 9.

⁵⁷³ APA, 2013; CPA, 2017.

⁵⁷⁴ CSC CD 001, 2013, s. 2.

⁵⁷⁵ CSC CD 700, 2017, s. 20.

⁵⁷⁶ PBC Policy Manual, 2017.

⁵⁷⁷ CSC CD 700, 2017.

⁵⁷⁸ CPA, 2017.

In the context of a risk assessment involving an offender that maintains innocence, objectivity and impartiality are essential. Impartiality requires the consideration of all discordant information, as well as the willingness to consider multiple explanations and hypotheses. As Scott stated many years ago, professionals must consider the factors of the case “from the point of view of as many theoretical standpoints as possible.”⁵⁷⁹ A comprehensive assessment, in line with the legal and ethical standards highlighted above requires differentially evaluating alternative hypotheses and interpretations. Professionals must determine “whether symptoms of psychopathology are genuine, factual information is accurate, and legally relevant capacities are presented in a way that describes their potential well.”⁵⁸⁰ As a result, evaluators must consider the veracity of an offender’s claim of innocence when conducting a comprehensive risk assessment.

Although some commentators are hesitant to acknowledge the fact that some offenders may in reality be wrongfully convicted, the available domains of authority directing ethical and defensible risk assessments suggests that evaluators must give some degree of consideration to this notion. Harkins et al. commented on this interpretation of an offender that is in categorical denial. “There is another possible interpretation that may not (and possibly should not) be considered by practitioners as they understandably do not want to collude with their clients; some offenders who deny their offense may not have committed it.”⁵⁸¹ In addition, Craissati made note of the possibility of factual innocence among offenders that categorically deny the offence; “it is important to hold in mind the possibility that total denial does actually reflect the offender’s innocence. This is an uncomfortable idea, and one for which there is limited objective evidence.”⁵⁸² Nevertheless, the fact that it is a possibility that an offender may be innocent necessitates that an evaluator gives some thought to the plausibility of this account while forming their opinions.

Several biases are likely to affect an evaluator’s ability to remain objective and impartial when confronted with an offender that maintains innocence.⁵⁸³ When giving consideration to the underlying rationale or purpose of denial in the given evaluatee, professionals must ensure to be cognizant of the fundamental attribution error. Falling prey to this error is likely to lead to characterological explanations for denial, as opposed to giving serious consideration of the situational and contextual factors that may have led an offender to be wrongfully convicted. As well, anchoring oneself in the position that

⁵⁷⁹ Scott, 1977, p. 139.

⁵⁸⁰ Heilbrun et al., 2003, p. 77.

⁵⁸¹ Harkins et al., 2015, p. 163.

⁵⁸² Craissati, 2015, p. 400.

⁵⁸³ Bush et al., 2006.

the offender is guilty of the offence prior to commencing the risk assessment may result in a presumption that is difficult, if not impossible, to shift. Although it is reasonable to assume that an offender who has been convicted of an offence is in fact guilty of said offence, evaluators should remain open to the possibility that some offenders who maintain innocence are telling the truth and have been wrongfully convicted. Confirmation bias will also likely lead professionals that fail to consider the possibility that the offender is truthful in their innocence claim to gather and interpret information in a manner consistent with their initial assumption. Moreover, evaluators may disregard or rationalize inconsistent information if they fail to remain impartial.

Evaluators must consider all relevant information from a variety of perspectives.⁵⁸⁴ When confronted with disputed facts during a risk assessment, evaluators are instructed by ethical and practice standards to consider the discrepant information in an impartial and objective manner from multiple theoretical standpoints.⁵⁸⁵ However, evaluators base their decisions on information beyond what has been proven in court (i.e., charges, other reports, third-party information) and evaluators are not required to resolve all disputed facts. Evaluators are required to consider all plausible explanations and interpretations of the information upon which they base their opinions.⁵⁸⁶

Accordingly, when faced with an offender claiming innocence during a risk assessment, the evaluator should consider the possibility that the offender is in fact innocent. The amount of consideration given to this possibility will be dependent upon the plausibility of the account in context of all the available information. On the other hand, evaluators should also consider various explanations for an offender that is in categorical denial under the assumption that they are in fact denying their guilt. As discussed above, denial may stem from a number of underlying reasons, including a natural cognitive process,⁵⁸⁷ a desire to avoid negative consequences,⁵⁸⁸ an attempt to protect one's self-image⁵⁸⁹ or underlying antisocial attitudes.⁵⁹⁰ Finally, professionals should make note of the impact of these various explanations on other facets of the case. For instance, denial has a close association to treatment motivation and completion.⁵⁹¹ Denial is also associated with lack of insight.⁵⁹² Evaluators should

⁵⁸⁴ Heilbrun et al., 2003, 2015; Scott, 1977; Webster et al., 2014.

⁵⁸⁵ APA, 2013; Heilbrun et al., 2003, 2015; Scott, 1977; Webster et al., 2014.

⁵⁸⁶ APA, 2013; Melton et al., 2007.

⁵⁸⁷ Maruna & Mann, 2006.

⁵⁸⁸ Lord & Willmot, 2004.

⁵⁸⁹ Bladgen et al., 2014.

⁵⁹⁰ Langton et al., 2008.

⁵⁹¹ Jung & Nunes, 2012; Levenson & Macgowan, 2004.

⁵⁹² Rogers & Bender, 2003.

consider the impact of denial on various other risk factors and important details of the case from multiple perspectives.

iv. REASONABLENESS

The relevant domains of authority clearly articulate that a risk assessment must be reasoned and defensible. The law is clear that PBC decisions regarding the risk posed by an offender must be reasonable.⁵⁹³ A reasonable decision is supported by reasons that can withstand a fairly pointed examination.⁵⁹⁴ The *CCRA* makes numerous references to the fact that offenders must be provided with information about decisions, including reasons for decisions. That is, according to the *CCRA*, all decisions are to be recorded, including the reasons for the decisions, and these reasons are to be communicated with offenders. For instance, the *CCRA* recognizes that offenders must be provided with decisions, including “reasons for decisions” so as to “ensure a fair and understandable conditional release process.”⁵⁹⁵

Several policies also highlight the importance placed on objectivity and the need to justify professional opinions. PBC policies clearly state that professionals must provide a rationale for their opinions and decisions. According to the PBC Policy Manual, parole decisions can be appealed if the board fails to provide the offender with the relevant reasons for the decision. CSC policies also reference the fact that professionals are accountable for their decisions and actions. Professionals must be willing to “explain, answer to, and justify the appropriateness of actions and decisions.”⁵⁹⁶ Further policies highlight that professional must be able “to justify, support, and explain decisions and recommendations.”⁵⁹⁷ As well, offenders should receive “complete information, particular, concerning decisions and the supporting reasons, before or after the decision.”⁵⁹⁸ CSC policies also indicate that specific reasons must be given for determinations regarding specific risk factors, including establishing whether a risk factor is relevant to a given evaluatee’s risk.⁵⁹⁹ One manner in which to determine whether a given decision or opinion is reasonable is if it contravenes relevant policy directing professional action.⁶⁰⁰

⁵⁹³ *Aney*, *supra* note 45; *Cartier*, *supra*; *CCRA*, 1992; *Latimer*, *supra* note 45.

⁵⁹⁴ *Canada (Director of Investigation and research) v. Southam Inc.*, [1997] 1 S.C.R. 748

⁵⁹⁵ *CCRA*, 1992, p. 57.

⁵⁹⁶ CSC CD 001, 2013, s. 2.

⁵⁹⁷ CSC CD 700, 2017, s. 5c.

⁵⁹⁸ CSC CD 700, 2017, s. 20.

⁵⁹⁹ CSC CD 705-6, 2017.

⁶⁰⁰ *Baker*, *supra* note 50; *Sychuk*, *supra* note 49. .

Ethical codes indicate that a clear differentiation must be made between facts and opinions, theories, or hypotheses. That is, evaluators are instructed to “clearly differentiate between facts, opinions, theories, hypotheses, and ideas.”⁶⁰¹ The AAPL Ethics Guidelines further clarify that evaluators should distinguish “between verified and unverified information as well as among clinical ‘facts,’ ‘inferences,’ and ‘impressions.’”⁶⁰² Finally, professionals should “explain the relationship between their expert opinions and the legal issues and facts of the case at hand.”⁶⁰³ Finally, practice standards clearly indicate that professionals should clarify the reasoning and rationale behind their opinions.⁶⁰⁴ As well, evaluators should limit and qualify their opinions when based on incomplete or inconsistent information.

Reasonableness and defensibility are key aspects of any risk assessment.⁶⁰⁵ These factors are especially important when conducting a risk assessment with an offender that claims innocence for an offence on their record. In addition to considering all the relevant information from a variety of perspectives, evaluators should be able to support their opinions and recommendations with sufficient reasoning and explanation. In this context, evaluators should provide a rationale for their interpretation of the innocence claim. That is, the evaluator should be able to articulate a rationale for their opinions under the consideration that the offender is being honest in their innocence claim and that the offender is in denial. Under the assumption that the offender is guilty and in denial, evaluators should be able to justify their interpretation of this denial and the impact of denial on other risk factors and facets of the case. For instance, the evaluator may use the offender’s claim of innocence to indicate a lack of insight into their offending behavior, a manifestation of underlying attitudes supportive of offending, or as a normative reaction to unpleasant circumstances that has little bearing on future risk.

Heilbrun and colleagues assert that the manner to differentiate between “verified and unverified information is to describe the extent to which data that are consistent across interview, medical tests, and TPI [third-part information] are reasonably consistent in pointing toward the same conclusion.”⁶⁰⁶ However, evaluators are not required to determine which accounts are in fact accurate descriptions. Instead, evaluators should simply make note of inconsistent information and determine how this disputed information may change their opinions regarding the offender’s risk. When

⁶⁰¹ CPA, 2017, p. 27.

⁶⁰² AAPL, 2005, p. 3.

⁶⁰³ APA, 2013, p. 16.

⁶⁰⁴ Heilbrun et al., 2003; Melton et al., 2007.

⁶⁰⁵ Heilbrun et al., 2003; Melton et al., 2007; Webster et al., 2014.

⁶⁰⁶ Heilbrun et al. 2003, p. 77.

information is not consistent or facts are disputed, the various ethical guidelines suggest that cautionary language be used in order to address the inconsistent findings.⁶⁰⁷ When providing the rationale and reasoning underlying professional opinions and recommendations, evaluators should clearly identify any areas of disputed information, as well as the impact of this disputed information on their opinions and recommendations. Cautionary language and qualifying statements should be employed when an opinion is based on incomplete or inconsistent information.

v. STRUCTURE

It is near universally accepted within the field that structured approaches to risk assessment are far superior to unstructured clinical judgment.⁶⁰⁸ Practice guidelines clearly indicate that structured approaches are more reliable and defensible than unstructured approaches.⁶⁰⁹ The available empirical evidence has also undisputedly shown that structured approaches have greater levels of reliability and predictive validity compared to unstructured approaches.⁶¹⁰ Various relevant policies highlight the need to employ a structured approach. Both PBC and CSC policy emphasize that risk assessments must utilize a scientifically validated, or empirically supported, methodology.⁶¹¹ CSC policies indicate that decisions be based in structured professional judgment and actuarial tools.⁶¹² PBC policies further clarify that a structured approach must be employed in conducting a risk assessment as part of a conditional release decision. Ethical guidelines further stress the importance of using a structured approach to risk assessment according to the tools intended purpose and population.⁶¹³ For instance evaluators are instructed to “use assessment instruments whose validity and reliability have been established for use with members of the population tested.”⁶¹⁴ Furthermore, evaluators should “use assessment procedures in the manner and for the purposes that are appropriate in light of the research on or evidence of their usefulness and proper application.”⁶¹⁵

⁶⁰⁷ APA, 2010, 2013, CPA, 2017; Heilbrun et al., 2003.

⁶⁰⁸ Blanchard et al., 2017; Bonta et al., 1998; Guy, 2008; Hanson & Morton-Bourgon, 2004, 2009; Otto & Douglas, 2010.

⁶⁰⁹ Guy et al., 2015; Hart, 2001; Webster et al., 2014.

⁶¹⁰ Bonta et al., 1998; Hanson & Morton-Bourgon, 2004, 2009.

⁶¹¹ CSC CD 705-5, 2017; PBC, 2017.

⁶¹² CSC CD 700, 2017.

⁶¹³ APA, 2010, 2013.

⁶¹⁴ APA, 2010, p. 12.

⁶¹⁵ APA, 2013, p. 15.

B. COMPARING ACTUARIAL VERSUS SPJ APPROACHES

The actuarial approach and structured professional judgment, discussed in section IV, “Methods of Assessing Violence Risk,” are the main approaches to risk assessment available. However, the actuarial approach and risk assessment instruments based upon this approach are not able to effectively address the fundamental qualities of a risk assessment involving a claim of innocence. Although an evaluator can be sufficiently competent regarding the key aspects of denial while employing an actuarial instrument, actuarial instruments may not allow the evaluator to consider all relevant information.

Actuarial instruments only permit the evaluator to consider the set of predefined risk factors that were found to be most predictive of the relevant outcome in the derivation sample.⁶¹⁶ That is, when relying on an actuarial risk assessment instrument, the evaluator’s opinion is limited to consideration of the variables that were selected as possible risk factors in the construction sample and yielded a strong enough association with violence in the construction sample to end up on the risk assessment instrument.⁶¹⁷ Other facets of the case that were not included on the tool are not given consideration in forming an opinion regarding the offender’s risk. As a result, certain decisive or significant factors may not be considered in the assessment.⁶¹⁸ For example, it may not be possible to consider the fact that the offender claims innocence during the assessment, nor is it possible to consider the veracity of this claim and the implications in either case. Due to the empirical item selection and mechanical process involved in the actuarial approach, it is problematic to maintain integrity and strive for accuracy during a risk assessment employing an actuarial instrument.

Actuarial instruments also fail to promote the consideration of information from multiple perspectives as indicated by the theme of objectivity and fairness. Actuarial risk assessment instruments typically involve rating the presence of a set of risk factors and subsequently computing a final risk estimate according to some algorithm.⁶¹⁹ These tools do not allow the evaluator to consider multiple perspectives or interpretations of information. For instance, two of the most prominent actuarial risk assessment instruments, the VRAG and SORAG,⁶²⁰ provide very strict guidelines for scoring each item that allow little flexibility in the interpretation or consideration of alternative explanations. In discussing the scoring of a particular item on the VRAG related to

⁶¹⁶ Douglas & Reeves, 2010; Guy et al., 2015.

⁶¹⁷ Douglas & Reeves, 2010.

⁶¹⁸ Buchanan, 1999; Melton et al., 2007.

⁶¹⁹ Grove & Meehl, 1996.

⁶²⁰ Harris et al., 2015; Quinsey et al., 2006.

elementary school maladjustment, the authors indicate that if no official documentation is available other than the offender's self-report then the evaluator should trust negative statements made by the offender but not statements that paint the offender in a good light.⁶²¹

That is, the authors report that "if the offender self-reports behavior problems at school, count them. However, if the offender reports no problems, and that is the only information available, omit the item and score by prorating."⁶²² As well, the VRAG and SORAG specifically detail to count charges and convictions for criminal offences when scoring specific items, even if the offender self-reports additional offences that are not included on their official records.⁶²³ As can be seen, these actuarial tools offer little in the manner of facilitating the examination of information from multiple theoretical standpoints.

In addition, the authors of the COVR, another actuarial risk assessment instrument, specifically address what to do when an evaluatee's self-report is contradicted by or inconsistent with other sources of information.⁶²⁴ The authors describe four courses of action that are hypothetically possible in a risk assessment involved disputed facts. First, the evaluator could take the offender's self-report as truthful and ignore inconsistent information, even if the evaluator had question to believe the self-report of the offender. Second, the evaluator could use their professional judgment to attempt to determine the factually correct information. Third, the evaluator could confront the offender with the discrepant or inconsistent information in attempts to resolve the disputed facts of the case. Finally, the evaluator could, upon consideration of the offender to be untruthful and unreliable, choose to base their risk assessment solely on file information and not employ the COVR, which requires offender self-report.

The authors assert that the first option may result in ethically and professionally inappropriate action, as the evaluator would be basing their assessment on information that is likely to be invalid. The second option also leaves the evaluator open to disregarding important information and raises the question of whether the evaluator can accurately detect deception and arrive at the factual truth. The authors of the COVR recommend the third option be used in administering the tool, as this method was used in the development of the tool. If the disputed information is satisfactorily resolved, then the information can be used on the COVR. However, if the disputed information cannot be resolved, the authors recommend omitting this item from the COVR. Once again, this

⁶²¹ Harris et al., 2015.

⁶²² Quinsey et al., 2006, p. 303.

⁶²³ Harris et al., 2015.

⁶²⁴ Monahan, 2010; Monahan et al., 2006.

actuarial tool does not facilitate the consideration of information from multiple perspectives and orientations. The nature of actuarial risk assessment instruments does not permit the evaluator to consider all the relevant information from a variety of viewpoints.

Although actuarial instrument seem to allow for a reasoned opinion to be provided, there are serious limits to the reasonableness and defensibility of this approach in the context of an offender maintaining innocence. The actuarial approach is based on aggregate statistical relationships between risk factors and relevant outcomes in a construction sample.⁶²⁵ These relationships are used to identify individuals that match groups of offenders on certain risk factors resulting in a certain probability of violence or offending based on the probability seen in the development sample of similar offenders. As a result, actuarial instruments are primarily limited to assessments that involve strict prediction.⁶²⁶ However, both PBC and CSC policies define a risk assessment as making “reference to appropriate strategies for the management of risk.”⁶²⁷

PBC policies also indicate that risk assessments should “include an assessment of the offender’s likelihood of re-offending taking into consideration the nature and gravity of the offence that could be anticipated should the offender re-offend.”⁶²⁸ Accordingly, a comprehensive risk assessment requires the description of the nature, severity, imminence, frequency, and likelihood of violent, sexual, or general offending, as well as a description of possible risk management strategies. The reasonableness of opinions about an offender’s risk based on actuarial instruments are limited to the items included on the actuarial instrument, the specific definition and scoring instructions for those items, and the algorithm for arriving at a final risk estimate.

On the other hand, the SPJ approach facilitates the evaluator in effectively addressing each of the fundamental qualities of a risk assessment. Evaluators should have a fundamental level of competence prior to conducting a risk assessment under the SPJ approach. SPJ instruments generally list at least two user qualifications for necessary competence in order to use the tool.⁶²⁹ First, evaluators must have expertise in individual assessment. This should involve some formal education (e.g., university courses, specialized education, supervised work experience) and the requisite professional credentials for the given setting. As well, the evaluator must have expertise

⁶²⁵ Grove & Meehl, 1996.

⁶²⁶ Blanchard et al., 2017; Cooke & Michie, 2013; Heilbrun, 1997.

⁶²⁷ CSC CD 705-5, 2017; PBC 2017, section 2.2.4.

⁶²⁸ PBC, 2017, section 2.1.4.

⁶²⁹ Boer et al., 1997; Kropp et al., 1994, 1995, 1999, 2005, 2008, 2010; Webster et al., 1997, 2009.

in the relevant type of violence. Evaluators should be familiar with the scientific and professional literature regarding the nature, causes, and management of the relevant type of violence. Consequently, an evaluator that employs an SPJ instrument in conducting their comprehensive risk assessment should have sufficient competency in these critical areas. General competence in the broad literature regarding the nature, causes, and management of violent behaviour should provide evaluators with sufficiently competence in the key aspects of denial and the relationship between denial and specific types of violence or offending. The focus on competence in the SPJ approach also facilitates gaining competence in additional areas when faced with diverse cases.

Using an SPJ instrument also facilitates addressing the theme of integrity and accuracy, including the consideration of all relevant information. In the first step of a comprehensive risk assessment using the SPJ approach, evaluators must gather and document the relevant data.⁶³⁰ SPJ instruments provide direction to evaluators with regards to the nature and sources of information that should be gathered in order to sufficiently justify professional opinions with a reasonable degree of professional certainty. The information base will vary from case to case, but the primary sources of information in each assessment should comprise an interview with the evaluatee and a review of all available file information (e.g. criminal justice records, health care records, education and employment records, and prior assessment reports), in addition to interviews with collateral informants.

As well, SPJ risk assessment instruments facilitate the consideration of a diverse array of information regarding the evaluatee, as the tools are developed using logical or rationale item selection.⁶³¹ This method involves a systematic review of the scientific, professional, and theoretical literature in order to identify risk factors for the particular type of violence that are applicable across diverse populations, settings, and contexts. Consideration of these risk factors ensures that the evaluator considers a broad collection of empirically supported risk factors in every case. Furthermore, SPJ tools allow evaluators to consider case specific risk factors that are not specifically included on the instrument.⁶³² As a result, evaluators can consider any additional information that they consider pertinent to this given individual's risk. The combination of a comprehensive set of predefined risk factors and the ability to consider case specific factors facilitates the evaluator in considering all the relevant information to the case at hand.

⁶³⁰ Blanchard et al., 2017; Douglas, Hart, Groscup, & Litwack, 2013.

⁶³¹ Douglas, 2008; Douglas & Kropp, 2002; Guy et al., 2015.

⁶³² Douglas, Hart, Groscup, & Litwack, 2013; Guy et al., 2015.

