Report of the Treatment Policy and Funding Task Force
to the King County Bar Association Board of Trustees

Drug-Related Crime and Disorder: Practical Policy Options

Reducing Criminal Justice Exposure Through Early Intervention

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EXECUTIVE SUMMARY

The Drug Policy Project of the King County Bar Association has produced a coherent body of recommendations for effective drug control by replacing the current framework of criminal prohibition with one of legal regulation. While recognizing that problems related to substance abuse and its control will require sweeping reform of failed drug policies in the U.S., the KCBA has also sponsored examination of possible short-run reforms within the current framework of legal prohibition. The KCBA Treatment Policy and Funding Task Force was formed to consider policies and programs to reduce the extent to which detention, prosecution, adjudication and incarceration are applied to persons whose involvement with the criminal justice system could be alleviated by effective substance abuse treatment.

Recent years have seen programmatic and legal innovations to mitigate the futile or unnecessary incarceration of persons affected by substance abuse, but analysis of factors at work in recent treatment initiatives shows that much more can be done.

- Court-directed programs have connected persons with treatment who otherwise would have been missed because they might not have sought or may not have met eligibility conditions for voluntary treatment.
- Despite these advantages, legal sanctions to encourage treatment are costly in terms of the administrative measures required to safeguard offenders' liberty interests and the justice system's accountability and public safety mandates.

As a result of our analysis, we have emphasized reforms that intervene at early stages of criminal justice system involvement, relying less extensively on legal sanctions and more on motivating persons to participate in treatment with minimal criminal justice oversight. Following are the key elements of our recommended strategy:

- Greater use of front-end programs to divert people from jail or engage them in treatment without relying on court mandates to enforce compliance.
- Reclassification of low-level drug felonies as misdemeanors to open up further options for diversion and avoid handicapping defendants' future prospects by a felony conviction.
- State-wide educational efforts to increase predictability, fairness, and access for offenders to drug-court programs.
- Expand use of the Drug Offender Sentencing Alternative (DOSA) by allowing conversion of the entire total confinement sentence to community custody or partial confinement.

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INTRODUCTION

In December 2001, the King County Bar Association Drug Policy Project issued a white paper, "Is it Time to End the War on Drugs?" In its preamble to this document, the King County Bar Association Board of Trustees expressed its hope to "spark an open and honest discussion about the criminal justice system's inability to create the result that we all want: reducing the damage done by drugs while not creating more harm than the use of the drugs themselves." Efforts to reduce the damage done by drugs should move decisively toward a public health model rather than relying primarily on the use of criminal sanctions.

The findings and recommendations of the white paper were based on the work of several King County Bar Association (KCBA) task forces, including a task force on Drug Addiction Treatment and one on the Use of Criminal Sanctions. After reports were issued and the combined white paper was produced, the task forces reconvened and activities required to move forward on KCBA recommendations were assigned to a number of working groups. These included the Treatment Policy and Funding Task Force, formed to respond to several recommendations in the drug addiction treatment report; in particular to consider ways of reorganizing treatment funding streams and oversight authority to improve the accessibility and effectiveness of substance abuse treatment.

In a parallel development, the task force on criminal sanctions had generated one group working to redefine the overall legal framework for control of drugs, and another to consider shorter-term alternatives, within the current prohibition system, to reduce use of criminal penalties for persons with substance abuse-related offenses. In fall of 2003, the latter group was merged into the Treatment Policy and Funding Task Force. In addition to KCBA Drug Policy project staff, the enlarged group included members from the Department of Alcohol and Substance Abuse (DASA), the Department of Corrections (DOC), substance abuse treatment agencies, King County human services, King County Superior and District Courts, King County Adult Detention, the Seattle police, and the University of Washington.

The mission of the combined group has been to describe treatment, diversion, and sentencing interventions to reduce the use of incarceration for persons with substance abuse problems.

I. DEFINING THE PROBLEM

A. Despite Reforms, the Use of Incarceration for Substance-Abusing Persons Remains High

We know that substance abuse treatment diminishes drug use and is a cost-effective method of reducing criminal recidivism.[1] But substance abuse treatment is not readily available to all who would benefit from it, and large numbers of individuals with chemical abuse or dependency problems are incarcerated in jails and prisons.[2] These recognitions provide common ground among citizens and policymakers with differing opinions on the justice or wisdom of criminal penalties to control drug use and distribution. Those who reject the prohibition of recreational drugs other than alcohol and tobacco, as well as those who continue to see a need for legal prohibition, may agree that it is costly in terms of resources and human suffering to incarcerate persons whose proclivity for committing criminal offenses could be addressed more effectively by providing substance abuse treatment.

The costs of failure to intervene with addicted or substance-abusing offenders are substantial. Of the $2.5 billion in annual costs associated with drug and alcohol abuse in Washington State,[3] over 20% ($541 million) are attributed to crime, and offenders represent a substantial though not precisely estimated portion of other costs in lost wages, lower productivity, and medical and social service expenses. Persons sentenced to prison with a history of drug-related offenses have a higher risk than most other offenders to commit new offenses, especially drug and property offenses, after release from prison.[4] It also appears that imprisonment does little to alter

[1] *Principles of Drug Addiction Treatment*, (National Institute of Drug Abuse , 1999, pp. 15-16), reports that "treatment reduces drug use by 40 to 60 percent." Robert Barnoski & Steve Aos, in *Washington State Drug Courts for Criminal Defendants: Outcome Evaluation and Cost-Benefit Analysis* (Olympia: Washington State Institute for Public Policy, 2003), estimate that each dollar spent on drug courts saves $1.74 in criminal justice costs.

[2] These widely replicated findings were reported in 2001 by the KCBA Task Force on Drug Addiction Treatment. In its *County Profile of Substance Use and Need for Treatment Services in Washington State* (1999), the Department of Alcohol and Substance Abuse (DASA) reported that among Washington residents with incomes under 200% of the federal poverty level, only 18.3% who need treatment—according to established diagnostic criteria—can be served with current public resources. Between July 1998 and June 1999, more than 60% of people arrested for any crime in Seattle and Spokane tested positive for some drug use, and in Spokane, 43% of arrestees said they would like treatment (Spokane Quarterly Report, 1999, Arrestee Drug Abuse Monitoring Program).

[3] Thomas Wickizer, *The economic costs of drug and alcohol abuse in Washington State* (Washington State Department of Social and Health Services, DASA, 1999).

[4] Alan Beck, *Recidivism of Prisoners Released in 1983* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 1997). Robert Barnoski, & Steve Aos, *Presentation to the Standards and*

patterns of substance abuse; in one study, 95% of imprisoned offenders relapsed within three years of prison release, 85% of them within one year.[5]

Like many other states, in recent years Washington has seen the introduction of several programs to increase access to treatment in lieu of incarceration for persons with drug-related offenses:

- The Drug Offender Sentencing Alternative (DOSA), introduced in Washington in 1995 and expanded in 1999, allows eligible drug and property felony offenders to reduce their time in prison by 50% if they complete treatment and abide by other sentence conditions.
- Since 1994, 25 jurisdictions in Washington have introduced drug courts, which provide effective, court-supervised treatment alternatives to criminal conviction for eligible offenders charged with drug-related offenses.[6]
- In 2002, the Washington legislature passed SHB2338, which reduced sentences for drug-related offenses and directed that the expected savings in corrections costs be spent for substance abuse treatment and support services for offenders with a chemical dependency problem.

It is also worth noting that in September 2003, voters in Seattle passed initiative I-75, which directed police to make marijuana possession its lowest enforcement priority. This program had no substance abuse treatment component, but proponents and some critics of the initiative agree that the new policy has reduced marijuana-related arrests without provoking widespread public cannabis consumption.[7] Thus it also provides an example of reducing harms, or costs, associated with use of recreational drugs.

These initiatives, along with discussions initiated by the KCBA Drug Policy project, have placed Washington at the forefront nationally of creative changes in drug-related enforcement, sentencing and treatment policies.

However welcome and useful they have been for participants, have these reforms changed the overall picture of under-use of treatment and overuse of incarceration?

Ranges Committee, Sentencing Guidelines Commission. (Olympia, WA: Washington State Institute for Public Policy, 1999). David Lovell, Gregg Gagliardi, & Paul Peterson. Recidivism and social service use among persons with mental illness after release from prison (*Psychiatric Services* 53(10):1290-1296, 2002).

