

## Article

# HOPE Probation and the New Drug Court: A Powerful Combination

Judge Steven S. Alm<sup>†</sup>

There are nearly five million people on probation and parole in the United States.<sup>1</sup> Some are successful in following the terms of their community supervision. But many are failing at community supervision.<sup>2</sup>

In 2013, of the probationers nationwide who exited supervision, only 66% successfully completed. Of those that were not successful, 15% were incarcerated (revoked or had a new offense), 3% absconded and 11% for “other unsatisfactory reasons” (includes revocations with a new probation sentence).<sup>3</sup> In

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<sup>†</sup> Judge Steven S. Alm has been a Circuit Court Judge in Honolulu, Hawai'i since 2001. He is the principal HOPE Probation judge and, from March, 2011-September, 2014, served as the First Circuit's Adult Drug Court Judge as well. From 1994-2001, Judge Alm was the United States Attorney for the District of Hawai'i. He is the past President of the Hawai'i State Trial Judges Association, served as Chair of the 2005 Penal Code Review Committee (done every 10 years), and currently serves as co-chair of the Interagency Council on Intermediate Sanctions. In 2007, HOPE Probation received the American Judicature Society's Special Merit Citation Award, and in January, 2009, Judge Alm received the McGovern Award presented by the Institute for Behavior and Health for the most promising drug policy idea of the year. In October, 2010, Judge Alm was named Hawaii Jurist of the Year by Chief Justice Mark Recktenwald. In 2013, HOPE was named as one of the “Top 25 Innovations in Government” by the Harvard Kennedy School of Government. Judge Alm wanted to thank the following individuals and other members of his staff for their help in preparing this article: Probation Section Administrator Cheryl Inouye, Drug Court Administrator Janice Bennett, Law Clerks Teri Wright, Dorothy Meisner and Aaron Wills, and volunteers Linda Lee and Piilani Smith. Copyright © 2015 by Judge Steven S. Alm.

1. See ERINN J. HERBERMANN & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2013 at 1 (Oct. 2014) (revised Jan. 21, 2015), available at <http://www.bjs.gov/content/pub/pdf/ppus13.pdf>; SADBHH WALSH, *Probation and Parole: A Study in Criminal Justice Dysfunction*, THE GUARDIAN (Apr. 26, 2012, 3:30 PM), <http://www.theguardian.com/commentisfree/cifamerica/2012/apr/26/probation-parole-study-dysfunction>.

2. See HERBERMANN & BONCZAR, *supra* note 1, at 5.

3. *Id.* at 5 tbl.4.

addition, 43.3% of those released from prison in 2004 were reincarcerated within 3 years, either for committing a new crime or for violating condition of their release.<sup>4</sup>

This causes further victimization and crime, hurts the offender and his or her family, and costs taxpayers millions of dollars a year.<sup>5</sup>

In Hawaii, I have been directly involved in working on ways to make court-ordered community supervision more effective. This has consisted of two main strategies: the creation and expansion of Hawaii's Opportunity Probation with Enforcement, or HOPE Probation, and reconfiguring and expanding our drug court program to shift its target group from a primarily lower-risk pretrial population to a higher-risk probation population and to expand the program to help more offenders.

### I. MY BACKGROUND

I believe my background made me uniquely positioned to start HOPE Probation.

I was born and raised in Honolulu, Hawaii, and was educated here through high school. I attended the University of Hawaii for two years, and then spent the next eleven years on the U.S. mainland for college (B.S. and M. Ed.) and law school. My wife (also from Hawaii) and I returned here in 1985. I passed the Hawaii State Bar Exam and started working as a deputy prosecuting attorney that year. I spent nine and a half years at the City Prosecutor's Office. After five years of doing jury trials and being a felony team captain, I became the Director of the Misdemeanor and Family Court Division. I also successfully prosecuted a number of complex homicide cases, the last case being the murder of a police officer.

I was appointed by President Clinton as the United States Attorney for Hawaii in 1994. The office focused on labor racketeering, political corruption, drug trafficking, police brutality, and crimes against tourists during my tenure as U.S. Attorney. Among the first cases brought by the office was the forfeiture of

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4. The Pew Ctr on the States, Public Safety Performance Project, *State of Recidivism: The Revolving Door of America's Prisons* (2011) available at: [https://www.michigan.gov/documents/corrections/Pew\\_Report\\_State\\_of\\_Recidivism\\_350337\\_7.pdf](https://www.michigan.gov/documents/corrections/Pew_Report_State_of_Recidivism_350337_7.pdf).

5. See *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. COURTS, <http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system> (July 18, 2013). The difference between the annual cost of incarceration for a single offender as opposed to supervisory probation is \$25,600.59. *Id.*

two buildings in Honolulu's Chinatown. The buildings contained an active bar/crack house. At the end of this successful case, I wrote an asset forfeiture sharing check to the Honolulu Police Department (they had done the lion's share of the work, investigating, making arrests, and documenting the criminal activity in and around the bar for the past several years) for \$560,000.00. Those Chinatown buildings now house a community center and a police substation.<sup>6</sup>

During those years, I developed a trustworthy reputation and good relationships with all of the law enforcement agencies (local, state, and federal) in Hawaii.<sup>7</sup> Later, this became very helpful in a Nixon-goes-to-China way when I started HOPE Probation. Based on this working relationship and trust, I was able to enlist the various law enforcement agencies to work harder and faster, in taking offenders into custody when they tested positive for drugs at probation and in serving more arrest warrants. In the spring of 2001, I was appointed by Hawaii Governor Benjamin Cayetano as a State Circuit Court Judge. From 2005 to the present, I have been Co-Chair of the Inter-agency Council on Intermediate Sanctions, a statewide inter-agency effort established to reduce recidivism through evidence-based assessments and practices and research driven initiatives.<sup>8</sup>

## II. THE PROBATION SITUATION IN 2004

In mid-June of 2004, I was assigned to a felony trial calendar that included such offenses as burglaries, assaults, robberies, sex assaults, and murders. As a judge, I firmly believe

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6. Civil Forfeiture, Hawaii, *US v. Real Property Titled in the Name of Taipei Partners*, US ATTORNEY OVERNIGHT No. 923 (Sept. 18, 1996) (on file with author); Steven S. Alm, *Forfeiture Law Is Valuable Weapon in Drug Battle*, HONOLULU STAR-BULLETIN (Jan. 8, 1999), <http://archives.starbulletin.com/1999/01/08/editorial/viewpoint.html>.

