

# THE JUDGE IS THE KEY COMPONENT:

THE IMPORTANCE OF PROCEDURAL FAIRNESS IN DRUG-TREATMENT COURTS

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## INTRODUCTION

“I’ve learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.”<sup>1</sup>

**B**eginning in the 1960s, the United States has suffered from waves of illicit drug epidemics, which have exerted immense stress on our system of criminal justice.<sup>2</sup> For decades, the governmental response has been to wage a “War on Drugs” that has siphoned funding away from our nation’s schools and into the budgets of our correctional systems.<sup>3</sup> In spite of the considerable amount of taxpayer dollars that has been dedicated to enforcement and incarceration initiatives, substance abuse remains a driving force in the criminal-justice system.<sup>4</sup> After five decades of inefficient spending and ineffective imprisonment, governments at every level are realizing just how ineffective this “war” has been.<sup>5</sup>

While the rest of the nation slowly develops an understanding that our courts and judges can become powerful motivators instead of intimidators, in 1989, Florida’s Eleventh Judicial Circuit took a visionary step toward ending perpetual criminality for drug-dependent defendants.<sup>6</sup> By establishing the nation’s first drug-treatment court (DTC), the Eleventh Circuit created a revolutionary system that’s built healthier communities, cut spending, and changed how courts approach sentencing.<sup>7</sup>

### Footnotes

1. Maya Angelou, quoted in *A Conversation with Dr. Maya Angelou*, BEAUTIFULLY SAID MAGAZINE, July 4, 2012, <http://beautifulysmagazine.com/201207feature-of-the-month-3/>. Although the quote is often attributed to Angelou, one researcher has credited it to Carl Bueher. See Garson O’Toole, *They May Forget What You Said, But They Will Never Forget How You Made Them Feel*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2014/04/06/they-feel>.
2. Jonathan P. Caulkins & Peter Reuter, *Reorienting U.S. Drug Policy*, 23 ISSUES ONLINE SCI. & TECH. (2006), <http://issues.org/23-1/caulkins/>.
3. MICHAEL MITCHELL & MICHAEL LEACHMAN, CENTER ON BUDGET AND POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION (2014), <http://www.cbpp.org/cms/?fa=view&id=4220>.
4. Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MEDICINE e141 (2008), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0050141>.
5. Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment* 3, 4, 6 (Global Commission on Drug Policies, Working Paper, January 2011), [http://www.globalcommissionondrugs.org/wp-content/themes/gcdp\\_v1/pdf/Global\\_Com\\_Bryan\\_Stevenson.pdf](http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Bryan_Stevenson.pdf). See also Press Release, United States Department of Justice, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (August 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.
6. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 455 (1999).
7. DOUGLAS B. MARLOWE, NAT’L ASS’N OF DRUG COURT PROFESSIONALS, RESEARCH UPDATE ON ADULT DRUG COURTS (2010), [http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP\\_1.pdf](http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf).

The DTC methodology, which is based upon ten key components and best-practice standards, has since spread throughout the criminal-justice system to benefit other populations.<sup>8</sup> The success of the DTC model has led to a series of specialty courts, such as veterans' treatment courts, that have realized newfound success in reducing recidivism among their participants.

In this paper, the American Judges Association (AJA) argues that, while programmatic success requires adherence to best practices based upon the ten key components, ongoing judicial interaction with drug-court participants based upon the four principles of procedural fairness (voice, neutrality, respectful treatment, and trustworthy authorities) is the most critical.<sup>9</sup> After reviewing the mounting literature on the success of DTCs, researchers have confidently concluded that the power of the judge-participant relationship is so immense that it may have "effectively suppressed all other theoretical mechanisms" that could potentially lead to desired outcomes.<sup>10</sup>

The developing understanding of the power of the judge-participant relationship led to a 2007 white paper published by the AJA titled *Procedural Fairness: A Key Ingredient in Public Satisfaction*.<sup>11</sup> The findings included in that paper demonstrated how the four principles of procedural fairness transformed individuals' courtroom experiences, as well as the general public's perception of the judiciary. Current research has established that the success of DTCs is dependent upon a judge's adoption and use of the four principles of procedural fairness.

Procedural fairness is the tool that drives the judge's influence upon DTC participants. This finding holds true regardless of a participant's gender, race, age, or economic status.<sup>12</sup> The research is quite clear that judges who adhere to the four principles of procedural fairness achieve superior outcomes within their DTCs compared to judges who do not.<sup>13</sup>

While the AJA on behalf of its 2,000 member judges in the United States and Canada has consistently recognized and supported the achievements of DTCs, the purpose of this white paper is to identify and advocate for continued change that will improve the daily work of these courts and the judges who preside over them. We believe that the baseline social-science research underlying this paper is applicable not only in the U.S. and Canada, but in any country using the DTC model.

8. *Id.* at 3. These key components are:

1. Drug courts integrate alcohol and other drug-treatment services with justice-system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due-process rights.
3. Eligible participants are identified early and promptly placed in the drug-court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug-court responses to participants' compliance.
7. Ongoing judicial interaction with each drug-court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug-court planning, implementation, and operations.

10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug-court-program effectiveness.

NAT'L ASS'N OF DRUG COURT PROFESSIONALS, DRUG COURT STANDARDS COMM., *DEFINING DRUG COURTS: THE KEY COMPONENTS*, at iii (1997, reprinted 2004).

9. NAT'L ASS'N OF DRUG COURT PROFESSIONALS, *supra* note 8, at 15. See also Douglas B. Marlowe et al., *The Judge Is a Key Component of Drug Court*, 4 DRUG CT. REV. 1, 26 (2004), [http://www.ndcrc.org/sites/default/files/dcr.iv2\\_.pdf](http://www.ndcrc.org/sites/default/files/dcr.iv2_.pdf).

10. SHELLI B. ROSSMAN ET AL., 4 THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 5 (2011).

11. Kevin Burke & Steve Leben, *Procedural Fairness, A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 4-5 (2007).

12. SHELLI B. ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 7 (2011).

13. *Id.*

## DRUG-TREATMENT COURTS

“The truth is that Drug Courts have always placed inordinate demands on themselves. Dissatisfied with what was currently being done and had always been done, Drug Courts pushed through the envelope and redesigned the criminal justice system.”<sup>14</sup>

**B**y 1980, the use of powdered cocaine was widespread in the United States.<sup>15</sup> An oversupply of powdered cocaine in the early 1980s led to the creation of crack cocaine.<sup>16</sup> Crack, being cheaper and easy to transport, spread like wildfire through the inner cities of America.<sup>17</sup> Violent crime, including murder, soared as a result of this new drug epidemic.<sup>18</sup> In response to public safety concerns, harsh new drug laws were passed.<sup>19</sup> The resulting number of individuals arrested and imprisoned for drug-related crimes increased elevenfold between 1980 and 1997, overwhelming both courts and correctional systems.<sup>20</sup>

In 1989, one of the cities struggling with this new criminal environment was Miami, Florida. South Florida’s geography made it an ideal entry point for illicit drugs produced in Central and South America, forcing Miami officials to prepare for another onslaught of drug-related crime.<sup>21</sup> Believing that Miami’s criminal-justice system was already overburdened, Chief Judge Gerald Wetherington of Florida’s Eleventh Judicial Circuit issued an administrative order creating the nation’s first drug court and appointed Judge Herbert Klein to oversee its design and implementation.<sup>22</sup>

Out of that single court grew a new movement. Starting with inner-city courts and expanding outward to suburban and rural communities, DTCs flourished.

As the number of DTCs grew, they began to evolve. The early courts focused on drug-addicted adults charged with nonviolent felonies. Soon thereafter, DWI courts (also known as sobriety courts) emerged, followed by juvenile drug courts, family dependency courts, reentry courts, campus drug-treatment courts, and tribal drug-treatment courts.<sup>23</sup> Each new court was born out of a unique response to a localized problem.

Pushing this growth at every stage was an organization founded in 1994 by the first twelve drug courts: The National Association of Drug Court Professionals (NADCP).<sup>24</sup> The core philosophy of the NADCP was expressed in a set of principles known as the ten key components of DTCs.<sup>25</sup> Taken together, the components represented a new approach to supervising defendants. Essential to the structure is a criminal-justice team led by a

14. NAT’L ASS’N OF DRUG COURT PROFESSIONALS, 1 ADULT DRUG COURT BEST PRACTICE STANDARDS 3 (2013).

15. Caulkins & Reuter, *supra* note 2.

16. DRUG ENFORCEMENT ADMINISTRATION, 1985-1990, at 59; <http://www.dea.gov/about/history/1985-1990.pdf>.

17. *Id.* at 59-60; Caulkins & Reuter, *supra* note 2.

18. David B. Kopel, *Crime: The Inner-City Crisis* (2010), <http://www.davekopel.com/CJ/Mags/InnerCityCrisis.htm>.

19. Ryan A. Kemper, *U.S. Drug Control Policy: Clinging to an Outdated Perspective*, 10 RES PUBLICA 73, 79, 83 (2005).

20. Stuart Taylor, Jr., *America’s Prison Spree Has Brutal Impact*,

NATIONAL JOURNAL MAGAZINE, November 14, 2009.

21. Richard L. Berke, *Cities Move to Curb Summer Crime Increase*, N.Y. TIMES, May 21, 1989.

22. Hora et al., *supra* note 6, at 455.

23. *Types of Drug Courts*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/what-are-drug-courts/models>.

24. *About NADCP*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/about-nadcp>.