The process of conducting a comprehensive risk assessment using a SPJ tool also facilitates the consideration of information from multiple perspectives. Several processes involved in conducting a comprehensive risk assessment under the SPJ approach assist evaluators in considering information from a variety of theoretical positions leading to a more objective and fair assessment. The key feature of the SPJ approach is the establishment of evidence-based guidelines that structure the risk assessment process, yet at the same time evaluators are required to exercise their professional discretion at key stages.⁶³³

In addition to consideration of a vast assortment of relevant case information and rating the presence of predefined and case specific risk factors, evaluators should rate the idiographic relevance of each risk factor for the case at hand. This step allows the evaluator to consider whether each nomothetically derived, aggregate based risk factor is relevant for the given individual being assessed. This process necessitates consideration of the idiographic manner in which each risk factor is manifesting and operating within the given evaluatee.

SPJ instruments facilitate the evaluator in thinking about the specific role and importance of each risk factor for the given individual being assessed. As well, in the next step, evaluators integrate case information employing case formulation. Formulation involves the integration of diverse information into an inclusive, concise account of the relevant factors affecting an individual's likelihood of committing violence in order to guide decision-making.⁶³⁴ Requiring evaluators to consider the individual relevance of each risk factor as well as integrate information into a comprehensive formulation assists the evaluator in systematically considering a variety of interpretations and perspectives. Specifically, these stages in an SPJ assessment allow the evaluator to consider whether claims of innocence are factual or fabrication. The SPJ approach also facilitates consideration of the various explanations and interpretations of denial and the impact of any claims of innocence on other interconnected risk factors, such as treatment noncompliance or attitudes supportive of offending.

Opinions and recommendations reached in a risk assessment under the SPJ approach are reasonable and defensible. The seven-step process involved in an SPJ assessment⁶³⁵ ensures that professional opinions and recommendations are adequately supported with reasons and these reasons are documented. The consideration of a diverse set of predefined empirically supported risk factors and case specific factors combined with determinations of the idiographic manifestations and relevance of each of

⁶³³ Douglas, Blanchard, Henry, 2013; Guy et al., 2015.

⁶³⁴ Hart et al., 2011.

⁶³⁵ Guy et al., 2015.

these risk factors incorporated in a comprehensive formulation of the case ensure that professional opinions are defensible. The SPJ approach allows evaluators to comment on the consistency and verifiability of information used to form opinions. Evaluators are also able to make note of inconsistent and disputed information and the impact of this information on other facets of the case. Formulation requires the integration of all relevant information into a cohesive account.⁶³⁶ As such, the process of formulation ensures that the professional is able to explain, justify, and support opinions and recommendations.

The SPJ approach also incorporates reference to the specific nature, imminence, frequency, and severity of violent behaviour through scenario planning.⁶³⁷ Evaluators are required to consider the most likely and plausible situations in which the offender may perpetrate violence in the future. This is consistent with both PBC and CSC policies requiring details of the reoffending behaviour to be detailed in assessment reports.⁶³⁸ These scenarios are once again logically connected to other facets of the case with supporting documentation conducted during the earlier stages of the SPJ assessment. An SPJ assessment also facilitates communication about risk management,⁶³⁹ as required by CSC and PBC policy.⁶⁴⁰

The sixth step of an SPJ assessment involves making recommendations regarding case specific risk management plans. These risk management plans are directly linked to the scenarios of future violent offending, which are themselves directly linked to the understanding of the case developed during case formulation. As a result, evaluators can provide risk management recommendations that are solidly supported with an underlying rationale. Using an SPJ approach allows the evaluator to consider information from a variety of perspectives and then arrive at a reasoned opinion about the case. The SPJ approach can facilitate the evaluator in considering the various interpretations of an offender's claim of innocence, and the impact of this claim of innocence on other facets of the case, in particular the individual's likelihood of perpetrating future violence.

Accordingly, using an SPJ approach will facilitate the evaluator in addressing each of the important themes identified for conducting a risk assessment with an offender that claims innocence. An evaluator should be sufficiently competent in risk assessment prior to employing an SPJ instrument, which should facilitate competence in

⁶³⁶ Hart et al., 2011.

⁶³⁷ Guy et al., 2015.

⁶³⁸ PBC, 2017, s.2.1.4.

⁶³⁹ Blanchard et al., 2017; Guy et al., 2015.

⁶⁴⁰ CSC CD 705-5, 2017; PBC 2017.

the relevant aspects of denial. An assessment using the SPJ approach also facilitates the consideration of all relevant information from a variety of perspectives in order to arrive at a reasonable, justifiable opinion. Notably, the SPJ approach also encourages evaluators to focus on the most strongly supported risk factors for the given type of violence, which does not include denial.⁶⁴¹ This approach also helps evaluators to avoid being overly influenced by the presence of a single risk factor.

The recommendation to use the SPJ model as opposed to the actuarial approach when conducting a risk assessment with an offender that claims innocence is consistent with recommendations made by various commentators and authorities.⁶⁴² For instance, discussing different approaches to risk assessment, Roychowdhury and Adshead concluded that the SPJ approach is the most consistent with relevant ethical and professional guidelines and thus the “most sensitive to ethical concerns.”⁶⁴³ These authors further state that the SPJ approach has been considered the “gold-standard approach” to risk assessment.⁶⁴⁴ Additionally, several international practice guidelines support the use of the SPJ approach. For instance, England’s National Mental Health Risk Management Programme (Department of Health) provides guidelines for the assessment and management of risk in mental health services across England. These guidelines state that the SPJ approach “offers the most potential where violence risk management is the objective.”⁶⁴⁵ As well, “best practice point 10” states “where suitable tools are available, risk management should be based on assessment using the structured clinical judgment approach.”⁶⁴⁶

Scotland’s Risk Management Authority (RMA) conducted a comprehensive review regarding the empirical support for tools developed to assess violent, sexual, and general recidivism. Based on this review, the standards and guidelines issued by the RMA arrived at the resulting conclusion:

When conducting a detailed risk assessment for any offender, the use of tools based upon static assessment items – actuarial tools – is permissible only when it forms part of a structured professional assessment; identifying risk and protective factors specific to the individual; and formulating risk in an analytical manner. This is due to the limitations of actuarial tools in the crucial tasks of both identifying risk and protective factors specific to the individual and

⁶⁴¹ Mann et al., 2010.

⁶⁴² Guy et al., 2015.

⁶⁴³ Roychowdhury & Adshead, 2014, p. 81.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ UK National Mental Health Risk Management Programme (Department of Health, 2007), p. 18.

⁶⁴⁶ *Ibid.*

*also guiding practitioners in the formulation of risk leading to tailored risk management plans.*⁶⁴⁷

Updating their previous standards and guidelines, Scotland's RMA again concluded that SPJ instruments should be used in all risk assessments:

*The assessor must use a structured professional judgement approach in forming their assessment. The assessor must use at least one risk assessment tool. Where only one tool is used, this should be a structured professional judgement tool approved by the RMA. Where actuarial tools are used in addition to a standard professional judgement tool, assessors must use or reference RMA-approved actuarial tools.*⁶⁴⁸

Finally, in addition to the various reasons for utilizing the SPJ approach described throughout this paper, Kropp and Hart made note of the legal incentive for using the SPJ approach:

*The Supreme Court of Canada, in considering a wide range of cases related to violence and violence risk over many decades, has consistently held that the application of discretion by criminal justice and mental health professionals (e.g., police and corrections officers, prosecutors and judges, parole and review boards, psychiatrists and psychologists) is both necessary and appropriate.*⁶⁴⁹

C. SPJ UTILIZED IN *PREVENTING PAROLE*

As part of *Preventing Parole*, Mr. Blanchard conducted violence risk assessments of Mr. Tallio, Mr. Richards and Gerry. Forensic psychologist Dr. Robert Ley also assessed Mr. Tallio and Elizabeth for *Preventing Parole*. Dr. Ley is an independent psychologist—he is not a CSC employee. Both Mr. Blanchard and Dr. Ley employed an SPJ approach in their assessments.

As Mr. Tallio's case is currently before the Court of Appeal for British Columbia; Mr. Richards's. 696 application is currently before the Minister of Justice of Canada, and Elizabeth and Gerry face upcoming parole hearings, the reports will not be appended here in their entirety. However, the following excerpts outline Mr. Blanchard's and Dr. Ley's findings with respect to the participants' risk.

⁶⁴⁷ RMA, 2007, p. 7; see also RMA, 2013.

⁶⁴⁸ RMA, 2013, p. 7.

⁶⁴⁹ Kropp & Hart, 2004, p. 6.

MR. TALLIO: Assessment by Dr. Ley

Dr. Ley interviewed Mr. Tallio in person for approximately seven hours, and over Skype for an additional two hours. He reviewed voluminous file materials. Regarding Mr. Tallio's innocence claim, Dr. Ley stated on page 2 of his 34-page report:

At the outset of this report it should be noted that Mr. Tallio is insistent that he did not commit the crime of sexually assaulting and murdering his very young cousin. In fact, although I gather that police and psychiatric witnesses at Mr. Tallio's trial asserted or implied that he had confessed to the crime, Mr. Tallio denies doing so. In short, Mr. Tallio has steadfastly denied responsibility for the rape and murder of Delavina Mack for the last 34 years. In that regard, I understand that legal representatives of the Innocence Project (IP) of the UBC law school have accepted Mr. Tallio's case. Those representatives, including yourselves, have investigated the possibility that Mr. Tallio has been wrongfully convicted. In June of this year the BC Court of Appeal (BCCOA) ruled that Mr. Tallio could appeal his conviction, despite that appeal having been initiated more than 30 years past the statutory deadline for it. As one component of Mr. Tallio's appeal, further testing of the DNA evidence associated with Mr. Tallio's crime, is being undertaken.

In this assessment and report I have not focused on the psychological issues that might be relevant to the question of whether Mr. Tallio has been wrongfully convicted or whether he may have falsely confessed or not. In contrast I have focused upon those issues that are relevant to Mr. Tallio's suitability for a pass program and lower security classification. I am familiar with the mandate of the Innocence Project and consider that organization to have the expert researchers and other related resources that can be focused upon the question of Mr. Tallio's possible innocence or criminal responsibility. In other words, I do not conceptualize your referral to me or the present assessment, as one oriented toward evaluating Mr. Tallio's innocence or guilt. It is not my role to frame the current evaluation in support of a retrial of Mr. Tallio's case. As a result, it is important at the outset of this report that I state my acceptance of Mr. Tallio's guilt for his present offence as it was determined at his trial.

Dr. Ley reviewed Mr. Tallio's "very aversive, disadvantaged and traumatic childhood and early adolescence," including the years of sexual assault he suffered by his uncle, Cyril Tallio. He rated Mr. Tallio on the Historical-Clinical-Risk Management-20:

Version 3 (HCR-20^{V3}) and the Sexual Violence Risk – 20 (SVR-20), both reviewed above. On page 10 of his report, Dr. Ley wrote:

Both the HCR-20 (V3) and SVR-20 are not psychological tests that are completed by the individual who is being assessed, but rather they are instruments that are applied to the individual (and his background) and then rated by the assessor. Both the SVR-20 and the HCR-20 (V3) are so-called “structured clinical judgment methods.” These risk assessment strategies have greater validity and are considered superior methods for estimating risk than are actuarial measures, which mathematically weight and combine fixed factors, which are not modified by the passage of time or other dynamic changes in the life and psyche of the offender.

Regarding denial, Dr. Ley wrote on pages 27-28 of his report:

Before commenting upon Mr. Tallio’s current psychological adjustment, prognosis, risk status and psychological suitability for entering the community and transfer to a lower security setting, in my view there are some important background comments to be made. First, given the horrific nature of Mr. Tallio’s offence and the ways in which such a crime is unthinkable to most people, it is understandable that Mr. Tallio has been subjected to strong moral judgements by authorities, as well as hostile verbal and physical attacks by prison inmates. Likewise I strongly suspect that Mr. Tallio has been subject historically to unfavourable perceptions by decision makers associated with his case. The fact that Mr. Tallio has been adamant in his denial of raping and suffocating his toddler cousin, has likely served to intensify moral outrage toward him and decreased his prospects for moving through his sentence with greater alacrity than has occurred. In other words, it is a reasonable assumption that Mr. Tallio’s failure to achieve any kind of community access or release, as well as classification to a lower security setting relates in part to Mr. Tallio’s adamant denial of responsibility for his offence. Notably denial of responsibility for a crime is not empirically associated with risk. In fact, when one examines the items that constitute the most valid and frequently used risk assessment instruments, denial of criminal responsibility is not a risk factor in any of these instruments. However, in Mr. Tallio’s case from a psychological standpoint, it is likely that decision makers have been consciously and unconsciously influenced to judge Mr. Tallio and his case more negatively, given the nature of his offence and the denial of the commission of it.

In my forensic experience there are many reasons why someone might deny the commission of a crime. Generally there are three possible explanations that can be made with respect to an individual's consistent and insistent denial of his or her offences. First of all it is possible that the individual is consciously aware of and fully recollects his criminal act or actions and that he is lying willfully in regard to his role in the crime. If that is the case then the person would be denying his offence in the lay sense of the word. In other words, the offender is intentionally lying about his commission of the crime. Second, "denial" is a clinical term as well. It is a psychological construct that refers to a psychological defence mechanism, whereby unconsciously an individual represses or "forgets" or significantly distorts behaviours (or other thoughts, feelings and actions) that are unacceptable or otherwise threatening or anxiety arousing to the person.

Given this explanation it would imply that if Mr. Tallio committed this offence in the manner implicit to his conviction, then he has repressed or distorted his criminal acts and genuinely believes that he did not act in the manner that has been attributed to him and which underpins his offence. Third, on a very rare occasion, it is possible that an individual has been wrongly convicted, and he has not done that which has been attributed to him. If this situation exists in Mr. Tallio's case, then his "denial" is valid and legitimate. Regardless of these competing explanations, as I have noted above, it is not my role to determine amongst them but rather to simply evaluate the degree of risk which Mr. Tallio represents in the context of his undertaking a program of community access and possible lower security placement in the near future.

As to Mr. Tallio's risk to society, Dr. Ley wrote on pages 30-31:

In regard to a risk appraisal of Mr. Tallio, I agree with Dr. Cooper's contention that the task is made more difficult as Mr. Tallio has spent more than three-quarters of his life in correctional settings. However, that said, in my opinion one can utilize an offender's conduct and experiences in correctional settings to substantially inform a risk assessment. Federal prisons are highly structured environments and significantly limit personal freedoms. Nonetheless one can evaluate an inmate's interpersonal relations, educational/vocational performance, psychological status, coping ability, propensity for aggression and violence, alcohol and drug use or abuse habits, attitudes toward authority, planning and problem solving, et cetera. Prisons are very stressful environments, which offer great potential for interpersonal conflict. However, because prisons do not offer abundant opportunities for autonomous, independent and self-sufficient functioning, the prison environment is not an ideal one within which to view an individual's

adjustment in the much less structured environment outside of prison. It is for this very reason that ETA/UTA programs and day parole are desirable, and create an excellent system of appropriate checks and balances, as the inmate earns progressively greater freedoms and self-sufficiency.

As an initial approach to an evaluation of Mr. Tallio's risk, from a clinical standpoint one can make inferences about Mr. Tallio's risk for interpersonally violent recidivistic crimes, based upon his comportment in prison. In my opinion, in general, Mr. Tallio's conduct in prison has been very good. Generally he has not been an aggressive or violent person. To me it appears that Mr. Tallio's violence has most often occurred in regard to physical attack and aggressive confrontation by others. In that regard one can construe Mr. Tallio's aggressivity as self-protective. There are few, if any, indications of Mr. Tallio acting in an unprovoked or premeditated instrumentally violent way. Mr. Tallio has coped well with the challenges from other inmates that he has faced. Given the nature of the inmate hierarchy and the so-called "con code," it would be expected that other inmates would harass, provoke, confront and physically attack Mr. Tallio as a "baby killer" or "baby raper" (Mr. Tallio's words). In my opinion Mr. Tallio has been quite resilient and generally moderate in reaction to being targeted by other inmates. In particular for the last six years Mr. Tallio has not engaged in any altercations or any sort of violence. In fact, given my review of his file, I can find only one reference to Mr. Tallio acting aggressively in the last decade. As a result, it is my clinical estimate that Mr. Tallio represents a low to low moderate but manageable risk of committing interpersonally violent crimes in the future.

Furthermore Mr. Tallio's risk of committing interpersonally violent crimes in the future is further diminished by the so-called "burnout phenomenon." "Burnout" refers to the established observation and empirical finding that antisocial men become markedly less violent as they enter their 40s and 50s (and later years). Mr. Tallio is in that age range now, which serves to attenuate the likelihood of his engagement in future violent crimes.

And on page 32, Dr. Ley wrote:

Given Mr. Tallio's denial of responsibility for his index offence, naturally it is difficult, if not impossible to know the particular psychosexual features that influenced it. However, withstanding Mr. Tallio's offence, more generally in his lifetime he has not shown a pattern of pedophilic behaviour. Based upon Mr. Tallio's account of his sexual history and a review of his life and the records that underpin it, it does not seem that Mr. Tallio experiences persistent and intense

sexually arousing fantasies, urges or behaviours that involve sexual activities with a pre-teen child. Although Mr. Tallio's offence involved a sexual homicide with a female toddler, there is no evidence that Mr. Tallio has engaged in sexual activities with other children. During his adolescence his sexual relations and activities were conventional ones with similarly aged female peers. In my opinion, based upon the information available to me, it appears that Mr. Tallio's sexual orientation is an adult heterosexual one. That conclusion is provisional; however, given Mr. Tallio's denial of his offence.

Dr. Ley concluded that he views Mr. Tallio's degree of risk "as manageable in the course of Mr. Tallio being transferred to a lower security setting, and undertaking a pass program;" that Mr. Tallio "does not represent an undue risk of recidivism or danger to the public by commencing an ETA program from [minimum institution]." He recommended that Mr. Tallio should receive weekly therapy treatment to deal with his diagnosis of PTSD throughout the course of an ETA/UTA program which would serve to "bridge" him into the community on day parole.

MR. TALLIO: Assessment by Mr. Blanchard

Mr. Blanchard interviewed Mr. Tallio in person for 5.5 hours. He also interviewed his adoptive sister, adoptive mother, his brother and then-IPO, in addition to an extensive file review. Mr. Blanchard also used the SPJ approach. He utilized the HCR-20 as well as the Risk for Sexual Violence Protocol (RSVP) in formulating his opinion.⁶⁵⁰

To deal with the factor of Mr. Tallio's innocence claim, Mr. Blanchard presented scenarios in which Mr. Tallio did commit the index offence and scenarios in which he did not. For instance, on page 15 of his report Mr. Blanchard wrote:

If he did commit the index offence, another plausible scenario is that Mr. Tallio commits a sexual assault, specifically rape. In this scenario, Mr. Tallio is in a situation with an easy or vulnerable target and decides to take advantage of the situation. It is more likely in this scenario that he targets someone with whom he is more familiar, including a child or toddler. The sexual violence is likely to result in serious psychological or physical harm, including the possibility of life-threatening violence. The likelihood of this scenario appears to be low, given that Mr. Tallio has only one act of sexual violence on his record from over 30 years ago and has seen considerable

⁶⁵⁰ Hart, Kropp, Laws, Klaver, Logan, & Watt, 2003.

improvement in a number of domains over the years. Of note, if Mr. Tallio is in fact innocent of the index offence, this scenario appears to no longer be plausible.

Mr. Blanchard concluded that Mr. Tallio's violence risk "appears to be manageable in the community, either during temporary absences or if released from custody." On pages 17-18 of his report, Mr. Blanchard recommended the following management strategies to assist in mitigating Mr. Tallio's risk, if he is released into the community:

a) Monitoring: I recommend Mr. Tallio be directed to attend visits with his parole officer at least every two weeks, with additional home and telephone visits at the discretion of the parole officer. Mr. Tallio should be required to live in transitional housing that is capable of monitoring his day-to-day attitudes and behaviours. Mr. Tallio should be monitored for signs of increased agitation, anxiety, and stress, as well as attitudes supporting the use of violence, and substance use.

b) Treatment: I recommend that Mr. Tallio continue to receive individual therapy focused on his history of trauma and abuse, as well the consequences of this history on his social orientation and attitudes. Mr. Tallio should also continue receiving support for his ongoing issues with low mood and anxiety. Mr. Tallio will require substantial assistance in reintegrating into the community, in the form of group or individual counselling. It is also recommended that Mr. Tallio reengage in aboriginal programming in the community.

c) Supervision: I recommend that Mr. Tallio not return to his home town but instead be placed in transitional housing in another community where his remaining social supports are able to visit. Contact between Mr. Tallio and his biological family should be closely monitored. Assuming he committed the index offence, Mr. Tallio should also have no contact with children unless under direct supervision.

d) Safety Planning: Mr. Tallio's adoptive mother and adoptive sister should be informed of the outcome of any decisions regarding Mr. Tallio's future. Staff at the transitional housing should be informed of Mr. Tallio's history and should be advised to contact his parole officer in the event of any increase in stress or negative attitudes. They should be advised to immediately report even minor violence. Mr. Tallio's parole officer should maintain regular contact with the staff at Mr. Tallio's transitional residence and his family supports.

