

## A New Continuum for Court Supervision

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### INTRODUCTION

The bad news is that five million people are on probation or parole in the United States.<sup>1</sup> The good news is that Hawaii has finally found a way to effectively supervise probationers that substantially reduces victimization and new crimes, helps offenders succeed on probation and avoid going to state prison, and saves taxpayers millions of dollars. This task has been accomplished by developing an effective continuum of supervision that includes regular probation (probation-as-usual), Hawaii’s Opportunity Probation with Enforcement (HOPE Probation), and a now-redirected Drug Court.

At sentencing in Honolulu, approximately thirty percent of defendants are sent to prison for a number of years.<sup>2</sup> The remaining seventy percent are placed on probation (or deferral) and given a

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\* Judge for the First Judicial Circuit in Honolulu, Hawaii. In 2004, I created Hawaii’s Opportunity Probation with Enforcement (HOPE) program, and in 2011 I was designated the Hawaii Drug Court judge in Honolulu.

<sup>1</sup> Amy L. Solomon et al., Pew Ctr. on the States, *Putting Public Safety First: 13 Strategies for Successful Supervision and Reentry* 1 (Dec. 2008), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/13\\_strategies.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/13_strategies.pdf).

<sup>2</sup> Marshall Clement et al., Council of State Gov’ts Justice Ctr., Presentation, Justice Reinvestment in Hawaii: Analysis & Policy Framework, at slides 9–10 (Jan. 17, 2012), <http://www.justicereinvestment.org/states/hawaii/pubmaps-hi>.

chance to clear their records.<sup>3</sup> Hawaii now has three good alternatives to effectively supervise offenders on probation and/or deferral. At initial sentencing, those offenders who have minimal problems and who are at lower risk will be placed on probation-as-usual. Many will succeed there. Those who have difficulty complying with probation-as-usual or who are identified as high risk from the start will be placed in HOPE Probation. Most will succeed there. Some of the more criminally minded and antisocial (some of whom perhaps should have been sent to prison to begin with) are the ones who will frequently fail to comply with the conditions of HOPE probation. If they abscond repeatedly, they will be sent to prison. If they don't run, and yet are unable to succeed in HOPE, even with stints in treatment, Drug Court has now become a good alternative. With Drug Court, at the most serious end of the addiction/risk continuum, it becomes the last stop before prison. That makes sense from both the research and experience perspectives. The majority of our supervision and treatment resources should be devoted to those offenders who need them most. Each person that succeeds in Drug Court now is one fewer person going to prison.

How do we decide where to place the offender for supervision? In this new model, Hawaii uses the medical concept of triage. The courthouse is thought of as a hospital. Offenders are the patients. Those who are not sent to prison at sentencing are placed on felony probation (or deferral) and triaged into the most appropriate supervision program or track that will allow them to succeed. Probation-as-usual is the outpatient clinic. HOPE Probation is the hospital ward. The Drug Court, now reconstituted to target primarily high-risk offenders, is the Intensive Care Unit (ICU).

## I

### PROBATION-AS-USUAL

The first option for effectively supervising many offenders is probation-as-usual. Honolulu's dedicated and caring probation officers create a working alliance with their clients to help them succeed on community supervision. All Honolulu probation officers have college degrees and many have their Masters in Social Work.<sup>4</sup> Probation officers in Honolulu have been using evidence-based

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<sup>3</sup> *Id.*

<sup>4</sup> Interview with Cheryl Marlow, Probation Adm'r, Adult Client Servs. Branch, Haw. First Circuit Court, in Honolulu, Haw. (2012).

practices since 2002.<sup>5</sup> That means, among other things, focusing supervision efforts on the high-risk offenders, not “over-treating” or overly supervising the low-risk offenders, and not mixing the two groups.<sup>6</sup> Honolulu’s probation officers are trained in Motivational Interviewing and Cognitive Behavioral Therapy<sup>7</sup> and are increasingly using case planning to more effectively work with the probationers.<sup>8</sup> They employ the Level of Service Inventory–Revised<sup>9</sup> and the Adult Substance Abuse Survey<sup>10</sup> for assessment purposes.

