

# DOES FLORIDA NEED A STATUTORY DRIVING UNDER THE INFLUENCE (DUI/DWI) PRETRIAL INTERVENTION DIVERSION PROGRAM?

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## I. INTRODUCTION

Imagine a state in which a driver can repeatedly be arrested for impaired driving (DUI/DWI), and each time his or her case comes before the Court, the driver is legally considered to be a first-time offender for penalty purposes.<sup>1</sup> Imagine a state in which

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\* © 2015, Karl B. Grube. All rights reserved. Senior Judge, State of Florida. M.J.S., University of Nevada, 1992; J.D., Stetson University College of Law, 1970; B.S., Elmhurst College, 1967. Judge Grube served as a County Court Judge in St. Petersburg, Florida, since his election to that office in 1976. In 2006, he took senior status and continues to preside throughout the State of Florida in criminal and civil divisions. Judge Grube has served as Assistant Dean of the Florida College of Advanced Judicial Studies; the Regional Judicial Outreach Liaison for the National Highway Traffic Safety Administration; the Florida Judicial Outreach Liaison; and most recently, a member of the Florida Impaired Driving Coalition and the “DUI Programs Review Board” which monitors and conducts annual site inspection visits for all facilities that administer DUI programs in the State of Florida. In 2015, Judge Grube will celebrate his thirty-first anniversary as a member of the faculty of the National Judicial College.

1. See *Pretrial Diversion: Frequently Asked Questions*, ORANGE COUNTY GOV'T FLA., <http://www.orangecountyfl.net/Portals/0/Library/Jail-Judicial/docs/PreTrial%20Diversi%20FAQ.pdf> (last visited May 1, 2015) [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), <http://miami.cbslocal.com/2011/05/17/dui-diversion-program-unveiled-for-first-time-offenders/> [hereinafter *DUI Diversion*] (reporting on Miami's “Back on Track” pretrial diversion). The term “penalty” as used herein refers to those sanctions commonly associated with a sentence in the context of a criminal proceeding. The term “penalty” is not intended to include the administrative loss of driving privileges by revocation or suspension, which is an “administrative detail” not considered part of a criminal sentence or punishment. See *McDaniel v. State*, 683 So. 2d 597, 598 (Fla. 2d Dist. Ct. App. 1996) (citing *Smith v. City of Gainesville*, 93 So. 2d 105, 107 (Fla. 1957) (en banc)) (“It is well established that the revocation of a driver's license is not the imposition of criminal punishment, but rather ‘an administrative detail supplementary to’ the judicial function.”). See also *State v. Walters*, 567 So. 2d 49, 49 (Fla. 2d Dist. Ct. App. 1990) (stating that “revocation of a driver's license is not a criminal punishment”); *Dep't of Highway Safety & Motor Vehicles v. Vogt*, 489 So. 2d 1168, 1170 (Fla. 2d Dist. Ct. App. 1986) (holding that revocation of a driver's license is not part of the sentence in DUI cases; rather, it strives to protect the public). Because it is not a “sentence,” it cannot be an illegal sentence subject to correction through a 3.800 motion.

impaired drivers' first-time offenses are diverted from judges and dismissed, so that when they offend a second time, they are once again only a first-time offender.<sup>2</sup> Imagine a state in which judges are prohibited by statute from withholding, deferring, or suspending adjudication of guilt in DUI/DWI cases, but it is routinely done without the judge being made aware or being able to do anything about it.<sup>3</sup> A response may be that there ought to be a law against that, but there is not. Under present Florida law, the diversion of first-time DUI/DWI offenders requires judges to treat second-time DUI/DWI offenders as first-time offenders because their previous diversion does not count as a prior offense.<sup>4</sup> These diversion practices in DUI/DWI cases are the subject of this Article and the basis for the argument that Florida law needs to be changed.

The initial purpose of this Article is to acquaint the reader with several different types of first-offense DUI/DWI diversion programs that are currently utilized in our Nation's state and municipal courts. With this approach it will be possible to categorize the various programs in terms of their function and their effect on the prosecution of first-time impaired drivers. It will further provide the opportunity to identify Florida's four most prominent diversion programs and determine into which category they belong. Lastly, this Article will examine whether changes in the way DUI/DWI cases are presently being diverted in Florida could improve delivery of justice and improve the safety and welfare of Floridians.

## II. DIVERSION BY STATUTE OR BY EXECUTIVE AUTHORITY

The DUI/DWI diversion programs that are commonly found in state and municipal courts conveniently fall into one of two categories. The programs are either "statutory" or "de facto" programs.<sup>5</sup> Statutory programs are the creation of a legislative body

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2. See *DUI Diversion*, *supra* note 1; *Orange County FAQs*, *supra* note 1, at 2–3.

3. FLA. STAT. § 316.656(1) (2014).

4. *DUI Diversion*, *supra* note 1; *Orange County FAQs*, *supra* note 1, at 2–3.

5. Diversion programs, in general, can be a creation of statute or by more local government in a de facto manner. Black's Law Dictionary defines "de facto" as "[a]ctual; existing in fact; having effect even though not formally or legally recognized." BLACK'S LAW DICTIONARY 479 (Bryan A. Garner ed., 9th ed. 2009). For another example of a statu-

that has statutorily codified uniform statewide provisions.<sup>6</sup> Those provisions include specification of those who may qualify for diversion,<sup>7</sup> the requirements for and legal effect of successful program completion,<sup>8</sup> and provisions prohibiting repetitious use of diversion by repeat DUI/DWI offenders.<sup>9</sup>

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torily created program, there is a general “[p]retrial intervention program” and a “[m]isdemeanor pretrial substance abuse education and treatment intervention” program. FLA. STAT. §§ 948.08, 948.16. Section 948.08(1) explains that the pretrial intervention programs shall provide for “appropriate counseling, education, supervision, and medical and psychological treatment as available and when appropriate for the persons released to such programs.” FLA. STAT. § 948.08(1). The next subsection of the Statute details that the program is for first-time offenders, “or any person previously convicted of not more than one nonviolent misdemeanor,” and the person must be charged with a misdemeanor or a third degree felony to be eligible for the program. *Id.* § 948.08(2). Section 948.16, Florida Statutes, provides for a substance abuse and treatment education program. To be eligible for this section of the Statute, the person must be charged with a “nonviolent, nontraffic-related misdemeanor and identified as having a substance abuse problem or who is charged with a misdemeanor” for certain crimes, like prostitution or possession of a controlled substance. *Id.* § 948.16(1)(a). Some of the terms listed in these statutory pretrial intervention programs are not defined by the legislature and are left to “the prerogative of the state attorney for the circuit.” George E. Tragos & Peter A. Sartes, *Diversion Programs: PTI . . . Dismissal . . . Problem Solved . . . or Is It?*, 82 FLA. B.J., Oct. 2008, at 73.

6. The pretrial intervention program explained in note 5 is an example of a statutorily created program. A statutorily created program has the benefit of being uniform across a state. Florida Governor Rick Scott issued a governor’s message on a portion of the most recent bill that would affect the pretrial intervention program statute in 2012. *Governor Scott Urges Employers to Make Hiring Florida’s Heroes Their Business*, FL.GOV (Jan. 24, 2012), <http://www.flgov.com/2012/01/24/governor-scott-urges-employers-to-make-hiring-florida-s-heroes-their-business/>. Governor Scott outlined the provisions of the omnibus military affairs bill, part of which was targeted at pretrial intervention and special courts for veterans living in Florida. *Id.*

7. Washington’s code provides that “[a] person charged with a traffic infraction, misdemeanor, or gross misdemeanor under Title 46 RCW shall not be eligible for a deferred prosecution program unless the court makes specific findings pursuant to RCW 10.05.020 or [Section] 18 of this act. Such person shall not be eligible for a deferred prosecution program more than once.” WASH. REV. CODE § 10.05.010(2) (2014). The person wishing to benefit from the program must petition the court for application and provide specific facts under oath including that the wrongful conduct was caused by drug addiction, alcohol addiction, or mental health problems. *Id.* § 10.05.020(1). The person must also be willing to seek treatment. *Id.*

8. Upon successful completion of Delaware’s diversion program, the Delaware code provides that “the court shall discharge the person and the proceedings against the person and shall simultaneously with said discharge and dismissal submit to the Division of Motor Vehicles a written report specifying the name of the person and the nature of the proceedings against the person which report shall be retained by the Division of Motor Vehicles for further proceedings, if required.” DEL. CODE ANN. TIT. 21, § 4177B(c) (2014).