[5] Steven S. Martin *et al.*, Three-Year Outcomes of Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare," (*Prison Journal* 79:294, 1999).

[6] Robert Barnoski, & Steve Aos, *Washington State Drug Courts for Criminal Defendants: Outcome Evaluation and Cost-Benefit Analysis* (Olympia: Washington State Institute for Public Policy, 2003)

[7] B. Young, "Marijuana measure called effective by supporters and foe," (*The Seattle Times* 6/18/2004).

County jails, with their heavy annual turnover of lower-level felony and misdemeanant offenders, represent the majority of drug-related criminal justice activity; but statewide trends are best displayed in Department of Corrections statistics. The proportion of offenders in prison for drug-related offenses has decreased from 23% in 2000 to 19% in 2004, and the proportion of first-time admissions represented by drug-related offenses has decreased from 32% in 2000 to 27.5% in 2004. But the number of persons in prison for drug offenses has continued to rise, and drug offenders' one-third share of recidivists admitted to prison every year has not declined. As a result, drug-related offenses still represent 30% of annual admissions to prison for new offenses (first-time offenders plus recidivists); and property offenses, the vast majority of which are associated with drug addiction or abuse, represent another 28% of annual new offense admissions.[8]

For those who oppose the criminal prohibition model of drug control, alternative programs such as probation, drug courts, and drug offender sentencing alternatives are preferable to incarceration because they impose lower costs on the penalized individual and on society. It does not follow, however, that the availability of alternatives for drug offenders therefore justifies the imposition of criminal penalties for drug abuse. Over half of probationers violate their conditions, and are therefore subject to renewed sanctions.[9] For this reason, it appears that the more conditions are imposed in an attempt to prevent relapse, the more likely probationers are to fail.[10] In other words, the use of alternative criminal sanctions for drug-related offenses raises, albeit to a milder degree, the same issues that incarceration does.

While acknowledging that problems related to control of substance abuse may ultimately require sweeping reform of the prohibition model, the Treatment Policy and Funding Task Force set itself the task of determining whether, within an overall framework of legal prohibition, further reforms could be undertaken. We considered a variety of current programs, in Washington and elsewhere. In addition to identifying issues in carrying out treatment policy reforms, we considered promising new approaches to replace incarceration of drug-related offenders with treatment and services.

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[8] These statistics were obtained by analyzing annual Offender Characteristics, Population and Movement reports from the Department of Corrections, Office of Planning and Research, from 1999 to 2004. Admissions for new offenses (first-time offenders plus recidivists) are distinguishable from admissions for parole or post-release supervision violations, which are left out of the statistics reported here.

[9] Faye S. Taxman *et al*., Graduated Sanctions: Stepping into Accountable Systems and Offenders (*Prison Journal* 79:182, 1999); Douglas Young *et al.*, *Alcohol, Drugs and Crime: Vera's Final Report on New York's Interagency Initiative*, 1991.

[10] Paul Gendreau *et al*., Intensive Rehabilitation Supervision: The Next Generation in Community Corrections? (*Federal Probation* 58: 72, 1994); Joan Petersilia and Susan Turner, "Intensive Probation and Parole," in Michael Tonry, ed., *Crime and Justice: A Review of Research*, 1993.

B. An Example

Before moving to a discussion of programs and policies, let us pause to consider a story that illustrates many of the concerns of the task force: an individual story repeated, with significant variations, in thousands of cases.[11]

Born twenty-five years ago, Jeremiah had lived in 15 different homes by the time he was twelve years old. Because his father was an alcoholic and his mother a heroin addict, Jeremiah was often neglected and occasionally abused, and he became a ward of the state; stints in foster care or group homes were punctuated by occasional attempts by one or the other parent to take him back and make a home for him, but each time he was abandoned once again. By the time he was 15 he had fathered a child, had dropped out of school, and had become a binge drinker who was not averse to using other substances when offered. He stayed with relatives or at group homes until he burned out his welcome, sometimes working as a day laborer, often wandering the streets until early in the morning with other young men and, in the process, becoming well known to police.

To the adults who took an interest in him—counselors, parents of friends—Jeremiah was a paradox. Almost always he was considerate in demeanor and thoughtful in conversation, rarely indulging in self-pity or blaming his troubles on others, and showing both curiosity and concern about the ways of the world. He would get a job, find a place to live, and report that things were going better; but after a few weeks, he would feel "the walls closing in on him," and go drinking. When drunk, he was a different person: dense, obnoxious, and spoiling for a fight. And whether drunk or sober, he couldn't always be counted on to show up tomorrow if an arrangement had been made for him to do odd jobs or hook up with a social service agency.

Turning eighteen meant that Jeremiah graduated from youth detention to the King County Jail. He was arrested for getting into a fight at a political march, for participating in a marijuana sale, for driving in a car that one of his friends had stolen, for failure to appear. Stays ranged from three weeks to four months; when charged, he always accepted plea bargains, and was usually sentenced to time served and released. He was always drunk at the time of his offenses, and though his rap sheet grew longer and longer, he was always poor and never committed any crime for financial gain until his last, selling cocaine to an undercover officer; something he was doing, he says, because he owed money to someone who sold drugs for a living. This time Jeremiah recognized he was in serious trouble and reached out for help

[11] The name has been changed and details have been altered or omitted to protect the subject's privacy. He has read and approved the use of this account.

wherever he could find it. Jeremiah's father, who had stopped drinking and maintained steady employment, visited him in jail and came to his trial; but Jeremiah had no idea where his mother was.

Because Jeremiah's one assault conviction had occurred just before he turned 16, he was eligible for the Drug Offender Sentencing Alternative and, with good conduct time and credit for time served in jail, he had two years left to serve in prison rather than five. Jeremiah saw prison as an opportunity to turn his life around, and during the first months succeeded in getting a G.E.D. and participated in outpatient treatment; after that, it was dead time, as he gradually came to believe that prison had nothing valuable to offer him, and grew more and more resentful about being ordered around. Jeremiah also had outpatient treatment while on workrelease. Several months after his release, he was returned to jail after one late, very drunk night when he got into a shouting match with a patrol officer that ended with several officers wrestling him to the ground; he lost his job, but a few weeks later Jeremiah pled to a misdemeanor, was sentenced to time served, and released once more. Since then, Jeremiah has managed to stay out of trouble with the law, remaining employed most of the time, though without a permanent residence. Recognizing that frequent relapses have imperiled his livelihood and his relationships, Jeremiah has followed the direction of his community corrections officer to move into alcohol and drug free housing, and is participating in chemical dependency treatment as well as a 12-step program.

Several points are worth noting about Jeremiah's story. His particular combination of social and psychological circumstances, together with accidents of biography over which he had no control, make Jeremiah a unique case: others like him may have lived continuously with one or both parents, or had even less social support; some may have severe mental illness, others present themselves with robust self-confidence; some may be less appealing, or more committed to crime for gain, or chronically addicted to one particular substance. But many features of Jeremiah's story are shared by thousands of substance-abusing young people who circulate in and out of our prisons and jails, and must be taken into account by treatment funding and policy. Some lessons are particularly relevant to the discussion that follows:

- Whether criminalized or not, substance abuse, particularly among parents, can have devastating consequences;
- A substance abuse problem can be serious and costly without rising to the level of chemical dependency;

- Young people headed for prison may be known to police and frequent jail guests, but the arrest and detention process does not lead reliably to early intervention;
- The damage of substance abuse is often bound up with issues of personal loss, mental health, homelessness,, and unemployment;
- For people with serious multiple problems, relapse after treatment or incarceration can be expected, but does not preclude eventual improvement.

C. Stages of Criminal Justice System Involvement

The committee found it useful to consider interventions at various stages of criminal justice system involvement. Beginning with the initial police contact, persons may be diverted, treated, or managed at different points as they progress from the front end—arrest or detention—through the filing, adjudication, and disposition of charges. A recent publication by the Bureau of Justice Assistance provides a chart with eleven decision points,[12] to which, under Washington's correctional system, we would have to add several post-release supervision junctures: return to prison or jail for violations, release from active supervision, and final completion of all legal and financial obligations. For this report, we have grouped points of intervention into three principal stages:

1. Front-End Interventions. When police make contact with subjects of complaint and possible arrest, they may decide to let them go, issue a citation, or transport them to a detoxification facility, emergency room, or a triage operation instead of taking them to jail. Once at the jail or station house, they may be offered bail with or without conditions.

