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A Drug by Any Other Name is Still a Drug: Why the Florida Judiciary Should Start Treating DUI as any Other Drug Offense

Gail Sasnett-Stauffer

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**A DRUG BY ANY OTHER NAME IS STILL A DRUG:
WHY THE FLORIDA JUDICIARY
SHOULD START TREATING DUI
AS ANY OTHER DRUG OFFENSE**

*Gail Sasnett-Stauffer**
& *E. John Gregory***

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** B.S., U.S. Military Academy, West Point, NY; J.D., University of Florida Levin College of Law; Captain, U.S. Army. Editor-in-Chief (Spring 2001), *Florida Law Review*. As with all my other accomplishments in life, I dedicate this Article to my wonderful family, those who made me, Mom and Dad, and those who sustain me on a daily basis, my sweet wife, Yali, and beautiful daughter, Estelle.

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Drug Courts are “one of the most monumental changes in social justice since World War II.”¹

— General Barry McCaffrey, U.S. Drug Czar

I. FOREWORD BY GAIL SASNETT

In the summer of 2000, through close personal experience with an alcoholic family member brought into the open through a charge of DUI,² I became very aware of alcoholism’s impact on a person and the insufficiency of our current legal system in addressing the underlying issue of addiction to alcohol. Thinking about how alcohol is another drug, albeit a legal one, I wondered why Drug Court principles would not be applicable for addressing the problem of alcoholism when it is the court system that becomes aware of the addiction through DUI charges. A few phone calls led to Nadine Milford, President of MADD — Albuquerque.

She answered my question with a resounding, “Yes, they are applicable!” She went on to explain how she came to be so involved in the DWI/Drug Court movement after losing her daughter and three grandchildren in a crash caused by a drunk driver. She determined that these deaths would not be in vain. She educated herself on the offense of DUI³ and on alcoholism and drug addiction. In New Mexico, which was number one in the nation for alcohol-related deaths, she became the leading advocate for DUI/Drug Courts being established,⁴ but only as long as they succeeded. She maintains that commitment to this day because, “It’s working.”⁵ From that point this Article was conceived.

1. Cory Reiss, *Courts Seek Fix as Funds Dry Up*, GAINESVILLE SUN, available at <http://gainesvillesun.com/articles/2000-11-26d.shtml> (last visited May 17, 2002). In addition, according to Newsweek, “Gen. Barry McCaffrey, says the phrase ‘drug war’ should be retired in favor of ‘drug cancer.’” Jonathan Alter, *The War on Addiction*, NEWSWEEK, Feb. 12, 2001, at 38.

2. Throughout this Article, except where otherwise noted, “DUI” refers to the offense of driving under the influence of alcohol, and not solely under the influence of illicit drugs.

3. “DWI” in New Mexico.

4. Conversation between Nadine Milford and Gail Sasnett, October 2000.

5. *Id.*

II. INTRODUCTION

Treatment-based drug courts began in Miami-Dade County as a method of dealing with the ever burgeoning, recidivism-driven drug offense criminal docket.⁶ While the purpose of Drug Courts is to treat the underlying addictions that lead to the criminal recidivism of substance-abuse offenders,⁷ few Drug Courts nationwide now accept clients based solely on a DUI charge. Most Drug Courts, rather require that the drug-court-qualifying offense be an illicit drug offense.⁸ However, as “drug courts have proven their effectiveness in controlling both the drug usage and criminality of drug-using offenders, communities have successfully expanded drug court programs to include drug-using offenders charged with non-drug offenses.”⁹ DUI recidivism is also a major societal problem,¹⁰ and the data

6. See *Statewide Drug Court Graduation*, available at <http://www.county.com/drugcourt/Florida%20Drug.html> (last visited May 26, 2001) (“Florida started the drug court movement by creating the first treatment-based drug court in the nation in 1989. The drug court concept was developed in Dade County (Miami, Florida) stemming from a federal mandate to reduce the inmate population or suffer the loss of federal funding.”).

7. See Roger H. Peters & Mary R. Murrin, *Effectiveness of Treatment-Based Drug Courts in Reducing Criminal Recidivism*, 27 CRIM. JUST. & BEHAV. 72, 73 (2000).

8. In our own research, we found that the most common underlying offenses leading to the participation of a defendant in Drug Court were drug possession and drug sales. See generally *id.*

9. *Facts on Drug Courts*, available at http://www.county.com/drugcourt/facts_on_dr.htm (last visited May 26, 2001).

10.

Each DUI arrest represents 1,000 episodes of drunken driving It’s a formula developed from roadside sobriety surveys Nationally, one-third of those arrested on DUI charges are repeat offenders. In one study, 61 percent of third-time DUI offenders broke traffic laws while licenses were under suspension. Florida inventoried its repeat offenders four years ago: 47,391 drivers had three or more DUI arrests, and 3,284 had six or more In 1991, the Highway Patrol tried “Operation Roundup.” An elite unit of troopers in four counties . . . kept watch on six-time DUI offenders with prior arrests for driving while suspended. They arrested 116, including a Tampa man who, in the process, racked up his 26th DUI conviction.

Patty Ryan, *Sobering Indifference*, TAMPA TRIB. (quoting Jim Frank of the National Highway Traffic Safety Administration in Washington, D.C.), reprinted in TAMPA BAY ONLINE, available at <http://tampabayonline.net/reports/hitrun/fo1.htm> (last visited May 25, 2001). “A third of [DUI] offenders on probation compared to about two-thirds in jail reported prior [DUI] sentences. Of [DUI] offenders, 34% in jail and 8% on probation reported three or more prior [DUI] offenses.”

available thus far supports that DUI/Drug Courts are effective in reducing DUI recidivism as well. A DUI offense is clearly a good proxy for alcoholism.¹¹ Alcohol abuse is also a good proxy for the abuse of illicit drugs.¹² Researchers agree that “court-ordered treatment should be considered an adjunct, not an alternative, to license sanctions” in DUI cases.¹³ Further, alcoholism is one of the most harmful and costly forms of substance abuse.¹⁴ The number of years of potential life lost from alcohol-related traffic crashes is astounding.¹⁵ Since Drug Courts were established to fight drug crime recidivism, and DUI recidivism is one of the most dangerous examples of criminal recidivism involving “the most widely used psychoactive drug in the world,”¹⁶ alcohol, why do Florida Drug Courts not accept DUI offenders before their courts? Why are Florida Courts treating DUI offenses differently than illicit drug offenses when both are the result of chemical addiction, and these same courts have recognized that the standard system does not work for substance abuse offenders?¹⁷

Laura M. Maruschak, BJS Statistician, *Bureau of Justice Statistics Special Report; DWI Offenders under Correctional Supervision*, June 1999 (NCJ 17221), at 1. We were not able to find comparable statistics for Florida, but if Ohio is representative of states nationwide, recidivism is formidable: “Of the 797,877 DUI offenders in Ohio, 528,071 have been convicted once, 154,535 have two convictions, 63,522 have been convicted three times and 27,846 have been convicted four times.” Randy Ludlow, *Prison to House Chronic DUIs*, POST, available at <http://www.cincypost.com/news/1998/dui120198.html> (last visited May 25, 2001).

11. “Of [DUI] offenders, about 37% on probation and nearly 47% in jail exhibited indicators of past alcohol dependence.” Maruschak, *supra* note 10, at 1.

12. *Id.* at 11.

13. *Alcohol Alert: National Institute on Alcohol Abuse and Alcoholism No. 31 PH 362 January 1996*, available at <http://silk.nih.gov/silk/niaaa1/publication/aa31.htm> (last visited Feb. 25, 2001).

14. See generally *State Trends in Alcohol Problems 1979-92*, in 5 U.S. ALCOHOL EPIDEMIOLOGIC DATA REFERENCE MANUAL (1st ed. Sept. 1996), available at National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6000 Executive Blvd., Rockville, MD 20892.

15. For example, according to the National Institutes of Health, in 1997 alone, the number of years of potential life lost in alcohol-related traffic crashes was approximately 307,183 years. *Years of Potential Life Lost (YPLL) from Total and Alcohol-Related Traffic Crashes According to Sex, United States, 1977-97*, available at <http://www.niaaa.nih.gov/databases/crash03.txt> (last visited Feb. 25, 2001). One study found that between 1988-96, an average of 463 lives of children below 14 years were claimed as a direct result of DUI. See Guohua Li, *Child Injuries and Fatalities from Alcohol-Related Motor Vehicle Crashes*, J. AM. MED. ASSOC., May 3, 2000, available at <http://jama.ama-assn.org/issues/v283n17/ffull/jed00025.html> (last visited Mar. 20, 2001).

16. Li, *supra* note 15.

17. The establishment of treatment-based Drug Courts by most jurisdictions in Florida supports the inference that Florida courts generally recognize that the standard system does not work for substance abuse offenders.

In a few jurisdictions in California, and elsewhere throughout the nation, some Drug Courts actively accept DUI offenders.¹⁸ In fact, several Drug Courts nationally have recognized that for a large percentage of their clients, alcohol is the primary drug of choice.¹⁹ Several New Mexico counties lead the nation in this respect, with their Drug Courts actually accepting more offenders under the jurisdictional hook²⁰ of a DUI offense than under that of an illicit drug offense.²¹ We refer to such courts, based on the Drug Court model, which accept both DUI offenders and illicit drug offenders, as "DUI/Drug Courts."²² While the nation's Drug Court movement started in Florida, our research has revealed that there is no Drug Court in Florida that accepts clients solely on the basis of their having committed a DUI offense. However, some counties are beginning to experiment with establishing dedicated DUI Courts based on the Drug Court model.²³ There may be DUI offender clients in some Florida Drug

18. See Judge Jeff Tauber & C. West Huddleston, *DUI/Drug Courts: Defining a National Strategy*, National Drug Court Institute (Mar. 1999). The Bakersfield, California Drug Court has accepted multiple drunk driving offenders since its inception in July 1993. *Id.* at 17. Dona Ana County, New Mexico has had a DWI Drug Court since 1995. *Id.* at 26. Maricopa County DUI Court, Arizona. *Id.* at 29. The Payne County Drug Court, Stillwater, Oklahoma began operation in May 1995. *Id.* at 30. The Fredericksburg, Virginia Regional DUI Court began operation on May 1, 1999. *Fredericksburg Regional DUI Court Brochure* (on file with authors).

19. According to Steven R. Belenko, Ph.D., *Research on Drug Courts: A Critical Review 1999 Update*, 2 NAT'L DRUG COURT INST. REV. 1, 18 (1999), "27% of Madison County (IL) participants were dependent on alcohol at the time of the admission [into drug court]; alcohol was the primary drug of choice for 43% of Cumberland County (ME) participants and 21% of New Castle County (DE) clients." Statistics collected in 2001 reflect a rise in the percentage of Cumberland County (ME) participants who reported alcohol as their primary drug from 43% in 1999 to 58% in 2001. *Id.*

20. For purposes of this Article, we refer to the charge which gets a client into DUI/Drug Court as the "jurisdictional hook."

21. See American Council on Alcoholism Web Site, *Bernalillo County Metro Court*, available at <http://www.aca-usa.org/bernalillo.htm> (last visited May 25, 2001) ("[T]he Bernalillo County Metropolitan DWI/Drug Court Program has become primarily an alcohol based program.").

22. This terminology, "DUI/Drug Court" seems to be the standard way to refer to a court, based on the Drug Court model which accepts DUI offenders. We feel, however, that this terminology, "DUI/Drug Court" is a bit unfortunate because it seems to imply that alcoholism, the root cause of DUI recidivism, is somehow different from other drug addictions. Ideally, the term "Drug Court" itself would encompass alcohol addiction as well. This notwithstanding, because in Florida and nationwide, "Drug Court" is associated almost exclusively with courts dealing with illicit drug offenders, we feel the need throughout this Article to make this distinction and will refer to the courts they advocate as "DUI/Drug Courts."

23. See Belenko, *supra* note 19, at 8-10.

Courts, but these DUI offenders ended up in Drug Court based on other illicit-drug-related charges.²⁴

The notion of DUI Courts based on the Drug Court model is not totally foreign to Florida. Previously, Drug Court professionals in Florida have considered the applicability of the Drug Court model to DUI offenders and have raised a number of concerns, some of which are addressed in this Article.²⁵

24. For instance, if a person were arrested for DUI, and a subsequent search incident revealed illegal drugs in his automobile, that person could end up in Drug Court under the jurisdictional hook of the drug charge. Since universally Drug Courts forbid the use of alcohol, and as will be discussed later in this Article, the treatment regimen for illicit drug users and for alcohol abusers appears to be essentially the same, these defendants end up being treated for the alcohol abuse while participating in Drug Court under the auspices of the drug charge. *See, e.g., Hewlett v. Florida*, 661 So. 2d 112 (Fla. 4th DCA 1995) (demonstrating that it is possible for current Drug Court clients to also have current DUI offenses). Also, it appears that a large number of current Drug Court participants in Florida have as their primary drug of choice alcohol. *See Peters & Murrin, supra* note 7, at 81 (noting twelve percent in Escambia County and twenty-two percent in Okaloosa County).

25. Following an extensive needs assessment of Florida Drug Courts, a comprehensive curriculum for treatment-based Drug Court teams was created. A conference was held in June 1996 with seventeen Drug Courts participating to test that curriculum. As part of the needs assessment, the issue of handling DUI offenders in the Drug Court manner arose. As this Article will periodically refer back to this discussion, it is produced in full below:

Drug court team members [from the 17 Florida drug courts] who offered comments on the suitability of the drug court approach in DUI cases also demonstrated a diversity of views, from one respondent who stated that the second offense is one offense too many for the safety of the public to another respondent who advised that lack of transportation is an access-to-treatment issue. A number of respondents discussed the role of Alcoholics Anonymous, either as an essential part of aftercare or as an early part of the treatment program. One respondent suggested providing treatment only to those who do not respond to AA. Several recommended the involvement of [MADD] and [SADD] as well as victim presentations. While some encouraged an educational approach, others questioned incentives and ways to monitor success, perhaps through breathalysers and urinalysis.

The diversity of opinion was carried into the consideration of revisions in court processes that would be appropriate in a DUI drug court. Some respondents advocated pre-trial diversion programs, with prosecution or sentencing deferred [*see infra* Part VII.B.2]. Others insisted that the programs not be pre-trial or diversion, but that pleas be required and that sanctions be administered as conditions of probation [*see infra* Part VII.B.3]. A number of respondents noted that such a program would require changing statutory language and working around a mandatory jail sentence [*see infra* Part VII.B.1]. Others advocated the revision of sentencing guidelines for very harsh penalties, accountability for the second DUI, and strict enforcement of sanctions for positive tests. Incentives were raised, including whether to nullify the first charge and keep the second on

Following the widespread success of the Drug Court model nationally, in November 1998, the National Drug Court Institute (NDCI)²⁶ assembled practitioners from seven jurisdictions which had expanded their Drug Court programs to include offenders whose sole offense consisted of a repeat DUI offense.²⁷ These practitioners formed the DUI/Drug Court Advisory Panel (Advisory Panel) "to explore and compare the needs of DUI and [illicit] drug offenders and assess the applicability of the drug court model to repeat DUI offenders."²⁸ The Advisory Panel made this recommendation: "Establish DUI courts that are based on the drug court model, or *widen the focus of existing drug courts to include DUI cases.*"²⁹

Our purpose in writing this Article has been to localize the Advisory Panel recommendation in the Florida Drug Court experience and in Florida Law. It is our view that in a judicial system of limited resources, it would be best for society and defendants if the more egregious of DUI offenders were treated like other substance abusers and had access to Drug Courts or Drug Court methods. In this Article, we make two general proposals: first, that Florida's existing Circuit Court Drug Courts should be adapted to accommodate DUI offenders; second, that independent DUI/Drug Courts should be established at the County Court level.³⁰ Throughout this

the record. Some believed only first offenders should be eligible, while others indicated third or fourth offenders should be eligible [*see infra* Part VI.D]. Several respondents advised that the judge must be knowledgeable about alcoholism, that this type of court would clarify case review as part of a judge's role, and that several facets of the state division of motor vehicles were implicated, including reporting requirements and staff familiarity with treatment for substance abuse. Some respondents also encouraged involvement of the defendant's family.

Gaining Momentum: A Model Curriculum for Drug Courts (Office of the State Courts Administrator, Supreme Court of Florida, Sept. 1996), at 16.

26. NDCI is sponsored by the Office of National Drug Control Policy, Executive Office of the President and the Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice. The Mission of the NDCI is: "Promoting education, research and scholarship for drug court and other court-based intervention programs." NDCI Web Site, *available at* <http://www.ndci.org/aboutndci.htm> (last visited Feb. 25, 2001).

27. Tauber & Huddleston, *supra* note 18, at vii.

28. *Id.*

29. *Id.* at x (emphasis added).