9. Delaware’s diversion program begins by making it clear that the program applies to a specific kind of offender. *Id.* § 4177B(a). The person must not have a previous offense; the person must not have “accumulated [three] or more moving violations within [two] years of the date of the offense”; the person did not injure any other person beside him or herself; the person did not have “an alleged alcohol concentration of .15 or more” either

De facto programs are most commonly the creation of authority acting in an executive capacity such as a prosecutor, court administrator, or one or more judges.<sup>10</sup> De facto programs are generally governed by local guidelines as opposed to uniform statewide statutory requirements.<sup>11</sup> De facto diversion guidelines are applied, at the discretion of the executive authority, on a case-by-case basis. De facto diversion programs lack statewide uniformity and vary intrastate from jurisdiction to jurisdiction.<sup>12</sup> Most notably, de facto programs differ from their statutory counterparts in that they lack statewide statutory controls to prohibit repetitious use by repeat DUI/DWI offenders.<sup>13</sup>

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while driving or within four hours of driving; the person was driving with a valid license; and the person did not have a child in the car while driving under the influence. *Id.*

10. Orange County, Florida's pretrial diversion program for DUI/DWI offenders is an example of a de facto program. On the Orange County government website, it is explained that only the State Attorney may approve an offender's case for pretrial diversion. *Orange County FAQs*, *supra* note 1, at 1.

11. Orange County's de facto diversion program guidelines can be accessed on the county government website. Orange Cnty. Corr. Dep't, *Community Corrections Division\*\*\*Pretrial Diversion Program, Misdemeanor/DUI Pretrial Diversion Information*, ORANGE COUNTY GOV'T FLA. (Mar. 2013), <http://www.orangecountyfl.net/Portals/0/resource%20library/jail/Pretrial%20Diversion%20Information.pdf> [hereinafter *Orange County Guidelines*]. These guidelines include eligibility, program length and cost, special conditions, and instructions on how courts may refer persons to the diversion program. *Id.*

12. Palm Beach County, Florida's diversion program is not statutorily created, much like Orange County's program. Although these two programs provide similar time frames for completion (twelve months), there are different monetary contribution requirements (in Orange County, offenders must donate to Mothers Against Drunk Driving, whereas, in Palm Beach County, offenders pay a "regular" fine), and different requirements for an ignition interlock system being placed on the offender's car (in Orange County, if the offender's blood alcohol level was above .15, the ignition interlock must be on the car for six months, whereas, in Palm Beach County, the requirement is three months). See *Orange County Guidelines*, *supra* note 11 (providing an outline of the requirements for the program); *Palm Beach County Strikes Right Balance in DUI Prosecutions*, SUN SENTINEL (Sep. 3, 2013), [http://articles.sun-sentinel.com/2013-09-03/news/fl-editorial-dui-dl-20130903\\_1\\_motor-vehicle-dui-conviction-jail-time](http://articles.sun-sentinel.com/2013-09-03/news/fl-editorial-dui-dl-20130903_1_motor-vehicle-dui-conviction-jail-time) (describing the Palm Beach County diversion program initiative).

13. Stories of repeat offenders plague the media. One such account was reported by NBC and detailed repeat drunk driving offenders committing the crime eleven, fourteen, and even eighteen times. Hoda Kotb, *The Worst Kind of Drunk Drivers: Arrests, Fines, Convictions—Nothing Seems to Stop Some Repeat Offenders*, DATELINE NBC (July 9, 2013), [http://www.nbcnews.com/id/13320570/ns/dateline\\_nbc/t/worst-kind-drunk-drivers/#.U\\_JRWfIdX-s](http://www.nbcnews.com/id/13320570/ns/dateline_nbc/t/worst-kind-drunk-drivers/#.U_JRWfIdX-s).

### III. FLORIDA'S DE FACTO DUI/DWI DIVERSION PROGRAMS

As this Article is being written, Florida has four separate DUI/DWI diversion programs operating in major court jurisdictions. All four are de facto diversion programs created by state attorneys.<sup>14</sup> They are operated at the discretion of the state attorneys of the Eighth Circuit (Alachua, Baker, Bradford, Gilchrist, Levy, and Union Counties);<sup>15</sup> the Ninth Circuit (Orange and Osceola Counties);<sup>16</sup> the Eleventh Circuit (Miami-Dade County);<sup>17</sup> and the Fifteenth Circuit (Palm Beach County).<sup>18</sup> Other de facto programs are to be found in Florida, but they do not involve the scale of the four chosen to be the studied in this Article. Each of the four Florida programs is the creation of a separate elected state attorney who has exercised prosecutorial discretion and utilized executive authority to implement. The implementation of these diversion programs is defended by the state attorneys on the basis of having the legal authority and the inherent discretion to decide who should or should not be prosecuted.<sup>19</sup> Utilizing this authority, the state attorneys have the legal ability to decline to

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14. For example, Orange County's program provides that the State Attorney is the *only* individual who can approve a person's participation in the program. *Orange County Guidelines*, *supra* note 11. In Miami Dade, the "Back on Track" program was created by the State Attorney to allow first-time offenders the chance for a reduced charge if they complete the program. *DUI Diversion*, *supra* note 1.

15. The Eighth Circuit of Florida's state attorney is William P. Cervone. For information about what counties are serviced by the Eighth Circuit and deferred prosecution programs, see *William P. Cervone, State Attorney*, ST. ATT'Y OFF. EIGHTH JUD. CIRCUIT, <http://www.sao8.org/Default.htm> (last visited May 1, 2015).

16. The state attorney of the Ninth Circuit is Jeffrey L. Ashton. See *Welcome*, ST. ATT'Y OFF. NINTH JUD. CIRCUIT, <http://sao9.net/> (last visited May 1, 2015) (providing a background on the State Attorney and areas of Florida that the circuit serves).

17. Katherine Fernandez Rundle is Miami Dade's state attorney for the Eleventh Circuit of Florida. See *Justice Starts Here*, ST. ATT'Y OFF. ELEVENTH JUD. CIRCUIT, <http://www.miamisao.com/index.htm> (last visited May 1, 2015) (detailing the services that the State Attorney's Office provides and giving the public access to legal information).

18. Dave Aronberg is Palm Beach County's State Attorney for the Fifteenth Circuit of Florida. *Office of the State Attorney*, ST. ATT'Y OFF. FIFTEENTH JUD. CIRCUIT, <http://www.sa15.state.fl.us/stateattorney/> (last visited May 1, 2015).

19. For example, the meeting minutes from a Criminal Justice Commission meeting in Palm Beach County illustrate that a spokesperson from the State Attorney's Office came in to describe the desired goals of the program, how the State Attorney would implement the program, the proposed tiers of the program for offenders, and that the program would be for first-time offenders only. This was not at a legislative session for debate but rather just an associational meeting. Palm Beach County Criminal Justice Commission, *Law Enforcement Planning Council Final Summary Minutes*, at 4 (Apr. 25, 2013, 9:30 AM).

prosecute, dismiss, or reduce the charges of first-time DUI/DWI offenders who complete their diversion programs.<sup>20</sup>

How can Florida state attorneys undertake to implement their own DUI diversion programs without legislative authority? In implementing their in-house programs, all four Florida prosecutors have relied on their inherent powers, as well as the absence of statutory authority prohibiting them from implementing such programs.<sup>21</sup> State attorneys have executive-branch discretion to decide if and when to prosecute an individual.<sup>22</sup> While Florida prohibits its judges, pursuant to Section 316.656 of the Florida Statutes, from suspending, deferring, or withholding the adjudication of guilt or the imposition of sentence in impaired driving cases,<sup>23</sup> this does not prohibit state attorneys from doing so through a diversion program. Similarly, while Section 316.656 prohibits judges from accepting a plea to a lesser offense in cases where the person was charged with impaired driving with a

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20. See, e.g., *Orange County FAQs*, *supra* note 1, at 1 (providing information on how the pretrial diversion program works and the State Attorney Office's authority).

