

FLORIDA'S NON-STATUTORY, DE FACTO DUI/DWI DIVERSION PROGRAMS: DIVERTING JUSTICE FOR JUDICIAL AND PROSECUTORIAL EXPEDIENCY?

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I. INTRODUCTION

Imagine a state in which a driver can repeatedly be charged with impaired driving (“DUI” or “DWI”),¹ and when his or her case comes before the court, the driver is legally considered to be a first-time offender for penalty purposes.² Imagine a state in which impaired drivers’ first-time offenses are diverted from judges and dismissed, so when they offend a second time, they are once again only a first-time offender.³ Imagine a state in which judges are prohibited by statute from withholding, deferring, or

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1. See FLA. STAT. § 316.193 (2018). The term “DUI” as used in this Article refers to the offenses of Driving Under the Influence and Driving with an Unlawful Blood Alcohol Level, as well as the former offense of “Driving While Intoxicated” contained in former FLA. STAT. § 316.1931 (repealed 1986). DUI is occasionally used interchangeably with the terms “impaired driving” or “driving while impaired.”

2. See *Pretrial Diversion: Frequently Asked Questions*, ORANGE CTY. GOV'T FLA., <http://www.orangecountyfl.net/Portals/0/Library/Jail-Judicial/docs/Pretrial%20Diversion%20FAQ.pdf> (last visited Mar. 31, 2019) [hereinafter *Orange County FAQs*] (describing the Pretrial Diversion process); *DUI Diversion Program Unveiled for First-Time Offenders*, CBS MIAMI (May 17, 2011, 9:08 AM), <https://miami.cbslocal.com/2011/05/17/dui-diversion-program-unveiled-for-first-time-offenders/> [hereinafter *Miami-Dade DUI Diversion*] (reporting on Miami’s “Back on Track” pretrial diversion program).

3. See *Miami-Dade DUI Diversion*, *supra* note 2; *Orange County FAQs*, *supra* note 2, at 2–3.

suspending adjudication of guilt in DUI cases, but it is routinely done without the judge being made aware or being able to do anything about it.⁴ A response might be that there ought to be a law against that, but there is not. Under present Florida law, the diversion of first-time DUI offenders requires judges, law enforcement, and prosecutors to treat second-time DUI offenders as first-time offenders because their previous diversion does not count as a prior offense.⁵

This Article is a follow up to a 2015 Article in which the Author sought to answer the question, *Does Florida Need a Statutory Driving Under the Influence (DUI) Pretrial Diversion Program?*⁶ That Article advocated enactment of a statutory DUI diversion program to replace Florida's de facto diversion programs.⁷ To date, all of Florida's DUI diversion programs remain non-statutory and de facto⁸ in nature. They are de facto in nature because they are neither statutory programs created by the Florida Legislature, nor are they products of Florida's administrative regulatory bodies. Florida's de facto diversion programs are the creations of Florida's state attorneys—the “prosecuting officers” who exercise jurisdiction locally in the sixty-seven counties that are encompassed in the twenty judicial circuits of Florida.⁹ The exercise of the state attorneys' discretion as prosecuting officers extends to determining whether, and to what extent, criminal offenses are prosecuted.¹⁰ It is through the use of this discretionary

4. FLA. STAT. § 316.656(1) (2018).

5. *Miami-Dade DUI Diversion*, *supra* note 2; *Orange County FAQs*, *supra* note 2, at 2–3.

6. Karl B. Grube, *Does Florida Need a Statutory Driving Under the Influence (DUI/DWI) Pretrial Intervention Diversion Program?*, 44 STETSON L. REV. 735 (2015).

7. *Id.* at 754.

8. *De facto*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/de_facto (last visited Mar. 31, 2019) (explaining that, as an adverb, it means “[i]n fact, whether by right or not” and then, as an adjective, as “[e]xisting or holding a specified position in fact but not necessarily by legal right”).

9. FLA. CONST. art. V, § 17.

In each judicial circuit a state attorney shall be elected for a term of four years. Except as otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law; provided, however, when authorized by general law, the violations of all municipal ordinances may be prosecuted by municipal prosecutors.

Id.

10. 14B FLA. JUR. 2D *Criminal Law—Procedure* § 1129 (2018) (footnotes omitted):

executive authority that the state attorneys in seven judicial circuits¹¹ have chosen to implement their own DUI diversion programs that operate locally in various counties encompassed within those seven judicial circuits.¹² Because first-offense DUIs are misdemeanors and most often the subjects of diversion, these diversions will be cases that are within the local jurisdiction of Florida's sixty-seven county courts.¹³ County courts are presided over by county court judges who are judicial officers elected for six-year terms.¹⁴ At present there are 322 county court judges, with

In the exercise of his or her discretion, the state attorney may choose, in a particular case, for a myriad of reasons, not to prosecute on particular charges, notwithstanding the fact that sufficient evidence exists to support a conviction on the charges. Indeed, the discretionary power of a prosecutor in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. The discretion conferred upon the state attorney permits him or her to select the statute under which an accused will be charged; to initiate a prosecution by the filing of an information in lieu of a presentment to a grand jury for an indictment; to file an information upon the failure or refusal of a grand jury to return an indictment for an offense; and to abandon a prosecution which has been commenced. Moreover, the exercise of the state attorney's discretion to select the statutory provision under which an accused will be prosecuted will not support a claim of denial of equal protection or due process of law.

Id.

11. Those seven judicial circuits are the Third, Eighth, Ninth, Eleventh, Thirteenth, Fifteenth, and Sixteenth.

12. FLORIDA STATE COURTS ANNUAL REPORT 2016–2017, FLORIDA COURTS 58, <https://www.flcourts.org/content/download/218125/1974696/florida-courts-annual-report-2016-17.pdf>. Judicial Circuits and the Counties: First—Escambia, Okaloosa, Santa Rosa, and Walton Counties; Second—Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla Counties; Third—Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor Counties; Fourth—Clay, Duval, and Nassau Counties; Eighth—Alachua, Baker, Bradford, Gilchrist, Levy, and Union Counties; Ninth—Orange and Osceola Counties; Tenth—Hardee, Highlands, and Polk Counties; Eleventh—Miami-Dade County; Twelfth—Desoto, Manatee, and Sarasota; Thirteenth—Hillsborough County; Fourteenth—Bay, Calhoun, Gulf, Holmes, Washington, and Jackson Counties; Fifteenth—Palm Beach County; Sixteenth—Monroe County; Seventeenth—Broward County; Eighteenth—Brevard and Seminole Counties; Nineteenth—Indian River, Martin, Okeechobee, and St. Lucie Counties; and Twentieth—Charlotte, Collier, Glades, Hendry, and Lee Counties. This list shows that there are numerous counties within those circuits, but these diversion programs do not operate circuit wide, but only in those counties within the circuits that are chosen by the state attorneys.

13. *Florida Courts*, FLA. COURTS, <https://www.flcourts.org/florida-courts> (last visited Mar. 31, 2019). “The Florida court system is comprised of the Supreme Court, five district courts of appeal, 20 circuit courts and 67 county courts.” *Id.* “County courts shall have original jurisdiction: (a) In all misdemeanor cases not cognizable by the circuit courts.” FLA. STAT. § 34.01(1)(a) (2018). Therefore, DUIs that are subject to diversion are misdemeanors and misdemeanors are within the local jurisdiction of Florida's sixty-seven county courts.

14. *Trial Courts—County*, FLA. COURTS, <https://www.flcourts.org/Florida-Courts/Trial-Courts-County> (last visited Mar. 31, 2019).

each Florida county having at least one locally elected county court judge.¹⁵

The seven de facto programs that are discussed in this Article operate openly with published criteria for admission and stated requirements for successful completion. In addition to the seven judicial circuits' individual programs, there are "unpublished" DUI diversion programs that operate in other judicial circuits and the counties that are encompassed in those judicial circuits. The unpublished programs are generally operated by state attorneys who permit locally designated assistant state attorneys to decide whether certain first-offense DUIs should be diverted. If diversion is approved, the DUI charge is amended or refiled as a reckless driving charge. The DUI defendant is then allowed to plead to the amended or refiled reckless driving charge and is placed on probation to monitor compliance with specified conditions.¹⁶ All de facto state attorney diversion programs, whether published or unpublished, lack statewide uniformity and vary as to application criteria; requirements for successful completion; and the legal, financial, and personal benefits that inure to the successful program participants.

Although Florida's de facto programs vary significantly in terms and conditions, Florida's programs do fit squarely within the standard definition of DUI diversion programs published by the National Traffic Resource Center and other national authorities.¹⁷

15. See generally *County/Circuit Cross-References*, CONFERENCE OF CTY. COURT JUDGES OF FLA., <https://floridacountyjudges.com/public/counties/countycircuit-cross/> (last visited Mar. 31, 2019) (providing links to all the various county and circuit court judges). The number provided is based on research of all the county courts and the number of judges in each county.

16. Based upon the Author's personal knowledge and experience, an example of an unpublished DUI diversion program can be found in the Sixth Judicial Circuit, encompassing Pinellas and Pasco Counties. It provides for diversion of first-offense DUI cases that do not involve crashes or injury. Diversion is routinely accomplished by defense attorneys making application to specified assistant state attorneys without involvement of the court. If the case meets with the approval of a supervising assistant state attorney, the DUI charge is amended or refiled as a reckless driving charge. The DUI defendant then pleads to the reduced charge and is placed on probation for up to one year with conditions that include payment of a fine and costs, completion of a substance abuse education course, community service, and other conditions. Through this plea arrangement, the diverted defendant who successfully completes probation is spared license revocation and the other sanctions that would otherwise result from a conviction of the more serious charge of violating Florida Statute § 316.193. Courts have no oversight role in the operation of this type of unpublished diversion program. Courts only serve to accept the plea to the reduced charge and grant probation.

17. Elizabeth Buner, *Pre-Trial Diversion Programs for DUIs*, TRAFFIC RES. CTR. FOR JUDGES (Feb. 2015), <http://home.trafficresourcecenter.org/~media/Microsites/Files/traffic->

As such, Florida's de facto programs can be evaluated in light of criteria published in research papers, journals, and periodicals and also by comparing outcomes of Florida's diversion programs to those of other states' programs. In the evaluation of Florida's seven de facto DUI programs, this Article will focus upon the statewide effects, whether positive or negative, that Florida's seven de facto programs have had on enforcement, prosecution, adjudication, and public safety. Such evaluation will hopefully provide the basis for recommendations to improve Florida's programs and better answer the question of whether the seven de facto programs should be replaced by a statutory program with uniform statewide application.

In the 2015 Article, the Author consulted with prosecutors and fellow judges to compile a list of so-called advantages that accrue to prosecutors, judges, and defendants through the use of Florida's de facto diversion programs.¹⁸ These advantages are being recalled in this Article to provide a basis to determine whether the advantages are in fact such or whether they have come at the price of diminishing protection of the motoring public and the quality of justice dispensed by our courts.

The eight previously recognized advantages of disposing of DUIs by diversion programs can be summarized as follows: (1) de facto diversion programs are easily created by state attorneys without a time-consuming legislative process; (2) they "reduce the time between case intake and case disposition;" (3) they reduce the time and effort that prosecutors must spend in developing cases for

safety/Issue%20Brief%202%20Pretrial%20Diversion%20programs.ashx. This resource discusses that:

If an individual meets the criteria for eligibility and the state's attorney grants diversion, the offender enters into a court-mandated program in exchange for suspension of their charges. Length and conditions of the program vary, but often include court supervision, substance abuse evaluation and counseling, alcohol education, community service, random urine tests, and various fees. Upon successful completion of the program, the charges will be dropped and the offender may be able to have the DUI charge expunged from his or her record. (In some states, there will be no record of anything—charges, dismissal, or completion of the diversion program, while in other states, the record will reflect the charge and successful completion of the diversion program, but no conviction will appear on the record.) However, if the individual fails to meet any of the conditions/complete the program, the case will be reopened and resolved in court.

Id. at 2.

18. Grube, *supra* note 6, at 750.

trial, responding to discovery, motion practice, and negotiating dispositions; (4) the published diversion criteria allow defendants to be triaged and prequalified by use of an application process; (5) they allow both sides to concentrate on more serious first-time offenses that are likely to require motion practice and proceed to trial; (6) they spare qualified defendants from a DUI conviction and license revocation and save money on fines and fewer billable hours if represented by counsel; (7) they create a better, less adversarial working relationship between prosecutors and defense attorneys who work with established criteria to effect favorable settlements; and (8) they decrease the pending caseloads for judges, prosecutors, and defense counsel because cases are diverted away from motion calendars and trial dockets.¹⁹

The purpose of this Article is to examine the function and the effect of Florida's de facto diversion programs from various perspectives. These various perspectives are: (1) how the de facto diversion programs are perceived by governmental and private organizations that are concerned with impaired driving issues; (2) how the de facto diversion programs affect the safety of the motoring public; (3) whether the de facto diversion programs conflict with existing Florida impaired driving laws; (4) how the de facto diversion programs affect the role of the judiciary in providing fair, effective, and efficient justice; (5) how the de facto diversion programs financially impact both state and local governments; (6) whether it is feasible for the legislature to enact a uniform statewide DUI diversion program law; (7) whether amendments to existing impaired driving statutes would improve de facto diversion programs; and (8) whether state attorneys' adherence to certain "best practices" would improve the rule of law and better protect the motoring public.

