DWI System Improvements for Dealing with Hard Core Drinking Drivers

SANCTIONING

TRAFFIC INJURY RESEARCH FOUNDATION

A DRIVING FORCE FOR SAFETY

DWI System Improvements for Dealing with Hard Core Drinking Drivers

Adjudication & Sanctioning

Robyn D. Robertson and Herb M. Simpson

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The Traffic Injury Research Foundation

The mission of the Traffic Injury Research Foundation (TIRF) is to reduce traffic-related deaths and injuries. TIRF is an independent, charitable road safety institute. Since its inception in 1964, TIRF has become internationally recognized for its accomplishments in identifying the causes of road crashes and developing programs and policies to address them effectively.

Traffic Injury Research Foundation
171 Nepean Street, Suite 200
Ottawa, Ontario K2P 0B4
Ph: (613) 238-5235
Toll free: 1-877-238-5235
Fax: (613) 238-5292
Email: tirf@trafficinjuryresearch.com
Website: www.trafficinjuryresearch.com

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About the Authors

Robyn Robertson is a Research Associate with the Traffic Injury Research Foundation. She received her Masters degree in Criminology and has worked for the Solicitor General of Canada and Members of Parliament in the areas of correctional policy and legislation. Ms. Robertson is also a part-time instructor for the Police Foundations Program where, for the past six years, she has taught criminological theory, the criminal justice system, and criminal and civil law.

Herb Simpson is President & CEO of the Traffic Injury Research Foundation (TIRF). Previously he was a Clinical Psychologist in the Federal Penitentiary System and a Professor of Psychology at several universities. Dr. Simpson serves on numerous national and international road safety boards and committees. He has been recognized for his contributions, particularly in the areas of young drivers and drinking-driving, and has received a number of prestigious awards for them. During his 27-year career in traffic safety, he has produced several hundred reports and articles on traffic safety issues, is a member of the editorial board of several journals, and a consultant to government and industry around the world.

Acknowledgements

This report is the third in a series dealing with DWI system improvements. The first dealt with problems in the detection and apprehension of hard core drinking drivers; the second dealt with the prosecution of these offenders. The current report examines ways to improve the adjudication of DWI cases and sanctioning of hard core drinking drivers. It would not have been possible without the assistance and participation of judges across the United States.

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We are also grateful to the Conference of State Court Administrators for their assistance in identifying limited and general jurisdiction judges experienced in DWI cases who could be surveyed to determine the generality of the findings obtained from the workshops and to gain further insights into adjudication and sanctioning problems and their solutions. A total of 900 judges from 44 states provided us with their views, opinions, and experiences. Gratitude is also extended to the Honorable Francis X. Halligan, Jr. and the American Judges Association who assisted with the review and completion of this work.

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The opinions expressed in this report are those of the authors and do not necessarily represent the views or opinions of the sponsor, the Conference of State Court Administrators, the American Judges Association, and senior judges, administrators, and individual judges who participated in this project.

List of Abbreviations Used in the Report

AJA	American Judges Association
APRI	American Prosecutors Research Institute
BAC	Blood Alcohol Concentration
COSCA	Conference of State Court Administrators
DMV	Department of Motor Vehicles
DWI	Driving While Impaired. See footnote, page 2
EHM	Electronic Home Alcohol Monitoring
FARS	Fatal Accident Reporting System
FBI	Federal Bureau of Investigation
FRE	Federal Rules of Evidence
FTA	Failure to Appear
HGN	Horizontal Gaze Nystagmus
NCSC	National Center for State Courts
NDAA	National District Attorneys Association
NDR	National Driver Register
NHTSA	National Highway Traffic Safety Administration
NJC	National Judicial College
NTLC	National Traffic Law Center
NTSB	National Transportation Safety Board
OR	Release on Own Recognizance
PBT	Preliminary Breath Test
PSR	Pre-sentence Report
SFST	Standardized Field Sobriety Test

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Executive Summary

Synopsis

- This is the third report from a major study designed to identify ways to improve the efficiency and effectiveness of the DWI[1] system for dealing with hard core drinking drivers.
- The present report underscores the need for system improvements by identifying key problems in the adjudication and sanctioning of DWI cases and recommends practical solutions derived from prior research and validated by the experiences of almost a thousand judges who participated in the project.
- A forthcoming report will examine system improvements related to the monitoring of hard core offenders.

Background

- Unprecedented declines occurred in the drinking-driving problem during the 1980s and early 1990s.
- These improvements have been largely attributed to changes in socially responsible individuals, who were drinking and driving less often and consuming less alcohol when they drove.
- Since the mid-1990s, however, declines in the problem have not been sustained, suggesting that the characteristics of the problem have changed.

[1] The abbreviation DWI (driving while impaired, or intoxicated) is used throughout this report as a convenient descriptive label, even though some states use other terms such as OUI (operating under the influence) and DUI (driving under the influence), and in some cases they refer to different levels of severity of the offense. We have used DWI not only to maintain consistency throughout the report but also because it is more descriptive of the offense usually associated with hard core drinking drivers.

- A very significant portion of the problem is accounted for by a high-risk group of drinking drivers referred to variously as hard core drunk drivers, chronic drunk drivers, persistent drinking drivers, or drivers with high blood alcohol concentrations (BACs).
- This dangerous group of offenders has been declared a priority by virtually all major government and non-profit agencies in the U.S.
- In response to this concern, new programs and policies have been developed and implemented to deal with hard core drinking drivers -- e.g., many states have passed legislation imposing stiffer sanctions on offenders with BACs in excess of .15; forty-one states have passed some form of vehicle incapacitation law.
- Great strides have been made on the legislative front and continued efforts are needed.
- At the same time, there is growing evidence that legislation is not enough, since hard core repeat offenders are "slipping through the cracks" -- in part, because their familiarity with the system allows them to circumvent it.

Legislation and regulation are necessary but not sufficient for success.

- Changes are needed that will improve the efficiency and effectiveness of the DWI system for dealing with hard core drinking drivers.

Objectives

- This project has as its primary goal focusing attention on the need for improvements in the DWI system by identifying priority problems and recommending practical, cost-effective solutions.

Goal: Identify priority problems and recommend practical, cost-effective solutions.

- The study is examining the entire spectrum of policies, programs and practices that target hard core drunk drivers -- from initial apprehension and charging by the police, through prosecution and adjudication, to the application of sanctions, and follow-up monitoring by probation and parole.
- The current report deals with the need for improvements in the adjudication and sanctioning phase of the DWI system.

Approach

- The project involved a series of steps designed to illuminate where changes are needed in the DWI system's response to hard core drinking drivers to improve its efficiency and effectiveness.
- A comprehensive literature review was used to generate problems identified by previous research. These problems were synthesized and condensed into a short-list of priority issues.
- This list formed the basis for discussion in a series of workshops held in five states with 22 judges from both limited and general jurisdiction courts. All were experienced with DWI adjudication and they represented 19 different judicial districts. Workshop participants verified, expanded and prioritized the problem list and developed a set of solutions.
- To increase the generality of these findings and obtain further information about such things as the frequency with which various problems are encountered, a major national survey of judges was conducted with the cooperation and assistance of the Conference of State Court Administrators.
- A total of 900 limited and general jurisdiction judges from 44 states responded to the survey, ensuring the findings are representative of the problems facing judges across the country.

Findings and Recommendations

- Judges consistently acknowledge the need for improvements in the DWI system to enhance the adjudication of DWI cases and sanctioning of hard core drinking drivers.
- In addition to highly technical evidence and overlapping legal issues, the unprecedented growth in DWI legislation in the past decade has made an already complicated system even more complex. Even when defendants are ultimately convicted, there are few guarantees that the sanctions imposed will actually be fulfilled. The inability of judges to effectively monitor repeat DWI

offenders has made the sanctioning of DWI offenders frustrating and discouraging to some judges.

- A linchpin to successfully improving the efficiency and effectiveness of the DWI system is to streamline and simplify the adjudication and sanctioning of repeat offenders.
- In addition to the need for better monitoring, a variety of other problems and needed changes to the adjudication system were identified by judges.
- Judges identified nine key problems that impede the effective adjudication and sanctioning of hard core drinking drivers, and recommended ways to overcome these problems. The problems, in order of priority, include: sentence monitoring, evidentiary problems, caseload, motions and continuances, failure to appear, records, sentencing disparity, mandatory minimum sentences, and juries.

- **Sentence Monitoring**

  - *The problem*: The common assumption is that convicted DWI offenders comply with the terms and conditions of their sentence, however, they frequently fail to do so. Repeat offenders, in particular, know that problems in the monitoring system, such as a lack of communication among diverse agencies, incomplete or inconsistent reports, and insufficient time to review reports make it difficult for judges to determine if offenders have violated the terms of their sentence. This problem is compounded by the fact that there are often not enough probation officers to effectively manage caseloads. Not surprisingly, it is estimated that 40% of offenders never even report to the probation office and that 50% of offenders fail to maintain the terms of their probation (MADD 2002).

Judges in some jurisdictions estimate that over 40% of offenders never report to the probation office.

  - *The consequences*: Some offenders experienced with the DWI system quickly learn that a conviction does not guarantee they will have to complete the imposed sentence because of weaknesses inherent in the monitoring system. The ability of offenders to circumvent sanctioning compromises the effectiveness of the justice system. If sentences cannot be closely

monitored, the needed behavior change will not occur, and future offenses will not be deterred.

- *The solution*: The information flow to judges needs to be streamlined. Additionally, the reporting process should be centralized through probation and parole so that monitoring by diverse agencies is synthesized and coordinated.

  Consistent and frequent contact with the offender and better communication among the relevant agencies is critical for achieving compliance with sanctions. The effectiveness of this has been demonstrated in several programs across the country. Increased contact also permits for swifter processing of probation violations.

  Specialized DWI courts provide greater opportunities for close monitoring and offender accountability. The integrated approach they offer combines the leverage of the criminal justice system with proven treatment modalities and judges recommend their expanded use.

♦ **Evidentiary Issues**

- *The problem*: Evidentiary problems associated with DWI cases are an issue at all levels of the judicial system. Police and prosecutors have identified evidentiary problems as a major issue (Simpson and Robertson 2001; Robertson and Simpson 2002); judges echo this concern. Evidence that is not properly collected, documented or presented in court has important implications for the effective adjudication of DWI cases.

  Insufficient or inadequate evidence may require judges to accept pleas to lesser charges, to dismiss cases at the pre-trial stage, to exclude evidence or attribute it a lesser weight, or impose a reduced sentence. Judges are particularly concerned with the ability of defendants to refuse chemical testing, impeding the collection of important evidence and allowing them to avoid conviction in many instances.

  Many judges also report that they do not have sufficient knowledge about many scientific and technical issues involved in DWI cases. Limited

opportunities for judicial education, access to legal resources, and trying these cases infrequently can make it difficult to gain expertise in ruling on motions and weighing evidence.

Many judges report they do not have sufficient knowledge about many scientific and technical issues involved in DWI cases.

- *The consequences:* Cases with poor or weak evidence are more likely to be dismissed at the pre-trial stage or result in unsatisfactory plea agreements, allowing offenders to avoid sanctioning. If the case does proceed to trial, the quality and quantity of available evidence as well as how it is presented affect the likelihood of a conviction.
- *The solution:* Judges uniformly see the need for judicial education on DWI evidentiary issues, given their highly technical and consistently evolving nature. Although numerous specialized courses are available, opportunities for judges to participate are compromised by caseloads, resources and competing demands for education.

  Judges recommend that the pervasive problem of test refusal be legislatively addressed so that critical evidence of impairment (BAC) is available. They also support reducing the excessively strict and burdensome statutory requirements for DWI investigations and arrests, and simplifying procedures so that evidence is not readily lost on technicalities.

♦ Caseload

- *The problem*: Some judges report that they process (arraignments, pre-trial hearings, sentencing) as many as 200 cases a day. Not all are DWI cases of course, and there are no national statistics that accurately quantify the number of DWI cases processed through the courts. However, it can be assumed that a majority of the 1.4 million DWI arrests made annually result in some form of processing by a judge. This provides some indication of the volume of cases facing judges each year. DWI offenses are the most frequently adjudicated misdemeanor in the lower courts -- for example, in Minnesota, almost 40% of the criminal calendar is DWI related (Dehn 2002).

DWI offenses are the most frequently adjudicated misdemeanor in lower courts.

Caseloads are determined not only by the number of DWI offenders processed through the courts, but also by the manner is which a case is resolved (e.g., dismissals, pleas, trials). Some methods are more expedient; others require considerable time and resources, contributing to caseload volume and creating court backlogs. When more cases go to trial, judges must devote considerable time and attention to these cases, reducing the time available to hear and process other cases.

- *The consequences*: Heavy caseloads reduce the time for judges to familiarize themselves adequately with case specifics and offender circumstances, allowing repeat offenders to avoid meaningful sanctioning.

  Heavy caseloads also prolong the adjudication of cases (because less time is available to hear them), ultimately resulting in more dismissals and acquittals due to delays. A high volume of cases also impedes monitoring and limits time available for judicial education, as judges are unable to attend courses for extended periods.

- *The solution*: Almost half (43%) of judges in our survey report that more judges are needed to reduce caseloads and improve the adjudication of DWI cases. This would permit time to review case specifics thoroughly, identify repeat offenders, and ensure that appropriate sentences are imposed.

  Almost half of judges report that more judges are needed to reduce caseloads.

  More that half (50%) of judges also believe that specialized DWI courts are better equipped to handle DWI cases, permitting swifter resolutions, reducing backlogs and improving outcomes. Improved efficiencies can also be realized if alcohol evaluations are mandatory and results are provided in a timely manner.

♦ Motions and Continuances

- *The problem*: Motions consist of written technical arguments involving specific points of law that are supported by memoranda and other documents that reference relevant precedents involving similar facts and circumstances. Judges must weigh opposing motions filed by the prosecution and defense

and make rulings regarding which motions will be granted or denied. These rulings have considerable implications for how a trial will proceed as well as its outcome -- i.e., either a dismissal, an acquittal or a conviction. The over use or "frivolous" use of unnecessary motions and continuances (motions requesting a delay in proceedings) is an abuse of process, which judges report as much more common in cases involving repeat offenders.

- *The consequences*: Frivolous motions and continuances burden judges with unnecessary paperwork, wasting time and resources. These cases remain on dockets for longer periods, contributing to caseload demands, dismissals and acquittals. The time and resources devoted to these prolonged cases also detracts from the ability of judges to efficiently adjudicate other cases and monitor offenders.

- *The solution*: Judges recommend stricter adherence to case processing guidelines and the limiting of frivolous motions and continuances to ensure caseload and backlogs are not increased further. Some judges have become proactive in this regard by limiting the time permitted to hear motions and continuances and strongly encouraging attorneys to file within stated guidelines. A small portion of judges (20%) even support legislatively limiting motions and continuances, using explicit language to avoid loopholes.

20% of judges even support limiting motions and continuances legislatively.

♦ **Failure to appear**

- *The problem*: To avoid prosecution and/or conviction, offenders will sometimes fail to appear for arraignment or trial. Estimates of this behavior range from 10%-30%, depending on the prevalence of borders with other states or countries. A majority of judges agree that, regardless of the stage in the court process when it occurs, failure to appear is a more serious problem among hard core repeat offenders who go to considerable effort to avoid conviction. This behavior is perpetuated by nominal penalties and the difficulties associated with apprehending offenders once they have left the immediate jurisdiction.

10-30% of offenders fail to appear for arraignment or trial.

- *The consequences*: By failing to appear on DWI charges, defendants can avoid prosecution and conviction, mostly because authorities are unable to locate them. Due to record problems, those who fail to appear are not likely to be identified following subsequent arrests, meaning that they will be released from custody, only to fail to appear again. Offenders also benefit from this behavior because it is more difficult to convict on DWI charges as the case gets older. Cases involving a defendant who has failed to appear are carried forward on the court docket, causing caseloads to expand and further stressing court resources.

- *The solution*: More than 40% of judges recommend making bond/bail (money or assets placed with the court, which are forfeited if the offender does not appear for trial) a condition of release on arrest warrants issued for failure to appear. If the defendant is subsequently arrested for outstanding charges, the arraigning judge will be aware of the defendant's predisposition not to appear and will take appropriate steps to ensure appearance at trial.

  Over 40% of judges support making bond a condition of release on an arrest warrant for failure to appear.

  Judges also support holding offenders who engage in this behavior in custody, and the development of transportation and cost-sharing agreements between neighboring jurisdictions to ensure that offenders are returned to the appropriate jurisdiction to answer for outstanding charges.

♦ **Records**

- *The problem:* Records necessary for adjudication -- including driver records, criminal history, alcohol evaluations, pre-sentence reports -- are maintained by different agencies, for different time periods. Their contents may not be comparable, and their accuracy or completeness may be inconsistent, at best. Inefficient access to relevant information impedes decision-making and the effective adjudication of cases.

- *The consequences:* Without accurate, up-to-date records that can be easily accessed, judges are severely impeded at several phases of the adjudication of a DWI case. Without the necessary information, judges are unable to determine if plea agreements are "conscionable" and reflect the severity of

the offense and the offender's history. They are unable to determine what sanctions are most appropriate, the severity of those sanctions, or the need for treatment.

In the absence of needed information, judges may also be unable to impose the harsher sanctions mandated for repeat offenses or to take advantage of those options only available for repeat offenses. This greatly diminishes the effectiveness of imposed sanctions and their associated deterrent effect. A lack of information can also lead to sentencing disparity -- i.e., offenders with similar cases and histories may receive vastly different sentences.

- *The solution:* Almost half (44%) of the judges in our survey report that the National Driver Register (NDR) is one of the most effective databases available for identifying problem drivers. However, this register relies on data from state DMVs; data which is often incomplete or inaccurate. Consequently, greater efforts are needed to improve the quality of data gathered for this purpose. There are many current initiatives underway to address these issues.

Almost half of the judges rely heavily on the National Driver Register and support efforts to improve its quality.

Judges also support the establishment of uniform driver abstracts that standardize look-back periods and other important information. Over 40% of judges believe that this would greatly improve the utility of these records. Judges would also like to see greater availability of pre-sentence reports. Additionally, there is considerable support for making the alcohol evaluation certificate a condition of bond, ensuring that offenders will comply with the evaluation and that judges will have access to this important information for purposes of sentencing.

Over 40% of judges support establishing uniform driver abstracts and standardizing look-back periods.

♦ Sentencing Disparity

- *The problem*: Cases with similar circumstances and backgrounds often receive different -- sometimes quite different -- sentences. This occurs because seemingly similar cases actually differ substantially. But, when making a decision, judges must take a number of factors into consideration

including: the seriousness of the offense, aggravating factors, prior convictions, probation recommendations, alcohol evaluations, social stability and family issues (Gottfredson 1999).

However, even allowing for such factors, disparities still exist. Some of these can be explained by a variety of other factors, including: the enormous number of judges dealing with tens of thousands of DWI cases annually, judges' familiarity and confidence in the different sanctions available, personal experience with sanctions, the availability of sanctioning options and the accessibility of resources to accommodate these sanctions. Indeed, more than 65% of judges in our survey report that fiscal concerns impact sentencing decisions occasionally or often.

More than 65% of judges report that fiscal concerns impact sentencing.

- *The consequences:* Sentencing disparity results in some offenders not receiving appropriate sanctions. This reduces the potential for behavior change and increases the likelihood of recidivism. Further, the inconsistent application of penalties creates a public perception of unequal justice. Most importantly, disparity permits and encourages offenders to manipulate the system to obtain lesser sentences through practices such as "judge-shopping" which is reported to occur either occasionally or often by 46% of the judges in our survey.

46% of judges say that "judge-shopping" occurs occasionally or often.

- *The solution:* Judges recommend greater access to scientific evaluations, allowing them to make informed sentencing decisions based on sound scientific research. More than 80% of judges in our survey report that summaries of scientific research on the effectiveness of sanctions would greatly benefit sentencing decisions and lead to greater consistency and lower recidivism rates.

More than 80% of judges report that summaries of scientific research would greatly benefit sentencing decisions.

Judges also believe that the use of DWI courts should be expanded, allowing experienced judges to utilize treatment resources and sentence, sanction or reward offenders with greater consistency. Additionally, the development of tiered penalties, supported by 74% of judges in our survey, would ensure that repeat offenders

74% of judges believe that tiered penalties would facilitate sentencing.

receive the more severe sanctions that are warranted while still permitting the needed discretion.

- **Mandatory minimum sentences**

  - *The problem*: Introduced in an effort to bring consistency and uniformity to sentencing, mandatory minimum sentences stipulate the nature and level of sanctions that are to be imposed for certain offenses. Judges believe that mandatory minimums impede rather than facilitate the sentencing process because they can stipulate sanctions that are either inappropriate or inapplicable. It is not uncommon for the policies and requirements of some sanctioning programs to exclude repeat offenders who are subject to mandatory minimums. Moreover, loopholes in penalty legislation make them confusing to apply, and resources are not consistently available to impose these sanctions.
  - *The consequences:* When provisions contained in mandatory minimums are dated, impractical, and not based on empirical evidence, offenders receive inappropriate or ineffective sentences which diminish deterrent effects. Inadequate resources to consistently impose these sentences, a lack of available services, or difficulties in interpreting legislation erode the certainty with which minimums are imposed and undermine public confidence in the system.
  - *The solution:* Judges recommend the inclusion of more alternative and creative sentencing options in mandatory minimum sentences. Existing mandatory minimums can also be improved by clarifying and updating the legislation as well as by allocating more resources to ensure that these sentences can be imposed.

Judges recommend the inclusion of more alternative and creative sentencing options in mandatory minimums.

- **Juries**

  - *The problem:* Jury trials are more likely to be selected by repeat offenders, who are often facing substantial incarceration time. Not only can this election

delay a case several months, but offenders also appear to recognize that DWI jury trials produce much lower conviction rates than jury trials involving other criminal offenses -- 60% and 75% respectively (NCSC 2001). It is likely that juries are ill-equipped to adjudicate complex evidentiary and legal issues and more frequently reach inappropriate verdicts. Juries often make incorrect assumptions about the evidence (e.g., assume a breath test was not offered) that the prosecution may not be able to correct. DWI offenders can also unfairly benefit from the sympathetic attitudes towards drinking and driving that still prevail in some jurisdictions.

Conviction rates in DWI trials are considerably lower than those for other offenses.

- *The consequences:* Offenders can avoid sanctioning if juries are unable to reach appropriate verdicts due to the complexities associated with evidentiary and legal issues. The lack of consequences for these offenders does nothing to deter impaired driving or change key behavior.

  Jury trials also contribute considerably to caseload demands because of prolonged processing. These delays constitute a drain on the limited court resources available.

- *The solution:* Nearly 75% of the judges in our survey believe evidence of test refusal should be admissible at trial; only 25% believe that evidence of priors should be admitted as well. This important information would assist the jury in reaching decisions based on a more complete understanding of the facts of the case. Some judges also recommend the elimination of jury trials for lesser offenses.

75% of judges believe test refusal evidence should be admissible at trial; 25% believe priors should also be admitted.

Summary

It should be evident from reading this report that the adjudication of a DWI case is highly dependant on work completed by other criminal justice agencies (e.g., police, prosecutors). In addition to highly technical evidence and overlapping legal issues, the unprecedented growth in DWI legislation in the past decade has made an already complicated system even more complex. Even when defendants are ultimately

convicted, there are currently few guarantees that the sanctions imposed will actually be fulfilled despite the best efforts of probation and parole officers. There is a need to streamline and simplify the adjudication and sanctioning of DWI cases to improve the effectiveness and efficiency of the system. This is a primary concern to judges and a linchpin to successfully improving the DWI system.

In addition to this general recommendation, a variety of specific changes to the DWI system can improve the adjudication and sanctioning of repeat offender cases. These improvements are organized below in terms of the general method by which this can be achieved.

- **Training and Education**

Judges identified several areas in which training can improve the adjudication and sanctioning of hard core drinking drivers:

- greater opportunities for judicial education on DWI evidentiary issues to prepare and familiarize judges with a variety of specialized scientific and legal issues; and
- more training for all criminal justice professionals so that they may acquire the necessary technical and specialized skills and knowledge to ensure the proper detection, apprehension, prosecution and monitoring of hard core drinking drivers.

- **Communication and Cooperation**

Judges believe that improved communication and cooperation with other professionals involved in the DWI system will facilitate the adjudication of DWI cases and the sanctioning of hard core drinking drivers. They support:

- streamlining the monitoring process so that judges can efficiently review information from probation officers and quickly identify offenders failing to comply with imposed sanctions and conditions;

- centralizing the reporting process so judges receive a single report from probation officers who collate and synthesize the needed information about offender monitoring and compliance from relevant agencies;
- facilitating more contact and better communication between judges, probation officers, treatment professionals and offenders to ensure that offenders comply with imposed sanctions and conditions -- there was considerable agreement that these objectives can best be achieved through specialized DWI courts;
- making bond a condition of a bench warrant issued for an offender that has failed to appear, to ensure that the arraigning judge will be aware of this behavior and take adequate steps to guarantee future appearances;
- developing transportation and cost-sharing agreements between neighboring jurisdictions to encourage courts to honor outstanding warrants and ensure that offenders are returned to court to answer for DWI charges after failing to appear;
- requiring electronic home alcohol monitoring in lieu of maximum bond at the pre-trial phase; and
- implementing a telephone-reminder system to notify offenders of upcoming appearances to reduce the incidence of failure to appear.

♦ Record Linkages, Availability and Access

Records containing data and information pertinent to the adjudication of DWI cases are maintained by a diversity of agencies. Records vary in terms of how current the information is with regard to content (both in terms of the nature of the information and its scope), as well as its accuracy and completeness. Judges require timely access to accurate, contemporary and comprehensive records to facilitate the adjudication of DWI cases. The importance of this has been underscored by numerous agencies and remains a critical need. Judges support the following improvements to ensure the availability of needed information:

- improving the quality of records currently available in the National Driver Register to ensure that they reflect current charges and clearly indicate all dispositions;

- creating uniform driver abstracts;
- standardizing court reporting practices and look-back periods; and
- increasing the availability of alcohol evaluation and pre-sentence reports.

Technology

Judges believe that greater use of technology can improve the efficiency and effectiveness with which they adjudicate cases involving hard core drinking drivers. They support:

- greater use of arrest and booking videos to improve the quality and quantity of evidence brought to court, clarify discrepancies in the interpretation of evidence and substantiate officer testimony; and
- creating an integrated records system linking all relevant agencies and providing comprehensive and timely information on the DWI cases being adjudicated.

Legislation and Regulation

Judges also identified a number of legislative changes that would improve the adjudication of repeat DWI cases:

- making refusal a criminal offense to ensure that offenders are not permitted to circumvent sanctioning and avoid identification as a repeat offender;
- admitting evidence of refusal at trial to permit judges and juries a fair and accurate basis for reaching a verdict;
- legislatively limiting the number of motions and continuances, using explicit language to ensure reasonable processing of DWI cases and minimize unnecessary delays;
- reducing statutory requirements to permit officers reasonable flexibility to respond to the dynamic environment in which DWI investigations and arrests occur;

- using tiered penalty systems that specify increased sanctions for repeat offenses;
- eliminating the option of a jury trial for lesser DWI offenses;
- clarifying and updating existing legislation on mandatory minimum sentences; and
- including more alternative and creative sentencing options in mandatory minimum sentences based on empirical scientific research.

1.0 Background

Unprecedented declines in the drinking-driving problem occurred during the 1980s (NHTSA 1997; NTSB 2000; Simpson 1993; Sweedler 1994; U.S. Department of Health and Human Services 1988). Progress continued through the early 1990s, although the gains were far less impressive (NHTSA 1997; NTSB 2000). Progress halted altogether in the late 1990s (NHTSA 2000). Even more worrisome is the fact that alcohol-related crashes actually increased in 2000 (NHTSA 2000), and preliminary estimates for 2001 show this is unchanged (U.S. DOT 2002).

Various explanations have been offered as to why the substantial gains in the 1980s were not replicated in the 1990s (Simpson et al. 1994; Stewart and Voas 1994). One widely accepted explanation is that the characteristics of the drinking-driving problem changed (Beirness et al. 1998; Mayhew et al. 2000) and that continued progress on a similar scale would be challenging because of this.

The profound improvements observed in the 1980s have been attributed primarily to changes in the practices of so-called socially responsible individuals -- they were drinking and driving less often and had lower blood alcohol concentrations (BACs) when they did drink and drive. The same could not be said for a group of individuals who frequently drive after drinking, usually with very high BACs. This high-risk group of individuals did not show the same level of change and, as a consequence, now account for a significant part of the alcohol-crash problem. For example, in 2000, drivers with BACs of .15 and above accounted for nearly 80% of the drunk drivers killed in the U.S. (NHTSA 2000). As a spokesperson to the National Safety Council recently stated, "We've already deterred virtually all of the social drinkers. We're now down to the hard core of people who continue to drink and drive in spite of public scorn…" (Pickler 2001).

The importance of this high-risk group was extensively documented early in the 1990s in a report from our institute entitled, "The Hard Core Drinking Driver" (Simpson and Mayhew 1991), even though the legacy of concern about this group certainly pre-dates that report (e.g., Glad 1987; L'Hoste and Papoz 1985). By the end of the 1990s there

was widespread recognition that addressing the problem of hard core drinking drivers should be a national priority. Groups such as the National Transportation Safety Board, the National Highway Traffic Safety Administration, the Century Council, the American Legislative Exchange Council, Mothers Against Drunk Driving, and the National Commission Against Drunk Driving declared that the key to continued progress in the fight against drunk driving was dealing effectively with hard core offenders.

As more and more agencies accepted the importance of dealing with hard core drinking drivers, a variety of descriptive labels for this group emerged -- e.g., "persistent drinking driver", "chronic drunk driver" and "high-BAC driver". Despite the variation in terms, all of them referred to individuals with a common set of characteristics -- they frequently drove after drinking; they usually had high BACs (often defined as a BAC in excess of .15); they had a history of arrests and/or convictions; and, many were alcohol dependent (Hedlund and Fell 1995; Simpson 1995; Simpson and Mayhew 1991).

Research shows that such individuals comprise a very small percentage of the population of nighttime drinking drivers -- less than 1% -- but they account for a very large percentage of the alcohol-related crashes occurring at that time -- in excess of 50% (Simpson and Mayhew 1991).

The magnitude of the problem created by the hard core and the apparent inability of the existing DWI[1] system to change their behavior led to a growing interest in identifying countermeasures that might be effective with this group. A number of proven and promising solutions were described in a second major report from our institute entitled, "Dealing with the Hard Core Drinking Driver" (Simpson et al. 1996).

Since that report was issued, many of the recommended measures have been implemented. Indeed, the 1990s proved to be a watershed for legislation targeting the hard core. Twenty-seven states passed legislation that imposes stiffer sanctions on offenders with BACs in excess of .15 (the BAC level at which the aggravated charges

[1] The abbreviation DWI (driving while impaired, or intoxicated) is used throughout this report as a convenient descriptive label, even though some states use other terms such as OUI (operating under the influence) and DUI (driving under the influence), and in some cases they refer to different levels of severity of the offense. We have used DWI not only to maintain consistency throughout the report but also because it is more descriptive of the offense usually associated with hard core drinking drivers.

are applied varies from .15 to .20 across the states; McCartt 2002), explicitly recognizing the dangers posed by drivers with high BACs. Other states increased the charge from a misdemeanor to a felony, based on such things as prior convictions and aggravating factors.

And, this trend does not appear to have lessened. According to the Century Council, "in the 2000 legislative session, 42 states introduced nearly 300 pieces of legislation focusing…on the hard core drunk driver" (The National Hardcore Drunk Driver Project 2001). Forty-three states have now passed legislation for either the mandatory or discretionary use of alcohol ignition interlocks; 41 have passed some form of vehicle incapacitation law (i.e., license plate removal, vehicle impoundment, immobilization, or forfeiture).

It is evident that great strides have been made on the legislative front. However, there is still room for improvement in the legislative arena and continued efforts are required to promote the needed changes.

Legislation and regulation are necessary but not sufficient for success.

At the same time, legislation and regulation, although necessary for success, are not sufficient. This is poignantly illustrated by the case of ignition interlocks. An impressive body of literature (Beirness 2001) has demonstrated that interlocks significantly reduce DWI recidivism. As noted above, this has led to 43 states passing the requisite legislation to enable their use with offenders. To date, however, only about 40,000 units are in use in the United States -- this represents just 3% of eligible offenders. Even in jurisdictions where the law removes judicial discretion by making interlocks mandatory for repeat offenders, very few have been installed (Beirness 2001). Part of the reason for this is that the law is ignored for various reasons, such as a lack of adequate resources and the perceived cost (Tashima and Helander 1998). Whatever the reasons, the fact is that an effective sanction, although legislated, is not being consistently applied.

Problems throughout the DWI system diminish its effectiveness.

The case of the interlock is, unfortunately, not unique. It is illustrative of a wider range of problems in the DWI system that reduce its effectiveness and efficiency in dealing with hard core drinking drivers. Indeed, there are problems throughout the system -- in enforcement, prosecution, sanctioning, and

monitoring (Hedlund and McCartt 2001). Such problems impact efforts to keep hard core offenders off the road and/or to change their behavior.