Many offenders, especially low-risk ones, can be successfully supervised on probation-as-usual, the outpatient clinic. Their criminal histories and behavioral problems are not severe. They are, or can be, motivated to comply and work with the probation officer and get referrals as needed for services. Many offenders can initially be placed on probation-as-usual. Then, if they start having problems, such as positive drug tests, missed appointments, or failures at treatment, they can be transferred to a more structured and intensive

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<sup>5</sup> INTERMEDIATE SANCTIONS STEERING COMM., STATE OF HAW. JUDICIARY, ENHANCING THE USE OF INTERMEDIATE SANCTIONS IN HAWAII: A PROPOSED PLAN FOR THE JUDICIARY (July 2001).

<sup>6</sup> Pew Ctr. of the States, Public Safety Performance Project Issue Brief, Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders 4–5 (Sept. 2011), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2011/Pew\\_Risk\\_Assessment\\_brief.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_Risk_Assessment_brief.pdf) [hereinafter Public Safety Performance Project].

<sup>7</sup> Motivational Interviewing (MI) and Cognitive Behavioral Therapy (CBT) have shown to be proven methods of reducing recidivism. MI focuses on the interpersonal interactions with the offender that can lead to intrinsic motivation to change. CBT is based on the social learning theory which emphasizes how thinking influences feelings and behaviors. CBT techniques focus on cognitive restructuring, modifying behavior, and developing alternative coping skills through practice and role-play.

<sup>8</sup> Angela Hawken, *The Message from Hawaii: HOPE for Probation*, PERS.: J. AM. PROBATION & PAROLE ASS’N, Summer 2010, at 36, 48, available at <http://www.apainc.org/html/HAWAII%20HOPE%20Guide.pdf>.

<sup>9</sup> Level of Service Inventory-Revised (LSI-R) is a fifty-four item dynamic risk assessment tool that measures ten criminogenic domains. It has shown to be a robust predictor of risk for recidivism and is used on many jurisdictions across the country. For more information about, and access to, the LSI-R survey, see Don Andrews & James Bonta, *Psychological Assessments and Services: Level of Services Inventory-Revised*, MHS, <http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&id=overview> (last visited Mar. 16, 2013).

<sup>10</sup> The Adult Substance Use Survey (ASUS) is a sixty-four item, self-administered psychometric instrument designed to measure the degree of involvement in, and disruption from, alcohol and other drug use. *Appendix D: Examples of Screening and Assessment Tools for Substance Use Disorders*, NAT’L CTR. ON SUBSTANCE ABUSE AND CHILD WELFARE, [http://www.ncsacw.samhsa.gov/files/SAFERR\\_AppendixD.pdf](http://www.ncsacw.samhsa.gov/files/SAFERR_AppendixD.pdf) (last visited Mar. 16, 2013). It is widely used by criminal justice, mental health, and AOD centers to determine recommended treatment levels.

placement—HOPE Probation, the hospital wards. In addition, some offenders, based on their past histories of noncompliance with supervision or their current high-risk status, may be more appropriate for HOPE from the start and are placed there at initial sentencing.

Probation officers have two options when offenders on probation-as-usual start having problems and start violating the conditions of their probation. First, they can continue to “work with” the offender and try to address their issues. Second, they can write up the violation(s) and have him or her arrested on a Motion for Revocation of Probation. As the officers have no mechanism to bring offenders back to court quickly for a single violation, the tendency is to let violations accumulate without taking formal action until the probation officer has a “good” case for revocation. At that point, the probation officer would typically characterize the offender as “not amenable to probation” and recommend that the offender be sentenced to prison for years. In the meantime, of course, the offender is out in the community continuing to use drugs and committing other new crimes.

For many noncompliant offenders, probation-as-usual is delayed, uncertain, and actions taken can be unnecessarily harsh and end in years in prison. As a result, for many offenders who have problems on probation-as-usual, the appropriate response is placement in HOPE Probation. These offenders have shown that they require meaningful supervision with jail consequences.

