

## The Promise of DWI Court: What Does It Mean and Why Should Prosecutors Care?

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### INTRODUCTION

Drunk driving kills. How many times is that statement said in advertising, by community leaders, or even by friends and family? The sad truth is that drunk driving does kill. It kills indiscriminately on the roads and highways. It kills in the early morning and in the late afternoon. It kills the young and the old; the rich and the poor; the weak and the strong. Every day, somewhere in this country, a prosecutor will talk with family members who have lost a loved one because of an impaired driver. These cases can be some of the most challenging cases for a prosecutor to handle; legally, because of the combination of scientific evidence and eyewitness testimony; emotionally, because the case involves someone that died, who five minutes earlier was heading home from church bingo or from making plans for an upcoming wedding.

Unlike what some people contend, there is no silver bullet to end impaired driving. Like the people committing it, impaired driving is a complex issue requiring a variety of tools to fight it. Some tools like sobriety checkpoints, roving patrols, and increased media advertisements are critical in deterring, as well as catching, an impaired driver. However, even when a Driving While Impaired (DWI)<sup>1</sup> offender is arrested, it is unclear how

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<sup>1</sup> For purposes of this article, DWI is the same as OWI (Operating While Intoxicated/Impaired) or DUI (Driving Under the Influence). These terms are used interchangeably in the literature. States may have different names for the behavior, but it is all the same: Driving after having consumed alcohol, with the alcohol affecting a person's ability to drive safely.

that person can be stopped from drinking too much and then driving again. Most people learn from the arrest and conviction. Approximately one-third of all DWI arrests involve persons with prior convictions for DWI.<sup>2</sup> Thus, two-thirds of those arrested learn from their lapse in judgment. The factors that result in a social drinker committing a DWI offense versus those that cause a hardcore<sup>3</sup> DWI offender to drive impaired are vastly different, and complicated. Different tools are needed depending on the person. Who repeat offends and who does not can depend on, in large part, whether or not the person is alcohol dependent.

A fairly new tool in the effort to stop impaired driving is the DWI Court. A DWI Court is an accountability court. It works with the hardcore DWI offender by implementing intensive supervision and long-term treatment to change the person's behavior so he does not repeat. This article will discuss the role of DWI Court in fighting impaired driving. It is divided into four parts. Part I discusses the reasons for having a DWI Court. Part II will examine how the idea of a DWI court was developed by looking at its precursor—the Drug Court. Part III will discuss what exactly a DWI Court is, how it works, and what the research says about its effectiveness. Finally, Part IV will discuss the need to have prosecutors involved throughout the process, from the beginning when a charge is made, until the end, when a participant graduates from the program.

## I. DWI KILLS

One thing is clear for prosecutors: they see some of the worst in people. They see the brutality committed against fellow citizens. There are people out there who commit evil acts against other individuals. However, the typical DWI offender is not an evil person committing an act of brutality. Yet, there is no doubt the person has committed a significant crime. In the United States over 1.4 million people were arrested in 2007 for DWI. "This is an arrest rate of 1 for every 144 licensed drivers."<sup>4</sup> Alcohol-impaired driving is one of America's most often committed crimes. With alcohol as a legal drug for anyone over the age of twenty-one, it is easily accessible, and with this country's fascination with cars, it is easy to put the two together.

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<sup>2</sup> U.S. DEP'T OF TRANS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., REPEAT INTOXICATED DRIVER LAWS (2007) (DOT HS 810 718W).

<sup>3</sup> As used in this article, the term "hardcore" is a reference to those DWI offenders that are either arrested for the first time with a Blood Alcohol Content (BAC) over .15 or those that have a prior DWI conviction.

<sup>4</sup> U.S. DEP'T OF TRANS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2008 DATA, OVERVIEW 5 (2009) (DOT HS811 162).

However, these two items should never be combined. Not only is DWI one of the most often committed crimes, it is one of the deadliest crimes in the nation. In 2009, 10,839 persons were killed<sup>5</sup> in a motor vehicle crash<sup>6</sup> which involved a driver at .08 BAC<sup>7</sup> or higher. While 10,839 fatalities is a decrease from previous years,<sup>8</sup> it is still tragic and wrong that so many people are dying from this preventable crime. Each person killed had family or friends in their lives that must now deal with the grief and the loss.

For the past forty years, there has been a significant reduction in the number of people killed on the country's roads and highways.<sup>9</sup> From 1980 until the mid 1990's, there were dramatic reductions on impaired driving fatalities; however, since then the reductions have been relatively innocuous, if any at all. The percentage of all persons killed in motor vehicle crashes versus those killed each year from impaired drivers has remained fairly

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<sup>5</sup> U.S. DEPT OF TRANS., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, RESEARCH NOTE (2010) (DOT HS 811 363).

<sup>6</sup> The word "crash" is used purposefully. A DWI fatality is never an "accident." An accident implies happenstance. DWI fatalities are clearly preventable and never happen because of chance.

<sup>7</sup> Blood Alcohol Content, (BAC) is a standard way to measure a person's level of intoxication. All fifty states have .08 BAC as the illegal level for a DWI charge.

<sup>8</sup> See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FARS Encyclopedia, available at <http://www-fars.nhtsa.dot.gov/Main/index.aspx> [hereinafter FARS Encyclopedia] (stating that "the mission of FARS is to make vehicle crash information accessible and useful so that traffic safety can be improved. In order to improve traffic safety, the United States Department of Transportation (DOT) National Highway Traffic Safety Administration (NHTSA) created FARS in 1975. This data system was conceived, designed, and developed by the National Center for Statistics and Analysis (NCSA) to assist the traffic safety community in identifying traffic safety problems and evaluating both motor vehicle safety standards and highway safety initiatives. FARS is one of the 2 major sources of data used at the NCSA."). In 2008 there were 11,773 persons killed with a driver at a BAC of .08 or higher. In 2007, the number of people killed was 13,041.

<sup>9</sup> American's roads are safer today, even though Americans are traveling more than ever before. In 1985, the miles traveled were 1,774 billion. U.S. DEPT OF TRANS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 1994: A COMPILATION OF MOTOR VEHICLE CRASH DATA FROM THE FATAL ACCIDENT REPORTING SYSTEM AND THE GENERAL ESTIMATES SYSTEM, at 15 (DOT HS 808 292), available at <http://www-nrd.nhtsa.gov/Pubs/FARS94.pdf>. Ten years later, it was 2,423 billion miles, and ten years after that it was 2,989 billion miles. See FARS Encyclopedia, *supra* note 8. All the while, with the number of miles being traveled increasing, the rate of fatalities per hundred million miles traveled has gone in the opposite direction. Consider, in 1985 the fatality rate per hundred million miles was 2.5. In 2009, it was 1.13 per hundred million; the lowest rate ever. So, while the country is traveling significantly more, the rate at which people are dying on the roads is decreasing.