MR. RICHARDS: Assessment by Mr. Blanchard

Mr. Richards was eligible for day parole in 2014, and for full parole in 2017. He has been on 10 ETAs to visit his family in the past and some medical ETAs, but no UTAs, which normally proceed day parole, let alone full parole. Mr. Blanchard interviewed Mr. Richards for more than six hours, and also interviewed his brother and childhood friend. Mr. Blanchard reviewed Mr. Richards's voluminous file materials.

Mr. Blanchard assessed Mr. Richards's violence risk using the SPJ approach according to the HCR-20^{V3} and the RSVP. On page 4 of his report, Mr. Blanchard noted that Mr. Richards's *"claim of innocence adds a level of complexity and uncertainty to the risk assessment process; however, it does not preclude an opinion from being formed."*

Mr. Blanchard detailed Mr. Richards's past offences and the facts of the index offence. He also outlined Mr. Richards's history of being sexually, physically and verbally abused, as well as his history with substance abuse, the fact that he does not suffer from mental illness; his institutional behaviour and, on page 17, his *"exemplary work performance."* Overall, Mr. Richards *"has been described as being well behaved, polite, and respectful to staff and his peers."*⁶⁵¹ Mr. Richards has had seven minor institutional charges since 1994, the most recent being an incident in which he brought tobacco⁶⁵² into a correctional transportation vehicle following an ETA to visit his family. Mr. Richards was transferred to medium security from minimum security overnight due to the tobacco, and his ETAs were cancelled. This has been *"the only instance in which he has required any administrative interventions."*⁶⁵³

On pages 11-12 of his assessment, Mr. Blanchard wrote:

With regards to treatment, despite Mr. Richards' continued denial of involvement in the index offence, he is described as being an active participant in his correctional plan and motivated in his rehabilitation. Mr. Richards has completed several correctional programs during his lengthy incarceration, including Anger and Emotions Management, Family Violence treatment, Breaking Barriers, and a substance abuse treatment program. He has also completed the Violence Prevention Maintenance program. Numerous reports note that Mr. Richards has actively participated in his correctional rehabilitation. Although he has continually maintained innocence for his index offence, he has demonstrated a willingness and motivation to address various risk factors that contributed to his history of

⁶⁵¹ Blanchard, 2018, p. 10.

⁶⁵² (Specifically, three pouches of tobacco).

⁶⁵³ Blanchard, 2018, p. 10.

violent behaviour. During his first federal incarceration, Mr. Richards participated in the Phoenix Program, a sex offender treatment program offered to offenders at the Alberta Hospital. The benefits he received from this program have been called into question, as he was convicted of violent offences after taking part in this program.

On the other hand, program performance evaluations indicate that he actively engaged in his programming and benefitted substantially from other treatments. Mr. Richards completed substance abuse treatment in 1995. His attendance was described as excellent and post-treatment testing indicated that he made progress in a number of key areas. In the earlier years of his incarceration, Mr. Richards attended AA regularly, whereas his attendance is much more sporadic in the past years. He believes that the AA meetings offered within the institution are not the best context in which to work on his sobriety and relapse prevention. However, Mr. Richards has indicated that he plans to attend AA meetings once released.

Following the Family Violence Treatment program in 1998, Mr. Richards is reported to have displayed a considerable amount of understanding and insight into the underlying reasons behind his history of violence. Following the Anger and Emotions Management program in 2006, Mr. Richards is noted to have given a good effort and shown appreciable gains. He demonstrated improvement across all of the tested domains, including inappropriate thinking patterns, tendency to react impulsively, tendency to become irritated, and ability to cope without the use of anger. Mr. Richards is credited with gaining valuable skills from this program. The most recent psychological assessments indicate that Mr. Richards has displayed considerable progress toward addressing his risk factors and rehabilitative goals. Overall, Mr. Richards has successfully completed a number of treatment programs designed to assist in managing his risk for violence and has internalized several risk management strategies he learned during these programs.

On pages 15-16, Mr. Blanchard analyzes Mr. Richards's insight, setting out scenarios to consider the instance in which Mr. Richards is indeed innocent:

a) In the past, Mr. Richards has been noted at times to rationalize and minimize some of his prior criminal behaviour. Records indicate that he has attempted to minimize his responsibility for some of his past offences, as well as minimize the harm to the victims...

Finally, Mr. Richards' insight into his index offence is non-existent. Mr. Richards continues to deny any involvement in the murder conviction for which he is currently serving a life sentence. Since his conviction, he has continually and persistently denied any involvement in the offence. As a result, Mr. Richards has failed to accept any responsibility or express any guilt for this offence. He has also been unable to identify the factors that lead him to commit this grievous offence or acknowledge that treatment may reduce the likelihood of a similar offence occurring in the future. Mr. Richards does feel bad for the victim of this index offence and her family; he indicates that he often thinks about and regrets the impact that this offence had on all those involved.

b) Conversely, Mr. Richards readily admits to and acknowledges his other history of sexual, violent, and general criminality, as well as his abusive attitude toward women. He acknowledges the contribution of his previous substance abuse problems and negative attitudes on his history of criminal and violent behaviour. He additionally understands and recognizes how these factors could increase his risk for reoffending in the future if they are not appropriately managed. Records indicate that Mr. Richards has been open about his prior offences, except for the index offence, and described himself prior to his incarceration as a selfish and violent man that abused women in relationships and when involved with prostitutes.

c) Overall, Mr. Richards is generally noted to display an appropriate and increasing level of insight into his historical factors that have contributed to his violent and criminal behaviour. He recognizes that he had serious problems with his attitudes and behaviours prior to being convicted of his index offence. As well, correctional records indicate that throughout his incarceration Mr. Richards has gained a better understanding of and insight into the factors that have contributed to his previous violence. He is also more aware of the impact that these factors may have on his behaviour in the future. Notably, if Mr. Richards is in fact innocent of his index offence, then his claim of innocence should not be included as evidence of problems with insight. Without this prominent evidence, Mr. Richards has no recent problems with insight.

Mr. Blanchard delves into the scenarios in which Mr. Richards could commit violence in the future and their likelihood on pages 18-19 of his report. On page 20, he concluded:

In light of the opinions outlined above, Mr. Richards' risk of violence (general or sexual) appears to be manageable in the community,

either during temporary absences from a prison setting or if released from custody. Nevertheless, Mr. Richards will require intensive supervision and services in the community.

Mr. Blanchard recommended that Mr. Richards be given the opportunity to take part in ETAs and UTAs. He gave recommendations for Mr. Richards's monitoring, treatment, supervision and safety planning in the event that the PBC grants him release into the community.

GERRY: Assessment by Mr. Blanchard

In 2018, Mr. Blanchard interviewed Gerry for more than three hours and conducted telephone interviews with members of Gerry's support system. He reviewed Gerry's CSC files and assessed Gerry's violence risk according to the HCR-20. As in his assessments of Mr. Tallio and Mr. Richards, Mr. Blanchard noted that Gerry's innocence claim made the risk assessment process more complex and uncertain, but that it does not preclude an opinion from being formed.

Mr. Blanchard reviewed the court-reported facts of the index offence and of Gerry's own account of the facts. Mr. Blanchard reviewed Gerry's serious history of substance abuse, which pre-dated the index offence. He reviewed the programs and treatments Gerry has completed. Regarding Gerry's level of insight, Mr. Blanchard wrote:

8) [Gerry] has some recent problems with insight. He continues to deny any direct involvement in the murder of [...], although he does accept some responsibility for his role in the events. [Gerry] fails to understand the personal factors that led him to murder [...]; however, he does display some understanding of his risk factors and the effects of his substance abuse.

a) On the one hand, previous reports indicate that he demonstrated little to no insight into his criminal behaviour. [Gerry] continues to display little insight into the murder of [...]. He repeatedly and vehemently denies having committed this offence. He continues to limit his culpability and struggles with taking responsibility and accountability for the offence. As a result, he has failed to identify the attitudes, values, and choices that led him to commit a violent murder. Reports indicate that [...] has not gained a full understanding of the factors that contributed to his previous violence. He also minimizes his criminal involvement. He evidences little insight into his involvement with and willingness to join a purported criminal

organization. Consequently, he has little insight into and fails to appreciate his risk for violence. Prior assessments also reveal that his plan to remain violence free in the future was lacking in detail. That is, his plan lacked detail regarding the personal attitudes, beliefs, and values that may lead him to commit a violent act.

b) On the other hand, recent reports indicate that despite maintaining his innocence [...] understands and accepts how his substance use problems led to the death of [...]. He accepts responsibility and expresses guilt for his part in the circumstances surrounding the victim's death. He genuinely expresses empathy for those affected by the victim's death and remorse for his involvement in the events. As well, reports indicate that [Gerry] has a fair amount of understanding regarding his addiction and association with negative peers. He has evidenced a good deal of insight into his problems with substance use and his need for substance use treatment. He understands the impact and consequences that his substance use problems had on the people in his life. He has previously and continues to make every effort to ensure that he does not return to his previous life of substance abuse. [Gerry] reports that in order to avoid similar circumstances in the future he must remain sober and stay away from drug use and the drug community. Finally, the most recent reports indicate that [Gerry] understands and readily acknowledges the factors that led to his criminal lifestyle, including his associates, attitudes, substance abuse problems, and need for financial gain. Overall, he is currently reported to have a fair amount of insight into his risk factors.

c) Of note, if [Gerry] is in fact innocent of his index offence, then he does not have any problems with insight.

Mr. Blanchard discussed the fact that Gerry does not suffer from any mental illness; that he has “*an exemplary work history*” and that he has appropriate plans for his future (i.e., where he will live if released on full parole, who comprises his support system). He concluded that other than the murder, Gerry has no other reported or known history of violence, and that his one act of violence appears to be inherently linked to his addiction to drugs. Mr. Blanchard then set out the following scenarios on pages 18-19 of his report:

3) If [Gerry] commits violence in the future, the following scenarios are most plausible. The most reasonable scenario in which [Gerry] engages in violence involves a return to his former life of abusing

drugs. This scenario involves [Gerry] finding himself in an interpersonal dispute with a friend or acquaintance while under the influence of narcotics or while withdrawing from narcotics. This situation may result in [Gerry] losing control and becoming violent in the form of a physical assault that [...]. The most likely victim in this scenario is a friend or acquaintance; however, a slight twist to this scenario may involve the violence targeting a family member or a stranger under similar circumstances. The consequences of this scenario may range from mild psychological and physical harm, if the assault is short lived and does not involve a weapon, but could escalate to include serious or life-threatening physical harm, especially if an improvised weapon is involved.

It is believed that this scenario is likely isolated to instances in which [Gerry] is attempting to obtain drugs or money for drugs, actively under the influence of drugs, or withdrawing from the effects of drugs. As such, this scenario is unlikely to occur in the immediate future (i.e., the risk is not imminent). The likelihood of this scenario appears to be low. This likelihood of this scenario is considered low because [Gerry] has completed a number of substance use and rehabilitative programs with positive gains during his incarceration; he has not used any drugs in over a decade; he lived a prosocial life for a number of decades prior to becoming addicted to [drugs]; he has successfully demonstrated his ability to live a life free of crime or violence in the community; he has strong family and community supports; he is engaged with several professional services at a community residential facility; and he has the support of his correctional case management team. However, the likelihood and imminence of this scenario may increase under specific circumstances. Evidently, any return to the use of narcotics may increase the likelihood of [Gerry] engaging in violence. Additional warning signs include increased stress, secrecy, deceit or manipulation, relationship issues, affiliation with procriminal associates, and noncompliance with treatment or supervision.

4) Notably, if [Gerry] is in fact innocent of his murder conviction, then he has no known history of violence. If this is the case, then the above formulation is limited in its applicability and relevance. Moreover, the likelihood that [Gerry] engage in the violent scenario described above is substantially reduced.

5) In light of the opinions outlined above, [Gerry's] risk of violence appears to be manageable in the community if he is granted full parole.

Mr. Blanchard then set out recommendations for Gerry's monitoring, treatment, supervision, and safety planning, should the PBC grant him full parole.

ELIZABETH: Assessment by Dr. Ley

In 2017, Dr. Ley conducted a violence risk assessment on Elizabeth using the SPJ approach. Elizabeth had already been eligible for full parole nine years prior, but she was merely attempting to obtain ETAs, UTAs and/or day parole. Dr. Ley interviewed her in 2016 and in 2017, for a total of nine hours. As in his assessment of Mr. Tallio, Dr. Ley noted that his role was not to evaluate Elizabeth's guilt or innocence, but to focus on the issues that are relevant for her suitability for a pass program or parole. For the purposes of the evaluation, he accepted the assumption of her guilt as it was determined at her trial.

In the year between his first and second interviews of Elizabeth, positive developments occurred for Elizabeth which Dr. Ley noted had significant effects on and for Elizabeth. Notably, Elizabeth had been transferred from a medium security unit to a minimum security unit. She had a new IPO, who was the individual who initiated Elizabeth's security transfer. Elizabeth conveyed to Dr. Ley that she was very pleased that her new IPO "made a concerted effort to comprehensively review [Elizabeth's] file and background, and she [IPO] was willing to give [Elizabeth] a 'fresh start'" (p. 22).

Dr. Ley utilized the HCR-20^{V3} and the Psychopathy Checklist Revised Form: Second Edition (PCL-R) in his assessment of Elizabeth, as well as the Female Additional Manual (FAM) which supplements the HCR-20^{V3} in that it is specific to the assessment of violence risk in women. Dr. Ley wrote on page 8 of his 29-page report:

The FAM contains additional guidelines for scoring risk items and for appraising risk management in women. The FAM identifies women gender-specific criteria for some of the risk factors but in addition specifies eight new items that have specific relevance to women. Those factors for violence risk are:

- 1. prostitution;*
- 2. parenting difficulties;*
- 3. pregnancy at young age;*
- 4. suicidality/self-harm;*
- 5. covert/manipulative behaviour;*
- 6. low self-esteem;*
- 7. problematic child care responsibility; and*

8. problematic intimate relationship(s).

On page 20, Dr. Ley wrote:

As I will expound below, apart from the nature of [Elizabeth's] crimes, there are no indications that she is an aggressive or violent person, and even given the nature of her offences, it is most unlikely that [Elizabeth] intended her crimes as hostile acts... However, that conjecture remains speculative given [Elizabeth's] denial of [index offence]. My conclusion that [Elizabeth] is not an aggressive or violent person is strongly supported by her benign conduct while incarcerated, particularly given that she has experienced a high level of bullying and cruel harassment as well as physical attacks while in custody, due to the nature of her crimes. [Elizabeth] has been assaulted and beaten up on occasion. She has experienced injuries, including cuts and concussions. In all instances, [Elizabeth] has not retaliated physically against her aggressors. Her restraint is impressive, particularly given that so-called "Con Code" (or "Convicts' Code"), which impels inmates to respond aggressively and violently to teasing, confrontations and actual assaults. The failure to retaliate usually promote further psychological torment and physical attacks.

Substance abuse or use was not implicated in [Elizabeth's] crimes. Notably she has not been a person who resorts to alcohol or other drug use in the context of significant life stresses. She did not abuse alcohol or other drugs as an adolescent or young adult prior to her crimes. Likewise there are no indications that [Elizabeth] has used alcohol or other drugs while in prison. All drug screenings have been negative.

...Although [Elizabeth] has successfully completed her Correctional Plan, her successful completion of proscribed programs has not been without conflict or consternation for both [Elizabeth] and her CMT. Although [Elizabeth] has not been overtly defiant or oppositional, a careful review of her file suggests that she has been ambivalent about some recommended counselling programs and other interventions, which [Elizabeth] readily acknowledges. [Elizabeth] has informed me that she did not willingly embrace some intervention programs, either due to her belief that they were unnecessary or as a result of [Elizabeth] experiencing the intervention programs as "not very helpful." Regardless, at this juncture, [Elizabeth] has completed her Correctional Plan, and a large number of programs...

On page 26-27, Dr. Ley stated:

In regard to a risk appraisal of [Elizabeth], from a clinical standpoint one can confidently state that there is a nil to negligible risk of [Elizabeth] committing similar crimes in the future, given her age and the low likelihood that she will [...]. Additionally, more generally, prior to [Elizabeth's] current offences she was not an antisocial, criminally oriented person. She was not aggressive or violent. Prior to [Elizabeth's] offences she did not show any significant signs of criminal maladjustment (such as alcohol/drug abuse, et cetera) despite having some aversive, traumatic experiences in her life such as [...]. However, at the time of my most recent assessment of [Elizabeth], she was psychologically stable. She did not show any symptoms of undue emotional distress or psychological disturbance.

Dr. Ley determined that Elizabeth represents a low and manageable risk in the community. He set out a number of recommendations for her to receive psychological counselling and treatment from therapists who are highly experienced in treating complex trauma.

We conclude this section with comments from Victoria-based forensic psychologist Dr. Bruce Monkhouse. In an interview with Ms. Barsky, Dr. Monkhouse stated, “Absolutely, an inmate’s risk can be assessed while they maintain innocence. Anyone and everyone can be assessed. It is highly unethical if a psychologist says they cannot assess risk because an inmate maintains innocence. Such a psychologist should be fired. Of course some inmates who maintain innocence are psychopaths and are lying, but some are not. *Everyone* can be assessed.”

In addition to being assessed, an inmate who maintains innocence can also be treated. The experiences outlined above in “CSC Programs: Entry and Completion” of *Preventing Parole* participants who were not allowed entry into treatment programs or who could not successfully complete treatment programs due to their innocence claim, are regrettable. One’s innocence claim should not itself hinder their ability to be treated. As will be discussed in the next section of *Preventing Parole*, treatment programs and treatment providers should view categorical denial, or claims of innocence, as a responsivity issue rather than a risk factor or barrier to treatment success.

IX. TREATMENT AND ACCESS TO PROGRAMS FOR INMATES WHO MAINTAIN INNOCENCE

The treatment of sex offenders that categorically deny involvement in an offence has been an area of controversy for decades.⁶⁵⁴ Due to the purported relationship between denial and recidivism, many consider that denial must be targeted in order for any progress to be seen in treatment.⁶⁵⁵ Denial is often considered a barrier to treatment success.⁶⁵⁶ Sex offenders that present with categorical denial or low motivation for treatment are often denied treatment, as they are deemed unamenable or unsuitable for treatment.⁶⁵⁷ However, others have commented how denial may be seen as a normative process that is not problematic.⁶⁵⁸ Maruna and Mann⁶⁵⁹ asserted that denial is a common, normal response among any person that is confronted with having done something wrong or immoral.

Denial and excuse making are expected, normal human behaviour.⁶⁶⁰ Excusing and justifying behaviour that other people view as unacceptable or immoral has been found to be a universal response displayed by all people.⁶⁶¹ Several authors have noted that externalizing responsibility for negative or harmful behaviours, as opposed to internalizing responsibility, has been shown to be associated with a number of positive outcomes.⁶⁶² People that make excuses for their wrongdoings have been found to be healthier and exhibit more positive adaptation than people who accept full responsibility for their wrongdoings.⁶⁶³ Excuse making also reduces feelings of shame and discredit.⁶⁶⁴ A reduction in shame can have several potential benefits, as an association has been found between increased levels of shame and offending behaviour.⁶⁶⁵ As well, shame has also been found to interfere with efforts to change.⁶⁶⁶

⁶⁵⁴ Ware et al., 2015.

⁶⁵⁵ Salter, 1988.

⁶⁵⁶ Endres & Breuer, 2014.

⁶⁵⁷ Happel et al., 1995.

⁶⁵⁸ Maruna & Mann, 2006.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Maruna & Mann, 2006; Ware et al., 2015.

⁶⁶¹ Snyder & Higgins, 1988.

⁶⁶² Maruna, 2004; Maruna & Mann, 2006.

⁶⁶³ Dodge, 1993; Seligman, 1991; Snyder & Higgins, 1998.

⁶⁶⁴ Brathwaite & Brathwaite, 2001.

⁶⁶⁵ Harris & Maruna, 2005.

⁶⁶⁶ Tangney & Dearing, 2002.

Notably, several researchers have found that offenders that make excuses and justifications, including outright denial, for their offending behaviour are in fact less likely to reoffend compared to offenders that fully accept responsibility for their behaviour.⁶⁶⁷ According to the general crime desistance literature, offenders that desist from offending are more likely to have used excuses and justifications for their past offending compared to offenders that continue to commit criminal offences.⁶⁶⁸ Desistance research has found that offenders that cease to continue offending are more likely to hold external and specific explanations and justifications to account for their crimes.⁶⁶⁹ Ware et al. concluded that the available “evidence is clear that excuse-making in its various forms, including denying having transgressed, is healthy and likely to lead to a cessation of unpleasant behavior.”⁶⁷⁰ Conversely, acceptance of responsibility for an offence and acceptance of the “offender” label have been found to damage self-esteem and alienate people from mainstream society.⁶⁷¹

Nevertheless, some professionals remain firmly in the position that denial must be overcome in order to participate in treatment. For instance, Freeman et al. discuss the considerable thought and progress made towards determining “the necessary steps to illicit acceptance of guilt and engagement in the treatment process.”⁶⁷² Additionally, research has shown that clinicians strongly believe that denial must be overcome in order to proceed through treatment.⁶⁷³ Freeman et al. found that psychologists differed in their opinions regarding the appropriate treatment programs for offenders who maintain innocence.