## II

### HOPE PROBATION

Unlike probation-as-usual, HOPE Probation is swift, certain, consistent, and proportionate. HOPE provides a jail term for every violation of probation, but that jail term is proportionate to the violation. For example, if an offender tests positive for drugs, he or she is arrested on the spot and transported to jail. A hearing is typically held two to three days later and the offender is usually given credit for time served and is released.

Robert L. DuPont<sup>11</sup> said of HOPE Probation:

HOPE is not like any other innovation I have seen over the past four decades in the fields of addiction and criminal justice. HOPE is not a mere modification or “tweaking” of the current system in place; it

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<sup>11</sup> Robert L. DuPont holds an M.D. He is President of the Institute for Behavior and Health, Inc., a founding Director of the National Institute on Drug Abuse, and was White House Drug Chief to Presidents Nixon and Ford.

is revolutionary. Not only does HOPE reduce drug use and violations of probation among offenders, but it also reduces incarceration. HOPE provides a new paradigm for successfully managing offenders and is fully scalable to the entire criminal justice system. HOPE has already made a lasting impact in Hawaii; it is now spreading across the country and around the world.<sup>12</sup>

HOPE probation was created from scratch in 2004 because I found probation-as-usual to be ineffective for many offenders. I thought good parenting might be a more effective model for how to successfully supervise offenders. This model is successful because it clearly lays out the rules and provides a swift, certain, consistent, and proportionate jail penalty for every probation violation. For example, if an offender misbehaves with a probation violation, the system is organized so the offender knows what punishment to expect. To follow this good parenting model, HOPE features five innovations.

First, HOPE starts with a warning hearing<sup>13</sup> by the judge in open court. Probationers are urged to succeed on probation and are encouraged to take responsibility for their actions. Expectations are made clear, and the consequences for noncompliance are laid out. For example, if an offender violates probation but turns himself or herself in immediately, the consequence will be two to four days in jail. If the offender absconds, he or she will serve at least thirty days in jail. Repeated absconding will lead to a prison sentence. Second, HOPE's organization allows for swift hearings. For example, over seventy percent of hearings are held within seventy-two hours of arrest.<sup>14</sup> Third, drug treatment is provided for those who request it or who cannot stop using drugs or alcohol on their own. Treatment providers appreciate this triage because only those probationers who request treatment, or who cannot stop on their own (a minor fraction), are referred. It preserves precious treatment slots for those who really need it, and offenders persevere with treatment in order to avoid jail

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<sup>12</sup> Interview with Robert L. DuPont, President of the Inst. for Behavior and Health, Inc., in Rockville, Md. (Fall 2012).

<sup>13</sup> A warning hearing is the probationers' first day in HOPE probation. The hearings are usually conducted in groups and take about fifteen to twenty minutes. In these hearings, all of the probationers are told that everyone wants them to succeed on probation. Probationers are also told that the judge cannot control what they will do, but the judge can control what the judge will do and the probationers can count on a jail sanction for every violation.

<sup>14</sup> ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 28 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

time. Dr. Angela Hawken<sup>15</sup> refers to this sorting-out process as “behavioral triage.”<sup>16</sup> Fourth, judges can supervise a large number of felony probationers. For example, as I see only offenders for violations that are rarely contested, I currently supervise nearly 2,000 felony probationers. Fifth, HOPE targets the toughest offenders. This includes those with histories of noncompliance on supervision and those who must be watched more closely—for example, violent offenders and sex offenders.

Due to these innovations, HOPE has proven to be extremely effective in helping offenders be more successful in complying with their conditions of probation. I am convinced that a large part of that success is because, unlike probation-as-usual, the offenders now believe they are being treated consistently and fairly. They know they are on felony probation and that there will be rules to follow. With HOPE, they know the rules and are treated fairly for any violation. As a result, they are much more likely to buy-in to HOPE.