Some of the problems are not new -- e.g., detecting hard core offenders who are alcohol tolerant and may not show obvious signs of impairment at the roadside. Some of the problems are not new but have been given a contemporary twist as a result of recent changes in the DWI system -- e.g., refusal to take a test for alcohol has increased in some jurisdictions because of the ever-escalating consequences of having a BAC over the statutory limit. And, some of the problems are new, arising from the increased complexity of drunk driving laws -- arguably the offense with the most extensive and complex criminal statutes.

Despite the failings within the system, it is important to keep in mind that it works relatively well -- there were approximately 1.4 million arrests for alcohol-related driving offenses in 2000 (FBI 2000); fewer people are drinking and driving (Balmforth 2000); and, significant declines in the problem occurred, at least during the 1980s and early 1990s (NHTSA 1997).

At the same time, it is evident that much more needs to be done. As described in our recent reports (Simpson and Robertson 2001; Robertson and Simpson 2002), many drunk drivers go undetected, some who are detected avoid arrest, and some who are arrested avoid prosecution and conviction. The poor quality of evidence impedes effective prosecution; overloaded courts engender plea agreements, which compromise the level of sanctions applied to offenders; and, savvy repeat offenders simply ignore the imposed sanctions. These problems illustrate the need for improvements in the DWI system, which is the primary goal of this project.

2.0 Objectives

The primary goal of this project is to underscore the need for improving the effectiveness and efficiency of the DWI system for dealing with hard core drinking drivers by determining where they "slip through the cracks", and how these gaps can be filled. The project is:

Project goal: underscore the need for improving the DWI system.

- providing comprehensive documentation of precisely where the system is failing, and why; and,
- offering practical solutions to these problems.

The need for change arises in part because of the disconnect between policy and action -- many of the laws and regulations are in place but for various reasons they are not being applied or implemented in a meaningful fashion. As a consequence, the efficiency and effectiveness of the DWI system is being compromised at many levels. This ultimately reduces the general and specific deterrent effects of the DWI system -- i.e., it sends a message that the chances of getting caught are slight; that if caught, the chances of being convicted are marginal; and, even if convicted, there is a reasonable chance that the penalties will not be enforced.

There are a multitude of problems associated with the system's response to hard core drinking drivers. However, some problems have more far-reaching consequences than others, so this project has as an objective the identification of *priority issues*. Moreover, not all problems are amenable to change in the short-term (e.g., the sympathetic attitude of jurors who do not consider drunk drivers to be "criminals"), or they are difficult to change because they are rooted in constitutional issues. As a consequence, this project has as an additional objective the identification of *practical, cost-effective solutions*.

Objectives: Identify priority problems and recommend practical, cost-effective solutions.

The project is examining the entire spectrum of policies, programs, and practices that target hard core drinking drivers -- from initial apprehension and charging with a DWI

offense (Simpson and Robertson 2001), through prosecution (Robertson and Simpson 2002), to adjudication and the final application of sanctions, and follow-up monitoring. This is critical because it has been clearly demonstrated that hard core offenders can "slip through the cracks" at many stages in the process. This comprehensive analysis of the system will provide timely and practical insights into how the criminal justice system is failing and, more importantly, how it can be improved.

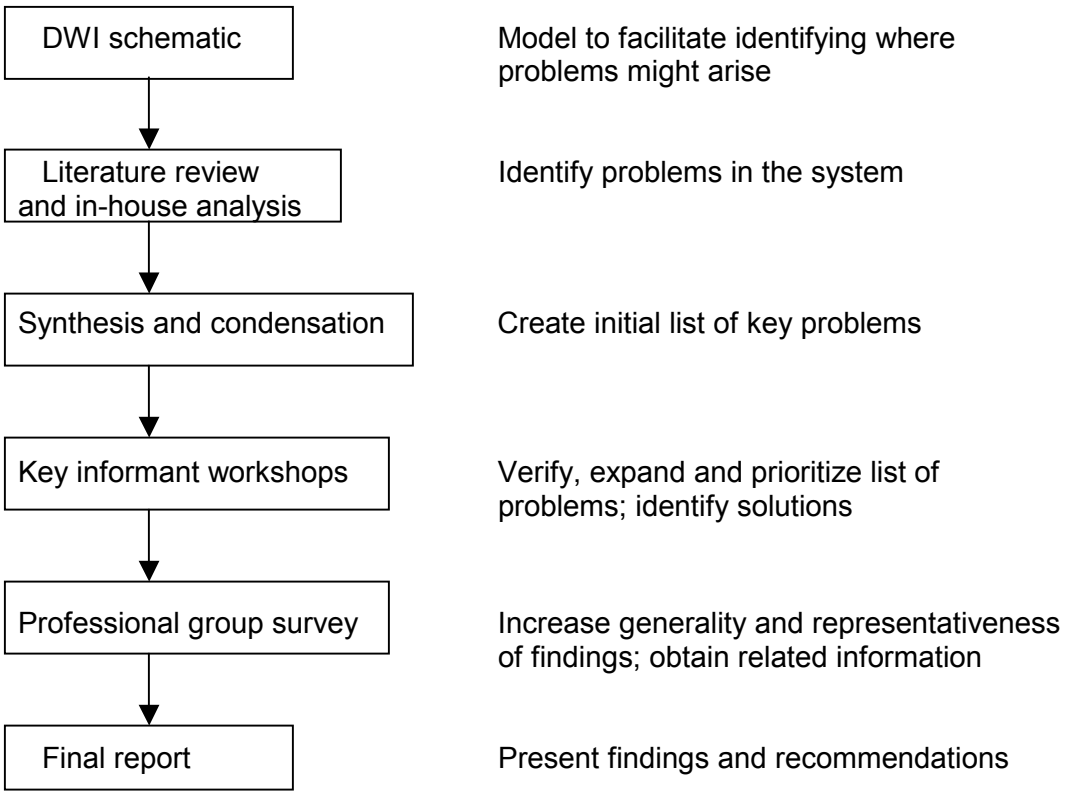
This report highlights the need for improvements at the adjudication phase of the DWI system. It documents problems and solutions associated with the adjudication of repeat DWI cases and the sanctioning of hard core drinking drivers. Earlier reports (Simpson and Robertson 2001; Robertson and Simpson 2002) focused on the detection and apprehension of hard core drinking drivers and the prosecution of DWI offenders. Copies of those reports are available at www.trafficinjuryresearch.com. A subsequent report will focus on the monitoring phase.

3.0 Approach

The overall approach to the project involves a series of steps designed to produce an increasingly refined, valid and representative list of ways to improve the efficiency and effectiveness of the DWI system's response to hard core drinking drivers. The project stages are outlined in Figure 1. This approach is being used to study all four phases of the DWI system -- enforcement, prosecution, adjudication and sanctioning, and monitoring.

Figure 1

Project Stages and Rationale



The first task was the development of a flow-chart, that represents schematically and generically how a DWI case proceeds through the system. The purpose of the schematic was to provide a model that would facilitate identifying where problems might arise. This representation of the system was reviewed and revised based on comments from a number of experts familiar with the DWI system.

Next, a comprehensive literature review was undertaken to determine what problems had already been identified by previous research. This set of problems was expanded by our own experience and knowledge of the system.

The expanded list of problems was synthesized and condensed to produce a short-list of key problems in each phase of the DWI system (i.e., enforcement, prosecution, etc.).

This final list of problems was then presented to a variety of representatives from the appropriate professional group in a series of workshops in several states -- participants were asked to verify, expand, and prioritize the list of problems as well as to identify solutions. The judgments of these professionals were collated to produce a rank-ordered list of priority problems as well as a set of associated solutions.

To increase the generality and representativeness of these findings and to obtain further information and insights into these issues, a larger and more representative group of professionals was surveyed. They were asked to rank-order the list of problems, to provide other relevant information, such as how frequently they encounter these problems, and to elaborate on the best ways to solve them.

The details of the process and its results are described in a series of reports -- this is the third in that series and it deals with adjudication and sanctioning.

4.0 The DWI System

To assist in identifying what type of problems might arise in the DWI system and where they are most likely to occur, a flow-chart was developed, which represented how a typical DWI case proceeds from detection through monitoring. Development of the schematic was greatly assisted by similar previous efforts (e.g., Jones et al. 1998). The schematic was intended to be generic and not meant to incorporate the variations and nuances of individual states' systems.

The schematic was presented to a number of professionals working within the DWI system to verify its accuracy and then modified as needed. It appears in Appendix C.

Even a cursory review of the schematic makes it evident that the DWI system is anything but simple. It is also evident that the processing of cases in the DWI system involves several phases that are relatively distinct and sequential but highly interrelated -- enforcement, prosecution, adjudication/sanctioning, and monitoring. Each of these phases is the primary responsibility of a different group of professionals -- enforcement is the responsibility of the police, prosecution the responsibility of district attorneys (or their equivalent), adjudication and criminal sanctioning the responsibility of the judiciary, and monitoring of criminal dispositions is the responsibility of probation and parole officers[2].

This convenient division of the system was used to structure the approach to the project, which is being completed in four segments to make the task manageable. The first two segments on enforcement and prosecution were covered in earlier reports (Simpson and Robertson 2001; Robertson and Simpson 2002). This third report deals with criminal adjudication and sanctioning. The fourth report will deal with monitoring.

[2] The term "probation officer" is used throughout this report for convenience to indicate both probation and parole officers.

Although this segmentation of the system is convenient, it is both arbitrary and somewhat misleading because the responsibility of each professional group extends well beyond the segment in which they have been placed (Hedlund and McCartt 2001). For example, prosecutors are not just involved in the prosecution of drinking drivers -- the evidence and recommendations presented to the judge by the prosecution is often an integral part of the sanctioning of the offender by the judiciary.

Moreover, the problems identified in one segment are not necessarily limited to it but can have reverberations throughout the system. We acknowledge these complexities explicitly and are sensitive to the erroneous impressions that can be created by simplifying a truly complex and dynamic system. We have avoided misleading simplification wherever possible.

4.1 The Adjudication and Sanctioning Process

The adjudication and sanctioning of a DWI offender typically elicits an image of a judge on the bench, banging the gavel, and passing sentence on the convicted offender. However, the adjudication of a DWI case, colloquially referred to as a “deuce”, “dee-wee”, or “dewie”, depending on the state, is in fact a very complex and detailed process of which sanctioning is only one element. As a result, the typical time frame to process a DWI case is three to four months, if the case is resolved with a plea agreement. When a case goes to trial, it may take six months or longer depending on the caseload of the court of jurisdiction. The adjudication and sanctioning process is illustrated in the schematic on page 13 and described in the following sections.

The explanation of the adjudication and sanctioning process provided here is meant to give the reader a general idea of the procedures used to determine the guilt of the accused as well as the imposition of sanctions and is not intended to elaborate on the detailed and complex procedures associated with a specific DWI adjudication in individual states. It is meant to provide a contextual basis for the report and assist the reader in locating the identified problems within the adjudication and sanctioning process in a chronological manner. The detailed information found in this section benefited substantially from the technical advice of the Honorable James E. Dehn, District Court

Judge in the 10th Judicial District in Minnesota and John A. Bobo, Jr., Director of the National Traffic Law Center of the American Prosecutors Research Institute.

There are seven distinct but interrelated stages associated with adjudication of a DWI case and the subsequent sanctioning of a DWI offender. These stages are identified in the following schematic -- arraignment (3.4 in the schematic); pre-trial process (3.5); trial process (3.6); enter verdict (3.7); sentencing (3.8); appeal (3.9); and post-conviction proceedings (3.10). At each of these stages the judge's role is to ensure that certain requirements or conditions are met by both the prosecution and the defense and that the accused receives a fair and just trial. Additionally, decisions made at each stage will have great significance for the stages that follow.

4.1.1 Arraignment

The purpose of an arraignment is to have the accused/defendant formally appear in court to be presented with the charges filed against them by the State, to notify the defendant of their constitutional rights, to inform the court if they need appointed counsel or wish to hire an attorney, and to enter a plea to the charge(s). This hearing may be presided over by a magistrate, a justice of the peace, a criminal court judge, or an individual appointed by a judge (e.g., commissioner) to handle lesser functions such as arraignments, bail and pre-trial hearings. Additionally, the judge or judicial representative will usually make a determination regarding the release of the accused at this time if he/she is being held in custody. Depending on the nature of the charges, arraignment may occur at the same time as the bail hearing (if the defendant is in custody), or the arraignment and bail hearings may occur separately. In states with a two-tiered court system, these hearings take place in a lower court. In states such as California, where the courts have been consolidated, they take place in any Superior Court of criminal jurisdiction.

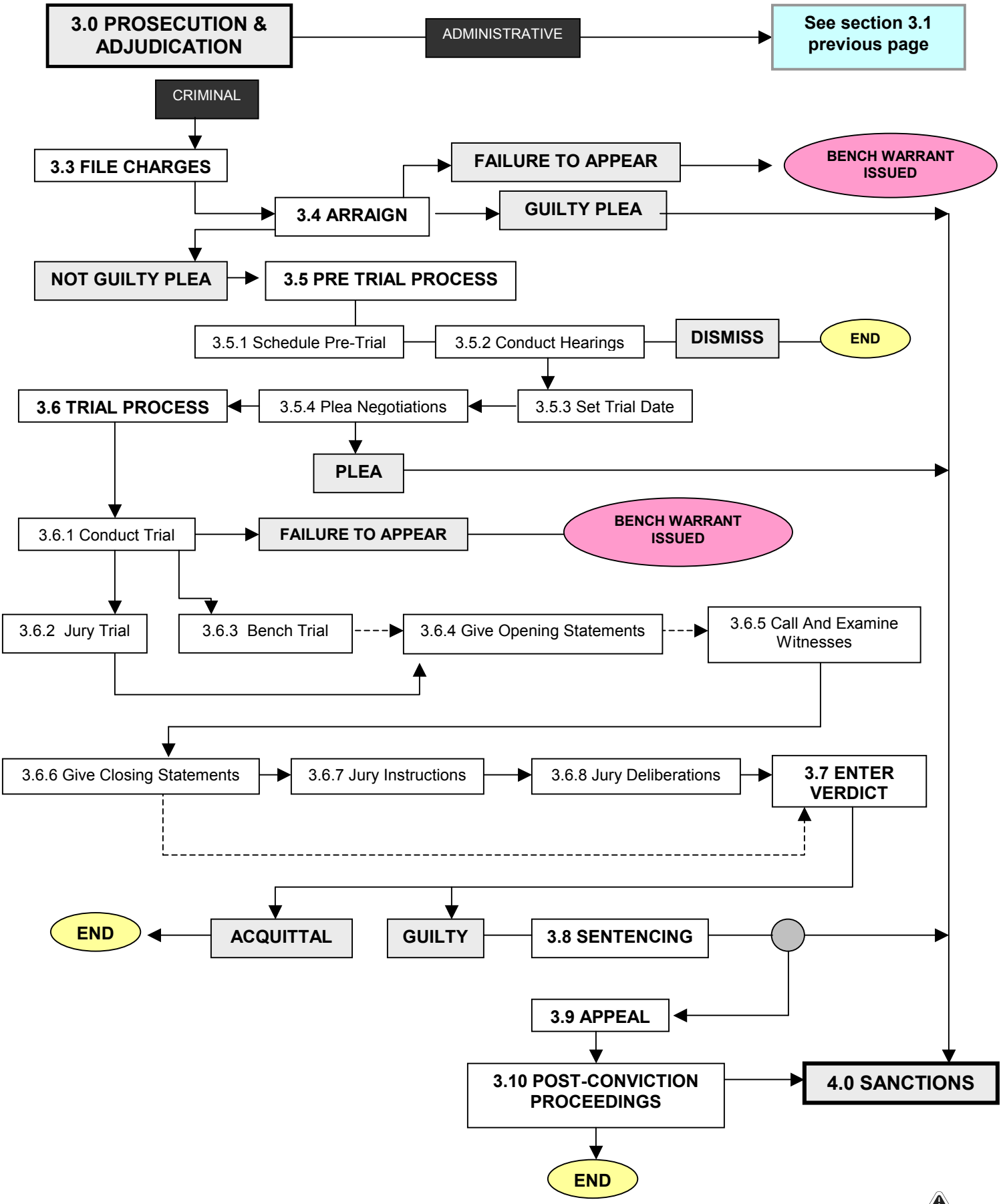
Typically, an arraignment begins the judicial proceedings by allowing the judge or magistrate to make sure everything is in order before re-scheduling the case on the docket. The judge will ensure that the defendant has been informed of his/her right to counsel, permit the defendant time to retain and instruct counsel before entering a plea, and determine if the defendant wishes to waive their rights and enter a plea of guilty.

Once a suspect has been arrested for DWI, they are not usually held in custody even though charges either already have been or will be filed against them. Often they are instead released into the custody of a third party and issued an appearance notice by the arresting officer. The accused may also receive a summons from the court in the mail. The notice or summons orders the accused to appear in court for arraignment at a specific time to answer for the charge(s).

When the accused is arrested following a DWI investigation, they may be released after they have been processed (breath-tested, photographed, fingerprinted) by either the arresting officer or watch commander on their "own recognizance" (OR). This means the accused agrees or promises to appear in court at a specified time and is not obliged to forfeit money or other assets as a means of ensuring their appearance in court. Consequently, arraignment does not typically occur immediately following an arrest on misdemeanor charges, unless the accused is held in custody. For those defendants not held in custody, the arraignment proceeding may not occur for several months. The acceptable time frame varies considerably from state to state and is a function of the judiciary as well as rules of criminal procedure.

In serious felony cases, especially those involving bodily injury or death, the accused is more likely to be held in custody until arraignment. In most states, an accused must be arraigned on the charge(s) within a maximum of 48 hours of arrest. At arraignment, the accused appears in court with a defense attorney to respond to the charge(s) and enter a plea of guilty, *nolo contendere,* or not guilty. A defense attorney may be hired privately by the accused or, if the accused cannot afford to hire an attorney, the court will appoint an attorney to represent the accused at the state's expense, commonly referred to as a public defender.

The role of the judge at arraignment is to review the charge(s) and hear the defendant enter a plea in response to the charge(s). If the defendant pleads guilty to the charge with the advice of counsel, the judge can accept the plea and set a date for sentencing. Depending on the judge or the jurisdiction, guilty pleas may only be accepted if the defendant is represented by counsel. If the defendant enters a plea of guilty without benefit of counsel, the judge may reject the plea and enter a plea of not guilty on behalf


3.0 PROSECUTION & ADJUDICATION
ADMINISTRATIVE
See section 3.1 previous page
CRIMINAL
3.3 FILE CHARGES
FAILURE TO APPEAR
BENCH WARRANT ISSUED
3.4 ARRAIGN
GUILTY PLEA
NOT GUILTY PLEA
3.5 PRE TRIAL PROCESS
3.5.1 Schedule Pre-Trial
3.5.2 Conduct Hearings
DISMISS
END
3.6 TRIAL PROCESS
3.5.4 Plea Negotiations
3.5.3 Set Trial Date
PLEA
3.6.1 Conduct Trial
FAILURE TO APPEAR
BENCH WARRANT ISSUED
3.6.2 Jury Trial
3.6.3 Bench Trial
3.6.4 Give Opening Statements
3.6.5 Call And Examine Witnesses
3.6.6 Give Closing Statements
3.6.7 Jury Instructions
3.6.8 Jury Deliberations
3.7 ENTER VERDICT
END
ACQUITTAL
GUILTY
3.8 SENTENCING
3.9 APPEAL
3.10 POST-CONVICTION PROCEEDINGS
4.0 SANCTIONS
END

of the defendant until he/she has the opportunity to retain and instruct counsel. Judges are permitted to do this in order to safeguard the rights of the accused.

Arraignment is a critical stage where judges have considerable responsibility. Foremost, the judge must ensure the defendant's guilty plea is knowing and voluntary before it can be accepted by the court. The judge is obligated to inquire whether the defendant is entering a guilty plea of his/her own free will, if the defendant is under the influence of alcohol or other drugs, what their level of acquired education is as well as whether they understand the consequences of a guilty plea. It is imperative that the judge make these inquiries because at no other time in court proceedings does a defendant waive so many constitutional rights all at once. The waiving of these rights will have serious repercussions for the defendant, and the judge must ensure that these rights are protected, or the case may be jeopardized.

The accused may also enter a plea of *nolo contendere,* which is Latin for "I will not defend it". Prosecutors often refer to this type of plea as "no contest". This plea is similar to a guilty plea in that the defendant accepts the punishment as if they were guilty. However, with this type of plea the defendant neither admits nor denies committing the crime, so there is no formal admission of guilt. Following the entering of a plea and its acceptance by the judge, a date will be set for sentencing.

If the accused enters a plea of not guilty to misdemeanor or felony charges, the judge will inquire whether the parties have any motions they wish to be heard. For example, in most DWI cases, whether misdemeanor or felony, the defense will challenge the constitutionality of the stop made by the police. If the court finds that the stop was unconstitutional, then all of the evidence gathered after the stop (e.g., field sobriety tests, defendant's statements, blood alcohol tests) will be suppressed by the court. If either party wishes to be heard on motions, the judge will set a date for pre-trial hearings. If there are no motions to be heard, the judge will set a date for trial.

At this time, the judge will also make a determination regarding the release of the accused. Decisions regarding release are based on two criteria: the likelihood that the defendant will appear for trial; and the seriousness of the offense and threat the accused poses to the community if released. In misdemeanor cases, the accused is often

released OR. The judge considers a variety of factors before releasing a defendant OR, such as the length of time they have lived in the community, their employment status, family status and community ties. A majority of misdemeanor defendants are released in this fashion.

One of the most important roles of a judge in dealing with hard core drinking drivers is to set out meaningful conditions of release that are reasonable, while ensuring public safety. In many states, by rule or statute, the courts are limited in what they can require apart from the defendant's presence at future hearings. However, conditions of release that require abstinence from controlled substances, including random alcohol testing, and pretrial electronic alcohol monitoring testing at determined times, have been deemed reasonable. In addition, prohibiting the frequenting of liquor establishments or purchasing alcohol as a condition of release have also been deemed reasonable.

If a defendant does not meet the criteria for release OR, the judge may also impose a cash or property bond. This means that the defendant must place assets (in a specified amount) with the court as security that the defendant will appear at trial. If the defendant fails to appear for trial, the assets will be forfeited.

In serious felony cases the judge may also require a surety. A surety is a person who knows the defendant and is willing to guarantee with personal assets their appearance and ensure that the defendant abides by any conditions imposed as part of release. This person must meet certain criteria of suitability. According to the Eighth Amendment of the U.S. Constitution and the Bail Reform Act of 1966, judges have an obligation to release defendants on reasonable bail with the fewest possible restrictions. They must choose the least restrictive alternative on a list of conditions designed to guarantee the appearance of the defendant.

It is not necessary for the prosecutor to be present at a bail hearing for misdemeanor DWI charges, or even felony charges, unless they wish to address a specific issue at that time, such as the accused posing a threat to the community or being a flight-risk (meaning the defendant is not likely to appear for trial). However, if the judge continues to proceed with the case at this time without written permission from the prosecutor to proceed in their absence, this may be considered *ex parte* contact between the judge

and the defendant and deemed an ethical violation. At this time, the prosecutor may also make a specific recommendation regarding bail, but the judge is under no obligation to accept it.

Following arraignment, misdemeanor charges may be dismissed if the judge later determines in a probable cause hearing that there is insufficient evidence to proceed to trial. When a case is dismissed, the accused is released without further obligation to the court. The prosecutor may have the option of re-filing charges at a later time if further evidence is discovered that would support the charges. Where there is sufficient evidence to proceed, a date is scheduled for pre-trial proceedings or trial, depending on the charges. Following the posting of any bail, the accused is released from custody.

4.1.2 Pre-trial Process

The pre-trial process involves a number of elements, some of which a judge must rule on, that affect the outcome of the case. These elements include: discovery, plea negotiations, trial election by the accused, and pre-trial motions. In felony cases, a preliminary hearing may also be necessary. In some states, this hearing may be preempted by a grand jury indictment when circumstances warrant such action.

Discovery. Articles for discovery include witness statements, physical evidence, photographs, diagrams, police reports, medical reports and probation reports. Discovery is an important part of the trial process and is typically regulated by statute. Consequently, the rules of discovery may vary from state-to-state. In all states, the prosecutor has a continuing legal obligation to turn over any and all exculpatory evidence (evidence that tends to exonerate a defendant from fault or guilt or mitigate punishment) to the defense in order to allow the accused time to prepare adequately for trial and defend the charges. Lower courts in many states do not allow for formal discovery proceedings due to time constraints, however, prosecutors do have a continuing legal obligation to provide exculpatory information to the defense. Discovery is not typically an issue in misdemeanor cases unless it involves a jury trial.

In some states, discovery is a one-sided process, meaning that the defense has no obligation to turn over its evidence to the prosecution. In these states, the defense is not

obliged to turn over any reports or evidence until they have had an opportunity to present this evidence in court. At that time, the prosecution may request an adjournment to fully review this new evidence and prepare any necessary cross-examination.

Other states have moved towards a policy of reciprocal discovery, meaning that both the prosecution and the defense are obliged to turn over any and all evidence to opposing counsel. This, of course, excludes any statements made by the accused that would violate attorney-client privilege or the defendant's right not to give evidence against him/herself. The purpose of this policy is to ensure that the truth is brought to court and that the trial process is open and fair for both parties. In many states, discovery is typically completed within 30 days of the commencement of trial unless the judge orders that discovery occur within a specified period.

The judge may also be required to make rulings when there are disagreements between the prosecution and defense regarding what items constitute discovery. In these instances, the judge will review the article(s) in question and make a decision based on the rules of evidence and criminal procedure rules. Often, the discovery process is quite contentious, especially in cases of injury or death involving a vehicle and the judge essentially acts as a referee in determining what materials are subject to discovery and what items are not. Further, the judge must carefully consider each ruling made, not only in discovery, but throughout the case, as an incorrect decision could form the basis for a subsequent appeal and reversal of an acquittal or conviction.

Plea negotiations. Plea negotiations are another important element of the pre-trial process and may be initiated at any point following the filing of the charges with the court. The prosecution and the defense must reach an agreement that is satisfactory to both parties, and then the judge will accept the agreement after the court determines there is factual basis for the plea and that the agreement is "conscionable".

The two most common forms of plea negotiations are charge bargaining and sentence bargaining. Typically, there is no statutory preclusion as to when these negotiations may be commenced or halted. The point at which negotiations most often occur is usually a function of local practice. Most often, plea negotiations take place prior to the

commencement of the trial. However, an agreement may be reached at any point prior to the reading of the verdict.

Charge bargaining usually involves a reduction and plea of the charge(s) to reflect what the facts of the case reveal after further investigation, such as BAC results under the legal limit or medical records documenting the condition of the defendant. In some instances, charges may be reduced in return for a guilty plea. In other cases the original charges may be amended upward after further investigation if a defendant's driving history reveals prior convictions.

Most states do not have anti-plea bargaining legislation in place (NTSB 2000), meaning that in some states the accused may be able to plead to a non-alcohol offense, a lesser charge than DWI. These policies vary from state-to-state and are governed by statute, or the particular policy of the District Attorney. In five states (CA, FL, MI, OR, PA) plea negotiations are not permitted in specific circumstances, such as cases involving death or serious injury and/or a BAC in excess of a specified amount. A total of 10 states have enacted plea-bargaining restrictions (AZ, AR, CO, KS, KY, ME, MS, NM, NY, WY), although some of these states will permit a defendant to plea to a lesser degree of a DWI charge (e.g., a first-offense instead of a repeat offense).

Sentence bargaining is also common in DWI cases. Prosecutors often agree to allow defendants to plead guilty if they are accepting the same punishment that they would receive from the court after a jury trial. The parties may also agree to sentence conditions that are appropriate for a particular defendant, such as mental health treatment, alcohol or drug evaluation, an ignition interlock, or electronic home alcohol monitoring. The prosecution and defense may also agree to an appropriate sentence that is presented to the court as part of the plea agreement. The judge is fully aware of the contents of these two types of agreements and will either accept or reject the proposed agreement, although most often these agreements are accepted. When accepting a proposed agreement, judges frequently rely heavily on the facts provided to them by prosecutors, making it extremely important for them to research the background of defendants thoroughly before negotiating an agreement. This can often be difficult for prosecutors, as explained in our previous report (Robertson and Simpson 2002).

If the judge decides that the agreed upon charge or sentence is too lenient, they may reject it. If this occurs, the accused is generally given an opportunity to withdraw the plea because plea agreements are governed by contract principles. This means that the accused did not consent to a harsher charge or sentence and, therefore, is not bound by the agreement. In these instances, the judge will strongly "hint" or voice why the agreement was rejected, thereby allowing both parties to re-draft the agreement to address judicial concerns.

Plea negotiations that do not specifically include an agreement with relation to sentencing result in the accused "taking their chances" with the sentencing judge. In these instances, the accused must abide by the sentence imposed.

When a plea agreement is reached prior to trial, the plea is entered on the court record. The accused may be sentenced immediately after the plea is entered or a date may be set for sentencing. If sentenced immediately, the accused is sentenced in accordance with the plea agreement, if one has been stipulated. If a particular sentence was not part of the agreement, the judge will sentence the offender according to the severity of the offense.

A large majority of DWI cases are resolved through plea negotiations. As described in our earlier report on prosecution (Robertson and Simpson 2002), a survey of prosecutors revealed that approximately 67% of defendants who plead guilty do so with a negotiated plea agreement in place. Other research indicates that up to 90% of all cases are negotiated by district attorneys (APRI 2001). When no plea agreement is arranged, a trial will be scheduled.

Judges also have the discretion to request a pre-trial conference at some point in the pre-trial process if they believe that one is necessary. This conference involves the judge, the prosecution and the defense. Its purpose is to narrow the issues that are to be raised at trial and to make a final effort to settle the case without a trial by reaching a mutually satisfactory agreement. While these conferences are by no means frequent, they certainly are not rare.

Trial election. The accused may also elect, at some point prior to the trial, to have either a trial by judge or a trial by jury. Currently 33 states permit a jury trial in all criminal cases, 6 states permit a jury trial for offenses with a penalty of incarceration, and 8 states permit a jury trial only if imprisonment upon conviction can exceed 6 months (NTLC 1997). If only misdemeanor charges have been filed, the matter may be tried in either a court of record or a lower court (e.g., a municipal or justice court). If the case involves a felony offense, the matter will be tried in the Superior Court.

Trial election is usually available to defendants in both misdemeanor and felony cases, unless it involves a very minor offense, in which case they may only be afforded the opportunity for a bench trial by a judge. In other states, defendants cannot demand a jury trial on a misdemeanor charge until they waive their case to the grand jury or are convicted and appeal the case for a trial *de novo* (a second trial) in a court of record. The accused may exercise the right to trial election up to the point when jeopardy is attached. Jeopardy refers to the fact that the accused can be tried only once for an offense and is usually considered attached once the first witness is sworn in a bench trial, or the jury is sworn in a jury trial.

If the defendant elects a bench trial, the judge will be the sole *trier of fact* and will make numerous decisions pertaining to all aspects of the case including what evidence is admissible, rulings regarding any motions filed, a determination regarding the guilt of the defendant, as well as the sentence to be imposed if convicted.

If the defendant elects for jury trial, the judge will preside over the jury selection process and fulfill many of the same duties as they would in a bench trial. In these instances, the judge's primary responsibility is to make legal rulings and to instruct the jury on the law. However, in a jury trial, a final decision regarding the guilt of the defendant is made by the jury. This decision is almost always a unanimous determination of guilty or not guilty based on the evidence presented as well as the legal instructions provided to them by the judge. The judge is then responsible for sentencing the defendant.

Pre-trial motions. Motions are written arguments initiated by either the prosecution or the defense regarding how a particular case should proceed. The filing of motions is governed by strict procedural rules and commonly takes place during, but is

not limited to, the pre-trial process. Motions cover a broad range of issues including discovery, evidence, and requests for continuances. Motions regarding evidence are often extremely complex with many references to technological and scientific data, information and analysis.

The purpose of pre-trial motions is to determine what evidence will be admissible and how the case will proceed. The judge makes appropriate rulings on the motions filed based on governing rules of evidence, criminal procedure, case law, legal opinions, memoranda, and other documents. The use of motions is an integral part of the pre-trial process and each motion performs a necessary function. However, in some instances, "frivolous" motions may be filed in an effort to delay or complicate a case. As described in our previous report (Robertson and Simpson 2002), the unnecessary use of motions is a matter of considerable concern for prosecutors.

There are a number of different kinds of motions that are routinely filed in a DWI case: notice pleadings, motions *in limine,* and motions to suppress evidence. The prosecutor will file pleadings that essentially list what charge(s) the accused will answer to, the time and location of the alleged offense, and the name of any victim(s) in the case.

Both the prosecution and the defense may also make motions *in limine*. These pre-trial motions help determine what evidence should be included or excluded on the basis of relevance to the case. For example, the prosecution may want to include the criminal history of the accused or evidence of prior "bad acts". The defense will argue that this evidence should be excluded because it is highly prejudicial and/or not relevant to the case.