2. Pre-Adjudication Interventions. A defendant has been charged and may petition the court to have prosecution deferred; or the defendant may appear before the court, such as a specialized drug court, and receive a chance to participate in court-supervised treatment; but there has not yet been a finding of guilt or innocence.

3. Post-Conviction Interventions. Once a defendant has been convicted, he or she may be offered an alternative sentence; treatment may be provided while a prison or jail sentence is being served, and transitional or post-release programs may be offered or included as a condition of an alternative sentence or as part of an offender's release plan.

[12] *A Second Look at Alleviating Jail Overcrowding: A Systems Perspective* (Bureau of Justice Assistance, U.S. Department of Justice, 2000).

The next three chapters describe some programs now being used in Washington at each of these stages, along with one promising British program; our consideration is by no means exhaustive, but does include approaches deemed promising or relevant by members of a committee with broad experience in this area of public service. Beyond describing program methods and objectives, we were concerned at each stage with the extent to which a program succeeds in reducing use of incarceration in favor of substance abuse treatment. We addressed this issue by asking the following questions:

- Who decides on participation in the intervention?
- Who is eligible for intervention?
- How is treatment funded and provided?
- What rights to treatment are recognized?

Often there were suggestions that changes to one of these funding or policy elements would enhance the effectiveness and scope of intervention. There were also discussions of obstacles to full implementation of treatment alternatives to incarceration, which included not only the availability of resources but unanticipated consequences of other legal or programmatic initiatives. Finally, we considered approaches used in other jurisdictions (for example, the Arrest Referral Program in Great Britain), or to address other issues (such as jail overcrowding), as a way to elicit principles to guide reductions in the use of incarceration by reforming and expanding the availability and effectiveness of substance abuse treatment.

II. FRONT-END INTERVENTIONS

The further one proceeds through arrest, detention, filing of charges, adjudication, conviction, and corrections, the greater the costs to the individual and to the system. It would appear, therefore, that front-end interventions pose the greatest promise of addressing the personal and social costs of substance abuse-related crime. We begin by considering alternatives at the point of arrest, and alternatives once someone has been booked, as two separate stages.

A. Street-Level Programs

When police officers observe or are called to respond to unruly and possibly criminal behavior, is it reasonable for them to consider alternatives to arresting the putative offender and bringing him to jail?

- Police have a fair amount of discretion to sort defendants arrested for misdemeanors into those who do and those who do not require detention. Those who are not flight risks may be interviewed and released at the scene or at the precinct house, although warrants for failure to appear will result in detention.
- When officers have come to know particular petty offenders as "frequent fliers," whose stays in jail make no apparent difference to their patterns, officers may support the development of alternative destinations.
- The I-75 initiative establishing a low enforcement priority for cannabis possession shows that street-level police discretion can be affected by public policy.

Alternative Arrest Destinations. Some programs have attempted to offer police an alternative to taking low-level intoxicated or decompensating offenders to jail by providing an alternative destination in which mental health or substance abuse issues could be assessed and referrals made. The Crisis Triage Unit at Harborview Medical Center (HMC) now provides an alternative for mentally ill arrestees; the Triage Center in Tacoma provides an alternative in a non-hospital building with detoxification and county-designated mental health professional staffing; and publicly-funded sobering centers provide an alternative to jail for chronic public inebriates.

- Because detoxification centers often have no openings, there may be no places open on a 24-hour basis to take intoxicated public order offenders other than jail.

- It is not clear that persons taken to alternative sites would otherwise have been charged and processed through the criminal justice system.

Existing information systems do not allow documentation of the extent to which HMC Triage actually diverts people from law enforcement into public health. More generally, problems of informed consent and information-sharing policies are raised by attempts to document early decision-making involving persons who may be eligible for treatment. Despite these limitations, it is clear that triage and detoxification agencies provide a clinically preferable alternative to jail for persons severely intoxicated or experiencing a mental health crisis.

Police-Based Diversion. Is it reasonable to expect police to work even more closely with clinicians, or to conduct clinical screenings? One experiment with pre-booking diversion in the early 1990's suggests a negative answer. A local mental health provider worked with police precincts, and later with jails, to divert municipal-level offenders with mental health or substance abuse issues into treatment. But this program was not cost-effective. It might be hoped that over time, as the parties gain experience, a police-based diversion program could be better administered. But a more general lesson may be drawn from this experiment:

- The levers that control the flow of offenders from streets to jails are in the hands of police, jail, and court staff. Programs will not succeed in diverting offenders from jail into treatment unless these agents have the incentive, the training and the resources to make alternative decisions.

How much leverage is required? It is commonly believed that without a charge, there is insufficient leverage to get arrestees to commit to treatment. This factor—the need for a sanction or a "hammer"—is held to limit the effectiveness of alternate destinations, such as triage and sobering facilities, in replacing incarceration with substance abuse treatment. *It may therefore be inferred that all front-end interventions are limited, and that arrestees or defendants must penetrate the court system far enough to have charges hanging over their heads before treatment will form a viable alternative to sentencing and incarceration.* Against this inference we offer the following observations:

- In 2001, after extensive literature review and discussion, the KCBA Task Force on Drug Addiction Treatment concluded that "drug addiction treatment should be available on request to every Washington resident who wants and

needs it," and "available at public expense to those who cannot otherwise afford it." Until this objective is met, we have no basis for denying that offering treatment, even in the absence of sanctions, can reduce the flow of substance abusers through our jails, courts, and prisons.

- Recent experience with jail-based and point-of-arrest programs in King and Pierce County, and the large-scale British Arrest Referral Program, all suggest that arrestees may take advantage of diversion, and detainees may look forward to treatment after release, even if a program doesn't rely on disposition of criminal charges as a sanction for treatment participation. We turn to these programs in the next section.

B. Point-of-Arrest Programs

British Arrest Referral Program. Since 2000, throughout England and Wales, a referral program has been established that provides referrals to treatment of drug-involved offenders at the point of arrest. "The idea is that a dedicated drugs worker, working in police custody cells, makes contact with drug using arrestees and refers them to appropriate treatment to address their drug use with the aim of reducing their drug related offending. Involvement with the scheme is voluntary and it is not an alternative to prosecution or due process."[13]

Arrest referral workers are informed about local treatment options, including waiting times, and use motivational interviewing techniques to "deliver a public health harm reduction message to all drug users (regardless of referral)."[14] In addition to providing information, arrest referral workers may conduct assessments and refer the prospective client to local treatment facilities. Some arrest referral "schemes" (as the British writers say) may use the incentive of a "deferred caution," in which no further action is taken if there is a positive 30-day report on treatment participation. (A formal caution is an alternative to prosecution, following an admission of guilt and informed consent by the offender, which becomes part of the criminal record and can be taken into account in future prosecutions and sentences.) With this limited exception, arrest referral proceeds independently of the legal sanction process.

An evaluation conducted under the auspices of the Home office found that in the first year of operation, 49,000 offenders were interviewed by specialists assigned to lock-

[13] Drugs and alcohol arrest referral schemes. http://www.crimereduction.gov.uk/drugsalcohol36.htm, downloaded 10/9/2004.
[14] *Id.*

ups, and over half were voluntarily referred to a specialist drug treatment service.[15] Methods of evaluation included client surveys, interviews, biological testing, and evaluation of police arrest rates to validate self-report data and confirm behavioral changes in criminal activity and drug use. Following are some principal findings:

- Arrest referral schemes have been effective in targeting prolific "problem drug-using offenders:" opiate and crack users, injection drug users, chronic shoplifters;
- Over half of the screened offenders had never had a previous treatment episode;
- Re-arrest rates declined for 67% of screened offenders, who also reported less shoplifting, reductions in drug use, and improvements in physical and psychological health;
- A savings of 4.4 billion pounds was projected over an 8-year period, for a benefit-cost ratio of 7:1.

Problems with engaging some groups of offenders were noted, and offenders who referred themselves following screening were more likely to stay in treatment than those referred to services by the station house program staff (participation is voluntary in both cases). Evaluations also noted problems with funding to allow treatment programs to handle increased capacity.