Dr. Hawken conducted a randomized, controlled trial of 493 drug-involved felony probationers.<sup>17</sup> They were on probation for a variety of felonies (drugs, property, violent), were three-quarters male, and had an average of sixteen prior arrests.<sup>18</sup> After one year, those in HOPE as compared to the control group on probation-as-usual, were:

1. Fifty-five percent less likely to be arrested for a new crime;
2. Fifty-three percent less likely to have their probation revoked;
3. Seventy-two percent less likely to test positive for illegal drugs; and
4. Sixty-one percent less likely to skip appointments with their probation officers.<sup>19</sup>

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<sup>15</sup> Dr. Angela Hawken is an Associate Professor of Public Policy at Pepperdine University and the primary HOPE researcher.

<sup>16</sup> See Angela Hawken, *Behavioral Triage: A New Model for Identifying and Treating Substance-Abusing Offenders*, 3 J. DRUG POL’Y ANALYSIS 1, 4 (2010); see also Steven Alm, *Triage: A New Medical Model for Sentencing and Probation*, PERS.: J. AM. PROBATION & PAROLE ASS’N, Winter 2012, at 42, 48 (Hawaii’s new model is based on the medical principle—triage).

<sup>17</sup> “Swift and Certain” Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/corrections/community/drug-offenders/hawaii-hope.htm> (last updated Feb. 3, 2012) [hereinafter *Swift and Certain*]; see also HAWKEN & KLEIMAN, *supra* note 14, at 60.

<sup>18</sup> *Swift and Certain*, *supra* note 17; HAWKEN & KLEIMAN, *supra* note 14, at 61–62.

<sup>19</sup> *Swift and Certain*, *supra* note 17.

As a result, the HOPE probationers were sentenced to prison for forty-eight percent fewer days than those in the control group who were on probation-as-usual.<sup>20</sup>

HOPE has resulted in decreased victimization and arrests for new crimes, it has helped offenders avoid going to prison, and it has saved taxpayers millions of dollars.<sup>21</sup> HOPE Probation has proven successful for most felony probationers. There are approximately 8,000 offenders on felony probation or deferral in the City and County of Honolulu, which encompasses the island of Oahu.<sup>22</sup> Following evidence-based practices,<sup>23</sup> the First Judicial Circuit's felony probation department is focusing its efforts on the higher-risk offenders. That has resulted in approximately 4,000 offenders being minimally supervised or "banked."<sup>24</sup> The remaining felony probationers, about 4,000, are being actively supervised. HOPE probationers do not see their probation officers more often than on probation-as-usual, but there will now be jail consequences for every violation. Currently, over 2,000 of those 4,000 are in HOPE and the vast majority are under my supervision.<sup>25</sup> And HOPE has always tried to follow the research and focus on those toughest cases, the ones most likely to fail on probation. Thus, whether they start in HOPE right away or get transferred after being on probation-as-usual, virtually all of the problematic probation cases are now in my courtroom for supervision in HOPE. As a result, Motions for Revocation of Probation in the other nine felony courtrooms in the First Judicial Circuit are virtually a thing of the past. But while many

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<sup>20</sup> *Swift and Certain*, *supra* note 17; HAWKEN & KLEIMAN, *supra* note 14, at 26.

<sup>21</sup> Prison in Hawaii costs \$46,000 per year per offender. Interview with Office of Ted Sakai, Dir. of the Dep't of Pub. Safety, State of Haw. Dep't of Pub. Safety, in Honolulu, Haw. (2012); *see also* Kristine Uyeno, *Adding up the Cost of Incarceration*, KHON2 (Feb. 5, 2013), <http://www.khon2.com/news/local/story/Adding-up-the-cost-of-incarceration/5laIoxki8EeJKVLQCU16dA.csp>.

<sup>22</sup> John Buntin, *Swift and Certain: Hawaii's Probation Experiment*, GOVERNING (Oct. 31, 2009), <http://www.governing.com/topics/public-justice-safety/Swift-and-Certain-Hawaii.html>.