Conversely, the defense may indicate that it intends to call expert witnesses regarding the effects of alcohol on the body or the psychiatric condition of the accused. The reason for this kind of testimony would be to mitigate the criminal responsibility of the accused. Similarly, the defense may argue that evidence of third-party negligence is relevant (e.g., the poor condition of the roads contributed to an accident). The prosecution may attempt to exclude this evidence as being irrelevant and would do so through a motion *in limine*. Motions *in limine* are brought equally by the prosecution and

the defense and may also be argued immediately preceding the commencement of the trial, or prior to the evidence in question being proffered.

When motions are filed, a judge has considerable discretion to determine to what extent motions will be heard. The judge may decide to accept only written arguments, to hear oral arguments, or both depending on the complexity of the issue raised. A judge's role is to examine the motions and supporting evidence filed by each side and make appropriate rulings based on their knowledge of the facts of the case and their own legal research and knowledge. A judge may choose to rule on motions immediately or to rule at a later, specified time. Judges must also keep in mind when making rulings, especially those regarding evidentiary motions, that their rulings may be subsequently reviewed on appeal and possibly overturned if decisions are not based on thorough and sound evaluation of all appropriate materials.

Ruling on motions in DWI cases can be very challenging for judges not experienced in DWI cases because, as discussed in earlier reports on enforcement and prosecution (Simpson and Robertson 2001; Robertson and Simpson 2002) much of the evidence associated with these cases is highly technical. For example, judges are usually required to be familiar with such things as methods of evidential breath testing, the accuracy and calibration of such tests, retrograde extrapolation of BACs, and accident reconstruction. The judge is also often required to be familiar with a number of medical or physiological conditions such as diabetes and nystagmus. If new or inexperienced judges have limited knowledge of these issues, ruling on motions can be extremely difficult.

This problem can be compounded when judges are not lawyers, a situation that exists in many states. Federal and State judges are almost always required to be lawyers. However, approximately 40 states permit judges to hold limited jurisdiction judgeships without previous experience as a lawyer, although those with legal training are preferred. This is especially true in lower courts or limited jurisdiction courts, where the types of cases tried are limited. These courts include municipal courts, magistrate courts, or other courts that are not "a court of record", meaning that records of all proceedings are not kept.

The defense may also make a motion to suppress evidence, often based on an alleged violation of constitutional rights, typically under the 4th and/or 5th Amendments. It is also common for the defense to make a speedy-trial motion if a substantial delay has occurred since the commission of the offense, a delay to which the defense did not agree or stipulate. If the unexcused delay has been so significant as to prejudice the defendant's ability to present evidence in his/her defense (e.g., witnesses are missing or evidence has been destroyed), the defendant may seek a dismissal of the charges. In these instances, the judge must determine to what extent prejudice has been suffered by the defendant and how that prejudice will affect the trial, if at all. Even if the judge chooses to deny this motion, it may still have the collateral effect of limiting the time a prosecutor will have to prepare the case.

Although the accused has the right to be present for pre-trial proceedings, he/she is not always required to attend. Often the accused will waive their participation in these proceedings and the defense attorney will appear alone to respond to and argue the motions filed.

In felony cases, a preliminary hearing is also held prior to the commencement of trial in order to determine if there is sufficient evidence to proceed with the case. The prosecutor must present a sufficient amount of evidence to clearly establish the key elements of the offense. However, it is not necessary that all the evidence be presented at this time, and the prosecutor need not prove the case beyond a reasonable doubt at this stage. The judge will listen to allegations made by the prosecutor and decide if sufficient evidence has been presented to merit proceeding with a trial. If the prosecutor cannot present sufficient evidence of the alleged crime at this time, the judge may dismiss the case. However, this does not exclude the possibility of the prosecutor re-filing the charges at a later date if more evidence is discovered.

In limited instances, the prosecutor may choose to seek a grand jury indictment directly, most often for felony charges, instead of proceeding with an arrest and subsequent preliminary hearing. The grand jury is empanelled by a judge, meaning that a judge alone selects members to serve on the jury. However, the judge does not play a role when cases are presented to the grand jury. The grand jury is directed by a district

attorney (or their equivalent) and they have considerable discretion regarding what cases are presented.

Depending on the jurisdiction, a grand jury may be composed of at least 12 and up to 20+ members of the public, and their proceedings are secret. Essentially, the prosecutor will present evidence of the alleged offense to the grand jury and ask the jury to return an indictment. While some states may also permit the defendant and his/her witnesses to appear before the grand jury, most do not. In these instances, the grand jury determines if there is sufficient evidence to warrant the matter proceeding to trial. The participation of the accused and the defense attorney is not necessary to obtain an indictment.

The prosecutor will often proceed with a grand jury instead of a preliminary inquiry when the alleged offense involves a public figure and there is concern that a public preliminary inquiry will damage the reputation of the accused. A public accusation could be detrimental to the reputation of the accused if he/she were later acquitted of the charges. The prosecutor may also elect to proceed by grand jury if the accused is delaying the preliminary inquiry repeatedly, or if the prosecutor does not wish to make the accused aware that criminal proceedings have been instituted against him or her. Another common tactical reason is to avoid letting the defense question the prosecution's main witnesses at a preliminary hearing where reciprocal discovery rules often do not apply. As mentioned above, the use of a grand jury is extremely rare in DWI cases in some states. However, in other states, it is very common as defendants are not permitted to access jury trial courts without grand jury review.

4.1.3 The Trial Process

If the accused elects for a jury trial it will be necessary to select a jury prior to the commencement of the trial. In some states only the judge is permitted to question potential jurors and in others this is the joint responsibility of the prosecution and the defense. The latter method can make jury selection a time-consuming process as both parties attempt to empanel members on the jury that are sympathetic to their case. Both the prosecution and the defense have an opportunity to question each member of the jury pool and make a decision as to the acceptability of each potential juror. The

prosecutor and the defense are permitted to excuse a certain number of potential jury members using challenges for cause or preemptory challenges. The judge has an obligation to ensure that the jury selection process is fair and that it abides by the rules associated with jury selection. After the jury is selected and sworn in, the trial will begin.

The trial itself begins with the prosecution making an opening statement identifying their theory of the crime and highlighting evidence that will be presented to support this theory. Following this, the defense has an opportunity to make an opening statement, which may present an alternate interpretation of the evidence and highlight facts that will support this alternate theory. For example, the prosecution will argue that the accused was intoxicated and guilty of the alleged offense, whereas the defense may argue that the accused was diabetic and having an insulin reaction, which caused them to act in an intoxicated manner.

It is also common for the defense to reserve their opening statement until after the prosecution has presented its entire case. By doing this, the prosecution is not alerted to what defense theory or arguments will be presented, and this makes it somewhat more difficult to rebut potential arguments during their case *in chief*. For example, the defense may argue that the accused had health problems that affected the test results, that the accused was overly tired, or that the breath-testing equipment was not working properly. Knowing what defense strategy is going to be employed will determine how the prosecution presents its case and what pieces of evidence are more strongly emphasized. When the defense reserves its opening argument, the prosecution is essentially “left in the dark” -- i.e., they don’t know what strategy the defense will be using or what elements they should be attempting to refute. This strategy does, however, have the potential drawback of allowing the prosecution’s opening statement not only to be the first thing the jury hears, but also to go unchallenged until later in the case.

After opening statements, the prosecution will present evidence supporting their theory of the case. This evidence may include police testimony, BAC test results, videotape of the arrest or booking, expert witness testimony substantiating horizontal gaze nystagmus (HGN), blood, breath or urine evidence, and citizen eye-witness testimony. This evidence must establish all the elements of the offense and be sufficient to prove

the case beyond a reasonable doubt. During this time, the defense will have an opportunity to cross-examine any witnesses presented by the prosecution in an effort to establish reasonable doubt.

The evidence presented by the prosecutor does not need to be tendered in any particular order. Some prosecutors present their strongest evidence first; others present it last. A prosecutor may also choose to present the evidence in a chronological order, so as not to confuse a judge or jury. Often, the method used is a stylistic choice of the prosecutor.

After the prosecution rests -- is finished presenting their case -- the defense will determine if it is strategically appropriate to present a defense. This may depend on the strength of the case presented by the prosecution. If the defense feels that the prosecution has not met the burden of proof to obtain a guilty verdict, they may decide not to present any evidence. At this time the defense may make a motion for a directed verdict of acquittal, meaning a request to the judge to acquit the accused based on the prosecution's failure to establish a *prima facie* case. The defense has no obligation to present any evidence, and the jury is instructed at the end of the case not to draw any inference from the fact that the defendant elected not to present any evidence.

If the defense decides it is necessary to present evidence, they have an opportunity to call witnesses and enter evidence in support of their theory of the case. The prosecution will also have an opportunity to cross-examine any defense witnesses. When the defense presents any new information or reports that were not turned over to the prosecution in discovery, the prosecution may request a brief adjournment to properly review the new evidence and prepare for cross-examination of any witnesses. At the completion of the defense's case, a motion will almost always be made by the defense requesting a directed verdict of acquittal, even if it is not likely to be granted.

Following the presentation of its evidence and the motion for acquittal, the defense will rest. The prosecution has an opportunity to present rebuttal evidence at this time and, in limited circumstances, the defendant can then present surrebuttal evidence. Both parties will make closing arguments, again highlighting evidence that supports their respective theories of the case. Some states also allow prosecutors, who carry the

burden of proof in the case, to give an initial closing argument and then, after the defense's closing argument, prosecutors are allowed to give rebuttal closing arguments in response to the defense's statement.

Throughout the trial process the judge is required to make legal rulings on a wide variety of issues including what facts the court will give judicial notice, any objections that are raised by either party, what witnesses will be permitted to testify and to what extent, and requests for continuances. Each of these decisions must be based on the rules of evidence, rules of criminal procedure, and precedent.

In a jury trial, the judge will also instruct the jury as to the law they must follow. The nature of the instructions may be decided by the judge with input from the prosecution and the defense. Such instructions may involve the weight to be attributed to certain kinds of evidence, the burden of proof that has to be met, and what elements jury members are/are not allowed to consider in reaching a decision.

4.1.4 The Verdict

In a bench trial, the judge alone will consider and decide legal issues and factual questions and render a verdict regarding the guilt of the accused. A judge acts essentially as a "fact-finder" and decides if the State has met its burden of proof. In making this decision, a judge is often required to determine what credibility and weight should be attributed to certain evidence or testimony. For example, regarding witness testimony, a judge will consider the witness' age, occupation, appearance and demeanor on the stand, interest in the outcome of the case and possible motive for testifying, and the extent to which their testimony sounds reasonable and matches the physical evidence in the case.

A judge may render a verdict immediately at the completion of a trial, or it may take several days or months to render a verdict in a case, depending on the complexity of the legal issues as well as their court calendar. Often a judge will spend considerable time reviewing the various facts of the case and supporting evidence before rendering a verdict.

In a jury trial, the judge has multiple responsibilities. Immediately following closing arguments, the judge has the discretion to act as "the 13th juror". This means that the judge has an opportunity to order a directed verdict of acquittal prior to jury deliberations based on the insufficiency of the evidence. If a directed verdict of acquittal is not appropriate, the judge will instruct the jury about the law that applies to the case, including the elements of the offense, before the jury is sent to deliberations. During deliberations the judge may be called upon to answer legal questions. The jury will then deliberate and return either a finding of guilty or not guilty. The judge will review the documentation and verdict prior to the verdict being entered on the record to ensure that the verdict is supported by the evidence presented. A not guilty finding does not necessarily mean that the defendant was innocent; rather, it can simply mean that the prosecution did not prove its case beyond a reasonable doubt. If the jury is unable to agree on a verdict, they may be declared a "hung jury" and a mistrial may occur. In this situation, the judge may order the case to be tried again before a different jury, may urge the parties to attempt to reach a plea agreement or dismiss the charges.

4.1.5 Sentencing

Upon conviction and prior to sentencing, a judge can order both an alcohol/drug evaluation report (to determine the nature and extent to which alcohol and/or drugs are a problem for the defendant) and a pre-sentence report (PSR). Although alcohol/drug evaluation reports are ordered in almost all DWI cases, PSRs are more commonly used for felony cases than misdemeanors. The alcohol/drug evaluation report is prepared by a designated agency in the treatment field while the PSR is typically prepared by a probation officer. However, many limited jurisdiction judges or magistrates have no probation officers to complete these reports or judges may be required to contract private probation services to complete PSRs.

These reports typically specify the nature of the offense, provides a detailed history of the defendant's criminal record, work history, medical conditions, family information and outlines available programs and resources that are appropriate for a disposition as well as a recommendation regarding sentencing. The probation officer will contact the prosecutor when preparing the PSR for information about the case, including the prior criminal history of the offender. Prior convictions, although not typically permitted as

evidence at trial due to their prejudicial nature, are often considered an enhancing factor for the purposes of sentencing.

It may take several months for an alcohol/drug evaluation report and PSR to be completed, and judges usually defer sentencing (often 2-3 months) until these reports are completed. After reviewing the alcohol/drug evaluation and PSR, a judge will then sentence the offender. If these reports are not requested by a judge, the offender may be sentenced either immediately or shortly after the completion of a trial. This practice is most common in lower courts involving misdemeanor cases.

At a sentencing hearing, a judge usually has considerable discretion to impose the sanctions that are appropriate to the facts of the case as well as to the particular circumstances of the offender. Judges may also refer to a sentencing grid that outlines an appropriate range of sanctions for specified offenses. Additionally, judges may be asked to consider aggravating factors, such as prior criminal convictions for DWI as well as mitigating circumstances, such as the remorse exhibited by the offender, their employment and family status. It is also very common for offenders to begin treatment immediately following a DWI conviction but prior to sentencing. This is often done as a basis to request leniency from the judge and to serve as a mitigating factor at sentencing.

Given the range of sanctions that can be imposed and the variety of factors influencing which ones are selected, wide variations in sentencing are not uncommon. However, this variation can result in “judge-shopping”; a defendant will attempt to have their case heard in front of what is perceived to be a “lenient” judge in an effort to secure a lesser sentence. To some extent, this has been offset by the introduction of mandatory minimum sentences for repeat offenders, which has removed some of the discretion and variability.

4.1.6 Appeal

Following a conviction, the accused may decide to appeal the case. Appeals are fairly frequent in DWI cases that go to trial. A notice of appeal is filed in the court where the defendant was convicted but heard in an appellate court by a different judge. Most

commonly, a point of law is argued that affects the admissibility of evidence. Appellate courts will usually give deference to the decision of the trial court judge regarding the admissibility of evidence. However, if the evidence is insufficient to support the conviction as a matter of law, or the trial judge's interpretation of the applicable law was clearly erroneous, the appeal court can set aside the verdict. In the former situation, the appellate court might dismiss the charge(s). In the latter, the case will be remanded back to the trial court for a new trial. When this happens, both parties may decide to reach a plea agreement as the prospect of a new trial is not pleasing, or the case may be re-tried. The appellate court may also uphold the verdict of the trial judge.

There are several courts of appeal that the defendant may resort to, in increasing order of importance, beginning with a state appeal court, through a state supreme court, and then the U.S. Supreme Court. Appeals are not automatically granted, and the defendant may or may not be granted "leave to appeal", meaning that the appeal court agrees to hear the case. In most instances, there is an initial review of the original transcripts to determine if there were errors made by the presiding judge, and the seriousness of those errors with respect to the outcome of the case.

4.1.7 Post-Conviction Proceedings

When a defendant has exhausted the appeals process, the defendant may petition the original trial court for a new trial in a request for post-conviction relief. This proceeding is also sometimes referred to as a Habeas Corpus proceeding. Typically, the defendant claims they were denied their constitutional rights at trial, most often the right to effective assistance of counsel. This often results in a hearing to determine the adequacy of defense representation at the original trial. Often the prosecutor must then be prepared to defend the performance of defense counsel and demonstrate that the defendant had adequate legal representation. While these proceedings are rare in typical DWI cases, they are almost always a certainty in vehicular homicide cases as well as cases in which the defendant was sentenced to a considerable period of incarceration.

5.0 Identifying Problems and Solutions

As described previously, this report -- the third in the series -- deals with the adjudication segment of the DWI system. It seeks to identify problems that impact the efficient and effective adjudication and sanctioning of hard core drinking drivers and recommend solutions to these problems.

5.1 Literature Review

A comprehensive review of the related literature was undertaken, specifically to identify problems in the adjudication of hard core drinking drivers (the bibliography contains a list of the articles reviewed). Concern over the successful sanctioning of drinking drivers, particularly repeat offenders, is not new. There is a reasonably extensive literature on the subject, but with only a few exceptions (Jones et al. 1998; Hedlund and McCartt 2001), it is fragmented with most articles dealing with only one or two specific problems. As a result, the relative and contemporary importance of many of the problems is difficult to gauge. Nevertheless, our review of the literature did uncover a reasonably wide range of issues.

The problems identified in the literature were collated and expanded, based on our own knowledge of the system. This initial list was then synthesized and condensed to reduce redundancy and overlap. This process yielded a list of key problems that affect the adjudication of repeat DWI cases -- problems such as sentence monitoring, evidentiary issues, caseload and motions and continuances.

Because the list of problems was generated from the research literature, some of which was neither contemporary nor national in scope, it was imperative to perform a “reality check” on the problem list. The first step in this process involved a series of workshops/focus groups with front-line judges.

5.2 Judicial Workshops

The purpose of the workshops was to validate, expand and prioritize the list of problems generated from the existing research literature. Details on when, with whom, and how these workshops were held are provided below.

5.2.1 Site Selection

To achieve some degree of representativeness in the information obtained from the workshops, it was decided to hold them in a variety of states and to obtain participants from different jurisdictions within each state. The selection of states was determined by several factors, not the least of which was convenience. As well, we felt it would be useful to include some states that demonstrated a more progressive approach to dealing with hard core drinking drivers and some states that had made less progress in this area. States were rated using an informal composite based on their legislative record, drunk driving statistics and evaluations conducted by other groups, such as MADD's "Rating the States" (MADD 1999).

From the list of states created by this process, we selected five states representing various regions of the country and then selected several jurisdictions within each state. An introductory information package and letter requesting participation in the project was sent to identified contacts in the targeted states. Follow-up discussions clarified the purpose of the workshop and what was expected from participants. We emphasized the need for participants with considerable contemporary experience in adjudicating repeat offender cases.

Workshops were organized and held during September, October and November 2000 in the following locations:

Arizona (Tucson)
Connecticut (Hartford)
Illinois (Rockford)
Massachusetts (Norwood)
New York (Albany)

A total of 22 judges representing 19 different jurisdictions participated in the workshops (their names and affiliations appear in Appendix B). These judges were experienced, knowledgeable, dedicated and committed to making a difference in the problem of drunk driving.

5.2.2 Workshop Format

All workshops were conducted and facilitated by the authors of this report. Each workshop lasted approximately three hours and followed the same format:

- an introductory presentation provided background information about our organization and the purpose of the project;
- the problem list was distributed (see Appendix D) and participants were asked to independently rank order these problems in terms of their impact on the efficient and effective adjudication and sanctioning of hard core drinking drivers;
- discussion and clarification ensued as needed;
- the rank-ordered lists were collected and collated by the workshop facilitators -- during this process, participants were asked to independently identify important problems that were not on the list;
- each participant was, in turn, asked to describe a problem they felt should be added to the list -- open discussion sought to clarify the nature of the problem, to determine if it was considered an issue by the other judges and, if so, to determine where it ranked in relation to those on the primary list; and
- finally, beginning with the problem that was ranked as the most serious, participants were asked, in round-table discussion format, to identify cost-effective, practical solutions to the problems.

Discussion in each workshop was lively and productive and consistently demonstrated the high level of commitment and passion the participants had for the adjudication and sanctioning of DWI offenders. Judges shared their concerns, views and opinions openly and freely. They had little difficulty understanding the problems contained on the list, or in rank-ordering them. Of some interest, many other problems were elicited during the open discussion but virtually all of them were variations of those on the primary list or were more specific instances of problems that were subtended by those on the primary list. This speaks to the validity and generality of the problems identified in the literature review.

Despite the differences in the states represented in the workshops and differences in jurisdiction and status of the participating judges, there was considerable consistency in the rankings as well as in the solutions suggested for overcoming or minimizing the effect of these problems. The results from the workshops are not discussed here but have been combined with the results from the survey (Section 5.3) and reported in a single, integrated section (6.0), that describes the overall findings and recommendations.

5.3 Survey of DWI Judges

The workshops yielded a list of priority problems in the adjudication and sanctioning of hard core drinking drivers as well as suggested solutions to these problems. Despite the overall consistency of findings across the five workshops, it was deemed useful to enhance the generality or representativeness of these findings through a broader survey of judges. Moreover, such a survey provided the opportunity to obtain other relevant information, such as the frequency with which various problems are encountered.

5.3.1 The Survey Instrument

Given the volume of information we wanted to obtain, two separate surveys were constructed -- one focusing on issues related to problems; the other focusing on issues related to solutions. However, both surveys included a section that asked judges to rank order the problem list that had been generated from the workshops. Copies of the surveys appear in Appendix E.

5.3.2 Obtaining Participation in the Survey

To facilitate a broad survey of judges, we searched the Internet for various professional organizations that could assist with survey distribution. After reviewing a number of judicial websites, we determined that the Conference of State Court Administrators (COSCA) would be the best suited for this role. Their mission is to identify and study issues and, when appropriate, develop policies, principles and standards relating to the administration of judicial systems and provide an effective network for the exchange of information, ideas, and methods to improve state courts.

A presentation was made to the Executive Board of COSCA on May 12th, 2001, to inform them of our ongoing research and to solicit participation and assistance with the distribution of the survey to experienced judges across the country.

5.3.3 Survey Distribution and Response

A package of 50 surveys was sent to each COSCA representative in all 50 states. It contained 25 problem surveys, 25 solutions surveys, 50 stamped, self-addressed return envelopes and an explanation of the project. Administrators were encouraged to use their own discretion when selecting survey recipients based on their knowledge and experience with judges in their jurisdiction.

Nine hundred surveys were completed. To our knowledge this is the largest and most comprehensive survey of judges' views on drunk driving issues. Table 1 shows the number of surveys completed, by state. Of the 900 completed surveys, representing judges in 44 states, 429 dealt with problems in the adjudication and sanctioning of hard core offenders, and 471 with solutions.

5.3.4 The Survey Respondents

Judges participating in the survey varied considerably in their years of experience, ranging from 1 to 37 years. The mean number of years of experience as a judge was 10.8. Experience in adjudicating DWI cases was extensive. Thirty-five percent of the respondents had 1-6 years experience in dealing with DWI cases, 30% had 7-12 years experience, and 35% had over 12 years experience.

Respondents were asked how many DWI cases they had adjudicated in their years as a judge. The distribution of DWI cases adjudicated was as follows: 43% had adjudicated between 1-500 cases; 24% had adjudicated between 500 and 1,000 cases; 14% had adjudicated between 1,000-2,000 cases; and 19% had adjudicated over 2,000 cases. Respondents were also asked to indicate whether they worked in a limited or general jurisdiction court. More than half (54%) of the respondents worked in limited jurisdiction courts, handling primarily misdemeanor DWI cases, and 46% worked in general jurisdiction courts handling both misdemeanor and felony DWI cases.

Table 1

Location of Survey Respondents

STATE	Number of Surveys Returned Total	State	Total
Alabama	29	Montana	24
Alaska	18	Missouri	24
Arkansas	19	Nebraska	12
Arizona	25	New Hampshire	23
California	27	New Mexico	19
Colorado	20	North Carolina	26
District of Columbia	1	North Dakota	30
Delaware	31	Ohio	29
Georgia	32	Oklahoma	1
Hawaii	11	Pennsylvania	34
Iowa	31	South Carolina	16
Idaho	1	South Dakota	27
Illinois	1	Tennessee	16
Indiana	35	Texas	22
Kansas	24	Utah	23
Kentucky	7	Virginia	14
Louisiana	26	Virgin Islands	5
Massachusetts	12	Vermont	12
Maryland	28	Washington	24
Michigan	36	West Virginia	12
Minnesota	33	Wisconsin	31
Mississippi	10	Wyoming	18
		Total	**900**

There was considerable variation in the size of the jurisdiction in which judges work: 13% of respondents work in a jurisdiction with a population of less than 20,000; 26% work in a jurisdiction with a population of 20,000 to 50,000; 24% in a jurisdiction with a population of 50,000 to 100,000; 18% in a jurisdiction with a population of 100,000 to 250,000; 9% in jurisdictions with a population of 250,000 to 500,000; and 10% in jurisdictions exceeding 500,000.

6.0 Findings and Recommendations

This section integrates the findings and recommendations arising from the literature, workshops and the survey of front-line judges from across the country. It describes problems encountered when adjudicating and sanctioning hard core drinking drivers and how these problems can be overcome.

Nine key problems that impede the efficient and effective adjudication and sanctioning of DWI offenders were identified. In order of priority, the problems are:

- sentence monitoring
- evidentiary problems
- caseload
- motions and continuances
- failure to appear
- records
- sentencing disparity
- mandatory minimum sentences
- juries

In the sections that follow, for each problem, we present:

- a description of the problem itself and quantitative information on its extent -- i.e., what it is, and how big a problem it is;
- the consequences of the problem -- i.e., the ways it can impact the effective and efficient adjudication and sanctioning of hard core repeat offenders; and
- recommended solutions for addressing the problem.

For convenience, this rather extensive information is summarized in an introductory paragraph at the beginning of each problem.

6.1 Sentence Monitoring

♦ **The problem**. The common assumption is that convicted DWI offenders comply with the terms and conditions of their sentence, however, they frequently fail to do so. Repeat offenders, in particular, know that problems in the monitoring system, such as a lack of communication among diverse agencies, incomplete or inconsistent reports and insufficient time to review reports, make it difficult for judges to determine if offenders have violated the terms of their sentence. This problem is compounded by the fact that there are often not enough probation officers to effectively manage caseloads. Not surprisingly, it is estimated that 40% of offenders never even report to the probation office and that 50% of offenders fail to maintain the terms of their probation (MADD 2002).

♦ **The consequences**. Some offenders experienced with the DWI system quickly learn that a conviction does not guarantee they will have to complete the imposed sentence because of weaknesses inherent in the monitoring system. The ability of offenders to circumvent sanctioning compromises the effectiveness of the justice system. If sentences cannot be closely monitored, the needed behavior change will not occur and future offenses will not be deterred.

♦ **The solution**. The information flow to judges needs to be streamlined. Additionally, the reporting process should be centralized through probation and parole so that monitoring by diverse agencies is synthesized and coordinated.

Consistent and frequent contact with the offender and better communication among the relevant agencies is critical for achieving compliance with sanctions. The effectiveness of this has been demonstrated in several programs across the country. Increased contact also permits for swifter processing of probation violations.

Specialized DWI courts provide greater opportunities for close monitoring and offender accountability. The integrated approach they offer combines the leverage of the criminal justice system with proven treatment modalities and judges recommend their expanded use.

6.1.1 Problem Description and Scope

When a DWI offender is convicted, the judge must pass sentence, which usually includes a variety of sanctions and associated conditions, such as payment of fines and fees, serving time in jail, attending treatment programs, having an ignition interlock installed, home arrest, or abstaining from the use of alcohol or other drugs through random alcohol testing or electronic home monitoring. It is also the ultimate responsibility of the judge to determine if offenders are in compliance with the terms of the sentence and to take action if violations occur. As described in more detail below, this is a complex and demanding task, which is made even more challenging with repeat offenders, not only because they often have multiple sanctions and conditions as part of their sentence -- reflecting both the gravity of the offense and the efforts needed to change their behavior -- but also because their familiarity with the system makes them skilled at avoiding detection, and/or indifferent to the consequences of non-compliance.

Although it is commonly assumed that offenders comply with the terms and conditions specified in the sentence, offenders frequently fail to comply, either in whole or in part. Indeed, judges in some jurisdictions estimate that more than 40% of offenders never even appear at the probation office. And, it has been estimated that nationally, half of offenders fail to maintain the terms of their probation (MADD 2002).

Judges in some jurisdictions estimate that over 40% of offenders never report to the probation office.

Following sentencing, the process of monitoring offenders varies among jurisdictions depending on existing legislation and local practice. Monitoring is often shared among probation/parole officers, prosecutors, and the courts. In a few jurisdictions, judges may monitor offenders directly by having them report to court periodically; this practice is more common in specialized DWI courts. Probation/parole officers are usually the ones responsible for the actual physical monitoring of offenders and the preparation of reports on compliance[3]. Officers are responsible for meeting with offenders on a regular basis, collecting payment of fines and fees, and verifying compliance with imposed restrictions, such as curfews and abstaining from alcohol and drugs.

[3] Probation officers are responsible for monitoring offenders who have not been incarcerated as part of their sentence; parole officers monitor offenders that have already completed a term of incarceration.

Reports from probation officers are forwarded to either the prosecutor or the judge for review and appropriate action. In instances of serious non-compliance, it is often necessary to file a "petition to revoke" (probation) and return the offender to court. The petition is filed by the prosecutor, either on their own initiative or at the request of the judge, depending on who reviews the report. In these probation violation cases, the State has the burden of proving the violation by "clear and convincing evidence" before a judge in a bench hearing. The offender has many constitutional rights during these proceedings except for the right to a jury trial. Judges then have the responsibility for deciding the seriousness of the non-compliance, and to what extent sanctions should be imposed.

The preparation of comprehensive and accurate monitoring reports is compromised by a number of factors. Owing to the diversity of organizations implicated in the sentence, probation officers often communicate with many different agencies -- e.g., treatment facilities, interlock service providers, and electronic monitoring companies -- in order to confirm offenders are completing sentence requirements. This can be further complicated by the fact that some probation officers have a limited number of DWI offenders as part of their caseload, so they may be unfamiliar with the relevant DWI agencies and service providers, compromising the communication process. Moreover, offenders may attend a variety of treatment facilities or service providers depending on their location and availability. Additionally, some repeat offenders can be difficult to monitor due to their transient nature and ability to avoid detection, as highlighted in our previous report on enforcement (Simpson and Robertson 2001). Consequently, monitoring DWI offenders is often complex and involves a number of people at a variety of agencies. Furthermore, these problems are often compounded by the fact that there are usually not enough probation officers to effectively manage caseloads.

Despite these problems, probation officers are required to prepare and forward regular monitoring reports on each offender to the appropriate judge, detailing whether offenders are complying with the terms of their sentences. The form and content of these reports can vary considerably depending on the judge and the probation department involved. Some reports consist of a standardized form in which appropriate boxes are checked. Most often, monitoring reports consist of a letter or narrative written by the probation officer. The length and content of the narrative is largely determined by the information

available to the officer as well as the complexity of the sentence that has been imposed. Some courts may also transcribe this information into a standardized form, prepared by the court, to simplify the review process. It is evident that the problems inherent in monitoring will be reflected in the information probation can provide to judges in their reports -- a complete and accurate picture is not always available.

Judges, who then review these reports, have the ultimate authority for deciding if the conditions of the sentence have been violated and, if so, whether to take action and what that action should be. Complete and accurate reports obviously facilitate the decision process; incomplete reports can ultimately result in ineffective monitoring.

Monitoring is also complicated because reports from probation officers may not be consistently produced (for a variety of reasons), or reports may not be submitted in a timely manner (a subsequent report on monitoring offenders is forthcoming). Nearly one-quarter of judges surveyed (23%) identified delayed or inconsistent reports as contributing to problems in monitoring offenders. Without these reports, judges are unable to determine if offenders are complying with imposed sanctions. Furthermore, in some jurisdictions, treatment agencies report directly to the court. This means that, in some instances, judges must deal with multiple reports from different agencies, further complicating the process.

Nearly ¼ of judges said monitoring problems were caused by inconsistent or delayed reporting.

Additionally, effective communication between the judge and the designated probation officer and/or any treatment facility may be irregular or even non-existent in some instances. Without effective communication between the judiciary, probation, and treatment facilities, judges may be unable to verify offender compliance. This means that offenders are often not returned to court and sanctioned for non-compliance, permitting offenders to “slip through the cracks”. Almost a third of judges surveyed (31%) reported that a lack of communication impedes effective monitoring. Repeat offenders, familiar with the system, know that their failure to report to probation or comply with sanctions will often go undetected, further encouraging non-compliance.

Almost ⅓ of judges reported that a lack of communication impedes effective monitoring.

Even if detailed and accurate monitoring reports are provided to the judge, they might not be reviewed in detail, since this can be a time-consuming task that is compromised

by caseload demands and limited resources. Despite the fact that judges may preside over proceedings in as many as 200 cases a day (see section 6.3), they are still responsible for reviewing each monitoring report, identifying instances of non-compliance, and then dealing with offender non-compliance in every case for which they have imposed a sentence. Judges are responsible for each offender they sentence in order to bring consistency to case management -- one judge, familiar with a particular case, handles proceedings, both pre- and post-conviction. However, this can result in judges being responsible for monitoring the compliance of literally thousands of offenders at a given time, making it exceedingly difficult to guarantee that sentencing conditions and requirements are being fulfilled in every case and that appropriate action is taken when offenders fail to comply. Nationwide, 43% of judges report that a heavy caseload is the most significant factor impeding the effectiveness of sentence monitoring.

Nationwide, 43% of judges report that heavy caseloads impede effective monitoring.