There are a number of reasons for our safer highways, which include the cars and roads being designed to be safer, as well as society no longer tolerating impaired driving. Thanks in large part to the work that MADD and others did, society no longer considers it acceptable to drink and drive. In 1983, 56 percent, (23,646) of all traffic fatalities were alcohol-related. In 2008, that number was 13,846, or 37 percent. FARS Encyclopedia, *supra* note 8. With the change in perception of what is right, DWI is recognized as a dangerous crime that can kill.

steadily at approximately thirty-one percent over the past decade.<sup>10</sup>

Even more troubling is that of the approximately 11,000 people that are killed each year, a large percentage of those individuals had driven impaired before. Many of them had even been arrested and convicted; yet they still continued to do it. As already noted, one-third of all DWI arrests involve individuals who have been previously convicted of DWI.<sup>11</sup> However, drivers with a prior conviction “are overrepresented in fatal crashes and have a greater relative risk of involvement in a fatal crash.”<sup>12</sup> Just as concerning, in 2008, fifty-seven percent of the drivers involved in an alcohol-impaired fatal crash had a BAC of .15 or higher.<sup>13</sup> “A driver with a BAC of .15 g/dL or greater is at least 20 times more likely to be involved in a fatal crash than a sober driver.”<sup>14</sup> The bottom line is there are a significant number of individuals with a BAC of .15 or higher and/or a prior DWI conviction who are killing other people.

Individuals with a BAC of .15 and/or a prior conviction for DWI are now known as hardcore offenders. While they only constitute approximately one percent of the total number of drivers during the weekend, they account for a large portion of the alcohol impaired driving fatalities.<sup>15</sup> Clearly, many serious DWI offenders do not learn from the arrest, detention, and conviction. They continue to drive while impaired, often to the detriment of those around them. The question remains: why do they continue to do it?

Many of these individuals suffer from alcohol dependency, commonly called alcoholism. Consider that for a 175 pound male to reach a .15 BAC on an empty stomach, he would have to drink nine standard beers in three hours, or “slam” seven in an hour. This is more than social drinking, and it indicates the person has a high tolerance to alcohol. To drink that much, and then be able to walk to the car, put the keys in the ignition, put the engine in drive, and then drive down a road clearly demonstrates a high tolerance, as well as practice. Tolerance to alcohol is not devel-

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<sup>10</sup> See FARS Encyclopedia, *supra* note 8.

<sup>11</sup> U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., A GUIDE TO SENTENCING DWI OFFENDERS 1 (2nd ed. 2005), available at [http://www.nhtsa.dot.gov/people/injury/alcohol/DWIOffenders/A Guide2.pdf](http://www.nhtsa.dot.gov/people/injury/alcohol/DWIOffenders/A%20Guide2.pdf).

<sup>12</sup> REPEAT INTOXICATED DRIVER LAWS, *supra* note 2.

<sup>13</sup> U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2008 DATA, ALCOHOL-IMPAIRED DRIVING 5 (DOT HS 811 155).

<sup>14</sup> U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: LAWS, HIGH BAC LAWS (2008) (DOT HS 810 883).

<sup>15</sup> HERB SIMPSON, DANIEL MEYHEW & DOUG BEIRNESS, DEALING WITH THE HARD CORE DRINKING DRIVER VII, XII, 21 (Traffic Injury Research Foundation 1996).

oped overnight; it takes time. This is an important consideration in the later discussion on long-term treatment.

Studies have found that repeat DWI offenders typically share a number of characteristics:

- White, male, under forty, single
- High school or less education; non-white-collar employment
- A BAC of .18 or greater at the time of the arrest
- On average, two or three prior DWI offenses, or several prior “other traffic” citations
- Generally drink beer, in bars and at home
- *Often alcohol-dependent* and have personality and psychosocial problems (emphasis added)
- More severe mental health problems<sup>16</sup>

It is important to understand alcoholism is a disease, recognized and described in the DSM-IV<sup>17</sup> and the ICD-10.<sup>18</sup> It is not a disease one can go out and “catch,” like a cold. It is a disease that develops over time, like diabetes, which then remains with the person for a lifetime. The symptoms of this disease include the following four indications:

- Craving: a strong need, or urge, to drink
- Loss of control: not being able to stop drinking once drinking has begun
- Physical dependence: withdrawal symptoms after stopping drinking, such as nausea, sweating, shakiness, and anxiety
- Tolerance: the need to drink greater amounts of alcohol to get “high”<sup>19</sup>

It is that craving which can result in a person ignoring the consequences of prison, fines, or society’s condemnation to drink and drive.

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<sup>16</sup> A GUIDE TO SENTENCING DWI OFFENDERS, *supra* note 11, at 2.

<sup>17</sup> See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 195–96 (4th ed. 1994).

<sup>18</sup> WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF DISEASES ch. V, F10–19 (10th ed. 2006).

<sup>19</sup> See NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, UNDERSTANDING ALCOHOL: INVESTIGATIONS INTO BIOLOGY AND BEHAVIOR 24 (2003).

### A. How Do We Protect Our Communities?

For two centuries, prosecutors in every corner of this nation have been asking what they have to do to protect their communities. It is an age-old question that has different answers depending on the time period and the type of crime. Two common responses by the criminal justice system are treatment and incarceration. These two responses are typically perceived to be in conflict: either we treat a person or we incarcerate them.

In the early 1960's, there was a significant effort to treat more criminal offenders, including drug offenders, and "rehabilitate" them. However, many of the same individuals sent to treatment for a short time kept returning, which resulted in a perception that treatment did not work. Furthermore, treatment officials questioned the need for incarceration for violation of a probation order. As a result they would not disclose problems that would arise, such as a positive drug test.<sup>20</sup>

With a perception that treatment did not work, and a belief that treatment personnel could not be trusted since they were keeping "secrets," and an increase in crime, prosecutors turned to incarceration as the tool to keep their communities safe. In the 1970's there was a significant push for mandatory sentences on a number of crimes, including drug crimes. Construction of jails and prisons increased. No longer would those convicted of a crime be "coddled." There was going to be a tough response. There was going to be punishment. A prime example of mandatory sentences for drug offenders are the so-called Rockefeller drug laws passed in New York in the 1970's. Those laws put low-level drug offenders behind bars for lengthy sentences.<sup>21</sup>

However, two problems came from that attitude. First, the individuals being put in jail almost always got back out, and when they did, they continued the same behavior. Second, the costs for prisons and jails grew astronomically. Over time, it has been recognized that it is not possible to incarcerate everyone who commits a crime. It is not practical or effective, and it is cost prohibitive.

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<sup>20</sup> It is understandable why treatment officials were not disclosing problems to the courts, since ethically the clinicians were required to keep their clients' confidences in those situations. However, that fact didn't change the belief that treatment providers were not reliable.

<sup>21</sup> The "Rockefeller Laws" have been recognized by many as a failed attempt to change the drug culture and get individuals to not use drugs. In October 2009, new laws went into effect repealing much of the Rockefeller laws in New York. As declared by Governor Patterson, "Families were broken, money was wasted and we continued to wrestle with the statewide drug problem." The Associated Press, *NY Drug Law Reforms Kick In, Treatment Stressed*, THE SYRACUSE POST-STANDARD, Oct. 7, 2009, available at [http://www.syracuse.com/news/index.ssf/2009/10/ny\\_drug\\_law\\_reforms\\_kick\\_in\\_tr.html](http://www.syracuse.com/news/index.ssf/2009/10/ny_drug_law_reforms_kick_in_tr.html).