21. *State v. Covington*, 131 So. 3d 10, 13 (Fla. 1st Dist. Ct. App. 2012) (Makar, J., concurring) ("But state attorneys are also officers of the court who, under the inherent powers of the judicial branch, can be called upon 'to prepare a document for the court's use in connection with a specific case in which the lawyer represents one of the litigating parties.'") (citing *United States v. Ray*, 375 F.3d 980, 988 (9th Cir. 2004)); see *Office of the State Attorney v. Polites*, 904 So. 2d 527, 532 (Fla. 3d Dist. Ct. App. 2005) ("Although the Office of the State Attorney is found in article V of the Florida Constitution, the judicial branch of the State, 'the decision to prosecute is an "executive" function. A state attorney, while being a quasi-judicial officer, also shares some attributes of the executive.'") (quoting *Office of the State Attorney, Fourth Judicial Circuit v. Parrotino*, 628 So. 2d 1097, 1099 n.2 (Fla. 1993)).

22. A general example of where state attorneys receive their power is the American Bar Association's Criminal Justice Standards. Standard 3-1.2(a) provides that "[t]he office of prosecutor is charged with responsibility for prosecutions in its jurisdiction." American Bar Ass'n, *Criminal Justice Section Standards*, AMERICANBAR.ORG [http://www.americanbar.org/groups/criminal\\_justice/standards/prosecution\\_function\\_standards.html](http://www.americanbar.org/groups/criminal_justice/standards/prosecution_function_standards.html) (last visited May 1, 2015). In Florida, the Attorney General oversees the state attorneys of the several circuits but the statute only provides that he or she "shall exercise a general superintendence and direction over the several state attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the state attorneys, shall give them her or his opinion upon any question of law." FLA. STAT. § 16.08 (2014).

23. FLA. STAT. § 316.656 (2014). "Notwithstanding 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." *Id.* § 316.656(1).

breath or blood alcohol level of .15% or more,<sup>24</sup> this prohibition does not apply to prosecutors.

**TABLE: COMPARING FLORIDA'S FOUR MAJOR DE FACTO  
DIVERSION PROGRAMS<sup>25</sup>**

Court of General Jurisdiction	Admission Qualifiers	Conditions	
<b><u>8th Circuit</u></b> <ul style="list-style-type: none"> <li>• Alachua</li> <li>• Baker</li> <li>• Bradford</li> <li>• Gilchrist</li> <li>• Levy</li> <li>• Union</li> </ul>	<ul style="list-style-type: none"> <li>• No multi-vehicle accident or damage to property of others</li> <li>• No prior criminal history of conviction or deferral; a prior dismissal of a charge will be evaluated on a case-by-case basis</li> <li>• No more than 5 prior moving traffic citations within prior 10 years, and no more than 1 within prior 1 year</li> <li>• No Blood Alcohol Level of .20 or over</li> <li>• No inappropriate behavior such as belligerence to law enforcement</li> <li>• No child in vehicle</li> <li>• Request for entry into program must be within 30 days of arrest absent extenuating circumstances and must be without any substantive motion practice or discovery proceedings having taken place</li> <li>• No controlled substances in the vehicle or on the defendant regardless of evidence that it was being used at the time</li> </ul>	<ul style="list-style-type: none"> <li>• \$500 charitable contribution in lieu of fine</li> <li>• 50 hours community service, including 5 hours Victim Impact Panel</li> <li>• Surrender license to State Attorney's Office for 14 days if not suspended by DHSMV</li> <li>• Alcohol evaluation and treatment, if required</li> <li>• Complete DUI School</li> <li>• \$50 costs of prosecution</li> <li>• Resolve any related citations independent of deferral agreement</li> <li>• 18 month period of deferral; defendant is permitted to plead to Reckless Driving, if diversion was successful</li> </ul>	
<b><u>9th Circuit</u></b> <ul style="list-style-type: none"> <li>• Orange</li> <li>• Osceola</li> </ul>	<ul style="list-style-type: none"> <li>• Misdemeanor/DUI charges only. Felony cases are supervised by the Department of Corrections</li> <li>• No prior sentence, conviction or dismissal for a similar charge</li> <li>• No more than one prior misdemeanor sentence for a dissimilar offense</li> <li>• No prior deferred prosecution/diversion programs</li> <li>• No prior felony sentences</li> <li>• Legal residence in the United States</li> </ul>	<b><u>DUI 1</u></b> <ul style="list-style-type: none"> <li>• 12 month minimum</li> <li>• \$600 fine</li> <li>• 50 hours minimum Community Service</li> <li>• Phone Reporting costs \$55</li> <li>• State Attorney Office fee \$50</li> </ul>	<b><u>DUI 2</u></b> <ul style="list-style-type: none"> <li>• 15 month minimum</li> <li>• \$750 fine</li> <li>• 50 hours minimum Community Service</li> <li>• Phone Reporting Costs \$73</li> <li>• State Attorney Office fee \$50</li> </ul>

24. *Id.* § 316.656(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[%] or more." *Id.*

25. The comparison chart was prepared and published in May 2014 by Sharon Traxler, State of Florida Traffic Safety Resource Prosecutor (TSRP) and member of the Florida Impaired Driving Coalition. Ms. Traxler is one of two TSRPs who function in Florida. Her responsibilities include conducting training and providing guidance for Florida prosecutors and law enforcement officers in matters related to DUI investigation and prosecution. She has coordinated DUI training seminars for the Florida Department of Transportation (FDOT) with funding from the National Highway Traffic Safety Administration (NHTSA).

	<ul style="list-style-type: none"> <li>• Approval by the Office of the State Attorney</li> <li>• No prior alcohol related driving offenses, regardless of disposition</li> </ul>	<ul style="list-style-type: none"> <li>• DUI Level I School, and Victim Impact Class</li> <li>• 10 day Vehicle Impoundment/Immobilization</li> <li>• \$500 monetary contribution</li> <li>• Law Enforcement Investigative Costs (includes drug/alcohol testing at time of arrest)</li> <li>• Random observed urine screens (no additional cost for on-site testing)</li> <li>• Obtain a substance abuse evaluation and complete any recommended treatment</li> <li>• Victim Impact Class through MADD</li> </ul>	<ul style="list-style-type: none"> <li>• DUI Level I School, and Victim Impact Class</li> <li>• 6-month MANDATORY Ignition Interlock</li> <li>• \$1,000 monetary contribution</li> <li>• Law Enforcement Investigative Costs (includes drug/alcohol testing at time of arrest)</li> <li>• Random observed urine screens (no additional cost for on-site testing)</li> <li>• Obtain a substance abuse evaluation and complete any recommended treatment</li> <li>• Victim Impact Class through MADD</li> </ul>
<p><u>11th Circuit</u></p> <ul style="list-style-type: none"> <li>• Miami-Dade</li> </ul>	<ul style="list-style-type: none"> <li>• No prior alcohol related driving history</li> <li>• No minor children in the defendant's vehicle at the time of his/her DUI arrest</li> <li>• No DWLSR at the time of his/her DUI arrest (unless the suspension had expired)</li> <li>• No at fault accident where he/she was at fault</li> <li>• The Advocacy "Back on Track Program" has no effect on the defendant's administrative DMV</li> <li>• Suspension</li> <li>• Sign an admission of guilt prior to acceptance</li> <li>• Plea to a reckless driving (traffic criminal charge) upon the completion of the diversionary program</li> <li>• May have their arrest and record sealed with a withhold of adjudication</li> </ul>	<p><u>Tier I</u></p> <ul style="list-style-type: none"> <li>• 6 month probation period</li> <li>• Complete DUI School within the first 3 months of the program</li> <li>• Complete a substance abuse evaluation &amp; treatment if mandated with the term of the program</li> <li>• 50 hours community service</li> <li>• Complete a 2-hour victim services/enforcement fund donation</li> <li>• \$500 cost of supervision</li> <li>• \$300 to victim services/enforcement fund donation</li> <li>• \$50 cost of prosecution</li> <li>• DUI School, drug testing fees, and treatment fees (if necessary) as required by the provider</li> </ul>	<p><u>Tier II</u></p> <ul style="list-style-type: none"> <li>• (Blood Alcohol Level above .15 or Refusal Case)</li> <li>• 9 month probation period</li> <li>• Complete DUI School within the first 3 months of the program</li> <li>• Complete a substance abuse evaluation &amp; treatment if mandated within the term of the program.</li> <li>• 100 hours community service</li> <li>• Complete a 2-hour victim services/enforcement fund donation.</li> <li>• \$650 cost of supervision</li> <li>• \$500 to a victim services/enforcement fund donation</li> <li>• \$50 cost of prosecution</li> <li>• DUI School, drug testing fees, and treatment fees (if necessary) as required by the provider</li> </ul>