Serious time constraints are imposed on the judge by caseload demands, but this is exacerbated by a lack of support personnel. Insufficient resources were identified as a problem by nearly half (48%) of the judges in our survey. Many, especially those that work in lower courts, do not have additional staff to collate and review monitoring reports, determine which cases require further attention and action, and then notify the judge. Also, as mentioned previously, many limited jurisdiction judges lack probation staff to assist with monitoring. Without sufficient resources for consistent follow-up and an efficient way to review monitoring reports, judges may have little knowledge regarding the actual completion of sentences.

Nearly half (48%) of judges identified insufficient resources as an impediment to effective monitoring.

When a judge does become aware of offender non-compliance, the prosecutor handling the case is notified so that a “petition to revoke” (probation) can be filed. These petitions, once filed, require the offender to appear in court so the judge can make a determination regarding non-compliance. These petitions are not uncommon and judges estimate that nearly a third (28%) of offenders are returned to court for failure to comply with, or complete, sentence requirements. Given the problems described above in obtaining information needed to precipitate a petition to revoke, it is obvious that far more than 28% of offenders do not comply with, or complete, sentencing requirements.

Judges estimate 28% of offenders are returned to court for failure to comply with sanctions.

But, even if a petition to revoke is filed, this does not guarantee that the offender will be sanctioned for non-compliance. One of the reasons for this is inherent in the timing of the petition -- they must be filed prior to the end of the probation period. Once the imposed term of probation has elapsed, the offender cannot be sanctioned for non-compliance. For example, if an offender is sentenced to ten months probation with a requirement to attend treatment but the offender fails to attend treatment, the petition to revoke must be filed before the end of the probation term (ten months). Once the sanction period has expired, a judge has no authority to impose additional sanctions, even if the offender failed to comply with the original conditions.

Accordingly, it is imperative that petitions to revoke be filed in a timely manner when offenders are non-compliant because only the judiciary has the authority to impose additional meaningful sanctions. Actually, probation officers also have the authority to impose sanctions for non-compliance, but this power is limited and sanctions are usually administrative. If an offender is willing to ignore a judge's orders and risk additional criminal sanctions, it is likely that they will do the same if only administrative sanctions are involved.

6.1.2 Consequences of the Problem

Considerable strides have been made in the past several decades in identifying effective sanctions and incorporating them into the options judges have for sentencing offenders. However, such sanctions cannot fulfill their intentions if they are not applied. Offenders experienced with the DWI system quickly learn that a conviction does not guarantee that they will have to complete the imposed sentence because of weaknesses inherent in the monitoring system. The ability of offenders to circumvent sanctioning compromises the effectiveness of the justice system. If sentences cannot be closely monitored, the needed behavior change will not occur, and future offenses will not be deterred.

Ineffective sentence monitoring also sends a message to the public that these crimes are not taken seriously, and society can lose confidence in the justice system's ability to deal with these offenders effectively.

6.1.3 Recommended Solutions

Judges recommended a number of solutions that can improve the effectiveness of sentence monitoring.

- **Streamline reporting process.** The existing reporting process needs to be streamlined so that judges can quickly determine which cases require attention and action. Similar to police and prosecutors (Simpson and Robertson 2001; Robertson and Simpson 2002), judges are awash in paperwork and rarely have sufficient time to review in detail every report they receive. Cases in which offenders are not complying with sanctions should be flagged in some manner and brought to the judge's attention. This will result in cases of non-compliance being prioritized, so that judges can take immediate action.

It may be more feasible, if resources are available, to have the probation reports reviewed by an individual within the court system who can report directly to the judge to ensure that offenders who fail to complete their sentence can be returned to court during the acceptable period by filing a petition to revoke.

- **Centralize reporting process.** Depending on the state, the monitoring of offenders may be the responsibility of one or more different agencies -- either the courts, probation, corrections, or treatment facilities. All these agencies may play a significant role in monitoring offenders, depending on what sentence has been imposed. In some cases, the agencies report directly and independently to the court, contributing to the paperwork problem. Judges believe that the reporting process would be greatly enhanced if one individual or agency was given overall responsibility for collating and synthesizing the needed information and reporting it to the judge. Over 80% of judges believe that probation officers should be the ones with such responsibility.

Over 80% of judges believe that probation officers are most able to effectively monitor offender compliance.

- **More contact and better communication.** More contact and better communication is needed between judges, probation officers, treatment professionals and offenders. Judges acknowledge that this will require effort and cooperation from all

agencies and will be difficult to accomplish under current caseloads and resource constraints.

Judges recognize that agencies are often not notified of offenders who require monitoring, or lack the resources to monitor caseloads effectively. It is important for appropriate probation and treatment personnel to receive timely notification when offenders are sentenced and for offenders to understand how to complete requirements. Probation and treatment personnel need to know which offenders are expected, as well as when, and there needs to be a policy in place so that if offenders do not report, the professionals will be able to notify the judge who can then take action for non-compliance.

A majority of judges believe that greater contact and communication between courts and sanctioning agencies, as well as offenders, would significantly improve compliance rates. Increased contact also permits for swifter processing of probation violations. Some judges across the country have taken steps to achieve this; moreover, they report that considerable benefits accrue with this approach, most notably reduced recidivism.

For example, Judge James Dehn, an Isanti County (MN) District Court Judge has developed a "Staggered Sentence" approach for multiple DWI offenders. Judge Dehn sentences defendants to the standard executed sentence (e.g., 90 days) that sentencing guidelines in Minnesota call for. He then divides the sentence into three segments of 30 days each. The first segment (30 days) is served immediately; the second segment is served a year later; the final segment is served two years later. In between the segments, the defendant must go on the electronic home alcohol monitor[4] (EHM) over the Christmas and New Year's time periods (generally 30 days). If the defendant is actively sober and involved in a structured sobriety group (e.g., Alcoholics Anonymous) they may bring a motion before the judge and ask forgiveness of the next segment of jail or electronic monitoring.

[4] Electronic home alcohol monitoring requires a defendant to submit to breath alcohol testing while at home at either fixed or random intervals.

Following a hearing, Judge Dehn may forgive the next segment if the defendant has provided sufficient proof of sobriety and compliance and has the support of their probation officer. Every defendant is warned at the time of sentencing that a new DWI offense during probation on the Staggered Sentence program *will* result in all jail time (365 days) being executed. An evaluation by the Minnesota House of Representatives Research Department and the Minnesota State Guidelines Commission (Cleary 2002) demonstrated a remarkable 50% reduction in recidivism and this program is now being considered for other repeat offenses (Cleary 2002). More information about this program can be obtained by contacting the judge at James.Dehn@courts.state.mn.us. Copies of the evaluation can be obtained at www.house.leg.state.mn.us/hrd/pubs/publist.htm#CRM.

Judge Dorothy Baker, of the 4th Judicial District in Oregon, has developed an Intensive Supervision Program that also emphasizes communication, individual assessment and close monitoring while offenders are in the process of recovery. Judge Baker invests considerable time in monitoring offenders, requiring them to maintain employment, participate in treatment, and in social activities that do not involve alcohol. Judge Baker rigorously ensures that offenders report to designated probation officers, and offenders are scheduled for follow-up meetings with the judge 45-90 days after sentencing. The results of her program demonstrate considerable success with these offenders. Just slightly more than 1% of participants have re-offended (MADD 2002).

Judge William Todd, Jr., of Rockdale County Judicial Circuit, Georgia has also created an effective DWI sentencing program that emphasizes individualized sanctions with frequent written communication between probation officers and judges as a necessary element of effective monitoring (NHTSA 1998). Judge Todd's program, as evaluated by NHTSA (1998), has demonstrated considerably lower rates of recidivism after four years. NHTSA research suggests that a key to the success of this program is its frequent and consistent contact with offenders (NHTSA 1998).

The success of these three programs demonstrates the value of improved communication among criminal justice agencies, and the importance of frequent contact with offenders to improve efficiency and effectiveness of sentence monitoring.

♦ **DWI Courts.** More than half of the judges surveyed recommend that specialized DWI courts be implemented or, if in existence, expanded because they offer effective and efficient monitoring of the defendants progress while in court and thereafter. Judges believe these specialized courts provide greater opportunities for close monitoring and offender accountability by streamlining the reporting process and centralizing the reporting effort into a single management information system with frequent progress reports to the judge. Research discloses that these courts experience success because of their regular status hearings before the judge with the attendant opportunity to assess the offender's progress in the program, to allow the offender to be an active participant in their own rehabilitation, and to more effectively monitor the offender (Belenko 1998). Additionally, the integrated approach they offer combines the leverage of the criminal justice system with proven treatment modalities.

These courts also provide a computer-based focal point for the gathering of information that can in turn be used to analyze the efficacy of the court and its processes. The data gathered indicates that specialized courts provide comprehensive and close supervision of the offender far superior than any working models now in existence (Belenko 1998). Moreover, research has demonstrated they reduce re-offense rates and result in financial savings while offloading offenders from traditional court systems (NDCI 1999; Jones and Lacey 2000).

6.2 Evidentiary problems

♦ **The problem**. Evidentiary problems associated with DWI cases are an issue at all levels of the justice system. Police and prosecutors have identified evidentiary problems as a major issue (Simpson and Robertson 2001; Robertson and Simpson 2002); judges echo this concern. Evidence that is not properly collected, documented or presented in court has important implications for the effective adjudication of DWI cases.

Insufficient or inadequate evidence may require judges to accept pleas to lesser charges, to dismiss cases at the pre-trial stage, to exclude evidence or attribute it a lesser weight, or impose a reduced sentence. Judges are particularly concerned with

the ability of defendants to refuse chemical testing, impeding the collection of important evidence and allowing them to avoid conviction in many instances.

Many judges also report that they do not have sufficient knowledge about a variety of scientific and technical issues involved in DWI cases. Limited opportunities for judicial education, access to legal resources, and experiences trying these cases can make it difficult for judges to rule on motions and weigh evidence.

- **The consequences**. Cases with poor or weak evidence are more likely to be dismissed at the pre-trial stage or result in unsatisfactory plea agreements, allowing offenders to avoid sanctioning. If the case does proceed to trial, the quality and quantity of available evidence and how the case is presented affect the likelihood of a conviction.

- **The solution**. Judges uniformly see the need for judicial education on DWI evidentiary issues, given their highly technical and constantly evolving nature. Although numerous specialized courses are available, opportunities for judges to participate are compromised by caseloads, resources and competing demands for education.

Judges also recommend that the pervasive problem of test refusal be legislatively addressed so that critical evidence of impairment (BAC) is available. They also support reducing the excessively strict and burdensome statutory requirements for DWI investigations and arrests, and simplifying procedures so that evidence is not readily lost on technicalities.

6.2.1 Problem Description and Scope

As described in our previous report on enforcement (Simpson and Robertson 2001), the statutory requirements for a DWI investigation and arrest are complex, detailed and rigorous. This makes them difficult to adhere to consistently and creates many opportunities for error. This potential for error is compounded by a dynamic arrest environment, excessive paperwork and inconsistent training of officers. When evidence is not collected and documented according to proper procedures, the quality and quantity of evidence that a judge may consider when adjudicating a DWI case is compromised.

Prosecutors also reported (Robertson and Simpson 2002) that evidence in DWI cases is critical, stating that they can be extremely challenging because much of the evidence is both technical and scientific, often requiring expert witnesses and considerable knowledge of a range of issues, including accident reconstruction, breath and blood analysis, medical conditions and retrograde extrapolation of BACs. The complexity of the evidence makes it difficult to present so that it is clearly understood and correctly interpreted by a judge and/or jury.

It is not surprising that judges also report that evidentiary issues are a major concern. Evidence that is not correctly collected, documented or presented in court has important implications for the effective adjudication of DWI cases. At the pre-trial stage, cases may be dismissed due to insufficient evidence; at trial, evidentiary problems can result in either a lesser sentence or an acquittal of the defendant.

- **Evidence at the pre-trial stage.** Evidence impacts the quality and quantity of plea agreements. If the evidence available to prosecutors is relatively weak, suggesting the defendant is unlikely to be convicted at trial, they will negotiate a plea agreement involving reduced charges or sanctions. Judges are required to ensure that the agreement reflects the facts in the case, and without adequate evidence, elevated charges or increased sanctions cannot be supported by law. In such cases, judges cannot reject the agreement.

Evidence is also important at the pre-trial stage to establish probable cause and justify proceeding to trial. Prosecutors are required to present sufficient evidence to substantiate the charges and demonstrate the need to proceed to trial. The role of the judge is to evaluate the available evidence and make an appropriate determination. When the evidence is insufficient, charges are often dismissed, although the judge will indicate that the prosecution is able to re-file charges at a later time, if further evidence is uncovered.

In this context, it is often difficult to provide sufficient evidence of intoxication that will substantiate the charges during pre-trial proceedings. As documented in our enforcement report (Simpson and Robertson 2001), there are inherent difficulties associated with the investigation and arrest process, particularly when it involves a

repeat offender. These savvy individuals are often alcohol tolerant and typically do not exhibit obvious signs of intoxication. They are also more likely to refuse to cooperate with police investigations. Officers report some element of refusal to cooperate -- with questioning, field sobriety tests, preliminary breath tests and chemical tests -- in one in three cases nationwide, with some states reporting refusal rates in excess of 70% (Simpson and Robertson 2001).

Because of their familiarity with the investigation and arrest process as well as its inherent loopholes, repeat offenders can effectively limit or compromise the evidence collected by police. Consequently, the prosecution may be unable to produce sufficient credible evidence of intoxication, or a BAC result in excess of the legal limit. In such cases, judges are required to dismiss the charges and the DWI defendant is released. Overall, judges estimate that nearly one in six repeat offender cases are dismissed because of poor evidence or other technicalities.

Judges estimate that one in six repeat offender cases are dismissed due to weak evidence or other technicalities.

Judges are also required to make rulings on pre-trial motions during this phase, and many of the motions involve complex and scientific evidence often associated with DWI cases (see section 6.4). The rulings made during this phase have considerable implications for the subsequent adjudication of the case by determining what evidence is admissible. Motions involving the admissibility of evidence are frequently filed by both the prosecution and the defense. For example, the defense may argue that BAC evidence should be inadmissible because the officer did not issue the appropriate statutory warning to the defendant prior to administering the breath test. It is the role of the judge to evaluate such motions and supporting arguments presented by each attorney, and then form a decision based on the rules of evidence.

In this context, judges have expressed some concern about their own ability to make informed and appropriate rulings on pre-trial motions regarding evidence to be proffered in court; many judges admit their knowledge of scientific and/or technical evidence is limited. Judges in our survey report they do not have sufficient knowledge in a number of areas. Eighty-six percent said they do not have sufficient knowledge about the science surrounding blood partition ratios; 75% said they have insufficient knowledge about the process of

Judges report they do not have sufficient knowledge about many scientific and technical issues involved in DWI cases.

retrograde extrapolation of blood alcohol levels; 65% have insufficient knowledge about accident reconstruction techniques; 48% are not sufficiently knowledgeable about the accuracy of different types of BAC analysis; and 37% feel they have inadequate knowledge about horizontal gaze nystagmus (HGN) testing. Limited knowledge of these issues makes it more difficult for judges to adequately evaluate evidentiary motions filed by the prosecution or defense, or expert testimony presented in court. When this evidence is not clearly understood, its value or relevance may be diminished, resulting in inappropriate rulings.

Even with extensive knowledge in these areas, judges are often at a disadvantage if they hear these cases infrequently. They may be unfamiliar with new developments in accident reconstruction or recent case law on HGN testing. This can create difficulty for a judge when ruling on evidence, especially if the defendant has hired a sophisticated defense attorney who specializes in DWI cases and is extremely knowledgeable about these forms of evidence.

The problem can be further exacerbated by the fact that, in some states, lower court judges, particularly those presiding in municipal courts, do not have legal training as an attorney. This can impede judges' ability to interpret technical and scientific evidence according to the Federal Rules of Evidence (F.R.E.).

- **The trial process.** Evidentiary problems are also associated with the trial process as they affect the weight or value of evidence that a judge determines is admissible. The weighting of evidence is done by the trier of fact and directly affects the verdict. Errors in the collection and documentation as well as the presentation of evidence can undermine the weight attributed to the evidence in a DWI case. For example, the paperwork associated with a DWI arrest is substantial, with officers often being required to document repetitive information on a dozen or more separate forms (Simpson and Robertson 2001). When errors are made in the arrest paperwork (e.g., incomplete forms, transcription errors), the defense has the opportunity to highlight these errors at trial. Depending on the extent of the errors identified, this can affect the weight assigned to the evidence.

The same can be said for officer testimony at trial. Without sufficient preparation, the testimony given by an officer can appear contradictory, or it can be interpreted incorrectly. In some instances, the credibility of the officer may be called into question if testimony is not entirely consistent with documented evidence. Judges are bound by rules when evaluating the evidence presented, and despite personal opinion, must adhere to the rules.

Test refusal poses a particular evidentiary problem in the adjudication of DWI cases. Much of the evidence collected by police during an investigation is largely circumstantial and open to alternative explanations. For example, bloodshot eyes can be explained by a lack of sleep, and poor results on field sobriety tests can often be explained by various medical conditions. Often the only solid evidence of intoxication is the BAC result. Indeed, prosecutors previously reported (Robertson and Simpson 2002) that the BAC is the single most compelling piece of evidence admitted at trial and this evidence is attributed the greatest value. When offenders refuse to take a breath test, this critical evidence is not available, forcing judges to base their decisions on other, more circumstantial evidence. In these instances, it is more challenging for the judge to clearly determine both the degree of intoxication and the guilt of the defendant beyond a reasonable doubt.

In this context, some judges noted that prosecutors who are new or have limited experience with DWI cases may not recognize the significance of evidence that has been collected, or overlook valuable evidence. This problem often occurs because many prosecutors lack experience and training in prosecuting DWI cases (Robertson and Simpson 2002). Over one-third of judges (34%) believe that prosecutors do not have the same knowledge and expertise about DWI and related evidentiary issues as many defense attorneys. This speaks to the need for prosecutor training -- a need already echoed by prosecutors themselves in our recent report on improving the prosecution of repeat DWI cases (Robertson and Simpson 2002). Finally, the presentation of evidence at trial is also crucial to the adjudication of DWI cases. What initially is, or appears to be, strong evidence can be substantially compromised if not presented clearly, accurately, and thoroughly.

One-third of judges believe that prosecutors do not have the same expertise and knowledge as defense attorneys.

- **The sentencing process.** Facts, including those not admitted into evidence at trial, also impact the sentencing process. For example, in 29 states enhanced penalties can be applied if the BAC at the time of arrest is in excess of a specified amount (typically between .15 and .20) and in 3 of these states the BAC can be specifically considered as an aggravating factor at sentencing (McCartt 2002). However, if the needed BAC evidence is not available because the offender refused to cooperate with the chemical test, or this evidence was deemed inadmissible because the proper warnings were not issued by the arresting officer, then the judge cannot consider this important evidence when sentencing an offender. Consequently, an offender may be able to avoid the mandated sanctions.

6.2.2 Consequences of the Problem

Cases with poor or weak evidence are more likely to be dismissed at the pre-trial stage or result in unsatisfactory plea agreements, allowing offenders to avoid sanctioning. If the case does proceed to trial, the quality and quantity of available evidence as well as how it is presented affect the likelihood of a dismissal, acquittal or conviction.

Inappropriate rulings on the admissibility of the evidence can occur if judges and/or prosecutors are not sufficiently familiar with the technical and scientific issues related to the evidence or do not have sufficient resources to research them.

There are also indirect consequences for other criminal justice professionals. Officers and prosecutors who observe continual dismissals or acquittals, especially of repeat DWI cases, can become frustrated and apathetic, diminishing their motivation to pursue these cases with care and precision, which creates a spiral effect that impacts evidence gathered in subsequent cases.

6.2.3 Recommended Solutions

Judges identified a number of ways to address evidentiary problems in the adjudication of DWI cases.

♦ **Training for judges.** Judges recommend greater opportunities for judicial education on DWI evidentiary issues. To adjudicate DWI cases effectively and efficiently, judges must be adequately prepared and familiar with a number of specialized scientific issues. The issue of judicial education has long been a concern of many organizations associated with the DWI issue. The American Bar Association and the National Advisory Commission of Justice Standards and Goals both proposed standards for judicial education in the 1980s (NTSB 1984). Also at that time, both the National Commission Against Drunk Driving (NCADD) and the National Transportation Safety Board (NTSB) identified the need for better and improved training of judges (NTSB 1984). The NTSB publication included comments from a Colorado judge that, although made nearly two decades ago, are still appropriate today. He said, "It serves very little purpose to have effective police agencies, training programs for law enforcement personnel, effective probation and post-adjudicatory processes if judicial officers do not understand or are unable to effectively deal with either pre-trial or post-trial matters, due to a lack of judicial education." (NTSB 1984, p.15).

More recently, Australian Justice Ronald Sackville noted, "The emergence of judicial education programs is an acknowledgement that judging requires a combination of skills, not all of which are necessarily possessed by every appointee to judicial office. This idea that all judges (including magistrates) arrive fully equipped in terms of legal and procedural knowledge, administrative and technical skills, temperament, the ability to communicate effectively and respond sensitively to cultural and social issues is hardly tenable." (Basten 1996, p. 46).

In most jurisdictions, the responsibility for judicial education rests with the Chief Justice, usually through the appointment of education policy boards or committees. The National Association of State Judicial Educators (NASJE) has recently released New Principles and Standards of Judicial Education, which became effective December 2001. This report notes that almost ¾ of states have some sort of mandatory education provisions, although topics may vary as a function of practice. Additionally, it is reported that, "…51 state and local judicial branch education offices reported more than 7000 seminars, conferences, and education programs from 1990 to early 1999…" and most reporting states mandate 15-20 hours of education annually. (NASJE 2001, p.9).

In this context, the National Judicial College (NJC) is now offering "cutting-edge traffic safety courses" in the 2003 academic year. Some of the courses included are, "Traffic Issues in the 21st Century", "DUI Primer for New Judges: Impaired Driving Case Fundamentals" and "Sentencing Motor Vehicle Law Offenders" (www.judges.org). Of some interest, our first two reports on DWI enforcement and prosecution (Simpson and Robertson 2001; Robertson and Simpson 2002) are to be included as part of the curriculum for the latter course. Courses on Scientific Evidence and Expert Testimony are also offered as part of NJC's standard curriculum for trial judges. Additionally, the College has developed Traffic Safety Faculty Development Workshops in order to train judges on cutting-edge technology, adult learning theory and presentation skills. This training can be made available through judicial education offices and other related state agencies. More information about these courses can be found at www.judges.org.

The NASJE is also developing a new resource database for judges, with funding from NHTSA. This will allow NASJE to provide Web-based resources for judicial education nationwide. It will offer judges and judicial educators, "…electronic resources such as curricula, PowerPoint presentations, publications, Web-based training materials, information on presenters available to speak about DWI-related topics, and guidelines for field sobriety and blood and breath alcohol tests" (www.nasje.unm.edu).

Although opportunities for judicial education exist at both the state and the federal level, many judges encounter barriers to participation. Courts are overburdened with heavy caseloads and case backlogs. Consequently, judges may be unable to leave to attend seminars that require a significant amount of time away from their regular duties. Furthermore, when training opportunities are made available, judges must select from a variety of courses and subjects. Many judges work in general jurisdiction courts, so they must be prepared to hear a variety of cases from drug offenses, to domestic violence, to offenses involving children, as well as DWI. Judges working in limited jurisdiction courts face similar demands, although often on a smaller scale.

The point is that judges must be well-versed in a broad range of topics if they are to fulfill their role effectively. This is a demanding requirement, and based on the response from judges in our survey, it is not easy to achieve. For judicial education programs to be

effective and achieve their intended goal, they must be developed with these considerations in mind.

- **More training for criminal justice professionals.** The vast majority of judges (85%) also recommend that all criminal justice professionals receive more training in the handling of DWI cases. Without the necessary technical or specialized skills and knowledge, these professionals have difficulty carrying out their responsibilities effectively and ensuring the proper detection, apprehension, and prosecution of guilty offenders. Indeed, as mentioned in our previous reports (Simpson and Robertson 2001; Robertson and Simpson 2002) police and prosecutors are also concerned about evidentiary issues and support the need for more specialized training opportunities.

85% of judges recommend more training for all criminal justice professionals.

- **Make refusal a criminal offense.** In most jurisdictions the sanctions for chemical test refusal are administrative and lack sufficient penalties to be a deterrent. Judges believe that making refusal a criminal offense will have considerable benefits. Overall, 55% of judges believe that the issue of test refusal should be addressed legislatively. In terms of the favored method of dealing with test refusal, almost 40% of judges believe that the best method is to increase the penalties for test refusal; 33% believe that evidence of refusal should be admissible in court; and, even 27% support greater use of forced blood draws.

55% of judges believe test refusal should be addressed legislatively.

Additionally, a majority of judges (73%) believe that evidence of refusal should be admissible at trial, and 47% support its admissibility at sentencing. These recommendations will ensure that necessary and important evidence is brought to court and will provide judges a fair and accurate basis for reaching a verdict. A criminal record for refusal would also ensure that suspects are correctly identified as repeat offenders on subsequent arrests.

As noted in previous reports (Simpson and Robertson 2001; Robertson and Simpson 2002) only 11 states have passed legislation making it a criminal offense or a sentence enhancement to refuse a chemical test (AK, CA, FL, IN, MN, NE, NJ, NY, OH, RI, and VT), so there is considerable room for improvement across the country.

♦ **Reduce statutory requirements.** Judges report that current statutory requirements for DWI investigations and arrests are too stringent and complex. Judges believe that these statutory requirements are difficult, if not impossible, for officers to follow consistently. As a result, evidence is commonly excluded due to technicalities, and cases are dismissed. Despite evidence of guilt, defendants are acquitted due to the strict procedural application of complex laws. Judges believe that greater flexibility to accommodate the circumstances of an arrest should be permitted, and that judges should be able to consider the magnitude of the violation against the goals of justice. One of the goals of the justice system is to ensure that a fair and balanced picture of the offense in question is brought to court. Complex and stringent requirements for DWI offenses are often incompatible with this goal.

♦ **DWI courts.** Judges feel that the development of more dedicated DWI courts and judges would improve the effectiveness of the criminal justice system's response, especially to hard core drinking drivers because both prosecutors and judges will be able to work exclusively on these complex cases. As noted elsewhere, "Special courts allow judges and prosecutors to specialize in drunk driving cases, meaning that hard core drunk drivers are less likely to slip though the court system unidentified, unpunished, untreated" (The Century Council 1997). More than half (51%) of judges feel that dedicated DWI courts and judges are better equipped to handle drunk driving cases; this is consistent with the views of prosecutors -- 45% of them support the use of dedicated DWI courts (Robertson and Simpson 2002).

Half of the judges believe dedicated DWI courts are better equipped to handle DWI cases.

Currently, DWI/Drug courts exist in several jurisdictions (e.g., AZ, CA, IN, NC, NM, OK, VA), and there is some evidence that DWI courts involving close monitoring and alcohol treatment can reduce recidivism (NDCI 1999; Jones and Lacey 2000). There is an impetus among treatment professionals to develop a national DUI/Drug Court Strategy and use these special courts in more jurisdictions to deal with drunk drivers (NDCI 1999).

♦ **Other.** Almost all judges (93%) support greater use of arrest and booking videos in DWI cases. Judges report that videotapes can significantly improve the quality of evidence brought to court, clarify discrepancies in the interpretation of the evidence,

and substantiate officer testimony. Proper training in the use of these videos is important as officers need to use tests that demonstrate impairment on the video, and the camera needs to be focused on the defendant. Officer narration would also be beneficial.

93% of judges support greater use of arrest and booking videos in DWI cases.

One-third of judges also strongly recommend better preparation of police officers prior to giving testimony in court. Most officers testify infrequently and would benefit from some simple instructions and guidance generally given to all witnesses before testifying in order to ensure that the testimony is correctly understood and interpreted.

6.3 Caseload

♦ **The problem**. Some judges report that they process (e.g., arraignments, pre-trial hearings, sentencing) as many as 200 cases a day. Not all are DWI cases of course, and there are no national statistics that accurately quantify the number of DWI cases processed through the courts. However, it can be assumed that a large majority of the 1.4 million DWI arrests made annually result in some form of processing by a judge. This provides some indication of the volume of cases facing judges each year. DWI offenses are the most frequently adjudicated misdemeanor in the lower courts -- for example, in Minnesota, almost 40% of the criminal calendar is DWI related (Dehn 2002).

Caseloads are determined not only by the number of DWI offenders processed through the courts, but also by the manner is which a case is resolved (e.g., dismissals, plea, trial). Some methods are more expedient; others require considerable time and resources, contributing to caseload volume and creating court backlogs. When more cases go to trial, judges must devote considerable time and attention to these cases, reducing the time available to hear and process other cases.

♦ **The consequences.** Heavy caseloads reduce the time available for judges to familiarize themselves adequately with case specifics and offender circumstances, allowing repeat offenders to avoid identification and meaningful sanctioning.

Heavy caseloads also prolong the adjudication of cases (because less time is available to hear them), ultimately resulting in more dismissals and acquittals due to delays. A

high volume of cases also impedes monitoring and limits time available for judicial education as judges are unable to attend courses for extended periods.

- **The solution**. Almost half (43%) of the judges in our survey report that more judges are needed to reduce caseloads and improve the adjudication of DWI cases. This would permit them time to review case specifics thoroughly, identify repeat offenders, and ensure that appropriate sentences are imposed.

More than half (50%) of judges also believe that specialized DWI courts are better equipped to handle DWI cases, permitting swifter resolutions, reducing backlogs and improving outcomes. Improved efficiencies can also be realized if alcohol evaluations are mandatory and results are provided in a timely manner.

6.3.1 Problem Description and Scope

National statistics that accurately quantify the number of DWI cases processed through the courts are not available. Criminal filings are, however, closely associated with population size, and an average of 1,380 criminal cases are filed per 100,000 population nationally. However, variations in the manner in which data is collected at the state level makes caseload comparisons difficult. For example, some courts (e.g., OH) count cases at arraignment, as opposed to at filing; most courts count each defendant as a case, but some states (e.g., MT, NY, WY) count one or more defendants involved in a single offense as one case (NCSC 2001).

The number of cases processed by the courts cannot be estimated precisely from the 1.4 million arrests for DWI in 2000 (FBI 2000) because there is no way of determining how many of these cases resulted in formal processing by the courts. However, this provides some indication of the volume of DWI cases facing judges each year. And, the volume is on the rise; the number of DWI filings increased by 9% from 1997 to 2000 (NCSC 2001).

The number of DWI filings increased by 9% from 1997 to 2000.

DWIs comprise a meaningful proportion of the criminal caseload in some courts. For example, DWI offenses are the most frequently adjudicated misdemeanor in lower courts, accounting for about 10% of their criminal caseload overall (Wilson and Mann

1990). Some states report much higher proportions of DWI cases on their criminal calendar. For example, Minnesota estimates nearly 40% of cases are DWI related (Dehn 2002). By contrast, DWI filings account for only 3% of the criminal caseload in general jurisdiction courts, which process mostly felony cases. This suggests that either felony DWI offenses are rare, or that very few DWI offenses are charged as felonies, making DWI caseloads a more significant problem in lower courts (NCSC 2001).

Although national statistics on caseloads are not readily available, it is an important issue for judges; they identified it as the third most serious problem they face. In many jurisdictions, they report appearances (e.g., arraignments, pre-trial hearings, sentencing) in as many as 200 cases a day, although not all of these involve DWI offenders. The "three-minute rule" is common practice in courtrooms across the country -- this is all the time a judge may have to become familiar with a particular case before arraigning a defendant, accepting a plea agreement, or passing sentence.

Caseloads are determined not only by the number of DWI offenders processed through the courts but also by the manner in which a case is resolved (e.g., dismissal, plea agreement, bench trial, jury trial). Some methods are more expedient; others require considerable time and resources, although all have associated benefits.

Plea agreements are typically the most expedient and common method of resolving DWI cases (apart from dismissing a case due to insufficient evidence) because they do not place extensive time or resource demands on the courts. Although reaching an acceptable plea agreement may require considerable time and effort on the part of attorneys, the role of the judge is minimal. Their primary responsibility is to ensure that pleas are "conscionable" and reflective of case circumstances. The judge must also determine an appropriate sentence if one is not specified as part of the plea. When cases are resolved in this manner, the judge typically has limited contact with the defendant while the plea is accepted and sentence is imposed.

However, more than ¼ of judges expressed concern about the fact that heavy caseloads do not permit adequate time for a thorough review of the details and circumstances of a case before making a decision regarding a plea agreement (or sentence). Nonetheless, pleas are viewed as a "necessary evil" if the system is to manage the volume of cases

coming into it. "Both prosecutors and judges are motivated to accept charge reductions and/or sentence modifications in return for pleas that avoid extended trials" (Wilson and Mann 1990, p.134).

Cases that are not resolved through a plea agreement are resolved at trial, in either a bench trial where a judge alone weighs the evidence and reaches a verdict, or in a jury trial where a jury weighs evidence and reaches a verdict with the legal assistance of a judge. Judges estimate that at least 16% of DWI cases go to trial, many of which are jury trials. These data are comparable to those in other reports that show, on average, 16-17% of DWI cases go to trial (NHTSA 1998). As further evidence of the volume of cases this creates in the courtroom, one study found that, "…as many as 5-15 trials may be set for one day when only one case can be heard at a time." (NHTSA 1998, p. 48), generating a sizable backlog of DWI cases.