Several distinctive features of this program are worth noting:

- Police are active participants, using saliva tests to conduct initial screenings;
- Offenders are screened on the basis of the likelihood of drug involvement in non-drug crimes such as shoplifting and burglary, *not* on the basis of a drug-related offense (only 16% of those screened were arrested for selling or possession);
- The program is aimed at drug abusers, particularly those using cocaine or heroin, but drug dependency (as opposed to abuse) is not a prerequisite.
- The program does not require the "hammer" of prosecution or incarceration to engage offenders in treatment.

[15] Arun Sondhi, Joanne O'Shea & Teresa Williams. Arrest referral: emerging findings from the national monitoring and evaluation programme. DPAS Paper 18, Drugs Prevention Advisory Service, Home Office, the United Kingdom.

It may be wondered whether differences between British and American criminal justice procedures would prevent replicating such an early intervention program in this country. For example, if less emphasis is placed on incarceration of offenders (including the minority in the program arrested on drug charges as well as those arrested for theft or burglary), drug abusers may have more opportunity to seek treatment rather than languishing in jail. And treatment services may be better funded and more accessible in the United Kingdom, although publications by the Home Office make clear that treatment and criminal justice agencies face problems similar to those confronting us here. The United Kingdom makes less use of incarceration overall: of 1.4 million offenders sentenced in England and Wales in 1997, 72% were fined and 7% were sentenced to immediate custody, with an average sentence length of 16 months. The incarceration rate in England and Wales is 139 per 100,000 population, compared to a rate of 702 per 100,000 in the U.S.[16] Of specific significance for the workability of an arrest referral program is the extent to which arrests result in lengthy jail stays pending adjudication, which may interfere with offenders following up on screening and referral at the point of arrest.

- In the United Kingdom, only 15% of persons prosecuted for "indictable" offenses (as opposed to traffic and other offenses deemed non-criminal in the U.S.) were held in custody;
- It appears that a similar flow analysis has not been conducted across the multiple jurisdictions of the U.S., although it is recognized that such information would assist efforts to reduce jail crowding.[17]

Far from discouraging us from considering arrest referral programs in U.S. jurisdictions, we contend that this front-end approach is so promising that we must take additional steps to remove obstacles that may be posed by unnecessary and futile detention of drug abusers committing low-level crimes. Below we describe some programs now underway to serve this objective.

[16] Marc Mauer, Comparative International Rates of Incarceration: An Examination of Causes and Trends. Washington, D.C.: The Sentencing Project, 2003.
[17] Gordon C. Barclay & Cynthia Tavares, ed., *Digest 4: Information on the Criminal Justice System in England and Wales* (Home Office, United Kingdom, 1999), Chapter 4. On the U.S. system, see the Bureau of Justice Assistance, *supra* n. 12.

Point-of-arrest screening and referral programs like the successful initiative in the United Kingdom should be established here, despite differences in legal procedures. If length of pre-adjudication detention is critical to the feasibility of this approach, we should take advantage of current fiscal incentives that support new programs to reduce jail populations, and augment them by economically providing early screening, engagement, and referral.

Municipal Court Resource Center. The Seattle Justice Center, which houses the police department and the municipal court, now operates a resource center where court-involved clients can obtain information and referrals about entitlements, substance abuse treatment, and other social services. Court clients with drug or alcohol involvement are provided information about ADATSA (Alcoholism and Drug Addiction Treatment and Support Act), which provides subsistence payments along with outpatient or inpatient treatment for indigent persons with a chemical dependency problem. Other agencies represented as this "one-stop shopping" location include the Department of Corrections, Seattle Mental Health, which operates a housing voucher program, and Western State Hospital. Persons who have committed public order misdemeanors such as public intoxication may be required to participate in the Alcohol and Drug Information School, and short-term educational program for which people may register at the Resource Center.

Seattle Community Court Program. Drug-or-alcohol-involved defendants charged with public intoxication have traditionally been given summons to appear in court at a later date, frequently resulting in a failure to appear and the issuance of warrants. To save time and effort by police and court personnel, as well as to provide an opportunity for constructive activity, the Seattle Municipal Court is developing a pilot program in the downtown area that will provide opportunities for immediate sentencing, emphasizing community-based work projects that will allow them to compensate neighborhoods for harms to the quality of community life. The court resource center will be used to assist community court participants with access to treatment and other social services.

Neighborhood Corrections Initiative. Many low-level offenders are already under supervision by the Department of Corrections, which has mounted an effort to intensify collaboration with the Seattle Police Department and the municipal court to interrupt patterns of criminal behavior. Focusing on neighborhood "hot spots," teams of corrections and police officers may apply a variety of responses to incipient criminal activity by offenders under supervision; in addition to arrest, DOC-regulated

options such as day reporting, assignment to a Prison work crew, stipulated agreements in which conditions of supervision are amended or intensified. Thus this program emphasizes alternative responses, besides incarceration, for low-level offenses and violations as a means of preventing resumption of more serious criminal conduct.

Criminal Justice Continuum of Care Project. King County has mounted an initiative to promote access to social services for persons arrested and processed at King County Correctional Facility and the Regional Justice Center, either as an alternative to total confinement or as part of a case disposition ordered by specialty courts such as mental health and drug diversion courts. Participating agencies include Community Psychiatric Clinic, Seattle Mental Health, Evergreen Treatment Services, Therapeutic Health Services, Pioneer Human Services, and DSHS; services include housing and mental health vouchers, intensive outpatient chemical dependency treatment, and access to opioid substitution treatment.

In an effort to reduce jail crowding and detention costs, King County jail staff and administrators recommend placement of arrestees on partial confinement status through the Community Center for Alternative Programs. Substantial effort has been devoted to assessing defendants and channeling them into appropriate substance abuse or mental health treatment programs.

- Like the British program, the King County initiative proceeds independently of the disposition of charges.
- Incentives to pursue treatment options are provided not by offers to suspend charges or as alternatives to conviction, but by the court's exercise of discretion to order administrative release to partial confinement status.
- In some cases, an eventual decision to sentence the defendant to time served may take into account the defendant's compliance with treatment recommendations, but this is not the major incentive for program participation.
- One incentive for program participation, in addition to the option of partial rather than full confinement, is the provision of housing vouchers. These vouchers can also be used to support homeless individuals who opt into mental health and drug court (post-filing, pre-adjudication) programs.

Between the fall of 2003 and February 2005, the Community Center for Alternative Programs referred 464 people for services: 45% for mental health or substance abuse

programs, 43% to DSHS for publicly-funded benefits, 27% for housing, and 16% for employment services.[18]

Like any new initiative, this program has had to confront major challenges. Information sharing with treatment providers poses problems of database management and articulation as well as informed consent. For example, implementation of HIPAA constraints on information sharing resulted initially in a rapid drop of referrals to the mental health court. With experience, administrators have learned that consent can be obtained once defendants understand their options, and that joint service agreements between agencies, in which all personnel have signed confidentiality oaths, can be used to bypass consent for sharing of some kinds of information.

A corrections-based program that requires workers to learn new skills of assessment and intervention also raises the question, what incentives are there for people working nights and weekends to put out extra effort? Bringing in contract workers to handle some of the work also requires extensive negotiation and maneuvering.

- For both law enforcement and jail personnel, screening and assessment are critical elements in attempts to divert people from further criminal justice system involvement into appropriate mental health or substance abuse treatment programs.
- In the jail setting, the focus of intake services must be to collect as much information as possible, as quickly as possible. Personal recognizance investigators have the task of putting together a package for the court that includes defendant needs and treatment options. The more efficiently this task proceeds, the greater the financial savings for the county and, it may be hoped, the greater the potential benefits of diversion to the defendant.

If the Continuum of Care Project succeeds in establishing screening and engagement as a routine part of jail booking procedures, it can be augmented by bringing in professional outreach and engagement workers like those used in the British Arrest Referral Program. The attempt to reduce costs due to detention reinforces longer-term efforts to reduce the personal and system costs of untreated drug abuse and repeated arrests, described in the previous chapter.