7. Letter from the Haw. Law Enforcement Coordination Comm. to Senator Daniel K. Inouye (Feb. 16, 2001) (on file with author) (requesting that I remain in my position as the U.S. Attorney for Hawaii even though the administration was changing and the standard practice is to change U.S. Attorneys). The Committee, made up of, and signed by the four county police chiefs, the Director of the Department of Public Safety and the representative of Federal Law Enforcement, cited my work in fostering "cooperation between local, state and Federal Law Enforcement, to an extent never before seen in Hawaii." *Id.*

8. 1 INTERAGENCY COUNCIL ON INTERMEDIATE SANCTIONS NEWSLETTER 1 (Zach Higa ed., Sept. 2005) [http://icis.hawaii.gov/wp-content/uploads/2013/07/newsletter\\_vol1\\_iss1.pdf](http://icis.hawaii.gov/wp-content/uploads/2013/07/newsletter_vol1_iss1.pdf) (explaining the council's mission is "reduce criminal offender recidivism by 30% through the use and application of effective evidence-based correctional assessments and treatment approaches").

that violent and dangerous individuals, and those who will not stop stealing, need to be sentenced to prison. But they are a minority.

At sentencing, approximately thirty percent of felony defendants are sent to prison.<sup>9</sup> This means that approximately seventy percent are placed on probation or deferral (and given a chance to keep their records clean) and are supervised in the community by probation officers.<sup>10</sup>

For more than a decade, our probation officers (POs) have been implementing the National Institute of Correction's Eight Evidence Based Principles (EBPs) to reduce recidivism.<sup>11</sup> The POs and other professionals have been trained across the system (pre-trial, probation, corrections case managers, and parole) to use risk assessment tools to identify which criminogenic risk factors are present and which should be the focus of their interaction with each offender. Over the years, these officers have also been trained in Motivational Interviewing and Cognitive Behavioral Therapy,<sup>12</sup> and effective case planning.<sup>13</sup> They have learned to form a therapeutic alliance with their clients, a strategy shown to influence outcomes by up to thirty percent.<sup>14</sup>

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9. *Justice Reinvestment in Hawaii: Analyses & Policy Options To Reduce Spending on Corrections & Reinvest in Strategies To Increase Public Safety*, COUNCIL ST. GOV'TS JUST. CENTER 2 (Aug. 2014), available at <http://csgjusticecenter.org/wp-content/uploads/2014/08/JR-in-HI-Analyses-and-Policy-Options.pdf>.

10. *Id.*

11. *The Principles of Effective Interventions*, NAT'L INST. CORRECTIONS (2005), <http://nicic.gov/theprinciplesofeffectiveinterventions>; PEW CTR. ON THE STATES, RISK/NEEDS ASSESSMENT 101: SCIENCE REVEALS NEW TOOLS TO MANAGE OFFENDERS 1 (Sept. 2011), available at [http://www.pewtrust.org/~media/legacy/uploadedfiles/pcs\\_assets/2011/PewRiskAssessmentbriefpdf.pdf](http://www.pewtrust.org/~media/legacy/uploadedfiles/pcs_assets/2011/PewRiskAssessmentbriefpdf.pdf) [hereinafter Public Safety Performance Project].

12. Motivational Interviewing (MI) and Cognitive Behavioral Therapy (CBT) have proven to be effective strategies to reduce recidivism. MI focuses on the interpersonal relationship between the PO and the probationer to elicit and strengthen their motivation for change. *Motivational Interviewing*, NAT'L INST. CORRECTIONS, <http://nicic.gov/motivationalinterviewing> (last visited May 3, 2015). CBT addresses how thinking influences behavior. It focuses on cognitive restricting and modifying behavior. See HARVEY MILKMAN & KENNETH WANBERG, NAT'L INST. CORR., COGNITIVE-BEHAVIORAL TREATMENT: A REVIEW AND DISCUSSION FOR CORRECTIONS PROFESSIONALS, 5 (May 2007), available at <http://static.nicic.gov/Library/021657.pdf>.

13. Angela Hawken, *The Message from Hawaii: HOPE for Probation*, PERSP.: J. AM. PROBATION & PAROLE ASS'N, 36, 48, available at <http://hopehawaii.net/assets/perspectives-message-from-hawaii-hope-for-probation-2010.pdf>.

14. Michael J. Lambert & Dean E. Barley, *Research Summary on the Therapeutic Relationship and Psychotherapy Outcome*, 38 PSYCHOTHERAPY 357, 358 (2001).

In Hawaii, we are fortunate to have dedicated and caring POs. They are all college graduates (typically from the University of Hawaii School of Social Work) and many have Masters degrees in Social Work or Criminal Justice as well.<sup>15</sup> In Hawaii, the probation function falls under the state Judiciary. POs are responsible for writing presentence reports and supervising offenders on probation and deferral.

Some felony probationers do well on probation-as-usual. They show up for their appointments with their POs, refrain from the continued use of illegal drugs or alcohol, and pay their restitution and court fees. These probationers work well with their PO and are directed to services and treatment programs as needed.

For many other probationers, however, even with well-educated, well-trained POs using EBPs, probation-as-usual is not enough. These offenders use drugs, skip PO appointments, don't pay their restitution or court fees, fail to follow through with court-ordered treatment, commit new crimes, or otherwise fail to comply with the conditions of probation. For these offenders, probation-as-usual was not an effective program. Something new was needed.

#### A. THE BEGINNING OF HOPE

When I was assigned to a felony trial calendar in mid-June, 2004, I saw Motions to Revoke Probation on the calendar. In spite of all of their efforts, using EBPs, our probation officers were still finding that many offenders were not complying with the conditions of probation, and were now becoming dangers to the community. The motions listed numerous violations (e.g., ten, twenty, or thirty separate probation violations) and often ended with the probationer absconding. The PO spent hours preparing the revocation affidavit, listing and describing all of the accumulated violations. The affidavit was forwarded to the Prosecutor's Office and a deputy prosecutor reviewed the affidavit and prepared the Motion to Revoke Probation. The motion and the affidavit would be forwarded to the administrative judge for the issuance of an arrest warrant. The errant probationer would eventually get arrested (often for a traffic violation or when committing a new crime—warrant service does not traditionally get the highest law enforcement priority). My staff would set the revocation hearing in two months and the

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15. Interview with Cheryl Marlow, Probation Adm'r, Adult Clients Servs. Branch, Haw. First Circuit Court, in Honolulu, Haw. (2012).

