



## Statement on the Impact of 2019 Wisconsin Act 106 on Operating While Intoxicated and Other Treatment Courts in Wisconsin

**Who we are** Since 2004, the Wisconsin Association of Treatment Court Professionals (WATCP) has provided training and advocacy for over 600 members from 90 treatment courts across the state, including Wisconsin's 17 Operating While Intoxicated (OWI) treatment courts. Our membership includes professionals from a variety of criminal justice stakeholder organizations including judges, prosecutors, defense attorneys, corrections, treatment providers, and law enforcement.

**Background and Issues** In February of 2020, Act 106 was passed requiring those convicted of OWI as a fifth or sixth offense to serve a bifurcated prison sentence with not less than 18 months confinement. Previously, Wis. Stat. sec. 346.65(2)(am) 5 required a minimum sentence of 6 months. This allowed an offender to be placed on probation and participate in one of our state's OWI treatment courts. Act 106 now prevents this. Given past legislative support for treatment court programs, WATCP believes this to be an unintended consequence, which could be corrected through trailer legislation while still maintaining the original intent for non-OWI court participants.

OWI courts protect public safety by addressing the root causes of driving while impaired by either drugs or alcohol. OWI courts utilize a team of criminal justice professionals (including judges, prosecutors, defense attorneys, probation and parole agents and law enforcement) along with substance use treatment professionals to systematically change participant behavior. Like drug courts, OWI courts involve extensive interactions between the judge and the participants to hold the participants accountable for their compliance with court, supervision, and treatment conditions. Unlike drug courts, the OWI conviction stands regardless of program completion.

The National Transportation Safety Board (NTSB), Governor's Highway Safety Assoc. (GSHA) and other organizations have endorsed OWI treatment courts as a proven strategy to address the individualized needs of repeat OWI offenders while providing close supervision and accountability. Various multijurisdictional studies examining both general and intoxicated driving recidivism over multiple years have shown that OWI courts reduce both measures of recidivism on average by 12% and in some cases by as much as 50-60%. For example, a study done in 2009 on the alcohol treatment court in Waukesha County demonstrated a 16% reduction in recidivism 2 years after successful completion. Beyond

recidivism, other studies indicate OWI court participants are half as likely as other OWI offenders to be involved in an alcohol related accident and more likely to comply with court, supervision, and to have their license reinstated. OWI courts are also more cost effective than traditional approaches when accounting for reduced incarceration, recidivism and other costs. For example, one program produced average net cost savings of \$1,505 per participant and \$5,436 per graduate. Finally and most importantly, these programs improve the lives of their participants and the safety of those on our roads.

OWI courts are most effective for high risk/high need participants. 5<sup>th</sup> or 6<sup>th</sup> OWI offenders often fall within this group. The National Center on DWI (driving while intoxicated) courts has published The Ten Guiding Principles of DWI courts, to which the most effective courts adhere. This recommends that programs focus on “offenders with the most serious criminal and dependency issues, who are most in need of treatment, and whose behavior poses the most clear and present danger to society – that is, those offenders who are seen as having the most negative community impact.”<sup>1</sup> These offenders often present with complex co-morbidity including substance abuse, mental health, and other disorders. As recognized by GSHA, the traditional “‘make ‘em pay and lock ‘em up’ approach may get these offenders off the street, but punishment aimed at the immediate behavior rather than the cause and delivered in a vacuum is unlikely to reduce recidivism or lead to long-term behavior change.” OWI treatment courts on the other hand, address these individualized needs through treatment, supervision and accountability.

Wisconsin currently has 17 OWI courts. While some admit participants with different numbers of prior offenses, many are focused on 5<sup>th</sup> or 6<sup>th</sup> offenders. Additionally, other treatment courts with equally rigorous requirements such as Veterans or Hybrid Courts also accept OWI participants charged with a 5<sup>th</sup> or 6<sup>th</sup> offense. Data taken from the Comprehensive Outcome, Research and Evaluation (CORE) database for treatment courts administered by WI Department of Justice (DOJ) reveals that since 2011, 281 5<sup>th</sup> or 6<sup>th</sup> OWI offenders were referred to treatment courts in 33 counties.<sup>2</sup> In 2018 alone, 63 of such offenders were referred to these courts in 21 counties. Those accepted served their mandatory jail sentence as a condition of probation and participated in their court programs. 79 participants have graduated successfully.