In spite of the recognized advantages of DUI diversion programs, there are noteworthy critical studies and research that question whether diversion programs, such as Florida's, actually improve highway safety and reduce offender recidivism, as discussed in Part II. Within Part II, there follows an overview of these sources with an eye to determine whether these sources reveal shortcomings that should raise serious concerns about the function and effect of Florida's de facto diversion programs. Part III focuses on potentially serious concerns and shortcomings that

19. *Id.* at 750-51.

include the lack of enhanced penalties for those who reoffend, dwindling enforcement, fewer adjudications, increased alcohol-related fatalities, conflicts with existing impaired driving sentencing laws, diminished insurance protection for the motoring public, and the substitution of tax-deductible donations to charity in place of mandatory fines and court costs. Part IV summarizes the shortcomings and concerns raised by Florida's de facto diversion programs. Part V provides how to address the shortcomings of the diversion programs. Part VI provides the best practices that state attorneys should follow in their diversion programs. Part VII concludes with the reader having the ability to determine whether Florida's various de facto DUI diversion programs should continue to operate as they are presently constituted, or whether changes should be implemented, and what best practices should be adhered to in order to better serve the interests of justice and the protection of Florida's motoring public.

II. THE PERCEPTION OF DIVERSION PROGRAMS IN LITERATURE

In spite of the recognized advantages of DUI diversion programs, there are significant critical studies, articles, and research that question whether diversion programs, such as Florida's de facto programs, actually improve highway safety and reduce impaired driving and offender recidivism. This review will focus on serious concerns and shortcomings concerning Florida's DUI diversion programs, and it will form the basis for recommending changes to existing diversion programs so that they may better serve the interests of justice and the protection of Florida's motoring public.

A. National Transportation Safety Board (NTSB)²⁰

In 2000, the NTSB proposed “a model program to reduce hard core [drunk] driving.”²¹ It included “[e]limination of the use of diversion programs that permit erasing, deferring, or otherwise purging the DWI offense record or that allow the offender to avoid license suspension.”²² All of Florida’s de facto DUI diversion programs defer adjudication of underlying DUI offenses, and they reward successful program participants with the ability to avoid the more serious sanction of “revocation” of their driving privileges, which otherwise would occur if they were adjudicated guilty of DUI pursuant to Section 322.28, Florida Statutes.²³

B. AAA Foundation for Traffic Safety²⁴

In 2002, the AAA Foundation for Traffic Safety published commissioned research that was conducted by James Hedlund and

20. *National Transportation Safety Board*, WIKIPEDIA (last modified Mar. 27, 2019, 7:20 PM), https://en.wikipedia.org/wiki/National_Transportation_Safety_Board. “The NTSB is an independent U.S. government investigative agency responsible for civil transportation accident investigation. In this role, the NTSB investigates and reports on aviation accidents and incidents, certain types of highway crashes, ship and marine accidents, pipeline incidents, and railroad accidents.” *Id.*

21. *Actions to Reduce Fatalities, Injuries, and Crashes Involving the Hard Core Drinking Driver*, NATIONAL TRANSPORTATION SAFETY BOARD, <https://www.nts.gov/safety/safety-studies/pages/sr0001.aspx> (last visited Mar. 31, 2019).

22. *Id.*

23. FLA. STAT. § 322.28(2)(a)(1) (2018):

Period of suspension or revocation.

(2) In a prosecution for a violation of s. 316.193 or former s. 316.1931, the following provisions apply:

(a) Upon conviction of the driver, the court, along with imposing sentence, shall revoke the driver license or driving privilege of the person so convicted, effective on the date of conviction, and shall prescribe the period of such revocation in accordance with the following provisions:

1. Upon a first conviction for a violation of the provisions of s. 316.193, except a violation resulting in death, the driver license or driving privilege shall be revoked for at least 180 days but not more than 1 year.

Id.

24. *About AAA Foundation for Traffic Safety*, AAA FOUNDATION, <http://aaafoundation.org/about/> (last visited Mar. 31, 2019). “Founded in 1947, the AAA Foundation for Traffic Safety is a not-for-profit, publicly supported charitable research and education organization dedicated to saving lives by preventing traffic crashes and reducing injuries when crashes occur.” *Id.*

Anne McCartt.²⁵ Their conclusions included: Diversion programs allow offenders to avoid license suspension and other DWI sanctions. By eliminating the offender's DWI charge, they allow second offenders to avoid the more severe sanctions prescribed for repeat offenders. State laws and practices should ensure that all DWI offenses are retained on a driver's record.²⁶

All of Florida's diversion programs offer successful participants significant benefits in return for not contesting the DUI charge they face. These benefits include avoidance of license revocation and, perhaps most importantly, that no DUI offense or alcohol-related offense will appear on their official driver record. In the Ninth Judicial Circuit, this is accomplished through the dismissal of the DUI charge by entering a *nolle prosequi*²⁷ of the offense. In each of the other diversion jurisdictions, the DUI offense is either amended to reckless driving or the underlying charge is dismissed and refiled as reckless driving.²⁸ The new or amended reckless driving charge is then either adjudicated on the record or withheld from adjudication. The offense of reckless driving,²⁹ by its defined elements, is not an alcohol-related offense, nor is it a lesser included offense of DUI.³⁰ Therefore, it cannot legally serve to enhance the mandatory penalties to be imposed in

25. James H. Hedlund & Anne T. McCartt, *Drunk Driving: Seeking Additional Solutions*, AAA FOUNDATION (May 2002), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.173.4143&rep=rep1&type=pdf>.

26. *Id.* at 54.

27. "Latin, Will not prosecute. The term *nolle prosequi* is used in reference to a formal entry upon the record made by a plaintiff in a civil lawsuit or a prosecutor in a criminal action in which that individual declares that he or she wishes to discontinue the action as to certain defendants, certain issues, or altogether. A *nolle prosequi* is commonly known as *nol pros*." *Nolle prosequi*, in 7 WEST'S ENCYCLOPEDIA OF AM. L. 258 (Jeffrey Lehman & Shirelle Phelps eds., 2d ed. 2004).

28. FLA. STAT. § 316.192 (2018). Florida defines reckless driving where "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property" or "[f]leeing a law enforcement officer in a motor vehicle is reckless driving per se." *Id.*

29. *Id.*

30. Wendy Evans Lehmann, Annotation, *Reckless Driving As Lesser Included Offense of Driving While Intoxicated or Similar Charge*, 10 A.L.R.4TH 1252, § 1 (1981).

The core of the offense of reckless driving lies not in the act of operating a motor vehicle, but in the manner and circumstances of its operation, indulgence in intoxicating liquor being wholly unessential to the establishment of the crime of reckless driving. Furthermore, although in a prosecution for driving under the influence of intoxicating liquors, reckless driving may be a factor in determining whether one was driving under the influence, it has generally been held not to be a necessary ingredient.

Id.

the event that the diverted defendant is adjudicated after committing a second DUI offense.

C. National Highway Traffic Safety Administration
("NHTSA")³¹

Research reported by the NHTSA reveals that evidence of the effectiveness of diversion programs has been mixed,³² and "[a]lthough a few studies have shown diversion programs reduce recidivism, others have shown no benefits."³³ The NHTSA research points out that "there is substantial anecdotal evidence that diversion programs, by eliminating the offense from the offender's record, allow repeat offenders to avoid being identified."³⁴ The NHTSA publication concludes that, in terms of effectiveness, "[e]liminating or establishing limits on diversion programs should remove a major loophole in the DWI control system."³⁵

D. American Journal of Public Health³⁶

Research published in 2010 in the American Journal of Public Health recognized:

31. *About NHTSA*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, <https://www.nhtsa.gov/about-nhtsa/nhtsas-core-values> (last visited Feb. 17, 2019). The NHTSA is an agency of the Executive Branch of the U.S. government, part of the Department of Transportation. It describes its mission as "[s]ave lives, prevent injuries and reduce economic costs due to road traffic crashes." *Id.*

32. *Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION 36 (2017), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812478_v5_countermeasures-that-work-a-highway-safety-countermeasures-guide-9thedition-2017.pdf [hereinafter NHTSA, COUNTERMEASURES THAT WORK] (citing Robert Voas & Deborah A. Fisher, *Court Procedures for Handling Intoxicated Drivers*, ALCOHOL RESEARCH & HEALTH (2001), https://www.researchgate.net/publication/11847777_Court_procedures_for_handling_intoxicated_drivers).

33. *Id.*

34. *Id.* (citing Hedlund & McCartt, *supra* note 25, at 54).

35. *Id.* at 36.

36. *AJPB: A Publication of American Public Health Association*, AMERICAN PUBLIC HEALTH ASSOCIATION, <https://ajph.aphapublications.org/> (last visited Feb. 15, 2019). The American Journal of Public Health is published by the American Public Health Association, which is a Washington, D.C.-based professional organization for public health professionals in the United States. Founded in 1872 by a group of physicians, including Dr. Stephen Smith and Dr. Henry Hartshorne, APHA has more than 25,000 members worldwide. *History*, AMERICAN PUBLIC HEALTH ASSOCIATION, <https://www.apha.org/about-apha/our-history> (last visited Apr. 1, 2019).

Despite efforts to reduce drinking and driving, the behavior persists and goes largely undetected and, even when detected, it may be only partially documented. Such reduced documentation is often due to procedures that focus exclusively on criminal sanctions and permit expungement, segregation, or purging of violation histories. The findings we present, along with those from [four] companion papers, suggest that drivers who commit an alcohol-related violation of any type are at increased risk of a subsequent offense.³⁷

Based on the foregoing, researchers concluded that “[n]o history of an alcohol-impaired driving violation, whether handled through administrative procedures, the criminal justice system, or a diversion program, should be expunged, purged, or segregated from a driver’s record.”³⁸ Again, all Florida de facto diversion programs provide either for dismissal or reduction of the underlying DUI charge, thus precluding the use of the original DUI charge for penalty enhancement in the event of a second DUI offense.

Further, first-time DUI offenders are statistically as likely as previously convicted DUI offenders to commit a second offense.³⁹ In a 2010 article in the *American Journal of Public Health*, researchers “sought to determine the statewide impact of having prior alcohol-impaired driving violations of any type on the rate of first occurrence or recidivism among drivers with 0, 1, 2, or 3 or more prior violations in Maryland.”⁴⁰ More than one-hundred-million driver records from 1973 to 2004 were reviewed with drivers being classified into four groups: those with zero, one, two, or three or more prior violations.⁴¹ “The violation rates for approximately [twenty-one] million drivers in these four groups were compared for the study period 1999 to 2004.”⁴² The results disclosed that “[o]n average, there were 3.4, 24.3, 35.9, and 50.8 violations per 1000 drivers a year among those with 0, 1, 2, or 3 or more priors, respectively.”⁴³ As a result, it was found that “[t]he

37. William J. Rauch et al., *Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders*, 100 AM. J. OF PUB. HEALTH 919, 924 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2853607/> (internal citations omitted).

38. *Id.* at 919.

39. *Id.* at 921.

40. *Id.* at 919.

41. *Id.*

42. *Id.*

43. *Id.*

recidivism rates among first offenders more closely resembles that of second offenders than of nonoffenders.”⁴⁴ This included first offenders who had participated in diversion and “probation before judgment” programs where the adjudication of guilt was withheld or the conviction record was segregated from the offender’s driving record.⁴⁵ It was found that “[m]en and women were at equal risk of recidivating once they have had a first violation documented. Any alcohol-impaired driving violation, not just convictions, is a marker for future recidivism.”⁴⁶

E. Governors Highway Safety Association (“GHSA”)⁴⁷

The GHSA regularly publishes its “Policies and Priorities” regarding impaired driving.⁴⁸ Among these policies and priorities are those dealing with impaired-driving plea bargaining and diversion programs as found in policy E14:

Diversion programs allow a drunk driving offense to be dropped if the offender agrees to enter an education, treatment or other rehabilitation program. Plea bargaining allows a DUI offender to avoid being convicted by accepting the penalty for a lesser or non-alcohol offense. Both of these approaches allow offenders to escape impaired driving penalties and undermine many elements of a comprehensive DUI system. States should restrict plea bargaining and limit diversion programs to first-time offenders with low [BACs] or, where possible, eliminate such programs altogether.⁴⁹

The GHSA recommends limiting diversion programs to offenders with low blood alcohol concentrations (“BACs”),⁵⁰ yet several of Florida’s de facto diversion programs do not limit diversion to offenders with low BACs. For example, in Monroe

44. *Id.*

45. *Id.*

46. *Id.*

47. *About Governors Highway Safety Association*, GOVERNORS HIGHWAY SAFETY ASSOCIATION, <https://www.ghsa.org/about> (last visited Apr. 1, 2019). GHSA “is a 501(c)(3) nonprofit representing the state and territorial highway safety offices that implement federal grant programs to address behavioral highway safety issues.” *Id.*

48. *Updated Policies and Priorities*, GOVERNORS HIGHWAY SAFETY ASSOCIATION 1, <https://www.ghsa.org/sites/default/files/2018-09/policies18.pdf> (last updated Aug. 31, 2018).

49. *Id.* at 18.