Transition Options Partnership (TOP). In Pierce County, the Department of Corrections (DOC) has coordinated efforts with the Department of Adult Detention and a network of treatment, housing, and employment services to identify persons

[18] Statistics provided by Dave Murphy, King County, Criminal Justice Initiatives Status Update, 2005.

under its supervision when they are re-arrested and intervene upon their admission to jail. Among past felony offenders, most of those who eventually commit another felony are first rearrested and jailed several times for supervision violations or misdemeanors. It is this cycle that DOC is attempting to interrupt by intervening when offenders under its supervision are booked at the Pierce County jail.

- Offenders are engaged in the program at the point of booking, but it continues through adjudication and release from jail.
- Some program clients may be first-time felony offenders facing jail rather than a prison term; others may be on community supervision status due to a previous felony.
- Program clients are drawn from the 13,000 active Department of Corrections supervision cases in Pierce County, 20% with a most recent release from prison, and 80% with a most recent release from jail.

Eligibility. DOC now expends its community supervision resources only on high-risk offenders, as determined by the Level of Supervision Inventory—Revised (LSI-R), an actuarial risk assessment instrument that applies past criminal history as well as more recent behavioral and attitudinal measures, and DOC's own Risk Management Inventory (RMI), which focuses on the particulars of an individual's offending pattern and takes into account special needs. Offenders at Risk Management Levels A and B are eligible for supervision and, therefore, for the TOPS program.

Because Transition Options Partnership (TOP) focuses on high-risk offenders, it doesn't specifically address drug offenders, but DOC has agreed to supervise all DOSA offenders as (at least) "high-needs B's", and seriously mentally ill offenders are also supervised on a high-needs basis.

Treatment Process. If offenders are screened as potentially high risk on the basis of a short-form administered at booking, DOC conducts an LSI-R and RMI. If potential participants are evaluated as high risk and show interest in the program, their needs are assessed, and a team develops a plan. This plan is then incorporated into the sentence, with the offender's agreement.

- In addition to substance abuse treatment, participants need help with housing, mental health, public subsistence, employment, and education; these needs are addressed by teams representing social service agencies, Churches, safe streets programs, and other neighborhood associations. Parks Department work crew or other jobs may be arranged by Work Source, a DOC contractor.

- The program begins while offenders are in jail and they are active in it for 6 months after release.

Although TOP participation may affect the length and nature of confinement, it differs from a Drug Diversion Program and resembles the British Arrest Referral Program in that no particular sentencing or adjudication incentives are offered as part of the program. No formal agreements are established as part of program admission, but to the extent that prosecutors and judges have discretion over disposition of cases, program participation provides confidence that alternatives to lengthy confinement may be feasible.

Conclusions. Pierce County's Transition Options Program, Seattle's downtown initiatives, and King County's Continuum of Care Project, were developed to serve purposes other than the specific aim of reducing the use of incarceration for persons with substance abuse problems. Seen in light of the successful experience of the British Arrest Referral Program, these local efforts reinforce critical points about point-of-arrest interventions:

1. *Though the high-pressure flow of offenders through jails, and the diverse cultural assumptions of criminal justice and social service providers, pose problems for collaboration, it can be achieved if all actors understand the potential human and fiscal benefits of intervention.*

2. *Although engagement and referral to chemical dependency treatment is valuable by itself, collaborative efforts can address a broader range of needs, including mental health, housing, and employment.*

3. *Successful intervention at the point of arrest does not require the threat of prosecution and conviction for those who fail to participate in treatment.*

4. *Early interventions, which address individuals affected by chemical dependency without using a drug-related offense as an eligibility condition, are consistent with KCBA's overall goal of reducing the damage of chemical dependency without reliance on criminal sanctions.*

III. PRE-ADJUDICATION INTERVENTIONS

Interventions considered in this chapter occur after charges have been filed but before there has been an adjudication, i.e., a court judgment that the defendant is guilty or not guilty of the filed charges.

- As we saw in the last chapter, point-of-arrest programs may continue after prosecution and adjudication, indeed after sentences have been served.
- The distinction between point-of-arrest and pre-adjudication programs is best understood in terms of the degree of court involvement required for the program to proceed.

Deferred Prosecution

Deferred prosecution is available in Washington only for misdemeanor offenses. With the assistance of counsel, defendants can petition the court for deferred prosecution on the grounds that they suffer from alcoholism, drug addiction, or a mental health problem and are in need of treatment. Deferred prosecution offers defendants the opportunity to avoid acquiring a criminal record if they seek and comply with a treatment program, and abide by "reasonable conditions" ordered by the court for five years. Charges will be dismissed after five years if defendants can show they have complied with all conditions.

- Defendants declare that they are fully aware of their legal rights and stipulate to the "admissibility and sufficiency of the facts" in the police reports.
- When prosecution is deferred on chemical dependency grounds, it includes a two-year treatment plan, and three years must elapse after the completion of this plan before charges will be dismissed. No standards for required length of treatment are imposed on those for whom prosecution is deferred on mental health grounds.

The program includes no special provisions to pay for substance abuse treatment or related services. The typical deferred prosecution client is a working person, charged with Driving Under the Influence (DUI), with some ability to pay for treatment independently or through private insurance. Indigent petitioners, however, may have treatment funded if they meet the program's income and substance abuse severity conditions.

Issues to be resolved concern the extent to which individuals who could benefit from deferred prosecution are excluded because they neither have the means for treatment nor qualify for publicly funded treatment. As with other court-directed treatment programs, possibilities for conflict arise because judges have the power to supersede the judgment of treatment providers about the defendants' ability to benefit from treatment and the extent and types of treatment that are clinically required.

In terms of our task force objectives, deferred prosecution offers two principal advantages:

- *It is a relatively low-cost option, involving limited administrative resources and averting further penetration of the criminal justice system by many low-level offenders;*
- *It provides defendants with strong incentives to seek treatment and allows monitoring of compliance.*

The limitation of deferred prosecution to misdemeanor drug-related offenses raises a further, more general issue. The classification of low-level drug offenses as felonies prevents the use of deferred prosecution, with the result that defendants must further penetrate the criminal justice system before qualifying for other alternatives such as drug diversion court. As discussed in the previous chapter, intervention at earlier stages of criminal justice involvement not only requires less court involvement and less administrative overhead, but is more consistent with KCBA's overall goal of reducing reliance on criminal sanctions. In addition to this disadvantage, defendants who have been convicted of drug-related felonies lose eligibility for public housing and education programs that could otherwise support the efforts of ex-offenders to find gainful employment and participate constructively in community life.

- Reclassification of low-level drug offenses as misdemeanors will make more defendants eligible for deferred prosecution and avoid handicapping their future prospects by a felony conviction.

Drug Courts

Drug courts represent a large-scale, nationwide effort to divert criminal defendants from incarceration into substance abuse treatment. In the late 1980's, the intensification of the War on Drugs threatened to overwhelm the criminal justice system, leading many jurisdictions to search for alternatives. As of 2001, 230,000 offenders had participated in almost 700 drug courts established since the early 1990's; drug courts are now operational in all 50 states. Washington state has used

drug courts since 1994, and over 25 were operating as of 2002. In King County alone, there were 2500 referrals to the court in its first three years of operation.

The U.S. Department of Justice, Office of Justice Programs, maintains a Drug Courts Program Office which provides technical assistance and maintains a grant program to "leverage the coercive power of the criminal justice system to enforce abstinence among and alter the behavior of drug-involved offenders."[19] Although procedures vary among jurisdictions, some common elements were initially established through federal funding requirements and continue to define the intervention today:

- Drug courts focus on nonviolent drug offenders, excluding those with previous assault or sex offense convictions;
- The adversarial criminal process is replaced by an agreement between the defendant and a multidisciplinary team—including judge, prosecutors, defense attorneys, treatment providers, and law enforcement—under which the adjudication process is suspended in exchange for an agreement to remain crime-free, abstain from substance abuse, and complete a treatment program.
- The defendant's compliance and progress towards completing the planned objectives are supervised by the judge consulting with the multidisciplinary team.

Jurisdictions vary greatly in eligibility standards and methods of operation. Here we rely principally on information about the King County Drug Diversion Court, the oldest and largest program in Washington. These are the stated program objectives:

- Reduce crime;
- Enhance community safety;
- Reduce substance abuse;
- Reduce the impact of drug cases on criminal justice resources; and
- Enable drug court participants to become responsible and productive members of the community.