Trials compound the caseload problem because they are time-consuming. Perhaps the most compelling piece of evidence that caseloads are placing an inordinate drain on court resources is that some states (e.g., AZ) have considered legislation eliminating the option of a jury trial for a first-offense DWI (NHTSA 1998). This is further exacerbated by the fact that trials often involve repeat offenders -- indeed, a majority of judges in our survey (60%) report that hard core repeat offenders are more likely to plead not guilty and go to trial. Their cases are often more complex and challenging, as described in the previous section, and therefore more time consuming.

60% of judges report that hard core offenders are more likely to plead not guilty and go to trial.

6.3.2 Consequences of the Problem

Heavy caseloads reduce time available for judges to familiarize themselves adequately with case specifics and offender circumstances before ruling on motions, accepting pleas, or imposing sentence. Final case outcomes may be inappropriate when judges do not have an opportunity to weigh various factors adequately. Guilty offenders may benefit by avoiding appropriate and meaningful sanctioning because judges have insufficient time to review case specifics.

With little time to review case files, judges often rely heavily on information provided by prosecutors. More than 90% of judges report they occasionally or often rely on information from prosecutors when making a decision regarding a plea agreement or sentence. This has implications for the adjudication of a DWI case because prosecutors may also have incomplete information. Our previous report on prosecution (Robertson and Simpson 2002) identified inherent difficulties associated with obtaining accurate and up-to-date offender information because of problems such as poor records and prosecutor inexperience.

Heavy caseloads can also impede the identification of repeat offenders. Many judges acknowledge that considerable pressure exists to keep the flow of cases moving in a timely manner. This often precludes their ability to sift through the files and records and to obtain information that would help them identify repeat drunk drivers.

Heavy caseloads prolong the adjudication process as well, creating backlogs in the court system ultimately resulting in dismissals and/or acquittals. Evidence has shown that the longer it takes for a case to come to trial, the less likely there will be a guilty verdict: evidence can be lost or contaminated, witnesses may fail to appear, and prosecutors may be more inclined to negotiate a plea in an effort to resolve cases quickly. And, as described previously in Section 6.1, heavy caseloads often impede the effective monitoring of repeat offenders because judges have insufficient time to review reports provided by probation officers to ensure that offenders are meeting requirements imposed on them at sentencing.

Finally, judges report that heavy caseloads often prevent them from participating in opportunities for judicial education, making it more difficult to acquire the technical expertise needed to adjudicate these cases, a need that was highlighted in the previous section.

6.3.3 Recommended Solutions

Judges identified three principal ways to address the problem of heavy caseloads and improve the adjudication of repeat DWI cases.

♦ **Hire more judges.** Almost half of those in our survey (43%) report that more judges are needed to reduce caseloads and improve the adjudication of DWI cases. Judges acknowledge that a thorough assessment of each DWI case, especially those involving repeat offenders, can be compromised by the volume of cases they are required to adjudicate. More time would be afforded to each case if additional judges were available. This would permit them time to review case specifics thoroughly, identify repeat offenders and ensure that appropriate sentences are imposed.

♦ **DWI courts.** Adding more judges to the system might be desirable but is unlikely in the current economic climate. Accordingly, judges also identified ways to make the system more effective and efficient. The most popular way to do this is through the use of specialized DWI courts. Half (51%) of judges in our survey believe that dedicated DWI courts are better equipped to handle drunk driving cases because of their familiarity with complex evidentiary issues, the offenders, and the use and availability of various alternative sanctions. Consequently cases can be resolved more swiftly, improving efficiency and reducing backlogs.

Half of judges believe dedicated DWI courts are better equipped to handle DWI cases.

♦ **Mandatory alcohol evaluations.** Improved efficiencies can also be realized if alcohol evaluations are mandatory for all DWI offenders and the results are provided in a timely manner, a recommendation that is supported by 85% of judges in our survey. Judges in some jurisdictions reported that they wait an average of 45-60 days to receive an alcohol evaluation, which delays the sentencing process, retaining cases on the docket. These evaluations clarify the extent of an offender's problem with alcohol and expedite the identification of appropriate sentences, permitting judges to turn their attention to other cases more rapidly. This information would also assist judges in evaluating plea agreements and sentencing recommendations.

85% of judges believe mandatory and timely alcohol evaluations of all DWI offenders will improve the efficiency of the courts.

6.4 Motions and Continuances

♦ **The problem**. Motions consist of written technical arguments involving specific points of law that are supported by memoranda and other documents that reference relevant precedents involving similar facts and circumstances. Judges must

weigh opposing motions filed by the prosecution and defense and make rulings regarding which motions will be granted or denied. These rulings have considerable implications for how a trial will proceed as well as its outcome -- i.e., either a dismissal, an acquittal or a conviction. The over use or "frivolous" use of unnecessary motions and continuances (motions requesting a delay in proceedings) is an abuse of process, which judges report as much more common in cases involving repeat offenders.

- **The consequences**. Frivolous motions and continuances burden judges with unnecessary paperwork, wasting time and resources. These cases remain on dockets for longer periods, contributing to caseload demands, dismissals and acquittals. The time and resources devoted to these prolonged cases also detracts from the ability of judges to efficiently adjudicate other cases and monitor offenders.

- **The solution.** Judges recommend stricter adherence to case processing guidelines and the limiting of frivolous motions and continuances to ensure case backlogs are not increased further. Some judges have become proactive in this regard by limiting the time permitted to hear motions and continuances and strongly encouraging attorneys to file within stated guidelines. A small portion of judges (20%) even support legislatively limiting motions and continuances, using explicit language to avoid loopholes.

6.4.1 Problem Description and Scope

Motions are written arguments initiated by either the prosecution or the defense and subsequently ruled on by a judge, regarding how a particular case should proceed. Motions, which are governed by strict procedural rules, are commonly initiated during pre-trial proceedings (but are not limited to this phase) and cover a broad range of issues including: discovery, the admissibility of evidence, limits placed on the use of particular kinds of evidence, and requests for continuances.

In most instances, motions consist of written requests supported by technical arguments involving specific points of law and by exhibits, affidavits and case law. Attorneys use motions to improve their respective chances of obtaining the desired outcome -- either a conviction or an acquittal. Judges must weigh opposing motions filed by the

prosecution and defense and make rulings regarding which motions will be granted or denied, based on the rules of evidence. These rulings have considerable implications for how a trial proceeds as well as its outcome.

Once an attorney has received notice that motions have been filed, they may choose to oppose them. Judges will likely grant any reasonable motions that are unopposed; however, if the attorney decides to challenge the motion, then a written response must be filed with the court explaining the legal grounds on which the motion is being challenged.

The judge plays a central role in determining what motions will be permitted and to what extent motions will be heard. They may decide to deny a motion entirely or permit written arguments only. Counsel are then permitted to submit a brief that argues their case. When issues are more complex and time permits, a judge may also decide to hear oral arguments; both attorneys are permitted to argue their case before the judge in addition to producing a written motion. At some point following arguments, either immediately or several days later, the judge will issue a decision granting or denying the motion in question. In rare cases, the judge may also reserve judgment until a later time, allowing the case to proceed before a decision is reached.

Some of the most technical motions involve the admissibility and use of evidence in court proceedings. There are two different kinds of motions that affect the use of evidence at trial. First, there are motions made to suppress or exclude evidence based on constitutional or statutory violations. For example, in DWI cases, the defense may argue that the officer was not justified in stopping the vehicle, that the suspect was not "Mirandized", or that the suspect was denied his/her right to counsel.
Second, there are motions *in limine*. These motions are mechanisms where prior to trial the prosecution or the defense may raise issues of admissibility of evidence. For example, the defense may want to argue that poor road conditions contributed to the loss of control of the vehicle by a driver implicated in a crash; the prosecution may object that the evidence is irrelevant to the case. Rulings made by a judge on motions *in limine* will determine what evidence will be admitted.

To further illustrate the extent to which motions may be a complicating and time-consuming factor in the adjudication process, listed below are motions which may be made during a routine DWI case. Judges are often required to adjudicate them at some point during the pre-trial or trial process.

- motion to amend charges
- motion for bail
- motion for a Bill of Particulars
- motion for continuance
- motion for discovery
- motion for dismissal
- motion for extension of time to file pre-trial motions
- motion for the admissibility of the HGN test
- motion to admit expert testimony
- motion to include prior convictions
- motion for pre-trial detention
- motion to suppress evidence – physical evidence/ statements/ identifications
- "speedy trial" motion
- motion for a witness list or to amend witness list

Although each of these motions has a purpose and function in ensuring the fairness of the trial process, the overuse or "frivolous" use of motions can create an abuse of process. Not only may these motions be filed to burden opposing counsel with unnecessary paperwork and delay the trial process, but they may also place considerable demands on a judge's time and on court resources. Motions in the form of continuances, if granted, also serve to delay the adjudication process.

Judges acknowledge that repeat offenders, through their attorneys, are most likely to engage in this tactic because of their familiarity with the system. As a case gets older, the ability to resolve it with a conviction diminishes significantly because evidence may be lost or contaminated, witnesses cannot be located, or officers are unable to appear to testify at trial.

The extent of the problem is evidenced by the fact that one-third (34%) of judges in our survey report that their ability to adhere to "case processing" guidelines is constrained by excessive motions. These guidelines identify the appropriate time frame in which a case should be resolved -- in most jurisdictions this ranges from three to six months.

34% of judges reported that excessive motions constrain their adherence to case processing guidelines.

Accordingly, as noted in our previous report (Robertson and Simpson 2002) there is a need to restrict the excessive use of motions and continuances. Part of the responsibility for this resides directly with the judiciary (NHTSA 1998).

6.4.2 Consequences of the Problem

Frivolous motions are time-consuming and create an unnecessary burden on judges who must review and evaluate each motion filed in order to make a ruling. This valuable time could be better used on more productive activities, such as reviewing probation reports and case files. Motions also contribute significantly to the caseload burden because they delay case processing -- some judges report cases that have been on their docket for a year or more that involve dozens of motions and continuances. The time and resources devoted to these prolonged cases detracts from the efficient adjudication of DWI cases as well as others.

Frivolous motions in DWI cases complicate and prolong the trial and enhance the likelihood of a dismissal or acquittal, allowing the defendant to avoid both conviction and identification as a repeat offender. Additionally, continuances consume valuable resources by wasting the time of the judge, the prosecutor, the investigating officer, and any other witnesses whose appearance has been scheduled.

6.4.3 Recommended Solutions

Judges identified two possible solutions to the problem of motions and continuances.

- **Adherence to case processing guidelines.** Many states have developed and instituted case processing guidelines that dictate the maximum amount of time it

should take to resolve a case in the court system. Guidelines specifying allowable time frames vary among states, typically ranging from three to six months, depending on the seriousness of the case.

Judges would like to adhere to these guidelines more closely, so cases are processed in a reasonable time frame and do not add to the caseload burden. Many judges are becoming proactive in dealing with the over use of frivolous motions; some judges report they clearly specify to the prosecution and the defense that limited time is permitted for motions and strongly encourage attorneys to file motions within acceptable periods. Other judges have made it their practice to limit the number of continuances permitted in a case.

♦ **Legislatively limit motions and continuances.** A small portion of judges in our survey (20%) support even more drastic measures to limit motions and continuances using legislation. If such steps are taken, judges emphasize that the legislation should use explicit and precise language so that loopholes are not created -- phrases such as "if practicable" and "to the extent possible" should be avoided (NHTSA 1998).

It is presumed that the resistance associated with legislative action (80% of judges did not support his approach) is no doubt rooted in issues of fairness at trial and the quality of the trial process. Judges want to ensure that important issues are not compromised in an effort to maintain efficiency and reduce caseloads.

♦ **Pre-trial Electronic Home Alcohol Monitoring.** Some judges also recommend increased use of pre-trial electronic home alcohol monitoring (EHM). This program, pioneered by Judge James Dehn in Minnesota in 1993, has been used extensively throughout the state in the past decade and has proven to be an effective pre-trial tool to decrease delays resulting from frivolous motions and continuances as well as improve public safety. This program requires the defendant to participate in alcohol testing at home in lieu of maximum bail. Failure to test or testing positive for alcohol results in the immediate arrest of the defendant.

This program has effectively reduced the motivation for delaying tactics of frivolous motions and continuances by forcing the defendant to maintain sobriety while the case is

pending. Delaying the case merely results in continued monitoring and sobriety for the defendant. Defendants assigned to this program are essentially forced to acknowledge their problems with alcohol addiction and many of them become anxious to negotiate a plea in order to either begin their treatment options or resolve their case and discontinue the alcohol monitoring. EHM was employed for more than 3,000 repeat DWI offenders in Minnesota in 2001, and has resulted in defendants maintaining sobriety, reducing the average time of pending cases and promoting resolutions in DWI cases (Cleary 2002). Additionally, Minnesota judges who order EHM have found that the incidence of non-appearance for hearing or trial of repeat DWI offenders greatly declined because defendants were anxious to resolve their case for the reasons stated above.

6.5 Failure to appear

♦ **The problem.** To avoid prosecution and/or conviction, offenders will sometimes fail to appear for arraignment or trial. Estimates of this behavior range from 10%-30%, depending on the prevalence of borders with other states or countries. A majority of judges agree that, regardless of the stage in the court process when it occurs, failure to appear is a more serious problem among hard core repeat offenders who go to considerable effort to avoid conviction. This behavior is perpetuated by nominal penalties and the difficulties associated with apprehending offenders once they have left the immediate jurisdiction.

♦ **The consequences.** By failing to appear on DWI charges, defendants, if guilty, can often avoid prosecution and conviction, mostly because authorities are unable to locate them. Due to record problems, those who fail to appear are not likely to be identified following subsequent arrests, meaning that they will be released from custody, only to fail to appear again. Offenders also benefit from this behavior because it is more difficult to convict on DWI charges as the case gets older. Cases involving a defendant who has failed to appear are carried forward on the court docket, causing caseloads to expand and further stressing court resources.

More than 40% of judges support making bond a condition of release on an arrest warrant.

♦ **The solution**. More than 40% of judges recommend making bond/bail (money or assets placed with the court, which are forfeited if the

offender does not appear for trial) a condition of release on arrest warrants issued for failure to appear. If the defendant is subsequently arrested for outstanding charges, the arraigning judge will be aware of the defendant's predisposition not to appear and will take appropriate steps to ensure appearance at trial.

Judges also support holding offenders who engage in this behavior in custody and the development of transportation and cost-sharing agreements between neighboring jurisdictions to ensure that offenders are returned to the appropriate jurisdiction to answer for outstanding charges.

6.5.1 Problem Description and Scope

To avoid prosecution and/or conviction, offenders will sometimes fail to appear for arraignment or trial. When a defendant fails to appear, a bench warrant ordering the arrest of the defendant is issued by the presiding judge. However, as documented in our previous reports (Simpson and Robertson 2001; Robertson and Simpson 2002), there are substantial problems associated with executing warrants, and the longer it takes to locate a defendant and return him/her to court, the less likely the case will result in a conviction.

The magnitude of the problem is difficult to estimate because it is not routinely recorded, and many states purge their outstanding warrant files every few years, making accurate statistics unavailable (Nalder 1997). More recently, a NHTSA report on the issue of outstanding DWI warrants makes clear that accurately quantifying the extent of the failure to appear is extremely difficult because of poor record-keeping systems (Wiliszowski et al. 2001).

Nationally, prosecutors estimated that approximately 22% of defendants fail to appear at some point in a typical DWI case (Robertson and Simpson 2002). Some states that have borders with other states, or with Canada or Mexico, identify this as being more of a problem -- estimates are that 10% to 30% of offenders fail to appear. The Century Council has reported "…there is evidence that offenders who fail to appear at trial are an increasing problem that is further burdening the justice system and leaving a number of cases unresolved" (Century Council 1997).

Estimates are that 10-30% of offenders fail to appear.

Failure to appear can occur at several phases in the court process, but if this behavior is more frequent at arraignment, pre-trial proceedings, or during trial is not known. However, a majority of judges agree that, regardless of the stage in the court process, failure to appear is a more serious problem among hard core repeat offenders, who go to considerable effort to avoid conviction. Judges also report that failure to appear is more of a problem in jurisdictions that have larger transient populations in which DWI offenders may move several times within a jurisdiction or between jurisdictions making them difficult to locate. Additionally, jurisdictions with larger immigrant populations experience this problem to a greater extent, as result of overriding concerns about immigration status.

Nominal penalties also tend to perpetuate this behavior. The penalties for failing to appear are considerably less than those for a DWI conviction, particularly for repeat offenders, and the penalties are not consistently imposed. Consequently, repeat offenders who are familiar with the system will often fail to appear rather than risk a DWI conviction.

Some states also report that cross-jurisdictional issues contribute to this problem. When a judge issues a warrant in their jurisdiction for an offender that failed to appear for DWI charges, it can be difficult to get judges in other jurisdictions to honor this warrant and hold the offender in custody. This is largely a result of limited resources. Judges are hesitant to expend resources on the custody and transportation of an offender who was charged in another jurisdiction, especially for a misdemeanor DWI. Similarly, District Attorney offices, as a policy, will not initiate extradition proceedings on a misdemeanor charge, especially when the defendant is located in a distant state, due to budget constraints.

6.5.2 Consequences of the Problem

By failing to appear on DWI charges, defendants, if guilty, can often avoid prosecution and conviction, mostly because police are unable to locate them. Limited resources impact the number of warrants that officers are able to execute, so few offenders are returned to custody to face charges. Furthermore, warrants are often purged from the system, so there is no record of this behavior, inhibiting identification of offenders who

are likely to fail to appear. Offenders engaging in this behavior are not likely to be identified following subsequent arrests, so they are released from custody, only to fail to appear again.

Offenders also benefit by failing to appear because as the case becomes older, a conviction becomes more difficult to obtain (if they are subsequently arrested). The potential for a conviction is further reduced if the defense makes a "speedy trial" motion, forcing the prosecution to bring the case to trial quickly and leaving scant opportunity to review relevant evidence or contact necessary witnesses. It is also very difficult for the prosecutor to demonstrate "due diligence", meaning that the prosecutor did everything necessary to prepare for trial and the case was vigorously pursued. Consequently judges may often be obligated to dismiss the charges.

Finally, when cases involving a defendant who has failed to appear are carried forward on the docket, caseloads expand. These cases remain unresolved and cannot be cleared from a judge's calendar. Furthermore, valuable time and resources are wasted when these cases have been scheduled and the defendant does not appear.

6.5.3 Recommended Solutions

Judges identified a number of ways to deal with the problem of failure to appear.

- **Make bond a condition of the arrest warrant.** When a defendant fails to appear, some judges make bail/bond (money or assets placed with the court to be forfeited for not appearing) a condition of release from custody on the bench warrant issued for their arrest. When the defendant is subsequently arrested, they will be forced to post bond in order to be released. By doing this, the defendant is more likely to appear because they may be unwilling to forfeit the money or assets. Additional instructions may also be included on the bench warrant such as "do not release OR" so the judge who later arraigns the defendant after a subsequent arrest will be aware of the defendant's failure to appear and take steps to ensure the appearance of the defendant. More than 40% of judges identified making bond a condition of the bench warrant as the best solution to this problem.

40% of judges support making bond a condition of release on arrest warrants.

♦ **Hold offender in custody.** One-quarter (25%) of the judges surveyed support the recommendation of holding defendants, who have previously failed to appear, in custody until the case comes to trial. This may be difficult to implement in some states because DWI is a designated bailable offense, meaning that defendants are eligible for bail and the amount of bail must be reasonable. Additionally, some jurisdictions have limited capacity to hold defendants due to jail overcrowding. However, if defendants have a pre-disposition not to appear, efforts should be made to hold them until the case can be resolved.

♦ **Transportation and cost-sharing agreements.** Many jurisdictions will not hold defendants on bench warrants from other jurisdictions because the cost incurred for returning the defendant to the jurisdiction that issued the warrant is excessive, especially if the original DWI is a misdemeanor. Jurisdictions are often forced to make these decisions in order to be fiscally responsible. However, repeat offenders quickly learn that they will not be extradited to answer for either the original DWI charge or the subsequent charge of failure to appear. This certainly does not discourage the behavior. In response to this, some jurisdictions have made arrangements to share the costs of transporting defendants with jurisdictions meeting halfway, so that the entire cost of the transport is not borne by one agency. Anecdotal evidence indicates that this arrangement has worked well between jurisdictions that are in close proximity.

♦ **Other.** Some jurisdictions have adopted more innovative ways to reduce the problem of failure to appear. For example, telephone reminders are being used in King County, Washington by Judge David Admire. Prior to scheduled court appearances, defendants receive a telephone reminder regarding their scheduled appearance much in the same way physicians and dentists remind their patients about their appointments. This program has apparently been successful in reducing failure to appear rates among all misdemeanor defendants (including DWI) from 42% to 18% (Modie 1999). It might be tempting to conclude that this suggests a major reason for failure to appear is that is the defendant simply forgot the court appearance. A more likely suggestion is that defendants believe they are not being monitored; the phone reminder dispels this misconception.

Finally, specialized DWI courts significantly reduce the failure to appear rate because of their frequent status hearings, close monitoring and the prospect that the offender will be removed from the DWI court and referred back to a traditional criminal court for processing.

6.6 Records

♦ **The problem**. Records necessary for adjudication -- including driver records, criminal history, alcohol evaluations, pre-sentence reports -- are maintained by different agencies, for different time periods. Their contents may not be comparable, and their accuracy or completeness may be inconsistent, at best. Inefficient access to relevant information impedes decision-making and the effective adjudication of offenses.

♦ **The consequences**. Without accurate, up-to-date records that can be easily accessed, judges are severely impeded at several phases of the adjudication of a DWI case. Without the necessary information, judges are unable to determine if plea agreements are "conscionable" and reflect the severity of the offense and the offender's history. They are unable to determine what sanctions are most appropriate, the severity of those sanctions, or the need for treatment.

In the absence of needed information, judges may also be unable to impose the harsher sanctions mandated for repeat offenses or to take advantage of those options only available for repeat offenses. This greatly diminishes the effectiveness of imposed sanctions and their associated deterrent effect. A lack of information can also lead to sentencing disparity -- i.e., offenders with similar cases and histories may receive vastly different sentences.

♦ **The solution**. Almost half (44%) of the judges in our survey report that the National Driver Register (NDR) is one of the most effective databases available for identifying problem drivers. However, this register relies on data from state DMVs; data which is often incomplete or inaccurate. Consequently, greater efforts are needed to improve the quality of data gathered for this purpose, and there are many current initiatives underway to address these issues.

Judges also support the establishment of uniform driver abstracts that standardize look-back periods and other important information. Over 40% of judges believe that this would greatly improve the utility of these records. Judges would also like to see greater availability of pre-sentence reports. Additionally, there is considerable support for making the alcohol evaluation certificate a condition of bond, ensuring that offenders will comply with the evaluation and that judges will have access to this important information for purposes of sentencing.

6.6.1 Problem Description and Scope

Our previous report on the prosecution of repeat DWI offenders (Robertson and Simpson 2002) highlighted the ways in which inconsistent access to and availability of important records adversely affects the prosecution of repeat offenders. Similarly, records necessary for adjudication are maintained by different agencies, for different time periods, none of which may be compatible with legislated look-back periods (the specified period in which prior convictions may be counted for the purposes of increasing a charge or sentence), the content of these records may not be comparable, and their accuracy or completeness may be inconsistent at best.

Record problems have implications for both the adjudication and sanctioning of repeat offenders by the judiciary. During the pre-trial process, judges are required to make decisions either accepting or rejecting negotiated plea agreements. Without accurate and up-to-date information, judges may have no way of evaluating proposed agreements to determine if they are "conscionable". For example, the number of prior convictions attributed to a defendant is relevant to evaluating a plea agreement because, depending on the legislation in a particular state, a second- or third-offense may carry mandatory penalties. Without information about prior convictions, a repeat offender is able to negotiate first-offense sanctions, and judges may not be aware that negotiated penalties in the agreement are inappropriate. According to judges, it is extremely common for repeat offenders to plead guilty, with an agreement, immediately following charges in order to resolve the case quickly thereby preventing the discovery of prior convictions. This allows the offender to avoid identification as a repeat offender and potentially harsher sanctions.

This behavior is most common in cases involving out-of-state prior convictions. As documented by Robertson and Simpson (2002), driver abstracts vary considerably between states in terms of content, symbols used to represent information (abbreviations), look-back periods and the time required to access these reports. It may take a week or more to access driver abstracts from other states, and by the time these reports are received by the prosecutor or the court, the case is quite often resolved. Judges in our survey reported that approximately 20% of repeat DWI cases involve out-of-state driving records.

Judges estimate that 20% of repeat DWI cases involve out-of-state driving records.

Even if these out-of-state records are made available to the court, judges may have considerable difficulty interpreting them and verifying the number of prior convictions. Often these records do not contain complete information (Robertson and Simpson 2002). Judges report that it is common for some prior convictions to be missing from the record, or it will contain a record of charges filed, without any indication of the resolution. "Disposition unknown" is frequently indicated on the record and, without the needed information, judges are unable to count these prior charges against the defendant when evaluating a plea agreement.

Information on prior convictions and driver abstracts are also relevant during the trial phase. Information that cannot be verified cannot be presented during trial. For example, in order for the prosecution to demonstrate the defendant was aware of the consequences of his/her behaviour, it is necessary to enter evidence of prior convictions. However, if the driver abstract does not specify the conviction, the disposition of the case, or other constitutional requirements, the judge is not able, according to rules of evidence and procedure, to allow this information to be entered into evidence.

The need for accurate and up-to-date records is also important during the sentencing phase. Judges require considerable background information about an offender in order to make appropriate sentencing decisions. This information includes, prior criminal history, driving records, alcohol evaluation reports and probation reports. Without this information, judges are unable to determine which sanctions will be most effective in preventing future recidivism.

Prior criminal history and driving records are necessary to determine the range of available sanctions for sentencing purposes. Many states have sentencing guidelines with mandatory minimum sentences that judges use to create an appropriate sentence. For example, judges may be required to impose a set number of days in jail or a specified fine for a third-offense. But, in the absence of accurate knowledge of prior convictions, judges cannot impose these tiered or elevated sanctions for repeat DWI offenses, and, unless this information is clearly documented and verified, judges are not permitted to consider this evidence at sentencing. Another example involves ignition interlocks. In some states, offenders are not eligible for an ignition interlock until their second- or third-offense. Without prior knowledge of previous convictions, a judge may believe they are unable to include this sanction as part of a sentence, even if they believe it would be appropriate.

In the absence of accurate knowledge of prior convictions, tiered or elevated sanctions cannot be imposed.

Judges also underscored the importance of information about alcohol evaluations in sentencing. Indeed, our survey revealed that judges nationwide order an alcohol evaluation in 92% of their cases. This is not surprising, given that nearly 40% of judges in our survey said treatment is the most effective sanction in preventing recidivism, making it imperative that they have access to evaluations so they can determine the necessity of further evaluation and treatment as part of a sentence.

Almost 40% of judges report that treatment is the most effective sanction to reduce recidivism.

A majority of states do require some form of screening of offenders, although the circumstances under which this occurs vary, depending on such things as the offense and the BAC at the time of arrest. Evaluations typically occur post-conviction and prior to sentencing (Century Council 1997), and when the assessment is complete, the responsible agency provides a letter to the judge indicating what tests were used, the results, and a recommendation for treatment. However, this information may not exist in some cases, and offenders often fail to appear for evaluations. Additionally, these evaluations are subject in many instances to patient confidentiality, and records of evaluations are almost never included in a court file.

Judges also report that pre-sentence reports (PSRs) are extremely important in determining an appropriate sentence. These reports are created at the request of a judge and contain extensive background information including, interview information,

alcohol screening or assessment, employment history, information about compliance with previous sanctions and treatment and insurance information. These reports also contain a recommendation regarding available sanctions and their appropriateness. Often, a significant amount of the information judges require can be found in PSRs. However, these reports are typically reserved for serious offenses and are infrequently prepared in misdemeanor DWI cases due to resource constraints.

Many misdemeanor courts do not have a probation department that can fulfill requests for PSRs and not all courts have probation officers available to prepare them. For example, only 8 of 84 justice courts in Arizona have probation officers available for this function, so a PSR is not available to the judge in a majority of cases, requiring judges to rely on other records that may be incomplete or inaccurate. Judges have difficulty making informed decisions regarding assessment, sentencing, and tracking and monitoring of offenders without a PSR.

6.6.2 Consequences of the Problem

Judges rely on a variety of records to make decisions. When this information is incomplete, inconsistent, inaccurate or unavailable, judges are limited in their ability to make appropriate decisions or impose harsher penalties for repeat offenders. Judges may be forced to impose lesser sentences without a clear indication of prior convictions from driver abstracts or criminal history records. If these records are not available in a timely manner, judges must continue with the case and make necessary decisions without the benefit of this information and repeat offenders may be sanctioned as first-offenders as a result.

Without up-to-date information, the ability of judges to identify the most effective sanctions is also compromised. For example, offenders diagnosed with alcohol dependence or addiction obviously have a much greater need for treatment. Offenders with a certain number of prior convictions are not eligible for diversion programs, or, depending on the number of prior convictions, certain sanctions may be mandated by DWI legislation.

Additionally, certain types of sanctions work more effectively with certain types of offenders. Appropriate and effective sentencing decisions are facilitated by complete information on the offender. In its absence, offenders can avoid not only mandated penalties, but those sanctions that are most appropriate and needed to change behavior. A lack of information can also lead to sentencing disparity, meaning offenders with similar cases and histories may receive vastly different sentences.

6.6.3 Recommended Solutions

Judges identified five ways to address the problem of inadequate or inconsistent records.

- **Improve the National Driver Register.** Almost half (44%) of the judges in our survey report that the National Driver Register (NDR) is one of the most effective databases available for identifying prior records of driving offenses and they support efforts to improve the timeliness and quality of its information. This computerized database was created by NHTSA and contains information on revoked and suspended drivers as well as those convicted of serious traffic violations, such as DWI, for a 10-year period. It is continually updated through a direct feed from state DMVs.

44% of judges support efforts to improve the timeliness and quality of NDR records.

This database expedites the record searching process by providing driver information from all 50 states and the District of Columbia, although typically more information is provided in the driver abstract from the state DMV than is found in the NDR. Judges can search the database for information pertinent to cases before them and quickly determine if an offender has prior convictions for DWI, even in other jurisdictions.

However, the information contained in the NDR relies on the consistency and accuracy of the DMV records found in each state, and the DMV's information comes from the courts. If information about convictions is not provided from the courts to the DMV in a timely manner, this information will also not appear in the NDR. Moreover, states also vary regarding what violations or offenses are reported, depending on their respective DWI laws, so the information provided is not necessarily uniform.

Considerable efforts have been undertaken by many agencies to improve the quality of traffic records through the development of compatible record sharing systems. In the past few years great strides have been made, but additional work is required to ensure that records contain complete, accurate and timely information. More information about this database can be obtained by contacting the National Driver Register in Washington, D.C., at (202) 366-4800.

♦ **Establish uniform driver abstracts.** Driver abstract forms should be standardized so that information of prior convictions can be consistently identified and clearly established. This will enhance sentencing of repeat DWI offenders. Over 40% of judges (43%) in our survey agreed that standardized driver abstracts are the best method to improve the utility of driver records and the sanctioning of hard core drinking drivers. Standardization would create uniform look-back periods for maintaining these records as well as establish content that is comparable in terms of information collected and how this information is expressed.

Over 40% of judges agree that uniform driver abstracts will improve the utility of driver records and sanctioning of offenders.

♦ **Make the alcohol evaluation certificate a condition of bond.** Judges believe that records of alcohol evaluations are one of the most important pieces of information for sentencing decisions. However, some offenders simply refuse to undergo the assessment, so no record is available to the judge to assist with sentencing. To overcome this problem, some judges (for example in Winnebago County, IL) make the alcohol evaluation certificate a condition of bond. This requires the defendant to appear for an alcohol evaluation and to produce the certificate for the court, ensuring this record is available. If the defendant fails to report for evaluation, a contempt order is issued and the defendant must appear before the court to explain why the assessment has not been completed. By doing this, judges ensure they have the necessary information to make informed case decisions.

♦ **Greater use of pre-sentence reports.** Judges in several states indicated that PSRs provide valuable information and insights that assist with important decisions in sentencing. Overall, these reports are generally more thorough evaluations of offenders and provide information in a concise format which greatly facilitates and expedites a judge's ability to make appropriate and effective decisions on sentencing.

Judges would like to see greater availability of these reports to facilitate the sentencing process, in both felony and misdemeanor cases.

♦ **Other.** Judges would like to see an integrated record system that links all relevant agencies, providing comprehensive and timely information on DWI cases they adjudicate. In this context, progress is being made. As described at a recent conference (28th International Traffic Records Forum, Orlando, FL, August 4-8, 2002), NHTSA has developed a "Model Impaired Driving Records Information System" and several states, most notably Iowa and New York, have made significant strides in implementing many of its key features. Automated data capture, electronic data transmission, integration and notification are becoming a reality.