25. See MARLOWE, *supra* note 7, at 3.

judge and composed of a prosecutor, defense attorney, police officers, therapists, local community victim advocates, and probation officers. When combined with mandatory treatment, aggressive drug testing, regular review sessions, ongoing team training, community outreach, and a careful evaluation of outcomes, DTCs were able to reduce recidivism rates significantly.<sup>26</sup>

One of the components, which calls for ongoing judicial interaction with each drug-court participant, began to emerge in importance so as to be described by drug-court researchers as a key component in DTCs.<sup>27</sup> As these researchers correctly pointed out, however, they were asserting this conclusion without detailed research on the impact of judicial interaction with DTC participants.<sup>28</sup> Nevertheless, there seemed to be an intuitive understanding among drug-court judges that their relationship with the participants had a substantial impact.<sup>29</sup> According to Judge Kevin Burke, who was among those early drug-court judges:

Many of the judges who engaged in the early generation of drug courts were quite transparent and open in how decisions were made and they gave explanations to the defendants as opposed to their lawyers. Their orders were understandable to defendants.<sup>30</sup>

An early study of DTCs echoed Judge Burke's sentiment:

Nearly all the clients in Erie County (OH) agreed that the judge treated them with respect (96%), was fair (93%), and was concerned about them (86%). Three-quarters said that the court interactions with the judge helped them to stay off drugs, as did regular court appearances.<sup>31</sup>

In a focus-group study in 2002, participants in six locations were asked about their experiences in DTCs.<sup>32</sup> In each location, participants' responses indicated that the judge was the most important influence in their success.<sup>33</sup> Participants stressed the significance of the individual attention they received from the judge and believed that their success mattered to the judge.<sup>34</sup> Participants indicated that without their relationship with the judge, they would not have felt the need to comply with the many conditions of the program, suggesting that the judge was the single most important element in their drug-court experience.<sup>35</sup> This positive impact was further reflected in some of the excerpts from their comments:<sup>36</sup>

- "She helps, she cares, she wants you to get your life together."
- "Judge . . . is like a father figure in a sense . . . he seems to know your background,

26. "75% of adult criminal Drug Court graduates never see another pair of handcuffs." *Drug Courts Work*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/drug-courts-work>. See also STEVE AOS ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006); JEFF LATIMER ET AL., A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM? (2006); Christopher T. Lowenkamp et al., *Are Drug Courts Effective: A Meta-Analytic Review*, 15 J. COMMUNITY CORRECTIONS 5 (2005); DEBORAL KOETZEL SHAFFER, RECONSIDERING DRUG COURT EFFECTIVENESS: A META-ANALYTIC REVIEW (2006); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459 (2006).

27. Marlowe et al., *supra* note 9, at 25.

28. *Id.* at 4.

29. Kevin Burke, *Just What Made Drug Courts Successful?* 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 39, 54 (2010).

30. *Id.* at 57.

31. STEVEN BELENKO, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 25 (2001).

32. JOHN S. GOLDKAMP ET AL., FROM WHETHER TO HOW DRUG COURTS WORK: RETROSPECTIVE EVALUATION OF DRUG COURTS IN CLARK COUNTY (LAS VEGAS) AND MULTNOMAH COUNTY (PORTLAND) 133 (2002).

33. *Id.* at 133.

34. *Id.*

35. *Id.*

36. *Id.* at 134.

your kids, your name, I mean he knows a lot of details about you—he remembers what he talked about with you last time.”

- “If you have one judge that oversees this program and she is constant then we all know what to expect, but when you have a whole lot of judges coming in they don’t know what you’ve been through or what’s really been happening with you.”
- “When you have one judge they are able to track what you are doing better . . . one is better because you have a link . . . .”
- “When it is such a personal issue, it is nice to be recognized by someone. I think that one judge is better because you already have a rapport built up with him.”

In 2004, an article in *Drug Court Review*, published by the National Drug Court Institute, argued that there was a need for significantly more research into the impact of the judge on successful participants in DTCs: “It is surprising . . . that little research has focused on the role of the judge in drug court.”<sup>37</sup> The authors acknowledged that participants indicated repeatedly that their success was due to their relationship with the judge, while, at the same time, stating:

Although it is true that drug court clients commonly credit their success in the program to their interactions with the judge . . . until very recently there was *no* experimental evidence to indicate whether the judge is, in fact, necessary or helpful to drug court outcomes.<sup>38</sup>

The evidence for this intuitive judicial understanding was later codified in *The Drug Court Judicial Benchbook*.<sup>39</sup> In the *Benchbook*, researchers for the drug-court movement suggested that there are nine core competencies necessary for a judge to be successful in operating a drug court.<sup>40</sup>

A close look at these core competencies highlights the key role that the drug-court judge plays in the successful operation of these courts. While not described in terms of procedural fairness, these core competencies create a circumstance where a judge is seen as having legitimate authority. That sense of legitimacy is derived from the involvement and preparation by the judge who provides a DTC participant with the subjective impression that the process they’re undergoing is fair.

The uniform approach of the ten key components combined with the nine core competencies fueled the growth of DTCs. By 2007, there were 1,667 DTCs across all 50 states.<sup>41</sup>

37. Marlowe et al., *supra* note 9, at 4.

38. *Id.* at 4.

39. THE DRUG COURT JUDICIAL BENCHBOOK 47-61 (Douglas B. Marlowe & William G. Meyer eds., 2011).

40. *Id.* at 47. These core competencies are:

1. Participates fully as a drug court team member, committing him or herself to the program, mission and goals, and works as a full partner to ensure their success.
2. As part of the drug court team, in appropriate non-court settings (i.e., staffing), the judge advocates for effective incentives and sanctions for program compliance or lack thereof.
3. Is knowledgeable of addiction, alcoholism, and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner.
4. Is knowledgeable of gender, age, and cultural issues that may impact the offender’s success.

5. Initiates the planning process by bringing together the necessary agencies and stakeholders to evaluate the current court processes and procedures and thereafter collaborates to coordinate innovative solutions.

6. Becomes a program advocate by utilizing his or her community leadership role to create interest in and develop support for the program.

7. Effectively leads the team to develop all the protocols and procedures of the program.

8. Is aware of the impact that substance abuse has on the court system, the lives of offenders, their families, and the community at-large.

9. Contributes to education of peers, colleagues, and judiciary about the efficacy of drug courts.

41. BJA DRUG COURT CLEARINGHOUSE PROJECT, DRUG COURT ACTIVITY UPDATE 2 (April 12, 2007).

## THE FOUR PRINCIPLES OF PROCEDURAL FAIRNESS

“Most people care more about procedural fairness—the kind of treatment they receive in Court—than they do about ‘distributive justice,’ *i.e.*, winning or losing the particular case.”<sup>42</sup>

In 2007, as the number of DTCs was expanding across the country, the AJA’s white paper fueled a new understanding of the impact of the principles of procedural fairness.

It is a well-established phenomenon that an individual’s distrust of the police is symptomatic of a wider belief that the criminal-justice system itself cannot be trusted.<sup>43</sup> This distrust, according to the research, is a result of negative experiences with individual police officers, particularly in minority and poverty-stricken neighborhoods.<sup>44</sup> A generalized distrust of the police in a particular neighborhood has been tied to increasing levels of crime and drug use.<sup>45</sup>

As with exposure to the police, exposure to the justice system has the power to shape an individual’s perception of the system’s overall legitimacy.<sup>46</sup> Procedural fairness, therefore, is a subjective evaluation of a person’s experience in the justice system and is external to “distributive justice,” *i.e.*, the actual outcome of the case.<sup>47</sup> While the distributive aspect of a case is important, individuals’ willingness to accept court decisions is rooted in their perceptions of how they were treated during the process itself.<sup>48</sup>

The concept that the subjective perception of process fairness is more important than the actual disposition seems contradictory to the idea of the rule of law. For most citizens, however, the core of the justice system is about the fair treatment of an individual in a courtroom. As the AJA’s 2007 white paper explained, “People value fair procedures because they are perceived to produce fair outcomes.”<sup>49</sup> This subjective evaluation of courtroom procedures is what creates the sense of legitimacy.<sup>50</sup> This is particularly true in criminal cases.<sup>51</sup> In fact, the evidence strongly suggests that in a criminal case, a defendant’s willingness to obey a court’s order is linked to his or her perception of the court’s legitimacy.<sup>52</sup>

This is especially important for an individual who is being sentenced. Even if a defendant receives a more stringent sentence than they’d hoped for, they’ll nonetheless comply with the court’s order so long as they think the process was fair.<sup>53</sup> This leads to better out-

42. Burke & Leben, *supra* note 11, at 5.

43. Andrew V. Papachristos et al., *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 404 (2012), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7426&context=jclc>.

44. *Id.*

45. *Id.*

46. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, in 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 283, 318 (Michael Tonry ed., 2003), <https://www.ncjrs.gov/pdffiles1/Digitization/202743-202750NCJRS.pdf>.

47. Burke & Leben, *supra* note 11, at 5-6.

48. Tyler, *supra* note 46, at 318.

49. Burke & Leben, *supra* note 11, at 6.

50. Tyler, *supra* note 46, at 287.

51. Jensen Cody Jorgensen, *Public Perceptions Matter: A Procedural Justice Study Examining an Arrestee Population 67-68* (June 2011) (unpublished M.S. thesis, Arizona State University), [https://cvpcs.asu.edu/sites/default/files/content/products/Jorgensen%20Thesis\\_Final2.pdf](https://cvpcs.asu.edu/sites/default/files/content/products/Jorgensen%20Thesis_Final2.pdf).

52. Tyler, *supra* note 46, at 284.

53. *Id.* at 300.

comes, as a defendant who successfully completes a probationary sentence has a reduced likelihood of rearrest.<sup>54</sup> It also, obviously, leads to a safer community and increases legitimacy of the entire justice system.

Given that this subjective evaluation is so critical to successful sentencing, what should an individual judge do to maintain a sense of legitimacy with the individuals who appear before him or her? The AJA white paper revealed four principles that create the conditions for perceived legitimacy:<sup>55</sup>

1) Voice: The ability to participate in a case by expressing one's viewpoint engages individuals in the process of courtroom decision making. This participation, as research suggests, is a critical indicator of overall satisfaction with a court proceeding. It turns out that the ability to talk to the judge increases satisfaction with the process even if individuals are told that their input will not affect the outcome.<sup>56</sup> The presence of voice, or lack thereof, has been shown to affect an individual's willingness to accept the decision in a courtroom.<sup>57</sup>

2) Neutrality: Neutrality equates to a generalized concept of fairness. A person who believes that a judge is fair and is balanced between both sides is much more likely to accept the decision than one who believes that the judge has already decided the case for reasons extrinsic to the facts or law.

3) Respectful treatment: Although treating individuals with dignity constitutes respectful treatment and creates an environment of civility, this concept is incomplete. Actual fairness is not enough; the perception of fairness must be experienced by the individual and the group of participant observers as a whole. An individual in the courtroom must believe that he or she has fundamental rights during the process and that those rights are being protected. Research has shown that legitimacy is created through respectful treatment, which, in turn, affects compliance.

4) Trustworthy authorities: Authorities need to be seen as benevolent, caring, and sincerely trying to help the litigants. Garnering that trust can be accomplished by listening to individuals and by explaining or justifying decisions that address the litigants' needs. The level of trust that is generated by doing this will give participants an impression that the judge, while not necessarily on their side, is at least open to hearing what is said and then will decide the case fairly.<sup>58</sup>

These four principles combine to create a sense of the court's legitimacy, and when that perception of authority is substantiated, compliance with the law is enhanced, even when it conflicts with one's immediate self-interest.<sup>59</sup> In other words, the perception of legitimacy, and the obedience that flows from it, are the keys to the success of the justice system in a free society.