With the passage of Act 106 however, this is no longer possible. Instead, offenders must serve a bifurcated sentence with at least 18 months in prison, denying them the ability to participate in OWI court. As a result, the size and community impact of these programs has been significantly reduced. The

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<sup>1</sup> Lower level OWI offenders are often not appropriate for these programs as: 1) first offenders often lack substantial treatment needs and are deterred from future alcohol recidivism by the stigma of the legal process alone. 2) Focusing valuable court and treatment resources on lower rather than high level offenders reduces programmatic impact/benefits for the community. 3) Potential sentences for lower level offenders may not provide sufficient motivation for completion of these rigorous and demanding programs.

<sup>2</sup> The sample taken from CORE database is limited to programs which use the database to record program data. Many programs rely on internal records maintained at the county level. Additionally, CORE first came online in 2018 and records prior to that date vary in completeness depending upon the accuracy of county submissions. *Therefore, actual numbers may be higher.*

data set saw only 43 referrals of 5<sup>th</sup> or 6<sup>th</sup> offenders in 2020, likely comprised of cases with offenses prior to the effective date of act 106. The number of active participants in OWI courts has similarly declined. Courts which focus on these offenders have been particularly hard hit. For example, the Monroe County OWI court, which focuses on 5<sup>th</sup> and 6<sup>th</sup> offenders, has graduated 48 participants since opening in 2012. Now only 5 remain in the program and it faces possible closure. The Marathon County OWI court has graduated 76 since opening the same year as Monroe. 90% of these were 5<sup>th</sup> or 6<sup>th</sup> offenders. It currently has 12 participants with 5 or 6 prior OWIs. It is unclear whether the 3 new referrals will be able to participate in the program.

There is longstanding bipartisan legislative support for treatment courts and diversion programs as shown by the passage of Wisconsin statutes 165.95 and 165.955, which govern funding and operations of the Treatment Alternatives and Diversion (TAD) program administered by WI DOJ. When first enacted in 2007, TAD was funded at approximately \$700,000. For calendar year 2020, funding has been increased to almost \$7.2 million annually. More specifically in statements during committee hearings for Senate Bill 6 (forerunner to Act 106), Sen. Alberta Darling, a sponsor, emphasized the deterrent effect of a mandatory prison sentence. However, she also expressed her hope that “with the expansion of treatment and diversion programs and other alternatives... Senate Bill 6 would never have to be used.” Finally, in the passage of act 106, the legislature opted for a different sentencing structure for 5<sup>th</sup> or 6<sup>th</sup> offenders. 7<sup>th</sup> or higher Offenders are required to serve *mandatory* prison sentences. 5<sup>th</sup> or 6<sup>th</sup> offenders on the other hand are *presumptively* required to serve the above described bifurcated sentence unless “the court finds that the best interests of the community will be served and the public will not be harmed.” The legislative comments and unique sentencing structure indicate that the legislature contemplated the importance of treatment alternatives in the passage of Act 106. However, the current language for departure from the presumptive minimum is unworkable. In imposing a sentence consistent with treatment court participation, it essentially requires the judge to predict the success of the participant by finding that the disposition is in the community’s best interest and that the public will not be harmed. Nor does Act 106 permit the option of staying the bifurcated sentence in favor of probation with a treatment court disposition.

**Recommendation** WATCP urges the legislature to adopt corrective language that is consistent with it’s established support of treatment courts and which will permit the use of these valuable court resources by a population that needs them the most. This will allow our treatment courts to continue to rehabilitate offenders and make our roads and communities safer for all Wisconsin residents.

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