The majority of psychologists in their study reported that a program specific for offenders that categorically deny their offences should be developed. The reasons for believing that a specific program is needed for these offenders differed between psychologists with some indicating that more attention can be given to breaking through denial whilst other indicating that the focus should be placed on avoiding reoffending. Conversely, a minority of psychologist believed that offenders presenting with categorical denial could be appropriately integrated into existing sex offender treatment programs.

⁶⁶⁷ Hanson & Wallace-Capretta, 2000; Harkins et al., 2015; Hood et al., 2002; Maruna, 2001.

⁶⁶⁸ Chiricos, Barrick, Bales, and Bontrager, 2007; Maruna, 2001, 2004; Maruna, LeBel, Naples, & Mitchell, 2009.

⁶⁶⁹ Maruna, 2001, 2004.

⁶⁷⁰ Ware et al., 2015, p. 220.

⁶⁷¹ Maruna et al., 2009.

⁶⁷² Freeman et al. (2010), p. 40; see also Looman, Dickie, & Abracen, 2005.

⁶⁷³ Blagden et al., 2011.

The majority of treatment programs for sex offenders require that these offenders accept responsibility for their offences.⁶⁷⁴ Northey⁶⁷⁵ claimed that sex offenders must accept full responsibility for their offending behaviour in order for treatment to progress. Several decades ago, McGrath highlighted the significance of accepting responsibility:

*One of the most important factors that help us decide whether or not to recommend community treatment is a person's willingness to be honest about his sexual history. Whether you did or did not commit a sexual offense is not a question for discussion. The court has already found you guilty.*⁶⁷⁶

Surveys of sex offender treatment programs across North America have found that acceptance of responsibility is considered a core treatment target by the majority of programs.⁶⁷⁷ McGrath et al. found that 50.0% of residential programs and 78.9% of community programs for adult male sex offenders in Canada listed offence responsibility as a core treatment target. Although no programs in Canada required offenders to fully admit to their sexual offending history in order to complete treatment, some degree of disclosure was required in 62.5% of residential and 73.6% of community sex offender programs. In the United States, 91.1% of residential and 91.8% of community programs for adult male sex offenders target offence responsibility as a primary treatment goal. About one-third of residential (36.6%) and community (33.4%) treatment programs required near full disclosure of the offending behaviour in order to successfully complete the treatment. Only 6.1% of residential and community programs do not require any disclosure of the offence.

Denial is often addressed as the first step in order to ensure offenders are fully engaged in the treatment program. However, Ware and colleagues⁶⁷⁸ highlight that a major obstacle confronted by treatment providers is that overcoming denial and accepting full responsibility is typically addressed as an initial treatment goal. The initial formative stages of the relationship between the offender and treatment provider are crucial. Attempting to challenge an offender's denial as a preliminary stage in treatment during this critical stage in the therapeutic relationship is likely to result in the offender interpreting the treatment provider's challenges as hostile, aggressive, or confrontational.⁶⁷⁹ Marshall and colleagues have observed that, although a warm and empathic treatment provider is a critical element of effective sex offender treatment

⁶⁷⁴ McGrath, 1990; McGrath et al., 2010; Ware et al., 2015; Winn, 1996.

⁶⁷⁵ Northey, 1999.

⁶⁷⁶ McGrath, 1990, p. 510.

⁶⁷⁷ McGrath et al., 2010.

⁶⁷⁸ Ware & Mann, 2012; Ware et al., 2015.

⁶⁷⁹ Ware et al., 2015.

programs, it is arduous for treatment providers that forcefully challenge claims of innocence to be seen as warm and empathic.⁶⁸⁰ Treatment aiming to eliminate categorical denial is laden with difficulty, especially if the treatment provider is construed as confrontational.⁶⁸¹ Treatment programs and treatment providers that are overly focused on eliminating denial can damage the therapeutic relationship.⁶⁸²

Several researchers and clinicians have commented on the ineffectiveness of a confrontational therapeutic style.⁶⁸³ For instance, Marshall and colleagues⁶⁸⁴ found that the use of a confrontational style in the treatment of sex offenders nearly eliminated any beneficial effects the treatment would have otherwise provided. In contrast, an empathic, rewarding, warm approach resulted in a number of positive treatment outcomes across a range of domains. Similar results were also reported by in examinations of group treatment programs for sex offenders.⁶⁸⁵ As well, White and Miller⁶⁸⁶ examined the addiction treatment literature on the use of confrontation, as a confrontational style is typical in this treatment area. Based on a broad review of the research, White and Miller concluded that no evidence was available for the use of a confrontational style. In fact, they could not find one study that found a confrontational treatment style was effective. On the other hand, White and Miller found much support demonstrating that the most effective treatment providers used an empathic, supportive, and warm approach. Janicki asserted that a vital component of any treatment program is the creation of “a safe, non-judgmental and respectful environment” consisting “of a strong therapeutic alliance and supportive relationships.”⁶⁸⁷

The treatment of offenders who maintain innocence raises unique ethical considerations. Levenson⁶⁸⁸ stressed the ethical dilemmas presented by categorical denial. On the one hand, it could be considered unethical to exclude, expel, or remove offenders that claim innocence from treatment due to this sole reason, as they should be provided the same treatment opportunities afforded to other offenders. On the other hand, it could be considered unethical to deliver treatment to an offender that targets a problem the offender says they do not have, or to an offender that is in fact innocent and does not require the treatment. In addition, Marshall and colleagues⁶⁸⁹ highlighted

⁶⁸⁰ Marshall, 2005; Marshall & Burton, 2010; Marshall, Marshall, & Burton, 2013; Serran & Marshall, 2010

⁶⁸¹ Ware et al., 2015

⁶⁸² Janicki, 2015.

⁶⁸³ Beech & Fordham, 1997; Henning & Holdford, 2006; White & Miller, 2007; Winn, 1996.

⁶⁸⁴ Marshall et al., 2002, 2003.

⁶⁸⁵ Beech & Fordham, 1997; Beech & Hamilton-Giachritsis, 2005.

⁶⁸⁶ White and Miller, 2007.

⁶⁸⁷ Janicki, 2015, p. 408.

⁶⁸⁸ Levenson, 2011.

⁶⁸⁹ Marshall, Marshall, & Kingston, 2011; Marshall et al., 2009.

several faults in the assumption that official records of offences mirror genuine, factual accounts of what actually occurred during the offence. Requiring offenders to agree with the official facts, or version of events described in official records, is thus problematic.

A. APPROACHES TO TREATMENT WITH DENIERS

Several programs are now available to address the issue of offenders that categorically deny involvement in an offence for which they have been convicted.⁶⁹⁰ With regards to sex offender treatment programs, there have been three general approaches to dealing with offenders that categorically deny involvement in an offence.⁶⁹¹ Sex offender treatments tend to (a) exclude offenders that maintain innocence, (b) allow these offenders to enter a treatment program that has an explicit goal of overcoming denial, or (c) allow these offenders to enter a treatment program that does not attempt to overcome denial. That is, some treatment programs prohibit offenders who claim innocence from entering the program based on the notion that effective treatment cannot advance without admission and acceptance of responsibility. Other treatment programs require the successful completion of pre-treatment modules meant to overcome categorical denial or accept offenders in categorical denial into the program with other offenders in which the program specifically targets acceptance of responsibility as a treatment goal. Finally, some treatment programs ignore the issue of denial and acceptance of responsibility and instead focus on widely recognized criminogenic factors. Each of these approaches will be reviewed in turn.

B. TREATMENTS THAT EXCLUDE DENIERS

The majority of treatment programs for sex offenders exclude offenders that claim innocence for their offence(s).⁶⁹² Programs that exclude offenders that categorically deny the offence rest on the assumption that the offender is untreatable or unsuitable to benefit from treatment; thus, they offer no attempts to overcome or challenge denial.⁶⁹³ When treatment programs take this approach, sex offenders in categorical denial remain untreated, potentially for lengthy periods of time, until the offender decides to stop denying and accept responsibility. Although there is certain evidence that offenders may naturally surmount their denial and accept responsibility without treatment, Ware et al.⁶⁹⁴ asserted that offenders are much more likely to overcome their denial and admit

⁶⁹⁰ Marshall, 1994; Marshall, Thornton, Marshall, Fernandez, & Mann, 2001; Pithers, 1994; Schlank & Shaw, 1996.

⁶⁹¹ Cooper, 2005; Ware et al., 2015; Yates, 2009.

⁶⁹² Cooper, 2005; Happel et al., 1995; McGrath et al., 2010; Ware et al., 2015.

⁶⁹³ Salter, 1988.

⁶⁹⁴ Ware et al., 2015.

responsibility within a supportive therapeutic setting. As an example, Lord and Willmot⁶⁹⁵ found that sex offenders who were previously in categorical denial but subsequently admitted to the offence all made this change during the course of a warm, supportive, empathic treatment setting.

As described above, there is a controversial, inconsistent relationship between denial and offending. Studies have found that denial increases risk for offending, decreases risk for offending, has no relationship with offending, or plays a different role for different groups of offenders. Nevertheless, when offenders are excluded from treatment programs due to their categorical denial, these offenders miss a vital opportunity to reduce or mitigate their risk for reoffending.⁶⁹⁶ This issue is further complicated by the fact that sex offenders have been found to benefit from treatment and successfully achieve various treatment goals while continuing to maintain their innocence. For instance, Beckett, Beech, Fisher, and Fordham⁶⁹⁷ conducted an extensive review of sex offender treatment effectiveness. They reported no differences in the rates of treatment success and attainment of treatment goals made by offenders that maintained their innocence compared to offenders that accepted responsibility. Maletsky,⁶⁹⁸ reviewing sex offender treatment effectiveness, also found no difference in attaining treatment benefits between offenders that deny and offenders that admit to their offences.

Cohen⁶⁹⁹ argued that the unconditional exclusion of all offenders that present with categorical denial is not legally appropriate, ethical, or therapeutically reasonable. Pointing to the fact that courts have reliably ruled that offenders, in particular sex offenders, cannot be penalized or punished on the sole basis that the offender denies having committed the offence, Cohen maintained that increased efforts should be put in to ensure that all sex offenders receive the appropriate treatment programs. According to Maletsky, “to deny a crime is natural; to deny treatment to those who deny it is a crime itself.”⁷⁰⁰ Accordingly, several authors have claimed that this approach to the treatment of sex offenders in categorical denial is unethical and not therapeutically viable.⁷⁰¹ These commentators call for the treatment of all offenders presenting with categorical denial, as it seems “more sensible, and certainly more ethical, to attempt to treat these offenders.”⁷⁰²

⁶⁹⁵ Lord & Willmot, 2004.

⁶⁹⁶ Ware et al., 2015.

⁶⁹⁷ Beckett et al., 1994.

⁶⁹⁸ Maletsky, 1996.

⁶⁹⁹ Cohen, 1995.

⁷⁰⁰ Maletsky, *supra* note 796, p. 4.

⁷⁰¹ Ware et al., 2015.

⁷⁰² Ware et al., 2015, p. 221.

C. TREATMENTS THAT ATTEMPT TO OVERCOME DENIAL

Two main approaches have been used in sex offender treatment programs in efforts to conquer categorical denial.⁷⁰³ The first approach involves requiring offenders to complete a pre-treatment module specifically designed to attempt to overcome denial prior to acceptance into a comprehensive treatment program. The second approach involves allowing offenders who maintain their innocence to enter treatment programs with other offenders and subsequently attempting to overcome denial during the program.

Pre-treatment programs designed specifically to target categorical denial rest on the basic assumption that treatment progress cannot be made unless denial is overcome and offenders accept responsibility.⁷⁰⁴ This approach presumes that offenders cannot engage in treatment while maintaining their innocence. For decades, the broad field of offender treatment, as well as specifically sex offender treatment, has been pervaded with the idea that acceptance of responsibility is necessary in order for an offender to engage in the treatment process, let alone gain any benefits from treatment.⁷⁰⁵ Nevertheless, some have found that reducing or eliminating denial is not associated with attaining other treatment goals.⁷⁰⁶

A number of different sex offender pre-treatment programs designed to overcome denial have been described in the literature. For instance, O'Donohue and Letourneau⁷⁰⁷ developed a brief seven session structured group sex offender pre-treatment program aimed at reducing denial. The cognitive-behavioural group program involved a combination of psychoeducation, cognitive restructuring, and victim empathy training. Seventeen sex offenders in categorical denial took part in the pre-treatment program. After the treatment, 11 of the offenders admitted to the offence. In addition, Brake and Shannon⁷⁰⁸ devised a pre-treatment program for sex offenders that categorically denied or denied substantial facets of their offences. The 21-session program was delivered over six months. The program focused on reframing denial, as well as developing accountability and victim empathy, then the offender's denial was directly confronted. Of the categorical deniers that began the program, 50% were expelled or otherwise failed to complete the program.

⁷⁰³ *Ibid.*

⁷⁰⁴ Levenson & Macgowan, 2004; Schneider & Wright, 2004.

⁷⁰⁵ Hapel et al., 1995; Seeler, Freeman, DiGuseppe, & Mitchell, 2014; Ware et al., 2015.

⁷⁰⁶ Beckett et al., 1994; Kennedy & Grubin, 1992.

⁷⁰⁷ O'Donohue & Letourneau, 1993.

⁷⁰⁸ Brake & Shannon, 1997.

Roberts and Baim⁷⁰⁹ also developed a program exclusively for sex offenders that categorically denied their offences. The program was based in a cognitive-behavioural approach and aimed to reduce denial sufficiently so as offenders could proceed to a more comprehensive treatment. Finally, Schlank and Shaw⁷¹⁰ developed a brief structured group program aimed at modifying denial in sex offenders. The program included relapse prevention and victim empathy training as components. It aimed to get offenders to accept full responsibility for their offences in order to enter a comprehensive treatment program. They found that 50% of the offenders accepted responsibility following the program. However, the study included only 10 offenders and the results are confounded by the fact that offenders were told that if they did not admit they would need to take part in and pay for plethysmograph and polygraph examinations.

Schneider and Wright⁷¹¹ highlighted that, although some pre-treatment programs have reported moderate rates of effectiveness at eliminating denial, the evidence in support of these programs is inadequate and complicated by serious limitations, including poor methodological designs and small sample sizes. Moreover, Ware et al.⁷¹² found that the support for these types of programs appeared to be mixed at best. They argue that the use of confrontation commonly used in pre-treatment programs targeting denial may explain the lack of effectiveness seen in some of these programs, as confrontation has been generally shown to reduce program effectiveness.

Other comprehensive treatment programs include both offenders that categorically deny their offences and offenders that admit to their offences in the same program.⁷¹³ One of the aims of these programs is fostering acceptance of responsibility and thus reducing or eliminating denial. This approach appears to be fairly common. In a survey of North American sex offender treatment programs, McGrath et al.⁷¹⁴ found that 37.5% of residential and 50.0% of community treatment programs in Canada combine deniers and admitters into the same group. In the United States, 46.6% of residential and 56.2% of community programs combine deniers and admitters.

Although this approach is common, there is limited data in the literature regarding the effectiveness of these programs.⁷¹⁵ Ware et al. argue that the lack of reports on these programs is likely due, in part, to the fact that offenders in denial are often expelled from the program or willingly withdraw from the program. Many have noted that

⁷⁰⁹ Roberts & Baim, 1999.

⁷¹⁰ Schlank & Shaw, 1996, 1997.

⁷¹¹ Schneider & Wright, 2004.

⁷¹² Ware et al. 2015.

⁷¹³ Vanhoeck & van Daele, 2011.

⁷¹⁴ McGrath et al., 2010.

⁷¹⁵ Ware et al., 2015.

sex offenders will frequently voluntarily discontinue treatment once the treatment aims at overcoming denial.⁷¹⁶ Moreover, these types of programs often target denial during the initial stage of treatment, sometimes involving an offence disclosure. However, as discussed above, challenging denial early in the therapeutic relationship is problematic, especially if the challenging is perceived as confrontational.⁷¹⁷

Several authors have argued in favour of combining deniers with admitters in sex offender treatment programs.⁷¹⁸ Some research has found that this treatment approach, combining categorical deniers alongside admitters in treatment programs, is able to lead to reductions in denial and equivalent treatment benefits as those offenders that admit to their offences. For instance, Beckett et al.⁷¹⁹ examined the effectiveness of seven community-based sex offender treatment programs that combined deniers and admitters. They found that categorical denial was not associated with treatment gains on a host of treatment targets, including various relapse prevention skills, victim empathy, social skills, and deviant sexual interests. That is, deniers and admitters improved equally across all domains, suggesting that denial does not interfere with attaining treatment goals.⁷²⁰

Additionally, Marshall⁷²¹ developed an open-ended group sex offender treatment program that combined offenders in categorical denial, offenders in partial denial, and offenders that admitted to their offences. Marshall's program was not developed to target denial or focus upon acceptance of responsibility. Instead the program focused on targeting established criminogenic factors. At the onset of treatment, 31% of the offenders maintained their innocence, while only 2% continued to maintain innocence after completing treatment. Following treatment, 85% of the offenders fully admitted to all facets of their offences.

Janicki argued that treatment focused on eliminating denial has serious moral and ethical implications. As one of the main functions of denial is thought to be the preservation and protection of an individual's self-image and self-esteem,⁷²² treatment that is overly focused on attempts to break through an individual's denial can have negative consequences on the offender.⁷²³ Breaking through denial when it is being used to protect and maintain a viable identity can result in the offender being

⁷¹⁶ Jones, 2009; Ware & Bright, 2008.

⁷¹⁷ Ware et al., 2015.

⁷¹⁸ Vanhoeck & van Daele, 2011.

⁷¹⁹ *Supra*, 1994.

⁷²⁰ Ware et al., 2015.

⁷²¹ Marshall, 1994.

⁷²² Craissati, 2015.

⁷²³ Janicki, 2015.

emotionally vulnerable. This may in fact lead to an increased risk of recidivism in the future.⁷²⁴ It has been posited that breaking through denial may actually impact the risk of recidivism in a negative manner.⁷²⁵ Accordingly, a balance needs to be achieved in order to “maximize the benefit to client well-being whilst minimizing any potential harm to the client or other.”⁷²⁶

Ware et al.⁷²⁷ highlighted the importance of considering the particular style and attitude a treatment provider used to approach offenders in categorical denial within a combined treatment program with admitters. Treatment providers often report that difficulties begin to appear soon after an offender that categorically denies enters treatment with other offenders.⁷²⁸ Mixing deniers and admitters in the same treatment program can have adverse effects on the treatment provider and other group members.⁷²⁹ This often results due to the offender being perceived as disruptive and defiant by the treatment provider and the other group members. As a result, the offender that maintains innocence is often expelled from the treatment program.

Marshall et al.⁷³⁰ argue that treatment failures of this sort may not be a result of the offender’s denial, but due to the treatment provider persistently and possibly aggressively attempting to overcome denial. As a result, the effectiveness of these programs is limited when attrition is high. Craissati⁷³¹ also highlighted that treatment providers might be mistaken in holding the assumption that offenders must make stable, internal attributions about their offending in order to successfully complete treatment and reduce their future risk. As well, an offender that fails to complete treatment, whether due to treatment dropout or expulsion, is more likely to recidivate compared to those offenders that successfully complete treatment.⁷³²

Treatment non-completion can result from a decision made by the offender or the treatment program.⁷³³ The distinction between treatment non-completion and expulsion is critical.⁷³⁴ For instance, Lockwood and Harris⁷³⁵ examined the differential effects of

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

⁷²⁶ Levenson, 2011, p. 355.

⁷²⁷ Ware et al, 2015.

⁷²⁸ Beyko & Wong, 2005; Cooper, 2005; Levenson, 2011; Schneider & Wright, 2004; Ware & Bright, 2008; Ware et al., 2015.

⁷²⁹ Blagden et al., 2011; Levenson & Macgowan, 2004.

⁷³⁰ Marshall et al., 2009.

⁷³¹ Craissati, 2015.

⁷³² Browne, Foreman, & Middleton, 1998; Marques, Day, Nelson, & West, 1994.

⁷³³ Lockwood & Harris, 2015.

⁷³⁴ Lockwood, 2012; Lockwood & Harris, 2015; Nunes & Cortoni, 2008; Nunes, Cortoni, & Serin, 2010.

⁷³⁵ Lockwood & Harris, 2015.

treatment non-completion and treatment expulsion on subsequent recidivism in a sample of over 5,500 juvenile offenders receiving community-based treatments. They found that treatment non-completion was related to drug and property offences, while treatment expulsion was related to violent recidivism.

D. TREATMENTS THAT DISREGARD DENIAL

Another approach to the treatment of sex offenders in categorical denial has been to offer them treatment that sets aside the issues of denial and acceptance of responsibility. Several researchers and practitioners have suggested that the best strategy in which to deal with offenders that maintain innocence is focussing treatment programs on attempts to reduce future reoffending, instead of focusing on past offending behaviour.⁷³⁶ Yalom warned to “never take away anything unless you have something better to offer. Beware of stripping a patient who can’t bear the chill of reality.”⁷³⁷ Blagden et al.⁷³⁸ stressed that treatment providers must be creative in order to deal with challenges and frustrations presented by an offender that maintains their innocence. As well, treatment providers should maintain a warm, supportive approach while attempting to foster prosocial attitudes and simultaneously eliminating an offender’s deficits.