54. Burke & Leben, *supra* note 11, at 7.

55. *Id.* at 6.

56. *Id.* at 12.

57. *Id.* at 6.

58. *Id.* at 6.

59. *Id.* at 7.

Judges simply do not have the resources to supervise every defendant who is given an alternative sentence to incarceration. Judges must rely upon a system of voluntary acceptance and compliance. Studies have shown that establishing a perceived legitimacy doubles the likelihood that a defendant will obey a court order.<sup>60</sup> The importance of judicial legitimacy and its impact on participant compliance has emerged in a series of studies focusing on DTCs.

### THE JUDGE IS THE KEY COMPONENT

“The mechanism by which drug courts reduce substance use and crime is through participants’ attitudes toward the judge.”<sup>61</sup>

The intuitive understanding of the central role of the judge, which had been embraced by many of the original DTC judges in creating and operating their courts, has been supported by significant new research. DTCs have been the subject of more scientific research than any other judicial activity.<sup>62</sup> However, the primary focus of the research was whether DTCs were an improvement over the other types of sentencing for drug-dependent defendants. Once it was clear that DTCs were more effective than other approaches, the question of how they were so effective became the subject of further research.<sup>63</sup> Very few of those studies, however, focused on the interaction between the participant and the judge. It is hard to imagine a DTC without the judicial status hearing and the relationship it creates between the participant and the judge.<sup>64</sup> Emerging research has now substantiated that intuitive understanding, as shown by the conclusion drawn by Douglas Marlowe, one of the preeminent researchers in the area of DTCs: “The results of this program of research provide compelling evidence that the judge is a key component of drug court . . . .”<sup>65</sup>

Thus, the foundation of a successful DTC is the relationship between the participant and the judge.<sup>66</sup> This relationship for a drug-court participant can be transformational. The simple act of a judge rising to applaud the success of a DTC participant can be the first step. Such small outward signs of respect in the form of rewards from the judge can motivate participants in a way that improves their chances of success.<sup>67</sup>

As one of the most extensive studies on DTCs, *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts* (MADCE), explained:

60. Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCH. REV. 323, 334 (1997).

61. ROSSMAN ET AL., *supra* note 10, at 258.

62. *Drug Courts Work*, *supra* note 26.

63. NAT’L INST. OF JUSTICE, DRUG COURTS: THE SECOND DECADE 3 (2006).

64. Marlowe et al., *supra* note 9, at 4.

65. *Id.* at 25. As a caveat, Marlowe’s statement is limited to a subset of high-risk, high-needs offenders. It should be noted, however, that Marlowe believes those are the only offenders who should be

placed in DTCs. As Marlowe stated in his article, “According to the criminal-justice theories of ‘Responsivity’ and the ‘Risk Principle,’ intensive interventions such as drug court are believed to be best suited for ‘high-risk’ offenders who have more severe criminal propensities and drug-use histories, but may be ineffective or contraindicated for ‘low-risk’ offenders” (at 4).

66. Sally L. Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts*, 1 NAT’L DRUG CT. INST. REV. 56, 59 (1998).

67. SHANNON M. CAREY ET AL., NPC RESEARCH, EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES, AND COSTS 51 (2008).



The most striking finding in this research is the power of the judge, and judicial interactions with the offenders, to promote desistance.<sup>68</sup>

The authors continued:

Second, there is a strong judge effect: at the between-courts level, drug courts had an indirect effect, through attitude toward judge, on reductions in subsequent drug use and criminal behavior. Drug courts participants reported fewer subsequent days of drug use and crimes committed per month, on average across all courts, 18 months later, and, they expressed more positive attitudes toward the judge at their 6-month interview, which in turn was associated with lower levels of drug use and crime at their 18-month interview, on average across all courts.<sup>69</sup>

This study confirmed Dr. Marlowe's finding that the judge plays a key role in a DTC and other researchers' assertion that the judge is the single most important component in a DTC.<sup>70</sup>

While the MADCE is one of the most extensive studies of DTCs to be published, it's not alone in supporting the idea that the participants' ongoing contact with a single judge is the key component in DTCs. In a study of the Erie County, Ohio, drug court, 75% of drug-court participants said that regular interaction with the judge helped them stay off drugs.<sup>71</sup>

In an additional study involving the Multnomah County DTC in Oregon, researchers reported adverse ramifications when the court stopped using a single DTC judge and, over a four-year period, instead used 22 judges and one referee.<sup>72</sup> As a result of this decision, attendance by participants at drug-court sessions dropped sharply, and those who appeared in front of more judges per 100 days had an increased likelihood of termination

68. ROSSMAN ET AL., *supra* note 10, at 117. The authors continue:  
We find no evidence that motivation for treatment, specific deterrence, fairness of one's court outcome, or a broad measure of procedural justice are associated with desistance in our sample. We posit three potential explanations for this finding. First, it is possible that the results signify exactly what they purport, that is, that those theoretical processes are not associated with better outcomes in drug court. Second, it is possible that the drug courts in our sample did not effectively implement practices that would promote those theoretical mechanisms. Thus, for example, it is entirely possible that although drug courts self-report adherence to best treatment practices, treatment was not implemented in these drug courts in a manner consistent with effective evidence-based practice. Finally, it is possible that the power of the judge (typed by legal scholars as therapeutic jurisprudence) is so strong that it effectively suppresses all other theoretical mechanisms.

The authors' definition of procedural justice is different than the definition used in this paper. The definition of procedural fairness used in this paper appears to comport with the three theories the authors discuss on page 94:

A third theory, drawn from the psychological literature, posits that engaging drug-involved defendants in a holistic and transparent process that maximizes perceptions of

equality, fairness, and justice (e.g., procedural justice) leads to desistance. In a similar vein, legal scholarship has identified participants' attitudes toward the judge—or their beliefs about the judges' competence, impartiality, and concern for their general well-being—as being critical to subsequent desistance, under the rubric of therapeutic jurisprudence . . . . To that, we add a fifth theoretical mechanism, distributive justice, as measured by participants' perceptions of the justness of court outcomes.

On page 117, the authors appear to accept the body of literature supporting the connection between procedural fairness and desistance when they say: "a substantial body of literature supports many of the underlying premises of deterrence and treatment motivation and eagerness. Thus, it is probably fair to conclude that if drug courts used these mechanisms more effectively, drug court results likely would be even better." The difference between the definition of procedural justice in the MADCE study and the definition of procedural fairness used in this paper allows for a different understanding of the factual information contained in the MADCE study.

69. *Id.* at 116-17.

70. Marlowe et al., *supra* note 9, at 25; GOLDKAMP ET AL., *supra* note 32, at 133.

71. BELENKO, *supra* note 31, at 25.

72. GOLDKAMP ET AL., *supra* note 32, at 107-08.

from the program.<sup>73</sup> Additionally, those who saw multiple judges also had an increased likelihood of being rearrested for non-drug-related offenses.<sup>74</sup>

Participants who interacted with a single judge during their time in the DTC missed fewer treatment sessions, were less likely to be terminated, and were more likely to complete the program.<sup>75</sup> In the focus-group sessions that followed their graduation, participants told the researchers that it was their personal relationship with the judge that was the most important factor in their success.<sup>76</sup>

Additional research has shown that when participants were asked if they would've completed the DTC program without the support of their judge, 73% indicated that they did not believe they would have.<sup>77</sup>

A study by NPC Research titled *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs*, reached the same conclusion: "The interaction of the drug court judge with participants is central to the drug court model."<sup>78</sup> The study investigated the length of time a single judge served in a DTC and the impact that judicial consistency had on participants.<sup>79</sup> Initially, the authors confirmed results similar to those of the Multnomah County DTC study:

In programs where judges rotate more frequently, staff and *participants report* that they have little continuity with the judge during the length of the program.<sup>80</sup>

The authors then focused on the length of time that a single judge presided over a DTC. They found that a judge who sat for at least two years had a lower recidivism rate by participants than judges who presided for a lesser period of time.<sup>81</sup> They also discovered that the reduction in recidivism improved dramatically during the judge's second year.<sup>82</sup> A DTC judge who served for more than two years reduced recidivism by over 300% (Figure 1).<sup>83</sup>

The reduction in recidivism also led to greater long-term cost savings, which totaled more than 300% (Figure 2).<sup>84</sup>

The study also found that a drug-court judge who served for two years or longer had a slightly higher graduation rate among drug participants.<sup>85</sup>

The reduction in recidivism when one judge presides for two years or longer in a DTC

73. *Id.* at 155.

74. NAT'L INST. OF JUSTICE, *supra* note 63, at 11. The report, however, contained an interesting caveat:

Researchers found evidence both to support and not to support the importance of the single judge approach, depending on the outcome that was examined. They speculate that the single judge hypothesis might actually represent other presumptions of the drug court model, such as the need for effective judicial supervision, continuity of monitoring, and consistency in rules and responses to participant behavior during the drug court process. Additional studies are currently being conducted to specifically test the impact of judicial oversight.

75. GOLDKAMP ET AL., *supra* note 32, at 157.

76. *Id.* at 133.

77. Scott Senjo & Leslie A. Leip, *Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process*, 3 WESTERN CRIMINOLOGY REV. 1 (2001), <http://www.westerncriminology.org/documents/WCR/v03n1/senjo/senjo.html>.

78. CAREY ET AL., *supra* note 67, at 59.

79. *Id.*

80. *Id.* (emphasis added).