		<ul style="list-style-type: none"> <li>• Cost recovery to law enforcement as determined in the defendant's case; and</li> <li>• Court Costs</li> </ul>	<ul style="list-style-type: none"> <li>• Cost recovery to law enforcement as determined in the defendant's case; and</li> <li>• Court Costs</li> </ul>
<p><u>16th Circuit</u></p> <ul style="list-style-type: none"> <li>• Palm Beach</li> </ul>	<ul style="list-style-type: none"> <li>• No Crash</li> <li>• No minors or animals in the vehicle</li> <li>• No Prior commission of similar offenses</li> <li>• No Prior Diversion Programs (excluding Juvenile Diversion Programs)</li> <li>• Must have a Valid Driver's License at the time of arrest. No prior prison sentence</li> <li>• No accompanying felony charges or possession of paraphernalia/controlled substances charges with DUI arrest</li> <li>• Plea must be entered at arraignment at Gun Club, North County Courthouse, South County Courthouse or Belle Glade</li> <li>• Plea must be entered prior to filing motions, demanding discovery or demanding a jury trial</li> <li>• <i>Notwithstanding these guidelines, each case will be evaluated on a case-by-case basis.</i></li> </ul>	<p><u>Tier I</u> (Blood Alcohol Level below .15)</p> <ul style="list-style-type: none"> <li>• DUI Nolle Prosequi entered upon entry into Diversion Program</li> <li>• Plea to Reckless Driving</li> <li>• Adjudication Withheld</li> <li>• 12 month probation period</li> <li>• Complete DUI School (Level I) within the first 4 months of the program</li> <li>• Complete a substance abuse evaluation conducted by the DUI School within 2 months of enrollment</li> <li>• Successfully complete any/all recommended treatment within the term of the program</li> <li>• No alcohol, illegal drugs, or prescription drugs without a valid prescription</li> <li>• Random urinalysis testing at own expense</li> <li>• 50 hours Community Service</li> <li>• Victim Impact Panel class</li> <li>• Vehicle immobilization for 10 consecutive days</li> <li>• 3 month alcohol monitoring device</li> <li>• \$250 fine &amp; court costs—paid within 6 months</li> </ul>	<p><u>Tier II</u> (Blood Alcohol Level between .150 &amp; .20 and/or Refusal case)</p> <ul style="list-style-type: none"> <li>• Plea of Guilty to Reckless Driving</li> <li>• Adjudication Withheld</li> <li>• 12 month probation period</li> <li>• Complete DUI School (Level I) within 4 months</li> <li>• Complete substance abuse evaluation within 2 months of enrollment</li> <li>• Successfully complete any/all recommended treatment within the term of the program</li> <li>• Not possess or consume any alcohol, illegal or prescription drugs without a valid prescription</li> <li>• Random urinalysis testing at own expense</li> <li>• 75 hours of Community Service</li> <li>• Complete a live Victim Impact Panel Class or "You Impact" (online class)</li> <li>• Vehicle immobilized for 10 consecutive days</li> <li>• MANDATORY 6 month alcohol monitoring device</li> <li>• \$250 fine and \$250 to Palm Beach County Victim Services</li> <li>• Court Costs paid within 6 months of entering program</li> </ul>

The existence of the above four de facto diversion programs in Florida has led other Florida state attorneys to consider implementation of their own in-house de facto DUI/DWI diversion programs.<sup>26</sup> At present, state attorneys who do not have a de facto diversion program generally operate on a case-by-case basis in determining whether a defendant's or defense attorney's request should be granted for reduction of a DUI/DWI charge to reckless driving or to some other offense of lesser severity.<sup>27</sup> This approach is most often facilitated by unpublished state attorney policies, known to criminal defense attorneys, which encourage counsel to correspond with a lead prosecutor to delineate the basis for requesting that a DUI/DWI charge should be reduced or dismissed. When such a request letter is sent, the defense and trial prosecutor generally request that the court continue or reset the DUI/DWI case pending the outcome of the decision by a lead or chief assistant prosecutor as to whether the request for reduction will be granted. This approach delays the disposition of the pending case, often up to thirty days or more, particularly if the review process includes review by a chain of superiors.

#### IV. WHY NOT USE EXISTING STATUTORY DIVERSION PROGRAM LAWS?

Florida has existing statutory law that provides for diversion programs. It is titled "[p]retrial intervention program," and it can be initiated by state attorneys.<sup>28</sup> Yet, none of the four DUI/DWI programs implemented by the state attorneys reference or incorporate the existing statutory provisions.<sup>29</sup> The four diversion programs discussed above are de facto diversion programs because they mimic statutory pretrial intervention programs, yet they are not ordained or governed by statute. Florida's statutory pretrial intervention diversion program is found in Section 948.08, Flori-

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26. Interviews with Assistant State Attorneys of the Sixth Judicial Circuit of Florida, in Clearwater, Fla. (April 2014).

27. *Id.*

28. FLA. STAT. § 948.08 (2014).

29. See, e.g., *Orange County Guidelines*, *supra* note 11 (providing no reference to Florida's statutory pretrial intervention programs). See also *Deferred Prosecution*, ST. ATT'Y OFF. EIGHTH JUD. CIRCUIT, <http://www.sao8.org/DeferredProsecution.htm> (last visited May 1, 2015) (defining a deferred prosecution program and requirements that a person must go through to complete the program without reference to Florida's statutory pretrial intervention programs).

da Statutes, and provides for the diversion of misdemeanors and certain types of third degree felony offenses.<sup>30</sup> This law applies to any first time offender, not convicted of “more than one nonviolent misdemeanor, who is charged with any misdemeanor or [third degree] felony.”<sup>31</sup> As with the four de facto DUI/DWI diversion programs, to enter the pretrial intervention program, the

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30. Florida Statute Section 948.08, entitled “Pretrial intervention program,” provides the following:

- (1) The department shall supervise pretrial intervention programs for persons charged with a crime, before or after any information has been filed or an indictment has been returned in the circuit court. Such programs shall provide appropriate counseling, education, supervision, and medical and psychological treatment as available and when appropriate for the persons released to such programs.
- (2) Any first offender, or any person previously convicted of not more than one nonviolent misdemeanor, who is charged with any misdemeanor or felony of the third degree is eligible for release to the pretrial intervention program on the approval of the administrator of the program and the consent of the victim, the state attorney, and the judge who presided at the initial appearance hearing of the offender. However, the defendant may not be released to the pretrial intervention program unless, after consultation with his or her attorney, he or she has voluntarily agreed to such program and has knowingly and intelligently waived his or her right to a speedy trial for the period of his or her diversion. The defendant or the defendant's immediate family may not personally contact the victim or the victim's immediate family to acquire the victim's consent under this section.
- (3) The criminal charges against an offender admitted to the program shall be continued without final disposition for a period of 90 days after the date the offender was released to the program, if the offender's participation in the program is satisfactory, and for an additional 90 days upon the request of the program administrator and consent of the state attorney, if the offender's participation in the program is satisfactory.
- (4) Resumption of pending criminal proceedings shall be undertaken at any time if the program administrator or state attorney finds that the offender is not fulfilling his or her obligations under this plan or if the public interest so requires. The court may not appoint the public defender to represent an indigent offender released to the pretrial intervention program unless the offender's release is revoked and the offender is subject to imprisonment if convicted.
- (5) At the end of the intervention period, the administrator shall recommend:
  - (a) That the case revert to normal channels for prosecution in instances in which the offender's participation in the program has been unsatisfactory;
  - (b) That the offender is in need of further supervision; or
  - (c) That dismissal of charges without prejudice shall be entered in instances in which prosecution is not deemed necessary.