Similarly, Janicki⁷³⁹ suggested that denial should be approached from a different perspective than traditionally taken in the criminal justice system. Instead of focusing on the encouraging offenders to passively take responsibility for their offences, treatment programs should take a more holistic approach in order to imbue the offender with the tools needed to desist from offending and achieve a satisfying life. Ware and Marshall⁷⁴⁰ recommend that treatment with offenders that categorically deny their offence should be similar to treatment with other offenders that admit to their offences. The main difference in treatment with deniers is that acceptance of responsibility is not a required as a part of treatment nor is it a treatment goal.

Marshall and colleagues⁷⁴¹ developed a treatment program specifically for sex offenders that categorically deny committing their offences. Their program appears to be the only comprehensive treatment program for offenders that maintain innocence that has been described in the literature.⁷⁴² Marshall et al.’s program, although designed

⁷³⁶ Blagden et al., 2014; Janicki, 2015; Marshall et al., 2001, 2011.

⁷³⁷ Yalom, 1991, p. 154.

⁷³⁸ Blagden et al, 2014.

⁷³⁹ Janicki, 2015.

⁷⁴⁰ Ware & Marshall, 2008.

⁷⁴¹ Marshall et al., 2001, 2011; Ware & Marshall, 2008.

⁷⁴² Ware et al., 2015.

specifically for offenders in categorical denial, did not attempt to challenge the offenders' denial. That is, the program did not target denial, attempt to overcome denial, or include acceptance of responsibility as a treatment target. Setting aside the issue of denial, the program aimed to target all the prominent known criminogenic factors in the same manner that is done in programs with offenders that admit to their offences.

Marshall et al.'s⁷⁴³ program was designed as a response to the many offenders that refuse to participate in treatment programs that aim to overcome their denial. In order to provide these offenders with access to treatments that are necessary in order to receive conditional release, the program was intended to offer offenders that maintained their innocence the opportunity to identify and target known criminogenic factors. The group program is based in positive psychology and includes a motivational approach all founded in the importance of the treatment providers' characteristics and the therapeutic relationship.

The program is offered to offenders as an opportunity to identify and work on problem areas in their lives that might have resulted in them being in a position to be accused and convicted of a sexual offence. The offenders are informed that the treatment may prevent them from ending up in a similar situation of being falsely accused of an offence in the future by acquiring various skills, attitudes, and behaviours to live a prosocial life. The program then simply involves adapting the content of a conventional sex offender program in order to target known criminogenic factors for sexual offending without requiring offenders to admit to their past offending.

Ware and Marshall⁷⁴⁴ describe their program as a "one step removed" approach that assists offenders without focusing on the index offence or admissions of guilt related to the index offence. Their treatment is centred upon assisting offenders to recognize "a series of attitudes, feelings, and behaviours that placed him at risk of being accused of offending."⁷⁴⁵ This focus allows treatment providers to identify criminogenic needs which can then be addressed during treatment in order to prevent future offending or accusations of offending.

Marshall et al.'s deniers' program has few differences from a conventional sex offender treatment program. The program begins with having the offender recount any problematic issues affecting the offender's life around the time of the alleged offences. This allows the treatment provider to identify individualized treatment goals to be addressed throughout the course of treatment. These treatment targets include factors

⁷⁴³ Marshall et al., 2001, 2011.

⁷⁴⁴ Ware & Marshall, 2008.

⁷⁴⁵ *Ibid*, p. 600.

such as emotional dysregulation, inadequate coping skills, poor social skills, and offence supportive attitudes. The factors targeted in Marshall et al.'s program have all shown a robust relationship with sexual offending and are generally accepted as the appropriate treatment targets.⁷⁴⁶

Several proponents have praised Marshall et al.'s program as a creative manner in which to deal with the various difficulties presented by offenders in categorical denial.⁷⁴⁷ However, other commentators have strongly criticized this approach. For instance, several authors have questioned whether a treatment program that doesn't target acceptance of responsibility can be effective or whether an offender completing Marshall et al.'s program can be said to have actually successfully completed treatment when they never accepted responsibility for their offences.⁷⁴⁸

Others have discussed how the treatment providers in Marshall et al.'s program may be seen as colluding with the offenders.⁷⁴⁹ Some commentators have pointed to various difficulties that may arise when a sex offender is allowed to maintain secrecy.⁷⁵⁰ Finally, it has been argued that treatment programs cannot be effective if they do not target empathy for the victim and Marshall et al.'s program may unintentionally harm the credibility of the victim.⁷⁵¹ Furthermore, Craissati, discussing programs designed specifically for offenders in denial, reported the evidence in support of these programs was limited, as "there is little published on the long-term outcomes of these groups, and little reported in the literature in the past ten years."⁷⁵²

⁷⁴⁶ Mann et al., 2010; Ware et al., 2015.

⁷⁴⁷ Langton et al., 2008; Laws, 2002; Yates, 2009.

⁷⁴⁸ Levenson, 2011; Schneider & Wright, 2004.

⁷⁴⁹ Levenson, 2011.

⁷⁵⁰ Frost, Ware, & Boer, 2009.

⁷⁵¹ Levenson, 2011; Vanhoeck & van Daele, 2011.

⁷⁵² Craissati, 2015, p. 402.

E. CLAIMS OF INNOCENCE IN OFFENDER TREATMENT

Based on a review of the relevant literature regarding treatment of offenders that maintain innocence for their offences, it is apparent that professionals have debated the appropriate manner with which to deal with these offenders for some time.⁷⁵³ Although three general approaches to the treatment of sex offenders in categorical denial have been employed in practice and discussed in the literature,⁷⁵⁴ treatments that exclude deniers or focus on challenging denial are inconsistent with law, policy, ethics, and science. Consistent with the views of some clinicians and academics,⁷⁵⁵ treatment programs should not exclude offenders that claim innocence from accessing services, nor should programs concentrate on targeting denial or acceptance of responsibility as a central aspect in treatment. Excluding offenders that maintain innocence from accessing treatment programs is inconsistent with the relevant law and policies directing the action of the correctional system in Canada. According to the *CCRA* (1992), the ultimate purpose of the correctional system in Canada is to “contribute to the maintenance of a just, peaceful and safe society by ... assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs” (section 3). The *CCRA* makes several further references to the responsibility of the CSC to provide rehabilitative services to offenders. For instance, the CSC is charged with providing “a range of programs designed to address the needs of offenders” (section 76) and offering “programs that contribute to the rehabilitation of offenders and their successfully reintegration into the community” (section 5(b)). CSC policies are also replete with references to the need to offer rehabilitative services to offenders.⁷⁵⁶

In addition, the available empirical evidence is clear that punitive based approaches are generally ineffective at reducing recidivism in offenders.⁷⁵⁷ Numerous meta-analyses have shown that incarceration, sanctions, and other punitive approaches are ineffective at reducing reoffending or may in fact increase rates of reoffending.⁷⁵⁸ In contrast, the evidence is clear that rehabilitative services are generally effective at reducing recidivism.⁷⁵⁹ This finding has been confirmed by numerous meta-analyses using a variety of methodological and statistical analyses across a wide range of studies and contexts.⁷⁶⁰

⁷⁵³ Levenson, 2011; Ware et al., 2015; Yates, 2009.

⁷⁵⁴ Cooper, 2005; Ware et al., 2015.

⁷⁵⁵ Bladgen et al., 2014; Janicki, 2015; Marshall et al., 2001.

⁷⁵⁶ CSC CD 700, 2017; CSC CD 726-2, 2017.

⁷⁵⁷ Andrews & Bonta, 2010b; Kim et al., 2013; Lipsey & Cullen, 2007.

⁷⁵⁸ Aos et al., 2001, 2006; Latimer et al., 2003; MacKenzie, Wilson, & Kider, 2001; Smith et al., 2002.

⁷⁵⁹ Andrews & Bonta, 2010b; Kim et al., 2013; Lipsey & Cullen, 2007; Smith et al., 2009.

⁷⁶⁰ Andrews & Bonta, 2010b; Gendreau, Goggin et al., 2006; Lipsey & Cullen, 2007; Smith et al., 2009.

Consequently, it is evident that offenders that claim innocence for an offence should not be excluded from accessing treatment programs. Whether or not an offender accepts responsibility for an offence should not be used to exclude certain offenders from accessing treatment programs that are designed to reduce their risk of reoffending. Offenders that claim innocence are often deemed to pose an undue risk by the PBC and remain incarcerated past their eligible parole dates. These offenders are in need of rehabilitative services in order to reduce their risk of offending and subsequently allow them to access parole. In addition to offering rehabilitative services to offenders that claim innocence, denial or claims of innocence should not be used to exclude, expel or otherwise terminate an offender's participation in a treatment program. One of the most prominent barriers to treatment is treatment access and attrition.⁷⁶¹ In particular, treatment noncompletion is a significant concern for service providers, offenders, and the general public.⁷⁶² Offenders should not be expelled from treatment programs due to a failure to overcome their denial.

Offenders that claim innocence should be provided with the same treatment opportunities as offenders that admit to their offences. Moreover, treatment programs should be offered according to core principles of effective correctional intervention.⁷⁶³ High risk offenders should be provided with intensive services and low-risk offenders should be provided minimal services. Treatment programs should target criminogenic needs and programs should be reactive to specific responsivity issues.

⁷⁶¹ Morgan et al., 2013; Olver et al., 2011.

⁷⁶² Barrett et al., 2008; Olver et al., 2011; Wormith & Olver, 2002.

⁷⁶³ Andrews & Bonta, 2010b.

F. RISK-NEED-RESPONSIVITY MODEL OF CORRECTIONAL INTERVENTION

Regardless of whether an offender claims innocence or accepts responsibility, treatment programs should operate according to the Risk-Need-Responsivity model of correctional intervention (RNR).⁷⁶⁴ The RNR model was first introduced in 1990. The RNR model's core principles of effective correctional intervention have been researched extensively and the model has been expanded and revised based on empirical findings in the field.

The RNR model describes several principles for effective correctional interventions.⁷⁶⁵ These principles are evidence-based as they were derived based on systematic reviews of the empirical literature in the field. The RNR model explicates principles for guiding the professional practice of correctional intervention. The principles pertain to several fundamental issues with respect to providing rehabilitative services.

The *human service principle* asserts, "introduce human service into the justice context."⁷⁶⁶ Put simply, this principle asserts that the criminal justice and correctional systems cannot rely on punitive-based sanctions in order to reduce offending. The legal and correctional theories supporting punishment-based approaches, such as deterrence or just deserts, must be replaced with human services. Human services in this context refer to correctional interventions that operate under a rehabilitation model. Rehabilitative services, involving clinical and social services, are the major drivers for addressing criminal behaviour. Effective correctional interventions (i.e., rehabilitative services) must be utilized and implemented according to the other core RNR principles.

The *risk principle* states that the intensity of services should be commensurate with the individual's risk level.⁷⁶⁷ Treatment intensity, encompassing the frequency, duration, and dosage of services, must be matched with offender risk level. Generally speaking, high-risk individuals should receive high intensity services and low risk individuals should receive minimal services. Thus, services should focus on moderate and high-risk offenders. As much as possible, contact between low-risk offenders and high-risk offenders should also be minimized or avoided. The risk principle, thus, speaks to who should be targeted with services and the intensity of the services offered to different groups of offenders based on the risk level of the given offender. Additionally, the risk principle links correctional treatment (i.e., management) to the assessment of

⁷⁶⁴ Andrews & Bonta, 2010a, 2010b; Andrews, Bonta et al., 1990; Andrews, Zinger et al., 1990.

⁷⁶⁵ Andrews, 2012, 2016; Andrews & Bonta, 2010a, 2010b; Andrews, Bonta et al., 1990; Andrews & Dowden, 2006; Dowden & Andrews, 2000.

⁷⁶⁶ Andrews & Bonta, 2010b, p. 46.

⁷⁶⁷ Andrews & Bonta, 2010b.

criminal behaviour. Professionals must be able to accurately determine an offender's risk level in order to determine the intensity of services that are appropriate in any given case. Thus, offenders must undergo a comprehensive risk assessment in order to determine interindividual differences in risk level and assign them to the appropriate type(s) and intensity of services. The matching of service intensity with risk level provides a bridge between assessment and treatment.

The *need principle* states that treatment services must target criminogenic needs.⁷⁶⁸ Offenders, especially high-risk offenders, have various needs, some of these are criminogenic and others non-criminogenic. A criminogenic need is a dynamic risk factor that is functionally related to criminal behaviour (i.e., a causal risk factor of criminal behaviour). That is, a criminogenic need is a characteristic that is capable of change over time and that when changed, results in a change in the likelihood of criminal behaviour. A non-criminogenic need is also capable of change but it is not associated with recidivism. Therefore, criminogenic needs are the targets of change for correctional interventions. If correctional interventions intend to reduce reoffending upon release from custody or supervision, they must target factors that are functionally related to criminal behaviour (i.e., criminogenic needs). The need principle, thus, speaks to what should be targeted with services. Thus, as with the risk principle, the need principle calls for a comprehensive assessment of the individual's risk. The focus here is upon identifying the most important criminogenic needs of a given offender in order to provide the most appropriate or optimal treatment services. Several prominent criminogenic needs have been identified for general offenders, including antisocial attitudes, antisocial cognitions, antisocial peers, family or marital problems, employment problems, problems with leisure/recreation, and substance use problems. These factors must be identified in order to employ the most appropriate and effective services. As well, this principle calls for the routine reassessment over time in order to determine whether change has been seen in the criminogenic factors and whether the treatment plan needs adjustments.

The *general responsivity principle* states that services should be based on cognitive-behavioural or cognitive social learning theories.⁷⁶⁹ Strategies based in this framework are the most effective and powerful approaches to promoting change. Within the general cognitive-behavioural approach, specific techniques that should be employed include "modeling, reinforcement, role playing, skill building, modification of thoughts and emotions through cognitive restructuring, and practicing new, low-risk

⁷⁶⁸ *Ibid.*

⁷⁶⁹ Andrews & Bonta, 2010b.

alternative behaviors over and over again.”⁷⁷⁰ All rehabilitative services should operate from a cognitive-behavioural or social learning perspective.

The *specific responsivity principle* states that the style and mode of a given service must be adapted based on specific, relevant characteristics of the offender.⁷⁷¹ Offender characteristics must be considered in the selection and administration of services. Correctional interventions must be provided in a manner that is sensitive to the individual’s age, gender, ethnicity, and cultural beliefs. Additional characteristics, such as the offender’s motivations, personality, and cognitive skills, must also be considered in order to adapt the style of services to the given offender. An offender’s learning ability, verbal intelligence, and interpersonal sensitivity are also relevant considerations. As an example, an offender who cannot read will require several modifications to any treatment that involves worksheets or questionnaires to be completed. Alternatively, a highly anxious offender may not do well in a group-based therapy or with highly confrontational treatment approaches. The responsivity principles, thus, involve using strategies that have been shown maximally effective generally and then individualizing the services according to characteristics of the particular individual.

The core principles of effective correctional intervention, therefore, address the who, what, and how of providing rehabilitative services.⁷⁷² Emphasizing the need for rehabilitative services if desistance is the ultimate goal, these core principles delineate who should receive services (high risk offenders), what these services should target (criminogenic needs), and how they should be targeted (adaptable cognitive-behavioural, social learning approaches). This evidence-based model has been subjected to numerous empirical investigations supporting its use.⁷⁷³

The core principles of effectiveness correctional intervention have been examined across numerous primary studies and dozens of meta-analyses.⁷⁷⁴ The empirical support for these principles has been reviewed extensively.⁷⁷⁵ For instance, Andrews, Zinger et al.⁷⁷⁶ conducted the first meta-analysis to investigate the principles of effective correctional intervention. They analyzed the data from 80 studies providing a total of 154 treatment comparisons. The authors classified each treatment as

⁷⁷⁰ *Ibid.*, p. 50.

⁷⁷¹ *Ibid.*

⁷⁷² *Ibid.*

⁷⁷³ Andrews & Bonta, 2010b; Morgan et al., 2013; Gendreau, Goggin et al., 2006; Gendreau, Smith et al., 2006; Smith et al., 2009.

⁷⁷⁴ Andrews & Bonta, 2010b; Smith et al., 2009.

⁷⁷⁵ Andrews & Bonta, 2010b; Gendreau, Goggin et al., 2006; Gendreau, Smith et al., 2006; Smith et al., 2009.

⁷⁷⁶ Andrews, Zinger et al., 1990.

appropriate, inappropriate, or unspecified based on their adherence to the risk, need, and responsivity principles. Appropriate treatments were those that adhered to at least one the principles of effective intervention. Due to the lack of detail provided in many of the primary studies, studies were often classified as appropriate based on their use of cognitive-behavioural services, with few studies provided sufficient detail to be classified based on the risk and need principles.

Andrews and colleagues found that appropriate treatments resulted in substantially larger reduction in recidivism ($\Phi = 0.30$, $k = 54$) compared to unspecified services ($\Phi = 0.13$, $k = 32$), inappropriate services ($\Phi = -0.06$, $k = 38$), and criminal sanctions ($\Phi = -0.07$, $k = 30$). That is, appropriate services resulted in a reduction in recidivism of about 30%, while inappropriate services resulted in an increase in recidivism of about 6%. Unspecified services were also found to be more effective than inappropriate services and criminal sanctions. The authors also compared behavioural to non-behavioural treatments as a direct tests of the general responsivity principle. Behavioural treatments were found to be far more effective than non-behavioural treatments ($\Phi = 0.29$, $k = 41$ for behavioural treatments; $\Phi = 0.04$, $k = 113$ for non-behavioural treatments). Finally, this pattern of results was found to be fairly consistent for both juveniles and adults, in community and institutional settings, across methodologically weaker and stronger studies, and studies reported before and after 1980.

After this landmark publication introduced the RNR model and evidence-based principles to correctional intervention, the empirical literature supporting these principles has grown substantially. Numerous independent studies have subsequently been conducted and several meta-analyses have synthesized the support for the RNR model.

Various CSC policies indicate their adoption of the core principles of effective correctional intervention or RNR model.⁷⁷⁷ General policies highlight the need for supervision to be “based on risk, need, responsivity, and professional judgment,”⁷⁷⁸ while more specific policies make reference to each of the core principles of effective correctional intervention.⁷⁷⁹ For instance, reference is made to the risk principle, as correctional programs will “have an intensity and continuum of care related to level of risk.”⁷⁸⁰ Reference is also made to the need principles, as programs should “address factors that have been empirically demonstrated to be linked to criminal behaviour.”⁷⁸¹

⁷⁷⁷ CSC CD 700, 2017.

⁷⁷⁸ CSC CD 700, 2017, section 10a.

⁷⁷⁹ CSC CD 726-1, 2017.

⁷⁸⁰ CSC CD 726-1, 2017, section 2.

⁷⁸¹ *Ibid.*

Finally, reference is made to the general and specific responsivity principles, as programs are to “be based on empirically validated models of behavioural changes,” and “include methods that are responsive to each offenders specific responsivity factors.”⁷⁸²

These same principles of effective correctional intervention should be employed when dealing with offenders who maintain innocence for their offences. If offenders who maintain innocence are judged to be a high risk for reoffending and denied parole, then these offenders should be a priority for treatment programs according to the risk principle. High-risk offenders should be the most prioritized group for accessing rehabilitative services and they should receive the most intensive services. Moreover, treatment programs should not target denial as a treatment goal. That is, treatment programs should target criminogenic needs (i.e., dynamic risk factors) that have shown the strongest and most consistent empirical relationship with offending. Treatment programs that target offender needs that have little to no association with criminal behaviour (i.e., factors that are non-criminogenic) have been shown to be generally ineffectual at reducing recidivism.⁷⁸³

Overall, the empirical evidence has failed to show a consistent relationship between denial including categorical denial and violent, sexual, or general recidivism.⁷⁸⁴ That is, some studies have found that claims of innocence are associated with a reduction in recidivism,⁷⁸⁵ whereas others have found denial may lower risk in high-risk offenders⁷⁸⁶ and increase risk in low-risk offenders.⁷⁸⁷ Overall, the evidence is clear that denial is not a major risk factor for violent, sexual, or general offending. Furthermore, treatment programs have been found to be effective when targeting criminogenic needs without attempting to overcome denial.⁷⁸⁸ As a result, denial is not a criminogenic need that should be the target of correctional intervention according to the RNR model.⁷⁸⁹

Treatment programs and treatment providers should view categorical denial, or claims of innocence, as a responsivity issue.⁷⁹⁰ Andrews and Bonta describe responsivity factors as “characteristics of the individual offenders, such as their

⁷⁸²*Ibid.*

⁷⁸³ Andrews & Bonta, 2010b; Andrews & Dowden, 2006; Gendreau, 1996; Smith et al., 2009.

⁷⁸⁴ Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004, 2005; Harkins et al., 2010, 2015; Ware et al., 2015.

⁷⁸⁵ Barbaree & Marshall, 1988; Harkins et al., 2010, 2015.

⁷⁸⁶ Harkins et al., 2010; Nunes et al., 2007.

⁷⁸⁷ Nunes et al., 2007; Harkins et al., 2010.