50. *Id.*

County, defendants charged with DUI who had blood/breath alcohol concentrations of up to 0.24 percent at the time of arrest are permitted to plead to the lesser offense of reckless driving.⁵¹ The same applies in the Third Judicial Circuit, the Eighth Judicial Circuit, and the Fifteenth Judicial Circuit (Palm Beach County), where offenders with blood/breath alcohol contents of up to 0.20 percent are permitted to enter guilty pleas to reckless driving and in some cases even have the reckless driving adjudication (conviction) withheld.⁵²

F. U.S. Centers for Disease Control and Prevention⁵³

The U.S. Centers for Disease Control and Prevention⁵⁴ has also weighed in on diversion programs:

51. See *Monroe County Board of County Commissioners Meeting Minutes of August 20, 2014*, MONROE CTY. BD. OF CTY. COMM'RS (Aug. 20, 2014), <http://www.monroecounty-fl.gov/AgendaCenter/ViewFile/Item/5211?fileID=5142> [hereinafter *Monroe County Aug. 2014 Meeting Minutes*] (incorporating and approving "Exhibit A" containing provisions of the "Back on Track DUI Diversion Program A Safe Driving Initiative of the Monroe County State Attorney").

52. See Letter from William P. Cervone, State Attorney, Eighth Judicial Circuit of Florida, to Kyle Clark, Chair, Florida Impaired Driving Coalition, *DUI Intervention Program* (Aug. 3, 2017) (copy on file with *Stetson Law Review*) [hereinafter Letter from William Cervone]; Memorandum from Jeffrey A. Siegmeister, State Attorney, Third Judicial Circuit of Florida, to All Staff, Office of the State Attorney, Third Judicial Circuit of Florida, *DUI Intervention Program* (Oct. 31, 2003) (copy on file with *Stetson Law Review*) [hereinafter Memorandum from Jeffrey A. Siegmeister, *DUI Intervention Program*]. Both Circuits' DUI Intervention Programs criteria specify "No BAL of .20 or over."

53. *CDC Organization*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/about/organization/cio.htm> (last visited Mar. 24, 2019). The CDC's mission is as follows:

CDC works 24/7 to protect America from health, safety and security threats, both foreign and in the U.S. Whether diseases start at home or abroad, are chronic or acute, curable or preventable, human error or deliberate attack, CDC fights disease and supports communities and citizens to do the same. CDC increases the health security of our nation. As the nation's health protection agency, CDC saves lives and protects people from health threats. To accomplish our mission, CDC conducts critical science and provides health information that protects our nation against expensive and dangerous health threats, and responds when these arise.

Id.

54. *Limits on Diversion and Plea Agreements*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/motorvehiclesafety/calculator/factsheet/plealimits.html> (last visited Mar. 22, 2019). The Centers for Disease Control and Prevention is the leading national public health institute of the United States and encourages limits on diversion and plea bargaining. *Id.*

Diversion programs defer sentencing while a DWI offender participates in some form of alcohol education or treatment. In many States, charges are dropped or the offender's DWI record is erased if the education or treatment is completed satisfactorily. . . . Both diversion programs and plea agreements reduce the time to punishment. In addition, they typically also result in less-severe punishment for DWI offenses and negatively affect deterrence. . . . [D]ismissal of charges and lack of permanent record means that a repeat offender may be tried or dealt with as a first-time offender because the record does not show the previous arrests.⁵⁵

The foregoing authorities' most-often-cited reason for eliminating DWI diversion programs is that diversion enables repeat offenders to be treated as first-time offenders.⁵⁶ In each of Florida's seven de facto diversion programs, whether the successful defendant's charge is effectively dismissed by a *nolle prosequi* or whether the charge is reduced to the non-alcohol-related offense of reckless driving with or without a withholding of adjudication, the result is the same. The successfully diverted defendant cannot be prosecuted as a second-time DWI offender. They are again a first-time offender and cannot be subjected to the mandatory enhanced penalties that a second-time DWI offender would be. Interestingly, there are other state DWI diversion programs, discussed later in this Article, that address this recognized recidivism flaw and provide a solution. But, before exploring how other states address previously diverted DWI defendants who recidivate, there are other shortcomings in Florida's de facto programs that need to be brought to light so that they may be addressed.

III. SERIOUS CONCERNS AND SHORTCOMINGS OF FLORIDA'S NON-STATUTORY DE FACTO DWI DIVERSION PROGRAMS

This Section discusses diversion program concerns and shortcomings as noted in the literature discussed earlier and as discovered by the Author from review of Florida Uniform Traffic Citation Statistics for DWI Violations and Dispositions compiled by the Florida Department of Highway Safety and Motor Vehicles

55. *Id.* (internal citations omitted).

56. *See supra* pt. II.A-F.

(“FDHSMV”).⁵⁷ As de facto DUI diversion programs have proliferated, DUI enforcement has declined as have DUI prosecutions, guilty pleas, and convictions, whereas the number of fatalities attributed to one or more drivers with a BAC of .08 or higher has risen. DUI diversion programs enable defendants with blood/breath alcohol levels of .15 or higher to plead to lesser offenses in contravention of Florida law. DUI diversion programs undermine the requirement of maintaining enhanced “financial responsibility” under Florida’s Motor Vehicle Insurance Law. Through DUI diversion programs, state attorneys that amend DUI charges to reckless driving cause official traffic citation statistics to reflect that judges, who accept such pleas, have violated Florida law by withholding adjudication of a DUI offense.

A. *DECLINE IN DUI PROSECUTIONS, GUILTY PLEAS, AND CONVICTIONS*

TABLE 1: Total DUI Cases and Number of DUI Cases Resulting in DUI Adjudications of Guilt by Year⁵⁸

| YEAR | TOTAL DUI CASES | ACTUAL GUILT ADJUDICATIONS |
|------|-----------------|----------------------------|
| 2012 | 53,664 | 37,004 |
| 2013 | 50,377 | 33,999 |
| 2014 | 49,776 | 33,425 |
| 2015 | 46,922 | 31,318 |
| 2016 | 44,643 | 29,477 |
| 2017 | 43,899 | 27,865 |

From 2012 to 2017, the total number of DUI charges brought by law enforcement each year has steadily declined 18 percent from 53,664 to 43,899.⁵⁹ In 2017, 9,765 fewer DUI citations were

57. *Annual Uniform Traffic Citation Report*, FLA. HIGHWAY SAFETY AND MOTOR VEHICLES, <https://services.flhsmv.gov/specialtyplates/uniformtrafficcitationreport> (last visited Mar. 22, 2019).

58. This chart was completed using Florida Uniform Traffic Citation Statistics as of 12/31/2018. *Annual Uniform Traffic Citation Report*, *supra* note 57.

59. *Annual Uniform Traffic Citation Report*, *supra* note 57. Florida Uniform Traffic Citation Statistics, as posted by the FDHSMV for years 2012 through 2017, reflect a decline from 53,664 total violations in 2012 to 43,899 total violations in 2017; the difference being 9,765 violations. This amounts to a decline of 18.18 percent in total DUI dispositions in a five-year period.

issued by law enforcement than in 2012. In the same time period, convictions (adjudications of guilt) in those DUI cases declined approximately twenty-five percent from 37,004 adjudications to 27,865 as of December 31, 2018.⁶⁰ This decrease in the number of DUI convictions corresponds to the increased use of DUI deferred prosecution diversion programs, in which successful participants are spared adjudication through charge amendments to non-DUI offenses or outright dismissal of their DUIs by *nolle prosequi*.

B. Increase in Car-Crash Fatalities with Drivers with Higher BAC

TABLE 2: Alcohol-Related Driving Fatalities Where One or More Drivers had a Blood Alcohol Concentration of 0.08 or Higher as a Percentage of Total Fatalities⁶¹

| YEAR | NUMBER OF CASES | PERCENTAGE |
|------|-----------------|------------|
| 2011 | 716 | 30% |
| 2012 | 697 | 29% |
| 2013 | 676 | 28% |
| 2014 | 685 | 27% |
| 2015 | 736 | 18% |
| 2016 | 841 | 26% |
| 2017 | 839 | 27% |

While in 2012 there were 697 fatalities attributable to one or more drivers with a BAC of 0.08 or higher, by 2017 this number had risen to 839.⁶² During a comparable period from 2012 to 2017, the number of DUI prosecutions and adjudications decreased from 53,664 to 43,899, and the number of DUI offenders who were

60. *Annual Uniform Traffic Citation Report*, *supra* note 57. Uniform Traffic Citation Statistics, as posted by the FDHSMV for years 2012 and 2017, reflect a decline in total DUI convictions (adjudications of guilt) from 37,004 in 2012 to 27,865 in 2017, the difference being 9,139 fewer convictions. This amounts to a decline in total DUI convictions (adjudications of guilt) of 24.7 percent over the five-year period.

61. This chart was completed using NHTSA Traffic Safety Facts Data Sheets from 2011 to 2017. *Traffic Safety Facts Sheets*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://crashstats.nhtsa.dot.gov/#/DocumentTypeList/11> (using filter field to search for "alcohol-impaired driving") (last visited Mar. 24, 2019).

62. *Traffic Safety Facts—2012 Data*, NATIONAL HIGHWAY SAFETY ADMINISTRATION (Dec. 2013), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811870>; *Traffic Safety Facts—2017 Data*, NATIONAL HIGHWAY SAFETY ADMINISTRATION (Nov. 2018), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630>.

adjudicated guilty (convicted) shrank 25%, from 37,004 to 27,865.⁶³ Steep declines in the number of defendants adjudicated guilty of DUI offenses appear to coincide with the proliferation of Florida's de facto diversion programs. As increasing numbers of defendants have their DUI charges dismissed or reduced to non-DUI offenses, the adjudication (conviction) numbers fall. Unfortunately, although the number of DUI offenses prosecuted to conviction continues to decrease, the number of DUI fatalities has increased.

C. Percentage of DUI Cases that Remain Pending Without Resolution Has Increased

Although the number of DUI cases that are filed for prosecution has steadily decreased from 2012 to 2017, the percentage of those cases that remain pending without resolution has increased.⁶⁴ The result is an increase in the number of open or pending cases at the end of the year.⁶⁵ All of Florida's state attorney-operated diversion programs operate on the principle of deferring prosecution of DUI offenders who have been allowed to enter their programs. The deferral of their case prosecution as DUI offenders is conditioned on the defendants completing certain conditions similar to those that would be required to be completed on probation, which would be granted if the offender had pled to the DUI as opposed to entering into a diversion program.⁶⁶ These conditions include completion of a substance abuse education

63. *Traffic Safety Facts—2017 Data*, NATIONAL HIGHWAY SAFETY ADMINISTRATION (Nov. 2018), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630>. See also *supra* note 59 (explaining the difference in violations between 2012 and 2017).

64. See *Annual Uniform Traffic Citation Report*, *supra* note 57. The Author examined the numbers found in Florida Uniform Traffic Citation Statistics Violations and Dispositions recorded between January 1, 2017 and December 31, 2017, and January 1, 2012 through December 31, 2012 to compare the percentage of unresolved cases remaining.

65. *Id.*

66. See Memorandum from Jeffrey A. Siegmeister, *DUI Prevention Program*, *supra* note 52 (setting forth criteria for DUI Intervention Programs, which include: "Complete DUI school . . . [r]esolve any related citations independent of deferral agreement . . . [and] 18 month period of deferral; plead to Reckless Driving if successful . . . "); see also Letter from Heather L. Jones, Assistant State Attorney, County Court Division Chief, to Members, Florida Impaired Driving Coalition, *DUI Intervention Program* (Feb. 6, 2012) (imposing an eighteen-month period of deferral and requiring a plea to reckless driving); *Orange County Corrections Department Community Corrections Division Misdemeanor/DUI Pretrial Diversion Information*, ORANGE CTY. FL (Dec. 2017), <http://www.orangecountyfl.net/portals/0/resource%20library/jail/pretrial%20diversion%20information.pdf> (specifying a supervision period of twelve to fifteen months and cautioning that "[y]ou will receive a letter with instructions to report for an intake appointment. This could take a minimum of 12 weeks from your court date").

course, treatment (if indicated), payment of monetary penalties, performing community service, and, in some cases, restrictions related to operation of vehicles.⁶⁷ Defendants who do not choose to participate in diversion, but rather choose to plead guilty or no contest, are immediately adjudicated. Their licenses are revoked immediately and forwarded by clerks of the court to the FDHSMV to be recorded as adjudications.⁶⁸ Diversion program defendants, however, have their cases deferred until they complete the conditions of their deferral program.⁶⁹ The diversion program cases remain open, and they increase the number of pending cases as reflected on the Department's Uniform Traffic Citation Statistics website. The DUI diversion program in the Ninth Judicial Circuit, which operates locally in Orange and Osceola Counties, is an example of how DUI dispositions are delayed while they remain diverted.⁷⁰ Other de facto diversion programs, such as the one in

67. Copies of all eligibility and diversion program completion requirements for each of the de facto DUI diversion programs discussed in this Article are on file at the Florida Impaired Driving Coalition. As set forth in the previous footnote, some of the eligibility and completion requirements are also available online, such as those for Miami-Dade County's "Back On Track" program. The original document for this program was located on the Advocate Program's website, but the link is no longer active. See *Pretrial Diversion and Probation Supervision*, ADVOCATE PROGRAM, <https://advocateprogram.org/pretrial-diversion-and-probation-supervision/> (last visited Apr. 12, 2019) (providing some criteria on this page, but not all of the criteria). However, a local attorney in Miami provides a document on what is required for this program on his website. *Court Options: Back on Track Program*, ERIC MATHENY LAW, https://www.ericmathenylaw.com/documents/Back-On-Track_Matheny.pdf (last visited Apr. 12, 2019).