The state attorney shall make the final determination as to whether the prosecution shall continue.

31. FLA. STAT. § 948.08(2).

offender must apply to the state attorney and must be accepted by the administrator of the pretrial intervention program.<sup>32</sup> The state attorney de facto programs differ in that the statutory program also requires the consent of the judge who presided at the initial appearance hearing of the offender.<sup>33</sup> Each of the four state attorney DUI/DWI diversion programs effectively by-pass the judge in the admission phase.<sup>34</sup> Perhaps the most salient reason that state attorneys have not employed the provisions of Section 948.08 is because Florida's statutory diversion program applies to misdemeanor and third degree felony cases, and a first-offense DUI is neither a misdemeanor nor a felony but rather a criminal traffic offense.<sup>35</sup>

### V. THE ISSUES

Would Florida be better served if a statutory DUI/DWI diversion program was enacted? Would a statutory DUI/DWI diversion program better protect the motoring public from recidivist impaired drivers who are more likely to be involved in injury and fatality-related crashes? De facto DUI/DWI diversion programs differ markedly from statutory DUI/DWI diversion programs. For purposes of comparing Florida's four de facto programs with statutory DUI/DWI programs, five existing statutory programs will be briefly examined. These five statutory DUI/DWI diversion

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32. *Id.*

33. Florida Statute § 948.08(2) provides the following:

Any first offender, or any person previously convicted of not more than one nonviolent misdemeanor, who is charged with any misdemeanor or felony of the third degree is eligible for release to the pretrial intervention program on the approval of the administrator of the program and the consent of the victim, the state attorney, and the judge who presided at the initial appearance hearing of the offender.

34. See, e.g., *Orange County FAQs*, *supra* note 1, at 1 (providing information on how the program works and the State Attorney Office's authority).

35. *Miller v. State*, 442 So. 2d 419, 420-21 (Fla. 4th Dist. Ct. App. 1983). *Miller* cites the following Florida statute:

775.08 Classes and definitions of offenses.—When used in the laws of this state:

. . .

(2) The term "misdemeanor" shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by a term of imprisonment in a county correctional facility, except an extended term, not in excess of 1 year. *The term "misdemeanor" shall not mean a conviction for any violation of any provision of chapter 316 or any municipal or county ordinance.*

*Id.* (quoting FLA. STAT. § 775.08 (1981)).

programs function in Delaware,<sup>36</sup> Kansas,<sup>37</sup> Oregon,<sup>38</sup> Pennsylvania,<sup>39</sup> and Washington.<sup>40</sup>

The most significant functional difference between Florida's de facto programs and the selected statutory programs is that the five states' statutory programs each provide that, if the defendant

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36. DEL. CODE ANN. TIT. 11, § 4218(a), "Probation before judgment," provides that "a court exercising criminal jurisdiction after accepting a guilty plea or nolo contendere plea may, with the consent of the defendant and the State, stay the entry of judgment, defer further proceedings, and place the defendant on 'probation before judgment' subject to such reasonable terms and conditions as may be appropriate." DEL. CODE ANN. TIT. 10, § 1025(a) (2014), "Expungement of adult police and court records," provides that "[i]f an adult person is charged with the commission of a crime or crimes and the case is terminated in favor of the accused, the person may request the expungement of the police records and the court records relating to the case pursuant to the provisions of this subchapter." One of the definitions of "terminated in favor of the accused" is "placed on probation before judgment." *Id.* § 1025(b)(3).

37. KAN. STAT. ANN. § 8-1009(a) (2013) provides that "[u]pon the filing of a first complaint, indictment or information alleging a person has violated K.S.A. 8-1567, and amendments thereto, or a county resolution which prohibits the acts prohibited by that statute, and prior to conviction thereof, the district attorney or county attorney shall determine whether the defendant shall be allowed to enter into a diversion agreement in accordance with this act." KAN. STAT. ANN. § 8-1567(o) (2013), "Driving under the influence; penalties," defines what driving under the influence means in the state of Kansas and also provides for different levels of penalty, depending on the offender's prior record and other aggravating factors.

38. *See* OR. REV. STAT. § 813.200 (2013) (discussing the availability of diversion programs, notice, petition, form, contents, and permitted use of intoxicants). The first subsection of this statutorily created diversion program provides that "[t]he court shall inform at arraignment a defendant charged with the offense of driving while under the influence of intoxicants as defined in ORS 813.010 or a city ordinance conforming thereto that a diversion agreement may be available if the defendant meets the criteria set out in ORS 813.215 and files with the court a petition for a driving while under the influence of intoxicants diversion agreement." *Id.* § 813.200(1). Section 813.215 of the Oregon Code lists several eligibility requirements for participation in diversion programs, including but not limited to: that the person is a first time offender *and* a first time diversion program applicant. *Id.* § 813.215. This is especially important as it stresses the fact that this type of diversion program is only for those who have not offended *anywhere* previously. *Id.*

39. 18 PA. CONS. STAT. § 9122 (2012). This section details the procedure for expungement; the Pennsylvania Code of Criminal Procedure explains that "[t]he rules set forth in this Chapter govern the procedures with regard to Accelerated Rehabilitative Disposition in court cases and in summary cases." PA. R. CRIM. P. ch. 3, *Committee Introduction to Chapter 3*. For a "discussion of the history of the use of pretrial diversion programs in Pennsylvania," see 14 PA. B. 3593 (10/6/84) and 554-557 A.2d (Pennsylvania Reporter Series). *Id.*

40. The Revised Code of Washington Section 10.05.010(1) details how a person may be eligible for a deferred prosecution by stating that "[i]n a court of limited jurisdiction a person charged with a misdemeanor or gross misdemeanor may petition the court to be considered for a deferred prosecution program." WASH. REV. CODE § 10.05.010 (2014). Section 46.01.260 outlines the procedure for the destruction of records by a director but specifically states that "[t]he director shall not destroy . . . records of deferred prosecutions granted under RCW 10.05.120 and shall maintain such records permanently on file." *Id.* § 46.01.260(2)(a).

is charged with a subsequent impaired driving offense, the defendant will be prosecuted with enhanced penalties, notwithstanding successful completion of a previous diversion program.<sup>41</sup> In effect, once a successful statutory diversion program graduate reoffends, he or she becomes a second offender subject to mandatory enhanced penalties.<sup>42</sup> In the five states, recidivist impaired drivers are easily identifiable, as their participation is reflected on their driving records.<sup>43</sup> Florida's de facto programs contain no such provisions or assurance.<sup>44</sup>

A DUI/DWI offender who successfully completes a Miami-Dade or Palm Beach County diversion program enjoys a reduction of his or her charge from DUI/DWI to Reckless Driving, and the adjudication of guilt (conviction) is withheld from the offender's driving record.<sup>45</sup> It appears that in addition, the offender may also qualify for expungement of the reckless driving charge from court records.<sup>46</sup> If the DUI/DWI offender is subsequently arrested and prosecuted for impaired driving, he or she is treated as a first-time offender.<sup>47</sup> A DUI/DWI offender who successfully completes the Orange County program receives a *nolle prosequi* of his or her impaired driving charge.<sup>48</sup> A *nolle prosequi* is generally defined as a prosecutor's decision to voluntarily discontinue prosecution.<sup>49</sup> It is sometimes equated with a dismissal; however in Florida, unlike a judgment on the merits, "a nolle prosequi is merely a discretionary decision by the State Attorney to be unwilling to prosecute; it

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41. DEL. CODE ANN. TIT. 21, § 4177(d)(11); KAN. STAT. ANN. § 8-1567(b)(1), (i)(3); OR. REV. STAT. §§ 813.010(6), 813.215(1)(d)–(e); 75 PA. CONS. STAT. §§ 3804(a), 3807(a)(2)(i); WASH. REV. CODE § 46.61.5055(3)–(4), 14(a)(xii)–(xiv).