Who Decides? Rules for eligibility and participation are determined by a multidisciplinary Executive Committee (judge, prosecution, defense, police, treatment). Admission to the program proceeds in three stages.

[19] Drug Court Monitoring, Evaluation, and Management Information Systems: National Scope Needs Assessment. U.S. Department of Justice, Bureau of Justice Assistance, 2003, iii.

1. Defendants found eligible in terms of an initial criminal history screen are offered the opportunity to participate.
2. Those who agree undergo a chemical dependency assessment.
3. If defendants meet treatment eligibility criteria and are approved for participation by the Executive Team, they are offered the chance to sign an agreement covering treatment and compliance conditions (they may still opt out of the program after meeting with the treatment provider).

In short, both the defendant and the multidisciplinary program team, guided by the chemical dependency assessment, decide on program participation.

Who is Eligible? The basic criteria are (1) arrest for a felony drug charge, including possession, prescription forgery, solicitation to commit delivery of a controlled substance, delivery or possession with intent to deliver small amounts of heroin, cocaine or marijuana;(2) no prior adult sex or violent convictions, and (3) need for treatment as determined by the assessment and evaluation. Rules concerning the amount of drugs in the defendant's possession have been established to exclude persons selling substantial quantities.

State law establishes an *eligibility ceiling*: a history of sex or violent offenses or methamphetamine manufacture excludes defendants, but jurisdictions vary in the extent to which defendants below that ceiling are considered for drug diversion court.

- In King County, defendants arrested for Theft 2, Forgery, Identity Theft, Malicious Mischief 2, Possession of Stolen Property 2, and Taking a Motor Vehicle are eligible given there is no indication that restitution would exceed $1500 at the time of opt-in. *Thus, King County has extended eligibility to defendants arrested for some non-drug felony charges*.
- In King County, defendants are excluded if they have convictions for past violent, weapons, or sex offenses, more than two DUIs, or more than two domestic violence offenses (the last requirement derives partly from the initial federal funding source).
- Results of the chemical dependency assessment may be challenged by defense attorneys.

How is treatment provided? Treatment can include detoxification, outpatient treatment, residential treatment and opiate substitution treatment. Treatment includes both individual and group treatment, involvement in self-help groups, and may include other ancillary services such as acupuncture. Some counties have multiple

providers, others a single provider. Minimal guidelines for treatment contracts are provided in state-level legislation enabling the program. DASA funds a level of treatment governed by the American Society of Addictive Medicine (ASAM) Patient Placement Criteria, although the length of court-ordered supervision and follow-up may differ. Non-compliance is managed cooperatively by the program committee, with the judge legally empowered to decide on the response. In addition to avoiding incarceration, incentives include, in most but not all counties, expunging the current offense record.

- The Department of Judicial Administration oversees contracts with providers, using funding provided by the county in addition to DASA funding.
- The providers are responsible for assessing clients according to criteria for abuse/addiction established by ASAM. Because the Drug Diversion Court program has purchased its own treatment capacity, *eligibility is not so tightly restricted by capacity-governed chemical dependency criteria as DASA programs for non-court public clients.* In particular, individuals affected by substance abuse who do not qualify as chemically dependent are eligible for the program.

Outcomes. Nationwide, a treatment retention rate of 70% has been reported, substantially higher than that of traditional treatment programs.[20] Costs are estimated at $2,000 – 3,000 per client, with savings in incarceration costs projected at $5,000 per individual. There is substantial evidence of cost savings and recidivism reductions both locally and nationally.[21] Questions have been raised, however, about the involvement of courts in ordering treatment and whether programs are as cost-effective as touted.[22] We noted above that the objective endorsed by the U.S.

[20] *Id.*, p. 2.

[21] *See*, *e.g.*, C. West Huddleston, III, Karen Freeman-Wilson and Donna L. Boone (2004), *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States.* Washington, D.C.: Bureau of Justice Assistance, U.S. Department of Justice, National Drug Court Institute, White House Office of Drug Control Policy; Michael Rempel, Dana Fox-Kralstein *et al*. (2003), *The New York State Adult Drug Court Evaluation: Policies, Participants and Impacts*, New York: Center for Court Innovation, p. 7; Jonathan E. Fielding, M.D. *et al*. (2002), "Los Angeles Drug Court Programs: Initial Results," *Journal of Substance Abuse Treatment*, v.23, pp. 217-224; Steven Belenko, (2001, 1999, 1998), "Research on Drug Courts: A Critical Review," *National Drug Court Inst. Rev*., v.1, pp. 1-42; v.2(2), pp. 1-58; Reginald Fluellen (2000), "Do Drug Courts Save Jail and Prison Beds?" *Issues in Brief*, New York: Vera Institute of Justice; Steve Aos & Robert Barnoski, Washington State's Drug Courts for Adult Defendants: Outcome Evaluation and Cost-Benefit Analysis. Olympia, WA: Washington State Institute for Public Policy, 2003.

[22] See Morris B. Hoffman (2002), "The Rehabilitative Ideal and the Drug Court Reality," *Federal Sentencing Reporter*, v.14, no.1, p. 172; and Douglas B. Marlowe, David S. Dematteo and David S. Festinger (2003), "A Sober Assessment of Drug Courts," *Federal Sentencing Reporter*, v.16, no.1, pp. 113-128. Even the data on drug courts collected by the Justice Department has been found to be inadequate for evaluating drug court effectiveness. U.S. General Accounting Office (2002), *Drug Courts: Better DOJ*

Department of Justice was to "leverage the coercive power of the criminal justice system to enforce abstinence among and alter the behavior of drug-involved offenders." The linkage between program effectiveness and the federal legal framework of prohibition has been challenged in several studies.

- Despite the emphasis on the coercive leverage provided by drug laws, *most drug law violators under court supervision (low-risk offenders) perform better the **less** they are supervised*. The only exception is the minority of offenders with serious mental illness or whose offending expresses ingrained antisocial traits; members of both groups perform well only with close supervision.[23]

- In drug courts, the fewer status hearings in court required of low-risk drug court clients, the higher the graduation rates and the longer the periods of abstinence after graduation.[24]

The drug court model has also been criticized because reliance on the authority of criminal justice decision-makers means that treatment may be ordered in ways that contravene accepted clinical standards.

- Some drug court programs may infringe on religious freedom by forcing defendants into 12-step programs, may impose treatment on defendants who don't need it, or may impose on people who fail the program harsher penalties than they would have received without it.

- Drug courts compromise the confidential relationship between patient and health care provider. The health care provider's client is the court, prosecutor and probation officer rather than the person who is receiving drug treatment.

Retention and completion rates differ widely for court-supervised treatment programs around the United States because of the variety of eligibility and performance criteria. Outcome statistics, therefore, may be affected by the extent to which "cherry pick" participants to ensure favorable outcomes. Furthermore, not all claims of program effectiveness have been based on reports by trained, independent investigators.

Few of these objections apply to King County, which runs a more expensive, carefully reviewed program. Independently available funding for treatment is supplemented by county funds dedicated to the program. This court also admits more

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Data Collection and Evaluation Efforts Needed To Measure Impact of Drug Court Programs, Washington, D.C.: Government Printing Office, GAO-02-434, April 2002, pp. 12-13.

[23] Douglas B. Marlowe et al. (2003), "A Sober Assessment of Drug Courts," 16 Federal Sentencing Reporter 1.

[24] David S. Festinger et al. (2002), "Status Hearings in Drug Court: When More is Less and Less is More," 68 Drug & Alcohol Dependence 151.

socially-handicapped participants in the attempt to ameliorate public disorder and to assist hard-to-reach populations, resulting in lower rates of program completion.[25]

- A recent evaluation by the Washington State Institute for Public Policy (WSIPP) found reductions in recidivism averaging 13% in five out of six adult drug courts operating in Washington in 1998 and 1999.
- For those five courts, economic analysis, using sophisticated methods developed at WSIPP, yielded a benefit-cost ratio of $1.75 saved per dollar expended.[26]

We consider below issues that affect expansion of the scope of the program and improvement of its clarity and efficiency.