6.7 Sentencing Disparity

♦ **The problem**. Cases with similar circumstances and backgrounds often receive different -- sometimes quite different -- sentences. This occurs because seemingly similar cases actually differ substantially. But, when making a decision, judges must take a number of factors into consideration including: the seriousness of the offense, aggravating factors, prior convictions, probation recommendations, alcohol evaluations, social stability and family issues (Gottfredson 1999).

However, even allowing for such factors, disparities still exist. Some of these can be explained by a variety of other factors, including: the enormous number of judges dealing with tens of thousands of DWI cases annually, judges' familiarity and confidence in the different sanctions available, personal experience with sanctions, the availability of sanctioning options and the accessibility of resources to accommodate these sanctions. Indeed, more than 65% of judges in our survey report that fiscal concerns impact sentencing decisions occasionally or often.

♦ **The consequences**. Sentencing disparity results in some offenders not receiving appropriate sanctions. This reduces the potential for behavior change and increases the likelihood of recidivism. Further, the inconsistent application of penalties creates a public perception of unequal justice. Most importantly, disparity permits and

encourages offenders to manipulate the system to obtain lesser sentences through practices such as “judge-shopping” which is reported to occur either occasionally or often by 46% of the judges in our survey.

- **The solution**. Judges recommend greater access to scientific evaluations, allowing them to make informed sentencing decisions based on sound scientific research. More than 80% of judges in our survey report that summaries of scientific research on the effectiveness of sanctions would benefit sentencing decisions and lead to greater consistency and lower recidivism rates.

Judges also believe that the use of DWI courts should be expanded, allowing experienced judges to utilize treatment resources and sentence, sanction or reward offenders with greater consistency. Additionally, the development of tiered penalties, supported by 74% of judges in our survey, would ensure that repeat offenders receive the more severe sanctions that are warranted while still permitting the needed discretion.

6.7.1 Problem Description and Scope

Judges are given considerable flexibility (discretion) in sentencing to ensure that sanctions are appropriate with regard to individual circumstances. Sentencing decisions take into consideration such things as the seriousness of the offense, aggravating factors, prior convictions, probation recommendations, alcohol evaluations, social stability and family issues (Gottfredson 1999). This explains, in part, why there is variability in the sentences imposed. However, cases with similar circumstances and backgrounds often receive different -- sometimes quite different -- sentences. This conflicts with the tenets of equality and fundamental fairness as a basis for our system of justice.

Part of the disparity in sentencing can be explained by the enormous number of judges across the country who are dealing with tens of thousands of DWI cases each year. Uniformity or consistency is difficult to achieve in such a diffuse system. Disparity is also attributable to judges’ familiarity with and confidence in the variety of sanctions available. Judges might emphasize certain sanctions -- e.g. ignition interlocks and home arrest -- and minimize the use of others -- e.g. jail and fines -- based on their experience with them.

Additionally, the sentencing alternatives available within each jurisdiction are often constrained by court resource allocations. Approximately ⅔ or 64% of judges surveyed report that resource constraints and fiscal concerns affect sentencing decisions occasionally or often. Some judges have greater resources and therefore a wider array of sentencing alternatives at their disposal. Other judges have fewer resources and are limited in what sentencing alternatives can be used to create an appropriate disposition.

⅔ of judges report that resource constraints and fiscal concerns affect sentencing decisions.

This can even impact the judge's ability to comply with legislatively mandated sanctions. For example, judges in rural jurisdictions may be unable to assign ignition interlocks or treatment as part of a sentence if the nearest service provider or treatment facility is an unreasonable distance from an offender's residence, particularly if their driving license has been suspended or revoked and there are no alternative means of transportation. Such practical problems result in sentencing disparities.

In this context, a common observation among judges across the country is the lack of availability of treatment services and overcrowding in jail facilities as evidenced by waiting lists. Research shows that a majority of hard core drinking drivers are diagnosed with either alcohol dependence or addiction (Lucker 1991), making treatment a necessity for these offenders. Indeed, treatment was ranked by almost 40% of judges in our survey as the sanction most likely to prevent recidivism among hard core drinking drivers. However, the availability of treatment as a viable sentencing option appears to be limited as 80% of judges agree that more alcohol treatment facilities are needed for repeat offenders.

80% of judges want more alcohol treatment facilities for repeat offenders.

Finally, sentencing disparities arise as a result of different philosophies, beliefs, and opinions among judges as well as from a lack of tiered penalties in DWI legislation. For example, a comparison of first-offender manslaughter cases involving impaired drivers revealed considerable differences between sentences handed down in rural areas of Missouri and those handed down in urban areas. "In rural areas sentences range up to seven years while in urban areas sentences can be as little as 90 days." (Lhotka 1999). Judges in rural areas favored more punitive sentences whereas those in urban areas emphasized a rehabilitative approach, reflecting differing philosophies. Additionally,

when tiered penalties do not exist, judges may be required to sentence repeat offenders to the same sanctions as first-offenders.

6.7.2 Consequences of the Problem

Sentencing disparity can result in offenders not receiving the appropriate sanctions. This reduces the potential for behavior change and increases the likelihood of recidivism. Indeed, the gap between belief and empirical evidence appears substantial in some cases. For example, despite the impressive body of evidence demonstrating the effectiveness of alcohol ignition interlocks (Beirness 2001), only 12% of the judges in our survey believe they will reduce recidivism.

Criminal justice professionals and the public can also become frustrated with inequality in sentencing and lose faith in the ability of the system to ensure fundamental fairness and to deal with these offenders effectively.

But perhaps the most significant consequence of sentencing disparity is that it often leads to "judge-shopping"; offenders will attempt to have their case heard by a judge that is perceived to be more lenient. Most judges have a standard set of dispositions that they hand down for impaired driving offenses, and defendants quickly become familiar with which judges hand down what type of sentence. It is only logical to try and have a case heard in front of a judge that might hand down a less severe sentence. And, the practice is not at all uncommon -- nearly half (46%) of the judges in our survey report that judge-shopping occurs occasionally or often.

Nearly half (46%) of judges surveyed report judge-shopping occurs occasionally or often.

6.7.3 Recommended Solutions

Judges have recommended a number of solutions to the problem of sentencing disparity.

- **Access to scientific evaluations of sanctions.** Judges believe that a contributor to sentencing disparities is differential familiarity with scientific evaluations of the effectiveness of various sanctions. This leads to confusion and uncertainty about

what sanctions work best with which offenders. Accordingly, judges would like greater access to scientific evaluations of sanctioning methods to increase the likelihood they are applying the most appropriate sanctions to individual offenders. Indeed, almost 80% of judges report that summaries of scientific research on the effectiveness of sanctions would greatly benefit sentencing decisions and lead to greater consistency and lower recidivism rates.

Almost 80% of judges report that timely and easy access to research on the effectiveness of sanctions would benefit sentencing decisions.

♦ **DWI courts.** Judges support expanding the use of DWI courts in order to bring greater uniformity to sentencing. These courts would reduce the number of judges responsible for DWI cases and involve judges familiar with various sanctions and their associated benefits. DWI court judges would also have greater experience on which to base their sentencing decisions. Overall, more than 50% of judges in our survey support the expanded development of DWI courts to reduce disparity in sentencing.

More than 50% of judges support the expanded development of DWI courts to reduce disparity.

♦ **Tiered penalties.** Three-quarters (74%) of the judges in our survey believe the development of tiered penalties in states where they do not currently exist would assist in the sentencing of repeat offenders and reduce disparity. Tiered penalties provide an appropriate range of penalties that may be imposed, while still allowing for discretion with regard to the individual circumstances of a case. With a tiered system, judges will be able to impose more appropriate penalties for repeat offenders than are currently possible.

74% of judges believe the development of tiered penalties will reduce disparity.

6.8 Mandatory Minimum Sentences

♦ **The problem**. Introduced in an effort to bring consistency and uniformity to sentencing, mandatory minimum sentences stipulate the nature and level of sanctions that are to be imposed for certain offenses. Judges believe that mandatory minimums impede rather than facilitate the sentencing process because they can stipulate sanctions that are either inappropriate or inapplicable. It is not uncommon for the policies and requirements of some sanctioning programs to exclude repeat offenders who are subject to mandatory minimums. Moreover, loopholes in penalty legislation

make them confusing to apply, and resources are not consistently available to impose these sanctions.

- **The consequences.** When provisions contained in mandatory minimums are dated, impractical, and not based on empirical evidence, offenders receive inappropriate or ineffective sentences which diminish deterrent effects. Inadequate resources to consistently impose these sentences, a lack of available services, or difficulties in interpreting legislation erode the certainty with which minimums are imposed and undermine public confidence in the system.

- **The solution.** Judges recommend the inclusion of more alternative and creative sentencing options in mandatory minimum sentences. Existing mandatory minimums can also be improved by clarifying and updating the legislation as well as by allocating more resources to ensure that these sentences can be imposed.

6.8.1 Problem Description and Scope

Somewhat related to the issue of sentencing disparity is the problem of mandatory minimum sentences, however, the extent of judicial concern about mandatory minimums is sufficient to identify it as a separate issue. Introduced in an effort to bring consistency and uniformity to sentencing, mandatory minimum sentences stipulate the nature and level of sanctions that are to be imposed for certain offenses. Judges believe that mandatory minimums impede rather than facilitate the sentencing process because they can stipulate sanctions that are inappropriate or inapplicable. It is not uncommon for the policies and requirements of some sanctioning programs to exclude many offenders who are subject to mandatory minimums. Moreover, loopholes in penalty legislation make them confusing to apply, and resources are not consistently available to impose these mandated sanctions.

Mandatory minimum sentences became very popular in the early 1980s to ensure that offenders received a certain level of sanctioning that reflected the severity of the offense and achieved deterrence. These minimums often emphasized punishment and incapacitation as the main goals of sentencing and typically involved traditional sanctioning methods (e.g., fines, jail and probation). With increased public attention

focused on the impaired driving issue, governments began to legislate mandatory minimum sentences for DWI.

Judges are concerned that the mandatory sanctions introduced two decades ago may no longer be appropriate. For example, a majority of hard core drinking drivers are diagnosed as alcohol dependant (Lucker 1991), yet meaningful treatment is not consistently included in mandatory minimums. Fines proscribed in mandatory minimums can discriminate against poor/indigent offenders and mandatory conditions of release of DWI offenders can be incompatible with the basic goal of bail, namely to prevent flight (Minnesota Annual Judges Conference 1999).

Judges also report that the composition and structure of mandatory minimum sentences can compromise their effectiveness. A common concern among judges is that, in many states, mandatory minimum penalties for repeat offenses are not dissimilar from those for first-offenses -- i.e., penalties are not tiered. Consequently, repeat offenders can receive the same disposition as first-offenders, even though repeat offender cases, by their very nature, suggest a different approach is needed. Judges also indicate that some of the mandated sentences might work with first-offenders but show no effect on repeat offenders. For example, judges believe that Victim Impact Programs have considerable success with first-offenders, but not with repeat offenders. Of course, the structure of sentencing options should be guided by empirical evidence and not beliefs, but the point is that there is a need to review mandatory minimum sentences to ensure that what is prescribed is effective.

Another example that illustrates judges' concerns about mandatory minimums involves treatment. In many states, judges are required to include treatment as part of the sentence for repeat offenders. However, this can be a hollow requirement if no program or facility is available in the judge's jurisdiction. Even when programs are available, policies may make repeat offenders ineligible for participation. For example, many treatment programs will not accept offenders that have a history of violence, yet, due to the nature of their problems with alcohol, some offenders also have a history of violence.

Similarly, despite mandated jail terms, judges frequently find that existing correctional facilities lack space for DWI offenders due to overcrowding issues. As a result, these

offenders are rarely required to serve time in jail, or serve considerably less time that the statute requires, even though a mandatory minimum sentence has been imposed by the judge.

Even the legislation itself can be problematic because it contains language or loopholes that erode or defeat its intent. For example “mandatory” license suspensions can frequently be circumvented, if it can be shown that the removal of the license would constitute a hardship for the offender, or their family (American Bar Association 1987). “Mandatory” ignition interlocks can also be avoided if the offender does not own a vehicle (sometimes because ownership is transferred prior to conviction).

Judicial understanding and application of mandatory minimum sentences can also vary considerably depending on how the legislation is interpreted. For example, judges may interpret mandatory minimums to be applicable only if prior convictions are felonies and not misdemeanors, or only if defendants had been convicted in state court, not municipal court (Ross and Foley 1987). One judge succinctly described the problem, stating, “I have no problem with mandatory minimums, but I have a hard time figuring out when they apply” (Minnesota Annual Judges Conference 1999).

6.8.2 Consequences of the Problem

The provisions contained in mandatory minimum sentences are often dated, impractical and, in many cases, not based on empirical evidence of effectiveness. Offenders can receive inappropriate or ineffective sentences which diminish deterrent effects. Moreover, in some states, the minimums do not differentiate significantly between first-time and repeat offenders, so both can receive similar sentences.

Inadequate resources to impose the sentences consistently, a lack of available services, or difficulties in interpreting legislation in some jurisdictions erode the certainty with which minimums are imposed and undermine public confidence in the system.

6.8.3 Recommended Solutions

Judges identified three ways to address the problems associated with mandatory minimum sentences.

- **More alternative and creative sentencing options.** Judges recommend the inclusion of more alternative and creative sentencing options (e.g., treatment, ignition interlocks, staggered sentencing) in mandatory minimum sentences. In particular, they would like to see more alternatives to incarceration. A more progressive attitude towards sanctioning has evolved among criminal justice professionals and existing research substantiates the belief that incarceration is not as effective as previously believed (Morris and Tonry 1990). Many new alternatives to sanctioning are being employed with successful results and decreased costs to the public (Jones et al. 1996).

Judges recommend the inclusion of more alternative and creative sentencing options in mandatory minimum sentences.

Accordingly, judges want more alternatives to incarceration included in mandatory minimums that will have a sufficient deterrent effect but still reflect the severity of the offense. Many judges recommend more intensive supervision programs and other alternatives that demonstrate a reduction in recidivism. Many judges specifically recommended the inclusion of more meaningful treatment in these sentences. Research has demonstrated the effectiveness of this sanction and if penalties are to be mandated, this should be included (Wells-Parker et al. 1995).

Judges also support the inclusion of more creative sentence alternatives. For example, Judge Ted Poe, a District Court Judge in Harris County, Texas, requires offenders to erect and maintain markers at the site of their crash, as well as visit and maintain their victims' gravesites. Other offenders are required keep a picture of their victim in their jail cell, to complete a set number of hours speaking at local high schools about the dangers of drunk driving, and view autopsies or carry placards indicating that they have been convicted of impaired driving (MADD 2002). Traditional sanctions are often not effective with hard core drinking drivers as they can avoid confronting the consequences of their behavior and the tragedy incurred by victims. Some judges believe these creative sanctions require offenders to take responsibility for their actions and can result in reduced recidivism (MADD 2002)

♦ **Clarify legislation and update existing minimums.** Judges recommend simplifying the existing legislation regarding the use and application of mandatory minimum sentences to achieve consistency in sentencing. Legislation should be reviewed so phrases such as "if practicable" are omitted and loopholes are closed to reduce the circumvention of mandatory minimum sentences (NHTSA 1998).

♦ **More resources.** In many cases, minimum sentences cannot be fulfilled because the resources are not available (e.g., no interlock service providers; no treatment facilities). Particularly in the case of hard core offenders where the diversity of sanctions is important, the needed sanctions, especially if mandated, are critical. Mandatory minimums will not be applied if the resources to fulfill them are not available.

6.9 Juries

♦ **The problem**. Jury trials are more likely to be selected by repeat offenders, who are often facing substantial incarceration time. Not only can this election delay a case several months, but offenders also appear to recognize that DWI jury trials produce much lower conviction rates than jury trials involving other criminal offenses -- 60% and 75% respectively (NCSC 2001). It is likely that juries are ill-equipped to adjudicate complex evidentiary and legal issues and more frequently reach inappropriate verdicts. Juries often make incorrect assumptions about the evidence (e.g., assume a breath test was not offered) that the prosecution may not be able to correct. DWI offenders can also unfairly benefit from the sympathetic attitudes towards drinking and driving that still prevail in some jurisdictions.

♦ **The consequences**. Offenders can avoid sanctioning if juries are unable to reach appropriate verdicts due to the complexities associated with evidentiary and legal issues. The lack of consequences for these offenders does nothing to deter impaired driving or change key behavior.

Jury trials also contribute considerably to caseload demands because of prolonged processing. These delays constitute a drain on the limited court resources available.

♦ **The solution.** Nearly 75% of the judges in our survey believe evidence of test refusal should be admissible at trial; only 25% believe that evidence of priors should be admitted as well. This important information would assist the jury in reaching decisions based on a more complete understanding of the facts of the case. Some judges also recommend the elimination of jury trials for lesser offenses.

6.9.1 Problem Description and Scope

According to the Sixth Amendment of the U.S. Constitution, all citizens have the right to trial by an impartial jury -- a group of citizens that has been selected according to procedural rules from the jury pool (i.e., all citizens with eligibility to serve on a jury based on DMV and/or voter registration). These citizens are considered impartial to the guilt or innocence of the defendant and have a duty to hear the evidence presented and make a determination of guilty or not guilty. In almost all states, jury verdicts are required to be unanimous to either acquit or convict. Juries have traditionally been composed of 12 members, but some states vary with regard to requirements and may include more or fewer members. For lesser offenses, juries are commonly composed of 6 members, sometimes referred to as a “rocket docket”.

The right to a jury trial varies according to the level of criminal offense (e.g., misdemeanor or felony), depending on the state. For example, a majority of states (e.g., FL, GA, IN, MS, MO, SD, TN) grant the right to a jury trial for a first-offense but in some states this right may be restricted depending on whether incarceration is a sanction for the offense (e.g., AK, MN, OK), and/or the length of imprisonment -- e.g., AZ, NE, RI (NTLC 1997). In other states (e.g., VA), the accused cannot demand a jury trial on a misdemeanor charge until they are first convicted in a bench trial. They can then appeal the case for a trial *de novo* in a court of record.

Jury trials are more likely to be selected by repeat offenders, who are often facing substantial incarceration time. Not only can this election delay a case several months, but offenders also appear to recognize that DWI jury trials produce lower conviction rates than in jury trials involving other offenses -- 60% and 75% respectively (NCSC 2001). It is likely that juries are often ill-equipped to adjudicate complex evidentiary and legal

issues and reach inappropriate verdicts. Juries often make incorrect assumptions about the evidence (e.g., assume a breath test was not offered) that the prosecution may not be able to correct. DWI offenders can also unfairly benefit from the sympathetic attitude towards drinking and driving that still prevail in some jurisdictions.

The extent of this problem varies depending on the availability of jury trials for DWI offenses in each state. Nationally, judges estimate about 16% of repeat offender cases result in trial (bench and/or jury); the large majority of DWI cases (80%+) are resolved with a plea agreement. Although statistics on the number of jury trials are not collected or reported nationally, judges estimate that 12% of repeat offender cases result in a jury trial, with the other 4% being resolved by bench trial. Jury trials are more common in some jurisdictions than others because of variations in social attitudes towards impaired driving as well as the availability of judges that impose less severe sentences.

Judges estimate that 12% of repeat offender cases result in a jury trial.

The evidence associated with DWI cases is often complex, involving a variety of scientific and technical evidence such as breath/blood analysis, retrograde extrapolation of blood alcohol levels, and accident reconstruction (see section 6.2). This evidence can be challenging for many criminal justice professionals, as has been discussed extensively in this series of reports. This is even more complicated for jury members who typically lack experience with these scientific issues as well as the legal training necessary to interpret the evidence. Uncertainty creates reasonable doubt. In this context, prosecutors and judges report that a BAC result is often the evidence that is most clearly understood by jury members and tends to be the most compelling in the decision-making process. However, this is the one piece of evidence often missing in cases involving hard core offenders, who are more likely to refuse the BAC test.

Jury members also reach verdicts without complete knowledge of the evidence. Critical evidence of test refusal and prior convictions, is not consistently available to the jury due to appellate court rulings (precedent). In a few states (e.g., MA, MD, MI, HI, VA) evidence of test refusal is either inadmissible or only admitted under limited circumstances. This means that jury members often do not hear any evidence regarding the request for a breath test or the defendant's refusal to cooperate. As a result, jury members often incorrectly conclude that the officer did not offer the breath test, and this

is damaging to the credibility of the officer. Jury members assume that the officer did not complete his/her duties and this also raises doubts about the ability of the officer, and other evidence collected. Prosecutors often have no way of correcting this conclusion. "Even when the prosecution has apparently proven guilt beyond a reasonable doubt, an inappropriate not-guilty verdict may be rendered. A failure of jury members to understand or correctly interpret the evidence or court rules underlies such verdicts." (NHTSA 1998, p. 61).

Jury members are also not usually aware of any prior DWI convictions the defendant may have. Prior convictions are often excluded as they may be unfairly prejudicial to the defendant. The rules of evidence in most states reflect the idea that the defendant can only be tried on the facts surrounding the case, not their propensity to commit that particular offense. Courts believe that juries would be unable to separate a defendant's propensity to drive while impaired from the actual facts surrounding the case on trial. However, jury members frequently assume incorrectly that this is a first-offense without evidence of priors. Without hard evidence of guilt, such as a BAC result, jury members are often likely to give the defendant "the benefit of the doubt" and acquit. Both prosecutors and judges report that, when polled following the resolution of the case, jury members often say they would have been inclined to convict on the evidence if they had known about prior offenses.

Finally, hard core drinking drivers are more likely to select jury trials in jurisdictions where sympathetic attitudes prevail regarding impaired driving offenses. Unfortunately, there are still some segments of society that do not view impaired driving offenses as a serious threat to public safety. This means that jury members are more inclined to sympathize with the defendant, often believing that "there but for the grace of God go I." Unfortunately, these attitudes can prejudice the outcome but rarely are they addressed meaningfully in the jury selection process.

This sympathetic attitude is further encouraged by defense attorneys who attempt to humanize the defendant. Common defense tactics are to refer to the defendant's community standing and reputation, employment, family status, volunteer activities, and financial responsibilities. The defense will also attack the evidence, arguing technical issues such as the reliability of the breath testing device, which may often confuse juries

significantly to constitute reasonable doubt. "Juries introduce a great deal of uncertainty into the process because they are influenced by experiences, inaccurate or wrong information and misconceptions." (NHTSA 1998, p.48).

6.9.2 Consequences of the Problem

Offenders can avoid sanctioning if juries are unable to reach appropriate verdicts due to the complexities associated with evidentiary and legal issues. The lack of consequences for these offenders does nothing to deter impaired driving or change key behaviors.

Jury trials also contribute significantly to caseload due to the extended time and resources necessary to adjudicate them. Judges spend considerable time informing jury members on rules of evidence and other procedural rules to ensure that cases are adjudicated correctly. Furthermore, jury trials are a considerable drain on court resources due to the additional time required to empanel a jury as well present complex technical evidence and legal arguments in a meaningful manner.

6.9.3 Recommended Solutions

Judges across the country recommend two key solutions for the problems associated with jury trials.

- **Make evidence of test refusal and prior convictions admissible.** Judges recommend making evidence of test refusal and prior convictions admissible in court. Nearly 75% of judges believe that test refusal should be admissible at trial and 25% of judges believe that evidence of prior convictions should be admitted. For juries to reach appropriate verdicts, they must be fully informed with regard to the circumstances of the case. Evidence of test refusal and prior convictions would effectively dispel many of the incorrect assumptions made by juries that often result in the acquittal of defendants. Many states have already addressed the issue of test refusal admissibility; however, little action has been taken with regard to the admissibility of prior convictions.

Nearly 75% of judges believe test refusal should be admissible at trial; 25% believe prior convictions should be admissible.

♦ **Elimination of jury trials for lesser offenses.** Judges in some states would like to see eligibility for jury trials limited for lesser offenses. DWI cases are some of the most complex and difficult to adjudicate and many judges believe that justice is not served by having juries decide them. Judges are more competent than juries to resolve these cases and evaluate the evidence according to legal rules, without the influence of personal bias. In this regard, Arizona has proposed a bill to eliminate the option for a jury trial for a first-offense DWI (NHTSA 1998). However, there is some debate among judges as to whether this recommendation should be pursued as it appears to conflict with the Sixth Amendment. Consequently, careful consideration of this recommendation will be necessary.

7.0 Summary

It should be evident from reading this report that the adjudication of a DWI case is highly dependant on the work completed by other criminal justice agencies (e.g., police, prosecutors). In addition to highly technical evidence and overlapping legal issues, the unprecedented growth in DWI legislation in the past decade has made an already complicated system even more complex. Even when defendants are ultimately convicted, there are currently few guarantees that the sanctions imposed will actually be fulfilled despite the best efforts of probation and parole officers. There is a need to streamline and simplify the adjudication and sanctioning of DWI cases to improve the effectiveness and efficiency of the system. This is a primary concern to judges and a linchpin to successfully improving the DWI system.

In addition to this general recommendation, a variety of specific changes to the DWI system can improve the adjudication and sanctioning of repeat offender cases. These improvements are organized below in terms of the general method by which this can be achieved.

7.1 Training and Education

Judges identified several areas in which training can improve the adjudication and sanctioning of hard core drinking drivers:

- greater opportunities for judicial education on DWI evidentiary issues to prepare and familiarize judges with a variety of specialized scientific and legal issues; and
- more training for all criminal justice professionals so that they may acquire the necessary technical and specialized skills and knowledge to ensure the proper detection, apprehension, prosecution and monitoring of hard core drinking drivers.

7.2 Communication and Cooperation

Judges believe that improved communication and cooperation with other professionals involved in the DWI system will facilitate the adjudication of DWI cases and the sanctioning of hard core drinking drivers. They support:

- streamlining the monitoring process so that judges can efficiently review information from probation officers and quickly identify offenders failing to comply with imposed sanctions and conditions;
- centralizing the reporting process so judges receive a single report from probation officers who collate and synthesize the needed information about offender monitoring and compliance from relevant agencies;
- facilitating more contact and better communication between judges, probation officers, treatment professionals and offenders to ensure that offenders comply with imposed sanctions and conditions -- there was considerable agreement that these objectives can best be achieved through specialized DWI courts;
- making bond a condition of a bench warrant issued for an offender that has failed to appear, to ensure that the arraigning judge will be aware of this behavior and take adequate steps to guarantee future appearances;
- developing transportation and cost-sharing agreements between neighboring jurisdictions to encourage courts to honor outstanding warrants and ensure that offenders are returned to court to answer for DWI charges after failing to appear;
- requiring electronic home alcohol monitoring in lieu of maximum bond at the pre-trial phase; and
- implementing a telephone-reminder system to notify offenders of upcoming appearances to reduce the incidence of failure to appear.

7.3 Record Linkages, Availability and Access

Records containing data and information pertinent to the adjudication of DWI cases are maintained by a diversity of agencies. Records vary in terms of how current the information is with regard to content (both in terms of the nature of the information and its scope), as well as its accuracy and completeness. Judges require timely access to accurate, contemporary and comprehensive records to facilitate the adjudication of DWI cases. The importance of this has been underscored by numerous agencies and remains a critical need. Judges support the following improvements to ensure the availability of needed information:

- improving the quality of records currently available in the National Driver Register to ensure that they reflect current charges and clearly indicate all dispositions;
- creating uniform driver abstracts;
- standardizing court reporting practices and look-back periods; and
- increasing the availability of alcohol evaluation and pre-sentence reports.

7.4 Technology

Judges believe that greater use of technology can improve the efficiency and effectiveness with which they adjudicate cases involving hard core drinking drivers. They support:

- greater use of arrest and booking videos to improve the quality and quantity of evidence brought to court, clarify discrepancies in the interpretation of evidence and substantiate officer testimony; and
- creating of an integrated records system linking all relevant agencies and providing comprehensive and timely information on the DWI cases being adjudicated.

7.5 Legislation and Regulation

Judges also identified a number of legislative changes that would improve the adjudication of repeat DWI cases:

- making refusal a criminal offense to ensure that offenders are not permitted to circumvent sanctioning and avoid identification as a repeat offender;
- admitting evidence of refusal at trial to permit judges and juries a fair and accurate basis for reaching a verdict;
- legislatively limiting the number of motions and continuances, using explicit language to ensure reasonable processing of DWI cases and minimize unnecessary delays;
- reducing statutory requirements to permit officers reasonable flexibility to respond to the dynamic environment in which DWI investigations and arrests occur;
- using tiered penalty systems that specify increased sanctions for repeat offenses;
- eliminating the option of a jury trial for lesser DWI offenses;

- clarifying and updating existing legislation on mandatory minimum sentences; and
- including more alternative and creative sentencing options in mandatory minimum sentences based on empirical scientific research.

8.0 Bibliography

American Bar Association. (1987). Drunk driving laws and enforcement: An assessment of effectiveness. *Alcohol, Drugs and Driving* 3 (2): 9-30.

American Council on Alcoholism. (2001). National DUI/Drug Court Strategy. www.aca-usa.org

American Prosecutors Research Institute. (2001). The Prosecutors Deskbook: Ethical Issues and Emerging Roles for 21st Century Prosecutors, 3rd Edition

Balmforth, D. (2000). National Survey of Drinking and Driving Attitudes and Behavior: 1999. Volume I: Findings. National Highway Traffic Safety Administration. U.S. Department of Transportation.

Basten Q.C, J., (1996). Should Judges Have PERFORMANCE STANDARDS?, Law Society Journal 34(1): p. 46, New South Wales, Australia

Beck, K., Rauch, W., Baker, E., and Williams, A. (1999). Effects of ignition interlock license restrictions on drivers with multiple alcohol offenses: a random trial in Maryland. *American Journal of Public Health* 89: 1696-1700.

Beirness, D.J. (2001). Best practices for alcohol interlock programs. Traffic Injury Research Foundation.

Beirness, D.J., Simpson, H.M., and Mayhew, D.R. (1998). Programs and policies for reducing alcohol-related motor vehicle deaths and injuries. *Contemporary Drug Problems 25/Fall.*

Belenko, Steven. (1998). Behind Bars: Substance Abuse and America's Prison Population. National Center on Addiction and Substance Abuse. Columbia University.

Blakey, Marion C. (1999). Confronting the problem of hard core drunk drivers. *Impaired Driving Update* 3 (2): 31-33.

Braun, Bill. (April 4, 1999). Start of 'DUI Court' delayed. Tulsa World.

Bureau of Justice Statistics. (1995). Increasing the Utility of the Criminal History Record: Report of the National Task Force. U.S. Department of Justice.

Byrne, J.M., Lurigio, A.J., and Petersilia, J. (1992). Smart Sentencing: The Emergence of Intermediate Sanctions. Newbury Park, California.

Campbell, Matt. (March 4, 2000). DWI task force agrees to recommendations. The Kansas City Star.

Cleary, J. (2002). Staggered Sentencing for Repeat DWI Offenders: An Innovative Approach to Reducing Recidivism. Minnesota House of Representatives, Research Department.

Cole, Hon. David R. (1999). Maricopa County DUI Court, *The DRE* 11 (4): 4-5. City of Phoenix. Law Department. City Prosecutors Office.

Court Statistics Project. (1995). State court caseload statistics, 1994. National Center for State Courts. State Justice Institute.

Criddle, Laura M., and Carson, Barbara. (1998). The injured drunk driver in central Texas: Incidence, demographics, and legal ramifications. *Journal of Emergency Nursing* 24 (4): 309-315.

Cunniff, M.A. (2002). Jail Crowding: Understand Jail Population Dynamics. National Association of Criminal Justice Planners. National Institute of Corrections. U.S. Department of Justice. http://www.nicic.org

Cydulka, Rita K., Harmody, Matthew R., Barnoski, Anita, Fallon, William, and Emerman, Charles L. (1998). Injured intoxicated drivers: Citation, Conviction, referral, and recidivism rates. *Annals of Emergency Medicine* 32 (3): 349-352.

DeFrances, Carol J. and Steadman, Greg W. (1998). Prosecutors in State Courts. Bureau of Justice Statistics Bulletin, U.S. Department of Justice.

Dehn, James. (2002). Personal communication.

Editorial. (February 26, 2000). Get dangerous drivers off the road. Chicago Tribune.

Elliott, Janet. (August 2, 2000). Sober truth: Law fails to curb drunken driving. Wall Street Journal.

Fallis, D. (October 10th, 1998). Is there any order in Oklahoma's courts: Figurative dual court system is a boon to offenders. http://search.tulsaworld.com/archives.

Federal Bureau of Investigation. (July 15th, 1999). Press Release – NCIC 2000. U.S. Department of Justice.

Federal Bureau of Investigation. Uniform Crime Reports: Crime in the United States – 2000.

Forcier, M.W., Kurtz, N.R., Parent, D.G., and Corrigan, M.D. (1986). Deterrence of Drunk Driving in Massachusetts: Criminal Justice System Impacts. *The International Journal of Addictions* 21 (11): 1197-1220.

Glad, A. (1987). After 50 years with per se law: The drinking and driving problem in Norway. In: P.C. Noordzij and R. Roszbach (eds.), *Alcohol, Drugs and Traffic Safety – T86*, p.241-244. Amsterdam: Excerpta Medica.

Goldsmith, S.. (1992). Prosecutors and Drunk Driving: Choosing an Effective Role. *Alcohol, Drugs and Driving* 8(1): 1-15.