Yet, many times incarceration is the answer for the hardcore DWI offender. After all, a first time DWI offender is typically not sent to jail or prison for an extended time, if at all. It is believed the person will learn from the arrest and conviction. Nevertheless, those individuals who are alcohol dependent cannot learn from the situation. Their body will not let them. They return to the criminal justice system for the same charge, numerous times for some, and each time get more and more time in jail or prison. Still, the question remains whether incarceration is the answer. For, if it is true that the person will get out again, and if incarceration does not change his behavior, it seems not much has been accomplished. Society is protected while the person is incarcerated, but that does not seem to be enough. Thus, the question remains what can be done with the hardcore DWI offender, before he or she kills someone. The overarching question deals with what the criminal justice system can do to permanently change behavior.<sup>22</sup>

#### B. Treatment as a Possible Solution

It is now known that treatment works. Treatment provides the tools and support needed for a person to change. It is no longer necessary to use just treatment, or just incarceration. The power of the court can be used to encourage and even require treatment to bring about a change in the dependent person's behavior.

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<sup>22</sup> Thankfully, the vast majority of the population does not have an addiction to a controlled substance or alcohol. So it is not generally recognized that change is HARD! Consider, how many New Year's resolutions are made each year? How many of them are kept? For an alcoholic to stop drinking, it is much harder than keeping a New Year's resolution to exercise more or lose weight. Change is hard, and incarceration, fines, and even ridicule do not work to change an alcoholic's behavior. To change an addiction it is necessary for a person to change his playground and his playmates. In other words, he has to change everything.

Drink too much and the effects are obvious: difficulty walking, blurred vision, slurred speech, poor judgment, and slowed reaction times. However, what are not seen are the long-term effects on a person's brain, especially a person that is dependent on alcohol, such as a hardcore DWI offender. However, thanks to a number of scientific advances, it is now possible to see the brain and gather a better understanding on the impact of alcohol. Imaging technology such as magnetic resonance imaging (MRI), computed tomography (CT), and positron emission tomography (PET) now allow scientists and doctors to examine the brain in a way that was not possible with a living person twenty years ago. Scientists can now see the internal changes of someone dependent on alcohol such as the shrinking of the brain; neurotransmitters (which allow nerve cells to communicate with other nerve cells) not as efficient; and observable deficiencies in the frontal lobe where learning and memory take place.

Many of these cognitive deficiencies are reversible with abstinence. Yet, in the short term, someone who has stopped drinking will still show significant problems in his cognitive abilities. Over time there will be improvements. Just as a person does not become dependent on alcohol overnight; to reverse the harms caused will take time. For some individuals, partial recovery can take from several months of abstinence to a year. For others, it will take even longer.

While focusing primarily on other drugs, there are a number of significant studies that demonstrate treatment works; in particular, four major studies, starting in 1968 at Texas Christian University and ending in 1995 at the Center for Substance Abuse Treatment. These four studies can be instructive about individuals dependent on alcohol, since alcohol is a drug. Those four studies are:

1. The Drug Abuse Reporting Project (DARP) collected data from 44,000 clients admitted to 52 federally funded treatment agencies between 1969 and 1972.
2. The Treatment Outcome Prospective Study (TOPS) collected data from 11,750 clients admitted to 41 treatment programs in ten cities between 1979 and 1981.
3. The Drug Abuse Treatment Outcome Studies (DATOS) was initiated in 1990 by the National Institute on Drug Abuse to evaluate drug abuse treatment outcomes and emerging treatment issues in the United States.
4. The National Treatment Improvement Evaluation Study, a congressionally-mandated five year study of the impact of drug and alcohol treatment on thousands of clients in hundreds of treatment units that received public support.

After nearly three decades of research, and 70,000 patients at all levels of substance abuse treatment and care, these four studies found a number of things to be true, with two critical determinations made overall. First and foremost, they found treatment worked. There was a significant reduction in drug usage after treatment, with a significant factor being the amount of time spent in treatment. In other words, beyond a ninety-day threshold, treatment outcomes improved in direct relationship to the length of time spent in treatment, with one year generally found to be the *minimum* effective duration.

Second, these studies determined treatment worked just as well with clients who had legal involvement or legal pressure as those without any legal pressure to enter treatment, and the ones with a legal involvement, e.g. a court order, were likely to stay in treatment longer. This was in light of the finding that most of the legally coerced addicts had more crime and gang involvement, more drug use, and worse employment records than their non-coerced counterparts. In other words, coerced patients benefited from treatment just as well—if not better—than a person who entered voluntarily.<sup>23</sup>

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<sup>23</sup> For more information on DARP, TOPS, and DATOS, see <http://www.datos.org/>. For the National Treatment Improvement Evaluation Study, see <http://ncadi.samhsa.gov/govstudy/f027/default.aspx>.



With the length of time in treatment as the most reliable predictor of success, and the fact that coerced patients tend to stay longer, the key to effective treatment is a system or environment which supports treatment and actively monitors the participant's ongoing treatment progress. Or, in so many words: Treatment does work, but only if the participant shows up when required.

The question therefore is how do we require hardcore DWI offenders to seek help and treatment when they do not believe they have a problem. Just as important, we must figure out how to keep DWI offenders in treatment to gain the long-term benefits. The clear answer to both questions is to use the power of the courts. A court can require a defendant to attend a treatment program, keep the defendant in treatment as needed, and if the orders of the court are not followed, hold the defendant accountable and impose consequences for not following the court's orders.

Treatment providers have found a benefit by working with the courts. With the courts enforcing the orders to stay alcohol- and drug-free and requiring attendance to a treatment program, the providers are actually finding that clients follow through with recommendations. They see the participants held accountable for their actions. Furthermore, treatment providers are now willing to have disclosure agreements signed between themselves, the client, and the court that allows for information about the participant and his addiction to be disclosed to help the DWI Court team understand what is needed to change the person's behavior.

## II. COURTS AS A PROBLEM SOLVER

For some individuals, having the court system involved with treatment, or the judge supervising a team that is trying to change a person's behavior through long-term treatment, is thought to be "social-work," with that word being used in a negative connotation. The public perception is that prosecutors are there to ensure a person is convicted, and the judge is there to throw the book at the person and put him in jail for a long time. However, as every prosecutor knows, a prosecutor's job is to ensure justice is achieved, not to get a conviction. As every judge, prosecutor, and defense counsel are well aware, sometimes throwing the book at the person is not the best response to ensure the person is not seen again in the system.

In imposing a sentence on a criminal defendant, modern day courts routinely look to four factors:

- Deterrence: steps taken to deter others from committing similar offenses.
- Societal retribution: society will impose a punishment on the offender for the crime committed.
- Rehabilitation: helping a person understand what they did was wrong, and to return that person to society as a law abiding person.
- Incapacitation: protecting society by incarcerating those individuals who are incapable of being reformed.

Which particular factor is considered more important depends on the crime and the offender, as well as societal attitudes. In the 1960's rehabilitation was considered more important: offenders were provided with treatment in prisons as well as other options to help individuals reform their ways and become law abiding citizens. However, the attitude of society changed as crime rates increased. Prison sentences increased, as well as the number of crimes with mandatory minimum sentences when certain crimes were committed, such as drug crimes, and steps like the Rockefeller laws, previously mentioned, were taken.

Since then, similar laws have been passed in regard to repeat DWI offenders. Statutes across the country require a minimum amount of incarceration to be imposed upon a repeat DWI offender conviction. This is based on the belief that if we impose more time on the person, the repeat DWI offender will change his behavior. However, the disease of alcohol dependency will not allow that change to happen, at least not due to increased incarceration.