42. *Id.*

43. DEL. CODE ANN. TIT. 21, § 4177B(c); KAN. STAT. ANN. § 22-2911(d); OR. REV. STAT. § 813.230(2); 75 PA. CONS. STAT. § 1534(a); WASH. REV. CODE § 10.05.060.

44. See Traxler, *supra* note 25 (comparing Florida's four major de facto diversion programs).

45. *Id.*

46. *Id.*

47. See *id.* (explaining that DUI/DWI offenders who complete the programs are free from DUI/DWI guilt).

48. See *Example of Pretrial Diversion Contract*, ORANGE COUNTY GOV'T FLA., <http://www.orangecountyfl.net/portals/0/resource%20library/jail/Pretrial%20Diversion%20Contract%20-%20English.pdf> (last visited May 1, 2015) (explaining that the deferred prosecution program allows the state to "file a Nolle Prosequi or otherwise permanently drop [the] case").

49. Black's Law Dictionary defines *nolle prosequi* as "[t]o abandon (a suit or prosecution); to have (a case) dismissed by a nolle prosequi." BLACK'S LAW DICTIONARY 1210 (Bryan A. Garner ed., 10th ed. 2014).

does not operate as an acquittal nor does it bar further prosecution.”<sup>50</sup>

## VI. ARE STATUTORY DIVERSION PROGRAMS BETTER?

Florida’s four de facto programs lack a statutory statewide basis providing for enhancement of repeat offenders, who have previously successfully completed a de facto diversion program. A successful first-offense diversion program defendant who re-offends is still a first-time offender.<sup>51</sup> This is the case because a previous DUI conviction of record does not exist if the first-time offender successfully completes the de facto program. In order to seek an enhanced penalty, such as a minimum mandatory incarceration or vehicle impoundment penalty, a “second conviction” must be established.<sup>52</sup> While a prosecutor could request that the court impose discretionary enhanced penalties, the court would not be required by law to impose such penalties. Unlike Florida’s de facto diversion programs, which vary from one state attorney’s jurisdiction to another’s, the five statutory state programs provide for uniformity throughout their states by codifying program conditions. Statutory programs prevent defendants from double dipping by completing a program and applying again when they commit a subsequent DUI/DWI. This is accomplished by permanently recording the diversion on the defendant’s state driving record.<sup>53</sup> At least one state, Oregon, also statutorily prohibits participation in its program if an applicant has participated in a diversion program or has been convicted of DUI/DWI in any other state.<sup>54</sup>

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50. *Peters v. State*, 128 So. 3d 832, 844 (Fla. 4th Dist. Ct. App. 2013) (quoting *Al-Hakim v. Roberts*, No. 8:08-CV-01370-T-17-EAJ, 2009 WL 2147062, at \*4 (M.D. Fla. July 13, 2009)).

51. See Traxler, *supra* note 25 (explaining that DUI/DWI offenders who complete the programs are free from DUI/DWI guilt).

52. Florida Statutes Section 316.193 provides for mandatory “imprisonment for not less than [ten] days” “[f]or [a] second conviction . . . that occurs within a period of [five] years after the date of a prior conviction.” FLA. STAT. § 316.193(6)(b) (2014).

53. DEL. CODE ANN. TIT. 21, § 4177B(c) (2014); KAN. STAT. ANN. § 22-2911(d) (2013); OR. REV. STAT. § 813.230(2) (2013); 75 PA. CONS. STAT. § 1534(a) (2012); WASH. REV. CODE § 10.05.060 (2014).

54. Oregon Revised Statutes Section 813.215(1) provides:

A defendant is eligible for diversion if the defendant meets all of the following conditions:

### VII. THE ADVANTAGES OF DUI DE FACTO DIVERSION PROGRAMS

Why did four Florida prosecutors believe that it was necessary to implement their own impaired driving diversion programs? Primary reasons include the following:

- (1) They did not have to wait for the Florida legislature to act;<sup>55</sup>
- (2) De facto programs reduce the time between case intake and case disposition. Typically when cases are suitable for diversion, application is made early, and less time is spent responding with "in-court" legal maneuvering;<sup>56</sup>
- (3) De facto programs reduce the amount of time and effort that must be spent responding to defense discovery demands, requests for reduction, motion practice, and preparation for possible trial;<sup>57</sup>
- (4) De facto programs generally have established specific substantive in-house criteria for determining whether a defendant should be allowed diversion or reduction of his

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(a) On the date the defendant filed the petition for a driving while under the influence of intoxicants diversion agreement, the defendant had no charge, other than the charge for the present offense, pending for:

- (A) An offense of driving while under the influence of intoxicants in violation of:
  - (i) ORS 813.010; or
  - (ii) The statutory counterpart to ORS 813.010 in another jurisdiction;
- (B) A driving under the influence of intoxicants offense in another jurisdiction that involved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled substance, an inhalant or any combination thereof; or
- (C) A driving offense in another jurisdiction that involved operating a vehicle while having a blood alcohol content above that jurisdiction's permissible blood alcohol content.

OR. REV. STAT. § 813.215(1)(a).

55. See *supra* text accompanying notes 14–27 (explaining how Florida's de facto diversion programs are created by state attorneys without legislative authority).

56. See, e.g., Traxler, *supra* note 25 (explaining that Florida's Eighth Judicial Circuit diversion program must typically be requested within thirty days of arrest).

57. See, e.g., *Orange County Guidelines*, *supra* note 11 (explaining that the deferred prosecution program allows "an excellent opportunity to avoid criminal prosecution" (emphasis omitted)).



or her DUI charge.<sup>58</sup> This allows first-offense cases to be triaged and pre-qualified for submission of applications;

- (5) De facto programs enable more personnel and resources to be devoted to serious first-time offenses that involve aggravating factors such as repeat offenses, crashes, and injury cases;<sup>59</sup>
- (6) De facto programs give first-time offenders who are unlikely to recidivate the opportunity to avoid personal, financial, and professional damage that results from a DUI conviction;<sup>60</sup>
- (7) De facto programs improve the working relationship of state attorney offices and the defense bar by establishing clear criteria for judging a defendant's candidacy for diversion;<sup>61</sup> and
- (8) Lastly, de facto programs assist judges in clearing dockets and reducing pending caseloads.<sup>62</sup>

#### VIII. THE DISADVANTAGES OF DE FACTO DUI DIVERSION PROGRAMS

What are the perceived negative consequences and/or legal shortcomings of Florida's four de facto diversion programs?

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58. See Traxler, *supra* note 25 (listing the admission qualifiers of Florida's four major de facto diversion programs).

59. See *id.* (demonstrating that the diversion programs are reserved for offenders without aggravating factors).

60. A GUIDE TO SENTENCING DWI OFFENDERS, Diversion Programs 2, 16 (2d ed. 2005), available at <http://www.nhtsa.gov/people/injury/alcohol/DWIOffenders/>.

61. *Orange County Guidelines*, *supra* note 11.

62. Driving records reflect previous DUI/DWI administrative suspensions of a driver's license pursuant to Section 322.2615, Florida Statutes, where the Florida Department of Highway Safety and Motor Vehicles has administratively determined that the driver refused chemical testing or was driving or in physical control with a blood alcohol level of .08 or higher. An administrative revocation or suspension sanction, following a previous DUI/DWI arrest or conviction, is not a criminal penalty and would not, as such, statutorily disqualify a driver from entering a de facto diversion program. See *State Dep't of Highway Safety and Motor Vehicles v. Begley*, 776 So. 2d 278, 278-79 (Fla. 1st Dist. Ct. App. 2000) (quoting *State Dep't of Highway Safety and Motor Vehicles v. Degrossi*, 680 So. 2d 1093, 1095-96 (Fla. 3d Dist. Ct. App. 1996)) ("Because driving is a privilege, it follows that revocation of that privilege does not constitute punishment. Rather, the revocation or suspension of this conditional privilege merely returns the parties to their prior non-privileged status. Since mandatory suspension is not a criminal penalty, but instead a civil sanction unrelated to an appeal of the criminal conviction, the trial court does not have jurisdiction to enter a stay.").