68. FLA. STAT. § 322.282 (2018).

When a court suspends or revokes a person's license or driving privilege and, in its discretion, orders reinstatement:

- (1) The court shall pick up all revoked or suspended driver licenses from the person and immediately forward them to the department, together with a record of such conviction. The clerk of such court shall also maintain a list of all revocations or suspensions by the court.

Id.

69. *Orange County Corrections Department Community Corrections Division Misdemeanor/DUI Pretrial Diversion Information*, *supra* note 66. The Orange County Corrections department information sheet provides that diverted DUI defendants remain under supervision for periods of twelve to fifteen months prior to the final disposition of their cases by dismissal. *Id.* This means disposition of the DUI case will remain pending for up to fifteen months, which does not even begin to run until a DUI defendant makes application to the diversion program. This is in contrast to the disposition of non-diverted DUI defendants, whose dispositions generally occur earlier in conformity with Florida's speedy trial rules. FLA. STAT. § 960.0015.

70. *Orange County Corrections Department Community Corrections Division Misdemeanor/DUI Pretrial Diversion Information*, *supra* note 66.

the Thirteenth Judicial Circuit⁷¹ that operates locally in Hillsborough County, advise applicants that they will be required to waive their right to a speedy trial and that a case disposition will be “set out” sixty days.⁷² During the time in which the case disposition is delayed, the diverted defendant is provided time to complete “Pre-Plea Sanctions” while the case disposition remains open and unadjudicated.⁷³

Table 3: Total DUI Cases Filed by Year and Percentage and Number that Remain Pending⁷⁴

| YEAR | NUMBER CASES FILED | % OF CASES PENDING | NUMBER OF CASES |
|------|--------------------|--------------------|-----------------|
| 2012 | 53,664 | 6% | 3,419 |
| 2013 | 50,377 | 6% | 3,187 |
| 2014 | 49,776 | 7% | 3,290 |
| 2015 | 46,992 | 7% | 3,128 |
| 2016 | 44,643 | 8% | 3,675 |
| 2017 | 43,899 | 13% | 5,745 |

D. Defendants Plead to Lesser Offenses When Their Blood or Breath Alcohol Levels Are 0.15 or Higher

In their previously referenced “Policies and Priorities,” the GHSA recommended that “[s]tates should restrict plea bargaining

71. *Reducing Impaired Driving Recidivism (RIDR)*, SAMMIS LAW FIRM—TAMPA DUI DEFENSE, <https://www.tampaflduilawyer.com/avoid-dui-penalties/ridr/> (last updated Feb. 1, 2019).

At the information meeting on February 26, 2018, many criminal defense attorneys expressed concerns that it would not be possible to complete all of the pre-plea sanctions within that time period and the State Attorney’s Office expressed a willingness to be somewhat flexible on that requirement during the transition phase of the initiative.

Id.

72. *Reduce Impaired Driving Recidivism*, OFFICE OF STATE ATTORNEY, 13TH JUDICIAL CIRCUIT, HILLSBOROUGH COUNTY, https://www.sao13th.com/wp-content/uploads/2018/08/RIDR-Info-Sheet_WideDistro_PDF-Final.pdf (last visited Apr. 1, 2019) This “Information Sheet” provides that: “At arraignment, the offender will waive speedy trial and agree to set the case for disposition approximately sixty (60) days out. Before disposition, the offender must provide proof of completion of the Pre-Plea Sanctions to the SAO.” *Id.*

73. *Id.*

74. See *Annual Uniform Traffic Citation Report*, *supra* note 57. Statistics generated for this table are current as of April 12, 2019.

and limit diversion programs to first-time offenders with low BAC[s], or where possible, eliminate such programs all together.”⁷⁵ Six out of seven of Florida’s de facto diversion programs accomplish the diversion of DUI offenders by amending or replacing the pending DUI with the charge of reckless driving. Reckless driving is a lesser offense than DUI; it is not, however, a “lesser included offense of ‘D.U.I.’”⁷⁶ When DUI offense diversion is successful, either the reckless driving charge either remains as a conviction of record or the adjudication may be withheld, depending on the policy of the state attorney who has granted the diversion.⁷⁷ Section 316.656(2), Florida Statutes, provides that:

No trial judge may accept a plea of guilty to a lesser offense from a person charged under the provisions of this act who has been given a breath or blood test to determine blood or breath alcohol content, the results of which show a blood or breath alcohol content by weight of 0.15 percent or more.⁷⁸

Notwithstanding this prohibition, Monroe County DUI defendants with blood/breath alcohol test results of up to 0.24 percent are permitted to plead to reckless driving.⁷⁹ The same occurs in the Third Judicial Circuit, the Eighth Judicial Circuit, and the Fifteenth Judicial Circuit (Palm Beach County), where offenders with blood/breath alcohol contents of up to 0.20 percent are permitted to plead to reckless driving, with or without a

75. *Impaired Driving Highway Safety Policies and Priorities*, GOVERNORS HIGHWAY SAFETY ASSOCIATION 11 (Aug. 2013), <https://www.ghsa.org/sites/default/files/2016-11/14-15PP.pdf>.

76. Lehmann, *supra* note 30, § 1.

It has been generally held that reckless driving is not a lesser included offense of driving while intoxicated or of variations of the latter charge. Recognizing the general rule that if the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser, the courts nevertheless have held that the offenses of driving under the influence of intoxicating liquor and of reckless driving are separate, distinct offenses, established by different evidence. The core of the offense of reckless driving lies not in the act of operating a motor vehicle, but in the manner and circumstances of its operation, indulgence in intoxicating liquor being wholly unessential to the establishment of the crime of reckless driving.

Id. (internal citations omitted).

77. See *Monroe County Aug. 2014 Meeting Minutes*, *supra* note 51, at Ex. A.

78. FLA. STAT. § 316.656(2)(a) (2018).

79. *Monroe County Aug. 2014 Meeting Minutes*, *supra* note 51, at Ex. A.

withholding of adjudication.⁸⁰ These practices not only run contrary to the policies of the GHSA, but more importantly, they also may constitute a violation of Section 316.656(2)(a),⁸¹ in which both the judge who accepts such a plea and the state attorney who urges acceptance of the plea may be complicit in wrongdoing.

E. Permitting Diversion of DUI/DWI Defendants Who Have Refused Blood/Breath Testing Provides Incentives for Defendants to Violate Florida's Implied Consent Law

Florida's Implied Consent Law⁸² provides that when a person is lawfully arrested by an officer who has probable cause to believe that the person drove under the influence, that person consents, by law, to submit to a chemical test of their blood, breath, or urine for the purpose of determining their BAC or for drugs. In each of the past six years, more than one-third of those arrested on probable cause for driving under the influence in Florida have refused to comply with Florida's Implied Consent Law.⁸³ This has

80. See Letter from William Cervone, *supra* note 52; Memorandum from Jeffrey A. Siegmeister, *DUI Intervention Program supra* note 52 (detailing diversion program specifications); *Palm Beach County 1st Time DUI Offender Program*, https://media.local10.com/document_dev/2017/08/09/1st%20Time%20DUI%20Offender%20Program_1502284440179_10269226_ver1.0.pdf (last visited Apr. 13, 2019).

81. FLA. STAT. § 316.656(2)(a) (2018).

82. FLA. STAT. § 316.1932 (2018). The statute provides:

Tests for alcohol, chemical substances, or controlled substances; implied consent; refusal.—

(1)(a) Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.

Id.

83. Refusal rates were compiled by the FDHSMV. See Email from Milton Grosz to Author, *Refusal Information* (Dec. 28, 2017, 2:42 PM) (copy on file with *Stetson Law Review*) [hereinafter Email from Milton Grosz, *Refusal Information*]; email from Milton Grosz to Author, *Data Request* (Jan. 11, 2019, 11:08 AM) (copy on file with *Stetson Law Review*) (follow-up email from the fldhsmv.gov source informed the Author that the refusal rate for 2017 was 34.987). The refusal rate for 2018 was unavailable at the time of publication and is therefore a projected figure based on the trend line of previous rates.

caused Florida to be ranked among states with the highest refusal rates. In 2014, NHTSA research note pegged Florida, as of 2011, as having the nation's highest refusal rate at eighty-two percent.⁸⁴ This figure was disputed by the DHSMV, which maintained that Florida's refusal rate was not more than thirty-six percent.⁸⁵ Even at percent thirty-six percent in 2011, Florida would still be tied for the fourth-highest refusal rate in the nation.⁸⁶

None of Florida's de facto DUI diversion programs exclude first-offense DUI defendants who have refused to comply with Florida's Implied Consent Law. However, all of the programs admit defendants who have registered BACs up to 0.19 (or in some cases up to 0.24).⁸⁷ In so doing, these diversion programs provide no incentive for DUI defendants to comply with Florida's Implied Consent Law. When the newest de facto DUI diversion program, Reducing Impaired Driving Recidivism (RIDR),⁸⁸ was publicly announced by State Attorney Andrew H. Warren in Hillsborough County, DUI defense attorneys reported that "[s]everal people pointed out that RIDR gave a huge incentive for people to refuse to take the breath test since anyone who blew over .20% would be automatically ineligible."⁸⁹

| Year | Refusal Rate |
|------|-------------------|
| 2012 | 34.24 |
| 2013 | 34.27 |
| 2014 | 35.63 |
| 2105 | 34.95 |
| 2016 | 35.17 |
| 2017 | 34.98 |
| 2018 | 35.00 (projected) |

84. ESTHER S. NAMUSWE, HEIDI L. COLEMAN & AMY BERNING, BREATH TEST REFUSAL RATES IN THE UNITED STATES—2011 UPDATE REPORT NO. DOT HS 811 881, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION 1, 2 (Mar. 2014), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/breath_test_refusal_rates-811881.pdf.

85. At the May 22, 2014 meeting of the Florida Impaired Driving Coalition, a representative of the FDHSMV reported that the 2011 refusal rate was "not more than 36 percent."

86. Namuswe, Coleman & Berning, *supra* note 84, at 2 fig. 1.

87. See *Monroe County Aug. 2014 Meeting Minutes*, *supra* note 51 (containing provisions of the Monroe County diversion program that allows applicants whose BACs do not exceed 0.25).

88. See *Reducing Impaired Driving Recidivism*, *supra* note 75.

89. Leslie Sammis, *RIDR—DUI Diversion in Hillsborough County, FL*, SAMMIS DUI BLOG (last updated Apr. 20, 2018), <https://tampaduiattorney.wordpress.com/2018/02/27/ridr-dui-diversion-in-hillsborough-county-fl/>.

Rather than rewarding DUI defendants who have complied with Florida's Implied Consent Law, Florida's DUI diversion programs appear to reward those who have not complied. In doing so, Florida's high refusal rate is likely to remain among the highest in the nation.

F. Undermining the "Financial Responsibility" Requirement of Florida's Motor Vehicle Financial Responsibility Insurance Laws

The enhanced requirements of Florida's Financial Responsibility Law, Section 324.023, Florida Statutes, require certain vehicle owners and drivers to maintain greater bodily injury or death coverage. It applies specifically to drivers and owners of motor vehicles located in Florida who pled guilty, were found guilty, or entered a plea of *nolo contendere* (no contest) to the charge of driving while under the influence under Section 316.193, Florida Statutes.⁹⁰ The enhanced coverage requirement to protect the motoring public from DUI offenders is related to studies that show DUI offenders demonstrably pose an added risk to public safety based upon their prior impaired driving conviction.⁹¹ Florida's *de facto* diversion programs allow DUI

90. FLA. STAT. § 324.023 (2018). Specifically, the statute states:

In addition to any other financial responsibility required by law, every owner or operator of a motor vehicle that is required to be registered in this state, or that is located within this state, and who, regardless of adjudication of guilt, has been found guilty of or entered a plea of guilty or *nolo contendere* to a charge of driving under the influence under s. 316.193 after October 1, 2007, shall, by one of the methods established in s. 324.031(1) or (2), establish and maintain the ability to respond in damages for liability on account of accidents arising out of the use of a motor vehicle in the amount of \$100,000 because of bodily injury to, or death of, one person in any one crash and, subject to such limits for one person, in the amount of \$300,000 because of bodily injury to, or death of, two or more persons in any one crash and in the amount of \$50,000 because of property damage in any one crash.

Id.

91. *E.g.*, James C. Fell, *Repeat DWI Offenders: Their Involvement in Fatal Crashes*, ICADTS (1993), http://www.icadtsinternational.com/files/documents/1992_137.pdf. The study found:

Drivers with prior DWI convictions are overrepresented among drivers involved in fatal crashes and the relative risk of fatal crash involvement is far greater for these repeat offenders. Only about 3 percent of all licensed drivers have a prior DWI arrest within the past three years, yet close to 12 percent of intoxicated

defendants to avoid DUI adjudications (convictions) and therefore render the provisions of Section 324.023 inapplicable to defendants originally cited for DUI. Section 324.023 only applies to those drivers or owners who have pled guilty or no contest to, or been found guilty of, Section 316.193.⁹² The motoring public thus loses the greater security of enhanced protection for three years should the successfully diverted DUI defendant become involved in an at-fault death or personal injury crash.