30. For those readers not acquainted with the Florida Court System, the County Court is the basic trial court for misdemeanor offenses, and it is at this level where most DUI offenses go through the judicial system. The Circuit Court is the felony trial court and is also the first level of appeal from the County Court. The next highest level of appeal after the Circuit Court is the District Court, with the Supreme Court above those. Felony DUIs are handled at the Circuit Court level. The existing Drug Courts in Florida are generally at the Circuit Court level. "The Florida Courts System is divided into five districts which are made up of 20 circuits which are made up

Article, we develop these proposals and address some of the inevitable criticisms and problems associated with including DUI offenders in existing Drug Courts and establishing new DUI Courts based on the Drug Court model.

This Article addresses unique statutory and administrative framework of Florida as well as the existing Drug Courts of Florida. In doing so, it shows how our proposals can be woven seamlessly into the current system to create a coherent system more effective than the current one, with a minimum of judicial effort expended in the transformation.

III. FLORIDA'S CURRENT SYSTEM FOR PROCESSING DUI OFFENDERS

Since we make specific proposals for modifying the way in which some DUI offenders are processed through the judicial system in Florida, we first explain Florida's current system. This somewhat detailed discussion is necessary because our proposals are designed to seamlessly weave into the current system and to only affect a small percentage of DUI offenders, leaving the current system intact for the vast majority of offenders.³¹ Indeed, due to the success of the current DUI Regime of Florida, the "drinking drivers that are left now, compared to 10 years ago, are people that are more difficult to reach."³² In Florida, DUI cases have a "unique and often complex nature."³³ This is due, in part, to the sophisticated statutory nature of Florida's DUI legal regime.

When speaking with many judges and others throughout the state about the authors' proposals for establishing DUI Courts or integrating DUI offenders into existing Drug Courts, several pointed out that Florida's existing legal structure, consisting of mandatory adjudication and incarceration minimums, could act as a grave impediment to the implementation of these proposals. In this part, we outline that legal structure, as well as its parallel, the administrative DUI structure. In later parts, we show not only that this structure should not act as an impediment to implementing our proposals, but by having such a legal/administrative

of 67 counties." Florida Courts Home Page, available at <http://www.flcourts.org/osca/courts/index.html> (last visited Mar. 15, 2001).

31. Just as not all drug offenders go through Drug Court, not all DUI offenders would be processed through DUI/Drug Court.

32. Ryan, *supra* note 10.

33. David A. Demers et al., *Getting Home Safely: DUI for Experienced Trial Judges*, at preface section (unnumbered pages) (2000) (unpublished manual for the instruction of judges, Florida College of Advanced Judicial Studies) (on file with authors).

structure already in place, Florida courts are in an even better position to implement our proposals. The judge or practitioner already well-versed in both the criminal and administrative tracks of Florida's DUI regime may want to skim this section or skip it entirely.

A. *The Crime of Driving Under the Influence*

A major part of the framework for Florida Criminal Law regulating DUI is contained in Florida Statutes Section 316.193, "Driving Under the Influence."³⁴ That statute defines the offense of DUI as:

driving or in actual physical control of a vehicle . . . [AND] (a) The person is under the influence of alcoholic beverages . . . when affected to the extent that the person's normal faculties are impaired; [OR] (b) The person has a blood-alcohol level of 0.08 . . . per 100 milliliters of blood; [OR] (c) The person has a breath-alcohol level of 0.08 . . . per 210 liters of breath.³⁵

To be guilty of the offense of DUI, one does not necessarily have to be under the influence of alcohol; rather, the DUI law criminalizes driving under the influence of illicit drugs as well.³⁶

For the crime of DUI, adjudication is mandatory.³⁷ In the case of illicit drugs and other diversion programs, the withholding of adjudication is a great incentive to defendants to participate voluntarily in existing Drug Court, but withholding adjudication in a DUI case "is illegal" and "can be attacked even though the state made no objection at the time of the sentence."³⁸ In addition, the judge in the DUI case does not have the option to suspend or defer the sentence.³⁹ Furthermore, the judge must place all offenders on monthly reporting probation.⁴⁰ As will be discussed in greater detail below, defendants are required to participate in a DUI program, which includes a psychosocial evaluation that may lead to mandatory treatment. Upon conviction, the court must suspend the driver's license for

34. FLA. STAT. ANN. § 316.193 (West 2000).

35. FLA. STAT. ANN. § 316.193(1) (West 2000).

36. See FLA. STAT. ANN. §§ 316.193, 893.03 (West 2000).

37. FLA. STAT. ANN. § 316.656(1) (West 2000).

38. Demers et al., *supra* note 33, at 36 (citing *State v. Rowell*, 669 So. 2d 1089 (Fla. 4th DCA 1996)).

39. FLA. STAT. ANN. § 316.656(1) (West 2000). The courts have made it clear that this requirement applies in all DUI cases. See Demers et al., *supra* note 33, at 37 (citing *State v. Line*, 698 So. 2d 318 (Fla. 4th DCA 1997)).

40. FLA. STAT. ANN. § 316.193(5) (West 2000).

a given period depending on the number of prior DUIs. The time during which the license has already been suspended pursuant to the administrative measure set forth below⁴¹ does not count towards the mandatory sentence imposed by the court.⁴² Further, if a convicted DUI offender is again arrested for DUI while his license is suspended, his automobile is subject to seizure and forfeiture.⁴³

1. DUI as a "Misdemeanor"

Non-felony DUI offenses are not technically misdemeanors, but are *sui generis* in themselves. However, DUI "offenses that are not charged as felonies are treated as misdemeanors for most purposes under Florida statutes,"⁴⁴ and so this article refers to non-felony DUI as misdemeanor DUI.

The first through third DUI convictions not involving property damage or injury strictly fall into this "misdemeanor" category. The prosecutor has the option of charging the fourth or subsequent DUI charge as a misdemeanor or felony.⁴⁵ For the first DUI conviction (with a BAL⁴⁶ below .20 and no minor present), the judge may order jail time up to 6 months, fines of between \$250 and \$500, revocation of driving privileges of 180 days to 1 year, 50 hours of community service, up to 1 year of probation, and impoundment or immobilization of the vehicle for 10 days, which must run subsequent to the jail term.⁴⁷ If BAL was .20 or above or a minor was present at the time of the offense, then the maximum jail time increases to nine months and the fine increases from \$500 to \$1000 plus costs.⁴⁸

In the case of a second DUI conviction, so long as the second conviction is not within five years of the first, or for subsequent convictions, not within ten years of a previous conviction, the sentencing judge is required to levy fines of between \$500 and \$1000, but is not required to impose any mandatory imprisonment.⁴⁹ The sentencing judge

41. See *infra* Part III.C.

42. "The court has no authority upon conviction to give credit on the suspension for the time that has elapsed since the administrative suspension at the time of arrest or to make the suspension retroactive." Demers et al., *supra* note 33, at 167 (citing *Veilleux v. Dep't of Highway Safety & Motor Vehicles*, 16 Fla. L. Weekly C79 (Fla. 12th Cir. Ct., Apr. 22, 1991)).

43. FLA. STAT. ANN. § 322.34(9)(a) (West 2000).

44. Demers et al., *supra* note 33, at 36.

45. 16 FLA. JUR. CRIMINAL LAW § 4387 (2d ed. 2000) (citing *Toledo v. State*, 580 So. 2d 335 (Fla. 3d DCA 1991)).

46. "Blood Alcohol Level."

47. Demers et al., *supra* note 33, at 52.

48. *Id.*

49. FLA. STAT. ANN. § 316.193(2)(a) (West 2000). This section requires punishment as follows:

may, however, in her discretion, sentence the defendant to between six and twelve months depending on prior DUI convictions.⁵⁰ License revocation can, depending on the length of time since the first or prior DUI conviction, range from 180 days to five years.⁵¹ The fines and discretionary imprisonment terms are greater if the person had a BAL over .20 or was accompanied by a person under the age of eighteen at the time of the offense.⁵² If the second conviction occurs within five years of a prior conviction, the court must order a mandatory ten-day imprisonment and impoundment or immobilization of the vehicle for thirty days, which cannot run concurrently with the imprisonment.⁵³ Fines range between \$500 and \$1000, and the minimum license revocation increases to five years.⁵⁴ For a third or subsequent DUI conviction within ten years of a prior DUI conviction, the mandatory imprisonment term jumps to thirty days and the impoundment to ninety days.⁵⁵ The fines range from \$1000 to \$2500 and license revocation may range from five years to permanent (in the case of a fourth or subsequent DUI conviction).⁵⁶ Damage to the property of another resulting from DUI is also considered a misdemeanor within the first three convictions.⁵⁷

-
1. By a fine of:
 - a. Not less than \$250 or more than \$500 for a first conviction.
 - b. Not less than \$500 or more than \$1,000 for a second conviction.
 - c. Not less than \$1,000 or more than \$2,500 for a third conviction;
and
 2. By imprisonment for:
 - a. Not more than 6 months for a first conviction.
 - b. Not more than 9 months for a second conviction.
 - c. Not more than 12 months for a third conviction.

Id.

50. FLA. STAT. ANN. § 316.193(4) (West 2000).

51. *Id.*

52. *Id.*

53. FLA. STAT. ANN. § 316.193(6)(b) (West 2000).

54. FLA. STAT. ANN. § 316.193(2)(a) (West 2000).

55. FLA. STAT. ANN. § 316.193(6)(c) (West 2000).

56. FLA. STAT. ANN. § 316.193(2)(a) (West 2000).

57. FLA. STAT. ANN. § 316.193(3)(c)(1) (West 2000).

2. DUI as a Felony

As of the 2002 legislative session, the prosecutor may charge a third DUI as a felony of the third degree.⁵⁸ Additionally, any DUI offense which leads to serious bodily injury to another is a felony.⁵⁹ If the DUI offense leads to death, there is a charge of DUI manslaughter in addition to a felony DUI charge.⁶⁰ The felony charge can be further upgraded if the defendant failed to render aid at the scene of the accident.⁶¹ Because DUI Courts, following the general practice of Drug Courts, would not accept defendants who are charged with crimes involving substantial bodily harm or death,⁶² this section looks only at felony DUI penalties for fourth or subsequent DUI offenses not involving substantial bodily injury or death. These third-degree felony convictions are punishable as are all other third-degree felonies under Florida law.⁶³ The judge may sentence the person to a term of prison of up to five years.⁶⁴ Additionally, the judge must levy a fine of between \$1000⁶⁵ and \$5000.⁶⁶ Under Florida sentencing guidelines, repeat felony DUI offenders may be sentenced for up to ten years in prison, without the possibility of parole for up to five years.⁶⁷

B. Probation and Related Treatment Options

By statute, all DUI offenders must be placed on monthly reporting probation and complete a "DUI Program."⁶⁸ Immobilization or impoundment of the vehicle is required as a condition of probation.⁶⁹ As discussed later in this Article, the DUI Program provider may refer the offender to a substance abuse treatment provider. If the offender fails to complete the course of treatment, he has violated probation. The sentencing

58. FLA. STAT. ANN. § 316.193(2)(b) (West 2000).

59. FLA. STAT. ANN. § 316.193(3)(c)(2) (West 2000).

60. FLA. STAT. ANN. § 316.193(3)(c)(3) (West 2000).

61. FLA. STAT. ANN. § 316.193(3)(c)(3)(b) (West 2000).

62. Although traditionally Drug Courts have only accepted nonviolent offenders, this may be changing. "The original authorization for federally funded drug courts excluded 'violent offenders.' But now, even former proponents of that restriction have concluded that the restriction excludes those offenders that are most in need of the supervision, drug testing and control that drug courts provide to their communities." See *Facts on Drug Courts*, *supra* note 9.

63. FLA. STAT. ANN. §§ 775.082-.084 (West 2000).

64. FLA. STAT. ANN. § 775.082(3)(d) (West 2000).

65. FLA. STAT. ANN. § 316.193(2)(b) (West 2000).

66. FLA. STAT. ANN. § 775.083(1)(c) (West 2000).

67. FLA. STAT. ANN. §§ 775.084(4)(a)(3), (4)(b)(3) (West 2000).

68. FLA. STAT. ANN. § 316.193(5) (West 2000).

69. FLA. STAT. ANN. § 316.193(6) (West 2000).

judge also has the option of having the defendant serve his mandatory jail time in a residential treatment facility.⁷⁰

C. *The DUI Administrative Track*

Up to this point, we have only discussed the criminal law in Florida as it relates to DUI. In addition to this criminal track, Florida also has a fairly sophisticated statutory and regulatory framework to process DUI offenders administratively.⁷¹ In this section, we briefly explain this administrative track.

As soon as a person is arrested on a charge of DUI the Florida Department of Highway Safety and Motor Vehicles (DHSMV) will indefinitely suspend his license, irrespective of conviction.⁷² This suspension is viewed as an administrative, safety-of-the-public measure and not as a form of punishment.⁷³ A court does not have the power to overturn this suspension and order the DHSMV to reissue a license.⁷⁴ A court may not

70. Judge Gary Cowart, a Broward County Court Judge who sat on the committee which initially started the Drug Court in Broward, explained to us that most of the DUIs he has seen as a County Court Judge (not in a specialized DUI Court setting) are first offenders, but that if he does see recidivism, he would look to substitute residential treatment in lieu of jail time.

71. See FLA. STAT. ANN. §§ 316.193-322.2615 (West 2000); FLA. ADMIN. CODE ANN. R. 15A-10 (2000).

72. FLA. STAT. ANN. § 322.2615(1)(a).

A law enforcement officer or correctional officer shall, on behalf of the department, suspend the driving privilege of a person who [has] been *arrested* by a law enforcement officer for a violation The officer shall take the person's driver's license and issue the person a 10-day temporary permit if the person is otherwise eligible for the driving privilege and shall issue the person a notice of suspension.

Id. (emphasis added).

73. See generally *Zarsky v. State*, 300 So. 2d 261, 263 (Fla. 1974) (stating that "revocation of a driver's license is not regarded as punishment (cruel, unusual or otherwise) of the offender but as an aspect of protecting the public"); *Demers et al.*, *supra* note 33, at 161 ("Degrossi concluded that the county court as trial court lacked jurisdiction to stay an administrative revocation that is not part of the punishment involved in the criminal conviction.") (citing *Dep't of Highway Safety & Motor Vehicles v. Degrossi*, 680 So. 2d 1093 (Fla. 3d DCA 1996)). "The suspension at the time of arrest and conviction are not part of the punishment, but are only designed to protect the public." *Id.* at 167.

74. See, e.g., *Dep't of Highway Safety & Motor Vehicles v. Grapski*, 696 So. 2d 950, 951 (Fla. 4th DCA 1997); *Dep't of Highway Safety & Motor Vehicles v. Degrossi*, 680 So. 2d 1093, 1095 (Fla. 3d DCA 1996).

even stay the administrative suspension pending appeal.⁷⁵ Furthermore, a court may not order reinstatement of a license revoked in this manner. The arrestee may request an informal review or hearing from the DHSMV to nullify the suspension.⁷⁶ Unless the suspension is overturned, the arrestee will ultimately have to enroll in an approved DUI Program (explained below) to receive a restricted license or a full reinstatement of driving privileges.⁷⁷

The administrative track also intersects with the criminal track for those convicted of (as opposed to merely arrested for) DUI. Florida Law requires DHSMV to suspend the license and driving privileges of DUI offenders (.08 BAL or higher or refusal to consent to a test) for a minimum of 180 days for a first-time offender to ten years for a third-time offender.⁷⁸ The DUI offender must successfully complete a DUI Program,⁷⁹ discussed below, in order to be eligible to hold a Florida driver's license again. For fourth and subsequent violations, the revocation of the driver's license or driving privilege "shall be permanent."⁸⁰

For certain hardships, the driver may petition to receive a restricted license before the end of the suspension period, but enrollment in or successful completion of a DUI Program is a prerequisite to receiving the restricted license.⁸¹

D. *The Florida DUI Program*

As the above analysis of the criminal and administrative tracks illustrates, all roads essentially lead to the participation of the defendant or arrestee in an approved DUI Program. This subsection looks at these DUI Programs. (As a preliminary matter, the term "DUI Program" as used throughout this Article is a term of art, specifically referring to those programs authorized under sections 322.292 and 322.293 of the Florida Statutes and implemented by Chapter 15A-10 of the Florida Administrative Code.) The Florida legislature has given the power to license DUI

75. FLA. STAT. ANN. § 322.28(5) (West 2000); *Anderson v. Dep't of Highway Safety & Motor Vehicles*, 751 So. 2d 749, 750 (Fla. 5th DCA 2000).