POs would spend more time re-writing that affidavit as a violation report, detailing each violation. Invariably, the POs would advise in their confidential sentencing letters to me that they had tried working with the offender but that the defendant was not amenable to probation and recommend that I sentence him or her to the underlying five, ten, or even twenty year prison term.

I immediately realized two things about the felony probation system: first, there were still significant problems with probationer compliance just as there were when I had been a deputy prosecutor nearly twenty years ago, and second, in spite of their best efforts to work with the probationers, the POs were not able to help many defendants succeed on probation in the current system. I knew it wasn't the POs' fault. They were trying their best, using state-of-the-art interventions (including EBPs like Motivational Interviewing). The system itself was still ineffective in many cases. The PO, in the face of a probation violation, had two choices: either continue to try to "work with" the probationer, using a variety of EBP strategies, without any court or jail interventions, or write up the violation(s) and bring the defendant back to court for a Motion to Revoke Probation and recommend that I sentence the probationer to a multi-year prison sentence. It was all or nothing.

I considered that and thought to myself, "There has to be a better way to change the probationers' behavior." I knew it was the probationer's responsibility to follow the rules of probation. However if a system has no concrete consequences (like jail) for rule breaking, the rule breaking continues.

In Hawaii, during sentencing, when a judge places a defendant on probation instead of sending him or her to prison, the judge reads a list of conditions the probationer must follow (e.g., no use of drugs or alcohol, seeing their PO, paying restitution).<sup>16</sup> The sentencing in court is very solemn and serious. When the probationer goes out in the real world and violates those conditions, such as using drugs or alcohol, however, the typical PO response is to talk to the defendant and try to find the cause or trigger for the drug or alcohol use, employ their relapse prevention and other EBP strategies, and perhaps refer the probationer to treatment. There is no immediate jail or prison consequence imposed for the violation. After all, what PO or judge wants to send someone to five years in prison for a positive drug or alcohol test? With probation-as-usual, a revo-

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16. HAW. REV. STAT. § 706-624 (2014).

cation of probation was the only option for the PO who wanted to bring the probationer back to court for probation violations. With no immediate jail consequence for violating probation-as-usual, the probationer walks out of the PO's office convinced that the probation system is not really serious and he or she will continue to use drugs or alcohol, skip PO appointments, and violate other conditions of probation.<sup>17</sup> That probationer would then be at higher risk of getting arrested for a new crime, such as drug possession, or a theft to buy drugs.<sup>18</sup>

Given the "all or nothing" sanctions structure of probation-as-usual, the PO typically lets the violations accumulate, while trying to work with the offender and address the appropriate criminogenic risk factors until determining that the probationer is a danger to the community.<sup>19</sup> After multiple violations, the Probation Officer now has a "good" case for revocation, and, as a last resort, brings the offender back to court for a revocation of probation with a recommendation for prison.<sup>20</sup>

### III. A SOLUTION?

Faced with this situation my first week on this felony trial calendar in June of 2004 and deciding that the current system wasn't working for many offenders, I asked myself, "What would work to change an offender's behavior on probation?" I thought of how my wife and I had raised our son and about how we were raised. You tell your child that you love and care for him or her, but the family has rules. If your child breaks one of those rules, you do something about it right away. If you give the child a consequence that is swift, certain, consistent, and proportionate to the misbehavior, he or she can tie together the bad behavior with the consequence and learn not to do it again.

I thought that if we could bring this firm but fair parenting approach to felony probation, it might be more effective in helping offenders succeed in complying with the conditions of probation than the current probation system. I suspected that many of the probationers I saw in court had grown up in households where there was not a lot of structure. While there

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17. ANGELA HAWKEN & MARK KLEIMAN, NAT'L INST. JUSTICE, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 6 (2009), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

18. *Id.*

19. *Id.* at 8.

20. STATE OF HAW. JUDICIARY, ADULT PROB., PROBATION VIOLATION GUIDELINES (1997).

may have been consequences for misbehavior (sometimes very severe), those consequences were likely not swift, certain, and consistent, and may well not have been in an atmosphere of caring.

In essence, I wanted to deconstruct that ten, twenty, or thirty-violation Motion to Revoke Probation and have the probationer arrested for each and every violation of probation and serve a swift, certain, consistent, and proportionate jail sentence each time. I believed that would help the probationer tie together the consequence with the bad behavior and learn from it. I decided on jail as the only sanction because it was impactful, unpleasant, and could be imposed immediately. Other sanctions like community service were considered, but it is very difficult to impose that immediately and a failure to comply will often lead to another violation. I thought, for example, that if a probationer was using drugs, tested positive at the probation office, was arrested on the spot, transported to jail, and then brought back to court in two days for a hearing on that violation, this could be a real teachable moment for that offender.

I looked at the relevant statutes<sup>21</sup> and saw that we could institute the HOPE strategy without changing the law. I then approached probation supervisor Cheryl Inouye and discussed this proposed strategy. She liked this new approach. She felt it could be effective in working with offenders and that it could cut through denial and help the probationers be more open to change rather than continuing with the status quo. She agreed to implement it on a trial basis with her high-risk probation section. That is what got HOPE started from the beginning, with targeting the high-risk probationers; those who had the worst drug and alcohol problems and those who should be watched the closest, like sex offenders. Ms. Inouye and I then worked with all of the other criminal justice partners (court staff, probation, prosecution, the defense bar, law enforcement and the jail staff) and together we created, and on October 1, 2004 launched, Hawaii's Opportunity Probation with Enforcement, or HOPE Probation. Setting up procedures to change the system and make it operate faster, and more effectively, was a real challenge. But a crisis can be an opportunity and the criminal justice system partners all agreed the current system was not working well for many offenders. We all agreed to try something new.

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21. HAW. REV. STAT. § 706-625 (regarding revocations and modifications of probation); *Id.* § 706-624 (regarding terms of probation); *Id.* § 706-623 (regarding terms of probation).



Where probation-as-usual is often delayed, uncertain, inconsistent, and, when court action is finally taken, often unnecessarily harsh, HOPE is swift, certain, consistent, and proportionate.