G. Violating Section 316.656, Florida Statutes, by
Withholding Adjudication of a DUI Offense

Section 316.656, Florida Statutes, is titled “Mandatory adjudication; prohibition against accepting plea to lesser included offense.”⁹³ It provides that “[n]otwithstanding the provisions of [Section] 948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of [Section] 316.193, for manslaughter resulting from the operation of a motor vehicle, or for vehicular homicide.”⁹⁴ Rather than dismissing a first-offense DUI and filing a new separate charge of reckless driving, many diversion program prosecutors simply amend the DUI to reckless driving.⁹⁵ The amendment causes the FDHSMV to treat the amended reckless charge as a withholding

drivers in fatal crashes have had at least one prior DWI conviction within three years of their crash.

Id. at 1044; *see also* FLA. STAT. § 324.023 (2018) (limiting specifically the application to every owner or operator of a motor vehicle “who, regardless of adjudication of guilt, has been found guilty of or entered a plea of guilty or nolo contendere to a charge of driving under the influence under [Florida Statute §] 316.193 after October 1, 2007 . . .”).

92. FLA. STAT. § 324.023.

93. FLA. STAT. § 316.656 (2018).

94. *Id.*

95. Based on the Author’s personal experience, both as a former elected Pinellas County Court Judge and presently as a senior status trial court judge, it is common practice for state attorneys to amend citations charging violation of Florida Statute § 316.193 (DUI) to instead charge violation of Florida Statute § 316.192 (Reckless Driving). The purpose of such amendments is to facilitate consummation of plea agreements necessary to allow a defendant to receive the benefit of a diversion program in which the defendant’s DUI charge will not appear as a conviction. By amending the DUI citation, rather than dismissing it, when the plea to reckless driving is accepted, the Florida Department of Highway Safety and Motor Vehicles will record the disposition of the DUI charge as a “withholding of adjudication” of the DUI charge by the judge who accepted the guilty or no contest plea to the reckless driving charge.

of the adjudication on the DUI charge.⁹⁶ This causes hundreds, if not thousands, of entries to be generated reciting that a judge had committed an act in violation of Section 318.656(1) by withholding adjudication in a DUI case. For 2016, FDHSMV uniform traffic citation statistics disclose that judges withheld adjudication in 2,776 DUI cases.⁹⁷ Such misrepresentations impugn the integrity of judges who were simply accommodating the requests of prosecutors to accept pleas in DUI cases that had been diverted down to reckless driving. These misrepresentations could be avoided if diversion program prosecutors would simply dismiss the diverted DUI charge and refile the same as a separate reckless driving charge.

H. Loss of Revenue from Fines and Statutory Costs

The sixty-seven independent Florida clerks of court⁹⁸ are required by Section 142.01, Florida Statutes,⁹⁹ to collect and

96. Email from Milton Grosz to Judge Karl Grube (Apr. 29, 2015) (copy on file with *Stetson Law Review*) [hereinafter Email from Milton Grosz (Apr. 2015)].

Sir: Per our conversation, I looked into the DUI cases where adjudication was withheld by judge as they display in 2014 Uniform Traffic Citation Statistics. The cases in question were cases where the DUI was reduced to reckless driving and the displayed number under adjudication withheld is part of the bookkeeping so that we do not have more dispositions for reckless driving than we have citations issued.

Id.

97. *Annual Uniform Traffic Citation Report*, *supra* note 57 (reviewing Florida Uniform Traffic Citation statistics, violations, and dispositions made from January 1, 2016 through December 31, 2016).

98. FLA. CONST. art. V, § 16:

Clerks of the circuit courts.—There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds. There may be a clerk of the county court if authorized by general or special law.

Id.

99. Specifically, the statute provides:

Fine and forfeiture fund; disposition of revenue; clerk of the circuit court.—
 (1) There shall be established by the clerk of the circuit court in each county of this state a separate fund to be known as the fine and forfeiture fund for use by the clerk of the circuit court in performing court-related functions. The fund shall consist of the following:

disburse fines and costs collected in DUI cases and other criminal cases. DUI cases that are dismissed or amended as a result of diversion result in reduced fines or no fine being imposed at all. Normally, upon conviction for a first-offense DUI with a blood or breath alcohol level of 0.08 or higher, the minimum fine is \$500 and the maximum is \$1,000. In cases where the blood or breath alcohol level is 0.15 or higher, the minimum fine is \$1,000 and the maximum is \$2,000.¹⁰⁰ Without diversion, pursuant to Section 142.01, these fines, together with “statutory court costs”¹⁰¹ that range from \$400 to \$550, would be collected by the clerk of the court and remitted as required by law or held in a “fine and forfeiture fund” for use by the clerk of the court in performing court-related functions.¹⁰²

DUI defendants in Orange County, in the Ninth Judicial Circuit who complete their DUI diversion programs have their DUI cases *nolle prosequi* (dismissed).¹⁰³ They do not pay even the minimum fines of \$500 or \$1,000 and are not subject to the maximum fines of \$1,000 or \$2,000.¹⁰⁴ Instead, they are required to make a “monetary contribution” of either \$500 or \$1,000

(a) Fines and penalties pursuant to [§§] 28.2402(2), 34.045(2), 316.193, 327.35, 327.72, 379.2203(1), and 775.083(1).

Id.

100. The penalties for driving under the influence are as follows:

Any person who is convicted of a violation of subsection (1) and who has a blood-alcohol level or breath-alcohol level of 0.15 or higher, or any person who is convicted of a violation of subsection (1) and who at the time of the offense was accompanied in the vehicle by a person under the age of 18 years, shall be punished:

- (a) By a fine of:
1. Not less than \$1,000 or more than \$2,000 for a first conviction.
 2. Not less than \$2,000 or more than \$4,000 for a second conviction.
 3. Not less than \$4,000 for a third or subsequent conviction.

Fla. Stat. § 316.193(4) (2018).

101. *Court-Related Filing Fees, Services Charges, Costs and Fines, Including a Fee Schedule for Recording, Distribution Schedule*, FLORIDA COURT CLERKS AND COMPTROLLERS 57, https://cdn.ymaws.com/www.flclerks.com/resource/resmgr/public_documents/_2018_distribution_schedule_1.pdf (last visited Mar. 30, 2019) (providing guidelines for Florida clerks on costs associated with various violations, including providing comparisons between first offenses of DUI and reckless driving).

102. *Id.*

103. See *nolle prosequi*, *supra* note 27.

104. *Orange County Corrections Department Misdemeanor/DUI Pretrial Diversion Information*, *supra* note 66.

depending on their blood/breath alcohol level.¹⁰⁵ The “monetary contribution” is to be made to an unspecified entity, which may include the “Mothers Against Drunk Driving” or other organizations.¹⁰⁶

In the Third Judicial Circuit, encompassing Suwanee, Hamilton, Dixie, Taylor, Lafayette, Madison, and Columbia counties, a \$500 “charitable contribution in lieu of fine” is required.¹⁰⁷ In the Eighth Judicial Circuit, encompassing Alachua, Baker, Bradford, Gilchrist, Levy, and Union counties, a \$500 contribution is required to a “charity.”¹⁰⁸ In the Third, Eighth, and Ninth Judicial Circuits, diverted DUI defendants may actually be able to gain an income tax deduction by making a charitable contribution instead of having to pay a fine.¹⁰⁹ As a result, the State of Florida receives no financial benefit. The mandatory charitable

105. *Id.* Orange County provides different fines for Tier 1 cases, in which offenders have a BAC of below .15%, and Tier 2 cases, in which offenders have a BAC > .15%:

DUI Cases Tier 1 and Tier 2:

- DUI Level I School
- Victim Impact Classes through MADD or Florida Safety Council
- Substance abuse evaluation and any recommended treatment
- Tier 1–10 day Vehicle Impoundment/Immobilization and a \$500 monetary contribution
- Tier 2–6 month Ignition Interlock and a \$1000 monetary contribution

Id.

106. *Program Allows DUI Suspects to Donate to MADD to Avoid Prosecution*, WFTV (Nov. 26, 2013, 4:16 PM), <https://www.wftv.com/news/local/program-allows-dui-suspects-donate-madd-avoid-pros/270741635>.

Channel 9 has learned some Orange County DUI suspects are making donations to Mothers Against Drunk Driving to avoid being prosecuted. First-time drunken drivers, including those accused of driving with blood-alcohol levels almost three times the legal limit, can avoid prosecution in Orange County by meeting certain requirements that include donating at least \$500 to MADD or another crime victims’ organization, reporter Kathi Belich found. Last year, MADD raked in \$150,000 from the program, but a new jail study calls the program improper and unfair.

Id.

107. Memorandum from Jeffrey A. Siegmeister, *DUI Intervention Program*, *supra* note 52.

108. Letter from William Cervone, *supra* note 52.

109. See *Publication No. 1771 – Charitable Contributions – Substantiation and Disclosure Requirements*, IRS, <https://www.irs.gov/pub/irs-pdf/p1771.pdf> (last visited Mar. 30, 2019); see also *Donate Now*, MADD, <https://www.madd.org/donate-now/make-honormemorial-gift-today/> (last visited Apr. 12, 2019) (“Mothers Against Drunk Driving is a 501(c)(3) public charity, IRS Tax ID 94-2707273. Donations to MADD are tax-deductible as allowed by law.”).

donation requirements of the Third, Eighth, and Ninth Judicial Circuits' DUI diversion programs may also carry negative ethical implications for both state attorneys and judges.¹¹⁰ Such implications may arise where the nature of the charitable contribution may give an appearance of impropriety in terms of a prosecutor or judge favoring or supporting a particular charity.¹¹¹ Judges who impose or approve of sentences that include charitable contributions may be perceived as violating ethical canons that prohibit judges from using the prestige of the judicial office to advance private interests.¹¹² Additionally, certain charitable contributions may be questioned as not being reasonably related to rehabilitating a defendant, or as diverting funds from state programs and trust funds that relate to funding enforcement or compensating victims of impaired drivers.¹¹³

Florida jurisdictions offer DUI deferred prosecution diversion programs that, upon completion, amend DUI charges to reckless driving.¹¹⁴ These jurisdictions either adjudicate the defendant to be guilty of reckless driving, or they withhold the adjudication of guilt. In some of the diversion programs that amend charges to reckless driving, the fines that are imposed range from as low as zero dollars, in the Third and Eighth Judicial Circuits, up to \$250 in the Fifteenth Judicial Circuit (Palm Beach County).¹¹⁵ These sums leave less money for the clerks of court to collect and disburse for performing court-related operations in comparison to a minimum of \$500, or up to \$2,000, in fines¹¹⁶ that would otherwise

110. Sylvia Shaz Shweder, *Donating Debt to Society: Prosecutorial and Judicial Ethics of Plea Agreements and Sentences That Include Charitable Contributions*, 73 FORDHAM L. REV. 377, 379–80 (2004).

111. *Id.* at 388, 390–91.

112. *Id.* at 390.

113. *Id.* at 393.

114. FLA. STAT. § 316.192 (2018).

115. See Memorandum from Jeffrey A. Siegmeister, *DUI Intervention Program*, *supra* note 52 (detailing diversion program specifications); Letter from William Cervone, *supra* note 52 (detailing diversion program specifications); see also *Palm Beach County: 1st Time DUI Offender Program*, *supra* note 80 (detailing admission requirements for Palm Beach County).

116. FLA. STAT. § 316.193 (2018). The statute requires the following fines for DUI convictions:

Driving under the influence; penalties.—

- (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2)

be required to be collected and disbursed if those DUI defendants were adjudicated and not diverted.

I. Role of Miami-Dade County's "Back on Track" DUI Diversion Program

Research conducted in 2018 by the University of Chicago NORC Center for Public Affairs¹¹⁷ disclosed that Miami-Dade County's DUI arrests had decreased sixty-four percent since 2009.¹¹⁸ "This is a significantly larger decrease than has occurred in the State of Florida as a whole (34%), and in the United States (29%), over the same time period."¹¹⁹ Miami-Dade alcohol-impaired driving-related fatal crashes increased from sixty-six in 2010 to 100 in 2015, then to seventy-six in 2016.¹²⁰ The decline in DUI arrests was found not to be due to any decline in DUI behavior. The final research report concluded that the number one factor in the decrease in DUI arrests was "law enforcement apathy."¹²¹ Other probable reasons included "[l]ack of confidence in the DUI

(2) Except as provided in paragraph (b), subsection (3), or subsection (4), any person who is convicted of a violation of subsection (1) shall be punished:

1. By a fine of:

- a. Not less than \$500 or more than \$1,000 for a first conviction.
- b. Not less than \$1,000 or more than \$2,000 for a second conviction.

Id.

117. James C. Fell, *State Attorney's Fund for a Safer and Healthier Community, Driving Under the Influence (DUI) Research Project: Final Report and Action Plan*, NORC at U. Chi., Mar. 14, 2018, at 1.

118. *Id.* at 22.

119. *Id.* at 1.