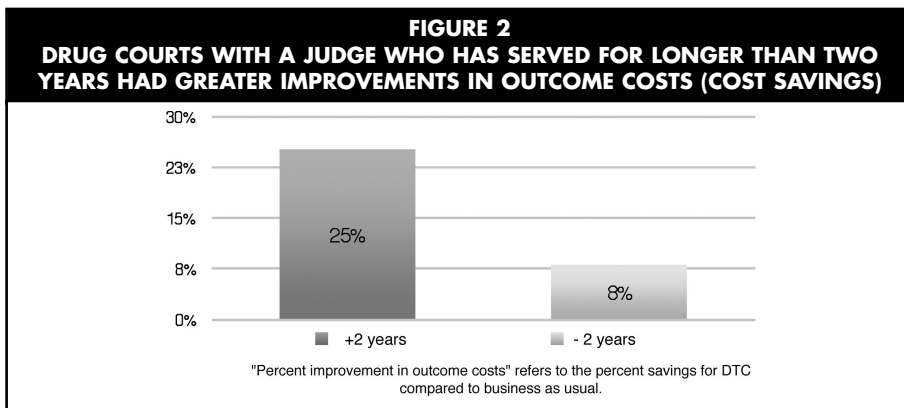
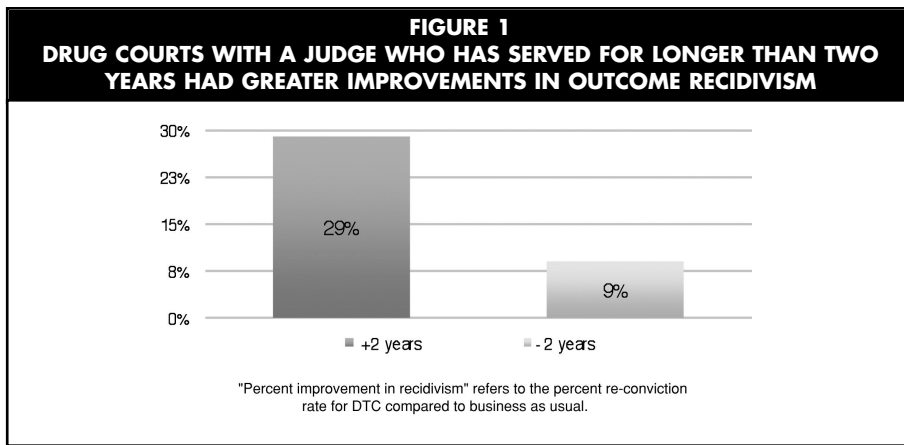
81. *Id.* at 56.

82. *Id.*

83. *Id.*

84. *Id.*

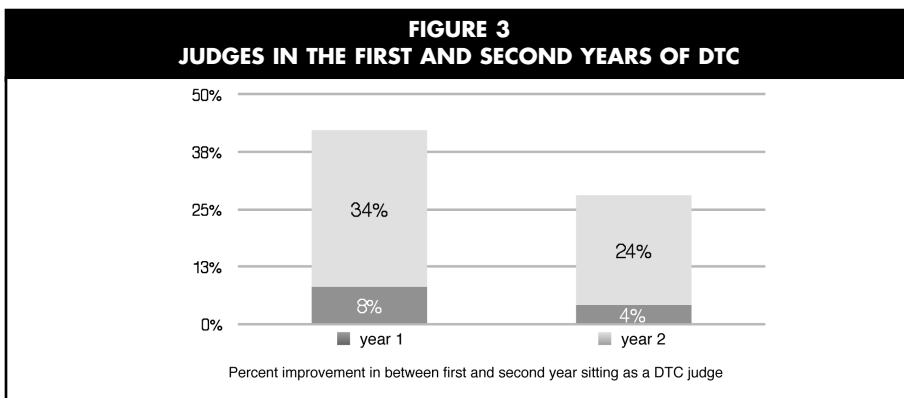
85. *Id.* The graduation rates were 52% for programs with judges who stayed longer versus 45% for programs with judges who stayed less than two years.



was highlighted by yet another study by NPC Research. In that study, the two judges exhibited dramatic decreases in recidivism rates during their second year. One judge went from an 8% reduction in recidivism in year one to a 42% reduction in year two. (Figure 3). A second judge went from a 4% reduction in recidivism to a 28% reduction.<sup>86</sup>

On the other hand, courts that use numerous judges in their DTCs do not make the best use of the power of the judge, “as many drug courts engage in practices (*such as rotating judges or having multiple drug court judges*) that would be expected to diminish judicial effectiveness.”<sup>87</sup>

Another significant finding involved judges who presided over DTCs in the later stages of their existence. The success rate for these later judges was better than their predecessors.<sup>88</sup>



86. *Id.*

87. ROSSMAN ET AL., *supra* note 10, at 117 (emphasis added).

88. MICHAEL W. FINIGAN ET AL., *IMPACT OF A MATURE DRUG COURT OVER*

One of the earliest DTCs, the Multnomah County Drug Court, discovered that the court itself had to invent its own operating procedures. As the court matured, the information was passed on from one judge to the next, leading to a more formal process where experienced judges taught their successors.<sup>89</sup>

These new judges were learning that the value of having a relationship with the participant made that individual feel respected and supported, predisposing them to success.<sup>90</sup> According to the MADCE final report, this approach caused participants to believe

that their judge treated them more fairly than the comparison group, including demonstrating *greater respect* and interest in them as individuals and *greater opportunities to express their own voice during the proceedings*. Furthermore, when offenders have more *positive attitudes toward the judge*, they have *better outcomes*. This was true across all offender subgroups when examining demographics, drug use history, criminality, and mental health.<sup>91</sup>

The researchers also did a separate, structured observation of the review sessions and confirmed that DTC judges who exhibited

*a more positive judicial demeanor (e.g., respectful, fair, attentive, enthusiastic, consistent/predictable, caring, and knowledgeable) produced better outcomes than other drug courts*. Both analyses reaffirmed the central role of the judge.<sup>92</sup>

The evidence showed that individuals who felt that their judge gave them a *voice* by providing them with a chance to tell their story, maintained neutrality through fair treatment, demonstrated *respect*, was knowledgeable about their case, and could be trusted reported fewer days of drug use one year later, confirming the interventive power of the four principles of procedural fairness.<sup>93</sup>

## THE IMPACT OF PROCEDURAL FAIRNESS IN A DTC

“The mechanism by which drug courts reduce substance use and crime is through participants’ attitudes toward the judge. When participants have more positive attitudes toward the judge, they have better outcomes.”<sup>94</sup>

The question is no longer “does the judge’s relationship with a DTC participant affect that participant’s success?” but “what are the best ways for a judge to build a connection with the participant so that successful outcomes are maximized?” It’s increasingly clear that the answer is the adoption of the four principles of procedural fairness and their active application in review sessions.

This paper represents an original consolidation of the existing research on the four principles of procedural fairness and their impact on DTC success.

89. *Id.* at 38.

90. ROSSMAN ET AL., *supra* note 10, at 208.

91. ROSSMAN ET AL., *supra* note 12, at 7 (emphasis added).

92. *Id.* (emphasis added).

93. ROSSMAN ET AL., *supra* note 10, at 106.

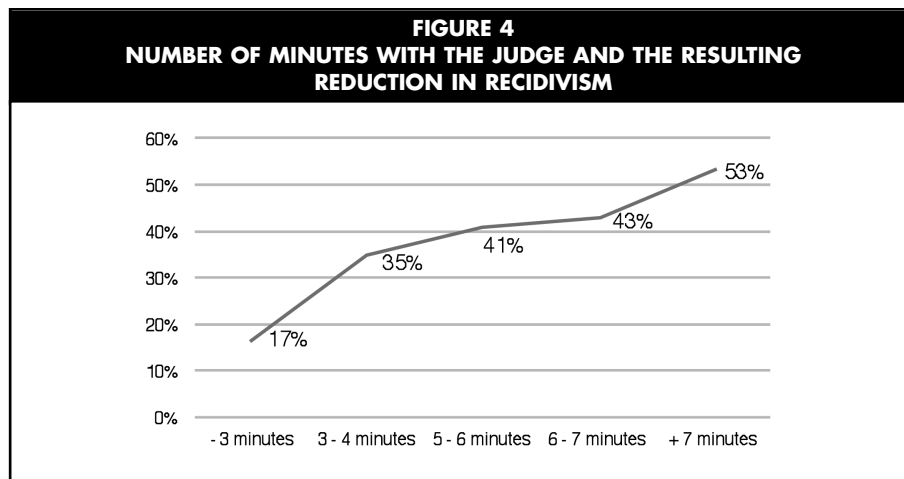
94. *Id.* at 258.

## VOICE

“Drug court participants clearly personalized the experience of appearing before and speaking to the judge in court; it appears to have a powerful effect. Participants spoke about being very nervous before court appearances, particularly when they anticipated sanction or reprimand[,] and also about the sense of satisfaction when they received positive feedback from the judge.”<sup>95</sup>

**P**articipants’ perception that their voice mattered in a DTC review session has been shown to be critical to their success.<sup>96</sup> Regular judicial interaction during a review session allows participants to converse with their judge, respond to judicial queries, and make independent statements.<sup>97</sup> Although this level of interaction requires time, when a judge engages in this way, it has a significant and positive impact.

NPC’s researchers established that if a judge spends the time to give participants an opportunity to express themselves in a review session, it significantly reduces recidivism.<sup>98</sup> Further, the longer a judge interacts with a drug-court participant in a review session, the greater the reduction in recidivism. Judicial interaction that lasts over three minutes reduces participant recidivism by almost half.<sup>99</sup> A judge who spends more than seven minutes with a participant attains more than triple the reduction in recidivism (Figure 4).<sup>100</sup>



Judicial status hearings, one of the defining features of DTCs, are admittedly both time-consuming and expensive.<sup>101</sup> However, a judge who meets with a participant at least every other week during the early stages of a DTC has greater reductions in recidivism and costs to the taxpayer than a judge who meets less often.<sup>102</sup> When a judge meets with a partici-

95. DONALD J. FAROLE, JR. & AMANDA B. CISSNER, SEEING EYE TO EYE? PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS, at iii (2005).

96. ROSSMAN ET AL., *supra* note 12, at 7.

97. SHELLI B. ROSSMAN ET AL., 3 THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE DRUG COURT EXPERIENCE 28 (2011).

98. Shannon M. Carey et al., *What Works? The Ten Key Components of*

*Drug Court: Research-Based Best Practices*, 8 DRUG CT. REV. 6, 24 (2012).