Good ideas and efforts for implementing HOPE Probation came from many sources. The prosecutor and Ms. Inouye designed a new fill-in-the-blanks Motion to Modify/Revoke Probation form that the PO could prepare in five minutes. The Public Defender requested that I warn his clients of the new procedures. The rules on probation remained the same but those rules were actually going to be enforced for the first time! In response, I created a new court proceeding called a “Warning Hearing.” The purpose of the hearing was to initiate the probationers into HOPE Probation by encouraging them to succeed and ensuring that they clearly understood the rules of probation and the likely consequences for violating those rules. The Probation Administrator pointed out that for several years we had been using EBPs and “what works,” and suggested that we have the Attorney General’s Office<sup>22</sup> collect statistics to see if the new strategy worked or not.

#### A. HOPE WARNING HEARING

We held the first Warning Hearing on October 1, 2004. There were thirty-four felony offenders: eighteen sex offenders and sixteen offenders convicted of a variety of felonies (property crimes, violent crimes, and drug use or sales). These probationers also had serious problems with drugs or alcohol, were failing at probation-as-usual, and had been transferred to Ms. Inouye’s high-risk probation section for closer supervision.

I addressed each probationer by name and spoke directly to each of them. I told them that everyone in court, their attorneys, the prosecutor, me, and the taxpayers of Hawaii, wanted them to succeed on probation. I recognized that as adults, they were going to make their own decisions. I could not control their decisions, but I could control mine. If they violated any of the conditions of probation, they could count on me giving them an immediate jail sanction as a consequence. I also recognized that we were all human beings and we all make mistakes and bad choices, like miscalendering a PO appointment or running into the wrong old friends and relapsing. After the Warning Hearing, each probationer could count on going to jail for each

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22. Crime Prevention & Justice Assistance Division, Department of the Attorney General, State of Hawaii.

and every probation violation, but that the sanction would be proportionate to the violation. If they tested positive for drugs and admitted to the use, they would be arrested on the spot and the sanction would be two days in jail.<sup>23</sup> If they tested positive for drugs, denied use and the lab later confirmed drug use, the sanction would be fifteen days in jail (for being in denial or lying about the drug use). If the probationer didn't show up for the drug test or the probation appointment at all and I had to issue an arrest warrant and law enforcement had to look for/arrest him or her, the sanction would be at least thirty days in jail. If the probationer repeatedly absconded, their actions would be showing me not that they were bad people but rather that they were not up to participating in community supervision, and they would be sent to prison.

If a probationer in HOPE can stop using drugs on their own, then they are not referred to treatment. Indeed, Dr. Hawken's research found that most of the probationers in the HOPE study group, selected as active drug users, did not have a single positive drug test the first year.<sup>24</sup> Many had only one.<sup>25</sup> The HOPE probationers were tested randomly, typically six times a month to start.<sup>26</sup> Those on probation-as-usual were only tested once a month when they saw their PO at their scheduled appointment.<sup>27</sup> If HOPE probationers are unable to stop using drugs on their own, they are referred to drug treatment.<sup>28</sup> The drug treatment programs in Hawaii are very supportive of HOPE and believe it helps their clients to succeed.<sup>29</sup> The pro-

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23. HOPE Probationer Harry Oneha explained, "In the beginning it's rough. Every addict, every alcoholic comes with the intention of beating the system. That's just the way we're wired, yeah? And as soon as you get over that, they find out that this program is here to save your life. And it does. It saves your life. I see a person that I'm supposed to have been all this time. Yeah. I see a whole new man. So I'm just gonna keep doing what I'm doing, and, uh, I put 110% behind HOPE program. I think it's a great program." Beyond Prison (California Correctional Police Officers Association 2012), *available at* <http://www.ccpoa.org/beyond-prisons-video-2012>.

24. HAWKEN & KLEIMAN, *supra* note 17, at 19.

25. *Id.*

26. *Id.* at 17.

27. *Id.*

28. *Id.* at 33.

29. Alan Johnson, the President and Chief Executive Officer of Hina Mauka Recovery Center and Chairperson of the Hawaii Substance Abuse Coalition, explained that "Treatment combined with sanctions from HOPE produces better outcomes than just treatment alone. Treatment agencies who are part of the Coalition report that outcomes with HOPE probationers have been very positive. HOPE probationers are definitely more responsive than other (non-HOPE probationers or parolees). When dealing with HOPE probationers,

grams are now only getting referrals for clients who request treatment or who demonstrate they can't stop using on their own.<sup>30</sup>

When we started HOPE Probation, I really didn't know a lot about research regarding drug use or recidivism. I just saw a problem and tried to fix it. The probation supervisor who agreed to try this new strategy, Cheryl Inouye, managed the high-risk probation section. The initial thirty-four HOPE probationers were those who had been sentenced out of my courtroom (mostly by the judge who preceded me), and were now being supervised in Ms. Inouye's high-risk section. The initial HOPE warning Hearing on October 1, 2004, included eighteen sex offenders and sixteen others probationers who had been convicted of a variety of felonies (e.g., burglaries, assaults, drugs) who had started in the main branch probation section, but who were failing probation due to drug and alcohol use and had been transferred to Ms. Inouye's high-risk section. It made a lot of sense to focus on the high-risk probationers and HOPE has attempted to do so ever since.

#### B. ORGANIZATION IS KEY

HOPE sounds like a simple concept, but the devil is in the details. It is very difficult to get all the different parts of the criminal justice system, often in different branches of government, to agree to change their procedures and work together in a swifter and more cohesive fashion.

The Prosecutors office and the Public Defender agreed to the new procedures, which mostly meant staffing more hearings in a shorter period of time, usually within a few days rather than in two months on probation-as-usual. These individuals were professionals, and I knew I could count on them and their respective offices to perform these new duties.

I also knew that the jail staff would do their part in housing the offenders who violated probation. I spoke to the jail staff and described the pilot project. I suggested that they streamline their intake procedures, if possible, because the new system would involve probationers being jailed usually for short periods of time (two to three days). Also, some offenders would likely be returning to jail multiple times.

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treatment counselors get a better and timelier response from both the probationers as well as from their probation officers." Letter from Alan Johnson, Hina Mauka Recovery Ctr., to Senator Brian T. Taniguchi (Mar. 15, 2010) (on file with author).