120. *Fatality Analysis Reporting System*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION <https://www.nhtsa.gov/research-data/fatality-analysis-reporting-system-fars> (last visited Apr. 1, 2019). Below is a chart for Miami-Dade Fatality Analysis Reporting System Analyses:

| | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|-----------------------------------|-------------|-------------|-------------|-------------|-------------|--------------|-------------|
| Fatal crashes | 227 | 223 | 217 | 212 | 268 | 316 | 279 |
| Fatal crashes BAC >= 0.08 | 66 (29%) | 77 (35%) | 73 (34%) | 63 (30%) | 81 (30%) | 100 (32%) | 76 (27%) |
| Traffic fatalities | 246 | 247 | 235 | 225 | 280 | 340 | 294 |
| Traffic fatalities BAC >= 0.08 | 69 (28%) | 89 (36%) | 82 (35%) | 65 (29%) | 90 (32%) | 111 (33%) | 80 (27%) |

Fell, *supra* note 117, at 23 tbl. 3.

121. *Id.* at 26.

arrest process” and the “perception by officers that the ‘Back on Track’ [diversion] program is a mere ‘slap on the wrist.’”¹²²

Among the recommendations that were put forth in the NORC research report were to:

4. Discuss the “Back on Track” program with law enforcement agencies so that they understand the purpose of the program.
5. Determine the recidivism rate of the DUI offenders who complete the “Back on Track” program and, if recidivism is low, inform police agencies. However, if recidivism is high or the same, look to make improvements to the program. Continually evaluate the program as laws change and marijuana is legalized.¹²³

IV. *SERIOUS CONCERNS AND SHORTCOMINGS SUMMARIZED*

The foregoing paragraphs detailed serious concerns and shortcomings regarding Florida’s de facto DUI diversion programs that were previously discussed in this Article. These “serious concerns and shortcomings” fall into several categories and can be summarized as follows:

1. By far the most often cited serious concern and shortcoming is that a successfully diverted first-time DUI offender can commit a second DUI and again be entitled to be treated as a first-time offender, thereby escaping the enhanced penalties that would attach to a second offense.¹²⁴

2. De facto DUI programs affect deterrence. DUI enforcement citations have decreased 18 percent since 2012 and DUI adjudications have dropped 24 percent.¹²⁵

122. *Id.* at 27.

123. *Id.*

124. *See supra* pt. I (setting forth previously cited negative opinions concerning the effects of DUI diversion programs expressed by nationally based transportation-safety organizations including the NTSB, the AAA Foundation for Traffic Safety, the NHTSA, the American Journal of Public Health, the GHSA, and the U.S. Centers for Disease Control and Prevention).

125. *See supra* pt. III. A, C, tbls. 1, 3 (showing declining number of DUI adjudications and increasing number of DUI cases that remain pending year to year).

3. As diversion programs have proliferated, DUI citations and adjudications have decreased while the number of fatalities related to alcohol impaired drivers has risen from 716 in 2012 to 839 in 2017.¹²⁶

4. De facto diversion programs either result in DUI charges being dismissed or being reduced to reckless driving charges. In doing so, they either entirely deprive the state of the fines and costs that would otherwise be imposed, or they substantially reduce the amount that can be imposed in the case of reductions to reckless driving.¹²⁷

5. De facto programs that reduce DUI charges to reckless driving in cases with breath test results over 0.15 percent BAC violate Section 316.656(2)(a), Florida Statutes, which provides that no judge shall accept a plea of guilty to a lesser offense from a person whose breath test shows a BAC of over 0.15.¹²⁸

6. De facto diversion programs enable diverted DUI defendants to be excused from the enhanced provisions of Florida's Financial Responsibility Law, which would otherwise function to protect the public by requiring enhanced injury and death coverage for a period of three years in order to maintain driving privileges.¹²⁹

7. Many de facto diversion program prosecutors amend DUI citations to reckless driving rather than dismissing the DUI charge and filing a separate reckless driving charge. The amendment process causes FDHSMV to treat the amended DUI charge as having been withheld by a judge.¹³⁰ This causes thousands of entries to reflect that a judge has violated Section 316.656(1),

126. *See supra* pt. III. B, tbl. 2 (detailing progression of fatalities where one or more drivers had a BAC of 0.08 or higher as a percentage of total fatalities).

127. *See supra* pt. III. H (referring to the financial loss to state and local entities of fine and cost revenue when diversion programs replace donations to charity in place of payment of mandatory fines and costs that would otherwise be required by statute upon a DUI conviction).

128. FLA. STAT. § 316.656(2)(a) (2018). Diversion programs that permit reduction of DUI offenses to the lesser offense of reckless driving in cases involving a blood/breath alcohol test of 0.15 or higher violate Section 316.656(2)(a).

129. FLA. STAT. § 324.023 (2018). Diversion of DUI cases by dismissal or reduction to reckless driving enables impaired drivers to avoid compliance with enhanced financial responsibility requirements mandated by Section 324.023.

130. Email from Milton Grosz (Apr. 2015), *supra* note 96.

which provides that no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of Section 316.193, Florida Statutes.

8. De facto DUI diversion programs necessarily divert DUI cases from their normal course through the criminal justice system. This has led to increasingly longer delays in the final disposition of DUI cases. This is reflected in the number and percentage of DUI cases that have remained pending at the end of each year.¹³¹

9. DUI diversion programs admit defendants who have refused to provide blood/breath test samples, thus rewarding defendants who have violated Florida's Implied Consent Law.

V. HOW TO ADDRESS DIVERSION PROGRAMS SHORTCOMINGS

Each of these serious concerns can be addressed through the enactment of legislation to regulate the operation of Florida's de facto DUI diversion programs. For models of statutory approaches that have addressed the serious concerns voiced herein, one can look to other states that have confronted the same diversion program problems. There follows a discussion of the previously identified serious concerns and shortcomings and how they can be addressed.

The most serious concern, voiced by researchers as well as government and private traffic safety advocacy entities, is that diversion programs allow DUI offenders who commit a second DUI to be treated as first-time offenders, thereby escaping the enhanced penalties that would attach to a second offense. This issue was successfully addressed by the Kansas Legislature by amending its DUI statute to expand the definition of "conviction" as follows:

"For the purpose of determining whether a conviction is a first, second or third or subsequent conviction for the purpose of sentencing under this section, *the term 'conviction' includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a*

131. *Annual Uniform Traffic Citation Report*, *supra* note 57.

complaint alleging a violation of this section. For such purpose ‘conviction’ also includes being convicted of a violation of a law of another state or an ordinance of any municipality which prohibits the acts that this section prohibits or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such a law or ordinance. For the purpose of this section, only convictions occurring in the immediately preceding five years, including prior to the effective date of this act, shall be taken into account.”¹³²

In Kansas, a person charged with DUI who enters into a DUI diversion program and thereafter commits a second DUI offense, is treated as a second-time DUI offender and subjected to the enhanced penalties applicable to second-time offenders.¹³³ The Kansas approach to impaired driving recidivism stands in stark contrast to Florida’s approach where, through de facto diversion programs, second-time DUI offenders again become first-time offenders who gain the privilege to escape the mandatory penalties applicable to second-time repeat offenders. This simple statutory provision effectively addresses the chief complaint of the critics of DUI diversion programs.

The constitutionality of counting participation in a DUI diversion program as a “conviction” for enhancement purposes in the event of a second or repeated offense was addressed by the

132. State v. Booze, 712 P.2d 1253, 1255 (Kan. 1986). Kansas’ DUI statute provides:

Convictions for a violation of this section, or a violation of an ordinance of any city or resolution of any county that prohibits the acts that this section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, shall be taken into account, but only convictions or diversions occurring on or after July 1, 2001. Nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person’s lifetime in determining the sentence to be imposed within the limits provided for a first, second, third, fourth or subsequent offense[.]

Id. See also KAN. STAT. § 8-1567(i)(3) (2018), which provides that “conviction” includes:

(A) Entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging an offense described in subsection (i)(2); and
(B) conviction of a violation of an ordinance of a city in this state, a resolution of a county in this state or any law of another jurisdiction that would constitute an offense that is comparable to the offense described in subsection (i)(1) or (i)(2).

Id.

133. KAN. STAT. ANN. § 8-1567(i)(1); *Booze*, 712 P.2d at 1257.

Kansas Supreme Court in the case of *State v. Clevenger*,¹³⁴ where the court ruled:

Finally, and most importantly, the defendant's decision to enter the diversionary program is completely voluntary. The defendant may choose to go to trial, rather than accept diversion. The trial phase guarantees all constitutional rights. Hence, there can be no claim the waiver of due process rights which accompanies the diversion agreement is not voluntary.

The final issue of importance in this case is the public policy behind the statute in question. The intent of allowing diversion for the first DUI offense was the legislature's recognition that although it had done away with plea bargaining, it deemed it appropriate to offer a less harsh option for a first offense. If, however, a defendant commits a second offense, there are no breaks. The purpose of sentence enhancement is to punish those who violate the law repeatedly. A repeated violator of the DUI law should be subject to sentence enhancement on a second offense regardless of whether the individual went to jail or sought diversion for the first offense.¹³⁵

In 1986, the Kansas Supreme Court again visited the issue of the constitutionality of statutory enhancement based on a previous diversion in the case of *State v. Booze*.¹³⁶ The court concluded its opinion as follows:

The defendant's arguments have failed to show that the statute should not be interpreted according to its plain meaning. Therefore, we hold that, pursuant to K.S.A. 1983 Supp. 8-1567(i), entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of 8-1567 is to be considered a conviction for purposes of sentence enhancement. The judgment of the lower court sentencing the defendant as a second offender is affirmed.¹³⁷

134. 683 P.2d 1272, 1274 (Kan. 1984).

135. *Id.* at 1275-76; *see also* *State v. Lohrbach*, 538 P.2d 678, 681 (Kan. 1975).

136. 712 P.2d at 1255.

137. *Id.* at 1258.

Florida's driving under the influence statute Section 316.193, Florida Statutes, could easily address this major shortcoming of the de facto DUI diversion programs by simply adding a provision to the last full paragraph of Section 316.193(6),¹³⁸ which defines what is considered to be a "previous conviction." An example of wording that would require a previous diversion program dismissal or reckless driving charge reduction to be considered a "previous conviction" has been proposed in the Whitepaper presented to the Florida Impaired Driving Coalition.¹³⁹ It would amend Section 316.193(6) as follows:

For the purposes of this section, any conviction for a violation of s. 327.35; a previous conviction for the violation of former s. 316.1931, former s. 860.01, or former s. 316.028; or a previous conviction outside this state for driving under the influence, driving while intoxicated, driving with an unlawful blood-alcohol level, driving with an unlawful breath-alcohol level, or any other similar alcohol-related or drug-related traffic offense, or the disposition of any offense for which a uniform traffic citation was issued for driving while under the influence as specified in s. 316.193, which offense was dismissed, amended, and/or for which adjudication was withheld by, through, or as a result of the completion of a pretrial diversion program, deferred prosecution program, or a pretrial intervention program is also considered a previous conviction for violation of this section.¹⁴⁰

This amendment does not contain any provision that would interfere with the executive authority or discretion of any state attorney to operate a non-statutory de facto DUI diversion program in their jurisdiction. The amendment simply provides for enhanced penalties should a previously diverted DUI defendant commit a second DUI after having been successfully diverted. State attorneys will be able to continue to operate their programs which, at present, only admit first-time DUI offenders. Even if a state attorney decided to admit a repeat DUI offender to one of their diversion programs, which is highly unlikely, the only effect

138. FLA. STAT. § 316.193(6) (2018).

139. Cambridge Systems Inc., *Florida Impaired Driving Coalition Meeting Report August 2-3, 2018*, FLORIDA IMPAIRED DRIVING COALITION 6, http://www.flimpaireddriving.com/pdf/August2018/FDIC%20August%202018%20Meeting%20Summary_4.pdf (last visited Apr. 1, 2019).

140. Proposed amended portions are underlined.

would be to require the repeat offender to be subjected to the statutory enhanced penalties applicable to repeat offenders.

A second major criticism of DUI diversion programs is that they do not provide an adequate record that the diverted DUI defendant was charged with DUI but had that charge dismissed, reduced, or amended to a non-alcohol-related offense. Such record keeping is necessary, otherwise repeat DUI offenders may continue to avail themselves of the benefits of diversion programs to cover up their records. At present there are no entries on Florida driving records that verify that a diversion program was completed and thus resulted in a dismissal or reduction of a previous DUI charge. Rather, state attorneys rely on defendants to disclose whether they have previously completed a DUI diversion program.¹⁴¹ In some jurisdictions, prosecutors may also investigate whether diversion applicants have previously attended a substance abuse education program, which could indicate that they have previously had the benefit of a diversion.¹⁴²

To remedy this shortcoming the Author proposed to the Florida Impaired Driving Coalition an amendment¹⁴³ to the record keeping provisions of Section 322.20(6), Florida Statutes, which

141. *Reduce Impaired Driving Recidivism*, *supra* note 72.

142. From speaking with the Hillsborough County's DUI Program's Executive Director, Helen Justice, Hillsborough County checks to see if applicants for the RIDR diversion program have previously attended DUI school, which would be indicative of a previous DUI charge. *See also* Excerpt from Interoffice Memorandum from Miami-Dade County State Attorney, to Florida Impaired Driving Coalition, *Back on Track Scoring* (copy on file with *Stetson Law Review*):

BACK ON TRACK SCORING: Qualifying Questions:

1. Does this case involve an Accident where the DEFENDANT was at FAULT?
2. Does the Defendant have any Open DUIs, Prior **DUI** Arrests, Convictions, Breakdowns, or any alcohol related driving charge?