76. FLA. STAT. ANN. § 322.2615(4),(6) (West 2000).

77. FLA. STAT. ANN. § 322.291 (West 2000).

78. FLA. STAT. ANN. § 322.28(2)(a)(1-3) (West 2000).

79. FLA. STAT. ANN. § 316.193(5) (West 2000) ("The court shall place all offenders convicted of violating this section on monthly reporting probation and shall require completion of a substance abuse course conducted by a DUI program licensed by the department under s. 322.292 . . .").

80. FLA. STAT. ANN. § 322.26(1)(a) (West 2000).

81. FLA. STAT. ANN. § 322.291 (West 2000); FLA. ADMIN. CODE ANN. R. 15A-10.029-10.039 (2000).

Programs to the DHSMV.⁸² The DHSMV, in turn, has exercised this power to license twenty-six different DUI Programs covering different geographical regions of the state.⁸³ The level of the DUI Program required for the offender may be different based on the number of previous DUI charges and the length of the suspension.⁸⁴

The fees for the DUI program range between \$175 and \$275, depending on the level.⁸⁵ As this Article points out, it is important that DUI Offenders are already required to pay for their own treatment because this greatly reduces the funding issues when establishing a new DUI Court or converting a Drug Court to a true DUI/Drug Court.⁸⁶ The Level I and Level II courses each have a set curriculum.⁸⁷ A very important aspect of the DUI Program is the Client Evaluation, which includes a psychosocial evaluation to detect substance abuse problems.⁸⁸ For those DUI Program participants determined during the psychosocial evaluation to have an alcohol or other substance abuse problem, the DUI Program must maintain a treatment referral system.⁸⁹ The purpose of the referral system is to

82. FLA. STAT. ANN. § 322.292 (West 2000).

83. FLA. ADMIN. CODE ANN. R. 15A-10.004 (2000); List of Florida's Licensed DUI Programs, available at http://www.hsmv.state.fl.us/ddl/dui_prog.html (last visited Jan. 5, 2001).

84. The National Safety Council (NSC) is one of the twenty-six DUI Program Providers licensed by the DMV. On their web site, the NSC lists the qualifications for the different levels of their DUI Program. See DUI Resource Center, available at <http://www.safetycouncil.com/dui.html> (last visited May 26, 2001).

85. This fee schedule is different from that reflected in the Florida Administrative Code, FLA. ADMIN. CODE ANN. R. 15A-10.0141, but reflects the information given to us by the DHSMV. See E-mail from Barbara Lauer, Florida Department of Highway Safety & Motor Vehicles, to Gail Sasnett (Apr. 30, 2001, 12:22:05 EST) (on file with authors) [hereinafter Lauer e-mail].

86. See *infra* Part VI.B.

87. FLA. ADMIN. CODE ANN. R. 15A-10.024 (2001).

88.

Each DUI program shall provide client evaluation services An evaluation shall be completed on all persons enrolled in the DUI program. The component shall include a psychosocial evaluation to determine the existence of a possible alcohol or other drug abuse or problem. If a client is enrolled in the program for more than one arrest or conviction, only one evaluation shall be conducted.

FLA. ADMIN. CODE ANN. R. 15A-10.027 (2001).

89. FLA. ADMIN. CODE ANN. R. 15A-10.028 (2001).

Each DUI program shall establish a treatment referral system for persons determined to have an alcohol or other substance abuse problem. Twelve step programs and self-help groups shall not be utilized by the DUI program for treatment referrals. The treatment agency may refer clients to twelve step programs and self-help groups. The client shall be given a listing of approved

provide a list of possible treatment providers and allow the DUI Program participant to make the ultimate selection of treatment providers. Although “[t]welve step programs and self-help groups shall not be utilized by the DUI program for treatment referrals,”⁹⁰ the treatment providers themselves may direct the participants to participate in such programs.⁹¹

If the certificate of completion of the DUI Program is issued before completion of any mandated treatment, it is issued contingent upon the treatment being completed.⁹² If a client completes the entire DUI Program except for the treatment portion, then upon return to the DUI Program, he will only be required to complete the treatment portion.⁹³

*E. A Variation of the Current System:
The Miami-Dade County
Recidivism Project —
the Probationary Approach*

Miami-Dade County is the Florida county with the largest population, and as may be expected, has a correspondingly large number of DUI arrests and related fatalities. In fact, the county represents 15% of the total Florida population, but represents more than 30% of the state’s alcohol-related fatalities.⁹⁴ One study found that up to 25% of first-time offenders became repeat offenders.⁹⁵ In order to deal with this recidivism, Miami-Dade County established the *Miami-Dade County Recidivism Project (DCRP)*.⁹⁶

The underlying belief of the DCRP is simple, “By offering intensive supervisory probation, recidivism among third-time offenders can be reduced and public safety can be increased.”⁹⁷ The DCRP is not a

providers with identifying information on location, fees, intake procedures and criteria for admission. The client shall be free to choose the treatment agency. An appointment with a treatment agency must be scheduled by the client within twenty (20) days following the evaluation.

Id.

90. *Id.*

91. “The treatment agency may refer clients to twelve step programs and self-help groups.”

Id.

92. FLA. ADMIN. CODE ANN. R. 15A-10.026(1) (2001).

93. FLA. ADMIN. CODE ANN. R. 15A-10.026(3) (2001).

94. James J. Vardalis & Ellen G. Cohn, *A Different Approach to Drunk Driving Court in Miami-Dade County: A Descriptive Analysis*, 4 (Sept. 2000) (Report of the Center for the Administration of Justice) (on file with the Florida International University School of Policy and Management).

95. *See id.*

96. *Id.* at 5.

97. *Id.*

DUI/Drug Court and is not based on the Drug Court model. Rather, it focuses on the probation side.

The enhanced probationary approach of the DCRP appears to be an improvement over the normal probation afforded DUI offenders because it includes stricter supervision, more frequent drug tests, and additional conditions such as attendance at Alcoholics Anonymous meetings.⁹⁸ Although participation in the DCRP is not mandatory, most judges include it as a condition of probation.⁹⁹ Because the DCRP aims to reduce recidivism rates, defendants must have at least three DUI convictions¹⁰⁰ to be eligible to participate.¹⁰¹ The third conviction involves a mandatory thirty-day jail term, so the intense supervision that will take place during probation actually begins in jail.¹⁰²

The following incentives are used to encourage defendants to participate voluntarily in the DCRP:

- Waiver or reduction of the DUI school enrollment fee;
- Support and assistance in obtaining affordable rehabilitation for alcohol addiction;
- Assistance in the application to reissue a revoked driver's license;
- Assistance with rectifying problems that may affect the successful completion of probation.¹⁰³

In our view, the greatest advantage of the DCRP as a method of dealing with repeat DUI offenders is its low cost and simplistic process of incorporation into the current system. The DCRP leaves the adversarial courtroom process in place and only changes the conditions and supervision of probation. Rather than retrain all the courtroom staff as required in a true DUI/Drug Court program, as explained below, the DCRP merely required the hiring of two specially trained probation officers.¹⁰⁴

98. Frank C. Rabbito, Multiple Offender Alternatives, Presentation at the SE DUI Conference (Aug. 28, 1999).

99. Vardalis & Cohn, *supra* note 94, at 6.

100. In Part VI.D, we advocate for more flexible criteria for directing certain offenders to participate in DUI/Drug Court.

101. *Id.*

102. *Miami-Dade County Recidivism Project: Final Narrative Report 2* (1998) (on file with authors) ("Probation contact begins while Offender is in jail.") [hereinafter *Final Report*].

103. *Id.*

104. *Id.* at 2. The DCRP hired two probation officers. "Each received training in the field of Chemical Dependency (40 hours) and spent 3 days at The Village, a comprehensive, licensed treatment program." *Id.*

IV. DUI/DRUG COURT AS A MODEL FOR FLORIDA

There exist several good articles and how-to manuals¹⁰⁵ discussing the efficacy of Drug Courts in treating substance abusers and thereby reducing recidivism rates. Although Drug Courts are still quite new, nationwide over 90,000 persons have participated in them.¹⁰⁶ This Article accepts the proposition, demonstrated empirically, that DUI/Drug Courts are effective in reducing recidivism rates.¹⁰⁷ For example, a 1996 recidivism study of a Payne County, Oklahoma DUI/Drug Court had a 96% success rate.¹⁰⁸ The Butte County, California DUI/Drug Court reported approximately an 80% success rate.¹⁰⁹ In this part, therefore, we are attempting to provide the unfamiliar reader with a brief description of the Drug Court model and explain why that model should work equally well for multiple DUI offenders. While we are not attempting to provide a scholarly dissertation on the underlying behavioral theories that make DUI/Drug Courts more effective in reducing recidivism, we present enough information in this part so that the reader understands the underlying concepts behind and the operation of DUI/Drug Courts.

DUI/Drug Court methods focus on increased supervision and testing of the client. In a later section, this Article argues that DUI/Drug Court itself can be made a special condition of probation. Based on these two propositions, one may be tempted to argue that mere increased probationary supervision, rather than involving the judiciary as in DUI/Drug

105. The Office of the State Courts Administrator, Florida Supreme Court has produced two excellent manuals: *Treatment-Based Drug Courts . . . a Guide* and *Gaining Momentum: A Model Curriculum for Drug Courts*. The information presented in these two manuals is consistent with our research from other jurisdictions and personal observations.

106. Peters & Murrin, *supra* note 7, at 73.

107. Because Drug Courts are relatively new, there exists somewhat of a paucity of data as to their effectiveness. Most of the surveys measuring success in reducing recidivism have been somewhat ad hoc and anecdotal, but suggest that Drug Courts are effective at lowering the recidivism rates of criminals who have participated in the programs. For a good summary and analysis of the many studies done, see Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG COURT INST. REV. 1 (1988) (reviewing thirty evaluation reports covering twenty-four Drug Courts); see also Peters & Murrin, *supra* note 7.

108. See American Council on Alcoholism Web Site, *Payne County Drug Court*, available at <http://www.aca-usa.org/stillwater.htm> (last visited May 25, 2001).

109. The Butte County Court used several different drugs with different experimental groups, giving a range which averaged around eighty percent. See American Council on Alcoholism Web Site, *Butte County Superior Court*, available at <http://www.aca-usa.org/butte.htm> (last visited May 25, 2001).

Court, would be the most effective way of reducing recidivism. This “increased probationary supervision approach” is precisely the path taken by the “Miami-Dade County Recidivism Project.”¹¹⁰ It is our hope that after reading this section, the reader will understand that there is a quantitative (amount of supervision) and qualitative (quality of supervision) difference in DUI/Drug Courts which makes them more effective in reducing alcohol and drug related recidivism for certain offenders than mere increased probationary supervision. This section consists of three subsections: Subsection (A) provides a brief structure of Drug Courts; Subsection (B) is a narrative based on our observations of Drug Courts; Subsection (C) answers the question why the DUI/Drug Court outcome is different from the outcome of mere increased probationary supervision.

A. *The Structure of Drug Courts*

There are several common characteristics of Drug Courts: (1) intervention and consequences are immediate; (2) the adjudication process is nonadversarial¹¹¹ in nature; (3) the judge takes a hands-on approach to the defendant’s treatment program; (4) the treatment programs contain clearly defined rules and structured goals for the participants; (5) the concept of the Drug Court requires a “team” approach that consists of a judge, prosecutor, defense counsel, treatment provider, and corrections personnel.¹¹²

The Advisory Panel¹¹³ looked at the ten components of Drug Courts to analyze how effective Drug Courts would be in accommodating DUI offenders.¹¹⁴ These ten components are listed below:

110. See *infra* Part III.E.

111. While Drug Courts are often described as nonadversarial, it is probably more proper to say that the “adversarial process, from a criminal justice system perspective, has . . . simply been placed in abeyance while the client participate [sic] in the drug court program.” Caroline S. Cooper, *Issues Raised for Defense Counsel in Drug Court Representation Relevant to the ABA Canon of Ethics: Cannons 2-4* (Mar. 1999), available at http://www.american.edu/spa/justice/publications/ndci_ethics.htm (last visited Feb. 26, 2001). This is because the “charges against the defendant . . . are still active as well as any orders that have been entered as a pre-requisite for program participation.” *Id.*

112. Peggy Fulton 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, 453 (1999).

113. See *supra* text accompanying note 28.

114. Tauber & Huddleston, *supra* note 18, at 7-10.

Drug Court Component 1: Drug Courts integrate alcohol and other drug treatment services with justice system case processing.

Drug Court Component 2: Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

Drug Court Component 3: Eligible participants are identified early and promptly placed in the Drug Court program.

Drug Court Component 4: Drug Courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

Drug Court Component 5: Abstinence is monitored by frequent alcohol and other drug testing.

Drug Court Component 6: A coordinated strategy governs Drug Court responses to participants' compliance.

Drug Court Component 7: Ongoing judicial interaction with each Drug Court participant is essential.

Drug Court Component 8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

Drug Court Component 9: Continuing interdisciplinary education promotes effective Drug Court planning, implementation, and operations.

Drug Court Component 10: Forging partnerships among Drug Courts, public agencies, and community-based organizations generates local support and enhances Drug Court program effectiveness.¹¹⁵

Most of the Drug Courts in the nation, including Florida's Courts, are based on these ten components.¹¹⁶ This is important to our proposal because the Advisory Panel found that these ten components are just as

115. *Id.*

116. *See* [series of reports on Florida Drug Courts at FSU] (demonstrating that all Florida Drug Courts do consist of these elements to one degree or another).

effective, if not more effective, in the treating of alcohol addiction than they are in treating other substance abuse addictions.¹¹⁷

B. *The Narrative: A Day in the Life of Drug Court*

Those who are familiar with Drug Courts may find this section describing a typical drug court day redundant, while those who are not will want to read it.¹¹⁸ Each Drug Court session is preceded by a "staffing," which is overseen by the presiding Drug Court judge. It occurs immediately prior to Drug Court in a chamber near the courtroom and lasts for about an hour. Those present at the staffing may include probation officers (and possibly similar positions such as "surveillance officers"), counselors assigned to the Drug Court, the Public Defender, the State Attorney, the Court Administrator responsible for the Drug Court, and treatment professionals involved (which may include a Drug Court psychiatrist). During this "staffing" the judge receives a verbal report on each of the Drug Court clients who is to appear in court this day. The staff members who have been working with the client update the judge on the client's progress. All involved discuss with the judge what the judge needs to do in court to help the client focus on his treatment. For instance, the judge might be told that Client¹¹⁹ Bell's attitude is wonderful and that she is a real asset to the treatment groups but that she needs a push to get a full time job. The staff might also suggest that the judge remind Client Marvin, who is graduating from the program,¹²⁰ of the importance of consistency as he leaves the program.

As court begins with its usual formality, all clients being heard by the Drug Court that day are present. Some clients are coming straight from jail; others are graduating; still others are somewhere in the middle of the process. One by one, the clients stand before the bench to address the judge. While the format of what each client will say to the judge varies, each one provides the judge with an update on both what the client has been doing since he was last in court and what goals the client has set for himself. The judge then talks from the bench to the client, probing for more information, addressing concerns the judge has with the client, and

117. See Tauber & Huddleston, *supra* note 18.

118. Also, this Article is based to a large degree on our personal observations of several Florida and New Mexico Drug Courts.

119. Drug Courts often refer to participating defendants as clients. Where used in this Article, client is used consistently with this usage.

120. Stephan A. Marcus, *The Singular Importance of Drug Court Graduations*, available at <http://www.american.edu/justice/ladrcgrad.htm> (last visited Feb. 26, 2001).

providing feedback, while all the clients are present and listening. Again, the way the judge handles his court and what the judge says to each client varies by judge. If the client is not doing what the judge believes the client should be doing, the judge will set some very definitive goals for the next week. For instance, if a client is working only fifteen hours per week, the judge might advise the client to be involved in a job search, or suggest that the client fill his time with volunteer work. Typically, the judge wants the client busy with work and treatment for substantially all of the workweek, and the judge will make that clear. Some examples of what a judge might say are, "You're going to have to structure your environment; it's easy to become over-confident; you're responsible for your actions; you're going to have to put more into your recovery; you can structure your life around Drug Court or around jail." The focus is on the client taking personal responsibility for himself and on being involved in his recovery. If a client doesn't do what he is supposed to do, the judge will issue a sanction from the bench, which could range from an oral scolding in front of the other clients to some time in jail.

After the client appears before the judge, the client reports to the side of the bench to receive his next court appointment and to obtain a receipt for being in court. He clarifies his next step prior to the time he leaves court. It then is up to him to follow through on what the judge has told him to do, but he leaves knowing that he will appear again in a week and will have to describe to the judge what he has done during that prior week. He also will be involved with treatment providers and probation officers during the week, indirectly serving as the eyes of the judge during the week. These trusted advisors will be updating the judge on the activities of the client at the next "staffing" prior to the client's next court appearance, resulting in built in accountability and responsibility.