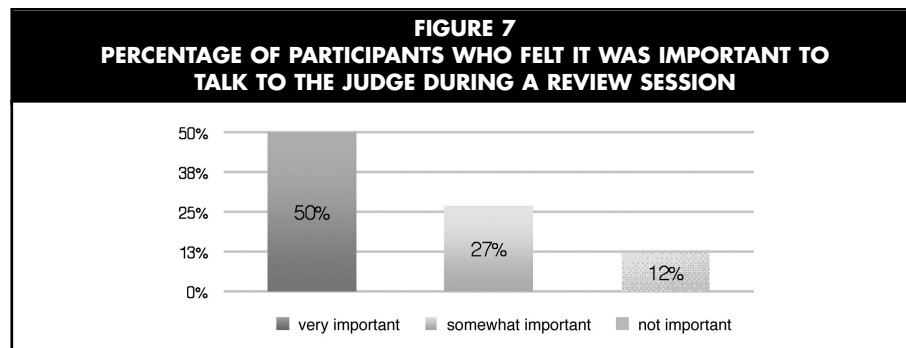
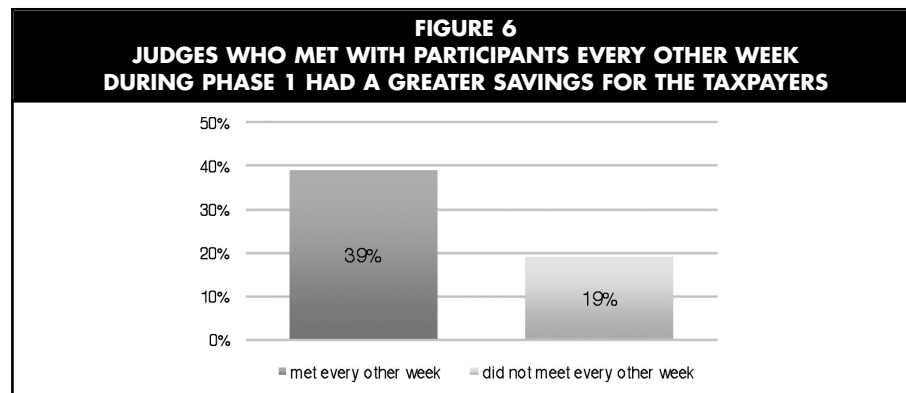
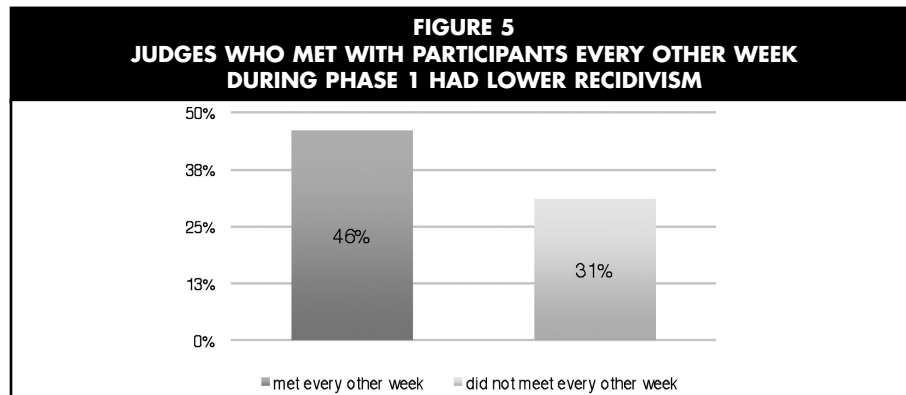
99. *Id.*

100. *Id.*

101. Marlowe et al., *supra* note 9, at 26.

102. CAREY ET AL., *supra* note 67, at 57.

pant every two weeks, there's a nearly 50% reduction in recidivism (Figure 5)<sup>103</sup> and an over 50% cost savings to the taxpayer (Figure 6).<sup>104</sup>



These statistics are supported by responses from the participants themselves. In one study, 65% of respondents said that they would not have been able to complete the drug-court program if they had appeared before a judge less frequently.<sup>105</sup>

Participants have been telling researchers since the inception of DTCs that their relationship with the judge was a major factor in their success in becoming drug-free. One study found that 77% of DTC participants thought it was important or somewhat important that they talk to the judge during a review session (Figure 7).<sup>106</sup>

103. *Id.*; see also Anna M. Malsch & Paige M. Harrison, NPC Research, Reentry Court Planning, Implementation, and Evaluation, presentation to the Oregon Judicial Conference (October 22, 2013), [http://npcresearch.com/wp-content/uploads/Oregon\\_](http://npcresearch.com/wp-content/uploads/Oregon_)

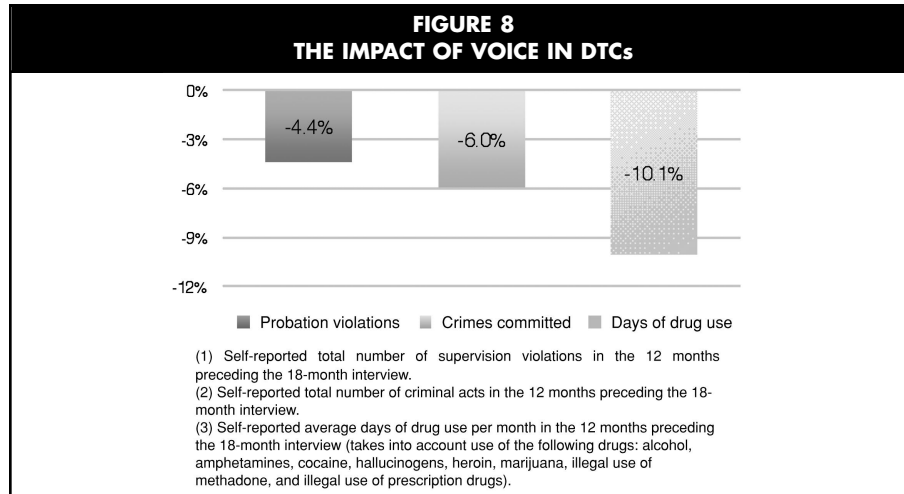
Judicial\_Conference\_1013.pdf.

104. *Id.*

105. Senjo & Leip, *supra* note 77.

106. *Id.*

Giving voice to a DTC participant led to a more positive attitude toward the judge, which, in turn, caused greater reductions in drug use and crime.<sup>107</sup> Participants in the study also felt that their judge gave them greater opportunities to express their own voice during the proceedings.<sup>108</sup> There is a marked correlation between participant success and voice (Figure 8).<sup>109</sup>



## NEUTRALITY

“Hence, taking steps to promote a fair court experience, and having a judge who can serve as an effective symbol of the court’s commitment to fairness, neutrality, and respect, can improve concrete offender outcomes . . . .”<sup>110</sup>

The impact of having a voice in the proceedings is dramatically reduced if the participant holds a perception that a magistrate has pre-decided the outcome. The status session in a DTC creates an opportunity for judges to use their inherent authority in a productive way. The repeated sessions enable judges to engage the participant in ways that are fruitful and establish ongoing relationships that are perceived as fair.<sup>111</sup>

Praise by a judge is a primary reward that can be offered to participants in a DTC.<sup>112</sup> Judges in DTCs are almost eight times more likely to praise the defendant than judges in non-DTCs (Figure 9).<sup>113</sup>

Using praise as a reward for appropriate behavior has been shown to significantly reduce recidivism and drug use.<sup>114</sup> In one study, the number of crimes expected to be committed after 6 months was reduced by 19.3% and at 18 months was reduced by 9.8% when compared to a court that does not offer rewards (Figure 10).<sup>115</sup>

107. ROSSMAN ET AL., *supra* note 10, at 259.

108. ROSSMAN ET AL., *supra* note 12, at 7.

109. ROSSMAN ET AL., *supra* note 97, at 95-96.

110. *Id.* at 98.

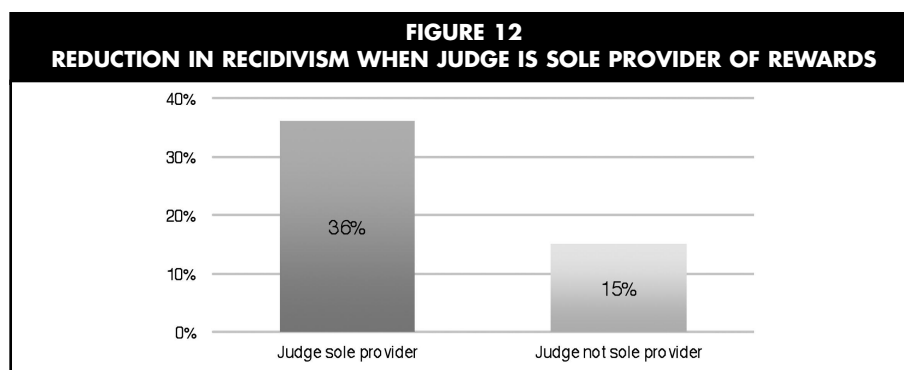
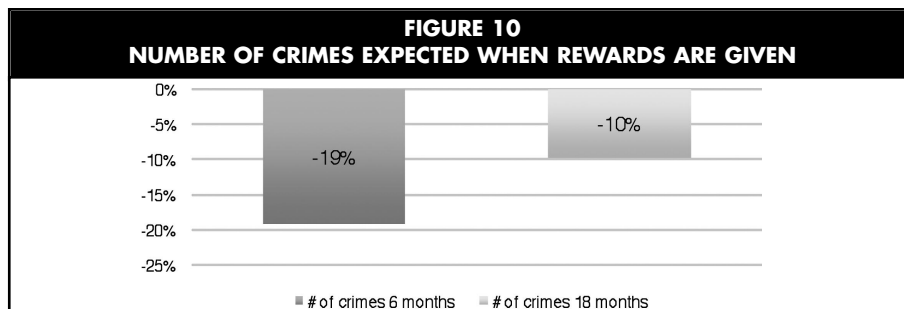
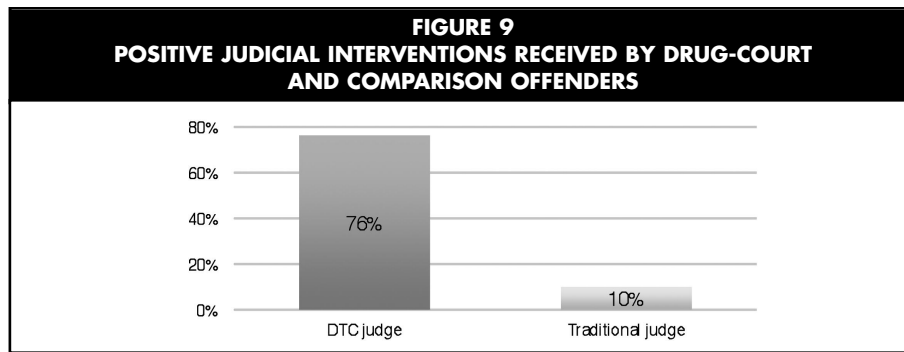
111. ROSSMAN ET AL., *supra* note 10, at 259.

112. NAT’L ASS’N OF DRUG COURT PROFESSIONALS, *supra* note 9, at 13.

113. ROSSMAN ET AL., *supra* note 10, at 29.

114. *Id.* at 224.