See also Memorandum from Catherine Vogel, State Attorney, 16th Judicial Circuit, to Florida Impaired Driving Coalition, *Back on Track DUI Diversion Program* (May 31, 2013) (copy on file with *Stetson Law Review*):

DUI Diversion Screening & Enrollment

Cases will be screened by the supervising agency (Court Options) pre-arrest through a review of all DUI arrest forms for eligibility criteria and a thorough review of criminal background checks. Defendants meeting criteria requirements could be sent letters offering Defendants an opportunity to enroll pre-arrest.

Id.

143. FLA. STAT. § 322.20(6) (2018) ("The department shall tabulate and publish statistics of traffic citation dispositions and provide records to court clerks for the purpose of verifying that the data was properly received and recorded.").

governs the maintenance of driver records by the FDHSMV.¹⁴⁴ The amendment to Section 322.20(6) would read as follows:

(6) The department shall tabulate and publish statistics of traffic citation dispositions and provide records to court clerks for the purpose of verifying that the data was properly received and recorded. For purposes of this section, the tabulation and publishing of traffic citation disposition records shall include the dispositions of offenses for which uniform traffic citations were issued for violations specified in s. 316.193, which violations were subsequently dismissed, amended, and/or for which adjudication was withheld by, through, or as result of completion of a pretrial diversion program, deferred prosecution program, or a pretrial intervention program.¹⁴⁵

Diversion programs that dismiss or reduce DUI charges to reckless driving charges that are either adjudicated or withheld from the defendant's record block the application of Section 324.023, Florida Statutes.¹⁴⁶ Diverted defendants are excused from the requirement of providing enhanced bodily injury and death coverage for a period of three years in order to maintain their driving privileges. This diminishes the protection that the motoring public would otherwise have had for three years had the

144. *Id.*

145. Proposed amended portions are underlined.

146. FLA. STAT. § 324.023 (2018).

Financial responsibility for bodily injury or death.—In addition to any other financial responsibility required by law, every owner or operator of a motor vehicle that is required to be registered in this state, or that is located within this state, and who, regardless of adjudication of guilt, has been found guilty of or entered a plea of guilty or nolo contendere to a charge of driving under the influence under s. ~~316.193~~ after October 1, 2007, shall, by one of the methods established in s. ~~324.031~~(1) or (2), establish and maintain the ability to respond in damages for liability on account of accidents arising out of the use of a motor vehicle in the amount of \$100,000 because of bodily injury to, or death of, one person in any one crash and, subject to such limits for one person, in the amount of \$300,000 because of bodily injury to, or death of, two or more persons in any one crash and in the amount of \$50,000 because of property damage in any one crash. If the owner or operator chooses to establish and maintain such ability by furnishing a certificate of deposit pursuant to s. ~~324.031~~(2), such certificate of deposit must be at least \$350,000. Such higher limits must be carried for a minimum period of 3 years. If the owner or operator has not been convicted of driving under the influence or a felony traffic offense for a period of 3 years from the date of reinstatement of driving privileges for a violation of s. ~~316.193~~, the owner or operator shall be exempt from this section.

Id.

defendant's DUI not been diverted. This serious concern is a shortcoming that can be addressed by an amendment to Section 324.023 as follows:

In addition to any other financial responsibility required by law, every owner or operator of a motor vehicle that is required to be registered in this state, or that is located within this state, and who, was issued a uniform traffic citation charging driving while under the influence as specified in s. 316.193, which offense was dismissed, amended, and/or for which adjudication was withheld by, through, or as a result of the completion of a pretrial diversion program, deferred prosecution program, or a pretrial intervention program or who, regardless of adjudication of guilt, has been found guilty of or entered a plea of guilty or nolo contendere to a charge of driving under the influence under s. 316.193 after October 1, 2007, shall, by one of the methods established in s. 324.031(1) or (2), establish and maintain the ability to respond in damages for liability on account of accidents arising out of the use of a motor vehicle in the amount of \$100,000 because of bodily injury to, or death of, one person in any one crash and, subject to such limits for one person, in the amount of \$300,000 because of bodily injury to, or death of, two or more persons in any one crash and in the amount of \$50,000 because of property damage in any one crash.¹⁴⁷

The previously detailed shortcomings, which diminish the protection that Florida motorists should be entitled to from DUI offenders, can be corrected by amendments to various separate statutes that deal with record keeping, insurance protection, and the enhanced punishment of recidivists. But amending separate statutes, in piecemeal fashion, is a challenging task at best. A simpler and more direct approach would be to enact a single statutory DUI diversion statute with statewide application to address the shortcomings noted above.

A statutory DUI diversion program could be crafted to allow state attorneys to admit DUI defendants at their discretion with their executive authority remaining absolute and free from judicial interference. In *State v. Pugh*,¹⁴⁸ the court reviewed the provisions of Florida's existing "Pretrial Intervention Program."¹⁴⁹ The court

147. Proposed amended portions are underlined.

148. 42 So. 3d 343, 343 (Fla. 5th Dist. Ct. App. 2010).

149. *Id.* at 343-44; FLA. STAT. § 948.08 (2018).

noted that the provisions of the statute required the consent of the state attorney, among others.¹⁵⁰ The court ruled that “the trial court exceeded its authority when it placed Pugh in the program despite the State’s objection. Certiorari relief is warranted.”¹⁵¹ Just as Florida’s present pretrial diversion statute provides state attorneys discretion to decide who is and who is not entitled to diversion, a similar provision could be added to any statutory DUI diversion statute.

Proposing a comprehensive statutory DUI diversion program and having it passed into law by the Florida Legislature is a daunting task.¹⁵² It is doubtful that state attorneys would voluntarily give up their in-house de facto programs, which allow them to collect and retain application and processing fees and order defendants to make tax-deductible charitable donations. An approach more likely to successfully address the serious concerns and shortcomings discussed herein would be to amend portions of existing statutes that relate to DUI recidivism, record keeping, and financial responsibility, as discussed previously. In the interim, the Florida Impaired Driving Coalition (“FIDC”) will offer state attorneys who operated DUI diversion programs a list of “Best Practices.” These Best Practices were developed by the FIDC after carefully considering practices that would address serious concerns and shortcomings presently existing in Florida’s de facto DUI diversion programs.

150. *Pugh*, 42 So. 3d at 344.

151. *Id.*

152. *How an Idea Becomes a Law*, FLA. SENATE, <https://www.flsenate.gov/About/HowAnIdeaBecomesALaw> (last visited Mar. 25, 2019).

Either house may originate any type of legislation; however the processes differ slightly between houses. A legislator sponsors a bill, which is referred to one or more committees related to the bill’s subject. The committee studies the bill and decides if it should be amended, pass, or fail. If passed, the bill moves to other committees of reference or to the full house. The full house then votes on the bill. If it passes in one house, it is sent to the other house for review. A bill goes through the same process in the second house as it did in the first. A bill can go back and forth between houses until a consensus is reached. Of course, the measure could fail at any point in the process.

Id.

VI. SUGGESTED BEST PRACTICES FOR STATE
ATTORNEY DE FACTO DUI DIVERSION PROGRAMS

A. Exclude Applicants whose BAC in a Blood or Breath
Alcohol Test is 0.15 or More

Section 316.656, Florida Statutes, prohibits judges from accepting pleas to lesser offenses when a defendant has provided a blood or breath test that registered 0.15 percent or more.¹⁵³ DUI cases with 0.15 percent or more BACs that are reduced to reckless driving require judges to violate Section 316.656 when they are asked to accept a plea to the reduced charge. Judges should not be put in such an untenable position. A number of Florida de facto DUI diversion programs accept applicants who have submitted to sobriety testing and have registered a BAC of 0.15 percent or higher. At least one county diversion program further accepts applicants with BAC results up to 0.24 percent.¹⁵⁴ These diversion program applicants can qualify to have their DUI charge reduced to reckless driving. This practice may also present ethical issues

153. FLA. STAT. § 316.656 (2018).

Mandatory adjudication; prohibition against accepting plea to lesser included offense.—

(1) Notwithstanding the provisions of s. 948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of s. 316.193, for manslaughter resulting from the operation of a motor vehicle, or for vehicular homicide.

(2) (a) No trial judge may accept a plea of guilty to a lesser offense from a person charged under the provisions of this act who has been given a breath or blood test to determine blood or breath alcohol content, the results of which show a blood or breath alcohol content by weight of 0.15 percent or more.

(b) No trial judge may accept a plea of guilty to a lesser offense from a person charged with a violation of s. 316.193(3), manslaughter resulting from the operation of a motor vehicle, or vehicular homicide.

Id.

154. See Memorandum from Jeffrey A. Siegmeister, *DUI Intervention Program*, *supra* note 52 (detailing diversion program “qualifiers” including, “[n]o BA[C] of .20 or over”); Letter from William Cervone, *supra* note 52 (detailing diversion program “qualifiers” including, “[n]o BA[C] of over .20 or over”); see also *Reduce Impaired Driving Recidivism*, *supra* note 72 (detailing diversion program “eligibility” including, “[n]o minor in the vehicle, BAC of .20 or higher, or a crash”); *Palm Beach County: 1st Time DUI Offender Program*, *supra* note 80, at 3 (detailing “program eligibility criteria” for the Palm Beach County 1st Time DUI Offender Program including, “TIER 2: (Breath/Blood Alcohol Levels Between .150 and .200 and Refusals)”); *Monroe County Aug. 2014 Meeting Minutes*, *supra* note 51 (detailing “admission criteria” including “[d]efendant may not have a Breath, Blood, or Urine Alcohol content of .25 or higher”).

for judges and prosecutors to consider.¹⁵⁵ Ignoring BAC tests of 0.15 or higher, or simply reducing BAC test results to less than 0.15 to facilitate a plea to conform with Section 316.656, could similarly present ethical issues for both the judge and counsel.¹⁵⁶

B. Exclude Applicants Who Refuse to Comply with Florida's Implied Consent Law

Florida's Implied Consent Law¹⁵⁷ provides that when a person is lawfully arrested by an officer who had probable cause to believe that they drove under the influence, that person consents, by law, to submit to a chemical test of their blood, breath, or urine for the purpose of determining their BAC, or for drugs. In each of the past six years, more than one-third of those arrested on probable cause for driving under the influence in Florida have refused to comply with Florida's Implied Consent Law.¹⁵⁸ This has caused Florida to be ranked among states with the highest refusal rates.

155. See Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, 39 ST. MARY'S L.J. 717, 728–29 (2008); Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2974–75 (2010).

156. Plea agreements require good faith factual bases in order to be both legally and ethically constituted. When facts, such as blood alcohol levels, are ignored or lowered solely to accommodate a guilty plea or an acceptance into a diversion program, ethical issues may arise. Such ethical issues seldom become actionable, however, because neither the prosecution, the defense, nor the judge are inclined to raise such issues to which there are parties.

157. FLA. STAT. § 316.1932 (2018).

Tests for alcohol, chemical substances, or controlled substances; implied consent; refusal.—

(1)(a) Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages.

Id.

158. Refusal rates were compiled by the FDHSMV; See Email from Milton Grosz, *Refusal Information*, *supra* note 83. Follow-up emails from the above source informed the Author that 2017 and 2018 rates were unavailable at the time of publication of this Article. For this reason, the refusal rates cited for years 2017 and 2018 were based on projected and estimated refusal rates provided to the Author.

None of Florida's de facto DUI diversion programs exclude first-offense DUI defendants who have refused to comply with Florida's Implied Consent Law. However, all of the programs admit defendants who have registered BACs up to 0.19 percent or, in some cases, up to 0.24 percent.¹⁵⁹ In so doing, these diversion programs provide no incentive for DUI defendants to comply with Florida's Implied Consent Law. When the newest de facto DUI diversion program (RIDR)¹⁶⁰ was publicly announced by State Attorney Andrew H. Warren in Hillsborough County, DUI defense attorneys reported that "[s]everal people pointed out that RIDR gave a huge incentive for people to refuse to take the breath test since anyone who blew over .20% would be automatically ineligible."¹⁶¹

Rather than rewarding DUI defendants who have complied with Florida's Implied Consent Law, Florida's DUI diversion programs appear to reward those who have not complied. In doing so, Florida's high refusal rate is likely to remain among the highest in the nation.

C. For DUI Diversion, Dismiss the DUI Charge and Issue a New Charge for Reckless Driving

Amending a DUI charge to reckless driving for diversion program purposes causes official records to reflect that the presiding judge withheld adjudication of the DUI charge in violation of Florida Law. Section 316.656(1), Florida Statutes, prohibits judges from suspending, withholding, or deferring adjudication or the imposition of sentence for any violation of Section 316.193 (Florida's Driving Under the Influence DUI

| Year | Refusal Rate |
|------|-------------------|
| 2012 | 34.24 |
| 2013 | 34.27 |
| 2014 | 35.63 |
| 2015 | 34.95 |
| 2016 | 35.17 |
| 2017 | 35.20 (projected) |
| 2018 | 35.20 (estimated) |

Id.

159. See *Monroe County Aug. 2014 Meeting Minutes*, *supra* note 51 (incorporating "Exhibit A" containing provisions of the "Back on Track DUI Diversion Program: A Safe Driving Initiative of the Monroe County Office of the State Attorney").

160. *Reduce Impaired Driving Recidivism*, *supra* note 72.