Gottfredson, D.M., (1999). Effects of Judges' Sentencing Decisions. National Institute of Justice: Research in Brief

Grady, P.. (Fall 2000). DRE Evidence Admitted. *The DRE* 12 (4): 5-7. City of Phoenix. Law Department. City Prosecutor's Office.

Grube, J.W., and Kearney, K.A., (1983). A "Mandatory" Jail Sentence for Drinking and Driving. *Evaluation Review* 7(2): p. 235-246.

Grunwald, D., McDonald, J., and Galante, J. (2001). Drunk Driving in Rhode Island – 1995-1997. Brown University.

Guidorizzi, D.D. (unknown). Should we really "ban" plea bargaining?: The core *concerns of plea bargaining critics.* *www.law.emory.edu.ELJ/volumes/spg98/guido.html*

Hedlund, J.H., and McCartt, A.T. (2001). Drunk Driving: Seeking Additional Solutions. AAA Foundation for Traffic Safety.

Hedlund, J.H., and Fell, J. (1995). Persistent drinking drivers in the U.S. In: Proceedings of the 39th Annual Conference of the Association for the Advancement of Automotive Medicine, pp. 1-12. Des Plaines, IL.: Association for the Advancement of Automotive Medicine.

Hedlund, J.H., and Fell, J. (1995). Repeat offenders and persistent drinking drivers in the U.S. In: Proceedings of the 13th International Conference on Alcohol, Drugs and Traffic Safety, Volume 2, eds. C.N. Kloeden and A.J. McLean. pp. 596-604, Adelaide, South Australia: University of Adelaide, NHMRC Road Accident Research Unit.

House of Representatives Research Department. (1999). Task Force: Minnesota's DWI laws and practices.

Jones, R.K., Joksch, H.C., Wiliszowski, C.H. (1991). Implied Consent Refusal Impact. Final Report. U.S. Department of Transportation. National Highway Traffic Safety Administration.

Jones, R.K., Lacy, J.H., and Wiliszowski, C.H. (1998). Problems and solutions in DWI enforcement systems. National Highway Traffic Safety Administration. Technical Report. U.S. Department of Transportation.

Jones. Ralph K., Wiliszowski, Connie H., and Lacey, John H. (1999). Draft Final Report: Examination of DWI conviction rate procedures. National Highway Traffic Safety Administration. U.S. Department of Transportation.

Jones, R.K., and Lacey, J.H. (2000). State of knowledge of alcohol-impaired driving: Research on repeat DWI offenders. National Highway Traffic Safety Administration.

Jones, R.K., and Lacey, J.H. (1998). Evaluation of an Individualized Sanctioning Program for DWI Offenders. National Highway Traffic Safety Administration.

Jones, R.K., Wiliszowski, C.H., and Lacey, J.H. (1996). Evaluation of Alternative Programs for Repeat DWI Offenders. National Highway Traffic Safety Administration. U.S. Department of Transportation.

Krause, K.R., Howells, G.A., Bair, H.A., Bendick, P.J., and Glover, J.L. (1998). Prosecution and conviction of the injured intoxicated driver. *The Journal of Trauma: Injury, Infection, and Critical Care* 45(6): 1069-1073.

Kwasnoski, J.. (Spring 1998). "It was the Car's Fault". Between the Lines 7(1). National Traffic Law Center.

Kwasnoski, J., and Gould, P.. (Summer 1998). The Vehicle Autopsy. Between the Lines 7(2). National Traffic Law Center.

Kwasnoski, J. and Gould, P. (Fall 1998). Defeating Attacks on the Police Reconstructionist (Part I). Between the Lines 7(3). National Traffic Law Center.

Kwasnoski, J., and Gould, P.. (Winter 1999). Defeating Attacks on the Police Reconstructionist (Part II). Between the Lines 7(4). National Traffic Law Center.

Lawn, J., and Blakely, M. (2000). Getting hard core drunk drivers off the road. *The DRE* 12 (2): 2-5. City of Phoenix. Law Department. City Prosecutors Office.

L'Hoste, J., and Papoz, L. (1985). The role played by acute and chronic alcoholism in road accidents: The results of an epidemiological study conducted in France. In: S. Kaye (ed.), Alcohol, Drugs and Traffic Safety – T83, p. 841-858. National Highway Traffic Safety Administration.

Lhotka, W.C. (June 26, 1999). Urban, rural courts differ in sentencing drunk drivers. Good Morning St. Louis. postnet.com

Lucker, G.W., Kruzich, D.J., Holt, M.T., and Gold, J.D. (1991). The Prevalence of Antisocial Behavior Among U.S. Army DWI Offenders. *Journal of Studies on Alcohol* 52(4): 318-320.

Maull, K.I., Kinning, L.S. and Hichman, J.K. (1983). The Injured Alcohol Impaired Driver – A Prospective Study of Culpability and Accountability. 27th Proceedings of the American Association of Automotive Medicine. San Antonio, Texas.

Mayhew, D.R., Beirness, D.J., and Simpson, H.M. (2000). Trends in Drinking-Driving Fatalities in Canada – Progress Continues. Paper presented at T-2000, International Conference on Alcohol Drugs and Traffic Safety. Stockholm, May 2000.

McCartt, A.T. (2002). Enhanced Sanctions for Higher BACs: Addressing the High-Risk Offender. *Impaired Driving Update* 6 (2): 27-28.

McLachlin, J.G., Smith, R.J., Mattice, C.R., and Scholten, D.J. (1993). Hospitalization and injury influence on the prosecution of drunk drivers. *American Surgeon* 59 (8): 484-489.

Meyer, J.A. and Gray, T. (1997). Drunk drivers in the courts: Legal and extra-legal factors affecting pleas and sentences. *Journal of Criminal Justice* 25(2): 155-163.

Michigan Prosecuting Attorneys Coordinating Council. (2002). Traffic Safety Training Program. www.michiganprosecutor.com.

Minnesota Annual Judges Conference. (December 9th, 1999). Survey Responses from Judges Attending Minnesota's Annual Judges Conference, Bloomington Marriott. Bloomington, Minnesota.

Modie, N. (March 5, 1999). Reminder: See judge tomorrow – or else. Seattle Post-Intelligencer, Washington. http://www.seattle-pi.com/local/jail05.html.

Morris, N. and Tonry, M. (1990). Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System. New York.

Mothers Against Drunk Driving. (1999). Rating the States 2000. Driven Fall 1999.

Mothers Against Drunk Drivers. (2002). Sentence Structure. DRIVEN magazine.

Nalder, E. (October 27, 1997). In Seattle, old warrants never die, they simply gather dust. Seattle Times. http://seattletimes.nwsource.com/extra/browse/html/197/purg-102797.html.

National Association of State Judicial Educators (Summer 2002). NHTSA Contract Underway for DWI Website Development. NASJE News.

National Association of State Judicial Educators. (2001). New Principles and Standards in Judicial Education.

National Association of State Judicial Educators. (1999). Issues and Trends in Judicial Branch Education? Verify reference from NASJE.

National Center for State Courts. (2001). Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project.

National Commission Against Drunk Driving. (2000). National Commission Against Drunk Driving. *Impaired Driving Update* 4(3): 68.

National Commission Against Drunk Driving. (1995). Strategies for Dealing with the Persistent Drinking Driver. Transportation Research Circular. Number 437.

National Conference of State Legislatures. (2001). Legislative Tracking Database. National Highway Traffic Safety Administration. http://www.nhtsa.dot.gov/ncsl.

National Drug Court Institute. (1999). DUI/Drug Courts: Defining a National Strategy. Alexandria, VA.

National Highway Traffic Safety Administration. (2002). National Driver Register. http://www.nhtsa.dot.gov/people/perform/driver.

National Highway Traffic Safety Administration. (2001). Secretary Mineta announces progress, setbacks for highway safety in 2000. Press Release September 24, 2001. U.S. Department of Transportation.

National Highway Traffic Safety Administration. (2000). Fatal Accident Reporting System. U.S. Department of Transportation.

National Highway Traffic Safety Administration. (2000). Digest of state alcohol-highway safety related legislation. Eighteenth Edition. U.S. Department of Transportation.

National Highway Traffic Administration. (1999). Sentencing and Dispositions of Youth DUI and Other Alcohol Offenses: A Guide for Judges and Prosecutors.

National Highway Traffic Safety Administration. (1999). Student Manuel: Prosecution of Driving While Under the Influence. U.S. Department of Transportation.

National Highway Traffic Safety Administration, National Institute on Alcohol Abuse and Alcoholism. (unknown). A guide to sentencing DUI offenders.

National Highway Traffic Safety Administration. (1997) Partners in Progress: An Impaired Driving Guide for Action. U.S. Department of Transportation.

National Highway Traffic Safety Administration. (1997). Driving While Intoxicated Tracking Systems. Volume I: Design and Operation. U.S. Department of Transportation.

National Highway Traffic Safety Administration. (1997) Partners in Progress: An Impaired Driving Guide for Action. U.S. Department of Transportation.

National Judicial College (2002). 2003 NJC Courses and Programs. http://www.judges.org.

National Traffic Law Center. (2000). Prior Convictions in DUI Prosecutions: A Prosecutor's Guide to Prove Out-of State DUI/DWI Convictions. American Prosecutors Research Institute.

National Traffic Law Center. (1999). HGN: the science and the law. American Prosecutors Research Institute. National Highway Traffic Safety Administration.

National Traffic Law Center. (1997) State Summary: Right to Jury Trial for Impaired Drivers. American Prosecutors Research Institute.

National Traffic Law Center. (Summer 1995). Double Jeopardy – State Supreme Courts Rule. Between the Lines. 3(2).

National Traffic Law Center. (Winter 1996). Miranda and DRE. Between the Lines. 4(4).

National Traffic Law Center. (Summer 1999). The Eyes Have It. Between the Lines 8(2).

National Traffic Law Center. (Fall 1999). The Dirt on Digital. Between the Lines. 8(3).

National Traffic Law Center. (2001). Admissibility of Chemical Test Refusals. www.ndaa.org/apri/NTLC/LegalIssues/Resources.

National Traffic Law Center. (Spring 2000). Admissibility in Advance. Between the Lines. 9(1).

National Transportation Safety Board. (1984). Deficiencies in enforcement, judicial, and treatment programs related to repeat offender drunk drivers.

National Transportation Safety Board. (1987). Deficiencies in enforcement, judicial, and treatment programs related to repeat offender drunk drivers. *Alcohol, Drugs and Driving* 3(2): 31-42.

National Transportation Safety Board. (2000). Safety report regarding actions to reduce fatalities, injuries, and crashes involving the hard core drinking driver.

Nichols, J.L., and Ross, H.L. (1989). The effectiveness of legal sanctions in dealing with drinking drivers. Surgeon General's workshop on drunk driving: Background papers, p 93-112. U.S. Department of Health.

Orsay, E.M., Doan-Wiggens, E., Lewis. R., Locke, R., and Ramakrishan, V. (1994). The impaired driver: Hospital and police detection of alcohol and other drugs of abuse in motor vehicle crashes. *Annals of Emergency Medicine* 24(1): 51-55.

Osnos, E., Ziemba, S., Merrifield, R. (February 25, 2000). 'Hard-Core' drivers stymie rules of road; I-55 crash shows futility of laws. Chicago Tribune.

Ostrom, B.J., and Kauder, N.B. (1994). Annual Report Examining the work of state courts, 1994: A national perspective from the court statistics project. State Justice Institute.

Owens, B. (2001). Accurate Treatment Reporting. *Impaired Driving Update* 5 (3): 55;68.

Parliamentary Travelsafe Committee. (1998). The road safety implications of unlicensed driving and the driving of unregistered vehicles in Queensland. Issue Paper #2.

Parliamentary Travelsafe Committee. (1997). Compulsory BAC Testing – Should BAC testing of persons who attend a hospital for examination and treatment as a result of a motor vehicle accident be compulsory? Issue Paper #1.

Partners in Progress. (1997). An impaired driving guide for action: As part of the 11000 x 2005 partners in progress initiative. National Highway Traffic Safety Administration. U.S. Department of Transportation.

Pena, C.V. (2001). Why we need DUI/DWI courts. Impaired Driving Update 5 (3):51-52.

Pickler, N. (2001). Alcohol-Related Auto Deaths Rise. The Washington Post (September 24).

Rem Jr., J.P. (2000). Showdown at the DWI corral. Law Knowledgebase. www.lawoffice.com.

Rehm, C.G., Nelson, J., MacKenzie, D., and Ross, S.E. (1993). Failure of the legal system to enforce drunk driving legislation effectively. *Annals of Emergency Medicine* 22(8): 66-68,1295-1297.

Robertson, R.D., and Simpson, H.M. (2001). DWI System Improvements for Dealing with Hard Core Drinking Drivers: Prosecution. Traffic Injury Research Foundation.

Ross, H.L., and Foley J.P. (1987). Judicial disobedience of the mandate to imprison drunk drivers. *Law and Society Review* 21(2): 315-323.

Ross, H.L., Simon S., Cleary, J., Lewis, R., and Storkamp, D. (1995). Causes and Consequences of Implied Consent Test Refusal. *Alcohol, Drugs and Driving* 11(1): 57-72.

Rottman, D.B., Flango, C.R., and Lockley, R.S.. (1995). State Court Organization 1993. Bureau of Justice Statistics. U.S. Department of Justice.

Runge, J.W., Pulliam, C.L., Carter, J.M., and Thomason, M.H. (1996). Enforcement of drunken driver laws in cases involving injured intoxicated drivers. *Annals of Emergency Medicine* (1): 66-72.

Schaver, M. (1998). Jefferson County faces huge backlog of arrest warrants. Courier-Journal. Louisville, Indiana. http://www.courier-journal.com/localnews/1998/9808/30/19980830warrants.html.

Shaver, Katherine, and Fallis, David S. (September 24, 2000). Special Report: One more for the road: A county's high tolerance. Washington Post.

Shaver, K., and Fallis, D.S. (September 25, 2000). Special Report: Loophole Benefit Defendants. Washington Post.

Shaver, K., and Fallis, D.S. (September 26, 2000). Special Report: Blame Plenty, Solutions Few. Washington Post.

Shiner, D. (1992). The Impact of Court Monitoring and No-Plea Bargaining Laws on DWI Behavior, Enforcement, and Adjudication. Alcohol, Drugs and Driving 8(1): 17-31.

Simpson, H.M., and Robertson, R.D. (2001). DWI System Improvements for Dealing with Hard Core Drinking Drivers: Enforcement. Traffic Injury Research Foundation.

Simpson, H.M., Mayhew, D.R., and Beirness, D.J. (1996). Dealing with the hardcore drinking driver. Traffic Injury Research Foundation.

Simpson, H.M. (1995). Who is the persistent drinking driver? Part II: Canada and elsewhere. In Transportation Research Circular, No. 437. *Strategies for Dealing with the Persistent Drinking Driver*. Washington, D.C: Transportation Research Board.

Simpson, H.M., Beirness, D.J., Mayhew, D.R. (1994). Decline in drinking and driving crashes, fatalities and injuries in Canada. In *Transportation Research Circular, 422. The Nature of and the Reasons for the Worldwide Decline in Drinking and Driving*. April, 1994: 26-38. Washington, D.C: Transportation Research Board/National Research Council.

Simpson, H.M. (1993). Drinking and Driving in the 1980s: Did things really get better? *Journal of the Alcoholic Beverage Medical Research Foundation* 3 (2): 75-78.

Simpson, H.M., and Mayhew, D.R. (1991). The hard core drinking driver. Traffic Injury Research Foundation.

Simpson, H.M., Beirness, D.J., Mayhew, D.R. (1991). The Hard Core Drinking Driver. Ottawa: Traffic Injury Research Foundation of Canada.

Smith, Scott R., and O'Rourke, Thomas W. (1997). Small-area prevalence estimates of drinking and driving. *American Journal of Health and Behavior* 21(5): 364-376.

Stewart, K., and Voas, R.B. (1994). Decline in drinking and driving crashes, fatalities and injuries in the United States. In: Transportation Research Circular, 422. The Nature of and Reasons for the Worldwide Decline in Drinking and Driving, April 1994: 50-59, Washington, D.C.: Transportation Research Board/National Research Council.

Sweedler, B.M. (1994). *Transportation Research Circular, 422*. *The Nature and Reasons for the Worldwide Decline in Drinking and Driving.* Washington, D.C: Transportation Research Board.

Sykes, Betsy. (1998). New DWI laws clogging court system. WRAL Online. http://www.wral-tv.com/news/wral/1998/0206-new-dwi-laws-clogging.

Tashima, H.N., and Helander, C.J. (2000). Annual Report of the California DUI Management Information System. California Department of Motor Vehicles.

Tashima, H.N., and Helander, C.J. (1998). Annual Report of the California DUI Management Information System. California Department of Motor Vehicles.

The Century Council. The National Hardcore Drunk Driver Project. (1999). From the grassroots to a National agenda: Issues and insights on hardcore drunk driving. Community Forums Report Draft.

The Century Council. The National Hardcore Drunk Driver Project. (1997). Combating hardcore drunk driving: A sourcebook of promising strategies, laws and programs.

The National Hardcore Drunk Driver Project. (2001). State Legislative Section. http://www.dwidata.org/state-legl.

The Foundation for Constructive Change. (1998). Report on the Second Judicial District Court Judges' Drunk Driving Sentencing.

Tonry, M. (1999). The Fragmentation of Sentencing and Corrections in America. Papers from Executive Sessions on Sentencing and Corrections. No. 1. Sentencing and Corrections: Issues for the 21st Century. Office of Justice Programs. National Institute of Justice.

Traffic Institute. (2000). 23rd Annual Vehicular Homicide/DUI Conference. Northwestern University.

Transportation Research Circular. (1999). DRAFT: Issues and methods in the Detection of alcohol and other drugs.

Transportation Safety Board. (1984). Safety Study: Deficiencies in enforcement, judicial, and treatment programs. NTSB #: SS-84/04.

U.S. Department of Transportation. (2002). Press Release: DOT Releases Preliminary Estimates of 2001 Highway Fatalities. April 22, 2002.

U.S. Department of Health and Human Services. (1988). Surgeon General's Workshop on Drunk Driving: Background Papers.

Vahlkamp, Mark E. (Fall 2000). Maintaining the DRE Program. *The DRE* 12 (4): 10-11. City of Phoenix. Law Department. City Prosecutor's Office.

Vingilis, E., Blefgen, H., Coulbourne, D., Culver, P., Farmer, B., Hackett, D., Treleaven, J., Soloman, R. (October 1990). The adjudication of alcohol-related criminal driving cases in Ontario: A survey of Crown Attorneys. Canadian Journal of Criminology. 639-649.

Voas, R.B. (2001). Have the courts and motor vehicle departments adequate power to control the hardcore drunk driver. Abstract. Pacific Institute for Research and Evaluation.

Voas, Robert B. (1999). The NHTSA rules on repeat intoxicated driver laws: An important first step to control high-risk driver. *Impaired Driving Update* 3(2): 27-30.

Voas, R.B., Marques, P.R., Tippetts, A.S., and Beirness, D.J. (1999). The Alberta interlock program: The evaluation of a province-wide program on DUI recidivism. *Addiction* 94: 1849-1859.

Wagenaar, A.C., Zobek, T.S., and Williams, G.D. (2000). Effects of DWI control efforts: a systematic view of the literature from 1960-1991. University of Minnesota, School of Public Health. Minneapolis, MN.

Weinrath, M. (1999). Are New Directions Warranted for the Pre-Sentence Report? An Empirical Assessment of its Predictive Utility in the Adult Court System. *Journal of Crime and Justice* 22(1): p. 113-129.

Wells-Parker, E.; Bangert-Drowns, R.; McMillen, D.L.; and Williams, M. 1995. Final results from a meta-analysis of remedial interventions with drink/drive offenders. Addiction 90: 907-926.

Williams, A.F., and Wells, J.K. (1993). Factors associated with high blood alcohol concentrations among fatally injured drivers in the United States, 1991. *Alcohol, Drugs and Driving* 9(2): 87-96.

Wiliszowski, C.H., Rodriguez-Iglesias, C.E., Lacey, J.H., Jones, R.K., and Cyr, E. (2001). A Study of Outstanding DWI Warrants. Final Report. National Highway Traffic Safety Administration.

Wiliszowski, C., Murphy, P., Jones, R., and Lacy, J. (1996). Final Report: Determine reasons for repeat drinking and driving. National Highway Traffic Safety Administration. U.S. Department of Transportation.

Williams, A.F. and Wells, J.K. (1993). Factors associated with high blood alcohol concentrations among fatally injured drivers in the United States, 1991. *Alcohol, Drugs and Driving* 9 (2): 87-96.

Wilson, K.A.C. (1999). Backlog of warrants climbing. Seattle Post-Intelligencer. http://www.seattlep-i.com/local/warr07.shtml.

Wilson, R.J., and Mann, R.E. (1990). Drinking and Driving: advances in Research and Prevention. Guilford Press. New York.

Appendix A

Judicial Officers and Administrators Who Assisted in Organizing the Workshops

Judicial Officers and Administrators Who Assisted in Organizing the Workshops

Illinois

1. Paul A. Logli – District Attorney, Winnebago County
2. Hon. Michael R. Morrison – Chief Judge, 17th Judicial District, Winnebago County
3. Hon. Henry C. Tonigan – Chief Judge, 19th Judicial District, Lake County

Massachusetts

1. Hon. Samuel E. Zoll – Chief Justice, Administrative Office of the District Courts
2. Deborah Proppe – Administrative Attorney, Administrative Office of the District Courts

Connecticut

1. Hon. Susan B. Handy – Chief Administrative Judge, Criminal Division, Superior Court

New York

1. Hon. Thomas W. Keegan – Administrative Judge, Third Judicial District
2. Hon. Jan H. Plumadore – Administrative Judge, Fourth Judicial District
3. Marilyn Jordon – Prinicipal Administrative Assistant, Fourth Judicial District
4. Hon. F. A. Nicolai – Administrative Judge, Ninth Judicial District

Arizona

1. Hon. Gordon T. Alley – Presiding Judge, Pima County Superior Court
2. Hon. Roberto Montiel – Presiding Judge, Santa Cruz County Superior Court
3. John Woods – Pinal County Court Administrator's Office

Appendix B

Judicial
Workshop Participants

Judicial Workshop Participants

Rockford, Illinois

1. Hon. Michael R. Morrison – Chief Judge, 17th Judicial District
2. Hon. Ron White – Associate Judge, 17th Judicial District
3. Hon. Thomas R. Smoker – Judge, 19th Judicial District
4. Hon. Valerie B. Ceckowski – Judge, 19th Judicial District

Newton, Massachusetts

1. Hon. Robert A. Cornetta– Judge, Salem District Court
2. Hon. Sara B. Singer – Judge, Natick District Court
3. Hon. W. Michael Ryan – Judge, Northampton District Court
4. Hon. Dyanne J. Klein – Judge, Newton District Court
5. Hon. Vito A. Virzi – Judge, Dudley District Court
6. Hon. M. John Schubert, Jr. – Judge, Holyoke District Court

Hartford, Connecticut

1. Hon. John Turner – Judge, Hartford Superior Court
2. Hon. Richard Dyer – Judge, New London Superior Court

Albany, New York

1. Hon. Lawrence J. Rosen – County Court Judge, Albany County
2. Hon. John C. Egan – City Court Judge, Albany Criminal Court
3. Hon. George E. Silver – City Court Judge, City of Ogdensburg
4. Hon. Gary L. Favro – City Court Judge, City of Plattsburg
5. Hon. Michael Martinelli – City Court Judge, City of Yonkers
6. Hon. Arthur Doran, Jr. – City Court Judge, City of Yonkers

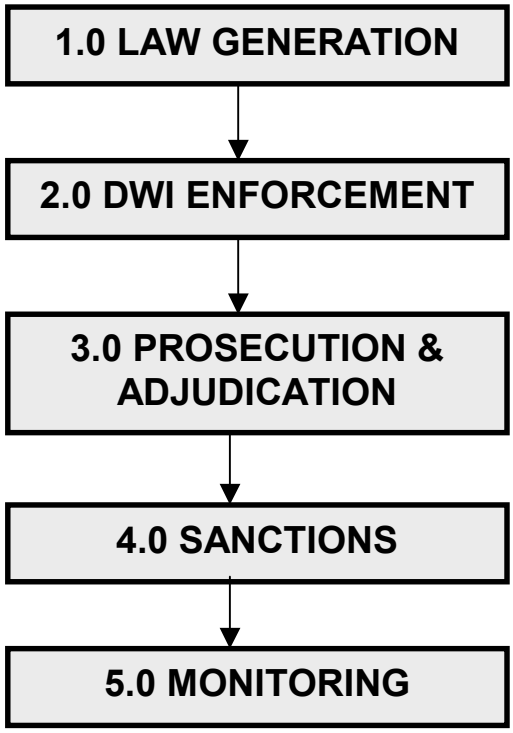
Tucson, Arizona

1. Hon. Paul Banales – Judge, Pima County Superior Court
2. Hon. Barbara Sattler – Magistrate, Tucson City Court
3. Hon. Bruce Griffith – Justice of the Peace, Superior Arizona
4. Hon. Mary Helen Maley – Justice of the Peace, Santa Cruz County

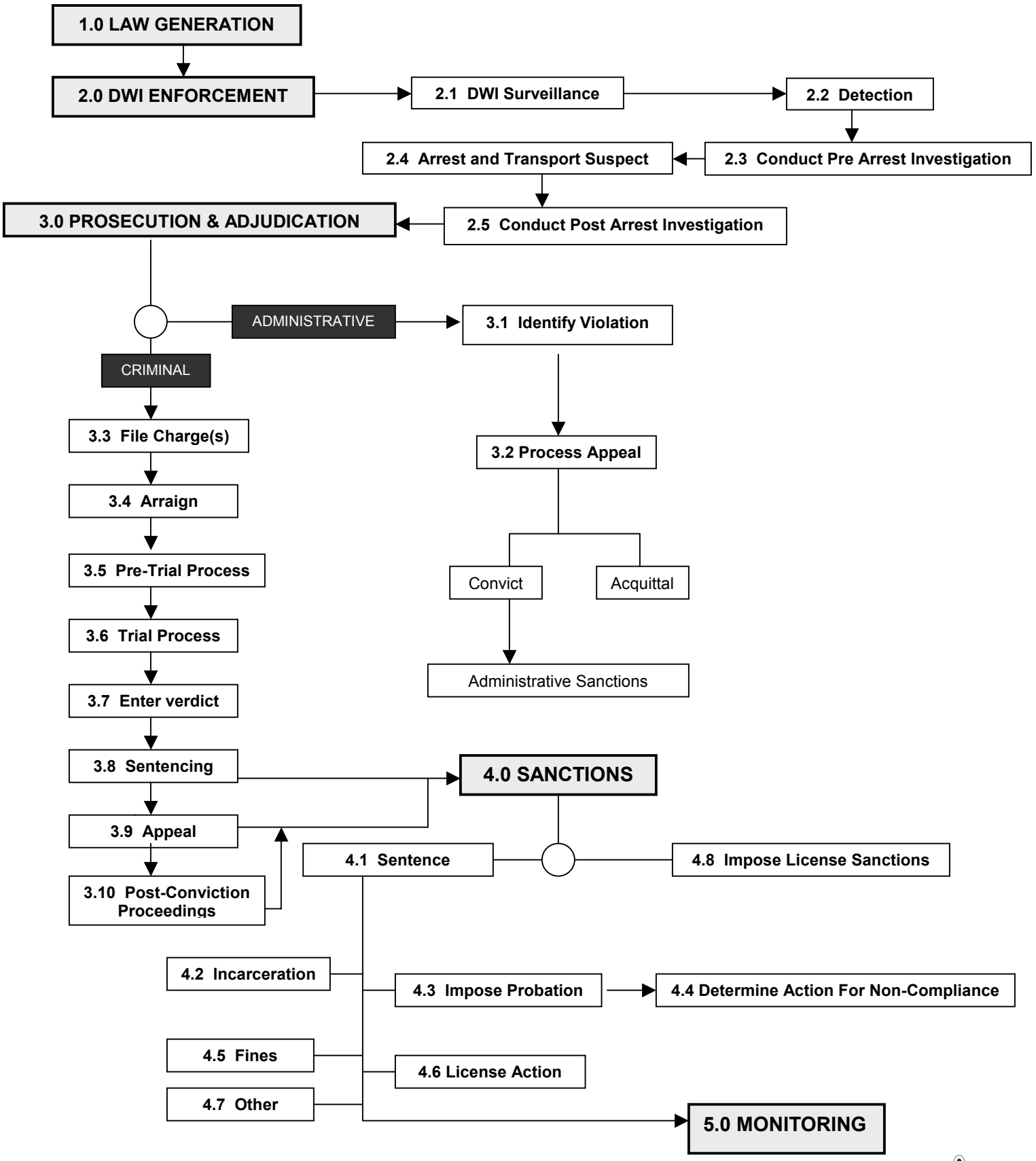
Appendix C

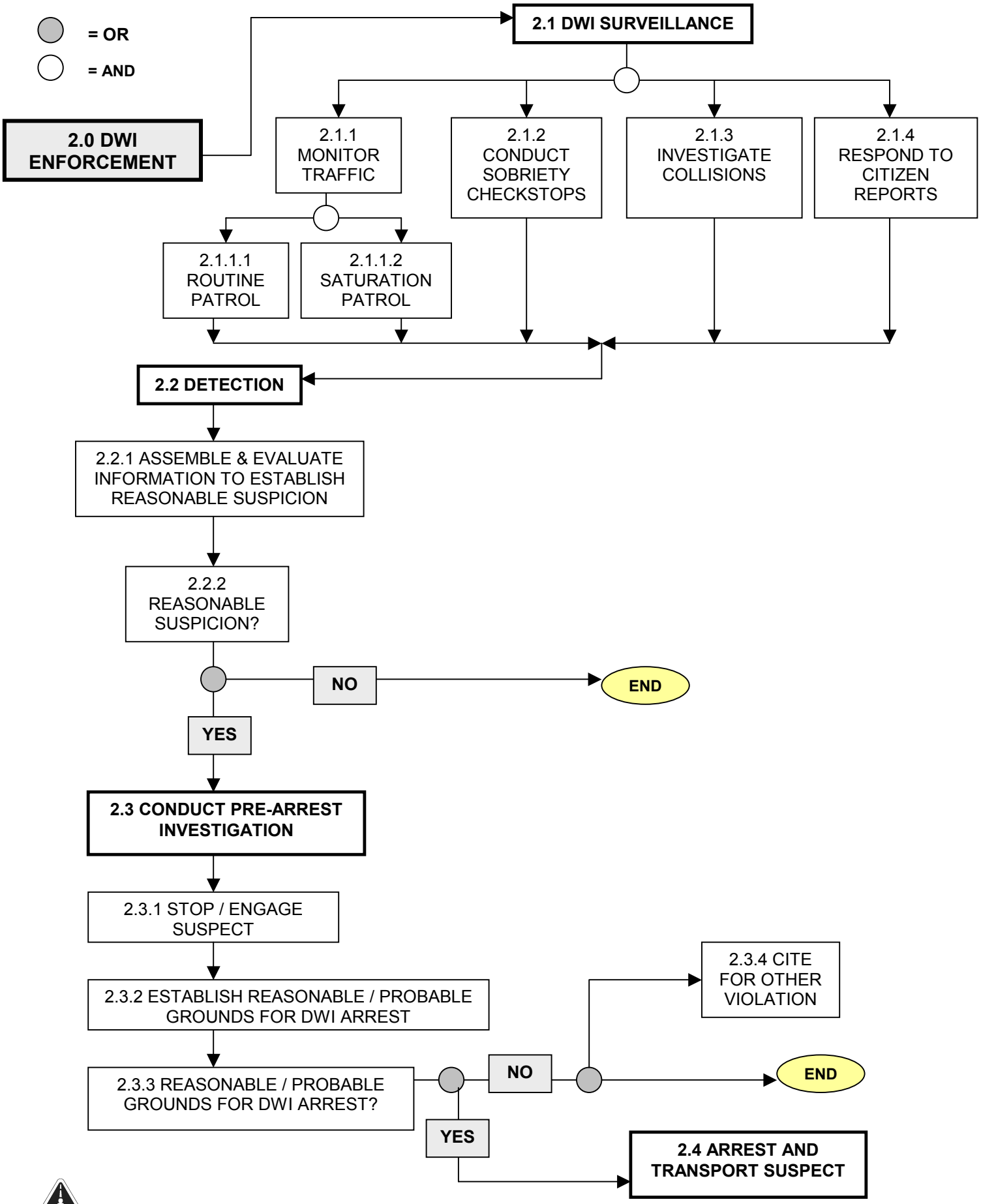
Schematic Representation of the DWI System