115. *Id.*



There was also a decline in the number of expected days of drug use, with a reduction of 9.2% at 6 months and 6.3% at 18 months (Figure 11).<sup>116</sup>

The impact of rewards is enhanced when the judge is the sole provider of those rewards, both in terms of recidivism (Figure 12) and savings to the taxpayers (Figure 13).<sup>117</sup>

An additional benefit of the judge being the sole provider of rewards is a slight increase in program graduation rates.<sup>118</sup> Interestingly, in their study, NPC researchers found no

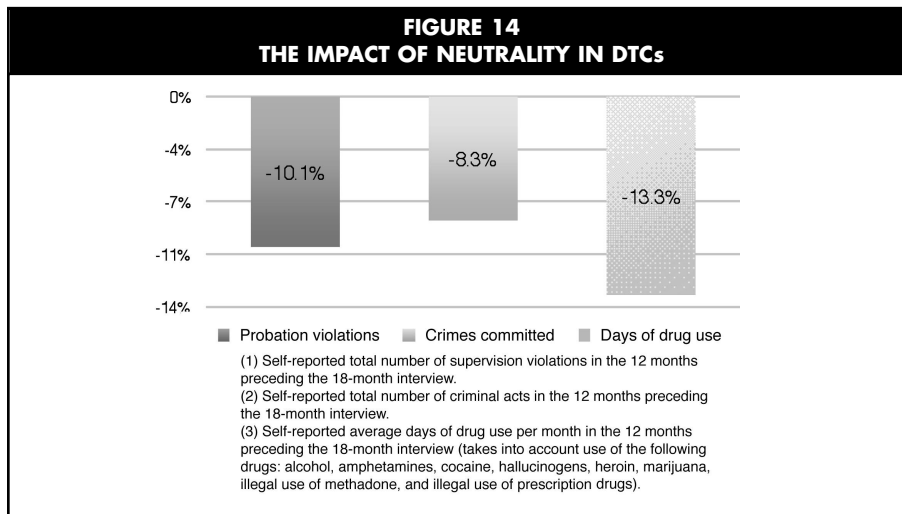
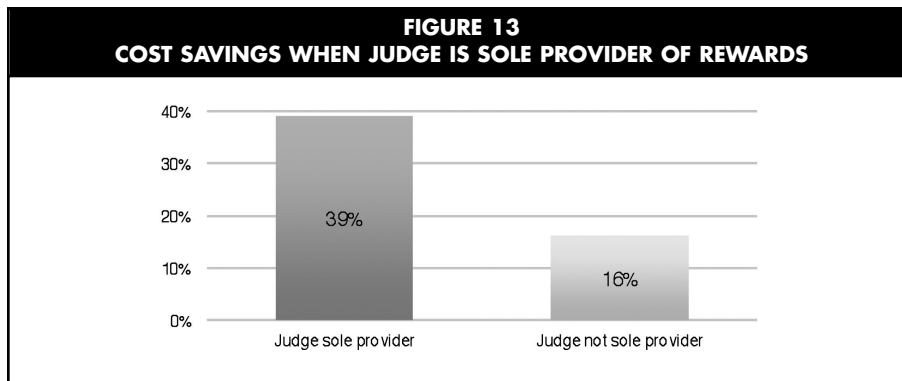
116. *Id.*

117. CAREY ET AL., *supra* note 67, at 51. Special thanks to Dr. Carey for

translating the cost-savings data to recidivism data.

118. *Id.*





evidence that suggested a judge should be the sole provider of sanctions for program violations. This suggests that sanctions, equitably applied, have little impact upon participant perceptions of judicial fairness or neutrality. However, there is an unmistakable connection between participant success and judicial neutrality (Figure 14).<sup>119</sup>

## RESPECTFUL TREATMENT

“Programs with judges that treated clients fairly and respectfully were shown to achieve better success than programs without such judges.”<sup>120</sup>

The commonality shared by top-performing DTCs is that the judges who preside over them understand the importance of making participants feel respected, which leads to better outcomes.<sup>121</sup> Participants in these top-performing courts believed that their judge treated them with more respect than participants in a comparison group.<sup>122</sup> This perception was validated by research observations that found that DTC judges who were respectful presided over courts that were more successful.<sup>123</sup>

119. ROSSMAN ET AL., *supra* note 97, at 96.

120. ROSSMAN ET AL., *supra* note 10, at 211.

121. *Id.* at 209.

122. ROSSMAN ET AL., *supra* note 12, at 7.

123. *Id.*

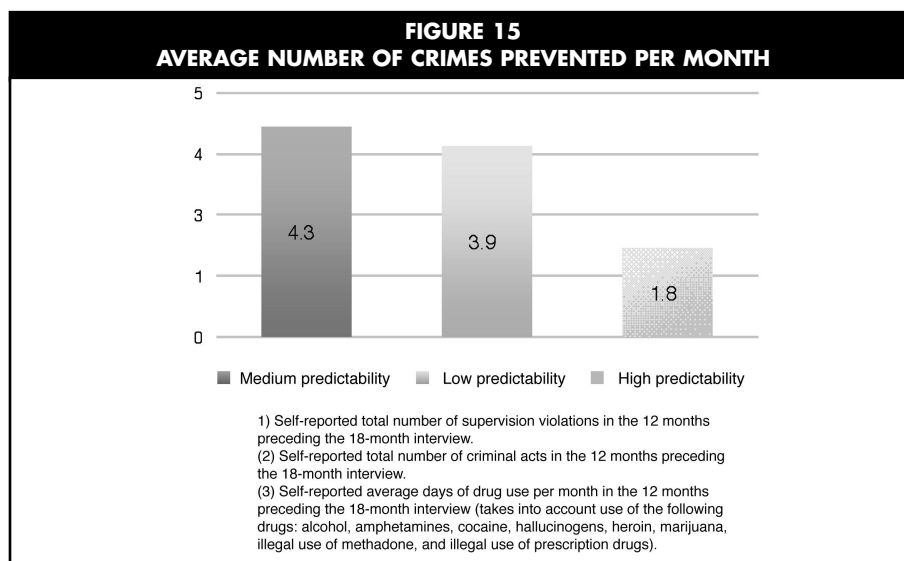
A study of a domestic-violence court modeled on the components of the DTC found that the respect that existed between the participant and the judge appeared to be the primary reason that the defendants complied with the court's orders.<sup>124</sup>

DTCs with judges who treat participants respectfully achieve better success than programs without such judges.<sup>125</sup> In contrast, judges who use criticism and negative feedback had higher rates of recidivism.<sup>126</sup>

In addition to promoting neutrality, judicial praise is a particularly important way of showing respect to participants. Drug-court participants who received judicial praise more often and who had a higher frequency of judicial status hearings reported committing fewer crimes and using drugs on fewer days.<sup>127</sup>

Moreover, participants do less well with judges who do not deviate from a fixed sanction structure.<sup>128</sup> Judges who are flexible in following a known sanction structure are almost two and a half times more likely to reduce recidivism when compared to judges who follow a rigid sanction structure (Figure 15).<sup>129</sup>

Even judges who rarely follow a known sentencing structure are more than twice as likely to prevent recidivism as judges who follow a rigid structure.<sup>130</sup>



Judges who follow a flexible pattern and customize incentives and sanctions are almost one and a half times more likely to reduce drug use than those judges who follow a rigid pattern and twice as likely to reduce drug use as judges who rarely follow a sentencing pattern (Figure 16).<sup>131</sup>

124. Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263, 295 (2002).

125. Scott R. Senjo & Leslie A. Leip, *Testing and Developing Theory in Drug Court: A Four Part Logit Model to Predict Program Completion*, 12 CRIM. JUST. POLY REV. 66, 66 (2001). Note: Some have suggested that the results of the study may suffer from a causation problem, as those who do well in the program are more likely to receive praise and encouragement.

126. Terance D. Miethe et al., *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQUENCY 522 (2000).

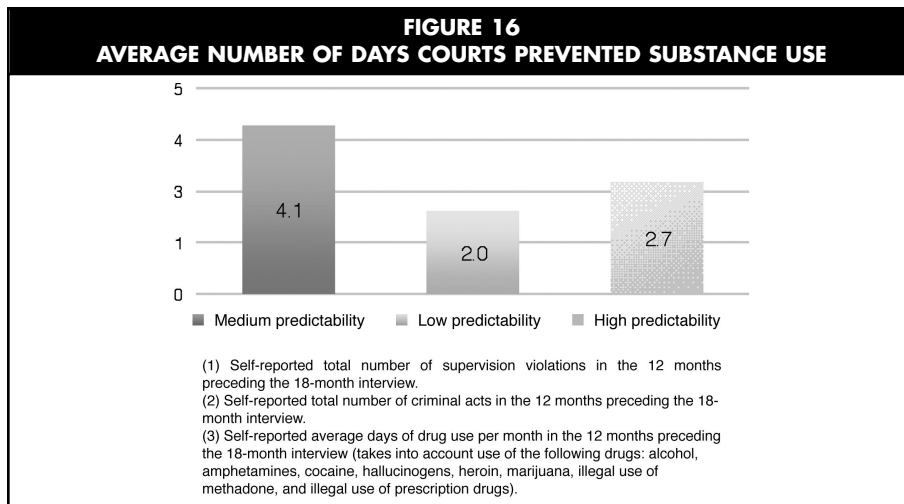
127. ROSSMAN ET AL., *supra* note 10, at 259.

128. *Id.* at 211.

129. *Id.* at 144.

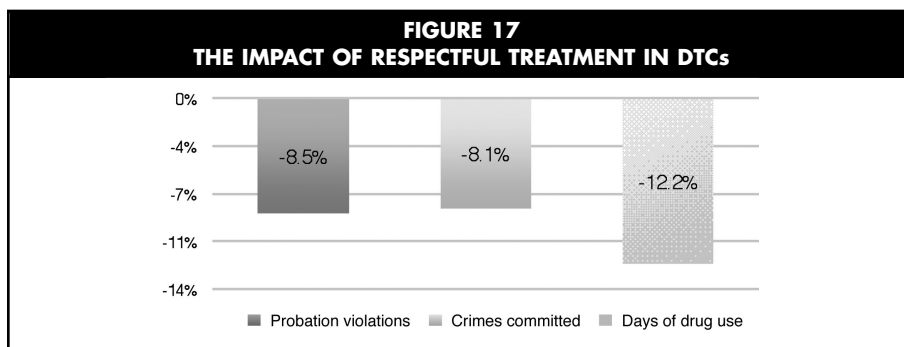
130. ROSSMAN ET AL., *supra* note 10, at 144.

131. *Id.* at 144-51.



Research findings confirm that judges who show defendants respect through the use of positive reinforcement and a willingness to be flexible in their sanctions preside over the most successful DTCs.<sup>132</sup> In these high-performing courtrooms, participants understand that their judge is treating them as individuals, taking into account both their efforts and their circumstances.<sup>133</sup> Courts that are considered too rigid or too flexible are less successful and may, in fact, create frustration and noncompliance through their inconsistency or rigidity.<sup>134</sup> This suggests that providing participants with a known set of sanctions that are applied with flexibility, are not arbitrary, and are clearly explained creates a sense of respect in participants that enhances DTC success.<sup>135</sup>

There's a distinct association between participant success and respectful treatment (Figure 17).<sup>136</sup> DTC participants who perceived their judges as respectful committed 8.5% fewer probation violations, committed 8.1% fewer new crimes, and had a 12.2% reduction in days of drug use.