Over time, more courts have tried to become problem-solvers. Instead of the knee-jerk reaction to put a drug or DWI offender into jail, courts now seriously consider what can be done to change this person's behavior. This change in philosophy is supported by the *Trial Court Performance Standards* published by the U.S. Department of Justice.<sup>24</sup> The *Standards* note that "[e]ffective trial courts are responsive to emergent public issues such as drug abuse" and that "[a] trial court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistently with its role of maintaining the rule of law."<sup>25</sup>

Something different had to be done with the addicted person in the courts, and something was. Twenty years ago, Dade Coun-

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<sup>24</sup> NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 4-5 (1997).

<sup>25</sup> *Id.* at 20.

ty, Florida, established the first Drug Court in the United States. Drug offenders were taking up a significant amount of court time, with no change in behavior from the offenders.<sup>26</sup> Today, more than 2,400<sup>27</sup> drug courts can be found across the country. Each court develops its own style, population, and criteria due to differences in the community as well as its resources. However, all Drug Courts follow the Ten Key Components,<sup>28</sup> which lay out the basic expectations for drug courts across the country. For example, and critical to each of these programs, each court will integrate treatment into the justice process, frequently testing to ensure continued sobriety, interacting judicially, and taking a non-adversarial approach.

Ultimately, Drug Court holds the participants of the program accountable for their actions, and at the same time provides the tools they need to change their behavior and become law abiding citizens. Drug Court is a common-sense approach to the drug offender, with the purpose to expedite the time between the arrest of the offender and getting the person into treatment, and to keep the person engaged in treatment long enough to get the benefits that treatment can provide.

However, there is the question of whether it works. "The body of literature on recidivism is now strong enough . . . to conclude that completing a drug court program reduces the likelihood of future arrests . . ."<sup>29</sup> As has been noted by Dr. Doug Marlowe,<sup>30</sup> "It has been proven beyond a reasonable doubt Drug Courts work."<sup>31</sup> Nationwide, seventy-five percent of Drug Court graduates remain arrest-free at least two years after leaving the

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<sup>26</sup> See Hon. Peggy F. Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 449 (1999).

<sup>27</sup> NAT'L DRUG COURT INST., RESEARCH FINDINGS (2009) (unpublished, on file with Nat'l Assoc. of Drug Court), available at <http://www.ndci.org/research>.

<sup>28</sup> For a complete discussion of the Ten Key Components, what they are and how they work, see generally NAT'L ASS'N OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), available at <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf>.

<sup>29</sup> Reginald Fluellen & Jennifer Trone, *Issues in Brief, Do Drug Courts Save Jail and Prison Beds?* VERA INST. OF JUST. (2000).

<sup>30</sup> Douglas B. Marlowe, J.D., Ph.D. is the Chief of Science, Policy & Law for the National Association of Drug Court Professionals, a Senior Scientist at the Treatment Research Institute, and an Adjunct Associate Professor of Psychiatry at the University of Pennsylvania School of Medicine. A lawyer and clinical psychologist, Dr. Marlowe has received numerous state and federal research grants to study coercion in drug abuse treatment, the effects of drug courts and other diversion programs for drug abusers involved in the criminal justice system, and behavioral treatments for drug abusers and criminal offenders.

<sup>31</sup> *The Verdict Is In*, Presentation by Dr. Doug Marlowe, NADCP 14th Annual Training Conference, St. Louis, Missouri (May 30, 2009); see Douglas B. Marlowe, *The Verdict on Drug Courts and Other Problem-Solving Courts*, 2 CHAPMAN J. CRIM. JUST. 53 (2011).

program.<sup>32</sup> Compare this to the typical re-arrest rates on those in a traditional court, in which forty-six percent of probationers commit a new offense and over sixty percent commit a probation violation.<sup>33</sup> Not to mention the high re-arrest rates ensuing after release from prison, which, as noted, generally exceed sixty to eighty percent. The U.S. Government Accountability Office (GAO) agreed, and in 2005, concluded that Drug Courts significantly reduce crime and save money for taxpayers by offsetting the costs of law enforcement, court case processing, and victimization resulting from future criminal activity.<sup>34</sup>

In the years since the GAO Report, researchers have continued to uncover definitive evidence for the efficacy and cost-effectiveness of Drug Court. Five independent meta-analyses have now all concluded that Drug Court significantly reduced crime by as much as thirty-five percent in comparison to traditional case dispositions.<sup>35</sup> These effects are not short-lived. Rigorous studies examining long-term outcomes have found that reductions in crime lasted at least three years<sup>36</sup> and as long as *fourteen years*.<sup>37</sup> As previously mentioned, Drug Courts have been proven to work beyond a reasonable doubt.

Drug Court initially focused primarily on illicit drugs; after all, it was in response to crack cocaine that the court in Florida started. Even though alcohol is a drug, Drug Court did not consider using this format with a DWI offender. Then in 1995, a court in Dona Ana, New Mexico, developed the first DWI Court focusing on the legal drug, alcohol, and the DWI offender.<sup>38</sup> Drug

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<sup>32</sup> John Roman et al., *Recidivism Rates for Drug Court Graduates: Nationally Based Estimate—Final Report*, 2003 THE URBAN INST. 27, 29 (2003).

<sup>33</sup> PATRICK LANGAN & MARK CUNNIFF, BUREAU OF JUST. STATISTICS, *Recidivism of Felons on Probation, 1986–1989* (1992).

<sup>34</sup> See ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES, REPORT TO CONGRESSIONAL COMMITTEES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE 71–73 [No. GAO-05-219] 2005.

<sup>35</sup> Steve Aos et al., *Evidence-based public policy options to reduce future prison construction, criminal justice costs, and crime rates*, Olympia: (Wash. State Institute for Public Policy, October 2006); Jeff Latimer et al., *A meta-analytic examination of drug treatment courts: Do they reduce recidivism?* (Can. Dep't. of Just., 2006); Christopher Lowenkamp et al., *Are Drug Courts Effective: A Meta-analytic Review*, J. OF COMMUNITY CORRECTIONS 5-28; (Fall 2005); Deborah Shaffer, *Reconsidering drug court effectiveness: A meta-analytic review*, Las Vegas, NV: Dept. of Criminal Just., University of Nevada; Wilson, et al. eds., (2006).

<sup>36</sup> DENISE GOTTFREDSON ET AL., MD. DEP'T OF PUBLIC SAFETY AND CORR. SERVICES, THE BALTIMORE CITY DRUG COURT: THREE-YEAR SELF-REPORT OUTCOME STUDY, EVALUATION REVIEW (2005).

<sup>37</sup> Michael Finigan et al., *The impact of a mature drug court over 10 years of operation: Recidivism and costs*, NPC Research, Inc. (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>.

<sup>38</sup> C. WEST HUDDLESTON ET AL., NAT'L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 1 fig. 1 (2008).

Court became the model for DWI Court, focusing on the DWI offender. It laid out the framework needed to change a hardcore DWI offender's behavior.