- (1) Unlike the five statutory programs mentioned above, there is no mandatory enhancement of penalties such as incarceration, fines, costs, or vehicle impoundment in the event that a defendant, who completes the diversion program, subsequently commits another DUI/DWI.<sup>63</sup>
- (2) The driving records of program graduates do not reflect participation in a diversion program that would statutorily disqualify them from entering another diversion program in another jurisdiction.<sup>64</sup>
- (3) Florida does not receive revenue that it otherwise would if a defendant were convicted of DUI. Section 316.193(2)(a)(1), Florida Statutes, provides for a minimum \$1,000 fine for a second conviction, whereas a first conviction requires a minimum fine of only \$500.<sup>65</sup> A repeat offender who previously completed a diversion program would be subject only to a \$500 fine and not the mandatory \$1,000 fine.<sup>66</sup>
- (4) In the Eighth and Ninth Circuit programs, diversion participants are required to make a charitable contribution.<sup>67</sup> In the Ninth Circuit, the contribution may be to Mothers Against Drunk Driving (MADD)<sup>68</sup> or another specified nonprofit entity. Such provisions may carry negative ethical implications.<sup>69</sup>

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63. See Traxler, *supra* note 25 (comparing Florida's four major de facto diversion programs).

64. A GUIDE TO SENTENCING DWI OFFENDERS, *supra* note 60, at 16.

65. FLA. STAT. § 316.193(2)(a)(1) (2014).

66. *Id.*

67. *Orange County Guidelines*, *supra* note 11. For an example of a standard form for a deferred prosecution in the Eighth Judicial Circuit of Florida, see DeThomasis & Buchanan, *Deferred Prosecution*, REASONABLEDOUBT.ORG, <http://reasonabledoubt.org/images/PDFs/duidef4.pdf> (last visited May 1, 2015). See also *Deferred Prosecution*, *supra* note 29 (discussing the charitable donation or community service requirement).

68. Mothers Against Drunk Driving is the largest nonprofit organization in the United States that works to "protect families from drunk driving and underage drinking." Mothers Against Drunk Driving, *About Us*, MADD.ORG, <http://www.madd.org/about-us/> (last visited May 1, 2015).

69. Sylvia Shaz Shweder, Note, *Donating Debt to Society: Prosecutorial and Judicial Ethics of Plea Agreements and Sentences that Include Charitable Contributions*, 73 FORDHAM L. REV. 377, 400–01 (2004) (discussing the ethical propriety of prosecutors asking a defendant to give a charitable contribution in lieu of a fine as part of a plea agreement).

- (5) Diversion program participants may not be as closely supervised as compared to those adjudicated and placed on monthly reporting probation by a court.<sup>70</sup> Pursuant to Section 316.193(6)(a), Florida Statutes, judges are required to place a first-time offender on probation for a period not to exceed one year; no such provision exists with respect to diversion programs administered by state attorneys.<sup>71</sup>
- (6) Decisions to allow impaired drivers to enter de facto diversion programs are not subject to appeal, as the decision to allow diversion is an executive decision and function by the office of the state attorney accomplished by stipulation between that office and the defendant.<sup>72</sup> Impaired driving judicial plea dispositions of impaired driving cases must result in convictions as a matter of law<sup>73</sup> and as such are subject to appellate scrutiny.<sup>74</sup>
- (7) The National Highway Traffic Safety Administration (NHTSA)<sup>75</sup> has long discouraged the use of DUI/DWI diversion programs based upon available research disclosing negative effects.<sup>76</sup>

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70. FLA. STAT. § 316.193(5) (providing that “[t]he 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 [Section] 322.292, which must include a psychosocial evaluation of the offender”).

71. *Id.* § 316.193(6)(a) (explaining the probationary and community service requirements).

72. DeThomasis & Buchanan, *supra* note 67.

73. FLA. STAT. § 316.656(1) (providing 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”).

74. *Id.* § 924.05.

75. The NHTSA is an administrative agency within the Department of Transportation headed by an NHTSA administrator. Nat’l Highway Traffic Safety Admin., *About NHTSA*, NHTSA.GOV, <http://www.nhtsa.gov/About> (last visited May 1, 2015) (Some important NHTSA duties include compiling data, providing information on current laws and regulations pertaining to transportation, and running research projects.).

76. A GUIDE TO SENTENCING DWI OFFENDERS, *supra* note 60, at 16 (“Diversion programs generally allow an offender to complete an education, treatment, and/or community service program and then dismiss the DWI charge. This results in no conviction on the driver record of the offender and means that some repeat offenders continue to be treated as first-time offenders. Programs allowing charge dismissal after completion of treatment generally do not appear to reduce recidivism. However, one study found that deferring prosecution for [two] years while offenders participated in various forms of treatment

- (8) Repeat impaired driving offenders are eight times more likely to be involved in fatal crashes.<sup>77</sup> By eliminating the convictions of first-time offenders who complete de facto diversion programs, repeat offenders can subsequently maintain first-offender status and significantly increase the masking of their likelihood of involvement in a fatal crash.<sup>78</sup> Statutory diversion programs provide better tracking of impaired drivers, as a repeat offense is better recognized as requiring a more aggressive approach to evaluation, monitoring, and treatment.<sup>79</sup>

### IX. CREATING A BETTER FLORIDA DUI/DWI DIVERSION PROGRAM

Creating a better diversion program begins with the realization that there is a need to replace Florida's present scattered de facto approaches to DUI/DWI diversions. There is a need to provide statewide uniformity in the way DUI/DWI diversions are administered. Building on this premise, the primary requirement must be that those who have previously participated in a DUI/DWI diversion, whether successful or unsuccessful, should not again be permitted to be diverted. The five model state statutory programs reviewed herein can provide workable examples to prevent the potential of allowing repeat impaired drivers to be diverted. These states' programs have functioned well and have survived appellate constitutional scrutiny.<sup>80</sup> The model provisions fall into three categories: (1) those that define prior diversions as

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decreased DWI recidivism during the deferral period and, in some cases, beyond. NHTSA has recommended that States eliminate diversion programs." (citations omitted)).

77. NHTSA's Nat'l Ctr. for Statistics and Analysis, *Traffic Safety Facts 2009 Data: Alcohol-Impaired Driving*, NHTSA.GOV 4 (Dec. 13, 2010), [www.nhtsa.gov/staticfiles/nhtsa/pdf/2010/811385.pdf](http://www.nhtsa.gov/staticfiles/nhtsa/pdf/2010/811385.pdf) (stating that "[d]rivers with a BAC [level] of .08 or higher involved in fatal crashes were eight times more likely to have a prior conviction for driving while impaired (DWI) than were drivers with no alcohol").

78. A GUIDE TO SENTENCING DWI OFFENDERS, *supra* note 60, at 16.

79. *Id.*

80. See *State v. Sell*, 43 P.3d 1246, 1250 (Wash. Ct. App. 2002) (holding that the deferred prosecution program did not violate equal protection by allowing individuals to enter the program only once); *Dyrdahl v. Dep't of Transp., Driver and Motor Vehicle Servs. Div.*, 131 P.3d 770, 774-75 (Or. Ct. App. 2006) (holding that the suspension of a person's driver's license for conviction of DUI did not violate the equal protection clause due to that person completing a diversion program in another state so as to not qualify for Oregon's diversion program).

convictions;<sup>81</sup> (2) those that prohibit no more than one diversion per lifetime;<sup>82</sup> and (3) those that limit the discretion of the prosecutor to accept or refer individuals for diversion who have previously had a diversion within a given prior period.<sup>83</sup>

In the first category are examples of provisions that define prior diversions as “convictions.” For example, Section 8-1567, Kansas Statutes, defines “conviction” as including, “[e]ntering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of a crime described.”<sup>84</sup> The crime described is that of “[d]riving under the influence.”<sup>85</sup> This is similar to Delaware’s prohibition found in Chapter 21 of Delaware’s Code, Section 4177B, defining a prior conviction as:

A conditional adjudication of guilt, any court order, or any agreement sanctioned by a court requiring or permitting a person to apply for, enroll in or otherwise accept first offender treatment or any other diversionary program under this section or a similar statute of any state, local jurisdiction, any federal or military reservation or the District of Columbia.<sup>86</sup>

In the second category are those provisions that limit diversion to no more than one diversion. This approach is exemplified in Washington’s Statutes, Section 10.05.010(2), stating that a “person shall not be eligible for a deferred prosecution program more than once; and cannot receive a deferred prosecution under both RCW 10.05.020 and [S]ection 18 of this act.”<sup>87</sup> Section 8-1567, Kansas Statute, also accomplishes this by providing that “a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, or an ordinance which prohibits the acts of this section, and amendments thereto, only once during the person’s lifetime.”<sup>88</sup>

The third category of statutory provisions includes those that limit the discretion of the prosecutor to accept or refer individuals

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81. KAN. STAT. ANN. § 8-1567(i)(1)–(3) (2013).