Judicial involvement. The drug court judge is extensively involved in monitoring the offender's progress in treatment, with status reviews monthly for active participants. While this sort of participation is important to supporting the program and maintaining its integrity in the eyes of many stakeholders, it also poses the risk of conflict between judicial and clinical judgments. Although many judges are clear that they are not drug treatment professionals and will defer to clinical members of the team concerning need for treatment, type of treatment, and duration of treatment, situations can arise where judges or prosecutors want to impose treatment requirements that differ from those recommended by treatment professionals.

- Treatment providers will not request public funds to pay for more treatment than is medically necessary according to ASAM criteria, which may place providers and clients in a bind.
- In King County, chemical dependency professionals are part of the Executive Committee and provide input into program admission and discharge decisions. The legal power to decide on admission, duration, and completion of treatment rests, however, with the court.
- Clinical admission, compliance, and completion standards are most appropriately defined by the local public substance abuse treatment authority, such as the King County Mental Health & Chemical Dependency Services Division.

[25] Out of 3,071 defendants opting into King County's drug court program between 1994 and 2004, 622 participants "graduated" and 350 participants are currently active. http://www.metrokc.gov/kcscc/drugcourt/, accessed 4/18/05.
[26] Aos & Barnoski, *supra* n. 21.

- Whether there is conflict between legal and clinical participants appears to depend on the judges' understanding of their role and the credibility of treatment providers. Training of judges and treatment providers about their respective responsibilities may be helpful in preventing confusion over standards.

Ensuring access. In King County, prosecutors refer to the multidisciplinary Executive Committee all defendants who meet the criminal history eligibility criteria. Defendants rejected by the prosecutors may petition the court, but it will consider only whether the criteria were appropriately applied. In some counties, however, it is believed that prosecutors exercise undue discretion to keep defendants out of drug court. Proposals have been floated to allow any defendant to bypass the prosecutor and petition the court for admission, but it is feared that this may flood the court with petitions of little merit, e.g., by defendants who don't meet established criteria. Furthermore, because drug diversion is technically a deferred prosecution program, courts have classified access to this option as privilege rather than a right; therefore, defendants have no equal protection interest that would support a claim that they must be allowed to participate.

Statewide Uniformity in Access and Treatment Policy?

- *The desire of local jurisdictions to control their own affairs would make it impossible to gain acceptance for any statewide standards for eligibility, treatment, or completion.*

- *A preferable approach is to establish statewide guidelines that encourage each county to define and publish standards for program eligibility, treatment delivery, and program completion that would establish uniform and predictable procedures on a county-wide if not a statewide basis.*

- *Educational efforts by statewide organizations such as the Washington State Association of Drug Court Professionals are preferable to legislation, both because education is less likely to arouse controversy over jurisdictional rights and because additional requirements will encumber program operations.*

Conclusions. While there are statewide standards concerning drug court procedures, eligibility exclusions, and the legal status of participants, there is no uniformity across local jurisdictions in prosecutorial and court decision-making about admitting defendants to the program. Attempting to impose statewide uniformity as a matter of law, however, may arouse political opposition that only wastes effort better spent on promoting full and efficient use of treatment alternatives to imprisonment.

Finally, let us note several issues that reflect the delicate and complex nature of our mandate: to define alternatives to incarceration of persons affected by substance abuse within a legal framework of prohibition. Because drug and alcohol abuse can be so destructive, particularly because it often leads to jail or prison, we wish to encourage maximum access to treatment for persons who could benefit from it. Individuals who abuse drugs come under the jurisdiction of the courts, both for so-called "drug offenses" and for offenses committed while intoxicated or to pay for drugs. Judicial intervention, especially through the drug court, has brought into treatment persons who would otherwise be missed by the publicly funded voluntary treatment system: they might not have shown up voluntarily, or they might not have met restrictive eligibility criteria designed to conserve resources by rationing access. But court involvement brings with it non-clinical interests:

- From a risk management standpoint, it may be doubted whether a blanket exclusion of any offenders with violent or sex offenses in their past records is needed, especially because it may rule out treatment for some who would benefit.
- Requiring participants to pay up to $1500 in restitution may discourage participation, although an argument can be made that this form of accountability contributes to personal growth.

In both cases, clinical arguments have been outweighed by concerns about public safety and accountability. To address these concerns, arguments must be couched in terms of what is safe and what is deserved, and therefore must consider issues beyond the optimal use of treatment and criminal justice resources.

IV. POST-CONVICTION INTERVENTIONS

The Transition Options Program in Pierce County, described in Chapter Three, represents not only a point-of-arrest program but a post-conviction intervention in two senses:

- Offenders targeted for screening upon jail admission are already under DOC supervision, by virtue of past felonies for which they have served prison terms or community corrections sentences;
- Offenders may proceed through the adjudication process on their current arrest and either serve terms in jail or be sentenced to community supervision under a social service plan developed by the TOP interagency team.

Although TOP was not set up as an alternative sentencing program for individuals who abuse drugs, it is mentioned here as an example of the ability of interagency networks to support judicial discretion to take advantage of existing flexibility in sentencing for misdemeanants and felony defendants with presumptive sentences less than one year: "For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used." (RCW 9.94A.680)

> *For persons convicted of misdemeanors and nonviolent felonies with sentences under a year, discretion already exists to use alternatives to incarceration. No legal change is required to use this discretion for eligible substance-abusing offenders; what is required, rather, is collaborative networks among social service agencies that can develop an alternative package for consideration by the court.*

Drug Offender Sentencing Alternative

The Drug Offender Sentencing Alternative (DOSA) is the principal post-conviction intervention for felony offenders at risk of imprisonment. As we saw in Chapter Two, the judge's decision to apply DOSA reduced Jeremiah's term in prison from six years to three years, and—despite serious bumps in the road—Jeremiah may yet benefit from the combination of support and supervision provided by the Department of

Corrections during the part of his sentence converted to community custody.Under DOSA, time in confinement is reduced by half if the offender completes treatment.

- The remainder of the prison term is converted to community custody, but total confinement may be re-imposed if the offender fails to complete treatment or violates conditions of supervision.

Who is Eligible. Although only first-time Violation of Uniform Controlled Substances Act (VUCSA) felony offenders were eligible when the program began in 1995, all property and drug offenders are eligible providing that they have no current or past violent or sex offenses, deadly weapons enhancements, or deportation orders. About one-quarter of DOSA sentences in 2000-2001 were based on non-drug felonies.[27]

- Priority for chemical dependency treatment under DOC auspices goes first to DOSA offenders, then to risk-level A's, then risk-level B's. Treatment of non-DOSA offenders affected by substance abuse, at all risk levels, is provided according to available resources. It is currently estimated that DOC treatment slots are available for only 50% of non-DOSA offenders with chemical abuse or dependency treatment needs.

How Treatment is Provided. Chemical dependency assessment must be completed while offenders are in prison, i.e., at reception. Some are moved out of prison so quickly that little else can be completed while they are there. The treatment program is developed by DOC, as a certified chemical dependency treatment agency, but is carried out both in prison and in the community by CiviGenics, its primary vendor, or other smaller providers in less populous areas of the state.

- Approximately 100 DOSA sentences are issued per month. Between prison and the community, a total of 3500 treatment slots are available.

- DOC operates three residential substance abuse treatment programs for offenders in prison, but most receive intensive outpatient treatment during the latter part of their prison terms.

- Continuing care is provided in work release or in the community by contracted providers, with DOC funds, continuing for a minimum of three months after prison release.

[27] Polly Phipps, Drug Offender Sentencing Alternative: Sentencing and Supervision. (Presentation to the Sentencing Guidelines Commission.) Olympia, WA: Washington State Institute for Public Policy, 2003.

- DOC tracks DOSA offenders after release to ensure that they attend required treatment. There is no waiting list for enrollment in treatment at the community justice centers.

Outcomes. In January, 2005, the Washington State Institute for Public Policy (WSIPP) completed its legislatively-mandated evaluation of effectiveness and cost savings in the DOSA program.[28] Offenders sentenced under the expanded DOSA provisions of 1999 were compared to offenders sentenced between 1997 and 1999 who would have qualified for the DOSA program had it existed at that time. Multivariate statistical analyses were also used to control for observed differences between the groups that might have affected chances of recidivism.

- WSIPP found significant differences in recidivism for drug offenders sentenced to DOSA: statistically adjusted two-year felony recidivism rates for the comparison group were 29%, compared to 20.2% for DOSA offenders.