### III. WHAT IS A DWI COURT?

In short, a DWI Court is an accountability court. It is based on the Drug Court model as a distinct court system dedicated to changing the behavior of the alcohol/drug dependent offenders arrested for DWI. DWI Court is a post-conviction court that works with the hardcore DWI offenders using quick responses to hold the person accountable, with intensive supervision and long-term treatment as a requirement. A DWI Court follows the Ten Key Components of Drug Court and the additional *Ten Guiding Principles of DWI Courts*, as established by the National Association of Drug Court Professionals. These standards set out what is expected from a DWI Court; effectively reducing the recidivism of the hardcore DWI offenders, making each community a safer place to live. The *Guiding Principles* include such expectations as: determining the population for inclusion into the program, performing a clinical assessment on each participant, developing an individualized treatment plan, intensively supervising and testing the participant while in the program, creating partnerships in the community with the program to build support, having the judge take on a leadership role, regularly evaluating the effectiveness of the program, and finding ways to ensure the program is sustainable.<sup>39</sup>

Because DWI Court is intensive and communities have limited resources, it is important to focus those resources on those individuals who are the most likely to hurt themselves and others, i.e., the "hardcore" DWI offenders. These are the individuals that cannot change their behavior without additional support. Such individuals have demonstrated dependence to alcohol. To put all DWI offenders into the program is a waste of resources and can potentially create other issues. A person with limited or no contact with the criminal justice system, who is not alcohol dependent, will learn from the arrest, the night in jail, and the appearance in open court. To put that person into an intensive program can create anger and resentment at the system. The person may develop attitudes and new relationships that actually encourage the behavior the criminal justice system is trying to

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<sup>39</sup> For a complete discussion of The Ten Guiding Principles for DWI Courts, see <http://www.dwicourts.org/learn/about-dwi-courts/-guiding-principles>.

eliminate.<sup>40</sup> This can result in them becoming a repeat DWI offender.

Initially a prosecutor may be agreeable to start a DWI Court that works with a second or third-time DWI offender, but object to a fourth- or fifth-time DWI offender, believing such a person just needs jail. The belief being that the offender has had several opportunities to change his behavior, and now it is time to move onto a different person. However, DWI Court is specifically for that offender—the fourth- and fifth- and even sixth-time DWI offender. It is this person that has clearly demonstrated he is alcohol dependent and an arrest, or jail, has not and will not change it. This is not to say that a second or third or even a first-time DWI offender with a high BAC is not an appropriate candidate; he very well could be. In determining who should be admitted to the program, the team should look to the person and his dependence to alcohol, not to the number of times a person has been convicted of DWI. In other words, the team should determine who is alcohol-dependent and whose behavior can be changed by an intensive program. A team should ask which offender is at the greater risk to repeat because of the dependence upon alcohol, and, which offender needs the greater investment by the criminal justice system to ensure that there is not a repeat offense.

One clear difference between a DWI Court and a traditional court is the time it takes to get the hardcore DWI defendant through the criminal justice system and into the program. In a traditional court, many hardcore DWI defendants do not get a conviction until weeks or months have passed after the case has been set and reset for any number of motions, hearings, and trials. The delays can start from the moment of the arrest and continue up until the day the person is sentenced.

A DWI Court's goal is to get the person into the program as quickly as possible. In many cases, that means there is a conviction and entry into the program within a month. In one DWI Court in Michigan, it means the day after the arrest.<sup>41</sup> DWI Court recognizes that the quicker the person is in the program the sooner there will be an impact with the person, and the safer

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<sup>40</sup> See Douglas B. Marlowe, *Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs*, 1 CHAPMAN J. CRIM. JUST. 167, 183–200 (2009) (discussing the importance of assessing the risks and needs of the person to be sentenced).

<sup>41</sup> In the particular DWI Court in Michigan, there is not a conviction one day after the arrest. However, the day after the arrest, a person is assessed and, if appropriate, offered entry into the program. If they accept, a plea is taken at that time, and bond is set until the day of sentencing. The bond conditions that are set at that time are similar to the conditions that will be required as a participant in the DWI Court program.

the community will be because of the long-term treatment and intensive supervision. By having all of the players in the criminal justice system working together, delays are eliminated. If issues exist with a case, the case is expedited.

It is here that prosecutors can help develop ways to process a case quickly. They must assess how much time passes after an arrest until the DWI charge is filed, how much time there is between the charge being filed and arraignment, and what can be done to shorten that time. Time after time, the initial response is that these cases cannot be moved any quicker. However, when everyone involved in the criminal justice system sits down and discusses what happens at each stage, and what can be done to have it happen quicker, changes occur. Prosecutors can help lead the discussion to ensure that the person's rights are protected and justice is done in a quick and fair fashion.

A critical component of any DWI court is targeting—trying to determine who should be in the program. In many DWI Courts, the prosecutor's office provides the initial screening into the program based on criteria that were developed while creating the DWI Court. It is at this stage, when the court is initially being set up, that a prosecutor plays an instrumental role in sitting down with the rest of the team and establishing criteria under which the DWI offender may be admitted into the program. To ensure fairness, the criteria must be developed at the beginning, and then over time it can be reexamined to determine if the criteria should be expanded or tightened. It is important that the prosecutor is open to allowing offenders into the program that can clearly benefit from it; for example, the ones that show time and time again that they do not learn from the traditional criminal justice system methods. DWI Court is not something that should be used to take the "easy low-hanging fruit." Rather, it is for the alcohol dependent individuals. Because these individuals are clearly dangerous, additional steps must be taken to keep the streets safe.

The primary goal of a DWI Court is public safety: to ensure that the public is not put into more danger by a DWI offender. Unlike the usual drug offender in a Drug Court, a DWI offender kills. As has already been discussed, DWI offenders are dangerous, and putting them on probation is a risk for everyone on the team. Because of that primary goal and the risk associated with the hardcore DWI offender, DWI Court uses intensive supervision. There is regular and random testing for alcohol and other drugs, as well as scheduled and unscheduled home and work visits. With a positive result for alcohol or drugs, the person is quickly brought before the court. If a person is late to court or to

treatment, or not at work, the person is quickly located and brought before the court. This sort of rapid response holds the offender accountable and gets his attention. The offender begins to learn that there are consequences when he does not follow through.

It is that intensive supervision and frequent testing that allows a prosecutor to know that the individuals in the program are being closely watched. It allows a prosecutor to know that if something happens where the offender drinks alcohol, or uses drugs, or violates a court order, the offender will be caught, and that there will be a consequence for that action. This scenario is very unlike what happens in a traditional court, where a person can violate a court order and be unaware of it until a run-in with law enforcement. Even then, the violation may not be heard by a judge for days, even weeks, later. Rapid response to a violation is a key factor in changing a DWI offender's behavior.<sup>42</sup>

Concurrent with intensive supervision, intensive, individualized treatment is administered to each person. Each person in a DWI Court receives a clinical assessment to develop a clinically sound treatment plan. Many times, individuals with alcohol dependency have other co-occurring mental health disorders that must also be addressed to ensure long-term success. There is the absolute need to have an individualized treatment plan that is reviewed and revised over the length of the probation. This combination of responses, the intensive supervision and the intensive long-term treatment, provides a comprehensive plan of action to change a person's behavior.

Another significant difference with DWI Court and a traditional court is the team component. A traditional court has the prosecutor and the defense attorney as combatants, with the judge as arbiter. Law enforcement officers are essentially bystanders, testifying in a courtroom to what they previously saw and heard, with treatment providers not even at the table. DWI Court brings together everyone that has a stake in the participant's future: the judge, the prosecutor, the defense attorney, the probation officer, law enforcement, treatment providers, court coordinators, and victim advocates.