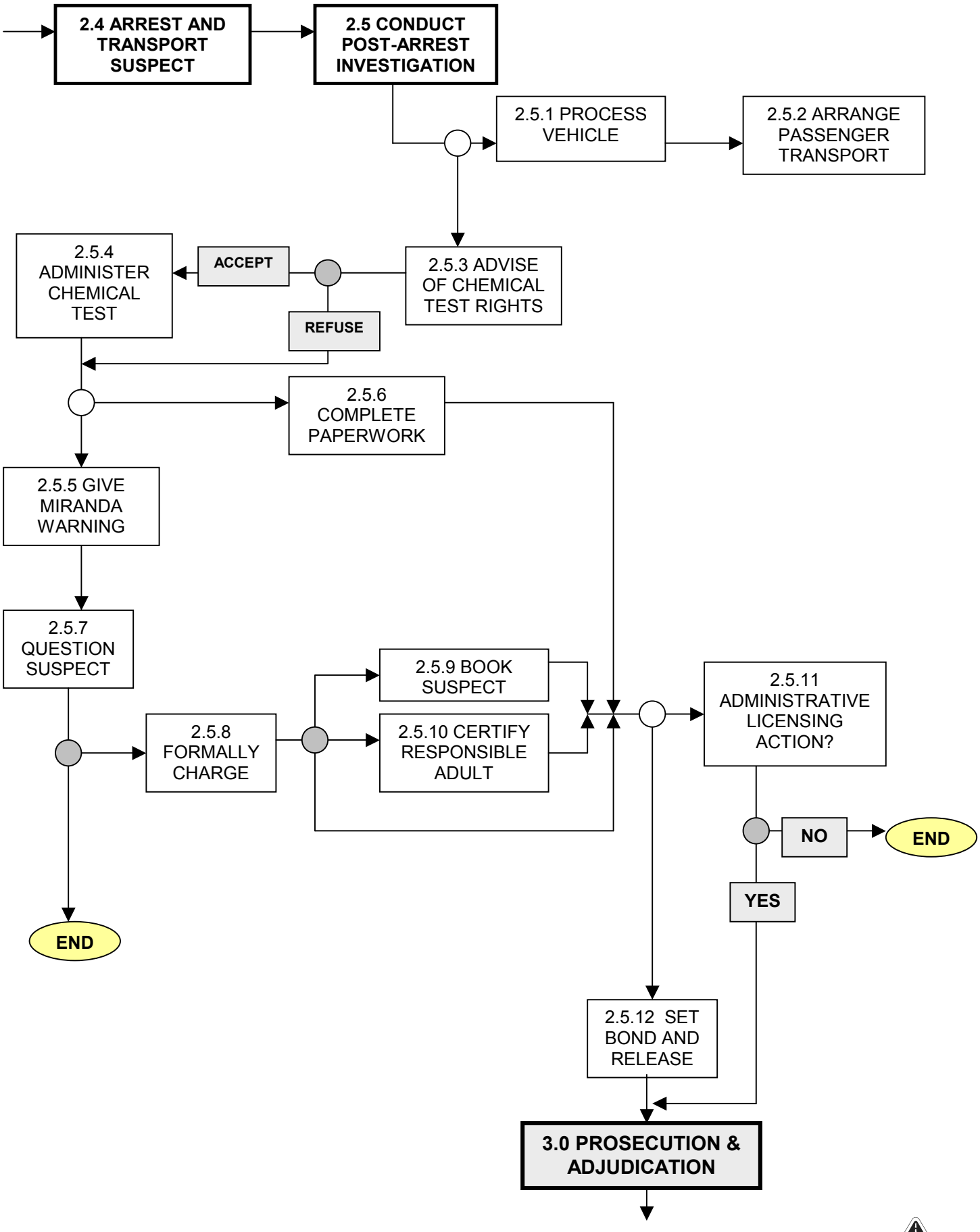
Overview

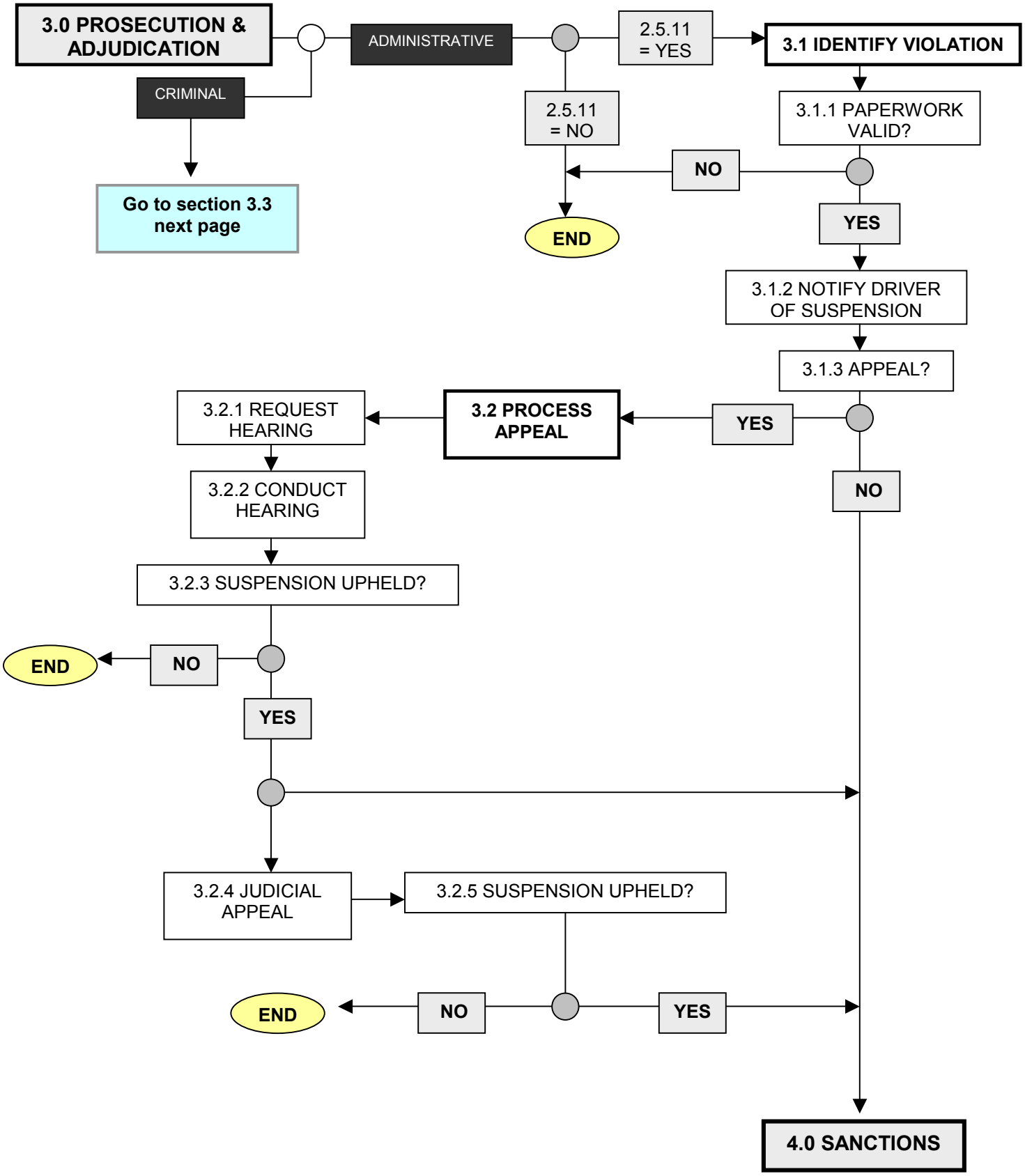

1.0 LAW GENERATION
2.0 DWI ENFORCEMENT
3.0 PROSECUTION & ADJUDICATION
4.0 SANCTIONS
5.0 MONITORING

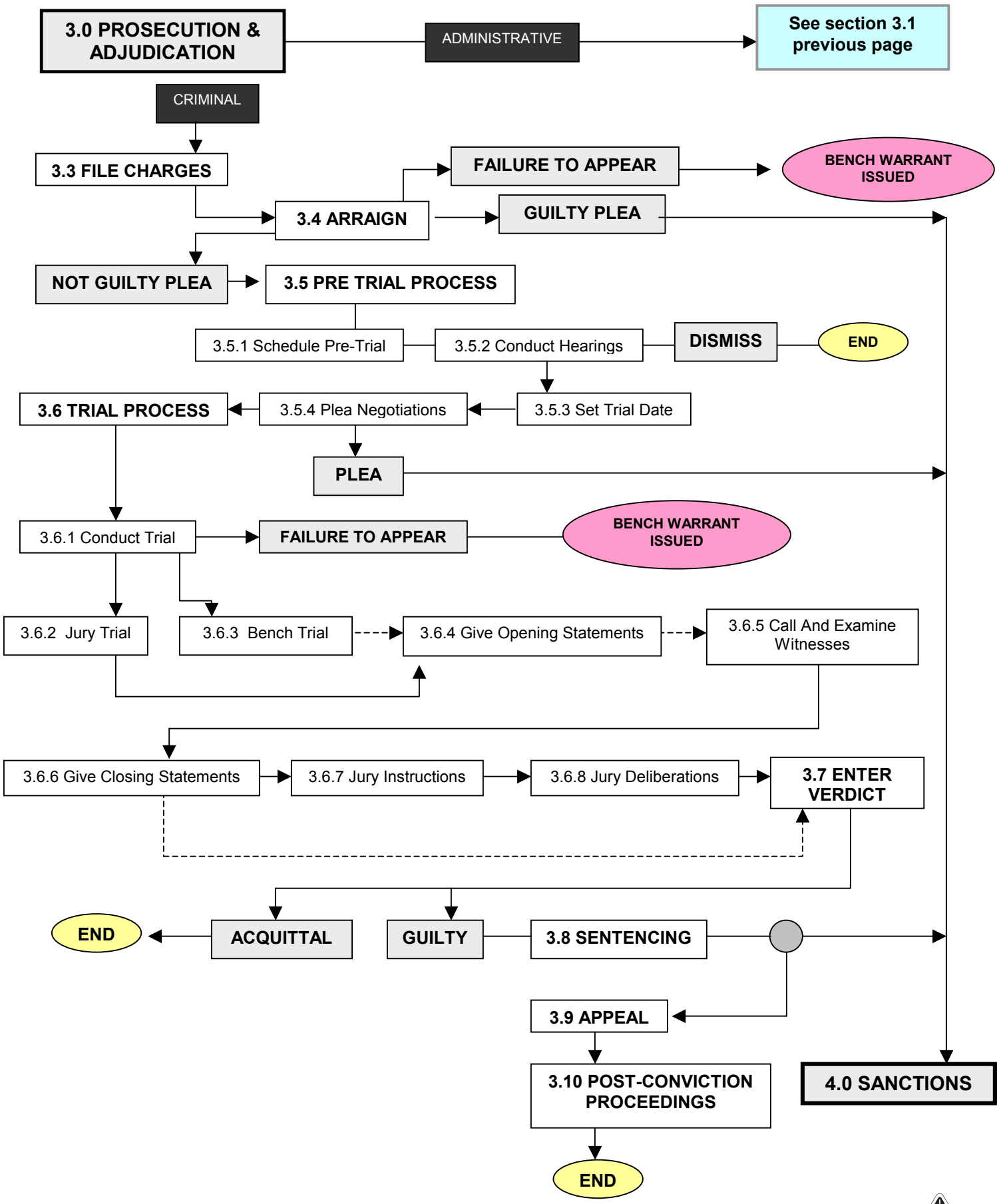
Overview

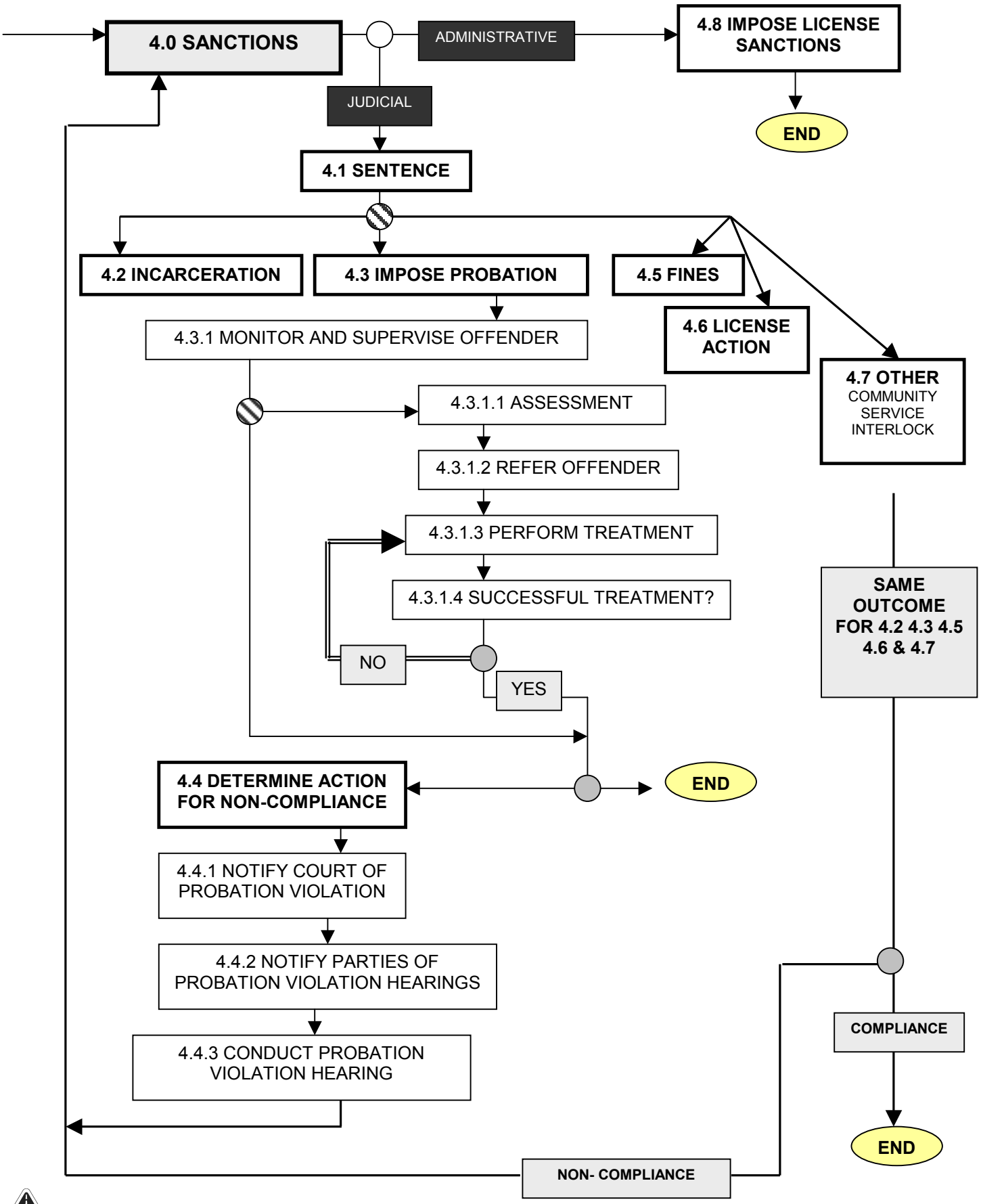

1.0 LAW GENERATION
2.0 DWI ENFORCEMENT
2.1 DWI Surveillance
2.2 Detection
2.3 Conduct Pre Arrest Investigation
2.4 Arrest and Transport Suspect
2.5 Conduct Post Arrest Investigation
3.0 PROSECUTION & ADJUDICATION
ADMINISTRATIVE
3.1 Identify Violation
CRIMINAL
3.2 Process Appeal
3.3 File Charge(s)
3.4 Arraign
3.5 Pre-Trial Process
3.6 Trial Process
3.7 Enter verdict
3.8 Sentencing
3.9 Appeal
3.10 Post-Conviction Proceedings
Convict
Acquittal
Administrative Sanctions
4.0 SANCTIONS
4.1 Sentence
4.8 Impose License Sanctions
4.2 Incarceration
4.3 Impose Probation
4.4 Determine Action For Non-Compliance
4.5 Fines
4.6 License Action
4.7 Other
5.0 MONITORING


= OR
= AND
2.0 DWI ENFORCEMENT
2.1 DWI SURVEILLANCE
2.1.1 MONITOR TRAFFIC
2.1.2 CONDUCT SOBRIETY CHECKSTOPS
2.1.3 INVESTIGATE COLLISIONS
2.1.4 RESPOND TO CITIZEN REPORTS
2.1.1.1 ROUTINE PATROL
2.1.1.2 SATURATION PATROL
2.2 DETECTION
2.2.1 ASSEMBLE & EVALUATE INFORMATION TO ESTABLISH REASONABLE SUSPICION
2.2.2 REASONABLE SUSPICION?
NO
END
YES
2.3 CONDUCT PRE-ARREST INVESTIGATION
2.3.1 STOP / ENGAGE SUSPECT
2.3.2 ESTABLISH REASONABLE / PROBABLE GROUNDS FOR DWI ARREST
2.3.4 CITE FOR OTHER VIOLATION
2.3.3 REASONABLE / PROBABLE GROUNDS FOR DWI ARREST?
NO
END
YES
2.4 ARREST AND TRANSPORT SUSPECT


2.4 ARREST AND TRANSPORT SUSPECT
2.5 CONDUCT POST-ARREST INVESTIGATION
2.5.1 PROCESS VEHICLE
2.5.2 ARRANGE PASSENGER TRANSPORT
2.5.3 ADVISE OF CHEMICAL TEST RIGHTS
ACCEPT
REFUSE
2.5.4 ADMINISTER CHEMICAL TEST
2.5.6 COMPLETE PAPERWORK
2.5.5 GIVE MIRANDA WARNING
2.5.7 QUESTION SUSPECT
2.5.8 FORMALLY CHARGE
2.5.9 BOOK SUSPECT
2.5.10 CERTIFY RESPONSIBLE ADULT
END
2.5.11 ADMINISTRATIVE LICENSING ACTION?
NO
END
YES
2.5.12 SET BOND AND RELEASE
3.0 PROSECUTION & ADJUDICATION


3.0 PROSECUTION & ADJUDICATION
ADMINISTRATIVE
CRIMINAL
Go to section 3.3 next page
2.5.11 = YES
2.5.11 = NO
END
3.1 IDENTIFY VIOLATION
3.1.1 PAPERWORK VALID?
NO
YES
3.1.2 NOTIFY DRIVER OF SUSPENSION
3.1.3 APPEAL?
YES
NO
3.2 PROCESS APPEAL
3.2.1 REQUEST HEARING
3.2.2 CONDUCT HEARING
3.2.3 SUSPENSION UPHELD?
NO
END
YES
3.2.4 JUDICIAL APPEAL
3.2.5 SUSPENSION UPHELD?
NO
END
YES
4.0 SANCTIONS


3.0 PROSECUTION & ADJUDICATION
ADMINISTRATIVE
See section 3.1 previous page
CRIMINAL
3.3 FILE CHARGES
FAILURE TO APPEAR
BENCH WARRANT ISSUED
3.4 ARRAIGN
GUILTY PLEA
NOT GUILTY PLEA
3.5 PRE TRIAL PROCESS
3.5.1 Schedule Pre-Trial
3.5.2 Conduct Hearings
DISMISS
END
3.6 TRIAL PROCESS
3.5.4 Plea Negotiations
3.5.3 Set Trial Date
PLEA
3.6.1 Conduct Trial
FAILURE TO APPEAR
BENCH WARRANT ISSUED
3.6.2 Jury Trial
3.6.3 Bench Trial
3.6.4 Give Opening Statements
3.6.5 Call And Examine Witnesses
3.6.6 Give Closing Statements
3.6.7 Jury Instructions
3.6.8 Jury Deliberations
3.7 ENTER VERDICT
END
ACQUITTAL
GUILTY
3.8 SENTENCING
3.9 APPEAL
3.10 POST-CONVICTION PROCEEDINGS
END
4.0 SANCTIONS


4.0 SANCTIONS
ADMINISTRATIVE
4.8 IMPOSE LICENSE SANCTIONS
END
JUDICIAL
4.1 SENTENCE
4.2 INCARCERATION
4.3 IMPOSE PROBATION
4.5 FINES
4.6 LICENSE ACTION
4.7 OTHER
COMMUNITY SERVICE
INTERLOCK
4.3.1 MONITOR AND SUPERVISE OFFENDER
4.3.1.1 ASSESSMENT
4.3.1.2 REFER OFFENDER
4.3.1.3 PERFORM TREATMENT
4.3.1.4 SUCCESSFUL TREATMENT?
NO
YES
SAME OUTCOME FOR 4.2 4.3 4.5 4.6 & 4.7
4.4 DETERMINE ACTION FOR NON-COMPLIANCE
END
4.4.1 NOTIFY COURT OF PROBATION VIOLATION
4.4.2 NOTIFY PARTIES OF PROBATION VIOLATION HEARINGS
4.4.3 CONDUCT PROBATION VIOLATION HEARING
COMPLIANCE
END
NON- COMPLIANCE

Appendix D

Problem List Distributed at Judicial Workshops

PROBLEMS IN ADJUDICATING AND SANCTIONING HARD CORE DRUNK DRIVERS

RANK*

- **FAILURE TO APPEAR:** Hard core repeat offenders are more likely to fail to appear at arraignment or trial, thereby evading sanctions and wasting court time and resources. ____

- **CASELOAD:** Hare core repeat offenders' familiarity with the system allows them to prolong the adjudication process, placing further demands on an already overloaded system. ____

- **RECORDS:** Judges often lack access to complete records on repeat offenders prior to making arraignment or sentencing decisions. This may result in lesser penalties that detract from the deterrent effect of dispositions. ____

- **MOTIONS/CONTINUANCES:** Repeat offenders are more likely to proceed to trial and file excessive motions and continuances in an effort to obtain a dismissal/acquittal. This undermines the likelihood of conviction and sanctioning. ____

- **INADEQUATE EVIDENCE:** Additional evidence of intoxication is necessary for prosecutors to win both probable cause hearings and trials because hard core offenders are more likely to refuse testing. Judges are often forced to exclude this evidence due to poor collection procedures or other issues. ____

- **JURIES:** Hard core offenders are more likely to elect for jury trials because jury members often do not understand the technical/legal issues associated with DUI trials, and/or fail to understand judicial instructions. This allows offenders to evade sanctioning. ____

- **MANDATORY MINIMUMS:** For various reasons, judges do not impose mandatory minimum sanctions. This can result in decreased penalties for repeat DUI offenders and reduce the deterrent effect of sentences. ____

- **SENTENCING DISPARITY:** Unequal sentencing practices can minimize penalties for repeat offenders and detract from the seriousness of the offense. This disparity results from inconsistency in training opportunities for judges, or a lack of court resources to make this offense a judicial priority. ____

- **SENTENCE MONITORING:** Repeat offenders often avoid sanctioning because judges are not in a position to ensure that offenders comply with or complete court ordered sanctions/treatment. This detracts from the effectiveness of the sanctioning process. ____

***Note:** Highest priority problem rank #1, Lowest priority problem rank #9

Appendix E

Judicial Surveys

ADJUDICATING AND SANCTIONING REPEAT DUI OFFENDERS

A National Survey of Judges

Traffic Injury Research Foundation
www.trafficinjuryresearch.com

August 2001

PURPOSE

The purpose of this survey is to obtain your views about key problems associated with the adjudication and sanctioning of hard core DUI offenders[1].

PRIVACY

To ensure the anonymity of individual respondents, only aggregate results will be published. Moreover, you are not being asked to provide personal information that could lead to your identification.

GENERAL INFORMATION

1. How many years have you worked as a judge? _____yrs.

2. Approximately how many DUI cases have you adjudicated? _____

3. In what state are you currently a judge? _____

4. Are the majority of your DUI cases in:
   - ❑ courts of limited jurisdiction
   - ❑ courts of general jurisdiction

5. What is the estimated population size of your jurisdiction?
   - ❑ 0 – 20 000
   - ❑ 20 000 – 50 000
   - ❑ 50 000 – 100 000
   - ❑ 100 000-250 000
   - ❑ 250 000 – 500 000
   - ❑ +500 000

Footnotes

[1] Hard core drunk drivers are repeat offenders who frequently drink and drive with high BACs.

For convenience, the abbreviation DUI is used throughout the survey, although the specific term used in state statutes may vary (e.g., DWI – driving while impaired, OUI – operating under the influence of alcohol, etc.)

1. The nine problems listed below affect the adjudication and sanctioning of hard core drunk drivers in many areas of the country. Rank order these problems in terms of how important they are to you. Give a rank of 1 to what you believe most affects your capacity to adjudicate and sanction hard core drunk drivers, a rank of 2 to the next most serious problem, and so on.

RANK

Evidentiary problems…….. ……_____

Monitoring sentences to ensure offender compliance……..._____

Caseload…..……_____

Excessive motions/continuances……..…….. _____

Lack of access to, or incomplete, criminal records……_____

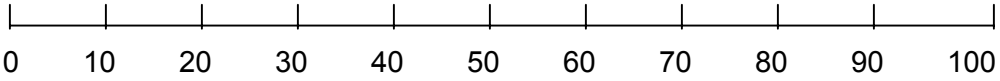
Jury trial selection by offender in hope of favorable verdict …… _____

Failure to appear…….……_____

Sentencing disparity …….. …...._____

Mandatory minimums……..……_____

2. What percentage of repeat offender DUI cases would you estimate are dismissed due to either technicalities, insufficient or inadmissible evidence?



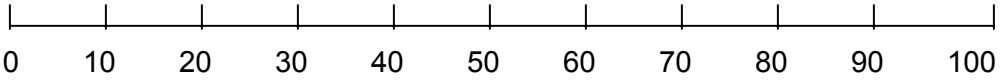
3. In which of the following areas of evidence do you possess considerable knowledge? (Please check as many as appropriate).

_____ HGN testing
_____ the calibration and accuracy of breath testing devices
_____ the accuracy of different types of breath test analysis
_____ retrograde extrapolation
_____ blood partition ratios
_____ accident reconstruction

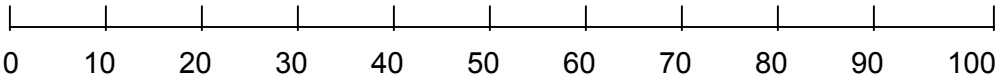
4. Do you feel that DUI prosecutors possess the same level of knowledge and expertise as DUI defense attorneys?

☐ Yes ☐ No

5. What percentage of DUI cases would you estimate go to trial in your courtroom? (Please circle the appropriate percentage on the scale below.)



6. What would you estimate is the percentage of DUI cases that are resolved by a jury trial in your jurisdiction? (Please circle the appropriate percentage on the scale below.)



7. In your experience, are repeat DUI offenders more likely to plead not guilty?

☐ Yes ☐ No

8. Do you find that excessive motions and/or continuances constrain your adherence to case processing guidelines?

☐ Yes ☐ No

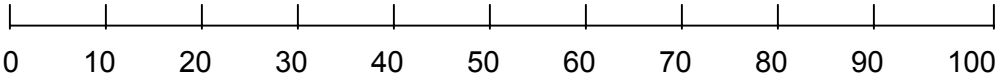
9. Are arrest and booking videos used in your jurisdiction?

☐ Yes ☐ No

10. Do you feel that your caseload permits adequate time to familiarize yourself with individual cases in order to make appropriate sentencing decisions?

☐ Yes ☐ No

11. In what percentage of cases do you order a repeat DUI offender to undergo an alcohol evaluation?



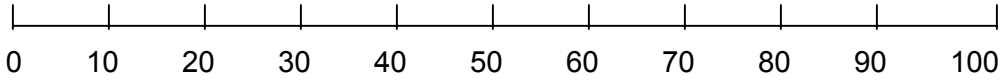
12. Do you feel that you have adequate resources to monitor an offender's compliance with his/her disposition?

☐ Yes (go to 13) ☐ No (go to 14)

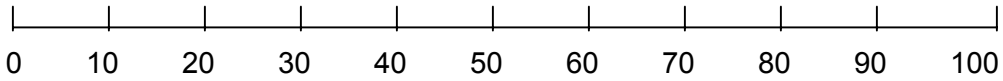
13. Which of the following factors most often impede the monitoring of an offender's compliance with his/her disposition? (Please select **one** of the following answers).

_____ heavy caseload
_____ inconsistent or delayed reports/updates
_____ lack of communication with sanctioning/treatment agencies
_____ court rotation

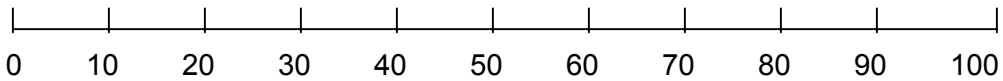
14. What percentage of DUI offenders would you estimate are returned to court for failure to complete the imposed disposition?



15. What percentage of repeat DUI offender cases involve defendants with out-of-state driving records? (Please circle the appropriate percentage on the scale below.)



16. How often are prior convictions excluded from consideration in sentencing a repeat DUI offender because of technicalities involving legislative differences or record-keeping practices, or lack of accessibility to records? (Please circle the appropriate percentage on the scale below.)



17. How often do you rely on information provided by prosecutors in order to make appropriate sentencing decisions?

☐ Rarely ☐ Occasionally ☐ Often

18. In your experience, how often does 'judge shopping' occur in your jurisdiction?

☐ Rarely ☐ Occasionally ☐ Often

19. How often do fiscal concerns impact the sentencing of DUI offenders? (e.g., You would like to make treatment part of the disposition, however, space is not available)

☐ Rarely ☐ Occasionally ☐ Often

20. If you could change one thing to improve the adjudication and sanctioning of repeat DUI offenders, what would it be?

_____
_____
_____
_____
_____

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THANK YOU.

ADJUDICATING AND SANCTIONING REPEAT DUI OFFENDERS

A National Survey of Judges

Traffic Injury Research Foundation
www.trafficinjuryresearch.com

August 2001

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   - ❑ 50 000 – 100 000
   - ❑ 100 000-250 000
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   - ❑ +500 000

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RANK

Evidentiary problems..._____

Monitoring sentences to ensure offender compliance..._____

Caseload..... _____

Excessive motions/continuances..... _____

Lack of access to, or incomplete, criminal and driver records..... _____

Jury trial selection by offender in hope of favorable verdict..... _____

Failure to appear..._____

Sentencing disparity ..._____

Mandatory minimums ..._____

2. Which of the following would **most** improve the quality of evidence presented in DUI trials? (Please select **one** of the following answers.)

_____ simplify police report forms
_____ improved training for prosecutors/police
_____ witness preparation before testifying
_____ make test refusal admissible

3. Do you believe that all professional groups within the justice system would benefit from workshops specifically designed to address DUI case issues?

☐ Yes ☐ No

4. Do you think that test refusal is a problem that should be addressed legislatively?

☐ Yes (go to 5) ☐ No (go to 6)

5. What do you think is the most appropriate method for addressing the issue of test refusal? (Please select **one** of the following answers.)

_____ increase penalties for refusal
_____ make test refusal admissible in court
_____ facilitate forced blood draws from those who refuse
_____ other (please specify) _____

6. Do you think that arrest and booking videos could provide valuable evidence?

   ☐ Yes ☐ No

7. Who do you think can most effectively monitor an offender's compliance with sentencing requirements? (Please select **one** of the following answers.)

   _____ judges
   _____ probation/parole officers
   _____ bailiffs/court employees
   _____ treatment facilities

8. Do you think greater integration between courts and treatment facilities would improve the monitoring of an offender's compliance with treatment conditions?

   ☐ Yes ☐ No

9. Do you feel that more judges are needed to reduce caseloads and allow judges sufficient time to become familiar with individual case histories prior to sentencing?

   ☐ Yes ☐ No

10. Do you feel that the number of motions and continuances in a DUI trial should be limited legislatively in order to ensure adherence to case processing guidelines?

    ☐ Yes ☐ No

11. What do you feel are the best methods for increasing the utility and/or availability of criminal and driving records? (Please select **two** of the following.)

    _____ make driver abstracts uniform among states
    _____ increase allowable time frame for accessing prior records
    _____ National Driver Registry
    _____ hire more bailiffs to conduct record searches

12. Do you think that test refusal and prior convictions should be considered as evidence in court proceedings? (Please check all appropriate answers.)

    Test refusal:
    ☐ during trial ☐ during sentencing ☐ excluded entirely

    Prior convictions:
    ☐ during trial ☐ during sentencing ☐ excluded entirely

13. Do you think that mandatory alcohol evaluations of repeat DUI offenders would assist judges in selecting the most appropriate disposition?

    ☐ Yes ☐ No

14. How do you think the problem of failure to appear could best be resolved? (Please select **one** of the following answers.)

_____ make bond a condition of arrest warrant
_____ increase penalties legislatively
_____ hold offender in custody
_____ other (please specify)_____

15. Which sanctions do you feel are most likely to reduce/prevent repeat DUI offences? (Please select **two** of the following answers.)

_____ fine
_____ license suspension
_____ jail
_____ other (please specify) _____
_____electronic monitoring
_____ ignition interlock
_____ treatment

16. Do you think that more alcohol treatment facilities are needed for repeat DUI offenders?

☐ Yes ☐ No

17. Would scientific research evaluating various sanctions assist you in making sentencing decisions?

☐ Yes ☐ No

18. Do you feel that dedicated DUI judges and courts would be better equipped to adjudicate and sentence repeat DUI offenders?

☐ Yes ☐ No

19. Would a system of tiered penalties assist you in sanctioning DUI offenders appropriately?

☐ Yes ☐ No

20. If you could change one thing to improve the adjudication and sanctioning of repeat DUI offenders, what would it be?

_____
_____
_____
_____
_____

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THANK YOU.