This is a general day in Drug Court. As Judge Michael Kavanaugh says, "There is no cookie-cutter approach to DUI/Drug court; there are many similarities but lots of permutations."¹²¹

C. How DUI/Drug Court Differs from Mere Increased Probationary Supervision Program

"At first glance, the drug court concept may appear to be similar to the everyday operation of existing pretrial diversion programs. However, drug court operates differently from the traditional courtroom environment by

121. Interview by Gail Sasnett with Judge Michael Kavanaugh, Bernalillo Metropolitan DWI/Drug Court Program, NM (Jan. 2001).

integrating available treatment and criminal justice resources *under the leadership of the court.*"¹²²

The role of the judge in Drug Court is much more extensive than under the standard system.¹²³ "The Judge is considered the symbolic and functional centerpiece of the drug court program."¹²⁴ A recent study by Dr. Sally Satel¹²⁵ considered the impact of the Drug Court judge in fifteen different Drug Courts.¹²⁶ First, Satel recognizes that by directly involving judges in the treatment and supervision of defendants, Drug Courts depart significantly from the standard system.¹²⁷ As explained above, the judge holds the defendant publicly accountable in open court in front of his peers for his progress in treatment.¹²⁸ Through her instantaneous sanctioning

122. *Treatment-Based Drug Courts . . . a Guide* (prepared by the Office of the State Courts Administrator, Florida Supreme Court, State Justice Institute (1996), at 6 (emphasis added)).

123.

The drug court judge . . . is much more involved in all aspects of the treatment and supervision of the defendant. One example of the judge's integral role is the requirement that defendants appear at regularly scheduled status hearings. These hearings are held frequently in the beginning of the program (as often as once a week from the first month), with the frequency tapering off as the defendant progresses further into the treatment period.

At each status hearing, the judge personally reviews with defendants their treatment progress reports. These reports describe each defendant's urinalysis results, attendance and attitude in treatment, recognition of his or her drug problem, and participation in the treatment program. The frequent hearings provide opportunities for the judge to reinforce positive behaviors, identify areas that need continued improvement, invoke consequences where appropriate, and establish a rapport with the defendant.

An observer of drug court may notice that the drug court judge talks directly with the defendant, usually bypassing the defense attorney. In addition, the judge has a familiarity with the defendant rarely seen in the traditional court. The judge may inquire about the defendant's health, housing situation, family, job, and feelings about treatment and drug usage. The combination of respect for the authority of the court and the rapport developed between the judge and the defendant is an important ingredient in the defendant's rehabilitation.

Id. at 8-9.

124. Sally L. Satel, M.D., *Observational Study of Courtroom Dynamics in Selected Drug Courts* (unpublished, on file with authors).

125. Sally L. Satel, M.D., is a Yale University-trained psychiatrist and is affiliated with a Washington think tank called the Ethics and Public Policy Center.

126. See Satel, *supra* note 124.

127. *Id.*

128. By contrast, under the standard system, once the sentence has been set forth, the judge will only again become involved if the defendant is rearrested or otherwise violates the terms of his probation, at which point it may be too late. *Id.*

power, applied as close to the time of incident¹²⁹ as possible, the judge attempts to create the proper incentives conducive to treatment.¹³⁰ This conforms with the notion that “behavior is shaped most effectively when punishments are swift and sure but not necessarily severe.”¹³¹ This method is more effective than the standard system of court-mandated sanctions, which are often seen as arbitrary.¹³²

Dr. Satel points out that the judge “represents moral authority.”¹³³ The judge also has power to control the life of the defendant, and the defendant knows this. Dr. Satel notes that the “symbolic impact of the black robe can’t be underestimated; it shows defendants that the system takes the defendant’s conduct seriously.”¹³⁴ She points out that the “judge has the latitude to shape the courtroom drama” such as to impress a certain message upon DUI/Drug Court clients in earlier stages of treatment who are typically seated in the jury box.¹³⁵ Through constant interaction with the judge, the defendants get the message that “someone in authority cares about them and is closely watching what they do.”¹³⁶ She notes that one of the most common functions of the Drug Court judge was to “organize a community of recovering people.”¹³⁷ She quotes one judge as saying, “keeping the addicts going to treatment is the purpose of the Drug Court judge.”¹³⁸

One of the most important aspects of the Drug Court model is the cooperative relationship among all members of the court team.¹³⁹ This is in

129. A failure could be anything from a relapse as evidence thru a positive urinalysis (which is usually not sanctioned very heavily by the Drug Court judges) to missing mandatory group therapy (which is typically sanctioned very heavily by the judges). *Id.*

130. *Id.*

131. *See* Satel, *supra* note 124.

132. “Traditional court-mandated treatment . . . is generally a few unacknowledged, strikes-and-you’re out affair. That is, the first few dirty urine drug screens go unpunished, but the next one lands the defendant in jail or prison to serve out his or her deferred sentence. Ignoring lapses and then, in a seemingly capricious way, coming down hard is a notoriously poor way to shape accountability.” *Id.*

133. *Id.*

134. *Id.* (quoting former Judge Jeff Tauber, now President of the National Association of Drug Court Professionals).

135. *Id.*

136. *See* Satel, *supra* note 124.

137. *Id.*

138. *Id.*

139. Peters & Murrin, *supra* note 7, at 73-75. Perhaps the most unique and important characteristic of Drug Court programs is the level of cooperative relationships formed among the Drug Court team members. Collaboration begins during the early planning stage and continues throughout the operations of Drug Court. All major decision points, from screening criteria and eligibility requirements to termination and completion of the program, result from collaborative

stark contrast to the adversarial model upon which our criminal justice system generally operates.¹⁴⁰ In the standard court system prosecutors oppose defense attorneys and the judge is a neutral arbitrator. The philosophical approach of the Drug Court is that all of these players form a partnership.¹⁴¹

The treatment methodology also differs from the treatment normally required as part of probation. Treatment under the Drug Court typically lasts about one year.¹⁴² Treatment is usually very intense in the beginning and tapers off as time progresses. Relapse is treated as part of the normal process of recovery and an opportunity to review the treatment plan rather than as another offense.¹⁴³

V. FLORIDA'S CURRENT DUI REGIME COULD BE IMPROVED BY CHANNELING CERTAIN DUI OFFENDERS INTO DUI/DRUG COURT

At this point, we again restate our earlier contention that perhaps the current system is adequate for most DUI offenders. Just as not all drug offenders go through the current Drug Courts, not all DUI offenders would go through DUI/Drug Court. The purpose of our proposals is to provide an alternative for certain DUI offenders for whom the current system has proven inadequate, just as Drug Courts provide an alternative for certain drug offenders for whom the current system proved inadequate.

A. The Current System and DUI/Drug Court Would Utilize the Same Elements Only Under Different Frameworks

In Part III, this Article sets forth the various parts of Florida's current DUI Regime: there is a criminal law component, mandating certain terms of incarceration and other traditional criminal responses; an administrative component, mandating that licenses be suspended; and, there is the DUI Program which intersects the criminal and administrative sides and provides

agreements among Drug Court team members. The court, through the designated Drug Court judge, provides the overall leadership for the team and represents the court authority to the Drug Court participants. *Id.*

140. *See id.* at 72-73.

141. *See id.* at 73.

142. *See id.* at 74.

143. *See id.* at 89.

a mechanism whereby certain defendants must undergo treatment for the underlying alcohol addiction which has led to their recidivism. In Part III, this Article argues that Florida courts do not need to modify any of these elements very much, but only need to place them all within the framework of a DUI/Drug Court for certain offenders. It is our view that the synergistic¹⁴⁴ effect of combining the existing elements of the DUI regime in Florida within the framework of a DUI/Drug Court will achieve results similar to those results achieved under Drug Courts in the reduction of illicit-drug related criminal recidivism. Part III considers some possible reasons why these same elements, which we are arguing will be more effective in the context of a DUI/Drug Court, prove ineffective for certain offenders under the standard system.

*B. How the Current Elements Could Be More
Effective Within the Framework
of a DUI/Drug Court*

1. How the Current Elements Interact
in the Current System

In the opinion of a young repeat DUI offender who had been through the current regime, the current system in Florida is simply too easy to scam. Under the current system, participation in the DUI Program is almost universally required as a condition of probation for DUI offenders or a requirement for a driver's license to be reissued. Once the defendant is sentenced, he will no longer see the judge unless he violates his probation. Under the DUI Program, as explained earlier, the defendant will be required to attend certain classes and may be required, depending on the result of the psychosocial evaluation conducted as part of the DUI Program, to participate in treatment, which may include Twelve-Step Programs. If the defendant does not successfully complete the DUI Program, including the treatment, he will, depending on the state of his conviction, have violated probation, with the normal criminal law consequences, including not being eligible to have his driver's license reinstated.

There are several questions which arise in the context on enforcing the above consequences: Who enforces and oversees that the defendant is actually participating enthusiastically in the treatment? Who personally

144. Synergy is defined as the "interaction of two or more agents . . . so that their combined effect is greater than the sum of their individual effects." THE AMERICAN HERITAGE DICTIONARY 1233 (4th Ed. 2000).

cares that the defendant is participating properly? How often does somebody check to ensure that the defendant is doing the right thing? Who administers swift sanctions? These are questions addressing the (1) quality and (2) quantity of supervision in the current system. As will be shown momentarily, it is the quality and quantity of the overall supervisory environment which makes the same DUI regime elements currently in use in Florida more effective for certain offenders in the DUI/Drug Court context.

2. The Quality of Supervision Under the Standard System is Inadequate for Certain Offenders

This “quality of supervision” issue directly addresses who or which authority is performing the supervision. In the standard system, the only person directly responsible for “supervising” the defendant so far as the legal system is concerned is the probation officer, who probably has one hundred other clients and has not had any specialty training in the area of chemical substance addictions.¹⁴⁵ The defendant does not have a real personal connection with the probation officer, to whom he is just one out of one hundred faces, nor does the defendant feel he will disappoint anyone by failing to perform optimally.

In order to determine whether the defendant is properly fulfilling his probation conditions, the probation officer relies on the self-reporting of the defendant, on reports from the DUI Program (which may also have received information from the treatment providers), and on drug testing done when the defendant reports in. With the large number of defendants being treated and the large number of defendants being supervised by one probation officer, it simply stands to reason that there is no one really holding the defendant’s feet to the fire, so to speak. In addition, there is no one holding the individual treatment providers responsible on a client-by-client basis for the clients who do not appear to be benefitting from treatment.

145. Interview with Frank C. Rabbito, Director, Miami-Dade County Recidivism Project (Aug. 28, 1999). Mr. Rabbito informed us that the typical convict:probation officer ratio in Miami-Dade County is 100:1. He was especially pleased that the DCRP was able to get that ratio down to 50:1 with specially trained probation officers. See *Final Report*, *supra* note 102.

3. The Quantity of Supervision Under the Current System is Inadequate for Some Offenders

Simply put, under the standard system, supervision is almost entirely dependent on one overloaded individual, the probation officer.¹⁴⁶ This creates a situation in which the defendant experiences minimum supervision. If he just shows up to treatment enough that the treatment providers do not report to the DUI Program and the DUI Program does not report to the probation officer, then the probation officer will not report to the judge and the defendant's probation will not be revoked and he will not otherwise be sanctioned. Even if the infraction is reported, the sanction is not swift.

4. Both the Quality and Quantity of Supervision Would be Improved by Placing the Current Elements of the Florida DUI Regime Under the Framework of DUI/Drug Courts

Recall Part III where this Article presented the DUI/Drug Court as a model framework for dealing with certain DUI offenders. Consider also the above discussion of the lack of qualitative and quantitative supervision under the current regime. Under the DUI/Drug Court, the same DUI Program would be in place as under the standard system, the same treatment providers would be present, and the same legal framework would be in place, but these elements would interact differently.

The difference would be that several times per month, the "client" (as the defendant is called in the DUI/Drug Court context) would appear before the judge and be held accountable for his current progress in the system. This would result in real accountability because the client would know that the judge has the power to instantaneously revoke his probation. The client would stand before the judge, in front of the other DUI/Drug Court participants, now his peers, and explain his recent failings or successes. In doing so, he would make a deeper commitment to his treatment. A client cannot get away with a flippant attitude or perfunctory participation when reporting before his peers to the judge in his black robe—this is all part of the so-called "judge effect" discussed earlier.¹⁴⁷ The

146. Lauer e-mail, *supra* note 85. Under the current system, the probation officer is not the sole source of supervision. "There is also tracking by the DUI program, treatment agencies and the DHSMV." *Id.*

147. *See infra* Part IV.C.

judge, also in front of the peers of the client will hold the client accountable through sanctions, or when deserving, praise the client's progress.

Before coming into court and seeing the defendant, the judge will have had a "staffing" with all the key players involved, including the individual treatment counselors whose clients will be appearing in court that day, a representative of the DUI Program, the Defense Attorney, and the state attorney. This group of people would have spent an hour or more discussing the clients and forming a plan of action for each one. Not only does this hold the treatment providers responsible for doing their jobs (it would be embarrassing for a treatment counselor if she were not prepared in front of the judge at such a staffing), but also it gives more authority to the treatment provider because the client knows the treatment provider will be reporting to the judge. Additionally, it allows input and consideration from members of the group. This is high quality supervision. Contrast this again with one overloaded probation officer occasionally getting information from the defendant and from the DUI Program.

C. *Why Stiffer Sanctions Alone Do Not Solve the Recidivism Problem*

The most common response to the DUI recidivism problem has been to increase sanctions. It appears that the move nationally towards stricter sanctions for DUI over the past twenty years has been effective to some extent.¹⁴⁸ However, the decline in DUI arrests is not entirely due to stricter enforcement and sanctions.¹⁴⁹

148. "Between 1990 and 1997 the number of arrests for driving under the influence of alcohol or drugs decreased 18%, while the number of licensed drivers increased nearly 15%." Maruschak, *supra* note 10, at 1. The DUI Arrest Rate has continued to decline in Florida as well. See *DUI Arrest Rate Declines* [Chart], available at http://www.state.fl.us/eog/govdocs...ical/section_two/sect_two_dui.html (last visited May 25, 2001). However, it is not always clear whether the stricter law actually leads to stricter sanctions due to judicial lenience. See Ryan, *supra* note 10.

149. "The decline in the number of DUI arrests may be partially explained by the aging of licensed drivers. In 1997 there were more licensed drivers age 35-54 than in 1986. While the percentage of arrests that these offenders account for increased, their rate of arrest decreased." Maruschak, *supra* note 10, at 2. In addition, it is possible that a lot of the decline can be attributed to lack of manpower among enforcement agencies:

Florida's DUI arrest hit a decade low last year — 55,705 — in keeping with a national trend. That's not a good sign, according to highway safety analysts. "It actually indicates less attention to the problem of drunk driving almost across the board," . . . Jim Frank of the National Highway Traffic Safety Administration

There is a strong likelihood that a person who receives a third or fourth DUI is an alcoholic.¹⁵⁰ The primary reason that stiffer sanctions do not work is that alcoholism is a substance abuse problem. While a person is incarcerated, he cannot commit DUI, but this can only be a permanent solution if society is willing to pay the dollar and moral costs of locking up DUI repeat offenders indefinitely. Short of indefinite incarceration (or effective treatment for the alcoholism), repeat DUI offenders are likely to reoffend.¹⁵¹ While the trend with DUIs has been to continually increase mandatory sentencing over the past decade,¹⁵² the trend with other substance abuse crimes has been to decrease sentencing.¹⁵³ This stems from the realization that long prison terms are an unsuccessful method of dealing with substance-abuse-related crimes.¹⁵⁴ It has been noted that “incarceration

concur. “We don’t look at DUI arrests as an indicator of what’s going on in terms of impaired driving,” Frank says.

Ryan, *supra* note 10, at 5-6.

150.

According to the CAGE diagnostic instrument, 37% of DWI offenders on probation and 47% of those in jail reported experiences which were consistent with a history of alcohol abuse or dependence . . . More DWI offenders on probation or in jail reported alcohol abuse or dependence than other offenders. Among other offenders, about 1 in 6 probationers and 1 in 4 jail inmates reported 3 or more signs of alcohol dependence.

Maruschak, *supra* note 10, at 9.

151. *Id.*

Of DWI offenders in jail, 52% were on probation, parole, or pretrial release when they committed the new offense for which they were incarcerated. DWI offenders on probation or in jail or prison and involved in the criminal justice system at the time of arrest were most commonly arrested while on probation or parole: 9% of probationers, 45% of jail inmates, and 56% of prisoners. Of DWI offenders on probation, nearly 9 out of 10 were not involved in the criminal justice system at time of arrest. Of incarcerated offenders, 46% of those in jail and 43% of those in prison had no criminal justice status at the time of arrest.