These individuals sit down together with one objective: how to change this person's behavior so he is no longer a threat to the community. It is a team effort, with the judge as the leader of

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<sup>42</sup> See Douglas B. Marlowe, *Application of Sanctions*, in *QUALITY IMPROVEMENTS FOR DRUG COURTS: EVIDENCE-BASED PRACTICES*, 107, 107-14 (NAT'L DRUG CT. INST., 2008) (providing a discussion on important factors when imposing sanctions on an addicted person).



the team. When discussing the participant, each person on the team provides the judge with the insight, experience, and opinion he or she has. Naturally, it is during this time when disagreements may arise. After all, the team includes elected officials and heads of departments, as well as any number of individuals that have strong opinions. It is also during this time when each person on the team has to recognize the importance of “give and take” for the team to be successful, and to consider the problem from the perspective of others on the team. During a team meeting, the presence of such “give and take” is clear when the prosecutor is suggesting community service for a violation and the treatment provider or defense attorney believes a short stint in jail is appropriate.

In trying to change a person’s behavior from being dependent on alcohol to being able to live free of it, there must be the recognition that it takes baby steps to reach that goal. It is not realistic to expect an individual to change everything about himself overnight. A person did not become alcohol-dependent overnight; it will take small steps and time to achieve a sober life. To encourage that change, DWI Court uses different levels or phases while a person is in the program. Each phase gives a participant visible and realistic steps to measure success. For example, it is not realistic to expect that an alcohol dependent person can remain alcohol free in the beginning. An alcohol-dependent person will attempt to “beat” the program; he will try to drink or use drugs. Again, that is the nature of the disease. However, it would be a realistic expectation later in the program.<sup>43</sup> DWI Court tends to be a long, rigorous program, generally lasting one to two years. Giving the program this type of structure provides the participant bite-size pieces to tear off and digest. This also allows the team to measure—somewhat objectively—how well the participant is progressing through the program requirements.

During the initial development of a DWI Court, the team members sit down and work out what is expected for each phase. It is at this time a prosecutor should participate and provide his or her perspective. A prosecutor must be involved in this component as some of the discussion may revolve around possible new criminal behavior. The prosecutor’s office must decide what actions it would take if there is new criminal behavior by the participant. For example, it must decide whether a criminal charge

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<sup>43</sup> This is not to imply that if a person tests positive for alcohol or a drug at any time that there is no response by the court. There is a response to *every* violation. However, the response will vary depending on previous violations the participant may have had, and on what phase the participant is in at the time of the violation.

will result if a participant drives while the person's license is suspended, or whether the prosecutor should allow the court, with input from the team, to sanction the person under the current charge; in addition, if a person uses marijuana, whether that would result in a new charge. This is the type of discussion that must happen in the initial development of a DWI Court to avoid complications at a later time.

It is also at this point in time when the team develops a range of responses for violations in each phase. There is not one response developed, but a whole list. This gives the DWI Court a number of options to consider when responding to a violation; after all, it depends on the person and the violation.

In the first phase, it is common to require a person to attend court on a weekly basis, provide random and scheduled urine tests once or twice a week, take breath tests on a regular basis, attend treatment two or three times in a week, possibly attend AA, and comply with any other court orders. It is expected, and even demanded, that the participants show up as scheduled and on time. A failure to comply with any of these requirements results in a sanction for the participant. Advancement to the next phase depends on the person completing those particular requirements. Usually a minimum amount of time must pass as well.

In the next phase, the person will attend court on a less-frequent basis, such as bi-weekly, possibly be required to have a job, continue with treatment as set up by the treatment plan, continue with drug and alcohol testing, work towards getting a GED if that is applicable, do community service, pay fines and costs, and a number of other requirements as set by the court. Just as the treatment plan is individualized, so are the court requirements. Everyone has to attend court, but how many times depends on the person, where they are in the recovery, and the phase the person is in at the time. Additionally, in later phases, DWI Court will usually require a minimum number of days where a person is clean and sober prior to any advancement to the next phase.

At each level, there are growing expectations of what the person will be able to achieve. For example, at the first phase, it is important to get a person to show up on time. At a later phase, the goal may be to require the participant to get and maintain employment. Each phase is set up to encourage the person to move forward, taking small steps towards that ultimate goal of sobriety, addressing the root cause during all of this time: the addiction to alcohol.

One of the most important tools a court will use to encourage a participant's change of behavior is the use of incentives and sanctions. It is the use of the incentives and sanctions that will keep the person engaged in treatment. They are critical in this effort. As previously noted, when a person completes treatment, the long-term success rate increases.

In a DWI Court, every infraction will lead to a consequence, a sanction. However, the response will vary, depending on where the person is in his recovery, and how many similar violations have occurred. DWI Court uses graduated sanctions to get the participant's attention. For a first violation, the response may be community service; for a second violation, it may be a weekend in jail; for a third violation, a week in jail. It depends on a number of factors, all of which are discussed by the team in advance, with input from all of the members, including the prosecutor.

DWI Court recognizes that the response must be tailored to the person, as some sanctions would not be considered effective. For example, for the average citizen who has no prior contacts with the criminal justice system, an arrest and a night in jail would have a significant impact on that person. Whereas for a person who has been arrested six or seven times and been in jail numerous times, a night in jail might have no impact. For that person, it might have more of an impact to do community service for a week, pay a large fine, or increase the number of times a person has to come to court. But even in these situations, the sanction is graduated. Anyone can become accustomed to a particular punishment when it is at a low or moderate level. Failure to increase the response, or to a series of weak sanctions, can actually result in a person testing how far they can go to cause problems for themselves and in the program.<sup>44</sup>

There must be a quick response for each violation, and the response must be appropriate for the person. In other words, it is having the appropriate response that gets the person's attention, which is most likely not the most severe sanction available. In fact, to bring out the "big guns" too soon in the process will result in a person learning that he no longer needs to fear the consequences, as he has seen the worse.

Sanctions alone will not change a person's behavior, the effects are transitory. While it is critical to respond to each infraction with an appropriate response, a sanction results in the person suppressing the undesired behavior. It does not get the

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<sup>44</sup> See Douglas B. Marlowe & Kimberly C. Kirby, *Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research*, 2 NAT'L DRUG CT. INST. REV. 1, 1-25 (1999).

person to learn what the appropriate behavior is for the long-term. For that, incentives are used.<sup>45</sup>

There are a number of sayings that talk about the power of incentives, such as: “The carrot is mightier than the stick;” or, “You’ll catch more bees with honey than vinegar.” Using positive reinforcement in a court setting provides the long lasting change desired. When a person does something that a DWI Court wants to continue, an incentive is used. This will reinforce the behavior and tell the person what they are doing is correct.

Prosecutors are not used to considering the power of an incentive to change behavior. In general, the court system is not geared that way. For the average citizen, it is the fear of coming to court and receiving a sentence that provides the “incentive” to not commit a crime. But for the hardcore DWI offender, the addiction to alcohol is stronger than the fear of what *could* happen or even what does happen. While sanctions are used to stop certain behavior, it is the use of incentives that lets a person know he is doing something right and that such behavior should be continued. Just as there is a variety of sanctions for each phase depending on the violation, there should be a variety of incentives for each phase. In fact, since incentives are more effective in changing a person’s behavior, the list of incentives should be greater than the list of sanctions.