<sup>23</sup> "While the phrase 'evidence-based' has not always been precisely defined in legislation, it has generally been constructed to describe a program or policy supported by outcome evaluations clearly demonstrating effectiveness." Elizabeth K. Drake et al., *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 VICTIMS & OFFENDERS 170, 170 (2009).

<sup>24</sup> Interview with Cheryl Marlow, *supra* note 4.

<sup>25</sup> CRIME PREVENTION & JUSTICE ASSISTANCE DIV., DEP'T OF THE ATTORNEY GEN., STATE OF HAW., HOPE PROBATION STUDY GROUPS, CASE SUMMARY, AS OF 2/13/13 (2013) (on file with author).

will succeed in HOPE, some will not. If they abscond repeatedly, for example, they are sent to prison.

### III DRUG COURT

For those chronically addicted offenders who don't run away but who can't stop using drugs and alcohol on their own or with treatment while on HOPE Probation, then the Drug Court becomes the best option. Drug Court is the ICU. Drug Court is an intensive program to manage drug-addicted offenders. Clients initially see the judge every week, get assigned a counselor and a case manager, live in clean and sober housing, and go to drug treatment. Due to these services, drug courts can be very effective but are limited in how many offenders can be served. The First Judicial Circuit's Drug Court capacity is 170 offenders, including at least thirty with co-occurring disorders, meaning offenders with substance abuse problems coupled with a mental health condition, such as bipolar disorder.<sup>26</sup> Currently, most of the new offenders entering Drug Court are those who have tried and failed at HOPE even with the assistance of a judge, a probation officer, and usually a drug treatment program. They will have shown they are unable to succeed on probation and are thus headed for state prison. While Drug Court<sup>27</sup> is certainly more expensive than HOPE<sup>28</sup> or probation-as-usual,<sup>29</sup> it is much cheaper than prison.<sup>30</sup>

When I became the First Judicial Circuit's Drug Court Judge two years ago in March 2011, it was not positioned for this new ICU role. Our Drug Court, like most, was used to working with the lower-risk, non-violent offenders. More than two-thirds were from the pretrial population. Most drug courts nationally have restrictive eligibility requirements that routinely exclude high-risk offenders, many of whom are likely to end up behind bars.<sup>31</sup>

Current research, however, advocates focusing supervision and treatment resources on the high- and moderate-risk offenders, those

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<sup>26</sup> Interview with Janice Bennett, Drug Court Adm'r, Haw. First Circuit Court, in Honolulu, Haw. (2012).

<sup>27</sup> Drug Court in Honolulu costs \$5,000 to \$8,000 per client per year.

<sup>28</sup> HOPE probation in Honolulu costs \$1,500 per probationer per year.

<sup>29</sup> Probation-as-usual in Honolulu costs \$1,000 per probationer per year.

<sup>30</sup> Prison in Hawaii costs at \$46,000 per offender per year. Interview with Office of Ted Sakai, *supra* note 21; Uyeno, *supra* note 21.

<sup>31</sup> Eric L. Seigny et al., *Can Drug Courts Help to Reduce Prison and Jail Populations?*, ANNALS (forthcoming 2013).

with more severe antisocial backgrounds or treatment-resistant histories.<sup>32</sup> Indeed, Dr. Douglas Marlowe<sup>33</sup> advocates that drug courts focus their efforts on the high-risk offenders.<sup>34</sup> Dr. Marlowe, concurring with the research, also emphasizes that it is counter-productive to over-treat the low-risk offenders and warns that drug courts should not mix low- and high-risk offenders.<sup>35</sup>

That shift, from the low-risk pretrial to the high-risk probation population, is what the First Judicial Circuit Drug Court has been doing for the past two years. The shift has been very successful. Now, more than two-thirds of the clients in the Drug Court are high-risk offenders, including some with violent histories. Some offenders abscond or otherwise fail in Drug Court, for example, by repeatedly using drugs and not making efforts to succeed in treatment, and end up in state prison. However, most see it as a last-chance privilege and do well by working, reporting to the program as directed, and testing negative on urinalysis drug tests.