Id. at 5.

152. See Richard Perez-Pena, *Pataki Presents Plan to Ease Laws on Drugs*, N.Y. TIMES, Jan. 18, 2001, available at <http://www.nytimes.com/2001/01/18/nyregion/18DRUG.html> (last visited Jan. 18, 2001).

153. *Id.*

154.

Consider that the number of inmates in American prisons more than tripled over the last 20 years to nearly 2 million, with 60 percent to 70 percent testing positive for substance abuse on arrest. These inmates are the parents of 2.4

in and of itself does little to break the cycle of . . . [substance abuse] . . . , and offenders sentenced to incarceration for substance related offenses exhibit a high rate of recidivism once they are released."¹⁵⁵ Anecdotal evidence from New Mexico indicated that one hundred percent of substance abuse offenders who had not gone through DUI/Drug Court got drunk within forty-eight hours of being released from jail.¹⁵⁶

On the practical side, there can be additional problems with long sentences for repeat DUI offenders. For instance, a judge in the standard system may take the approach that her imposition of increased incarceration in addition to the statutory mandatory minimums will effectively deal with the repeat DUI offender. One judge recounted her experience with trying to increase sentences for repeat DUI offenders.¹⁵⁷ Instead of merely doling out the mandatory thirty-day jail term for the subsequent DUI offense within five years, this judge often gave a sixty-day sentence. Over time, though, she found that a somewhat unexpected phenomenon occurred. When repeat offenders believed they would only face the mandatory thirty-day jail term, they were much more likely to plead out the offense, serve the mandatory time and move on (often to reoffend). However, once these repeat offenders began to get wind that it would be a mandatory sixty-day sentence, they refused to plead and began opting for trial. Since many of these defendants had been through the DUI legal process on several previous occasions, they knew the proper steps to take during their arrest and intake in order to put themselves in a good position to win at trial.¹⁵⁸

million children, all of whom are disproportionately likely to follow their parents to jail [I]f the prison population were to continue growing at the current rate, by 2053 the United States would actually have more people in prison than out.

Alter, *supra* note 1, at 37-38.

155. *Summary Assessment of the Drug Court Experience* (prepared by the Drug Court Clearinghouse and Technical Assistance Project, A Program of the Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice), available at <http://gurukul.ucc.american.edu/justice/just1.htm> (last visited Oct. 2, 2000).

156. Interview with Mark Pickle, Chief Probation Officer of the Bernalillo County Metropolitan Court, NM (Jan. 2001).

157. Discussion between Gail Sasnett and a Marion County, Fla. Judge regarding DUI sentencing.

158. These steps might include refusing to take a breath analyzer test or blood test. Such an offender could just answer the police request with a simple, "Take me to jail." Although the offender may have to spend a night in jail, there would be no tangible evidence, besides the officer's own observations, upon which to convict the offender. There are even web sites offering advice on how to get off of a DUI charge. See, e.g., *DWI/DUI Arrest Reports, News, & Information for Arrestees*, Official Publication for Drinking and Driving Arrestees, available at <http://www.dui-help.com> (last visited May 25, 2001).

This judge told us that in about half of these trials, the repeat DUI offender would be acquitted, and therefore, rather than receiving a sixty-day sentence, thirty days more than the mandatory minimum of thirty days, the offender would avoid any sanctions and be back out on the street, still without having addressed the underlying cause of the offense, the alcohol problem.¹⁵⁹

*D. DUI/Drug Court is a Viable and Easily-Implemented
Alternative for Those DUI Offenders for
Whom the Current System has
Proved Inadequate*

This Article does not advocate the replacing of the current Florida DUI regime with DUI/Drug Courts. In fact, judging from the decrease in DUI offenders over the past twenty years, it appears that the current system may work reasonably well for many offenders. The DUI/Drug Court model, whether it be a dedicated DUI Court at the County level or DUI/Drug Court at the Circuit level, is only for those persons for whom the current system has already proved ineffective. The discussion on criteria for participation in the DUI/Drug Court in Part VI.E seeks to ensure that those most amenable to treatment under the DUI/Drug Court are admitted. One factor weighed heavily in this discussion is the danger to society of the offender, which necessarily includes a weighing of the number of previous DUI offenses. It should be obvious that the current system is inadequate in the context of an offender who has multiple DUI offenses and has been through the current regime multiple times.

The bottom line is this: there exists clearly a group of true-addict offenders whose recidivism has not been reduced by the current system. Florida already has courts specially designed to treat offenders who reoffend due to their substance-abuse addictions, the current Circuit Drug Courts. In addition, Florida already has the multiple elements necessary for treatment under a Drug Court in place. These elements include the evaluation and treatment elements found in the DUI Program. There is everything to gain by putting these elements together to form true DUI/Drug Courts and at least evaluate whether recidivism can be reduced further than under the standard system.

159. *See id.*

VI. CHALLENGES OF EXPANDING/ESTABLISHING DUI/DRUG COURTS IN FLORIDA

Part VI looks at several general challenges to establishing new DUI Courts and further considers how these challenges are sometimes reduced or are otherwise inapplicable in the context of modifying existing Drug Courts to accommodate DUI offenders. This section will consider each of these challenges as it applies particularly in Florida. Several of these challenges have already been noted at the national level by the National Drug Court Institute (NDCI).¹⁶⁰ Along with concerns we identified in our research, we now turn to address several of the NDCI concerns: (A) Costs and Funding Issues, (B) The "Soft on Crime" Perception, (C) The Scope of Need, and (D) Existing DUI Courts.

A. *Costs and Funding Issues*

1. Types of Costs Involved: "Treatment Costs" and "Justice System Costs"

Among the Drug Courts we researched, one of the fundamental concerns was funding. "Dollars are scarce, and competition for funding prevents agencies from working together toward a common goal."¹⁶¹ Costs associated with establishing a Drug Court can be split into two categories: "Treatment Costs" and "Justice System Costs."¹⁶² The greatest increase in costs over the costs involved in the standard system tended to be the "treatment costs," because much of the "justice system costs" were already present in the court system (e.g., judges, prosecutors, and public defenders continue to be paid whether or not they are operating in a Drug Court context).¹⁶³

160. Tauber & Huddleston, *supra* note 18.

161. *Id.* at ix.

162. KEVIN M. SHERIN & BARRY MAHONEY, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TREATMENT DRUG COURTS: INTEGRATING SUBSTANCE ABUSE TREATMENT WITH LEGAL CASE PROCESSING 23 (1996).

163. *See id.* at 43.

2. The Existence of Florida's DUI Program Provides Ready Funds for the Treatment Costs

As explained in Part III.D above, under the standard system DUI offenders must pay for their own treatment in the DUI Program. In one fell swoop, the existence of the Florida DUI Program eliminates the greatest obstacle, funding of treatment. There may be increased costs above and beyond what treatment providers charge under the DUI Program because a true DUI/Drug Court requires representatives from the treatment providers to participate in court staffings and perform other tasks in addition to their duties under the DUI Program. The point here, however, is that the mere existence of the DUI Program would allow a county court, with little to no additional funding, to establish a local dedicated DUI Court.¹⁶⁴

As explained above, given the existence of the DUI Program with a funding mechanism (i.e., the client pays) already in place, there is only a small additional cost involved in the establishment of a dedicated county DUI Court. It follows then that there should be even less additional costs involved in converting an already existing Drug Court into a DUI/Drug Court because the additional justice system costs, namely the extra personnel required to operate the treatment-based court, have already been covered.¹⁶⁵ The treatment program under the DUI Program, in addition to the treatment structures already established under the Drug Court, should absorb most of whatever other costs would be involved in accepting DUI offenders into the Drug Court.

3. The Additional "Justice System Costs" Increased in the Short Term Should Be Offset by the Long Term Savings to the Judicial System Due to Decreased Recidivism

Since a DUI/Drug Court requires focusing more judicial attention on each individual defendant, additional judges, state attorneys, and public defenders could be required to provide this increased individual attention. For instance, due to the increased attention which needs be paid to each defendant, it is less likely that the judge could maintain as large a docket as

164. One judge we spoke with established a dedicated DUI Court at the county level without requiring any additional sources of funding.

165. Assuming, of course, that the original Drug Court is not expanded to accommodate more clients.

under the standard system; therefore, more judges may be required to service the same number of defendants. One criticism of DUI/Drug Courts is that they may siphon funds away from other areas of the judicial system.¹⁶⁶ Generally speaking, there is a greater judicial work load involved in the near term in that the individual defendants appear more often before the judge (initially once per week) in the course of one single case than they would under the standard system. This increased workload may lead to greater judicial cost in the short term. Yet, if one considers the long term potentiality of decreased recidivism, it is quite likely that, had it not been for the offender's participation in the DUI Court, that same offender would have appeared before the Court several more times during his life, and with each new DUI offense, the defendant would have increased the risk to society. Furthermore, since alcohol is often seen as a gateway drug,¹⁶⁷ by treating the alcohol addiction early, it is possible to avoid later addictions, which may be more expensive to treat. Therefore, in the long term, the actual judicial expense would be greater without the DUI Court.

The proposition set forth in this section is that DUI/Drug Courts are simply cost effective in the long term because they reduce recidivism. Indeed, Florida courts have already made the determination that Drug Courts are cost effective in the context of substance abuse and addictions, albeit currently only as pertains to illicit drugs.¹⁶⁸ Therefore, asserting that establishing DUI Courts or expanding Drug Courts to become true DUI/Drug Courts is a good idea only requires making a small logical inference from the status quo in Florida. Several studies support that Drug Courts may actually save taxpayer dollars in the long run.¹⁶⁹ In assessing the

166. "At first glance, drug courts appear to be an expensive alternative, as they demand the extensive involvement of a judge as well as treatment resources." Michael W. Finigan, *Assessing Cost Off-Sets in a Drug Court Setting*, 2 NAT'L DRUG COURT INST. REV. 59, 61 (1999).

167. See *supra* notes 10-11 and accompanying text.

168. This is evidenced by the establishment of a Drug Court by most of the twenty circuit courts in Florida.

169. See, e.g., Finigan, *supra* note 166, at 61-62.

[B]ased on the cost study of the Multnomah County STOP Drug Court Diversion Program . . . conducted in 1998, drug courts can save taxpayer dollars. In the Multnomah County study, cost offsets were found at both the county and state levels. According to figures from the STOP Program grant, an estimated \$1,002,979 added tax money was spent per cohort of clients that participated in the program. With the estimated total of \$2,476,760 of avoided cost savings, the author calculates that every taxpayer dollar spent on those cohorts produced \$2.50 of avoided cost savings to the taxpayers . . . Furthermore, if the broader cost savings (including victimization and theft costs) are estimated, the ratio of benefit to the Oregon taxpayer is \$10 saved for every \$1 spent.

potential cost savings of a DUI/Drug Court program, consideration must be given to the number of arrests and bookings, the costs of incarceration, the costs of prosecuting, the costs of probation, and the costs of victim losses from alcohol-related crimes, which includes the loss of life resulting from DUI offenders.¹⁷⁰

The costs of Drug Court may be as much as "half as much as jail, and the results are far more effective."¹⁷¹ Because the current Florida system already is vested with many building blocks of DUI/Drug Courts, the incremental costs of taking all these various elements together and placing them under either an existing Florida Drug Court, or a newly established DUI Court are indeed negligible.¹⁷²

"Benefits to court-based drug intervention programs are most easily conceptualized as cost savings arising from decreased drug use among defendants."¹⁷³ The benefits of reduced crime (here, DUI offenses) are great, including victim costs, costs of arrest, costs of sanctions, and the costs of parole and probation.¹⁷⁴ Another arguable benefit is that state attorneys and public defenders, acting in a cooperative environment, do not have to go through the process of preparing for trial, and therefore, the workload may actually be reduced for the involved attorneys, even in the short term.

While the case for greater long term savings can plausibly be made for establishing a new DUI Court, the case is even more persuasive for

Id. Another such study considered the District of Columbia Superior Court Drug Intervention Program (SCDIP). "Cost-benefit analysis has long been employed as an economic tool for evaluating the relative efficiency of capital projects, and it is particularly well-suited for [the evaluation of Drug Courts]." JOHN ROMAN ET AL., A METHODOLOGY FOR MEASURING COSTS AND BENEFITS OF COURT-BASED DRUG INTERVENTION PROGRAMS USING FINDINGS FROM EXPERIMENTAL AND QUASI-EXPERIMENTAL EVALUATIONS, 1 (Dec. 1998). "To evaluate the effectiveness of [the SCDIP], the impact evaluation compared the costs and benefits for participants in the two SCDIP experimental programs with those for similar defendants on the standard docket." *Id.* at 5. The SCDIP actually consisted of two different diversion programs, a court-based treatment program and a sanctions program. *Id.* For purposes of this Article, we consider only the court-based treatment program of the SCDIP, because it most closely approximates the DUI/Drug Court model we advocate.

170. See Finigan, *supra* note 165, at 71-79.

171. Alter, *supra* note 1, at 39; see also *Facts on Drug Courts*, *supra* note 9, at 3 ("Incarceration of drug-using offenders costs between \$20,000 and \$50,000 per person per year. The capital costs of building a prison cell can be as much as \$80,000. In contrast, a comprehensive Drug Court system typically costs less than \$2,500 annually for each offender."). Ohio recently completed a special prison facility just for fifth time DUI offenders at a cost of \$18 million. See Ludlow, *supra* note 10, at 1.

172. And thereby making it a true DUI/Drug Court.

173. ROMAN ET AL., *supra* note 169, at 3.

174. *Id.*

adapting an existing Drug Court to handle DUI offenders, to become a true DUI/Drug Court. The Circuit Drug Courts in Florida already have the structure and personnel in place to provide the individual supervision and treatment necessary for treatment based DUI courts to be effective.

4. Grants and Alternative Sources of Funding to Cover Some of the Additional Incremental Costs

While this section has shown that generally funding is not an insurmountable obstacle in the creation of a DUI Court or the conversion of a Drug Court into a DUI/Drug Court, some additional funding may be required, if not for initial establishment, certainly for expansion. In this regard, we encourage looking into the experience of finding funding for Drug Courts.

Here are some possible sources of additional funding: insurance reimbursement through the defendant's own health insurance or through Medicaid or other publicly funded insurance; state or local funding of substance abuse treatment services; and grant¹⁷⁵ support for treatment services from foundations or public agencies.¹⁷⁶

B. The "Soft on Crime" Perception

1. The Rigorous Obligations of DUI/Drug Court Support the View that DUI/Drug Court is Real Punishment and is not "Soft on Crime"

Countering the perception that DUI/Drug Courts are soft on crime will require a concentrated, careful, enduring public education effort. While the non-violent drug offenses which typically land defendants in Drug Court are often viewed as victimless crimes, the offense of DUI may tragically involve a victim. It was precisely this view of DUI as a crime with many potential victims that recently led to the adoption of strict criminal DUI laws in many states. In fact, it is arguable that these strict laws have been successful to some extent as the number of DUI arrests have continued to decrease

175. See, e.g., Mary Ann Barton, *Justice Department Awards Grants to Implement Drug Courts*, 30 NAT'L ASS'N COUNTIES, (Sept. 14, 1998), available at <http://www.naco.org/pubs/cnews/98-09-14/drug.htm> (last visited Sept. 26, 2000).

176. SHERIN & MAHONEY, *supra* note 162, at 44.

yearly in Florida.¹⁷⁷ Arguably, those not being effectively deterred by these laws — the alcoholics — are the very ones who would most likely be impacted by DUI/Drug Court.¹⁷⁸

Treatment-based approaches, like Drug Treatment Courts, appear to be non-punishment oriented. The Florida Criminal Punishment Code, however, makes it clear that punishment is the primary goal of sentencing in Florida, with rehabilitation only secondary.¹⁷⁹ One method this Article espouses for funneling defendants into DUI/Drug Court is for participation in the DUI/Drug Court to be made a mandatory special condition of probation at sentencing.¹⁸⁰ The stated goal of punishment, along with society's concern over the potential harm that DUI offenders may inflict on innocent victims, needs to be reconciled with the existence of DUI/Drug Courts and their treatment-oriented approach, especially if DUI/Drug Court participation is required at sentencing, a phase uniquely punishment-oriented. This is even more of a concern where a judge's future depends on re-election.

One way to reconcile the theoretical disparity between the treatment-orientation of DUI/Drug Courts and the punishment-oriented purpose of sentencing is to view DUI/Drug Court as an additional form of punishment. It requires the defendant to do more than he would otherwise have to do before his release from the criminal justice system.