132. *Id.* at 211.

133. *Id.* at 208.

134. *Id.* at 211.

135. Janine M. Zweig et al., *Drug Court Policies and Practices: How Pro-*

*gram Implementation Affects Offender Substance Use and Criminal Behavior Outcomes*, 8 *DRUG CT. REV.* 43, 74-75 (2012).

136. ROSSMAN ET AL., *supra* note 97, at 95-96.

## TRUSTWORTHY AUTHORITIES

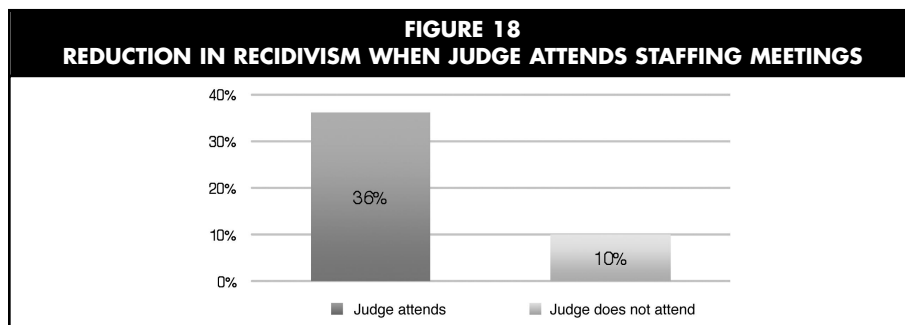
“Most clients indicated that the judge was fair, respectful, and trustworthy. Moreover, the judge was believed by the majority to be influential in terms of their progress.”<sup>137</sup>

**D**TC participants who believed that their judge could be trusted to be fair and treated them with respect reported fewer days of drug use 18 months into the program.<sup>138</sup> Additionally, participant trust in the judge is critical to participant success in a DTC, according to a report published by the National Institute of Justice:

Offenders report that interactions with the judge are one of the most important influences on the experience they have while in the program. They respond to the judge’s interpersonal skills and ability to resolve legal problems expeditiously and provide ready access to services.<sup>139</sup> Thus, it’s not just the amount of time a judge spends with a participant during a review session, but how the judge interacts with the person. A judge must be knowledgeable about the participant. The best way for a judge to become acquainted with each participant is to attend the staffing session.<sup>140</sup> The staffing session, also known as a DTC team meeting, generally occurs just before the courtroom review session.<sup>141</sup> During these sessions, the team generally reviews how each participant has done since his or her last court date and recommends to the drug court (judge) what action to take or what topics to address with each participant.<sup>142</sup>

The information gained during a staffing session allows the judge to become familiar with each participant, knowing their name and the circumstances of their case, thus providing the foundation for a sense of trust.<sup>143</sup> Studies show that a judge who attends staffing sessions reduces recidivism by more than 300% (Figure 18).<sup>144</sup>

However, attending the staffing session is only the beginning. Judges who are not willing to do the additional work necessary to gain a participant’s trust are unlikely to preside



137. Christine A. Saum et al., *Drug Court Participants’ Satisfaction with Treatment and the Court Experience*, 4 DRUG CT. REV. 39, 56 (2002).

138. ROSSMAN ET AL., *supra* note 10, at 106.

139. NAT’L INST. OF JUSTICE, *supra* note 63, at iii.

140. Shannon M. Carey, 2013 Best Practices Top 10, presentation to Michigan Association of Drug Court Professionals, slide 62 (2013) (on file with the author).

141. Carey et al., *supra* note 98, at 37; Michael Tobin, *Participation of Defense Attorneys in Drug Courts*, 8 DRUG CT. REV. 96, 106. The staffing is generally composed of the judge, attorneys, coordinator, probation, treatment, and a representative from law enforcement.

142. Tobin, *supra* note 141, at 106.

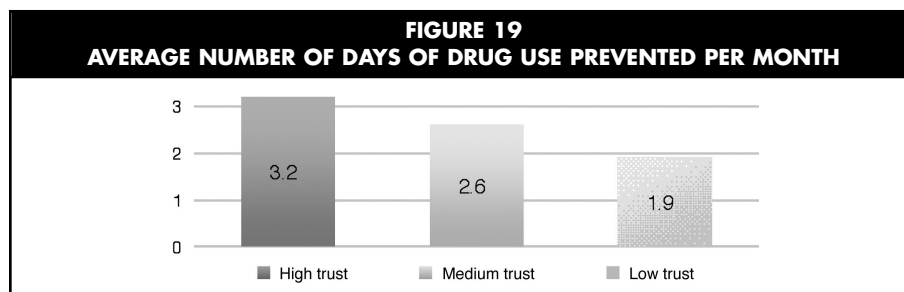
143. THE DRUG COURT JUDICIAL BENCHMARK, *supra* note 39, at 47-61.

144. Carey, *supra* note 140, at slide 62.

over successful DTCs.<sup>145</sup> Courts with judges who understand the value of building trust with participants by making them feel respected and supported create a positive relationship. This positive attitude toward the judge has a direct impact on a participant's subsequent success:

[R]espondents who displayed a more positive attitude toward the judge six months after the baseline interview (e.g., said their judge was knowledgeable about their case, gave them a chance to tell their side of the story, could be trusted to treat them fairly, treated them with respect) reported fewer days of drug use in the subsequent 18-month interview.<sup>146</sup>

This participant feedback is supported by actual observation. Judges with high positive attributes (*i.e.*, judges who were respectful, fair, attentive, enthusiastic, consistent, predictable, caring, and knowledgeable) were able to establish trust, which led to reduced participant drug use when compared to judges who were not considered to be trustworthy.<sup>147</sup> Judges who were highly trusted were almost twice as effective in preventing drug use as judges who were not highly trusted (Figure 19).<sup>148</sup> DTCs whose judges were perceived as trustworthy also prevented crimes among their participants.<sup>149</sup> The positive attributes that each DTC judge displayed created an environment of trust. When participants came to the understanding that they could trust their judge, their chances of success increased.



## SUMMARY

“[T]aking steps to promote a fair court experience, and having a judge who can serve as an effective symbol of the court’s commitment to fairness, neutrality, and respect, can improve concrete offender outcomes . . . .”<sup>150</sup>

**T**he factors that make up a successful DTC are diverse, but the emerging research demonstrates, beyond a reasonable doubt, that the interaction between a judge and a participant is central to that success.<sup>151</sup> The bond between participant and judge is not solely dependent upon the judge’s personality but rather upon the nature of that judge-participant relationship.

145. ROSSMAN ET AL., *supra* note 10, at 260.

146. *Id.* at 106.

147. ROSSMAN ET AL., *supra* note 10, at 197; *see also* AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND “DO THEY WORK?” 11 (2006) (“By contrast, the overriding prevalence of negative and stigmatizing judicial feedback was held largely responsible for

the negative evaluation results (higher rates of re-offending among participants than the comparison group) in one study of the Las Vegas drug court.”).

148. *Id.*

149. *Id.*

150. ROSSMAN ET AL., *supra* note 97, at 98.

151. ROSSMAN ET AL., *supra* note 12, at 7.

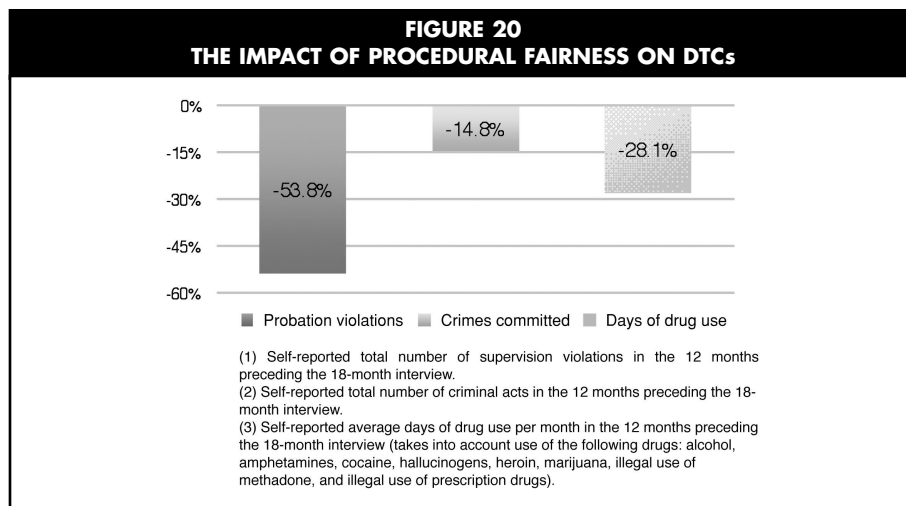
Different judges have different outcomes. There are significant divergences in DTC participant re-arrest rates based upon the judge.<sup>152</sup> As the authors of the MADCE study conclude:

[T]hese findings suggest that although drug courts are effective at promoting desistance in their present form, there is potential for drug courts to be even more effective.<sup>153</sup>

Making DTCs more effective requires focusing on the role that the judge plays:

First, even though we find that the judge has a prime role in shaping participant behavior, we note that drug courts do not necessarily maximize the potential of the judge—as many drug courts engage in practices (such as rotating judges or having multiple drug court judges) that would be expected to diminish judicial effectiveness. And finally, although other theoretical mechanisms were not shown here to be effective at modifying behavior, a substantial body of literature supports many of the underlying premises of deterrence and treatment motivation and eagerness. Thus, it is probably fair to conclude that if drug courts used these mechanisms more effectively, drug court results likely would be even better.<sup>154</sup>

The mechanisms for improvement are the application of the four principles of procedural fairness. There's a strong correlation between the principles and reductions in drug use, crimes committed, and probation violations (Figure 20).<sup>155</sup>



The evidence is overwhelming. For a DTC to be successful, a judge must provide participants with an opportunity to voice their concerns and a sense that they're treated with respect by a neutral and trustworthy authority.<sup>156</sup> The combined effect of the four principles of procedural fairness leads DTC participants to respond in a way that creates greater success. The success that these participants find in the courtroom transmutes into societal success, which reduces crime and decreases costs borne by taxpayers. This is the community-wide impact of procedural fairness.