Since September of 2012, for example, there have been two Drug Court graduations in the First Judicial Circuit involving forty-one offenders.<sup>36</sup> Fourteen were previously in HOPE Probation, were failing, and were headed for prison before being given a last opportunity to succeed in Drug Court.<sup>37</sup> Instead of costing Hawaii taxpayers \$1,935,500 in combined prison costs,<sup>38</sup> these fourteen are now all employed and have together paid over \$21,475 in restitution, traffic fines, court fees, treatment fees, and child support.<sup>39</sup>

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<sup>32</sup> See D.A. ANDREWS AND JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (5th ed. 2010).

<sup>33</sup> Marlowe is the Chief of Science, Law & Policy for the National Association of Drug Court Professionals.

<sup>34</sup> DOUGLAS B. MARLOWE, *NAT'L DRUG COURT INST., DRUG COURT PRACTITIONER FACT SHEET: TARGETING THE RIGHT PARTICIPANTS FOR ADULT DRUG COURTS* 8 (2012).

<sup>35</sup> *Id.* at 3–4; see also Public Safety Performance Project, *supra* note 6, at 4–5.

<sup>36</sup> See E-mail from Judge Steven Alm, judge for the Haw. First Judicial Circuit, 2d Div., to Chief Justice Mark E. Recktenwald, chief justice for the Haw. Supreme Court, Chief Judge Derrick H.M. Chan, chief judge for the Haw. First Judicial Circuit, 23d Div., & Judge Richard K. Perkins, judge for the Haw. First Judicial Circuit, 8th Div. (Mar. 1, 2013) (on file with author) [hereinafter 2013 E-mail]; E-mail from Judge Steven Alm, judge for the Haw. First Judicial Circuit, 2d Div., to Chief Justice Mark E. Recktenwald, chief justice for the Haw. Supreme Court, Chief Judge Derrick H.M. Chan, chief judge for the Haw. First Judicial Circuit, 23d Div., & Judge Richard K. Perkins, judge for the Haw. First Judicial Circuit, 8th Div. (Oct. 5, 2012) (on file with author) [hereinafter 2012 E-mail].

<sup>37</sup> See 2013 E-mail, *supra* note 36; 2012 E-mail, *supra* note 36.

<sup>38</sup> Interview with Office of Ted Sakai, *supra* note 21.

<sup>39</sup> *Id.*; see also 2013 E-mail, *supra* note 36; 2012 E-mail, *supra* note 36.

This shift in the Drug Court's target population was not easy, and it took a leap of faith on the part of those involved, including the Drug Court staff. But the shift has proven very successful. There has not been a single incident of violence among this population and none of the Drug Court clients who came from HOPE Probation have been arrested for a new crime.

#### CONCLUSION

This new paradigm of three programs provides a real and effective continuum of services for offenders under court supervision. Flexibility will, of course, need to be maintained to allow movement along the continuum when needed.

It should be emphasized that probation, including HOPE or Drug Court, is not for everyone. The truly violent, dangerous, and chronic law violators should be sent to prison at sentencing to protect the public. However, that is the minority. The greater majority of offenders can and should be placed on probation and can now be successfully supervised in the community under this new system of triage.

Programs based on the HOPE model are now operating in more than forty locations in sixteen states. Washington State is now placing its entire 15,500 high-risk probationer and parolee population into their HOPE-based program. Drug courts are currently operating across the country and in nearly half of all U.S. counties.<sup>40</sup>

By more effectively supervising offenders at the appropriate level, the criminal justice system can substantially reduce victimization and crime, protect public safety, help offenders and their families, and save taxpayers millions of dollars a year. It won't be easy, but with the right leadership, this continuum can become a reality throughout the American criminal justice system.

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<sup>40</sup> Pollack et al., *supra* note 31; CELINDA FRANCO, CONG. RESEARCH SERV., R41448, DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 2 (2010); WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 19 (2011).