Punishment is defined, in part, as a "[d]eprivation of property or some right."¹⁸¹ As explained earlier, generally speaking, under the present system, unless a sentencing judge is inclined to sentence repeat DUI defendants to more than the required thirty-day minimum¹⁸² jail term,¹⁸³ most DUI repeat offenders will only spend thirty days in jail, to be followed by a probationary period of minimal supervision due to the large caseloads probation officers must carry.¹⁸⁴ In addition, it is also likely that the

177. See *DUI Arrest Rate Declines* [Chart], available at http://www.state.fl.us/eog/gov/docs...ical/section_two/sect_two_dui.html (last visited May 25, 2001).

178. See Ryan, *supra* note 10 and accompanying text.

179. FLA. STAT. ANN. § 921.002(1)(b) (West 2001) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.")

180. See *infra* Part VI.D.

181. BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

182. In the case of a third time offender, see *infra* Part III.A.1.

183. Certainly, the greater number of previous DUI convictions, the greater is the likelihood the sentencing judge will sentence the defendant to terms significantly beyond the thirty-day minimum required for a repeat DUI offense. See *infra* Part III.A (discussing thirty-day sentence).

184. Recall the discussion of the Miami-Dade County Recidivism Project from Part III.E. Under the DCRP, two probation officers, specially trained in chemical dependency, were hired. Each of these two officers must supervise approximately fifty offenders, which, as Frank Rabbito explained, is about half the number usually assigned to a probation officer. Clearly, even with fifty offenders per probation officer, the level of supervision will be less than optimal.

defendant will participate in a treatment program under the auspices of the DUI Program, which will require additional meetings and other obligations.¹⁸⁵ On the other hand, in a DUI/Drug Court, it is likely that the offender will have to go to court on a regularly scheduled basis, perhaps monthly or weekly, and be subject to increased urinalysis or other testing, and ultimately live under the stricter supervision of both treatment providers, parole offices, *and the judiciary*. Clearly, under the definition of punishment set forth above, the defendant is more often being denied his liberty by virtue of these mandatory requirements than under standard probationary supervision.

Simply put, DUI/Drug Court is the harder path to follow. In this sense, it can be thought of as greater "punishment." While the defendant may not be spending the longest possible term incarcerated under the DUI Court model, it is unlikely that he would have served an extensive sentence, even under the standard system.¹⁸⁶ The thirty-day jail term is mandatory after the third offense, so even DUI/Drug Court participants would have to serve a minimum of thirty days in jail. Essentially the difference is that under a DUI/Drug Court model, once the defendant is released from the thirty-day jail term, he will be subject to strict court-supervised treatment aimed at treating his addiction. In this sense, the DUI/Drug Court adds more accountability onto the existing framework without taking anything away. In the standard courts, the same defendant, after getting out of jail, would have to participate in the Florida DUI Program to get his license back, but, other than that, would be minimally supervised. By being required (or electing if it is voluntary) to go through the DUI/Drug Court, a defendant would be subject to more punishment in terms of actual time and effort expended to deal with the underlying problem.

185. See *infra* Part III.D.

186. For instance, consider the discussion of some practical problems with increased terms of incarceration from Part V.C above. Under the proposal we set forth in Part VIII.B.3 for making DUI/Drug Court participation a condition of probation, the sentencing judge, if different from the DUI/Drug Court judge, could sentence the defendant to the same term of incarceration she would have otherwise sentenced him to, and then the DUI/Drug Court routine would start once the defendant finished the term of incarceration. While this is possible, it may not be ideal as the period for treatment would then begin later. It would probably be better if the DUI/Drug Court judge and the sentencing judge, if not the same person, at least coordinated to give the defendant a lesser term of incarceration, recognizing that the increased judicial supervision under the DUI/Drug Court would suffice and save incarceration costs in the near term.

2. Countering the "Bad Press Effect" Requires that DUI/Drug Court Professionals Make it Clear that DUI/Drug Courts Add to Without Taking Anything Away From the Current DUI Regime

Drug Courts sometimes, especially at the beginning, lead a precarious existence. Their funding is almost always initially grant-driven, and thereafter they may exist at the mercy of a board of county commissioners. If a DUI/Drug Court participant or graduate were to subsequently inflict injury while committing DUI, the fear is that the bad publicity would threaten the very existence of the Drug Court itself. Or, since county court judges are elected, the bad press associated with a tragic incident involving a DUI Court participant could diminish a judge's electability. We refer to this phenomenon as the "bad press effect."

Consistent with the bad press effect, one of the greatest criticisms of our proposal has been that unique among substance abusers, multiple DUI offenders present an especially poignant risk to society¹⁸⁷ and therefore pose a public relations liability for existing Drug Courts. Our view, however, is exactly the opposite: we believe that it is precisely due to the dangerous nature of DUI and the inadequacy of the current system to deal with certain offenders that DUI/Drug Courts can be an effective weapon in Florida's DUI arsenal.

One aspect of Drug Courts which makes them so effective is the ability of the judge to instantaneously sanction the defendant.¹⁸⁸ However, typically the Drug Court judge uses this sanctioning power sparingly on defendants who have tested positive on a urinalysis, recognizing that "some relapse is a part of the healing process."¹⁸⁹ In contrast to her treatment of a positive urinalysis, the Drug Court judge typically uses her sanctioning power liberally when a client has failed to show up to a mandatory Drug Court event or otherwise violated Drug Court rules. Judge Moran explained to us that this is an odd position for a judge to be in: overlooking the fact that the defendant before him has committed a drug offense as evidenced by the defendant's positive urinalysis. If the Drug Court offender were a repeat DUI offender, could the Drug Court judge be expected to overlook a positive urinalysis for alcohol? What if this defendant were to subsequently drive drunk and kill somebody in the process? What if the press were then to discover that a judge, only days or weeks before, had

187. Recall from Part II above just how much of a danger the offense of DUI poses to society.

188. See Satel, *supra* text accompanying note 124.

189. This is not true, however, in all courts. Judge William L. Blackwell (20th Circuit, Collier County) explained to us that he "never lets a slip go unpunished."

released this multiple DUI offender even though the judge knew that the offender had a positive urinalysis? Would the court's explanation that such treatment of a positive urinalysis was necessary in the interest of treatment allay public concern?

It is quite possible that a current Drug Court judge would have to modify his use of sanctions in the DUI Court context in order to address this possibility. For instance, whereas a current Drug Court judge may not give any jail time to an illicit drug offender who tests positive, the same Drug Court judge may have to give jail sanctions to a DUI offender who tests positive for alcohol.¹⁹⁰ The public also needs to be shown that participation in a DUI/Drug Court subjects the defendant to greater scrutiny and supervision than participation in normal probation for a DUI offense. This is primarily an issue of educating the public (as recognized by the Advisory Panel).

Consider what would happen if a DUI/Drug Court participant were to become involved in an accident and fatally injure an innocent bystander. What would be a proper way for DUI/Drug Court personnel to respond? How could such a program, that ostensibly allowed a dangerous DUI offender back on the street, be justified? How could DUI/Drug Court personnel respond to public allegations that the DUI/Drug Court approach, is "soft on crime" and therefore caused this tragedy. Here is one hypothetical response:

It is true that the defendant involved in this tragic incident was a current DUI/Drug Court client. In fact, he did have two previous DUI offenses and was an alcoholic. In fact, he did not have a license when he was driving.¹⁹¹ This defendant has been participating in the DUI/Drug Court for the past six months, ever since he completed his mandatory thirty-day jail term. It is true that during those six months of participation, he tested positive twice for alcohol in his system, and for each

190. Additional safeguards may also have to be taken. For instance, perhaps an ignition interlock device could be installed in the cars of all participants requiring that they blow an alcohol-free breath in order to be able to start the car. Some courts already use similar devices under the standard system. At least one study has found that such ignition interlock devices can be effective in reducing DUI recidivism. See Barbara J. Morse & Delbert S. Elliot, *Effects of Ignition Interlock Devices on DUI Recidivism: Findings from a Longitudinal Study in Hamilton County, Ohio*, 38 CRIME & PUNISHMENT 131 (1992). Electronic monitoring is also another viable option. See *Electronic Monitoring: Frequently Asked Questions*, available at <http://198.202.202.66/ElectronicMonitoring/645faq512.asp> (last visited May 25, 2001).

191. "Convicted drunken drivers ignore license suspensions, as do those suspended for other reasons. Last year police ticketed 159,323 Florida motorists for driving on canceled, suspended or revoked licenses." Ryan, *supra* note 10, at 2; see, e.g., Florida v. Van Hubbard, 751 So. 2d 552, 554 (Fla. 1999).

of those relapses, he was given a three-day jail sentence. But, also during these six months, this defendant completed the mandatory Florida DUI Program, this defendant appeared before the DUI/Drug Court judge each Friday, attended two or more AA sessions per week, met in group counseling once per week, and was subjected to frequent random urinalysis. This is a much stricter form of supervision than that accorded the typical DUI offender who is out of jail in thirty days, and then only interacts for one year as one of one-hundred probationers assigned to a generic probation officer. It is true that he tested positive twice for alcohol, but he was only caught these two times because he was tested so often in the DUI/Drug Court, and the six days he spent in jail as a result were six more days than he would have spent in jail under the previous system. In other words, the DUI Court program provided greater safety to the public through its increased supervision of the defendant. The defendant did not become involved in his latest DUI because of the DUI/Drug Court, but in spite of it. At least the DUI Court makes the greatest effort to treat the DUI offender's underlying alcoholism, which is the only way to preclude the defendant from becoming involved in a future DUI once released from jail, no matter how long the term. The only alternative would be to lock the defendant up forever — which is simply not feasible. In conclusion, it is not right to single the DUI/Drug Court out for blame for this tragedy when the DUI/Drug Court program required all the rigors of the standard system and the DUI Program, in addition to increased judicial supervision.

C. The Scope of Need

Any jurisdiction committing to a program will face major challenges in finding funding and qualified practitioners to support it and will have to make difficult choices as to whom to serve.¹⁹² This discussion is not intended to set out hard and fast criteria for client selection — perhaps a better job for behavioral scientists and those more experienced with Drug Courts, but rather to set forth certain considerations to demonstrate how the selection criteria should remain flexible. Preliminarily, we want to make it clear that we do not see DUI/Drug Courts as only serving the particular defendants who go through their process. Rather, we see DUI/Drug Courts as serving the greater public interest of reducing DUI recidivism and thereby creating a safer society.

192. Tauber & Huddleston, *supra* note 18 and accompanying text.

Recall that the effectiveness of Drug Courts in reducing recidivism lies in their ability to treat addiction, the underlying problem. Therefore, the goal behind client selection is to select the clients who will benefit the most from the limited number of seats, and whose placement in the Drug Court will benefit society the greatest. To this end, most current Drug Courts use the commission of an illicit drug offense as one element in a proxy that is used to determine whether this particular defendant should be permitted to become a Drug Court client. It seems incongruous then that Drug Courts should ignore what is obviously a strong proxy for substance abuse, the commission of the offense of DUI.¹⁹³ After all, DUI has already been considered a good proxy for identifying alcoholics in other contexts.¹⁹⁴

The next question is which DUI offenders should appear before DUI/Drug Courts. Whatever method used for selecting clients for DUI/Drug Court should identify those people most likely to serve the ends to which DUI/Drug Court is directed: reducing DUI recidivism and protecting the public. Therefore, the criteria must select the persons (1) most addicted to alcohol; (2) most likely to continue driving while intoxicated; and since the current system seems to work for many offenders, (3) those offenders for whom the current system has proven or will probably prove inadequate. In most cases, it is axiomatic that those with multiple DUI convictions in the past meet these characteristics, and therefore multiple prior DUI convictions (or even arrests) should be a good proxy for the above two criteria. In fact, the strength of the proxy would, anecdotally, seem to increase as the number of prior DUI offenses increases.

193. "Persons with detectable alcohol levels injured in motor vehicle crashes are clearly at relatively high risk of having an alcohol disorder." Lois E. Kahn, *Recognizing an Opportunity: Screening for Alcohol Disorders After Motor Vehicle Crashes*, 75 MAYO CLINIC PROC. 229, 229 (2000); see also *supra* text accompanying notes 9-13.

194. Kahn, *supra* note 193. In this editorial from the Mayo Clinic, the author argues that because those involved in DUIs are not screened for alcoholism at the hospital, an "[i]nvaluable opportunity for intervention and rehabilitation was missed." *Id.* This editorial points out many of the same arguments we make in this Article:

If one focuses on the large fraction of patients not receiving follow-up assessments [for alcoholism], the potential remains for future incidents of [DUI] with possible future accidents, injuries, or death. This unchecked high-risk behavior is an unacceptable cost to society. In contrast, the cost incurred to screen injured persons with detectable blood alcohol concentrations is justified, given the tremendous cost of motor vehicle crashes associated with alcohol.

Based on the above, it is quite possible that DUI/Drug Court is inappropriate for many first time DUI offenders.¹⁹⁵ By eliminating most first time DUI offenders, a large number of DUI offenders would automatically be eliminated from participation in the program. This is not to say, however, that first time offenders should never be considered for DUI/Drug Court. For instance, since the first two underlying criteria are addiction to alcohol and propensity to drive while under the influence, it would seem that a first time offender with a very strong showing in both areas may still be ideal for DUI/Drug Court, even though the third criterion is ambiguous. A first-time DUI offender who, upon a search of his automobile incident to arrest, is found to be in possession of numerous illicit drugs¹⁹⁶ may be a better candidate for a DUI/Drug Court than a second-time DUI offender whose only addiction appears to be alcoholism. Because alcohol is a gateway drug (and often part of a complex and multiple addiction),¹⁹⁷ defendants arrested on DUI charges often simultaneously incur illicit-drug charges.¹⁹⁸

After determining that many first-time offenders may be ineligible, the next question to arise is should all second-time offenders automatically be assumed to be alcoholics and placed in a DUI/Drug Court program?¹⁹⁹ We disagree with this hard and fast rule as well. The point here is that there needs to be some flexibility in the criteria for determining which DUI offenders to send to DUI/Drug Court.

195. For example, since a first time offender has never been through the current system, it becomes more difficult to tell if the current system is inadequate for dealing with the addiction of that person.

196. Since he is a first time offender, one could argue that his propensity to drive while under the influence is probably not as high as someone who has been arrested several times for this crime. Therefore indicating a stronger possibility that he is a substance addict.

197. See *infra* text accompanying notes 216-19.

198. For instance, a Westlaw search of Florida cases revealed several examples of defendants arrested for DUI where the arrest included other factors which may create a stronger indication of a substance abuse problem. See, e.g., *Roberts v. Florida*, 732 So. 2d 1127, (Fla. 4th DCA 1999) (finding DUI in addition to possession of cannabis and drug paraphernalia); *Florida v. Coble*, 704 So. 2d 197, 198-99 (Fla. 4th DCA 1998) (finding DUI in addition to possession of cocaine and drug paraphernalia); *Florida v. Saufley*, 574 So. 2d 1207, 1209 (Fla. 5th DCA 1991) (finding DUI in addition to cannabis); *Florida v. Neumann*, 567 So. 2d 950, 951-52 (Fla. 4th DCA 1990) (finding DUI in addition to possession of cocaine and drug paraphernalia); *Florida v. Green*, 530 So. 2d 480, 481 (Fla. 5th DCA 1988) (finding DUI in addition to possession of cocaine).

199. Several Florida Drug Court practitioners have already addressed this issue. See *supra* note 25 and accompanying text.

D. Existing DUI Courts

1. The Current Courts Will Continue to Occupy the Central Position Even if DUI/Drug Courts are Implemented

Currently, Florida has many courts which are called DUI Courts, but they are not the type of treatment courts referred to in this Article. The vast majority of existing DUI Courts are neither patterned after nor do they resemble the Drug Court model.²⁰⁰ These existing DUI Courts are county criminal traffic courts that process a large number of DUI offenders. Recall from earlier in this Article that we only envision our proposals as effecting those defendants for which the current DUI regime has proved inadequate. These current "DUI Courts" do contain a treatment element via their interaction with the DUI Program.²⁰¹ The existence of these courts should pose no impediment to the implementation of our proposals. If participation in DUI/Drug Court is a required special condition of probation, then defendants would go through these "DUI Courts" first and then proceed to participate in a DUI/Drug Court, whether it be a dedicated treatment DUI Court at the county level or a DUI/Drug Court at the circuit level. The vast majority of DUI defendants will continue to be processed through the standard court system.

2. The Successes of the Current "DUI Courts" and the DUI Program Should Not be Used as a Shield to Prevent the Establishment of DUI/Drug Courts Which Could Make the Current System Even More Effective

As shown in this Article, Florida has a very sophisticated DUI legal and administrative scheme.²⁰² With such an impressive system already in place, there may be some resistance in so far as the current system is viewed as adequate. In fact, one comment we received on a draft of this Article reflected this viewpoint. The question here is simple: if there is a chance to increase the effectiveness of the current system without a great increase in resources or sweeping legislative change, why not?