152. FINIGAN ET AL., *supra* note 88, at 36.

153. ROSSMAN ET AL., *supra* note 10, at 117.

154. *Id.*

155. ROSSMAN ET AL., *supra* note 97, at 97.

156. ROSSMAN ET AL., *supra* note 10, at 212.

## RECOMMENDATIONS

### FOR DTC JUDGES

1. Read the AJA's 2007 white paper, *Procedural Fairness: A Key Ingredient in Public Satisfaction*.<sup>157</sup> It will provide a deeper understanding of the key components of procedural fairness and act as a primer for the day-to-day operation of a DTC.
2. Promote *Voice*
  - Practice being a better listener. As the 2007 AJA white paper noted: "Listening is not the absence of talking. There are some excellent books about improving listening. The first step is good self-analysis. Each of us has different strengths and weaknesses. All of the literature concludes that you can become a better listener. The local academic community might be a good repository of advice."<sup>158</sup>
  - Hold frequent judicial status hearings, which will provide participants more opportunities for voice. Frequent status hearings increase participant contact with judges, which research has shown to be critically important. Additionally, in light of previous research on this topic, consider increasing the frequency of status hearings for "high risk" participants in particular.
  - During judicial status hearings, begin by greeting each participant by name, and conclude by offering well-wishes. Give participants a chance to speak before making key decisions. When making decisions, show respect by acknowledging participants' points of view. Even when their voiced opinion does not change the outcome, participants are more likely to view the decision as fair when they've been heard.
  - Spend at least three minutes with each participant. As previously discussed, the more time above three minutes spent with the participant, the greater the reduction in recidivism.
3. Promote *Neutrality*
  - Take time, when admitting a participant into a DTC, to explain the rules that will apply to the program and what rights they are giving up when they enter. This will also begin the process of establishing trust. The better participants understand the process, the more likely they are to succeed.
  - At the start of a judicial status hearing, explain the ground rules. Explain what is going to happen and why cases are going to be called in a particular order. Remind participants of their responsibilities and consequences of compliance and noncompliance in multiple hearings; ask if participants need new copies of the handbook or other materials used to deliver incentives and sanctions. It will help the new participants understand the nature of a status hearing and serve as a reminder for those who have more time in the program.
  - When making a decision, cite relevant laws, procedures, or program policies.
  - Always provide due process before imposing sanctions.
4. Promote *Respect*
  - List incentives and sanctions and their ground rules in the participant handbook but maintain some flexibility when applying them. Have examples of incentives and sanctions and the grounds for them in the handbook.

157. Available at <http://aja.nesc.dni.us/pdfs/AJAWhitePaper9-26-07.pdf>.

158. Burke & Leben, *supra* note 11, at 20.

- Be flexible in the imposition of incentives and sanctions by giving the participants' circumstances due consideration. Explain the reasons to both the participant and observers in the courtroom.
5. Promote *Trust*
- Be positive. Judges who were more supportive of participants produced better outcomes. Establish trust by being respectful, fair, consistent, caring, and knowledgeable about participants' lives. Do this by focusing on the participant instead of the computer or other things on the bench. Make use of nonverbal cues like eye contact and facial expressions. Avoid negative language and sarcasm. Do not sigh or express exasperation.
  - Attend all staffing sessions before the status hearing. Attendance at the staffing session will provide judges with information about individual participants that will improve judicial interaction with those participants. This, in turn, will give participants a sense that the judge can be trusted.
  - Ensure that participants comprehend the nature of the judicial status hearing and their place in it. It's the judge's responsibility to ensure that the participants, and the people in the courtroom supporting them, understand the process.

## FOR COURTS

6. Judges may take some time developing effective approaches in a DTC, and, therefore, a reasonable period of time may be needed before their style effects change in offender behaviors. For this reason, routinely rotating judges on and off drug-court benches will likely decrease judges' ability to successfully implement their roles and reduce the overall level of success of those drug-court programs.
7. Prepare judges new to the assignment by having them watch the online program for DTC judges, observe a DTC staffing and session, and read *The Drug Court Judicial Benchbook*.<sup>159</sup> Have the judge attend an orientation and judicial training as soon as possible after being assigned to the DTC.<sup>160</sup>
8. Choose DTC judges carefully. Not all judges are suited to the DTC model. Assigning a judge who does not believe in engaging participants or who will not follow the four principles of procedural fairness will negatively affect the operation of the DTC. The court will be best served if the judges assigned to the DTC docket are those who are committed to such courts and, equally as important, to the precepts of procedural fairness.
9. Monitor the DTC judge. There are a number of ways this can be accomplished. For example: distribute a survey at graduation asking participants about their attitude toward the judge or request that observers from the Supreme Court administrative office or the state drug-court association observe both staffing sessions and status hearings. Call in an outside expert to observe and provide technical assistance, including judicial coaching, to increase effectiveness. Use the data collected through these methods to help educate the judge in the core values of procedural fairness.
10. Provide a written handbook about the DTC to participants. The handbook should be in plain language and should include DTC policies, procedures, and expectations, including the incentives and sanctions.

159. Available at [http://www.ndci.org/Transitioning\\_Judges](http://www.ndci.org/Transitioning_Judges).

<https://register.judges.org/default.aspx?p=S12-WBTDCL>.

160. To register for courses at the National Judicial College, visit



11. Courts should send DTC judges to procedural-fairness trainings conducted by qualified judicial educators. Administrative offices of the courts should provide continuing education in this area.

#### FOR RESEARCHERS

12. Additional research examining the impact of the other members of the DTC team, and clients' perceptions of them, should be performed. This would allow the DTC community to determine the level to which these team members can further influence reductions in drug use and crime. Specifically, researchers could investigate attitudes toward primary case managers, probation officers, prosecutors, and defense attorneys.
13. Continuing studies on the impact of judges trained in the four principles of procedural fairness and DTC success should be undertaken.

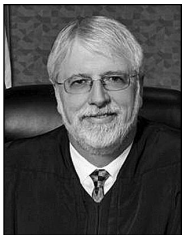
#### FOR JUDICIAL EDUCATORS

14. In our 2007 white paper, the AJA called upon the National Science Foundation and others who fund social-justice research to reach out to judges to develop strategies that ensure that sound, academic social-science research is shared in forms that are likely to produce change within the courts. Journals like *Court Review*, the quarterly journal of the American Judges Association, and judicial-education conferences are key venues for the dissemination of this information. We renew this call with an added emphasis on the need to share research on the effects of procedural fairness in DTCs.
15. The AJA encourages judicial educators to distribute this paper. If judicial educators make appropriate and accessible information about procedural fairness easily available to DTC judges, change will begin to occur, even without a call for specific action.
16. Train judges on best practices regarding the four principles of procedural fairness. Judges do not innately have the traits that elicit the most positive outcomes from participants. As a result, drug-court training programs should be developed to specifically address best practices.
17. DTC judges should be formally educated on the implications of research regarding procedural issues and the action steps available to them. Procedural fairness might be developed as an intensive course of study presented by the NADCP or its educational branch, the National Drug Court Institute. In addition to considering procedural fairness as a stand-alone subject, the AJA suggests that training on procedural fairness be integrated into the NADCP's annual educational conference.
18. Judicial educators should train judicial trainers in procedural fairness. The AJA will do its part by developing a program to train the trainer on the core principles of procedural fairness.
19. The American Judges Association calls on the National Judicial College to develop a course on procedural fairness and to integrate its principles in its general-jurisdiction courses.

## FOR JUDICIAL LEADERS

20. The AJA encourages the Conference of Chief Justices to place the issue of procedural fairness in DTCs on its agenda. Each state chief justice has enormous influence on the agenda for justice and education in his or her state. Collectively the Conference of Chief Justices can set the agenda for our nation's state courts. Many states already are deeply committed to the development of additional DTCs, and many individual chief justices are champions of this issue. The AJA would be happy to work with the Conference of Chief Justices DTC committee in developing ways to teach state DTC judges the four principles of procedural fairness.
21. The AJA also encourages the Federal Judges Association to place the issue of procedural fairness in DTCs on its agenda. The AJA would be happy to work with the Federal Judges Association and the Federal Judicial Center to develop ways to teach federal DTC judges the four principles of procedural fairness.
22. The AJA encourages the Bureau of Justice Assistance, the Veterans Administration, and the National Highway Traffic Safety Administration to fund research specifically targeted to improving the procedural fairness of DTCs, veterans' treatment courts, and DWI courts. The AJA encourages the National Center for State Courts and the Center for Court Innovation to join it in developing educational approaches to integrating procedural-fairness principles into DTCs.
23. The AJA encourages the American Bar Association and other bar-association leaders to join with the courts to ensure greater procedural fairness in our DTCs. Lawyers need to be educated on the social-science research described in this paper so that all of the stakeholders within the court system can work together toward a system of justice that can be respected by all.

### ABOUT THE AUTHOR



Judge Brian MacKenzie is an award-winning judicial educator who has written and presented on a broad range of issues, including procedural fairness, veterans' treatment courts, domestic violence, and court-media relations. He was honored by the Foundation for the Improvement of Justice with the Paul H. Chapman medal for significant contributions to the American criminal-justice system. He is the co-editor of the book *Michigan Criminal Procedure*, and his most recent article is *Extrajudicial Speech: Judicial Ethics in the New Media Age*, published by the *Reynolds Courts & Media Law Journal*.

Judge MacKenzie is currently the Chief Financial Officer of the Justice Speakers Institute, having retired from the 52nd District Court, located in Novi, Michigan, after almost 27 years of service. He has served as President of the American Judges Association and President of the Michigan Association of Drug Court Professionals and was the American Bar Association/National Highway Traffic Safety Administration Judicial Fellow.

Judge MacKenzie received his Juris Doctorate from Wayne State University Law School in 1974. He is married to Karen MacKenzie, and they share three children (Kate, David, and Breanna) and three grandsons (Daniel, Raymond, and Henry).

## ABOUT THE AMERICAN JUDGES ASSOCIATION

The American Judges Association (AJA) is the largest independent association of judges in North America. Formed in 1959, it has about 2,000 members from all levels of the judiciary: municipal, state or provincial, and federal; trial, appellate, and administrative. The majority of its membership consists of trial-court judges from the United States and Canada.

The American Judges Association seeks to serve as the Voice of the Judiciary® by speaking out on issues of concern to judges and by working to improve the work done by judges and the judiciary. The AJA provides high-quality educational programs for judges at an annual educational conference and publications with information useful to judges. The AJA supports a variety of programs and initiatives that promote fair and impartial courts, including the work of Justice at Stake ([www.justiceatstake.org](http://www.justiceatstake.org)), a partnership of more than 30 organizations, including the AJA, dedicated to maintaining fair and impartial courts.

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