30. HAWKEN & KLEIMAN, *supra* note 17, at 33.

The real challenge with starting a program like HOPE Probation is having judges, POs, and law enforcement change the way they are currently operating and instead try something brand new. And, as we all know, any type of change in a well-established system is hard.

To begin with, judges and probation supervisors have to work closely together. This is true both in starting HOPE as well as implementing it. Probation officers have to be able to give honest feedback to the judge and the judge has to be open to listening to their feedback. The two have to be ready to provide active, joint leadership to the whole effort. In addition to that joint leadership, judges and probation officers have to make other changes as well.

### 1. Judges

Judges must be willing to change the way they currently do business. Judges must first be willing to engage with the probationers in court. Talk to them. Listen to them. Let them know that the judge cares about them and wants them to succeed. Judges must be ready to give the shortest possible jail sentence to the probationers for each probation violation that will help tie together the misbehavior with the consequence. This jail sentence will cement the understanding in the probationer's mind that each probation violation will result in a swift, certain, consistent, and proportionate jail sentence. The immediacy of the consequence shows the probationer that there will be a consequence for all inappropriate behavior. Judges must be consistent and proportionate with their sentencing. I belong to the school of thought that as judges we should be sending people to prison who we are afraid of, not who we are mad at. There is too much anger in the court system, particularly concerning probation violations and revocations.

If a probationer violates the terms of his or her probation but takes responsibility for it right away, the jail sanction should be short: a few days. If the probationer does not behave responsibly, for example, by absconding, then the jail sanction should be longer: at least thirty days. It is critically important to make the sanction for absconding much longer than the sanction for reporting to probation and admitting to a violation. If you do not, you will have a lot of absconding. Probationers talk among themselves in treatment, in the probation waiting room, in jail, and on the street. If an absconder gets the same jail sanction as a probationer who messed up but takes responsibility right away, word will spread and more probationers will

abscond. For example, a thirty day sanction for absconding is proportionate to the violation and will deter that probationer and other probationers from running away and using law enforcement resources to look for them.

Some judges feel comfortable in this interactive role with probationers. Some judges do not feel comfortable. If a judge is not willing to continually engage with and encourage and talk to the probationers about their thinking, their choices, and the resulting consequences, this is not the right program for that judge.

The judge also needs to be ready to discuss the new procedures and the additional workload with his or her court staff. There will be more work and the court calendar will be busier. Instead of scheduling one Motion to Revoke Probation several weeks later on probation-as-usual, the HOPE Motions to Modify/Revoke Probation are usually set and heard in a few days.<sup>31</sup> There will be more motions brought in the new system.<sup>32</sup> Leadership here is key. If the judge wants to start and participate in this new program, and work harder, his or her staff will follow suit and do the same.

## 2. Probation Officers

POs must change the way they do their jobs as well. This will take real leadership in the probation office. As a result of their training and experience, POs typically have a lot of discretion in the way they do their jobs and handle probation violations on probation-as-usual.<sup>33</sup> No court referral (and resulting jail consequence) is typically made in the face of violations, such as testing positive or missing PO appointments. The PO tries to use EBP strategies, form a therapeutic alliance, and try to “work with” the probationer to succeed on probation. Sometimes these efforts to change probationer behavior are unsuc-

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31. HAWKEN & KLEIMAN, *supra* note 17, at 28 (finding that in Hawaii, 70% of the hearings were held within 72 hours).

32. How many hearings will, of course, depend on how many probationers that particular judge is supervising in HOPE. Data from the Crime Prevention & Justice Assistance Division, Department of the Attorney General, State of Hawaii, showed, for example that at the end of 2005, I was supervising 76 offenders in HOPE and I had a total of 65 hearings or 5.4 per month, about 1.26 hearings per week. At the end of 2006, I was supervising 274 offenders in HOPE and I had a total of 265 hearings or 22.1 per month, about one hearing a day. At the end of 2009, I was supervising 998 offenders in HOPE and I had a total of 1,514 hearings or 126.2 per month, about 6.3 hearings a day. Dr. Hawken determined that the hearings averaged less than seven and a half minutes each. *Id.* at 30.

33. *Id.* at 35–36.

cessful. In these cases, the violations subsequently accumulate until the PO deems the probationer a danger to the community. At that point, the PO writes up all of the violations and initiates the revocation process. Eventually, probationers are arrested and referred back to court for a Motion to Revoke Probation with a likely recommendation to state prison.

In HOPE, the POs lose their discretion up front. If a probationer tests positive for drugs and admits to use, he or she is arrested on the spot. It does not matter if his or her car is in the parking lot, or if his or her child has a birthday party the next day. Every violator in this circumstance is arrested. Later on, the PO will talk to the probationer and evaluate why he or she relapsed and how relapse might be prevented in the future, whether doing treatment is needed, etc.; but they all get arrested on the spot.

If a probationer fails to show up for a PO appointment, the PO will attempt to call or contact the offender and instruct him or her to report to the probation officer right away. If the probationer fails to contact the PO or report after several days (in Hawaii, five), the PO is required to call my staff. Then I will sign and issue a warrant for the probationer's arrest. POs are required to take this action each and every time a probationer fails to contact his or her probation officer or report after five days. This loss of discretion is a real challenge, and is even threatening for a number of POs, especially more experienced ones.<sup>34</sup> With good communication and the right leadership in the probation department, however, this can be overcome.

The probation supervisor will also have to train the line probation officers in how the HOPE strategy can be an effective complement to EBP the office currently is using with offenders. Soon after HOPE started, PO Supervisor Cheryl Inouye said,

Yes, the POs do lose some discretion at the front end. But then the probationers started coming to appointments much more often, they were much more often sober, and HOPE helped to cut through denial and create the incentive for change [where offenders weigh the pros and cons of change versus maintaining the status quo]. Now we could be the change agents we have always wanted to be.<sup>35</sup>

Ms. Inouye provided the critical leadership when HOPE started and continued to provide it as HOPE expanded over the years.

HOPE also requires speed. If a probationer tests positive

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34. *Id.*

35. Interview with Cheryl Inouye, Section Adm'r, Integrated Cmty. Sanctions Section, Adult Client Servs. Branch, in Honolulu, Haw. (2006).

for drugs or alcohol at the PO's office and admits to using, sheriffs are called to take the probationer into custody immediately. The necessary paperwork is prepared for the hearing, which usually occurs within seventy-two hours.<sup>36</sup>

### 3. Law Enforcement

Finally, law enforcement officers have to change the way they do business in two key ways.