161. Sammis, *supra* note 89.

Law).¹⁶² Judges should not be placed in the position of having a record erroneously disclose that, as judges, they violated Florida law because, at the request of the prosecution, the defendant accepted a plea to reckless driving in a DUI diversion program case. Issuing a new reckless driving citation upon dismissal of the underlying DUI would ensure that the FDHSMV's official records would accurately reflect that a judge did not violate Florida Statute § 316.656(1) by withholding or deferring adjudication on a DUI charge.

D. Fully Disclose Terms and Conditions of Any Formal or Informal DUI Diversion Program¹⁶³

In several jurisdictions, state attorneys operate DUI diversion programs that are not openly disclosed to the public. These diversion programs, which are referred to as “unpublished” programs, generally involve defense attorneys corresponding with assistant state attorneys and setting forth reasons why their clients should be permitted to enter a plea to a lesser charge, such as reckless driving, and receive probation.¹⁶⁴ Probation conditions may include completion of a Level I alcohol education program, driving for essential purposes only, community service, payment of a fine, and ignition interlock device use.¹⁶⁵

162. FLA. STAT. § 316.193 (2016).

- (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
- (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

Id.

163. This is one of the seven suggested “Best Practices” for state attorneys who operate de facto DUI diversion programs in Florida, that were developed by the Author and other members of the Florida Impaired Driving Coalition. This best practice was suggested based on the Author's familiarity with unpublished DUI diversion programs that do not have enumerated admission criteria and published requirements for successful completion. In some counties, such diversion programs are not advertised to the public and are almost exclusively available only to defendants who are represented by attorneys, in particular those attorneys who specialize in DUI defense.

164. *See supra* note 16.

165. Unpublished DUI diversion programs that divert DUI charges generally function similar to published programs, both of which reduce DUI charges to reckless driving offenses and then either place the defendant on probation or employ some other method of

Unpublished DUI diversion programs permit unequal treatment of DUI defendants, in particular those who do not have an attorney and are therefore unaware of the unpublished program. Unpublished DUI diversion programs may also discriminate against the unrepresented who are unable to afford an attorney with the connection and expertise to plead the client's suitability for diversion.¹⁶⁶ Published DUI diversion programs open up opportunities for a broader range of DUI defendants including those who cannot afford well-connected, private counsel who specialize in representing DUI offenders.

E. Inform Law Enforcement of Diversion Program Applications

State attorneys considering granting diversions should initially consult with and advise all case-connected law enforcement of the reasons why diversion is being considered and what the diversion program will entail. Law enforcement should be invited to offer their opinions, including whether the proposed diversion would be in the public's best interest.

In 2012, 53,664 DUI cases were brought by law enforcement. Prosecution of these cases resulted in 37,004 adjudications of guilt.¹⁶⁷ In 2017, the number of DUI defendants who were charged dwindled to 43,899, with only 27,865 resulting in an adjudication of guilt.¹⁶⁸ While DUI prosecutions have decreased, the number of fatalities attributable to impaired drivers in Florida has risen from 697 in 2012¹⁶⁹ to 839 in 2017.¹⁷⁰

There is evidence that the decline in the enforcement and prosecution of DUI crimes may be connected with the operation of diversion programs.¹⁷¹ Law enforcement may perceive diversion

supervision to ensure that the defendant completes required conditions of diversion. Such conditions generally include attendance at substance abuse education courses, evaluation to determine if treatment is required, payment of a reckless driving fine, community service, as well as other requirements that are generally required by published diversion programs.

166. If a DUI diversion program is unpublished, and eligible candidates are routinely referred only through DUI defense attorneys; unrepresented defendants may be unaware or unable to participate in such programs.

167. *Annual Uniform Traffic Citation Report*, *supra* note 57.

168. *Id.*

169. *Traffic Safety Facts—2012 Data*, *supra* note 58.

170. *Id.*

171. *Fell*, *supra* note 117, at 25.

programs that dismiss DUI charges or reduce them to reckless driving as an unwillingness of prosecutors to hold DUI defendants responsible for their actions.¹⁷² In every case in which a DUI charge is to be dismissed or reduced to reckless driving, the reasons for such action should be discussed with all case-connected law enforcement, and their opinions should be given strong consideration.

F. Screen All Diversion Program Applicants

Screening helps to determine if applicants previously were required to complete a “substance abuse education course” conducted by a DUI program or other entity in any state. Such previous attendance may be evidence that the applicant has previously been charged with DUI or participated in a diversion program, and therefore not appropriate for repeated diversion.

Evidence of previous attendance at a substance abuse or alcohol education course may disclose that an applicant for diversion has previously been convicted of DUI or had the benefit of a prior diversion.¹⁷³ Records of previous attendance at an alcohol or substance abuse education course are available through the

The police officers expressed more frustration with the issue of declining DUI arrests than the prosecutors. The police officers felt that lack of leadership from the agency chiefs, new priorities and officer reluctance to arrest DUIs and the “Back on Track” diversion program were the leading reasons for the decline in DUI arrests. The prosecutors felt more like lack of police training, officer apathy, the dislike of the “Back on Track” program, and the attitudes of jurors played a key role.

Id.

172. *Id.*

173. Persons who have previously been convicted of DUI and those who have previously participated in any of Florida’s DUI diversion programs would have been required to complete a substance abuse course and a psychosocial evaluation pursuant to Florida Statute 316.193(5). Evidence of such completion would indicate that an applicant for DUI diversion has either previously been convicted of DUI or has completed a DUI diversion program. *See* FLA. STAT. § 316.193(5) (2018).

The court shall place all offenders convicted of violating this section on monthly reporting probation and shall require completion of a substance abuse course conducted by a DUI program licensed by the department under s. 322.292, which must include a psychosocial evaluation of the offender. If the DUI program refers the offender to an authorized substance abuse treatment provider for substance abuse treatment, in addition to any sentence or fine imposed under this section, completion of all such education, evaluation, and treatment is a condition of reporting probation.

Id.

FDHSMV.¹⁷⁴ They can be obtained through the Bureau of Records or Bureau of Driver Improvement in the FDHSMV's Department of Motorist Compliance.¹⁷⁵

Diversion applicants who have previously completed a DUI or similar impaired driving diversion program or who have previously been convicted of DUI should not be accepted for diversion. Care must be taken in investigating records of previous driving offenses. Prior records for reckless and careless driving, as well as leaving the scene, should be investigated to determine if they involved alcohol or drugs. Offenses, such as reckless driving, that have been "sealed"¹⁷⁶ should be investigated to determine if they reflect that an applicant was previously charged with an alcohol-related driving offense in Florida or elsewhere.

G. Do Not Permit Any Commercial Driver License ("CDL") Holder to Participate in Any DUI Diversion Program

Title 49, Section 384.226 of the Code of Federal Regulations¹⁷⁷ is a federal regulation that has been adopted by every state. This

174. *Record Providers – Driving Record History (Abstract) and Motor Vehicle Records*, FLA. HIGHWAY SAFETY AND MOTOR VEHICLES, <https://www.flhsmv.gov/driver-licenses-id-cards/driving-record-history/> (last visited Mar. 31, 2019).

175. *Vehicle Insurance Questions and Answers—Involved in a Crash*, FLA. HIGHWAY SAFETY AND MOTOR VEHICLES, <https://www.flhsmv.gov/ddl/frfaqcrash.html> (last visited Mar. 31, 2019).

176. FLA. STAT. § 943.059 (2018).

Court-ordered sealing of criminal history records— The courts of this state shall continue to have jurisdiction over their own procedures, including the maintenance, sealing, and correction of judicial records containing criminal history information to the extent such procedures are not inconsistent with the conditions, responsibilities, and duties established by this section. Any court of competent jurisdiction may order a criminal justice agency to seal the criminal history record of a minor or an adult who complies with the requirements of this section

Id.

177. 49 C.F.R. § 384.226 (2018).

Prohibition on masking convictions— The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

Id.

regulation prevents states from deferring imposition of judgment, allowing diversion programs, or otherwise acting to prevent a conviction for violating a traffic control law from appearing on a CDL holder's driving record.¹⁷⁸ This "anti-masking" provision applies regardless of whether the CDL holder was operating a Commercial Motor Vehicle ("CMV") or a non-CMV at the time of the offense.¹⁷⁹ Accordingly, it would be a violation of both federal and Florida law to allow a CDL holder to participate in a DUI diversion program, whether that offense occurred in a personal vehicle or a commercial motor vehicle.¹⁸⁰

H. Requiring Probation and Other Conditions for Diversion Program Participants

Diversion program participants whose DUI charges have been reduced to reckless driving, with or without a withhold of adjudication, should be placed on probation for not less than six months but no more than one year with conditions tailored to protecting the public and preventing recidivism. Florida Statute § 948.15 governs misdemeanor probation services.¹⁸¹ It provides that defendants found guilty of misdemeanors shall be placed on probation "not to exceed [six] months," except that if "alcohol is a significant factor," the period of probation may be up to one year.¹⁸² By utilizing probation, diverted defendants can be monitored to ensure that, during the period of supervision, they are complying

178. See *Updated Policies and Priorities*, *supra* note 48, at 31.

179. *Id.*

180. *Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations (Second Edition)*, NAT'L DISTRICT ATTORNEY ASS'N (2017), at 30–33, https://ndaa.org/wp-content/uploads/CDLMono_REV2017_FinalWeb.pdf (last visited Mar. 31, 2019).

181. FLA. STAT. § 948.15 (2017).

Misdemeanor probation services—

(1) A defendant found guilty of a misdemeanor who is placed on probation shall be under supervision not to exceed 6 months unless otherwise specified by the court. Probation supervision services for a defendant found guilty of a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893 may be provided by a licensed substance abuse education and intervention program, which may provide substance abuse education and intervention as well as any other terms and conditions of probation. In relation to any offense other than a felony in which the use of alcohol is a significant factor, the period of probation may be up to 1 year.

Id.

182. *Id.*

with conditions related to protecting the public and discouraging recidivism.¹⁸³ Such conditions should include the following:

1. Abstinence from the consumption of alcohol and from the consumption of cannabis, unless, for medical purposes, pursuant to a referral from a qualified physician;

2. Do not enter, remain, or be present on premises where the primary business is the sale or service of alcoholic beverages except for the purposes of employment or with the permission of the probation officer;

3. Drive only for “business purposes” as defined in Florida Statute § 322.271(c)(1),¹⁸⁴ which means driving that is limited to any driving necessary to maintain livelihood, including driving to and from work, necessary on-the-job driving, driving for educational purposes, and driving for church and for medical purposes;

4. Completion of a Level I substance abuse course and the accompanying psychosocial evaluation to determine if treatment should be recommended or required;

5. Completion of treatment by an approved licensed treatment provider where treatment has been determined to be “required” as a result of a psychosocial evaluation;

6. Provide proof of enhanced Financial Responsibility for liability and property damage arising out of the use of a motor vehicle as described in Florida Statute § 324.023 for the duration of the probationary period;

7. Payment of all fines, court costs, and the reasonable costs as determined by the court to reimburse law enforcement for the

183. All DUI defendants who are convicted of DUI are required to be placed and monitored on probation pursuant to Section 316.193(5), Florida Statutes. FLA. STAT. § 316.193(5) (2016), 167.

184. FLA. STAT. § 322.271(c) (2013).

For the purposes of this section, the term:

1. “A driving privilege restricted to business purposes only” means a driving privilege that is limited to any driving necessary to maintain livelihood, including driving to and from work, necessary on-the-job driving, driving for educational purposes, and driving for church and for medical purposes.

2. “A driving privilege restricted to employment purposes only” means a driving privilege that is limited to driving to and from work and any necessary on-the-job driving required by an employer or occupation.

Id.

time and effort expended in the arrest and investigation of the original DUI offense;

8. Installation and use of an Alcohol Ignition Interlock Device, if ordered by the court; and

9. Compliance with other conditions ordered by the court.

VII. CONCLUSION

There are many advantages in utilizing the de facto DUI diversion programs that operate in Florida counties. These advantages inure not only to those who are accused, but to the many others who comprise Florida's criminal justice system. Criminal defense lawyers, assistant prosecutors, judges, court clerks, probation officers, law enforcement, and even charities all benefit by DUI prosecutions being diverted from a longer, costlier, and more complicated journey through the criminal justice system. Notwithstanding these advantages, Florida's de facto DUI diversion programs all contain a serious shortcoming in which successfully diverted first-time DUI offenders are able to commit a second DUI and again be entitled to be treated as first-time offenders. Repeat offenders can thereby escape the enhanced penalties that would attach to their second offense. This alone may account for increasing apathy on the part of law enforcement, which has resulted in officers believing that diversion programs amount to nothing more than a "slap on the wrist" of the diverted DUI offender. DUI enforcement continues to decline in terms of the number of DUI arrests and the number of citations issued; yet fatalities attributable to legally impaired drivers continue to rise. Diversion program DUI offenders are permitted to escape Florida's financial responsibility law, and those who are severely impaired with blood alcohol levels double or even higher than the presumptive level of impairment, are permitted to enter pleas to lesser charges in violation of Florida law.

Unquestionably, Florida would benefit from a single statutory DUI diversion program that would provide uniform statewide standards and controls to address the shortcomings and serious concerns brought to light in this Article. The prospects for such enactment, however, are negligible. It can only be hoped that those state attorneys who operate their counties' in-house DUI diversion programs will heed the serious concerns voiced herein, and that they will respond to the recommendations and adopt the best

practices offered by the FIDC. With that approach, state attorneys would better serve the interest of justice and the motoring public would be better protected.