82. WASH. REV. CODE § 10.05.010(2) (2014).

83. 75 PA. CONS. STAT. § 3807(a)(2)(i), (b)(1) (2012).

84. KAN. STAT. ANN. § 8-1567(i)(3)(A).

85. *Id.* § 8-1567(b)(1).

86. DEL. CODE ANN. TIT. 21, § 4177B(e)(1)(d) (2014).

87. WASH. REV. CODE § 10.05.010(2).

88. KAN. STAT. ANN. § 8-1567(i)(6).

who have previously had a diversion within a given prior specified period. This approach is illustrated in Pennsylvania's Accelerated Rehabilitative Disposition (diversion) Statute, Section 3807, which provides that:

The attorney for the Commonwealth shall not submit a charge brought under this chapter for Accelerated Rehabilitative Disposition if any of the following apply: (i) The defendant has been found guilty of or accepted Accelerated Rehabilitative Disposition of a charge brought under [S]ection 3802 within ten years of the date of the current offense unless the charge was for an ungraded misdemeanor under [S]ection 3802(a)(2) and was the defendant's first offense under [S]ection 3802.<sup>89</sup>

Several of the model states' statutes further contain provisions that not only bar diversions for applicants with prior in-state diversions or convictions, but they also bar diversions for those applicants who have had prior diversions or convictions in other jurisdictions. For example, Delaware bars diversion for those with "[a] conviction or other adjudication of guilt or delinquency pursuant to [Section] 4175(b) or [Section] 4177 of this title, or a similar statute of any state or local jurisdiction, any federal or military reservation or the District of Columbia."<sup>90</sup> Similarly, Washington bars diversion for those with a prior offense; "[a] 'prior offense' means any of the following: . . . (xi) [a]n out-of-state conviction for a violation that would have been a violation of (a)(i), (ii), (viii), (ix) or (x) of this subsection if committed in this state."<sup>91</sup> Both states also bar DUI/DWI diversions where the applicant has had a previous DUI/DWI diversion in an out-of-state jurisdiction.<sup>92</sup>

## X. CONCLUSION

The statutory diversion programs functioning in Delaware,<sup>93</sup> Kansas,<sup>94</sup> Oregon,<sup>95</sup> Pennsylvania,<sup>96</sup> and Washington<sup>97</sup> provide

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89. 75 PA. CONS. STAT. § 3807(a)(2)(i) (2012).

90. DEL. CODE ANN. TIT. 21, § 4177B(e)(1)(a).

91. WASH. REV. CODE § 46.61.5055(14)(a)(xi).

92. DEL. CODE ANN. TIT. 21, § 4177B(a); WASH. REV. CODE § 46.61.5055(4)(iii).

93. DEL. CODE ANN. TIT. 10, § 1027; DEL. CODE ANN. TIT. 11, § 4218.

94. KAN. STAT. ANN. §§ 8-1009, 8-1567(o) (2013).

95. OR. REV. STAT. §§ 813.200, 813.215 (2013).

appropriate examples upon which Florida should model its own statutory DUI/DWI diversion program. The programs in these five states have legislative and appellate review histories that confirm the necessity and constitutional propriety of their enactment. Most importantly, these model statutory diversion programs address the most glaring defect in Florida's court de facto diversion programs discussed above. Each of them provides statewide uniformity to ensure that a repeat DUI/DWI offender will not again qualify as a first-time offender and be able to escape the enhanced penalties and supervision that a repeat offender deserves.

Repeat offense impaired drivers and those with high blood alcohol levels are statistically more likely to be involved in crashes yielding injuries and fatalities.<sup>98</sup> Judges who deal with these DUI/DWI defendants are entitled to have the benefit of a statewide record showing a prior diversion. Florida judges who deal with such recidivists should be able to treat diversion program DUI/DWI offenders who reoffend as second-time offenders, subject to mandatory enhanced penalties. Florida's present de facto diversion programs lack uniformity and enable defendants to avoid recognition as their offenses are masked by being nolle prossed, or by being reduced to reckless driving and in many cases having adjudication and conviction withheld or expunged. These defects can be remedied by adopting provisions similar to those described in the statutes of the five model states discussed in this Article.

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96. 18 PA. CONS. STAT. § 9122 (2012); PA. R. CRIM. P. ch. 3, *Committee Introduction to Chapter 3* ("The rules set forth in this Chapter govern the procedures with regard to Accelerated Rehabilitative Disposition in court cases and in summary cases.").

97. WASH. REV. CODE § 10.05.010(2).

98. See Nathan Warren-Kigenyi & Heidi Coleman, *Traffic Safety Facts Research Note, DWI Recidivism in the United States: An Examination of State-Level Driver Data and the Effect of Look-Back Periods on Recidivism Prevalence*, NHTSA.GOV 1-2 (Mar. 26, 2014), [http://www.nhtsa.gov/staticfiles/nti/pdf/811991-DWI\\_Recidivism\\_in\\_USA-tsf-rn.pdf](http://www.nhtsa.gov/staticfiles/nti/pdf/811991-DWI_Recidivism_in_USA-tsf-rn.pdf) ("Historically, drivers with prior DWI convictions have been overrepresented in fatal crashes."). "According to a federal study, drivers convicted of alcohol-impaired driving during the past [three] years are at least 1.8 times as likely to be in fatal crashes as drivers with no prior convictions during the same time period." Austin Police Dep't, *Are Most Alcohol-Impaired Driving Crashes Caused by Repeat Offenders?*, AUSTINTEXAS.GOV, <http://www.austintexas.gov/faq/are-most-alcohol-impaired-driving-crashes-caused-repeat-offenders> (last visited May 1, 2015); see also Fla. Impaired Driving Coal., *Florida's Impaired Driving Problem*, FLA. DEP'T OF TRANSP., <http://www.dot.state.fl.us/safety/3-Grants/FIDCFactSheetFEB14.pdf> (last visited May 1, 2015) [hereinafter *FIDC's Program*] (discussing the problem of impaired driving and positing solutions).

The Florida Impaired Driving Coalition (FIDC)<sup>99</sup> has seven goals that include improving the prosecution and adjudication of impaired driving cases and enhancing impaired driving legislation.<sup>100</sup> The FIDC stands as an appropriate forum to study and determine if a statute-based statewide first-offense DUI diversion program would further either or both of these goals. If such a statewide program is found important to achieve Coalition goals and be in the interests of justice and the protection of the motor-ing public, it should be included in Florida's Impaired Driving Strategic Plan (IDSP) and pursued through the legislative process.

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99. "In 2009, FDOT facilitated the establishment of the [FIDC]. Agencies and organizations responsible for components of Florida's impaired driving system, or those agencies working to impact the effects of impaired driving, are participating in the FIDC. The FIDC was formed to identify and prioritize the State's most pressing impaired driving issues[;] review proven strategies[;] develop a strategic plan to serve as the blueprint for programs, funding, and potential legislative strategies that maximize the State's ability to impact these crashes[;] and oversee implementation of the strategic plan." Fla. Impaired Driving Coal., *Florida Impaired Driving Strategic Plan*, CAMSYS.COM ES-1 (Sept. 2011), <http://www.camsys.com/pubs/FLImpaired.pdf>.

100. *FIDC's Program*, *supra* note 98.