⁷⁸⁸ Beckett et al., 1994; Marshall, 2001.

⁷⁸⁹ Andrews & Bonta, 2010b.

⁷⁹⁰ Craissati, 2015; Endres & Breuer, 2014; Olver et al., 2011.

strengths, motivations, preferences, personality, age, gender, ethnicity, cultural identifications, and other factors.”⁷⁹¹ They specifically discuss amenability to and motivation for treatment as important responsivity factors that should influence the style and mode of treatment programs. In line with these views, several authors have discussed denial as a responsivity issue. For instance, according to Craissati, “barriers to treatment for sex offenders in total denial is essentially a responsivity issue.”⁷⁹² As well, Endres and Breuer state that it is “appropriate to understand denial not as a risk factor but as a responsivity issue.”⁷⁹³ Relatedly, “whether a client is hostile and disruptive, unmotivated, or low cognitive functioning, we argue that there are provisions that service providers can make to promote client retention.”⁷⁹⁴

Accordingly, offenders that claim innocence should be provided with services according to the principles of effective correctional intervention. These offenders should be offered rehabilitative services that match their risk levels, target criminogenic needs, and adapt the treatment program according to their categorical denial as a responsivity issue. Treatment of high-risk, high-need offenders typically requires the consideration of specific responsivity issues, such as low motivation, denial, or disruptive behaviours.⁷⁹⁵ Offenders presenting with denial, low treatment motivation, or poor treatment engagement can be especially challenging. Responsivity issues of this sort present difficulties for treatment professionals.

Instead of excluding categorical deniers for treatment programs, extra effort should be expended to engage high-risk offenders that exhibit denial into treatment programs. Jung and Nunes argued based on the principles of effective correctional intervention that “every effort should be made to deliver treatment to higher risk sex offenders exhibiting high levels of denial and minimization.”⁷⁹⁶ These offenders not only require intensive correctional programming but also require intensive efforts to ensure that these offenders are engaged in the treatment process. Finally, it is imperative that correctional treatment providers be familiar with denial. As Andrews and Bonta stated,⁷⁹⁷ it is imperative that “managers who accept the notion that RNR-based treatment is the more promising route to reduced recidivism need to ensure that staff is properly selected, trained, supervised and resourced to deliver the services.”

⁷⁹¹ Andrews & Bonta, 2010b, p. 46.

⁷⁹² Craissati, 2015, p. 402.

⁷⁹³ Endres and Breuer, 2014, p. 263.

⁷⁹⁴ Olver et al., 2011, p. 16.

⁷⁹⁵ *Ibid.*

⁷⁹⁶ Jung and Nunes, 2012, p. 494.

⁷⁹⁷ Andrews and Bonta, 2010b, at p.50.

X. RECENT DEVELOPMENTS

Since the preliminary work for *Preventing Parole* began, the federal Liberals won a majority government. Hope was high among many individuals that positive changes would be made in the criminal justice system. But has anything changed for the *Preventing Parole* inmates? Below are several updates:

A. GERRY

During the fall of 2017, the PBC heard Gerry's application for full parole. He had already been released on day parole in 2016, 4.5 years after he was eligible. Getting to that point was not an easy process, as conveyed through Gerry's case examples throughout *Preventing Parole*. Nonetheless, he has fared better than others over the years.

Gerry has been eligible for full parole since July, 2015. However, in 2017 the PBC did not grant him full parole, despite the fact that his CSC Case Management Team (CMT) supported him for full parole. In its 2017 decision, the PBC stated:

With regard to accountability your file indicates that you continue to deny committing the index offence but have been willing to participate in programs for which you have received positive reports. Your CMT indicates that you accept responsibility for the circumstances you state resulted in the victim's death. Your CMT believes that you genuinely express victim empathy and remorse for your actions. They indicate that your behaviour under community supervision has been positive. They remark that you are very committed to relapse prevention and to following your correctional plan and the special conditions imposed on your day parole.

The Board finds that you have completed programming and have reduced your dynamic risk rating. The most recent psychological report suggests your risk to re-offend violently is low to moderate, but would increase should you engage in substance abuse. You have attended support groups and trauma intervention in the community. You are now working fulltime. You have completed a number of overnight passes to the family home. You have complied and are said to be fully committed to your correctional plan and to meeting your parole obligations. On day parole continued you will continue to reside at the [...] where you now live....

The Board finds this a difficult case. You have continued to deny the murder that you were convicted of committing. You exercised your right to appeal the Court's decision but your appeal failed. The impact of the victim's death was traumatic for [...] family and friends; they continue to suffer psychologically and are not in favour of a full parole release particularly given your continued claims of innocence.

While you state you accept responsibility you say you are responsible for bringing the true murderer to the victim. While you did confess to the murder you later recanted your confession indicating it was made under duress. These factors point to the need for a fulsome exploration with you in a panel hearing.

The PBC then granted an extension of Gerry's day parole but did not grant full parole. Rather, it ordered a panel hearing regarding full parole. Even past his eligibility date, with his correctional plan completed, his risk low, and his CMT's support, the PBC found Gerry's to be a "difficult case." The PBC appears to be stymied, because Gerry maintains innocence. As of July, 2018, he remains on day parole, successfully working in a retail outlet.

B. MR. RICHARDS

In June, 2017, after Mr. Richards was found with three pouches of tobacco in a CSC van following an ETA to his family's residence, he was immediately transferred back to medium security from minimum security and his ETAs were automatically cancelled. Mr. Richards was not transferred back to minimum security until late fall, 2017. Following coverage of his innocence claim by *The Vancouver Sun*⁷⁹⁸, Mr. Richards's ETAs were re-approved by his institution's warden in September, 2018, more than one year after the tobacco incident. However, at the time of this writing in October, 2018, no new ETAs have yet to take place.

C. JAMES

In 2016, James was granted personal development ETAs. He was granted administrative ETAs in 2017, which were renewed in 2018. He has completed numerous successful ETAs during the past two years. However, his current IPO (who took over from the IPO who assisted in facilitating the ETAs) does not support him for UTAs.

⁷⁹⁸ See, for instance, Robinson, Matt. "Miscarriage of justice? Junk science, hypnotized witnesses, faulty DNA evidence and a jailhouse informant put Duray Richards in jail." *The Vancouver Sun* (last updated July 27, 2018) < https://vancouversun.com/news/local-news/junk-science-hypnotized-witnesses-faulty-dna-evidence-and-a-jailhouse-informant-put-duray-richards-in-jail?video_autoplay=true>.

According to James, his current IPO stated, “Well, you’re not admitting guilt so you’ve got no support.”

D. WESLEY

Wesley has successfully completed more than 300 ETAs but has still not been granted UTAs. The PBC was supposed to hear Wesley’s application for UTAs and day parole during the spring of 2018. However, due to an administrative error by his IPO, that hearing did not occur. His hearing for UTAs is now supposed to be taking place during the fall of 2018. Wesley has had three or four switches in his IPO over the past two years. He believes this is because once an IPO supports him, “they get tossed.”

E. MR. TALLIO

On November 30, 2016, lawyers Mr. Arbogast and Ms. Barsky filed Mr. Tallio’s Notice of Application for an extension of time to file his appeal in the Court of Appeal for B.C. National media outlets began reporting on his case in May, 2017, including *The Globe and Mail*, APTN, CBC.ca, CBC TV, CBC radio, Postmedia (particularly *The Vancouver Sun*), and others. Ms. Barsky discussed *Preventing Parole*’s catch-22 situation in numerous media interviews.⁷⁹⁹

It does appear that the attention given to Mr. Tallio’s case and to *Preventing Parole* resulted in positive change for his treatment in prison and his progression through his correctional plan. Further, Mr. Tallio had an extremely dedicated IPO, Bree Marshall-Sehra, who worked closely with him, Ms. Barsky, and Mr. Tallio’s new program facilitator. Mr. Tallio’s new program facilitator directed his program to focus on other factors such as the childhood sexual abuse he had suffered. Mr. Tallio was finally able to complete the High Intensity Sex Offender Program, gaining him the support of his CMT. Further, as part of *Preventing Parole*, Mr. Tallio was assessed by an independent forensic psychologist, Dr. Ley, for the first time during his incarceration. He had a new

⁷⁹⁹ See, for instance, Robinson, Matt & Fumano, Dan. “Catch-22: Appeal highlights effect of maintaining innocence on getting parole, lawyer says.” *The Vancouver Sun* (last updated January 18, 2018) <<https://vancouversun.com/news/local-news/catch-22-appeal-highlights-effect-of-maintaining-innocence-on-getting-parole-lawyer-says>>; Fumano, Dan & Robinson, Matt. “B.C. murder: Lawyers say man who has spent 34 years in prison is innocent,” *The Vancouver Sun* (last updated, July 13, 2017) <<https://vancouversun.com/news/local-news/b-c-murder-lawyers-say-man-who-has-spent-34-years-in-prison-is-innocent>>; CBC Daybreak North, “Lawyer Rachel Barsky representing a Bella Coola man who’s been in prison for 34 years claiming innocence” (May 19, 2017) <<http://www.cbc.ca/listen/shows/daybreak-north/segment/12682779>>.

violence risk assessment conducted by a CSC psychologist also. As well, CSC arranged for Mr. Tallio to begin therapy with a counsellor.

In August, 2017, Mr. Tallio was approved to transfer to a minimum security institution for the first time in his then-34.5 year incarceration. And on December 28, 2017, Mr. Tallio had a hearing for ETAs and UTAs before the PBC. The two PBC members asked Mr. Tallio about the sexual abuse he suffered at the hands of his uncle, Cyril Tallio. They asked him about his father's death; his 1980 suicide attempt. They asked him what he remembered of the day of the index offence, April 22-23, 1983. They said that the police said Mr. Tallio he confessed to killing the victim. "Is that not true?" "No," Mr. Tallio responded. "Why did you plead guilty?" they asked him. "I didn't," Mr. Tallio said. His IPO clarified that Mr. Tallio's lawyer entered a guilty plea on his behalf; "he feels he didn't plead guilty, that's where the discrepancy is."

The PBC approved Mr. Tallio's application for ETAs on Dec. 28, 2017, but did not grant him UTAs, advising him to do the ETAs first and then come back with another plan for UTAs later.

After much delay, requiring the involvement of the office of the Correctional Investigator of Canada, Mr. Tallio was transferred to minimum security on February 28, 2018. His first ETA, to his adopted sister's residence in a B.C. suburb, took place in June, 2018. He enjoys spending time with his adopted family, "eating good meals" and playing with their dogs.

F. ELIZABETH

Elizabeth has also experienced positive developments recently. Being transferred to a new IPO whom Elizabeth feels truly listens to her, had significant effects for her. Elizabeth has also been assisted by prison lawyer Eric Purtzki, working pro bono. New violence risk assessments were conducted on Elizabeth, by independent forensic psychologist Dr. Ley and by a CSC psychologist, both of whom found that Elizabeth did not pose undue risk to society. During the spring of 2018, the PBC granted Elizabeth's application for day parole, 11 years after her eligibility date for day parole. Full parole, for which she was eligible in 2010, still eludes her.

XI. JURISPRUDENCE

For those inmates maintaining innocence who do not have national media outlets tracking their cases, who do not have supportive CSC staff members, and/or who do not have pro bono prison lawyers, positive developments may never occur, unless policy and legislative changes are enacted, or unless this catch-22 dilemma—including the problematic provisions of the *CCRA*—is challenged in court.

In Canada, it appears there has never been a case in which refusal to grant parole was challenged and/or considered primarily on the grounds that the applicant had maintained his or her innocence. Rarely has the issue even been touched upon in domestic jurisprudence. It arose briefly in *R v Caron*, 2013 BCCA 475, in Justice Saunders' finding that the appellant, Mr. Caron, did not have to take programs requiring him to speak to his offence. Justice Saunders found that because Mr. Caron denied the offence, he could not meet this term of his probation order while his conviction appeal was outstanding. She suspended this condition of his probation. In very few cases, for instance, *Van Boeyen v Canada (Attorney General)*, 2013 FC 1175, refusal to grant parole due to the inmate maintaining his or her innocence was listed as one ground for judicial review of a PBC decision. However, the federal court did not list the issue of Mr. Van Boeyen maintaining his innocence as one that it considered. The federal court found that the PBC's decision to deny Mr. Van Boeyen parole was reasonable.

Re: Swanigan, a 2015 judgement issued in California, is promising, though international jurisprudence is of course not binding on Canada.⁸⁰⁰ Inmate Fred Swanigan, who was incarcerated for 35 years by that time, brought a petition for habeas corpus in the Court of Appeal of the State of California based *entirely* on the issue that the Parole Board continued to deny him parole solely due to his innocence claim.⁸⁰¹ Mr. Swanigan's parole eligibility date was September 15, 1997. He has been denied parole 11 times, despite being a "model prisoner" and scoring as the lowest risk for recidivism. The Court analyzed the issue in depth. The Court found that Mr. Swanigan does not pose an unreasonable risk to public safety, contrary to the Parole Board's contentions.

⁸⁰⁰ *Re: Swanigan*, 240 Cal. App. 4th 1; 192 Cal. Rptr. 3d 172; 2015 Cal. App.

⁸⁰¹ Several other inmates in the U.S. who maintain innocence have been released recently without litigation, though this still appears to be extremely rare. See, for instance, Clifford, Stephanie. "A Claim of Innocence is No Longer a Roadblock to Parole," (November 12, 2014), <https://www.nytimes.com/2014/11/13/nyregion/a-claim-of-innocence-is-no-longer-a-roadblock-to-parole.html>, which discusses the cases of Freddie Cox, Sundhe Moses, and Robert Hill, all in New York. See also, The Opinion Pages, Room for Debate: Parole When Innocence is Claimed," *The New York Times* (November 13, 2014) <<https://www.nytimes.com/roomfordebate/2014/11/13/parole-when-innocence-is-claimed>>.

The Parole Board claimed he lacked insight because he refused to admit responsibility for the offence.

The Court found that the Parole Board was not permitted to rely on Mr. Swanigan's refusal to admit guilt to conclude that he did not have insight or show remorse. On pages 14, 17, 20, and 22, the Court cited the California Penal Code, s. 5011(b), which states that the Parole Board "shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed."⁸⁰²

The Court concluded that "the record lacks some evidence—even a 'modicum' of permissibly considered evidence—to support the denial of parole."⁸⁰³ The Court granted Mr. Swanigan's petition for a writ of habeas corpus and vacated the Parole Board's decision denying parole. The Court ordered the Parole Board to conduct a new parole hearing, consistent with due process and with its decision. A new parole hearing—his 13th—was held in 2016 and Mr. Swanigan was released from prison in November, 2017.⁸⁰⁴

⁸⁰² California Legislative Information, (Part 3, Title 7, Chapter 1: The Department of Corrections and Rehabilitation)
<https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=7.&part=3.&chapter=1.&article=>>.

⁸⁰³ *Swanigan*, *supra* at p. 22.

⁸⁰⁴ June 8, 2018 email correspondence between Ms. Barsky and *Forensic Magazine* reporter Seth Augenstein, See also, Augenstein, Seth. "Parole Granted: Convicted Murdered Maintains Innocence, 3 Decades Later," *Forensics Magazine* (April 6, 2016)
<<https://www.forensicmag.com/article/2016/04/parole-granted-convicted-murderer-maintains-innocence-3-decades-later>>.

XII. RECOMMENDATIONS

A recurring theme throughout *Preventing Parole* has been the lack of consistency amongst inmates' experiences and treatments by the CSC and PBC. An inmate's ability to enter and complete programs, to cascade through security classifications, to obtain ETAs, UTAs, and parole, et cetera, is absolutely affected when they maintain innocence. However, the treatment that each *Preventing Parole* participant has had throughout the decades of their incarcerations varies, depending on who their CMT is, whether they have other factors to address besides their index offence, which CSC psychologist conducts their violence risk assessment, the profile of their case, the involvement of counsel, and so on.

Former PBC Vice Chair Stuart Whitley agrees. In an interview with Ms. Barsky, he said, "You can't run a railroad like that, ad hoc—there needs to be some structure if for no other reason that to avoid perpetuating an injustice." He noted that although the mandate of the PBC is not to go behind the Warrant of Committal—that the PBC must accept the court's finding of an inmate's guilt—there is a moral obligation to ensure that wrongful convictions have not occurred. "I don't think it's right that someone comes to the justice system claiming to be wrongfully convicted and no one looks at it. It's not okay to say what is currently done, which is saying, 'It's not our problem.'"

There are many factors which intertwine with the issue on a broader scale, such as the lack of resources for the CSC overall and the need for greater independence of the PBC (for instance, separate legislation should govern the PBC rather than legislation governing both the CSC and PBC together). However we will deal only with the issue on a more narrow scale, with recommendations below. The aim of the following recommendations is to implement a level of consistency and structure, to ensure that individuals who maintain innocence are not penalized for doing so, when the evidence is clear that denial is not a major risk factor for violent, sexual or general offending. An inmate's innocence claim has not been shown to have a consistent relationship with their risk to society; therefore risk assessment in CSC must change to reflect this. It is time that this Catch 22 problem be addressed in Canada.

- 1) A section(s) regarding inmates who deny their index offence must be added to the CCRA. The legislation must convey the following facts:

a) The CSC and PBC “shall not require an admission of guilt to any crime for which an inmate was committed.”⁸⁰⁵

b) In determining CSC program entry and completion, treatment, security classification, employment (including pay levels), and violence risk, the fact that someone is in denial of their offence will not prevent them from progressing. It is a prisoner’s commitment to rehabilitation, good behaviour and willingness to use their time in custody constructively which should determine whether they meet required standards.⁸⁰⁶

2) All sections of the CCRA, Commissioner’s Directives, or other CSC and/or PBC policies and protocols must be amended to reflect the fact that an inmate’s innocence claim—therefore, their level of responsibility and accountability—does not correlate with the risk they pose to society. Such sections (i.e., ss. 4, 101 of the CCRA, CD 001, CD 710-1, etc.) must be amended to remove the requirement of responsibility and accountability, or amended to clearly state that taking responsibility and accountability does not pertain to the index offence itself.

3) Structured professional judgment is to be utilized to assess inmates’ risk to society. SPJ should be used rather than the actuarial approach and/or unstructured clinical judgment for inmates who maintain innocence.

4) Extra effort should be expended to engage high-risk inmates who exhibit denial into treatment programs.

5) Correctional treatment providers and PBC board members must be made familiar with denial and the reasons why an inmate may deny guilt, including the possibility of factual innocence and wrongful convictions.

6) Until an independent body to review suspected miscarriages of justice exists in Canada, cases in which inmates maintain factual innocence—and especially those who maintain innocence past their eligibility for temporary release and/or parole—must be referred by the CSC and/or PBC to an organization such as Innocence Canada, the Innocence Projects at the University of British Columbia,

⁸⁰⁵ This language reflects a variation of the language utilized in s. 5011(b) of the California Penal Code, as it is not only setting a parole date that is affected by an inmate’s denial of guilt.

⁸⁰⁶ This language was informed by the UK’s Prison Service Instructions 2013: Incentives and earned privileged (prison management scheme for England and Wales), which entered into operation on November 1, 2013: <<https://www.justice.gov.uk/offenders/psis/prison-service-instructions-2013>>.

Osgoode Hall (York University), and McGill University (or other such groups) to review.

7) An independent body⁸⁰⁷—an extra-governmental agency to examine suspected miscarriages of justice, similar to the UK's Criminal Cases Review Commission (CCRC),⁸⁰⁸ should be formed in Canada. The CCRC has special legal powers to obtain information from the Crown, the police, social services, the National Health Service, and other bodies. The CCRC has approximately 90 staff members, including about 40 case reviewers. It is integral that an independent body be formed so that individuals who do not have their own professional interests at stake review innocence claims.

Implementing such a body would not be inexpensive. However, it may be less costly, in financial terms, than the continual incarceration of individuals who do not in fact pose risk to society and who may be awarded hefty compensation sums following lawsuits. More importantly, by not investing funds into addressing these pressing issues, the injustices of unnecessarily lengthy imprisonment will be perpetuated. In the absence of such an investment, we are sending the message to potentially wrongly convicted people that no one cares—a sentiment they already fear.

With evidence that their release would pose minimal undue risk to society, this result not only unnecessarily utilizes taxpayer money, but also exacerbates what is already a growing concern: in some cases, the criminal justice system has convicted an innocent individual and then imprisoned him or her for decades longer than his or her factually guilty fellow inmates.

⁸⁰⁷ For instance, the establishment of such a body was been recommended by the Royal Commission on the Donald Marshall Jr., Prosecution back in 1989 (see p 25, Summary of Recommendations, Recommendation 1: https://www.novascotia.ca/just/marshall_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf); in 1997 by the Honourable Fred Kaufman in the Commission on Proceedings Involving Guy Paul Morin (see p 40, Recommendation 117 at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf), as well as by Simon Fraser University criminology researchers Patricia Braiden and Joan Brockman (Braiden, Patricia & Brockman, Joan) "Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code" (1999) 17 Windsor Yearbook of Access to Justice 3, p 29) and Graham Zellick former chairman of the U.K.'s CCRC (see, Zellick, Graham, "Facing Up to Miscarriages of Justice" (2006) 31 Manitoba L.J. 556). The Association in Defence of the Wrongly Convicted (AIDWYC) called for the creation of a body modelled on the CCRC to replace the Department of Justice's Criminal Conviction Review Group, in its submissions to the Inquiry into Pediatric Forensic Pathology in Ontario (the Goudge Inquiry) (p 33, para 54, Recommendation 9; https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/submissions/pdf/Submissions_AIDWYC_and_Mullins-Johnson_Group.pdf).