200. Tauber & Huddleston, *supra* note 18, at ix.

201. *See infra* Part III.D.

202. *See infra* Part III.

VII. BASED ON THE CURRENT STRUCTURE OF FLORIDA'S DRUG COURTS AND THE CURRENT STATE OF FLORIDA LAW, FLORIDA'S DRUG COURTS COULD EASILY BE CONVERTED TO TRUE DUI/DRUG COURTS

Part VII begins by considering the basic considerations of why Drug Courts should naturally accommodate certain DUI offenders. Next Part VII sets out some different methods of incorporating certain DUI offenders into Florida's existing Drug Courts, thereby converting those courts to true DUI/Drug Courts.

A. Florida's Existing Drug Courts Could Easily Accommodate Repeat DUI Offenders

1. Characteristics of Drug and DUI Offender Populations

In order to justify inclusion of DUI offenders in Drug Court, it is necessary to compare and contrast the DUI offender population with both the illicit drug user population, and the criminal offender population in general.²⁰³ The NDCI has noted that offenders in the drug and DUI groups

203.

DWI offenders under corrections supervision were about 5 years older on average than other offenders Among probationers and State prisoners, about 1 in 5 DWI offenders were age 45 or older, compared to 1 in 9 offenders sentenced for other offenses.

. . . .

DWI offenders were better educated than other offenders. Thirty-seven percent of DWI offenders on probation, 18% of those in jail, and 16% of those in prison had attended some college. Among other offenders, 27% of those on probation, 15% of those in jail, and 13% of those in State prison had some college education.

Although correctional populations are predominantly male, women constitute a smaller proportion among DWI offenders than among other types of offenders. Among probationers, females accounted for 17% of DWI offenders, 7% of those in jail, and 6% of those in prison. Among other offenders, females accounted for 22% of probationers, 10% of jail inmates, and about 6% of State prisoners.

have similar characteristics. "Each offender has a substance abuse problem that is taking control of his or her life. Each requires comprehensive treatment, a strong support system, and the ability to come to terms with his or her problem before real change can occur."²⁰⁴

Both groups also differ in some significant ways. To begin with, based on the legal nature of their drug, DUI offenders tend to have a "legal orientation."²⁰⁵ Typical Drug Court offenders, on the other hand, are usually in court due to their possession of an illegal substance and thus tend to have an "illegal orientation."²⁰⁶ DUI offenders are also more likely to have family support groups or better financial resources, which tend to be helpful to recovery.²⁰⁷ Drug offenders, however, are more likely to be out of work and not have the type of support groups helpful to recovery.²⁰⁸

2. Addiction is Addiction and Therefore Alcohol Addiction Should Receive the Same Judicial Treatment as Illicit Drug Addiction

Dr. William Jacobs²⁰⁹ has remarked that "separating addictions is bothersome. Alcoholism is an addiction. Separating it out promotes the idea that it is acceptable. A drug is a drug."²¹⁰ In New Mexico, where DUI/Drug Courts exist, one judge has stated that he sees no dichotomy between alcohol and drugs.²¹¹ Another New Mexican judge has seen even better

Over two-thirds of DWI offenders under correctional supervision (74% of probationers and 68% of both jail inmates and prisoners) were white and non-Hispanic. Among other offenders, 58% of probationers, 35% of jail inmates, and 33% of prisoners were white.

Maruschak, *supra* note 10, at 6.

204. Tauber & Huddleston, *supra* note 18, at 6.

205. *Id.* In other words, because their drug is legal, they have a difficult time accepting the fact that they have a substance abuse problem, though they may realize they have broken a law.

206. *Id.* Clearly, it is easier for the illicit drug user to realize he has broken the law because the very interaction with the substance is illegal, as is not the case with alcohol.

207. *Id.*

208. *Id.*

209. Clinical Assistant Professor of Psychiatry with Shands at the University of Florida who works with the Drug Court in Jacksonville, FL. Dr. Jacobs is also the Medical Director at Gateway Clinical Services, a treatment provider in Jacksonville.

210. Telephone Interview by Gail Sasnett with Dr. William Jacobs, Clinical Assistant Professor of Psychiatry, University of Florida (Oct. 2000); Telephone Interview by Gail Sasnett with Robin Wright, Escambia County Court Administrator (Oct. 2000). Ms. Wright reiterated that "a drug is a drug."

211. Interview with Judge Thomas G. Cornish, Third Judicial District, Dona Ana County District Court, Las Cruces, NM (Oct. 2000).

success with the pure alcohol offenders than with the illicit drug offenders in the combined DUI/Drug Court model.²¹²

3. The Treatment Methodology is the Same for Alcoholism and Illicit Drugs

Among the several treatment providers who we questioned during pre-court staffings,²¹³ they all stated that the methodology they use to treat alcohol abusers is the same methodology they use to treat illicit drug offenders. Mr. Bill Beltz, a substance abuse counselor with Western Judicial Services, Inc.²¹⁴ (a contract treatment provider), explained to us that while addictions may not all be the same, recovery is very similar, and alcohol offenders fit in well with other recovering substance abusers.²¹⁵ These providers favored including DUI offenders within their treatment groups, which, under the current Drug Courts, consist primarily of illicit drug offenders. In fact, they already have alcoholics in their Drug Court groups; however, these alcoholics were in Drug Court based on an illicit drug charge.²¹⁶ The simple fact is that the methodology being used to treat the underlying alcoholism of the defendant is the same as the one being used to treat the illicit drug problem that brought them into Drug Court.

212. Interview with Judge Lourdes A. Martinez, Third Judicial District, Dona Ana County District Court, Las Cruces, NM (Oct. 2000).

213. Among substance abusers questioned were representatives of the following treatment providers: C.A.T.S., Marion-Citrus Mental Health Center, Act II Counseling, Inc., Tri-County Rehabilitation, Inc., Western Judicial Services, Inc., Options of Marion County.

214. Bill Beltz, Substance Abuse Counselor for Western Judicial Services, Inc.

215. Telephone Interview by E. John Gregory with Bill Beltz, Substance Abuse Counselor, Western Judicial Services, Inc. (Mar. 6, 2001). Mr. Beltz explained his thoughts in this area as follows:

The crux of the matter is that recovery for both [alcohol abusers and illicit drug abusers] is the same. Since the recovery ends up being the same, the methodologies used for recovery are the same. The strategies for getting through the denial, though, are different. DUI offenders should be included in the same group [as illicit drug offenders]. Both populations would benefit. It does put a little more of a challenge on the counselor — dealing with disparate populations. I would not go quite so far as saying that addiction is addiction, but I would say that recovery is recovery. In fact, most of the drug offenders we currently deal with are also addicted to alcohol. Only about 1/3 of our clients are pure drug addicts. Society and the alcoholic tend to see drugs as a different category [from alcohol]. Really, the problem is the same.

216. See *supra* note 24 and accompanying text.

4. It is Worthwhile to Permit DUI Offenders to Displace Other Illicit Drug Offenders in DUI/Drug Court

When it comes to the allocation of places in Drug Court, currently only occupied by illicit-drug offenders, two threshold questions arise: (I) In a Drug Court of limited slots, would it not be the case that for every DUI offender accepted as a client, one illicit drug offender will be denied a seat? (II) And further, how can this be justified? This section addresses these questions.

As to the first question, Florida jurisdictions have been extremely resourceful in developing ways to increase funding for their Drug Courts and thereby continually expand them to accept a greater number of clients. As this expansion continues, more seats will become available, although the problem of limited seats is a reality. This does not necessarily lead to an illicit drug offender being denied a seat. By the time a person has been arrested for multiple DUI offenses, he probably has a serious substance addiction.²¹⁷ The interrelationship between the use of alcohol and other drugs has been well documented.²¹⁸ As addictions are often mixed,²¹⁹ it is likely that this DUI defendant is also abusing illicit drugs.²²⁰ In fact, alcohol

217. See *supra* notes 10-11 and accompanying text.

218. See, e.g., John N. Marr, *The Interrelationship Between the Use of Alcohol and Other Drugs: Summary Overview for Drug Court Practitioners*, OJP Drug Court Clearinghouse and Technical Assistance Project, American University, Issues Paper Series (Aug. 1999). Marr explains that "the further use of alcohol by defendants already involved with alcohol or other drugs can lead to other addictions; and the use of alcohol by such defendants can trigger cross-addictions . . ." *Id.* at 3.

219. Laura J. Bierut et al., *Familial Transmission of Substance Dependence: Alcohol, Marijuana, Cocaine, and Habitual Smoking; A Report from the Collaborative Study on the Genetics of Alcoholism*, 55 J. AM. MED. ASSOC. 982 (1988).

220.

Over three-quarters of DWI offenders in jail and two-thirds of those on probation also reported using drugs in the past . . . Among DWI probationers, marijuana (65%) and stimulants (29%) were the most commonly used drugs, followed by cocaine-based drugs including crack (28%), hallucinogens (20%), depressants (15%), and opiates including heroin (6%). Among jail inmates held for DWI, marijuana (73%) and cocaine-based drugs including crack (41%) were the most commonly used followed by stimulants (36%), hallucinogens (33%), depressants (28%), and opiates including heroin (19%).

Thirty percent of those in jail and 17% of those on probation reported drug use in the month prior to arrest. More DWI offenders in jail (10%) than on probation (3%) reported using drugs at the time of offense. Although jail inmates more commonly reported past use, use in the past month, and use at the time of

has been referred to as a “gateway” drug leading to increased drug abuse.²²¹ In this sense, the offense of DUI, can be considered merely the “jurisdictional hook” by which to bring such multiple substance abuse clients into DUI/Drug Court.²²² Therefore to a certain extent, making Drug Court seats available to DUI offenders will “hook” the same clientele, only by a different offense. In this situation, an illicit drug offender is not having his Drug Court seat “taken” by an alcoholic, but rather the seat of a less dangerous²²³ illicit drug offender is being taken by an alcoholic who is also addicted to illicit substances and for whom the offense of DUI was merely the jurisdictional hook to get before the DUI/Drug Court. To the extent that multiple DUI offenders are abusing only alcohol, however, it is true that expanding Drug Courts to include DUI offenders will result in the substitution of a pure alcoholic (an abuser of a legal drug) for an illicit drug offender within the court.

As to the second question, how do we justify shifting a seat from an illicit drug user to an alcoholic when a DUI offender is not concurrently an illicit drug offender? Consider the following statistics: For the year 2000, there were 59,869 DUI arrests in the state of Florida.²²⁴ In 1999, 32.1% of

arrest, more probationers (56%) reported being a regular user of drugs than did jail inmates (48%).

Maruschak, *supra* note 10, at 11.

221. “A great deal of research has been conducted [on whether] alcohol is a ‘gateway drug’ and, in many cases, leads to more serious drug addictions.” Marr, *supra* note 218, at 8. Marr concludes that 86% of Nevada adult Drug Court program participants “whose current drug of choice is not alcohol or marijuana, began their drug-using behavior with one or both of these drugs.” *Id.* It seems, however, that the interrelatedness between alcohol and other drugs has not yet been fully acknowledged by the courts. See Richardson v. Florida, 620 So. 2d 257, 257-58 (Fla. 2d DCA 1993) (striking down special condition of probation forbidding use of alcohol where defendant was convicted of possession of cannabis); Boyd v. Florida, 749 So. 2d 536, 536 (Fla. 2d DCA 2000) (holding that the defendant could not be subjected to condition of probation prohibiting the use or possession of alcohol where the defendant had been convicted for solicitation or delivery of cocaine).

222. The “jurisdictional hook” must be defined (e.g., the number of past DUI offenses, the number of illicit drug offenses) in order to have a manageable number of people in DUI/Drug Court as well as to take in the group most amenable to treatment. This will be addressed in greater detail in Part VI.E.

223. We state that the illicit-drug offender in this context is “less dangerous” because the repeat DUI defendant not only has a good chance of being addicted to illicit drugs in addition to alcohol, but the repeat DUI offender has already proved his propensity to drive under the influence of such substances, thus making him more dangerous.

224. *Statewide Arrests by Age and Sex*, (2000), available at http://www.fdle.state.fl.us/FSAC/Crime_Trends/total_Index/FL_arrests-age-sex98.asp (last visited May 25, 2001).

traffic fatalities and 9.1% of traffic crashes were alcohol-related.²²⁵ Altogether, there were 936 alcohol related fatalities and 19,073 alcohol-related injuries.²²⁶

While taking away a seat from the latter and giving it to the former may be a close moral question, from a societal safety standpoint, it may make good sense to make such an exchange. The greater the number of past DUI convictions a defendant has, the greater the possibility of future convictions.²²⁷ Therefore, as the number of past DUI convictions rises, so does the need for the allocation of the DUI/Drug Court seat to go from the illicit drug offender, to the multiple DUI offender. This argument is relevant again when determining the number of DUI offenses a defendant must have had before becoming eligible for Drug Court.²²⁸

Finally, recall that the effectiveness of Drug Courts in reducing recidivism lies in their ability to treat addiction, the root of the problem. Therefore, as discussed in Part VI.D, the goal behind client selection is to select the clients who are most likely addicted to alcohol, who otherwise would be most likely to re-offend, and whose placement in the Drug Court will benefit society the greatest. Proven failure under the current system is also highly relevant. To this end, most current Drug Courts use the commission of an illicit drug offense as a major element in a proxy that is used to determine whether this particular defendant should be invited to become a Drug Court client. It seems incongruous then that Drug Courts should ignore what is obviously a strong proxy for substance abuse, the commission of multiple DUI offences.²²⁹

B. Overcoming Structural Impediments to Converting Florida's Drug Courts to DUI/Drug Courts

1. Most Drug Courts are at the Circuit Level Whereas Most DUI Offenses are Adjudicated at the County Level

Drug Courts are mostly established at the circuit court level while most DUI offenses are adjudicated at the county level. Only upon the third DUI

225. 1999 Florida Traffic Crash Facts, (1999), available at www.hsmv.state.fl.us/html/safety.html (last visited Dec. 15, 2000).

226. *Id.*

227. *See infra* Part VI.D.

228. *See id.*

229. *See Kahn, supra* note 193 and accompanying text.

offense does the prosecutor have the option of charging the DUI offense as a felony; thus, the vast majority of DUI offenses are not heard at the circuit court level. Because DUI offenses involve a complicated statutory scheme, as described previously, judges at the circuit court level, who seldom preside over DUI offenses, are relatively unfamiliar with this scheme as compared with judges at the county court level, who deal with DUI offenses on a daily basis. One possible solution to this situation is for Circuit Drug Court judges to be "specially assigned"²³⁰ as County Court judges for purposes of presiding over DUI offenders in DUI/Drug Court. Using this process, qualified and willing DUI misdemeanor offenders would physically appear in circuit court with the other Drug Court offenders, but

230. The Florida Supreme Court has approved of specially assigning County Court judges as Circuit Court judges in the past. *Treadwell v. Hall*, 274 So. 2d 537, 539 (Fla. 1973).

It is our overall view, from a consideration of Sections 2, 5, 6, 8 and 20 of revised Article V [of the Florida Constitution], that county judges who have been members of the Florida Bar for five years preceding their assignments to judicial service under Section 2(b) of Article V, and who have served in such office upon or after the effective date of the revision, are qualified to be assigned as temporary circuit judges for the performance of any judicial service a circuit judge can perform.

In the later *Payret* case, the Florida Supreme Court clarified that such assignments must be temporary in nature. *Payret v. Adams*, 500 So. 2d 136, 138 (Fla. 1986). Clarifying the court's earlier decision, *Crusoe v. Rowls*, 472 So. 2d 1163 (Fla. 1985), the court explained temporary as follows:

We suggested that when a county court judge is assigned to do solely circuit court work, the assignment, in order to be temporary, should be for no more than sixty days; when a county court judge is assigned to spend only a portion of his time doing circuit court work, we suggested no more than six months.

.....
Factually, *Crusoe* dealt with successive and repetitive assignments of county court judges assigned to hear a limited class of support orders. We found these assignments valid as the county judges were assigned "to supplement and aid the circuit judges rather than to replace them."

Payret, 500 So. 2d at 138 (quoting *Crusoe*, 472 So. 2d at 1165). In the above three cases, the Florida Supreme Court considered the assignment of County Court judges as Circuit Court judges. The scenario we suggest is the opposite: the assignment of Circuit Drug Court judges as County Court judges for the purpose of presiding over DUI offenders participating in their Drug Court. In addition, the assignment could either be done on an individual basis, per defendant transferred from regular County Court (which would require more administrative paperwork), or could probably be done in six week increments. It appears, therefore, that there should be no legal impediment to specially assigning Circuit Drug Court judges as County Court judges to preside over the few DUI offenders participating in their Drug Courts.

for legal purposes, they would be considered to be in county court. This would not only give the Circuit Drug Court judge familiarity with the DUI statutory scheme, but it would also consolidate all of the substance abuse offenders before one Circuit Court judge who is skilled in the practice of treatment-based jurisprudence. Alternatively, the DUI offender could go through the court system at the county court level all the way up to the point of sentencing, at which time the Circuit DUI/Drug Court judge would take jurisdiction of the case sitting as a County Court judge. It would then be the Circuit DUI/Drug Court judge who would pronounce sentencing.