First, they (in our case, the sheriffs who work out of the courthouse) have to be prepared to take a probationer into custody within five to ten minutes after he or she tests positive at the probation office and admits to use. The sheriffs take the probationer to the courthouse cellblock, and then transport him or her to the jail where the violator is held until his or her hearing in a few days.

Second, law enforcement will be tasked with serving more arrest warrants. With probation-as-usual, a warrant is typically issued only after a probationer has essentially failed at probation and the PO is recommending prison. In HOPE, law enforcement is now given an arrest warrant each time an offender absconds, for example, after failing to appear for a PO appointment, court hearing, or a drug test, or failing to complete treatment.<sup>37</sup> When HOPE began, I asked the United States Marshal to assist in this new venture. While HOPE is a state court program, the Marshal agreed to use his Federal Fugitive Task Force to serve any needed warrants. The Marshal agreed because I asked him to help and because he trusted me enough to participate in this new program. In 2006, I asked the Honolulu Police Department to assist with warrant service and they too agreed to help the HOPE program for the same reasons. Now the sheriffs, the Honolulu Police Department, and the U.S. Marshal all help to serve HOPE warrants. My background as a career prosecutor and my good relationships with all of the local, state and federal law enforcement agencies was critical in getting their initial and continued cooperation with this program.<sup>38</sup>

Later the research showed that HOPE probationers were using drugs less often and getting arrested for new crimes less often (meaning that the investigative branches of those agen-

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36. HAWKEN & KLEIMAN, *supra* note 17, at 13.

37. *Id.* at 9.

38. Letter from the Haw. Law Enforcement Coordinating Comm., *supra* note 7; *see also* US ATTORNEY OVERNIGHT *supra* note 6.

cies were saved many time-consuming investigations).<sup>39</sup> HOPE probationers were also going to state prison less often and for shorter periods of time.<sup>40</sup> Law enforcement now had concrete evidence to support doing the extra work associated with serving HOPE arrest warrants.

My career working with law enforcement and being the toughest sentencer in the courthouse as a judge helped me to start an innovative program like HOPE. I am the last judge who is going to be accused of being soft on crime.<sup>41</sup> While HOPE is tougher on offenders than probation-as-usual, to those who do not understand the system, a two-day jail sentence for using drugs may seem lenient. What they do not realize is that in probation-as-usual there would typically be *no* jail sanction at all. My background and reputation as a judge made me the right person to start HOPE.

#### IV. PROCEDURAL JUSTICE

If an offender believes the system is treating him or her fairly, they are much more likely to buy into that system. That is what procedural justice is all about.<sup>42</sup> I believe HOPE is procedural justice in action. In HOPE, we strive to be clear, transparent and predictable. Probationers are treated like adults. They know that they are on felony probation and there will be rules. But now they are encouraged to succeed and told what the likely consequences will be for a violation. I am consistent and the POs are consistent.

I am convinced that this consistent and proportionate treatment of probationers is a cornerstone of HOPE's success. HOPE is both perceived and is, in fact, consistent, proportionate, and fair. Even offenders serving a jail sanction for a HOPE violation told Dr. Hawken<sup>43</sup> they felt the program was firm but

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39. HAWKEN & KLEIMAN, *supra* note 17, at 20–21.

40. *Id.* at 25–26.

41. Myles Breiner, the President of the Honolulu Association of Criminal Defense Lawyers, said, “A lot of us were very skeptical, that given Judge Alm’s background [as a career prosecutor], that he would be even remotely sensitive to the needs of prospective defendants and inmates.” Cal. Corr. Peace Officers Ass’n, *supra* note 23.

42. See Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. ONLINE 525, 525–29 (2014), available at <http://yalelawjournal.org/forum/justice-sotomayor-and-the-jurisprudence-of-procedural-justice>.

43. Dr. Angela Hawken is an Associate Professor of Public Policy at Pepperdine University and the primary HOPE researcher. She was also the principle cost-benefit analyst for California’s massive treatment versus incarceration experiment, Proposition 36.



fair and accepted responsibility for their poor choices.<sup>44</sup>

I hear this language of personal responsibility by probationers for their actions on a regular basis in court. In addition, in the past ten years, I have only had approximately twenty five contested HOPE hearings.<sup>45</sup> In all the other thousands of hearings, the probationer has taken responsibility for his or her behavior, admitting to the violation and proceeding to sentencing. Further, I now almost never get requests by probationers to have their probation officer changed. On probation-as-usual that happens frequently because the probationer feels his or her PO is too strict and that the probationer is not being treated fairly. In HOPE, there is now almost never a request for a new PO. The probationers now feel like they are treated fairly and consistently regardless of which PO is handling their case.

As HOPE Probationer Michelle Fernandez put it: “They have faith in you. HOPE Probation also gives you a chance to want to get a life. It’s the best program in the world. This program is designed to help anybody who wants to help themselves [sic]. It saved my life, because I would still be running hard out there.”<sup>46</sup> HOPE Probationer Jonathan Townsley felt similarly, stating “If you cannot love yourself, then the program, or your probation officer, or the judge will love you until you can love yourself. And I started to experience that. I really felt that. [HOPE] helped me change. Become more honest. Keep me in check.”<sup>47</sup>

#### A. EARLY TERMINATION OF PROBATION

At the initial Warning Hearing, I tell the probationers that if they can be on HOPE Probation for two years without a violation, I will terminate their probation early (felony probation is typically four years long). If he or she can be supervised that long without a violation, he or she will have shown me and the PO that they no longer need to be supervised in the community. Terminating their probation early will reduce the PO’s caseload and give the PO more time to work with probationers who are

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44. Sam Kornell, *Probation That Works: Swift and Certain Punishment Reduces Crime. Parolees Love It.*, SLATE (June 5, 2013), [http://www.slate.com/articles/health\\_and\\_science/science/2013/06/hawaii\\_hope\\_probation\\_program\\_reduces\\_crime\\_drug\\_use\\_and\\_time\\_in\\_prison.html](http://www.slate.com/articles/health_and_science/science/2013/06/hawaii_hope_probation_program_reduces_crime_drug_use_and_time_in_prison.html).