The term “incentives” does not mean that every time a person does something right he is given a monetary incentive. An incentive can be applause during a court session; or it can be something as powerful and “simple” as a person in authority, such as a judge, saying: “Good job, keep it up.” Many of the participants are not familiar with anyone, especially a person in authority, recognizing them for a job well done or for doing what is expected. Praise can be a powerful tool in DWI Court and used in a number of ways. When probation officers are visiting a person’s home, while they are looking for signs of alcohol use, they are also looking to “catch the person doing right.” If a participant has obviously cleaned up the home, or has a good attitude, the probation officer can praise the person, saying: “Good job.” It is immediate and it is powerful. Additionally, the probation officer then tells the treatment provider, defense attorney, and the judge, and all of them may compliment the participant. For one action, it is possible to get multiple responses, each one supporting and encouraging the person. Over time, incentives are “withdrawn” to allow for the participant to develop; to not expect praise at every step. It happens naturally in a DWI Court, since

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<sup>45</sup> See *id.* at 18–20.

over time the participant will have fewer contacts with the court and the team members as the person progresses in the program. Thus, there are fewer occasions for an incentive to be applied.<sup>46</sup>

Today's clinical textbooks generally conclude the use of positive reinforcement is more effective in changing a person's behavior than the use of sanctions. However, using incentives without the possibility of sanctions can be detrimental, especially in the criminal justice system. It can be seen as coddling, allowing a person to become complacent and feel that they are entitled to certain benefits.<sup>47</sup>

DWI Court uses both incentives and sanctions, providing the proper balance in getting a person to change his behavior. It takes the sanction to tell a person that his behavior will not be tolerated and must be suppressed. It takes the incentive to tell a person that his behavior is proper and to continue it. It is that balance, when combined with the intensive treatment that a person goes through in a DWI Court, to understand his actions, and if necessary to address other underlying issues, that completes the package and gets a positive change for the long-term.

Another critical difference between a DWI Court and a traditional court is recognizing it is difficult for a participant to be dropped from the program. A traditional court will usually give a person one, two, maybe three times to violate a court's order before the court will terminate the probation and incarcerate the person, whether it is in jail or in prison. The belief being that probation is a privilege and that the person "blew" his chance with a violation. A traditional court doesn't want to give a person a second chance, as it will be viewed as being soft on crime. DWI Court may very well send a person to jail for violating a court's order. However, once that part of the sentence is completed, the person will return to intensive supervision, with treatment still taking place. The probation is not terminated. In fact, it is not uncommon for the drug testing to be increased or home visits to happen more frequently.

"Recovery is also a journey that takes time and effort and is often filled with false starts and failed attempts."<sup>48</sup> So it is expected that there will be violations and consequences for those

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<sup>46</sup> It should be noted that this does not mean that the random drug testing and home visits still do not occur. They do. Possibly not as frequently, but they still occur on a random basis to ensure that the participant remains alcohol and drug free. Treatment also continues for the entire time.

<sup>47</sup> See *supra* note 46 and accompanying text.

<sup>48</sup> CARLO C. DICLEMENTE, *ADDICTION AND CHANGE: HOW ADDICTIONS DEVELOP AND ADDICTED PEOPLE RECOVER* viii (Howard T. Blane & Thomas R. Kosten eds., Guilford Press 2003).

violations. This is especially true in the beginning of the program when the participant is just starting to understand what it means to be in the program, when his judgment is still impaired and the desire to use is significant. However, it is also expected that the person will be returned to the program to continue the work that has begun. Treatment must be long-term in order to work. It is the recognition of the need to keep the person in treatment for the long-term, and to use incentives and sanctions strategically, that has changed the mindset of criminal justice professionals everywhere.

This is not to say that a person cannot be terminated from the program. He can, but, the intent is to make it very difficult. Being dropped from the program usually occurs for one of two reasons. First, when keeping the person in the program will affect the program's integrity—for example, if he interferes with the drug testing that is done on all participants—the person must be terminated from the program. DWI Court will not only do frequent breath tests of the participants to ensure that the participants are not drinking, it will also take regular and random urine samples to test for other drugs.<sup>49</sup> However, if a person used a device called a *Whizzinator*, a false penis used to provide someone else's urine, to defeat the drug test, and then rented that device to other participants, he will have sufficiently affected the program's integrity such that he or she would not be allowed to remain in the program.

Second, a person could be dropped from the program when that person no longer is willing to work with the program or has done something that puts others at risk. An obvious example of that is, of course, the person being arrested for a new DWI charge while in the program. While it is recognized that a person will try to drink alcohol while in the program (and there will be a consequence for that action), it is not acceptable for that person to get behind the wheel of a car and drive while under the influence.

#### A. Does DWI Court Work?

Evaluation studies are considered vital to sustaining DWI Court programs. A DWI Court is expected to conduct outcome evaluation studies to demonstrate the dramatic effect of DWI/Drug Court on the community, to assess relative costs, and to maintain or seek funding. As previously noted, DWI Court is

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<sup>49</sup> Many times when a person stops using one substance, such as alcohol, they will turn to another substance to still get the high. DWI Court recognizes this and tests for a number of drugs, besides just alcohol.

based on the proven Drug Court model. Drug Court has been rigorously examined and found to be an effective method for reducing recidivism and drug addiction. DWI Court is a recent innovation to change a hardcore DWI offender's behavior. Studies are being done specifically on DWI Court, but they are just in the beginning phase.

A recent evaluation of three separate DWI Courts in Michigan<sup>50</sup> determined that, within two years of entering the DWI Court, participants were substantially less likely to be arrested for a new DWI offense or any new criminal offense than individuals sentenced in a traditional court. In one court, individuals that were in the DWI Court program were three times less likely to be rearrested for a new criminal offense and nineteen times less likely to be rearrested for a DWI charge. The recidivism rate was significantly lower for the DWI Court participants.<sup>51</sup>

The study also determined that DWI Court costs less than a traditional court, using fewer resources to achieve a better result. The executive summary of the evaluation concluded with the following statement: "Overall, these results demonstrate that the [DWI C]ourt is effective in reducing recidivism and reducing drug and alcohol use while using less criminal system resources to accomplish these goals."<sup>52</sup>

#### B. Who Supports DWI Court?

As can be seen, DWI Court is showing positive results. It is because of this impact that DWI Court is endorsed by the following: The Governor's Highway Safety Association, International Association of Chiefs of Police, Mothers Against Drunk Driving, National Alcohol Beverage Control Association, National Association of Prosecutor Coordinators, National District Attorneys Association, and National Sheriff's Association.

DWI Court has also been listed as a promising sentencing practice in *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (March, 2005), as well as in *Countermeasures that Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices* (2007), and the Third and Fourth Editions of the *Countermeasures Guide*, 2008 and 2009, respectively.<sup>53</sup>

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<sup>50</sup> Michigan calls its DWI Court "Sobriety Court." This court uses the same format as DWI Court; it just has a different name.

<sup>51</sup> See BRET FULLER ET AL., MICHIGAN DUI COURTS OUTCOME EVALUATION: FINAL REPORT (NPC Research 2007).

<sup>52</sup> *Id.* at V.

<sup>53</sup> These documents are printed by the National Highway Traffic Safety Administration (NHTSA), a division of the U.S. Department of Transportation.