2. Most Drug Courts Are Voluntary Pre-Prosecution Diversion Programs Where DUI/Drug Courts Would Be Dealing with DUI Clients on a Post-Adjudication Basis

Drug Courts are generally pre-prosecution diversion programs²³¹ whereas DUI Courts practically must be post-adjudication programs. Most Drug Courts are elective programs in which the defendant chooses to participate because he feels it will be in his best interest. As Drug Courts are typically voluntary, various incentives are used to persuade defendants to participate in Drug Court. Among these incentives are the withholding of adjudication by the judge and suspension of sentence. For the offender, Drug Courts are elective programs in which the defendant chooses to participate because he feels it will be in his best interest. As Drug Courts are typically voluntary, various incentives are used to persuade defendants to participate in Drug Court. Among these incentives are the withholding of adjudication by the judge and suspension of sentence. For the offender, the greatest incentive is the ability to avoid jail time and the possibility of having his record expunged upon successful completion of the program. This arrangement is possible because the Drug Court programs are essentially pre-prosecution diversion programs. A DUI Court could not operate quite the same way.

Conceivably, the state attorney could agree to defer prosecuting the multiple-offender DUI offense in exchange for the defendant's agreement to participate in DUI Court. This would essentially treat DUI offenders the same as drug offenders. Several judges explained to us that this would not be possible politically because if one such offender were to commit a DUI

231. See *Facts on Drug Courts*, *supra* note 9, at 2, "American University's Drug Court Clearinghouse reports that 70% of drug courts are now probation-based or post-plea programs." However, Judge William L. Blackwell in Collier County (Naples), Florida (20th Circuit) explained to us that his Drug Court is post-adjudication and all the clients have "suspended sentences hanging over their heads."

offense while in the program and harm a member of the public, the backlash would be severe. Instead, perhaps the better tack to take would be to just treat participation in DUI/Drug Court as a special condition of probation.²³²

3. DUI/Drug Court Could Function as a Special Condition of Probation

This approach requires very little change in the present handling of DUI offenders, many of whom normally plead instead of going to trial, at least up until the point where probation comes into play. The defendant would still proceed through the criminal justice system as under the current system, with court personnel maintaining their standard roles. Because this program's probation would be so closely supervised, the state attorney and public defender would need to understand that a minimum jail sentence and fine would be most appropriate in order for the defendant to begin the extensive DUI/Drug Court program as soon as possible. At sentencing, the judge would orally pronounce that a special condition of probation would be that the defendant participate in the DUI/Drug Court program. After the defendant completed his jail/prison time, he would then begin to be supervised under the auspices of the DUI/Drug Court program.

Under this approach, the sentencing judge, typically a county court judge,²³³ would proceed with normal sentencing, but the judge would require that the defendant participate in DUI/Drug Court as an additional special condition of probation. The judge could sentence the defendant to a minimum period of incarceration, less than the judge would otherwise sentence the defendant to, knowing that the supervision the defendant would be subjected to following release would be a much more strenuous judicial scrutiny.

Under Florida law, special conditions of probation must be reasonably related to the offense charged.²³⁴ However, general conditions of probation

232. See *supra* note 31 and accompanying text.

233. Unless the DWI is charged as a felony, see *infra* Part III, the forum will be County Court.

234. See *Grubbs v. Florida*, 373 So. 2d 905, 909 (Fla. 1979) ("Probation conditions must be reasonably related to the offense and should provide the standard of conduct essential to the probationer's rehabilitation in addition to the protection of the public."); *Smith v. Florida*, 513 So. 2d 1367, 1368-69 (Fla. 1st DCA 1987) (holding that a condition of probation prohibiting the consumption of alcohol was reasonable in a case where the defendant was convicted of possession of cocaine). *But see Boyd v. Florida*, 749 So. 2d 536, 536 (Fla. 2d DCA 2000) (holding that a condition of probation prohibiting the consumption of alcohol was not reasonably related to an underlying charge of cocaine possession). The Florida Supreme Court has expressly rejected a special condition of probation prohibiting use or possession of alcohol imposed on a defendant convicted on firearm charges. *Biller v. Florida*, 618 So. 2d 734, 735 (Fla. 1993); see also

(those conditions of probation specifically required by statute) need not be reasonably related to the underlying crime.²³⁵ Recall the various general conditions of probation statutorily required under Florida's DUI legal regime: participation in the DUI Program; mandatory treatment if the psychosocial evaluation deems it necessary; required probation and monthly reporting requirements; and immobilization of the vehicle.²³⁶ Consider our earlier discussion of the form and structure of DUI/Drug Courts.²³⁷ Many of these general conditions of probation for DUI are similar to the requirements of a DUI/Drug Court. Therefore, requiring that a defendant also participate in a DUI/Drug Court Program as a special condition of probation is changing the current system only minimally. The defendant will still have to fulfill these same general conditions of probation as required by statute, but he will be doing so under the auspices of the DUI/Drug Court. In light of the treatment and demonstrated effectiveness of the DUI/Drug Court methodology, a special condition of probation, requiring participation in a DUI/Drug Court Program, should not be held invalid if properly pronounced at sentencing.²³⁸ Considering that participation in the

of probation requiring alcohol testing was not reasonably related to crime of grand theft); *Kennedy v. Florida*, 701 So. 2d 634, 635 (Fla. 2d DCA 1997) (striking alcohol-related conditions in probation for gambling offense). In *Brock v. Florida*, 688 So. 2d 909 (Fla. 1997), the Florida Supreme Court clarified their holding in *Biller*. In *Brock*, the trial court ordered random drug and alcohol testing as a general condition of community control based on a plea of no contest to grand theft. *Brock*, 688 So. 2d at 909. The defendant argued that the trial court erred in imposing the testing because "the state failed to demonstrate that drug and alcohol use were related to his past or future criminal conduct." *Id.* at 910. The *Brock* court clarified that *Biller* "stands for the rule that special conditions of probation or community control must reasonably relate to the defendant's present criminal conduct or future criminality, or pertain to conduct which is itself criminal." *Id.* at 911. However, since the condition at issue in *Brock* was a "general condition of community control," and not a "special condition," it could be imposed on the defendant "irrespective of whether it reasonably relates to the type of offense." *Id.* at 912. The difference is simply that general conditions of probation go to the "State's interest and discretion in monitoring a defendant's conduct during community control." *Id.*

235. See *supra* text accompanying note 234.

236. See *infra* Part III.

237. See *infra* Part IV.

238. Consider some other special conditions of probation which have been imposed and upheld on appeal in the DUI area:

As a condition of probation a first time [DUI] offender was required to purchase a newspaper advertisement consisting of his mug shot and name with a caption, "DUI-Convicted." The Court upheld this condition and made the following findings: (1) while this condition may be punitive, probation conditions may be punitive, as well as rehabilitative; (2) the fact that this condition may impinge on constitutional rights, including the first amendment right of free speech, does not make it invalid; (3) it cannot be concluded as a matter of law that there is no logical relationship between the condition and the crime in that the humiliation may have the effect of deterring such future conduct. This decision was based

current DUI Program is a mandatory general condition of probation, and the court may order participation in the “Youthful Drunk Driver Visitation Program,” as a condition of probation,²³⁹ requiring participation in DUI/Drug Court as a special condition of probation would seem to fit nicely into the scheme and clearly be reasonably related to the crime of DUI.²⁴⁰

4. Possible Incentives for Voluntary or Semi-Voluntary Participation in DUI/Drug Court

As pointed out above, participation in most Drug Courts is voluntary. In order to get somebody to voluntarily agree to go through the increased rigor of a drug court, courts offer incentives which are otherwise unavailable in the DUI context, such as diversion and withholding of adjudication. The Special Condition of Probation option would make participation in DUI Court mandatory and eliminate the need for incentives. Further, studies indicate that coerced treatment can be as equally effective as voluntary treatment in treating substance abuse addictions.²⁴¹ It may not, however, be wise to completely forsake the carrot of incentives for the stick of mandatory probation in all cases. Some research has shown that the greater the number of coerced participants, the less effective group treatment becomes.²⁴² In order to get a proper mix of voluntary and

primarily on the reasoning in the “bumper-sticker” case of *Goldschmitt v. State*, 490 So. 2d 123 (Fla. 2d DCA)

Demers et al., *supra* note 33, at 39-40. Another appeals court determined that “it was proper for the court to make it a special condition of probation that the defendant not seek a hardship license during the term of probation because that was reasonably related to the offense and future criminality.” *Id.* at 40 (citing *Davis v. State*, 688 So. 2d 996 (Fla. 5th DCA 1997)).

239. FLA. STAT. ANN. § 322.0602 (West 2001).

240. Also, recall from our earlier discussion that participation in the Miami-Dade County Recidivism Project is often imposed as a special condition of probation. *See Vardalis & Cohn, supra* note 94 and accompanying text. To our knowledge, this imposition of this program as a special condition of probation has never been challenged. Since the DCRP involves many of the same elements as our proposals, it seems to follow that participation in DUI/Drug Court should be held to be a reasonable condition of probation.

241. For a discussion of the studies, see *Planning for Alcohol and Other Drug Abuse Treatment for Adults in the Criminal Justice System*, ch. 2, (DHHS Pub. No. (SMA) 95-3039 (1995)). Several studies indicate that clients who enter AOD treatment because they are forced to do so by the criminal justice system make as much progress as those who enter treatment voluntarily. However, some researchers are opposed to coerced treatment on philosophical or constitutional grounds, and there are clinicians who believe there is little benefit to forced treatment. *Id.*

242.

Clinical experience shows that if the percent of coerced patients in treatment centers and self-help groups becomes too high, treatment becomes less effective.

coerced participants, it may be desirable to set up a DUI Court in which some defendants are required to participate as a special condition of probation, while others are encouraged to participate through the use of incentives. This voluntary approach would be more in keeping with the traditional Drug Court methodology. A court could be imaginative with incentives, but could use the incentives employed by the Miami-Dade County Recidivism Project, discussed above, as a starting point.²⁴³ Some courts in other states have employed carrots, such as giving suspended jail sentences beyond the states' mandatory minimums and reducing fines,²⁴⁴ although the latter incentive may require legislative change in Florida.

*C. As an Alternative to Merging DUIs into
Current Drug Courts, Dedicated DUI
Courts Could Be Established
at the County Level*

Because DUI/Drug Courts and Drug Courts are essentially the same thing, thus far this Article has focused on why we should treat alcoholics who commit DUI offenses the same as other substance abusers who commit crimes due to their underlying addictions, i.e., that certain DUI offenders should be incorporated into the pre-existing Drug Courts of Florida. The main goal of this Article, though, is to argue that recidivism can be reduced by utilizing the ten components of Drug Courts to treat DUI offenders.²⁴⁵ Establishing dedicated DUI Courts (based on the Drug Court model) at the county level can also achieve this result.

In our research, we learned of one county court in Florida where the judge had established a DUI Court program based on the Drug Court model.²⁴⁶ We visited and talked with the judge, the court staff, and others involved. Here are our observations. Staffing sessions take place

Peer pressure can be used as a positive force if most patients aren't committed to recovery. Steps must be taken to assure that centers do not include too many mandated participants.

Friends of the Addicted for Comprehensive Treatment Web Site, *Drug Courts and Coerced Treatment*, available at <http://www.factadvocates.org/factsheets/facts11.html> (last visited Feb. 26, 2001).

243. See *supra* text accompanying note 103.

244. An example of a court employing these sort of incentives is the Los Angeles DUI Court. See E-mail from Judge Steve Sanora, L.A. DUI Court, to Gail Sasnett (May 16, 2001, 14:27:42 PST) (on file with authors).

245. See *supra* text accompanying note 114.

246. Interviews with Marion County, Fla. Judge and Staff (Mar. 6, 2001).

immediately before court. The following persons are present at the staffing: the DUI Court judge, a representative from the appropriate DUI Program provider, a Public Defender, a State Attorney, a Probation Officer, and representatives from each of the contract treatment providers. This staffing is very similar to Drug Court Staffings.

The most unique aspect of this County DUI Court is its funding system. In stark contrast to most Drug Courts which are at least initially dependent on Berne Grant Funding, this county was able to establish and maintain its DUI Court without any outside funding or assistance. The offenders pay for their own treatment since this treatment falls under the DUI Program. It required skillful negotiation to overcome one of the biggest obstacles to establishing this type of funding system, getting the treatment providers to agree on uniform low fees. Although this court is rather new, early indicators from the anecdotal evidence are that it is working as it was envisioned, with reduced recidivism and recovering offenders who are able to become productive citizens again.

VIII. CONCLUSION

The purpose behind the Drug Court movement in Florida has been to reduce criminal recidivism by addressing the underlying addictions that lead substance abusers to commit subsequent crimes. Given this purpose, this Article's value premise has been that it only makes sense that those substance abusers most likely to reoffend, i.e., certain DUI offenders who are alcoholics, and for whom the current system has proved inadequate, should also be treated the same as any other drug offender and be given access to treatment-based DUI/Drug Courts.

This Article has advocated the extension of the current Drug Court System in Florida to include certain DUI offenders. This Article is not a pioneering work advocating for the establishment of substance abuse treatment courts. Indeed, such an article is not necessary, at least in Florida, where most judicial circuits have shown their commitment to substance abuse treatment courts through their practice of establishing Drug Courts. Rather, this Article has provided a simple framework for taking the next logical step in the process: Florida already has treatment-based Drug Courts, and in addition, Florida has an extensive evaluation and treatment program for DUI offenders in the form of the current DUI Program. For the most part, these two systems, up to this point, have coexisted without ever crossing paths.²⁴⁷ This Article has presented a framework whereby the

247. As was pointed out to us during our research, these two systems do cross paths in several areas: (1) there exists a judicial liaison position in the DHSMV DUI Programs Office; (2) DHSMV participates in the training of new judges; (3) judges participate on the DHSMV DUI

two systems may be merged to create a more coherent criminal justice methodology for certain alcoholic DUI offenders in Florida — those for whom the current system has proved inadequate.

As part of the framework, this Article has suggested that mandating participation in DUI/Drug Court as a special condition of probation could seamlessly integrate DUI Courts into the current judicial system without upsetting the standard system as it now operates. Requiring participation as a special condition of probation necessarily makes DUI/Drug Court “coerced” treatment, which may have some drawbacks. Such an approach fits most easily into the statutory legal framework already established in Florida for processing DUI offenders. This Article has also suggested some possible incentives which could be used if the DUI program were established as a voluntary program which would be more consistent with the current Drug Courts, most of which are voluntary.

Alcoholism exacts a toll on society and on our criminal justice system through continued recidivism resulting in more criminal activities. The array of crimes committed or exacerbated as a result of alcoholism is great. Thus, the ideal Drug Court would accept clients, not only based on DUI offenses and illicit drug offenses, but also based on the commission of any crime whose root could be traced to an underlying alcohol or other substance addiction. It seems to us that this latter proposal is in perfect accord with the purpose for establishing Drug Courts — treat the underlying addiction of offenders so that they are less likely to reoffend. In the quest for the ideal, though, the practical should not be forgotten. Ideally, the court would not be called a DUI/Drug Court at all, but rather a Substance-Abuse Court; “DUI/Drug” Court would merely be an interim label. It is a long journey from a purely adversarial courtroom process to a true substance-abuse court that treated the underlying substance-abuse cause of certain crimes. The first step in that direction was the establishment of treatment-based Drug Courts in Miami-Dade. The next step, already successfully taken in other states, is including alcoholics who have been identified through being charged with DUI.

In this Article, we have advocated for this small incremental step towards that lofty goal of true substance-abuse courts, and we have shown how that small step can be taken in Florida without changing the current legal structure, and without extensive new funding. Because our proposals merely call for arranging the disparate elements of the existing system (current Drug Courts, current DUI Programs, and current treatment

Program Review Board; (4) judges may order second psychosocial evaluations; (5) judges sit on the review board of directors of DUI Programs; and (6) the staff in the community programs interact weekly, sometimes daily, with local probation staff. Lauer e-mail, *supra* note 85.

providers) within a new framework, there would be no revolutionary change in the process, but perhaps a revolutionary change in the result. Based on experiences in other jurisdictions, we would expect that DUI recidivism would drop dramatically, alcoholics would get into recovery and become productive citizens, and our streets would be safer. There is so much to gain at such a small price, and really nothing to lose.