45. A contested hearing is where a probationer chooses to have the prosecutor try to prove the motion. Witnesses are called, cross-examination is provided for, arguments are made. I then decide if the State has proven the violation.

46. Cal. Corr. Peace Officers Ass’n, *supra* note 23.

47. *Id.*

having problems and need probation supervision. Two years is a number that many probationers can wrap their heads around in a way that enables them to stick to the terms and conditions of probation and be released early. Research is showing that those individuals who are granted early termination of their probation have really turned their lives around and have stayed out of the criminal justice system.<sup>48</sup> In the last three years, more than one hundred HOPE probationers have been granted early termination of their probation and not a single one has been arrested since.<sup>49</sup>

#### B. LEADERSHIP

In order to successfully implement the HOPE strategy, leadership is required. The program particularly requires joint leadership by the judge and probation supervisors and additional leadership by the prosecution, the defense, and law enforcement. Change is very difficult to achieve. This is particularly true in government. Trying a new program may work but it may not work. It is always easier for an established system to keep doing that which has always been done. Creating and implementing HOPE Probation would not have been possible without the leadership demonstrated by all of the participants from all of the criminal justice agencies and their willingness to try something new when the existing system was not working for many probationers.

#### V. DRUG COURT

Drug courts started in Miami, Florida in 1989 in response to the flood of cocaine coming into Florida from the Caribbean.<sup>50</sup> Dissatisfied with their choices of prison or probation-as-usual for those convicted of drug possession charges or other crimes connected to drug use, the criminal justice system partners in Florida created the first drug court.<sup>51</sup> They reasoned that if a

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48. See Dr. Angela Hawken, Assoc. Professor of Pub. Policy, Pepperdine Univ., Presentation at Association for Public Policy Analysis and Management: Is Less More? Strategic Sanctions in Community Corrections (Nov. 6, 2014); see also Beth Pearsall, Nat'l Inst. Justice, *Replicating HOPE: Can Others Do It as Well as Hawaii?*, 273 (Mar. 4, 2014), <http://nij.gov/journals/273/Pages/replicating-hope.aspx>.

49. Hawken, *supra* note 48.

50. See Eric L. Sevigny et al., *Can Drug Courts Help To Reduce Prison and Jail Populations?*, in 647 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 190, 191 (Mario L. Small & Scott W. Allard eds., May 2013).

51. *History: Justice Professionals Pursue A Vision*, NAT'L ASS'N OF DRUG

client saw a judge once a week, was assigned a counselor and went to treatment, he or she would have a better chance of succeeding on probation and not be sent to prison.

Over the years, with the leadership of the National Association of Drug Court Professionals (NADCP), drug courts have greatly increased in number. As of 2012 there were over 2,700 drug courts (including Veterans Court, Family Drug Court, Juvenile Drug Court, etc.) operating in every state and territory in the United States, including approximately 1,500 adult drug courts.<sup>52</sup>

Drug courts have been shown to be very effective in helping clients to stop using drugs and to succeed on community supervision.<sup>53</sup>

In spite of this great potential however, drug courts are limited in two chief respects. First, there are many, many drug abusing offenders in the criminal justice system, and even with the large number of drug courts, only a small fraction of drug-involved offenders in the criminal justice system are helped. Nationally, there were 55,365 adult drug court participants in 2005 out of the 1.47 million arrestees that year who were at risk of drug abuse or dependency—about twenty-seven at-risk arrestees for each drug court slot.<sup>54</sup> Second, by their very structure, drug courts have size limitations. Given that the judge sees the client frequently from the start (often every week) and the program provides many services to its clients, the program requires a lot of judge and drug court staff time. Nearly half of drug courts reported that they have fewer than fifty participants and another nineteen percent had between fifty and seventy-four participants.<sup>55</sup>

Many drug courts also have very restrictive admission criteria.<sup>56</sup> The federal government sets this restrictive tone from

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C. PROF., <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited May 3, 2015).

52. DRUG COURTS: A PROVEN BUDGET SOLUTION, NAT'L ASS'N OF DRUG C. PROF., (May 2013), available at <http://www.nadcp.org/sites/default/files/nadcp/2013%20National%20Drug%20Court%20Month%20Field%20Kit.pdf>.

53. See Shelli B. Rossman & Janine M. Zweig, *The Multisite Adult Drug Court Evaluation: What Have We Learned from the Multisite Adult Drug Court Evaluation? Implications for Practice and Policy*, in 2 NAT'L ASS'N OF DRUG C. PROF. NEED TO KNOW (May 2012).

54. See Sevigny et al., *supra* note 50, at 194.

55. See JOHN K. ROMAN ET AL., URBAN INST. OF JUSTICE POLICY CTR., *THE MULTI-SITE ADULT DRUG COURT EVALUATION: WHAT'S HAPPENING WITH DRUG COURTS? A PORTRAIT OF ADULT DRUG COURTS IN 2004*, at 24 (Nov. 2011).

56. See Sevigny et al., *supra* note 50, at 194–95.

the start.<sup>57</sup> Typically, new drug courts receive federal funding.<sup>58</sup> For unstated reasons, perhaps to avoid bad publicity if a drug court client is arrested for a high-profile crime, many restrictions are placed on who can or cannot be accepted into drug court.<sup>59</sup>

No one with any history of violence (including, for example, a ten-year-old misdemeanor assault conviction) or any history of selling drugs (including a user selling a twenty dollar bag of crack to fuel his own habit) is admitted into drug court during the initial period of federal funding.<sup>60</sup> Indeed, most drug courts will only allow admission if the most serious conviction is a non-violent felony (59.7%) or a non-violent misdemeanor (27.9%).<sup>61</sup>

The leadership of the national drug court advocacy organization, the NADCP, recognizes the real potential of drug courts to reduce both drug use and criminal recidivism.<sup>62</sup> Drug courts typically provide true wrap-around services. These include regular hearings with the judge, drug testing, case management, and receiving substance abuse and mental health treatment.<sup>63</sup> Drug courts also provide incentives for good behavior and accomplishments. They can include verbal praise by the judge in court, applause by all the court attendees, gifts and prizes (e.g., a Pay Day candy bar in Honolulu's Drug Court for getting a job), certificates of achievement (e.g. completing a program phase), and awards for accomplishments such as sustained periods of sobriety (e.g., a "one-year sober" stone).<sup>64</sup> The NADCP knows that drug courts can be effective with any population and are encouraging the adult drug courts around the country to shift their focus from a lower-risk pretrial population to a higher-risk probation population.<sup>65</sup> The recidivism reduction will then be of more serious cases. By focusing on the most troubled, most addicted offenders in the criminal justice sys-

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. ROMAN ET AL., *supra* note 55, at 26.