⁸⁰⁸ Criminal Cases Review Commission, *Who we are*, (2018) <<http://ccrc.wpengine.com/about-us/who-we-are/>>.

APPENDIX I: THE 60-YEAR CLINICAL-ACTUARIAL DEBATE

Beginning with Meehl's foundational work, published in 1954, some research has found that actuarial prediction is at least as or moderately more accurate than clinical prediction. Meehl conducted one of the first systematic reviews of unstructured clinical versus actuarial prediction. Reviewing 20 studies in which clinical and actuarial methods were directly compared, Meehl concluded that "in all but one [study] the predictions made actuarially were either approximately equal or superior to those made by a clinician."⁸⁰⁹ Sawyer later reviewed 40 studies comparing the two approaches and reached a similar conclusion.⁸¹⁰ Additional qualitative literature reviews have examined the same question and arrived at largely similar conclusions in favour of the actuarial approach,⁸¹¹ except for one review.⁸¹² However, these literature reviews suffered from serious methodological and statistical limitations.

Grove and colleagues⁸¹³ conducted the first meta-analysis on studies that directly compared actuarial and clinical prediction. Sampling from the general decision-making literature, they synthesized the results of 136 independent studies, including 617 direct comparisons, in which the clinical and actuarial approaches were compared in the same study. Dependent upon the specific statistical analyses, the authors found that the largest number of studies (37% - 61%) showed equal performance between the two approaches, a smaller number of studies found that the actuarial approach yielded more accurate predictions (33% - 47%), and only a minority of studies (6% - 16%) indicated better predictive accuracy for the clinical approach. Grove et al. used these results to argue that actuarial prediction is on average 10% more accurate than clinical judgment and this does not vary across source of publication, type of judgment, type of data considered, amount of data available, type of professional, or experience of the professional.⁸¹⁴

The applicability of this meta-analysis to the violence risk assessment field has been questioned. Although Grove and colleagues use the term prediction throughout their article,⁸¹⁵ the majority of studies included in meta-analysis compared actuarial and clinical judgments for decisions about the present-state, not predictions about the future. As well, only 10 of the 136 studies focused on general criminality or violence, and all of these studies were conducted prior to 1988. As such, it has been argued that the Grove

⁸⁰⁹ Meehl 1954, p. 119.

⁸¹⁰ Sawyer, 1966.

⁸¹¹ Dawes et al., 1989; Garb, 1994; Marchese, 1992; Sines, 1971; Wiggins, 1981.

⁸¹² Holt, 1970.

⁸¹³ 2000; see also Gove and Meehl, 1996.

⁸¹⁴ Grove et al, 2000.

⁸¹⁵ Grove et al, 2000.

et al. (2000) meta-analysis “has no relevance to discussions about the comparative performance of actuarial and SPJ approaches to violence risk assessment”.⁸¹⁶

Ægisdottir and associates conducted a more recent meta-analysis to address this issue.⁸¹⁷ Examining only clinical judgments made by mental health practitioners, they synthesized the results of 67 independent studies, including 92 direct comparisons, in which the clinical and actuarial approaches were compared in the same study. This number was reduced to 49 studies, including 60 direct comparisons, after removing studies involving actuarial formulas that were not cross-validated. The authors found that the largest number of studies (52%) favoured the actuarial approach, a smaller number of studies found no difference between the two methods (38%), and only a minority of studies (10%) favoured the clinical approach. Based on their results, the authors reported that statistical prediction is on average roughly 13% more accurate than unstructured clinical prediction. Accuracy of the actuarial and clinical predictions was also found to vary by setting, type of decision, and the amount of available information. Investigating only four studies from prior to 1996 in which the prediction was for criminality or violence, the authors also report a small effect ($d = .17$) in favour of the actuarial approach. However, once again this study only included comparison of the unstructured clinical judgment and actuarial approaches, and little connection to the risk assessment field.⁸¹⁸

⁸¹⁶ Guy et al., 2015, p. 46.

⁸¹⁷ Ægisdottir et al., 2006.

⁸¹⁸ Guy et al., 2015.

APPENDIX II: VIOLENCE RISK ASSESSMENT META-ANALYSES

Bonta, Law, and Hanson⁸¹⁹ evaluated 64 unique prospective studies that examined predictors of violence amongst mentally disorder offenders. They compared “objective risk assessments” to unstructured clinical judgment. The objective risk assessments included both established risk scales and study specific actuarial measures (i.e., regression equations involving multiple risk factors), yet very few of the contemporary risk assessment tools were included in this meta-analysis. They found that the objective risk assessments were better predictors and more strongly related to general recidivism ($Zr = .39$) than clinical judgment ($Zr = .03$). The same pattern was also found for violent recidivism, with objective measures ($Zr = .30$) performing better than clinical judgment ($Zr = .09$). Although the objective risk assessments did not include the commonly used tools today, this meta-analysis demonstrated that actuarial approaches were systematically more strongly associated with general and violent recidivism amongst mentally disordered offenders compared to unstructured clinical judgment.

Hanson and Morton-Bourgon⁸²⁰ evaluated 95 studies on risk factors for sexual offending. Their main focus was the identification of empirically supported risk factors for predicting sexual recidivism. In a subset of analyses, they found that actuarial tools were more accurate than unstructured clinical judgment at predicting sexual violence ($d = .61$ and $.40$, respectively). A finding that was also reached by an earlier quantitative review by Hanson and Bussiere.⁸²¹ Hanson and Morton-Bourgon⁸²² also found no difference between the various actuarial tools included in the analyses, including the VRAG, the Sex Offender Risk Appraisal Guide (SORAG),⁸²³ and the Static-99.⁸²⁴ In an updated meta-analysis, Hanson and Morton-Bourgon⁸²⁵ once again found that actuarial tools yielded higher predictive validity than unstructured clinical judgment, with SPJ tools showing intermediate levels of predictive accuracy. However, the SPJ tools did not differ from the other approaches.

Updating their previous meta-analyses, Hanson and Morton-Bourgon⁸²⁶ (conducted a meta-analysis based on 118 distinct samples across 16 countries. Focusing on sex offender risk assessments, they investigated the relationship between

⁸¹⁹ Bonta et al., 1998.

⁸²⁰ Hanson and Morton-Bourgon, 2004.

⁸²¹ Hanson & Bussiere, 1998.

⁸²² Hanson & Morton-Bourgon, 2004.

⁸²³ Harris et al., 2015.

⁸²⁴ Hanson & Thornton, 1999; $d = .48$ to $.66$.

⁸²⁵ Hanson & Morton-Bourgon, 2007.

⁸²⁶ Hanson & Morton-Bourgon, 2009.

three types of recidivism (any, violent, or sexual) and assessment made using the actuarial, SPJ, or unstructured clinical approaches. For sexual recidivism, actuarial tools ($d = 0.66$) were found to be more accurate than unstructured clinical judgment ($d = 0.42$), while the SPJ approach was intermediate between the two other approaches ($d = .46$). However, only six studies examining SPJ tools were included in these analyses. Notably, an SPJ tool, the Sexual Violence Risk-20 (SVR-20)⁸²⁷ produced the largest effects for predicting sexual violence, but this was based on only three studies. For violent recidivism, tools designed to assess risk of violence yielded the largest predictive effects compared to tools designed to assess risk of sexual violence or general recidivism. Actuarial and SPJ tools yielded similar rates of accuracy and both performed better than unstructured clinical judgment for the prediction of general violence.

Across all types of assessments, the authors also found that tools produced the largest effects when predicting the type of outcome that the tool was designed to assess. That is, tools designed to assess risk of sexual violence yielded the largest predictive effects for sexual recidivism ($d = 0.46 - 0.67$) in comparison to tools designed to predict violence ($d = 0.33 - 0.39$) or any recidivism ($d = 0.62$). From their results, they concluded that the actuarial approach is more accurate than unstructured clinical judgment; however, due to the small number of studies focusing on the SPJ approach and the variability found within those studies, any conclusion drawn about the SPJ approach should be done cautiously.

In another very focused meta-analysis, Hanson, Helmus, and Bourgon⁸²⁸ examined the accuracy of risk assessments for spousal violence. Including 18 unique samples, they compared four approaches to risk assessment, including SPJ tools, spousal assault scales, other risk scales, and victim judgement. They found that all approaches were related to spousal violence. Importantly, no differences were found between the accuracy of the different approaches for assessing spousal violence.

Tully, Chou, and Browne⁸²⁹ also conducted a systematic review of the sex offender risk assessment instruments. They found that across the 43 studies and 31,426 participants all of the included tools, including SPJ and actuarial tools, yielded moderate predictive accuracy (AUCs = .64 to .76). For instance, the VRAG, SORAG, and SVR-20 yielded near equal predictive effects (AUCs = .68 to .70). However, no formal comparisons between tools or approaches were made.

⁸²⁷ Boer, Hart, Kropp, & Webster, 1997.

⁸²⁸ Hanson, Helmus & Bourgon, 2007.

⁸²⁹ Tully, Chou & Browne, 2013.

Additionally, at least two meta-analyses focusing on adolescent samples are relevant to discussions about the relative accuracy of the different approaches to risk assessment. Olver, Stockdale, and Wormith⁸³⁰ investigated the predictive accuracy of three specific tools in young offenders. Specifically, the authors investigated the Structured Assessment of Violence Risk in Youth (SAVRY)⁸³¹, the Youth Level of Service/Case Management Inventory (YLS/CMI)⁸³², and the Psychopathy Checklist-Revised: Youth Version (PCL:YV).⁸³³ Of note, the PCL:YV was not developed as nor does it purport to be a risk assessment tool; however, the authors included it for comparative purposes as measures of psychopathy have been shown to have a moderate association with violence and considerations of psychopathy are common in the risk assessment process. Using data from 44 independent samples, the authors examined the ability of these tools to predict general, nonviolent, violent, and sexual recidivism. None of the tools were predictive of sexual recidivism, which was not surprising as none of the tools were designed to assess for this type of violence ($r_w = .06 - .20$). Overall, the authors found that the three tools evidenced moderate levels of accuracy at predicting the other outcomes ($r_w = .16 - .38$), with no tool performing any better than the others. For instance, with regards to violent offending, no differences were found between the predictive accuracy of the SAVRY ($r_w = .30$), the YLS/CMI ($r_w = .26$), and the PCL:YV ($r_w = .25$). With regards to general offending the same pattern was found with all instruments performing equivalently ($r_w = .28 - .32$).

As well, Viljoen, Mordell, and Beneteau⁸³⁴ focused their meta-analyses on male adolescent sexual offenders. Across 33 studies, they investigated the predictive accuracy of four risk assessment tools, the Estimate of Risk of Adolescent Sexual Offense Recidivism (ERASOR),⁸³⁵ the Juvenile Sex Offender Assessment Protocol-II (J-SOAP-II),⁸³⁶ the Juvenile Sexual Offense Recidivism Risk Assessment Tool-II (J-SORRAT-II),⁸³⁷ and the Static-99. Once again, they reported that all four of the tools were predictive of sexual offending and no differences between the predictive effects of the four tools (aggregate correlations from .12 to .20). They all found that the accuracy of the four tools did not vary across setting, sample type, sample size, country, length of follow-up, or authorship.

⁸³⁰ Olver, Stockdale & Wormith, 2009.

⁸³¹ Borum, Bartel, & Forth, 2006.

⁸³² Hoge & Andrews, 2002.

⁸³³ Forth, Kosson, & Hare, 2003.

⁸³⁴ Viljoen, Mordell, and Beneteau, 2012.

⁸³⁵ Worling & Curwen, 2001.

⁸³⁶ Prentky & Righthand, 2003.

⁸³⁷ Epperson, Ralston, Fowers, DeWitt, & Gore, 2006.

Examining broader samples and risk assessment instruments, Table 7⁸³⁸ presents the major contemporary meta-analyses that have compared the risk assessment approaches in mixed samples. These mixed samples included mostly general offenders, offenders with mental disorders, and forensic psychiatric patients, with smaller numbers of civil psychiatric patients and other samples.

In a meta-analysis of 88 studies, Campbell, French, and Gendreau⁸³⁹ compared the performance of risk tools that had the largest number of evaluations. These tools included the HCR-20, Psychopathy Checklist-Revised (PCL-R⁸⁴⁰), Statistical Information on Recidivism (SIR⁸⁴¹), VRAG, Level of Service Inventory (LSI⁸⁴²), and Level of Service Inventory-Revised (LSI-R⁸⁴³). The authors examined these tools with regards to both institutional violence and violent recidivism. Overall, the authors found that the different instruments performed equivalently; that is, the confidence intervals were wide and overlapping across the instruments. For instance, with regards to institutional violence, the authors found that the HCR-20 ($Z_r = .28$) and LSI-R ($Z_r = .24$) produced the strongest predictive effects; however, their confidence intervals overlapped with each of the other measures (.09 to .25). From these results, Campbell et al. concluded that “no one measure stood out as the most effective for predicting violent recidivism”.⁸⁴⁴ The authors did find, however, that tools containing dynamic factors and a focus on risk management produced larger predictive effects with respect to violent recidivism.

Yang, Wong, and Coid⁸⁴⁵ focused their meta-analyses on comparing commonly used, contemporary risk assessment instruments across 28 studies. These tools included the General Statistical Information for Recidivism (GSIR⁸⁴⁶), Offender Group Reconviction Scale (OGRS)⁸⁴⁷, Risk Matrix 2000 for Violence (RM2000V)⁸⁴⁸, Violence Risk Scale (VRS)⁸⁴⁹, HCR-20, LSI-R, and VRAG. The authors were interested in comparing the predictive accuracy of these tools in comparison to the PCL-R, as this tool has been shown to have a consistent moderately strong association with violence

⁸³⁸ Table 7 is appended at page 192.

⁸³⁹ 2009; see also Campbell, French, & Gendreau, 2007.

⁸⁴⁰ Hare, 1991, 2003.

⁸⁴¹ Nuffield, 1982.

⁸⁴² Andrews, 1982.

⁸⁴³ Andrews & Bonta, 1995.

⁸⁴⁴ Campbell et al., 2009, p. 580.

⁸⁴⁵ Yang, Wong & Coid, 2010.

⁸⁴⁶ Bonta, Harman, Hann, & Cormier, 1996.

⁸⁴⁷ Copas & Marshall, 1998.

⁸⁴⁸ Thornton, 2007.

⁸⁴⁹ Wong & Gordon, 2006.

across settings and contexts.⁸⁵⁰ The authors found that all nine of the tools yielded moderate predictive effects (AUCs = .65 to .70).

Most notably, based on a complex set of multivariate regressions, the authors found very few differences in the predictive accuracy of the nine tools. They reported that approximately 25% of the variance in effects was attributable to differences between the nine tools, whereas 85% of the variance was explained by methodological and sample differences between the studies (e.g., age, sex, measurement of the outcome, length of follow-up). Across various statistical analyses, the authors found that only two tools yielded larger predictive effects than and added incrementally validity to the PCL-R. These tools were the HCR-20, based on 16 studies, and the OGRS, based on only two studies. As Yang et al. found “no one tool predicting violence significantly better than any other”,⁸⁵¹ they concluded that other criteria should be used to inform tool selection, such as the purpose of the assessment and the ability of the tools to guide risk management.

Unfortunately, the same limitation is found in many risk assessment meta-analyses. They only include the numeric scores from SPJ tools. Although empirical evidence is important regarding the sum of the different risk factors on SPJ instruments, these reviews fail to include a central feature of the SPJ approach: the summary risk judgments (i.e., low, moderate, or high risk). These summary risk judgments are meant to guide professional practice and are the primary method to communicate an individual's likelihood for violence and intervention priority. With the exception of Hanson and Morton-Bourgon,⁸⁵² which included three studies using summary risk judgments with sex offenders, only two meta-analyses have included a substantive comparison between the summary risk judgments and other risk assessment approaches.

Singh, Grann, and Fazel⁸⁵³ evaluated the accuracy of nine risk assessment tools, both SPJ and actuarial, across 88 independent samples. They were interested in determining which of the large number of structured risk assessment tools yielded the strongest predictive validity, as well as investigating whether particular features of the study (e.g., gender, ethnicity, type of outcome) impacted the accuracy of the tools. They included nine risk assessment tools: the Spousal Assault Risk Assessment (SARA),⁸⁵⁴ HCR-20, LSI-R, PCL-R, SAVRY, SORAG, Static-99, SVR-20, and VRAG. Unlike most other meta-analyses, they conducted two sets of analyses in which participants were

⁸⁵⁰ See, for instance Edens, Campbell, & Weir, 2007; Walters, 2003.

⁸⁵¹ Yang et al., 2010, p. 757.

⁸⁵² Hanson & Morton-Bourgon, 2009.

⁸⁵³ Singh, Grann & Fazel, 2011.

⁸⁵⁴ Kropp, Hart, Webster, & Eaves, 1994, 1995, 1999.

dichotomized into categories of either low or high risk. For the SPJ tools, the authors included the non-numeric summary risk judgments in 22 of the 27 studies included in the meta-analysis. The authors collapsed the ratings in order to compare low and moderate risk to high risk in some analyses, and low risk to moderate and high risk in others. When the summary risk judgments were not available on the SPJ tools, and for the actuarial tools, the authors similarly reduced the numerical scores into two categories.

In contrast to most of the other meta-analyses, Singh et al.⁸⁵⁵ reported that there were substantial differences across the nine tools in terms of predictive accuracy. They reported that a SPJ tool, the SAVRY, produced the largest predictive validity coefficients. In contrast, the LSI-R and the PCL-R produced the smallest coefficients. The authors concluded from this finding that tools designed to assess risk in specific populations, such as the SAVRY with adolescents, were more accurate than those designed for more general populations, such as the broad applicability of the LSI-R and the PCL-R. As well, they reported that tools designed to assess more specific outcomes (i.e. violence) were more accurate than tools designed for more general outcomes (i.e., general recidivism). Nevertheless, the authors also noted that their study found “no evidence that, compared with SPJ tools, actuarial instruments produced better levels of predictive validity.”⁸⁵⁶ The authors also found that most study variables did not affect the accuracy of the instruments (i.e., gender, ethnicity, country, setting), yet they did find some evidence that larger predictive effects were found in samples that were older and contained a larger proportion of Caucasians.

Some commentators have raised concern regarding the statistical analyses used in the Singh et al.⁸⁵⁷ meta-analysis, particularly the dichotomization of risk.⁸⁵⁸ The main argument is that risk assessment tools should be analyzed in the manner that corresponds to their intended professional use. As others have noted,⁸⁵⁹ the current professional standards regarding test development and evaluation assert that empirical evaluations should focus on the intended professional use of each test or instrument.⁸⁶⁰ Furthermore, Williams et al.⁸⁶¹ reanalyzed some of the results presented in Singh et al. using alternative approaches. In these alternative analyses, the substantial differences between tools reported by Singh and colleagues were drastically reduced. The overlap

⁸⁵⁵ Singh et al, *supra* note 284.

⁸⁵⁶ Singh et al., 2011, p. 510.

⁸⁵⁷ Singh et al., 2011.

⁸⁵⁸ Williams, Wormith, Bonta, & Sitarenios, 2017; but see Fazel, 2017.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999, 2014.

⁸⁶¹ Williams et al., 2017.

in predictive validity indexes for the different instruments was so high (between 52.4% and 86.1%), leading the authors to conclude “the instruments are in fact more alike than dissimilar in their ability to predict violence.”⁸⁶²

Guy⁸⁶³ conducted a comprehensive review of all the SPJ literature. In a meta-analysis that included 106 different samples, Guy investigated the accuracy of SPJ and actuarial tools, as well as whether the accuracy of SPJ tools varied across a number of sample features (e.g. age, gender, country, setting). Comparing the numeric use of SPJ tools (i.e., the sum of the present risk factors) with the summary risk judgments, Guy found that the summary risk judgments consistently outperformed the numeric scores; that is, they were more strongly related to and predictive of violence. Guy compared actuarial and SPJ tools in several analyses.

Examining all available tools and effect sizes, SPJ summary risk judgments yielded higher predictive validity (AUC = .68) compared to actuarial tools (AUC = .62) and unstructured clinical judgment (AUC = .59). Examining only one composite effect size per sample, SPJ summary risk judgments (AUC = .69) and actuarial tools (AUC = .67) yielded higher predictive validity than unstructured clinical judgment (AUC = .58). Furthermore, the largest predictive effects for the various SPJ tools were found between the summary risk judgments and the type of outcome for which the tool was designed to assess. For instance, the HCR-20 summary risk judgments showed the strongest relationship with violence, as opposed to sexual violence or general criminality. As well, the SVR-20 summary risk judgments showed the strongest relationship with sexual violence and the SARA summary risk judgments with spousal violence. Guy also found that the accuracy of SPJ tools did not differ by gender, adult versus adolescent, North America versus Europe, setting (civil psychiatric, forensic psychiatric, correctional, mixed), institutional versus community violence, or authorship of the paper.