#### IV. WHY SHOULD PROSECUTORS BE INVOLVED?

Today, with prosecutor offices having insufficient staff, budgets being cut on a regular basis, and caseloads increasing on all levels, it is a legitimate question to ask why prosecutors should take on more work; especially since the vast majority of the work is done after a conviction, when the judge is involved and a prosecutor typically is not. The short answer: because it works better than business as usual. Prosecutors are not in the job to make money; they do it to make a difference in the community, to make it safer, and to help the victims that come through the criminal justice system. This type of program is making communities across the country safer. Therefore, a more important question concerns why a prosecutor would not become involved.

It is useful to look at research done on the Drug Court system, which is the model for DWI Court. A recent study by NPC Research asked whether it makes a difference if a prosecutor attends all staffing sessions as well as Drug Court sessions. The answer was a definite “yes.”<sup>54</sup> The study found that with a prosecutor attending all team meetings, as well as all court sessions, the participant graduation rate was higher than when the prosecutor did not attend on a regular basis. There was also an increase in the graduation rate when the defense attorney was expected to attend the team meetings and court sessions. Furthermore, outcome costs savings due to recidivism were also increased when the prosecutor and defense attorney were present at the team meetings and court sessions.

There was no definitive explanation as to why it made a difference, since it was beyond the scope of the study. However, team members interviewed during the study believed that it carried more weight to have both the defense attorney and prosecutor present and on the same page as the judge. Additionally, having both attorneys at the team meetings allowed for better communication and quicker responses, which is always important in a Drug Court. To not have the prosecutor’s voice heard on a case in the criminal court system would indicate an abdication of a prosecutor’s role to see justice done regarding a defendant, as well as a victim.

Given that DWI Court yields better results than a traditional court, with greater success when a prosecutor is present at team meetings and court sessions, and a reduced cost to the crim-

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<sup>54</sup> SHANNON M. CAREY ET AL., *EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS* (NPC Research 2008).



inal justice system and to society, again, the question needs to be asked why a prosecutor would not be involved in such an endeavor.

As previously mentioned, budgets are being cut across the country. As such, how a prosecutor's office agrees to support a DWI Court with an attorney remains an important question. However, it is for that very reason—the budget—that a prosecutor should consider a DWI Court. Granted, due to the intensive nature of DWI Court, an attorney's time is taken up during team meetings and court sessions. However, based on the results, the costs are outweighed by the benefits. As stated by the above-noted Michigan study, DWI Court is less expensive than a traditional court. In some ways, this is because jail and other sanctions are used more strategically, so costs are saved in that regard. Additionally, as already noted, the DWI offender is moved through the criminal justice system at a quicker pace, to get them into the program as quickly as possible.

That quicker pace also has a cost benefit to the prosecutor's office. The trials that are normally scheduled, which an assistant prosecutor has to prepare for, no longer happen. The time and money spent subpoenaing and interviewing witnesses is spent elsewhere, allowing assistant prosecutors to work on other cases. Additionally, over time, there is a reduction of hardcore DWI offenders. Joseph Lumpkin, Chief of the Athens-Clarke County Police Department in Athens, Georgia, and part of the DWI Court team in Athens, noted: "The officers on the road believe that it's successful because we aren't arresting the same individuals over and over. We don't see the individual that we've arrested a month or two months before."<sup>55</sup> If law enforcement officers are not seeing the same individuals on the road, then prosecutors are certainly not seeing them in the courtroom.

Consider what currently happens with the hardcore DWI offender in most courts across the country: the person will very likely get some incarceration, pay some fines and costs, and be told to get treatment. However, we must seriously consider what happens once the sentence is imposed and the jail time served. The features which make DWI Court effective—intensive follow-ups to ensure that the person is not drinking and that the person is showing up to work or to treatment, and provision, on a regular and random basis, of urine samples for drug testing, for example—are most often absent. Instead, the court may have to

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<sup>55</sup> DVD: DWI Courts: Making Our Communities Safer (Nat'l Ctr. for DWI Courts 2009) (on file with author).

wait for that call from Officer Smith saying that they have the defendant in custody for another DWI charge.

The elected prosecutor in Eaton County, Michigan, was asked over ten years ago to consider being on the DWI Court team, a brand new concept at that time. Recently he provided the following reflection:

When we started our DWI court in 1997, I knew that I was taking a risk. Prosecutors, of course, are supposed to be “Tough on Crime,” and every elected prosecutor knows that the next election cycle could bring a challenge that he or she is “soft” on drugs or drunk drivers. This is the stuff that keeps us up at night.

But prosecutors are also supposed to be smart and are expected to make effective use of limited resources. I had taken the tough, punishment-only approach for years, but limited jail and prison space in Michigan had reduced the actual available incarceration for drunk driving. That meant that a drunk driving defendant could not be removed from the road for any meaningful length of time.

Moreover, while probation agents were well intentioned, their case-loads were too large to monitor probationers closely. All things considered, I decided that the greater risk was in not trying a new approach.

And, over the course of ten years, I have found that the residents of our county approve of our efforts to deal with the underlying substance abuse. I believe that our effort has been a success. I’m not suggesting that every case has been a success. But, overall, I believe that as a result of our program, a number of participants have returned to productive lives at work, and returned to relationships with children and other family. What skeptic could disagree with that?<sup>56</sup>

In July 2009, the nation’s premier association for prosecutors, the National District Attorneys Association (NDAA) looked at DWI Court to decide if this was a program that should be supported by that august association. What follows is part of the resolution passed by NDAA:

Prosecutors occupy a unique position from which to advance the DWI Court concept. They are capable of bringing together essential parties and components necessary to develop a court, which, where appropriate, can provide a consistent alternative to the current reliance on the traditional application of conviction, punishment and probation. As America’s prosecutors, the National District Attorney’s Association should be at the front edge in the development of the DWI Court concept and encourage prosecutors to explore them throughout the United States. The use of DWI Courts is an essential part of the drug and

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<sup>56</sup> Jeff Sauter, *A Risk-Taker is Sold on DWI Courts—A Prosecutor’s Viewpoint*, DWI CT. REP. 4–5 (Mar. 2008).

traffic safety policies promoted by the National District Attorney's Association.<sup>57</sup>

Prosecutors from around the country are seeing the benefit from a DWI Court in their jurisdiction. They are coming out in support of the program, recognizing that it takes a joint effort of everyone in the criminal justice field to change the behavior of the hardcore DWI offender and save lives in their communities.

#### CONCLUSION

On the Thomas Jefferson Memorial in Washington, D.C., one of the quotes on the wall reads:

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regime of their barbarous ancestors.

During the past two decades, we have obtained a better understanding of what it takes to change a hardcore DWI offender's behavior. We now know that jail is not the be-all, end-all, in changing behavior. In fact, it is an inefficient tool to change the behavior of those individuals that are alcohol dependent. It protects us from them while they are incarcerated, but not afterward. It is time for the institution known as the criminal justice system to advance and keep pace with the times. It is time for the criminal justice system to put on a new coat for the hardcore DWI offenders, one that incorporates accountability using intensive supervision as well as intensive and long-term treatment, and to work towards building safer communities throughout the nation. DWI Court is one more tool to use in the fight to stop impaired driving. DWI Court is the tool to change the hardcore DWI offender's behavior, for a lifetime.

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<sup>57</sup> NDAA resolution passed July 2009, *available at* <http://www.dwicourts.org/sites/default/files/ncdc/NDAA%20-%20DWI%20Court%20Resolution.pdf>.