- The average cost of treatment for DOSA offenders was estimated at $1,319 per offenders. This cost was more than offset by differences in recidivism rates and associated crime costs, and especially by differences in incarceration costs due to reductions in sentence. As a result, WSIPP estimates that each dollar spent on the DOSA program for drug offenders generated between $7.25 and $9.94 in savings due to reduced costs.

- WSIPP found no statistically significant differences in recidivism between DOSA participants with non-drug offenses and the comparison group, with the result that for these offenders, the program did not quite generate enough criminal justice cost savings to pay for itself.

- As we have discussed in connection with other programs, offenders with drug problems—whether or not they have drug offenses—also face other challenges, such as homelessness and unemployment. An earlier WSIPP evaluation found that offenders with DOSA sentences fare better in these respects than other drug offenders.[29]

Treatment Policy Issues. In 2002, there were some prosecutors who refused to recommend offenders for the DOSA program because of concerns about subsequent treatment and supervision in the community. The cause of unhappiness was that some DOSA offenders were evaluated as low risk and thus didn't pass DOC's

[28] Steve Aos, *Washington's Drug Offender Sentencing Alternative: An Evaluation of Benefits and Costs*. Washington State Institute for Public Policy, 2005.
[29] Phipps, *supra* n. 27.

threshold for community supervision and eligibility for DOC-funded treatment. This problem was resolved by the end of 2002:

- DOSA status is now incorporated into DOC's risk management protocols so that all DOSA offenders are subject to post-release community supervision, regardless of actuarial risk to re-offend or commit acts of violence.
- As noted above, DOSA offenders have first priority for DOC's available treatment slots.

Although the systemic cause of interagency conflict over the DOSA program has been resolved, this episode is mentioned here for two reasons. First, it reprises our comment, at the end of Chapter Four, that the entry of criminal justice actors into the substance abuse treatment arena means that program delivery can be affected by extra-clinical considerations, in this case the correctional preference for intervening on the basis of public safety risk. Second, it reinforces a major theme of this report:

> *Restrictions on program eligibility, due to the need to ration scarce social service resources, can be counterproductive in terms of longer-term savings in the human and economic costs of incarceration.*

Several issues continue to restrict the use of DOSA and other post-conviction programs as a means of broadening access to substance abuse treatment by persons for whom it could reduce their risk of continued or longer incarceration:

- Chemical dependency is found in 70% of offenders screened upon entry to prison. The combination of DOSA eligibility conditions and risk priority criteria means that the vast majority of chemically dependent offenders will not receive DOC-sponsored treatment.
- To the extent that incentives for treatment participation, as in DOSA, depend on the desire to shorten terms of total confinement, there is a risk that continuing legislative reductions of drug offense prison terms (as in SHB2238, 2002) may undercut those incentives. So far, there is no evidence of decline in demand for DOSA due to shorter presumptive sentence lengths for drug felonies.

While we recognize that fear of continuing incarceration may provide constructive incentives without which some individuals who abuse drugs would remain stuck in their cycle of abuse, it is inconsistent with the principles of the KCBA Drug Policy Initiative to maintain or advocate penal sanctions for drug law violations for this reason. Instead, we recommend the following approach to the twin problems of resources and incentives:

- *Allow the entire prison term to be converted from total confinement to community supervision, with partial confinement as appropriate, for qualifying DOSA offenders.*

- *Apply savings of reduced incarceration savings to enhance the intensity of correctional supervision and support, and to increase voluntary access to correctional substance abuse treatment for offenders who don't meet DOSA eligibility or DOC risk criteria for the currently restricted slots.*

V. CONCLUSIONS

The KCBA Treatment Policy and Funding Task Force directed itself to describing reforms in policies that would reduce the extent to which detention, prosecution, adjudication, and incarceration are applied to persons whose involvement with the criminal justice system could be alleviated by effective substance abuse treatment. While acknowledging that problems related to control of substance abuse may ultimately require sweeping reform of the prohibition model, we set ourselves the task of determining whether, within an overall framework of legal prohibition, further reforms could be undertaken. We proceed from several evidence-based premises:

- Substance abuse treatment diminishes drug use and is a cost-effective method of reducing criminal recidivism.
- The costs of failure to intervene with addicted or substance-abusing offenders are substantial.
- Persons at risk of jail or prison due to substance abuse problems are typically indigent, frequently arrested or detained, and hampered by issues of housing, employment, mental health, and wavering attachment to mainstream values and social support networks.

Recent years have seen progress in mitigating the futile or unnecessary incarceration of substance abusers, but analysis of factors at work in recent treatment initiatives shows that much more can be done.

Approach. KCBA's 2001 Task Force on Drug Addiction Treatment, the progenitor of this and several other specific policy analysis efforts over the last several years, recommended sufficient funding of treatment programs to make treatment available on demand for all who need it. While we support this general recommendation, we don't view advocacy of increased capacity as an adequate response to the current situation, in which successful programs continue to be regarded as difficult to afford.

- Recent successful innovations in Washington such as drug courts, DOSA, and apparently unrelated efforts to reduce jail crowding and break recidivism cycles provide guidance on the feasibility of further reforms in Washington State.

- Rather than canvassing every program and approach available in Washington or other jurisdictions, we have attempted to identify obstacles and opportunities through analysis of factors at work in a limited number of existing programs.

These programs, embedded to various degrees in routine criminal justice operations, manifest conflicts as well as promise in attempts to "leverage the coercive power of the criminal justice system to enforce abstinence among and alter the behavior of drug-involved offenders."[30]

Treatment in Criminal Justice Context. Controversies over court-directed treatment, exemplified both by drug courts and the DOSA program, indicate that issues about funding, clinical integrity, and desired outcomes are no longer negotiated only between the client and the provider, but also involve a third party—court or corrections—that supervises an offender in need of chemical dependency treatment.

- Court-directed programs have engaged persons in treatment who otherwise would have been missed because they might not have sought treatment voluntarily, or who might not have met restrictive eligibility criteria designed to conserve resources by rationing access.

- Involvement of courts and corrections also means that decisions about program eligibility, treatment delivery, and program completion are governed not only by clinical considerations but by factors such as public safety, risk management, and legal accountability.

- While legal sanctions can provide important incentives for engagement in treatment, they can be costly in terms of the administrative oversight and procedural intricacies required to safeguard both offenders' liberty interests and the justice system's accountability and public safety mandates.

- Not every intervention is a smashing success. Past experience suggests that new initiatives must be realistic about who makes consequential decisions and how funds are best spent: "As with any business . . . a key to profitability is keeping costs under control."[31]

These lessons have guided our recommendations about directions for expansion of programs to replace incarceration with treatment for substance-abusing offenders.

[30] U.S. Department of Justice, *supra* n. 19.
[31] Aos & Barnoski, *supra* n.28, p. 11.

Summary of Recommendations

- *Concentrate on point-of-arrest interventions and jail-based programs that engage offenders in chemical dependency treatment and other social services without relying on court mandates to enforce compliance.*

- *Take advantage of existing discretion to use partial confinement for detention of low-level arrestees, and to convert short-term sentences of low-level offenders to community supervision, as a means of engaging offenders in treatment and other social services in lieu of detention or jail sentences.*

- *Experiment with an adaptation of the British Arrest Referral Program in King County and apply the lessons to disseminate the program to other jurisdictions.*

- *Arrest referral, drug courts, and post-conviction alternate sentences such as DOSA have all proved themselves cost-effective. While exercising due diligence about program integrity and research support, do not allow considerations of short-term costs to prevent expansion or replication of approaches with demonstrated success.*

- *To increase predictability, fairness, and access for offenders to drug court programs, undertake statewide educational efforts to help each jurisdiction develop and publish clear standards for eligibility, treatment approach, and completion of treatment.*

- *Low-level drug offenses should be reclassified as misdemeanors rather than felonies. The definition of "low-level" is a task for legislators with input from law enforcement, corrections, and treatment providers.*

- *Expand use of DOSA and access to correctional substance abuse treatment by allowing conversion of the entire total confinement sentence to community custody or partial confinement, and apply saved incarceration costs to fund enhanced program oversight and additional treatment slots for offenders who currently don't qualify for correctional chemical dependency treatment.*

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