Several additional meta-analyses that investigated specific risk assessment tools are worth noting as well. For instance, Guy, Douglas, and Henry⁸⁶⁴ compared the predictive validity of the HCR-20 and the PCL-R. Meta-analyzing 34 samples in which both of the instruments were included, they found comparable accuracy for both tools (AUC = .69). Removing the psychopathy item from the HCR-20 did not affect the results. In a series of multivariate analyses, they all found that the HCR-20 added incremental predictive validity over the PCL-R, but the converse was not true. Similarly, Schwalbe⁸⁶⁵ found no difference in the predictive validity between the PCL, the YLS/CMI,

⁸⁶² *Ibid*, p. 8.

⁸⁶³ Guy, 2008.

⁸⁶⁴ Guy, Douglas & Henry, 2010.

⁸⁶⁵ Schwalbe, 2007.

and several region specific actuarial tools. Edens, Campbell, and Weir⁸⁶⁶ found no difference in predictive validity between the PCL family of measures (PCL, PCL-R, PCL:YV) and the YLS/CMI. Gendreau, Goggin, and Smith⁸⁶⁷ also found no differences between the PCL-R and the LSI-R. In a meta-analysis of 72 samples focusing on tools designed to assess general offending, Desmarais, Johnson, and Singh⁸⁶⁸ identified 19 actuarial assessment tools. Results showed that “no one instrument stood out as producing more accurate assessments than the others.”⁸⁶⁹

Fazel, Singh, Doll, and Grann⁸⁷⁰ conducted a meta-analysis of 68 studies, largely overlapping with Singh et al.⁸⁷¹ They also investigated nine commonly used risk assessment tools: LSI-R, VRAG, Static-99, SORAG, PCL-R, SVR-20, HCR-20, SARA, and SAVRY. Overall, they found that risk assessment tools (AUC = .66 to .74) performed on par with other medical diagnostic tools. They found that tools designed to assess risk for violence (HCR-20; VRAG, SAVRY, SARA) had higher levels of predictive validity compared to tools designed to assess general criminality (LS family of measures) or psychopathy (PCL family of measures), with odds ratios of 6.1 and 2.8, respectively. As well, the predictive accuracy of the tools did not differ by gender, ethnicity, age, setting, length of follow-up, and authorship status.

Finally, Singh and Fazel⁸⁷² conducted a meta-review in which they qualitatively evaluated nine systematic reviews and 31 meta-analyses involving forensic risk assessment from 1995 to 2009. Involving 2,232 studies, these reviews tended to compare the accuracy of actuarial to unstructured clinical or structured professional judgment, the accuracy of different risk assessment tools, or the accuracy of risk assessment tools over a number of methodological and sample characteristics. Notably, they found “mixed evidence regarding the comparative accuracy of actuarial and clinically based tools.”⁸⁷³ Most of the reviews found that actuarial tools were more accurate than unstructured clinical judgment, but the evidence comparing the actuarial approach to SPJ was lacking. Singh and Fazel also concluded that, across all of the 126 risk assessment tools included in these reviews, “no one measure was consistently found to be better than any other.”⁸⁷⁴ Essentially, all of the tools analyzed performed at the same moderate level of prediction. They also reported that 11 of 13 reviews found

⁸⁶⁶ Edens, Campbell & Weir, 2010.

⁸⁶⁷ Gendreau, Goggin & Smith, 2002.

⁸⁶⁸ Desmarais et al., 2015.

⁸⁶⁹ Desmarais et al., 2016; p. 213.

⁸⁷⁰ Fazel et al., 2012.

⁸⁷¹ Singh et al, 2011.

⁸⁷² Singh & Fazel, 2010.

⁸⁷³ *Ibid* at p. 981.

⁸⁷⁴ *Ibid*.

no differences in accuracy rates for the different risk assessment tools across genders, with one review finding better prediction in females and one finding better prediction in males. The findings with regards to ethnicity were also mixed with five of eight reviews findings no differences across ethnicity and three finding better prediction in samples with larger proportions of Caucasians.

APPENDIX III: TABLES 6 & 7

Table 6. Meta-Analyses Comparing Risk Assessment Approaches – Specific Samples

	Bonta, Law, & Hanson (1998)	Hanson & Morton-Bourgon, 2009	Olver, Stockdale, & Wormith, 2009	Viljoen, Mordell, & Beneteau (2012)
Studies	58 (64)	110 (118)	49 (44)	33 (31)
Study Dates	1959-2008	1972-2008	1990-2008	2000-2011
Sample Type	Mentally Disordered Offenders	Sex Offenders	Adolescent Offenders	Adolescent Sex Offenders
Sample Size	15,245	45,398	8,746	6,196
Follow-Up	57.6 (SD=44.4)	70.0 (SD=46.6)	29.1 (SD=24.8)	71.0 (–)
Outcomes	General (45.8%) Violence (24.5%)	General (33.2%) Violence (19.5%) Sexual (11.5%)	General (50.2%) Violence (28.4%) Sexual (13.3%)	General (49.4%) Sexual (10.9%)
Risk Tools	Objective (k=9) Clinical (k=3)	Actuarial (k=81) SPJ (k=6) Clinical (k=11)	PCL:YV (k=28) SAVRY (k=9) YLS/CMI (k=22)	ERASOR (k=10) J-SOAP-II (k=9) J-SORRAT-II (k=7) Static-99 (k=8)
Conclusion^a	Actuarial > Clinical	Actuarial > Clinical	Actuarial = SPJ	Actuarial = SPJ

Note. Studies = number of studies (independent samples); Follow-up = average duration in months (standard deviation); Outcomes = type of outcome (average rate); Risk Tools = main tools/approaches (maximum number of studies included in analyses); Conclusion = overall conclusion regarding risk assessment approaches; – data not available; PCL:YV = Psychopathy Checklist-Revised: Youth Version; SAVRY = Structured Assessment of Violence Risk in Youth; YLS/CMI = Youth Level of Service/Case Management Inventory; ERASOR = Estimate of Risk of Adolescent Sexual Offence Recidivism; J-SOAP-II = Juvenile Sex Offender Assessment Protocol-II; J-SORRAT-II; Juvenile Sex Offense Recidivism Risk Assessment Tool-II.

^a Actuarial > Clinical indicates higher predictive validity for actuarial compared to unstructured clinical approaches; Actuarial = SPJ indicates equivalent predictive validity for the two approaches.

Table 7. Meta-Analyses Comparing Risk Assessment Approaches – Mixed Samples

	Campbell, French, & Gendreau (2009)	Singh, Grann, & Fazel (2011)	Guy (2008)	Yang, Wong, & Coid (2010)
Studies	88 (88)	68 (88)	113 (104)	28 (28)
Study Dates	1980-2006	1995-2008	1996-2008	1999-2008
Sample Size	273,734	25,980	14,638	6,348–7,221 ^a
Follow-Up	–	56.3 (SD=41.3)	–	43.8 (–)
Outcomes	Institutional (25.8%) Violence (21.7%)	General (31.4%) Violence (–)	General (40.9%) Violence (30.4%) Sexual (19.8%)	Violence (24.9%)
Risk Tools	HCR-20 (k=11) LSI-R (k=19) PCL-R (k=24) SIR (k=17) VRAG (k=14)	HCR-20 (k=9) LSI-R (k=8) PCL-R (k=20) SARA (k=4) SAVRY (k=9) SORAG (k=7) Static-99 (k=14) SVR-20 (k=5) VRAG (k=12)	ERASOR (k=2-3) HCR-20 (k=2-51) SARA (k=2-9) SAVRY (k=4-16) SVR-20 (k=2-10) VRAG (k=3-19)	GSIR (k=3) HCR-20 (k=16) LSI/LSI-R (k=5) OGRS (k=2) PCL-R (k=16) PCL:SV (k=8) RM2000V (k=3) VRAG (k=17) VRS (k=4)
Conclusion^b	Actuarial = SPJ	Actuarial = SPJ ^c	Actuarial = SPJ	Actuarial = Clinical

Note. Studies = number of studies (independent samples); Follow-up = average duration in months (standard deviation); Outcomes = type of outcome (average rate); Risk Tools = main tools/approaches (maximum number of studies included in analyses); Conclusion = overall conclusion regarding risk assessment approaches; – data not available; HCR-20 = Historical-Clinical-Risk Management-20; LSI-R = Level of Service Inventory-Revised; PCL-R = Psychopathy Checklist-Revised; SIR = Statistical Information on Recidivism; VRAG = Violence Risk Assessment Guide; SARA = Spousal Assault Risk Assessment; SAVRY = Structured Assessment of Risk in Youth; SORAG = Sex Offender Risk Appraisal Guide; SVR-20 = Sexual Violence Risk-20; ERASOR = Estimate of Risk of Adolescent Sexual Offence Recidivism; GSIR = General Statistical Information on Recidivism; OGRS = Offender Group Reconviction Scale; PCL:SV = Psychopathy Checklist: Screening Version; Risk Matrix 2000 for Violence; VRS = Violence Risk Scale.

^a The authors only reported the sample size per instrument.

^b Actuarial > Clinical indicates higher predictive validity found for actuarial compared to unstructured clinical approaches; Actuarial = SPJ indicates equivalent predictive validity effects for the two approaches.

^c Singh et al. (2011) reported differences between in predictive validity across tools, but not across approaches.

APPENDIX IV: SELECT RESEARCH ON THE STRUCTURED PROFESSIONAL JUDGMENT APPROACH

Currently, at least 61 published studies have investigated the predictive validity of the summary risk judgments. Of the available studies, 56 (92%) found partial or full support for the use of the summary risk judgments. That is, all but five of these studies found that the summary risk judgments were predictive of violence.

With respect to the five studies that did not support the use of SPJ summary risk judgments,⁸⁷⁵ some points are worth highlighting. In a sample of 89 stalking offenders, Foellmi et al.⁸⁷⁶ found that the summary risk judgments made using the SAM did not predict stalking reoffending. O'Shea et al.⁸⁷⁷ examined the HCR-20 using a pseudo-prospective design in a sample of 613 psychiatric inpatients. They found that, although the HCR-20 numerical scores were predictive of various violent and non-violent sexual behaviours, the summary risk judgments were not. However, the HCR-20 was not designed to assess risk of sexual violence. Evaluating three risk assessment tools in a sample of 169 male adolescents admitted to a residential sex offender program, Viljoen et al.⁸⁷⁸ found that the SAVRY summary risk judgments were not predictive of nonsexual violence in youth, yet the numeric scores on this instrument were. The other two tools, the J-SOAP-II and J-SORRAT-II, were not predictive of sexual violence but some evidence was found for their relationship with nonsexual violence. Sjösted and Långström,⁸⁷⁹ investigating one SPJ and three actuarial instruments designed to assess sexual violence in a sample of 51 rapists, found that none of the examined tools, the PCL-R, SVR-20, VRAG, or Rapid Risk Assessment for Sex Offence Recidivism (RRASOR),⁸⁸⁰ were predictive of sexual violence. As well, Schaap et al.,⁸⁸¹ investigating the HCR-20 and PCL-R in a sample of 45 female forensic psychiatric patients, found that neither of these instruments was related to violent or general offending, including the scale scores, total scores, or final risk judgments. However, some of the indexes produced effects that were comparable to other studies (i.e., AUC values in the moderate range), including the HCR-20 summary risk judgments (AUC = .65), which suggest that low statistical power may have contributed to this finding.

⁸⁷⁵ Foellmi, Rosenfeld, & Galietta, 2016; O'Shea, Thaker, Picchioni, Mason, Knight, & Dickens, 2016; Schapp, Lammers, & de Vogel, 2009; Sjösted & Långström, 2002; Viljoen et al., 2008.

⁸⁷⁶ Foellmi et al., 2016.

⁸⁷⁷ O'Shea et al., 2016.

⁸⁷⁸ Viljoen et al., 2008.

⁸⁷⁹ Sjösted & Långström, 2002.

⁸⁸⁰ Hanson, 1997.

⁸⁸¹ Schaap et al., 2009.

Additionally, five studies found only mixed or partial support for the predictive validity of the summary risk judgments. These studies found that the summary risk judgments were predictive in some statistical analyses but not others,⁸⁸² in one subsample but not the other,⁸⁸³ or with respect to some outcomes but not others.⁸⁸⁴ For instance, Alderman et al.⁸⁸⁵ found that the START summary risk judgment was predictive of violence, but not when the total number of different analyses was considered (i.e., correction for familywise error). Similarly, Belfrage and colleagues⁸⁸⁶ found that SARA summary risk judgments were predictive of intimate partner according to certain statistical analyses but not others, leading them to conclude that a small or weak predictive effect was present.

Examining the HCR-20 summary risk judgments, O'Shea and colleagues⁸⁸⁷ found they were predictive of violence in a sample of 109 psychiatric patients with intellectual disabilities but not in the comparison group of psychiatric patients. In a sample of 34 psychiatric patients, Braithwaite et al.⁸⁸⁸ examined START summary risk judgments with respect to the seven outcomes this tool is designed to assess: violence, self-harm, suicide, unauthorized leave, substance use, self-neglect, and victimization. The summary risk judgments were only predictive of substance use. In addition, Viljoen et al.⁸⁸⁹ in a sample of 102 civil psychiatric patients, found that the START summary risk judgments were generally predictive of violence, but the HCR-20 summary risk judgments were only related to certain types of violence.

The remaining 51 studies found support for the predictive validity of the summary risk judgments. These studies examined the accuracy of summary risk judgments across a variety of instruments, samples, and countries. Predictive validity of the summary risk judgments has been supported in a number of instruments designed for adults, including the HCR-20, SARA, SAVRY, SVR-20, Short-Term Assessment of Risk and Treatability (START),⁸⁹⁰ and Structured Assessment of Protective Factors for Violence (SAPROF),⁸⁹¹ as well as children and adolescents, including the ERASOR, SAVRY, Short-Term Assessment of Risk and Treatability: Adolescent Version

⁸⁸² Alderman, Major, & Brooks, 2016; Belfrage et al., 2012.

⁸⁸³ O'Shea, Picchioni, McCarthy, Mason, & Dickens, 2015.

⁸⁸⁴ Braithwaite, Charette, Crocker, & Reyes, 2010; Viljoen, Nicholls, Roesch, Gagnon, Douglas, & Brink, 2016.

⁸⁸⁵ Alderman et al., 2016.

⁸⁸⁶ Belfrage et al., 2012.

⁸⁸⁷ O'Shea et al., 2015.

⁸⁸⁸ Braithwaite et al., 2010.

⁸⁸⁹ Viljoen et al., 2016.

⁸⁹⁰ Webster, Martin, Brink, Nicholls, & Desmarais, 2009

⁸⁹¹ de Vogel, de Ruiter, Bouman, & de Vries Robbé, 2012.

(START:AV),⁸⁹² Early Assessment Risk List for Boys (EARL–20B);⁸⁹³ and Early Assessment Risk List for Girls (EARL–21G).⁸⁹⁴

Reporting on a variety of different samples types including civil psychiatric patients, forensic psychiatric patients, general offenders, mentally disordered offenders, sex offenders, stalking offenders, offenders with intellectual disabilities, adolescent offenders, and veterans, these studies spanned broad geographic regions included data collected from at least 12 countries: Canada, Denmark, Finland, Hong Kong, the Netherlands, Norway, Portugal, Serbia, Spain, Sweden, the United Kingdom, and the United States. Based on a review of the available research, it is evident that the final risk judgments are related to and predictive of violence across a host of countries, settings, methodologies, and instruments.

In addition, several of these studies have investigated whether the summary risk judgments add incrementally to the prediction of violence over and above other indexes on the instrument or other established instruments. In order to test for incremental validity, researchers commonly use multivariate regression analyses in which the comparison variable is entered in the first step of the model and then the summary risk judgments are entered in the second step. Alternatively, several comparison variables may be entered in the first step (or multiple steps) and then the summary risk judgment is entered in the final step. Evidence for incremental validity is offered if the addition of the summary risk judgments adds in a substantive manner to predictive power of the prior model (e.g., set of variables).

At least 23 published studies that examined the predictive validity of the summary risk judgments also investigated the incremental validity of these summary risk judgments over and above the numeric use of the tool (i.e., summing the present risk factors), a PCL family measure (e.g., the PCL-R), an actuarial instrument (e.g., VRAG), or unstructured clinical judgment. In total, 21 (91%) studies found mixed or full evidence for incremental validity of the summary risk judgments. The two studies that failed to demonstrate incremental validity of the summary risk judgments over the numeric use of the instrument examined the same instrument with samples of adolescents.⁸⁹⁵ Both Schmidt et al.⁸⁹⁶ in a sample of 133 adolescent offenders referred by the court for mental health assessments, and Vincent et al.,⁸⁹⁷ in a sample of 480 male adolescent

⁸⁹² Viljoen, Nicholls, Cruise, Desmarais, & Webster, 2014.

⁸⁹³ Augimeri, Koegl, Webster, & Levene, 2001.

⁸⁹⁴ Levene et al., 2001.

⁸⁹⁵ Schmidt, Campbell, & Houlding, 2011; Vincent, Chapman, & Cook, 2011.

⁸⁹⁶ Schmidt et al, 2011.

⁸⁹⁷ Vincent et al., 2011.

offenders, found that the SAVRY summary risk judgments did not add incrementally over the numeric use of the tool (i.e., total score of present risk factors)

Six studies found mixed or partial support for the incremental validity of the summary risk judgments.⁸⁹⁸ Generally, these studies provided inconsistent evidence across the type or definition of the outcome,⁸⁹⁹ across the comparison measure of incremental validity,⁹⁰⁰ across the timeframe of prediction,⁹⁰¹ or across gender.⁹⁰² For instance, Arabach-Lucioni et al.⁹⁰³ found that the HCR-20 summary risk judgments added incrementally to the numerical scores in prediction violence during two out of three possible timeframes.

Finally, evidence for the incremental validity of the summary risk judgments over and above the numeric use of the instrument has been found in 15 studies. Incremental validity of the summary risk judgments has been found across a range of sample types: adolescent offenders,⁹⁰⁴ civil psychiatric inpatients,⁹⁰⁵ forensic psychiatric patients⁹⁰⁶, mixed psychiatric patients,⁹⁰⁷ as well as adult offenders⁹⁰⁸ and offenders with mental disorders.⁹⁰⁹

Additionally, several studies have directly compared the predictive accuracy of SPJ and actuarial tools including analyses of whether the summary risk judgments add incrementally over and above the actuarial instrument. For instance, summary risk judgments made using the HCR-20 have been shown to add incremental predictive validity to the PCL-R for predicting violence among samples of forensic psychiatric patients⁹¹⁰ and correctional offenders.⁹¹¹ Summary risk judgments made using the START have shown incremental validity over the PCL:SV.⁹¹² Summary risk judgments

⁸⁹⁸ Arabach-Lucioni, Andrés-Pueyo, Pomarol-Clotet, Gomar-Soñes, 2011; Chu, Daffern, & Ogloff, 2013; Dolan & Rennie, 2008; Douglas & Ogloff, 2003; Lodewijks et al., 2008a; O'Shea & Dickens, 2016.

⁸⁹⁹ Chu et al., 2013.

⁹⁰⁰ Dolan & Rennie, 2008; Douglas & Ogloff, 2003.

⁹⁰¹ Arabach-Lucioni et al., 2011,

⁹⁰² Lodewijks, de Ruiter, & Doreleijers, 2008,

⁹⁰³ Arabach et al, 2011.

⁹⁰⁴ Dolan & Rennie, 2008; Enebrink, Långström, & Gumpert, 2006; Lodewijks, de Ruiter, & Doreleijers, 2008; Lodewijks, Doreleijers, & de Ruiter, 2008.

⁹⁰⁵ Arabach-Lucioni, Andres-Pueyo, Pomarol-Clotet, & Gomar-Sones, 2011.

⁹⁰⁶ de Vogel, de Ruiter, Hildebrand, Bos, & van de Ven, 2004; Desmarais, Nicholls, Wilson, & Brink, 2012; Douglas, Ogloff, & Hart, 2003; Pedersen, Rasmussen, & Elsass, 2010; Troquete et al., 2015; van den Brink, Hooijschuur, van Os, Savenije, & Wiersma, 2010.

⁹⁰⁷ Ho et al., 2013; O'Shea, Picchioni, & Dickens, 2016.

⁹⁰⁸ Douglas, Yeomans, & Boer, 2005; Kropp & Hart, 2000; Neves, Goncalves, & Palma-Oliveira, 2011.

⁹⁰⁹ de Vogel & de Ruiter, 2006.

⁹¹⁰ de Vogel, de Ruiter, Hildebrand, Bos, & van de Ven, 2004; Douglas et al., 2003.

⁹¹¹ Douglas et al., 2005.

⁹¹² Desmarais, Nicholls, Wilson, & Brink, 2012.

made using the SAVRY have similarly show incremental validity over the PCL:YV,⁹¹³ and over unstructured clinical judgment.⁹¹⁴ Comparing the HCR-20 and VRAG, Douglas et al.⁹¹⁵ found that each instrument provided unique variance in predicting violence. That is, the final risk judgments added incrementally to the VRAG and the converse was also true.

⁹¹³ Dolan & Rennie, 2008.

⁹¹⁴ Lodewijks, Doreleijers, & de Ruiter, 2008.

⁹¹⁵ Douglas et al. 2005.

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