62. See DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., DRUG COURT PRACTITIONER FACT SHEET: TARGETING THE RIGHT PARTICIPANTS FOR ADULT DRUG COURTS 2 (Feb. 2012); Rossman & Zweig, *supra* note 53.

63. See Rossman & Zweig, *supra* note 53, at 4.

64. ROMAN ET AL., *supra* note 55, at 64.

65. Rossman & Zweig, *supra* note 53, at 3.

tem, drug courts can have the biggest impact and get the best return for their investment.<sup>66</sup>

This shift in focus is starting to occur across the country but the progress is slow. Some states have statutes that restrict entry into drug court.<sup>67</sup> Others have self-imposed restrictive admission criteria.<sup>68</sup>

Most drug courts continue to exclude many individuals who would benefit most from drug court's wrap-around services.<sup>69</sup> As a result of these restrictive policies, drug courts are not realizing their true potential and are not having much of an impact on reducing our prison population because these higher-risk, more troubled offenders who might end up in prison down the road are never able to gain entry into drug court.<sup>70</sup> If more drug courts were to expand their admission policies to higher-risk individuals, including those with a history of violence, they might well have a greater impact on reducing the prison population in the United States.<sup>71</sup>

#### A. SHIFTING THE FOCUS OF DRUG COURT IN HONOLULU

In March of 2011, I became the drug court judge in Honolulu, Hawaii. Drug Court Administrator, Janice Bennett, and I both agreed that we should shift the focus of the Drug Court to target higher-risk offenders. At the time, two-thirds of Honolulu's Drug Court clients were admitted from the lower-risk pretrial track.<sup>72</sup> Any client's admission into Drug Court from the pretrial track was contingent on approval from the Prosecutor's Office. Prosecutorial agreement was required because if a pretrial client successfully completed Drug Court and graduated, the prosecution would ask the Drug Court judge to dismiss the pending felony charge(s) against the offender. With two-thirds of Drug Court admissions coming from the pretrial track, that meant that only about one-third were coming from the higher-risk probation track (where the prosecution makes a recommendation regarding admission but does not have a veto and the Drug Court makes all the admissions decisions).

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66. *Id.*

67. *See, e.g.*, N.J. STAT. ANN. § 2C:35-14 (West 2014); Steven Belenko et al., *The Long Road To Treatment: Models of Screening and Admission Into Drug Courts*, 38 CRIM. JUST. & BEHAV. 1222, 1222-43 (2011).

68. *See* ROMAN ET AL., *supra* note 55, at 31.

69. *See* Sevigny et al., *supra* note 50, at 194-95.

70. *Id.*

71. *Id.* at 206-07.

72. Interview with Janice Bennett, Drug Court Adm'r, Haw. First Circuit Court, in Honolulu, Haw. (2014).

Ms. Bennett and I agreed that by following the research<sup>73</sup> and focusing on the higher-risk probation track, we could have a bigger impact on offender behavior and get a greater return for our Drug Court dollars. We also felt that Drug Court could be servicing more offenders and have more of an impact on the community supervision and prison systems.

Over the past three-and-a-half years, Hawaii's (Honolulu) Drug Court has been increasing in size. When I started as the drug court judge in March of 2011, there were 127 clients in drug court. As of September 2014, when my tenure as Drug Court Judge ended, there were 197 clients in drug court. During those three-and-a-half years as Drug Court Judge, I saw a total of 407 clients.<sup>74</sup>

We have also relaxed the criteria for drug court admission. We try to determine who, among the supervisory population (i.e., all those not sent to prison at sentencing), most needed the potent wraparound services of drug court.

The Hawaii (Honolulu) Drug Court is precluded by statute from admitting those individuals convicted of a non-probationable class A felony (e.g., manslaughter or robbery in the first degree—that is, robbery with a dangerous weapon—both punishable by twenty years in prison) or those convicted of a crime involving serious or substantial bodily injury (assault in the first or second degree) within the last five years.<sup>75</sup> This means there are no legal restrictions on admitting those convicted of many other violent crimes and sentenced to probation, including crimes of kidnapping, robbery in the second degree (robbery without a weapon), terroristic threatening in the first degree (a threat with a dangerous weapon), terroristic threatening in the second degree (without a weapon), or misdemeanor assault, nor felonious assaults when the conviction was more than five years old.<sup>76</sup> The Honolulu Drug Court is now accepting offenders with those convictions if it is determined they can benefit most from Drug Court's services.

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73. See MARLOWE, *supra* note 62; Public Safety Performance Project, *supra* note 11, at 4–5.

74. Interview with Janice Bennett, *supra* note 72.

75. HAW. REV. STAT. § 706-605.1 (2014).

76. *Id.* § 707-710 (regarding assault in the first degree); *Id.* § 707-711 (regarding assault in the second degree); *Id.* § 707-712 (regarding misdemeanor assault); *Id.* § 707-716 (regarding terroristic threatening in the second degree); *Id.* § 707-717 (regarding terroristic threatening in the first degree); *Id.* § 707-720 (regarding kidnapping); *Id.* § 708-841 (regarding robbery in the second degree); *Id.* § 709-906 (regarding abuse of family and household members).

I spoke with the drug court staff about this shift in the admissions policy when I became the drug court judge in March 2011. The staff expressed their concerns about working with violent clients. I pointed out that the pool from which the drug court probation applications were drawn were offenders a judge had already decided to place on community supervision or probation instead of sending to prison. As such, if we, as most jurisdictions currently do, say “this probationer is too violent for drug court,” consider the alternative. That probationer does not disappear. Or go to prison. That probationer will be supervised down the hall by a single PO in his or her cubicle. As I told the staff, “How is that safer for the community?” In the last three-and-a-half years during my tenure, there has been no violent behavior by the Honolulu Drug Court clients against other drug court clients or court staff, including by those offenders with a history of violence.<sup>77</sup>

It is my belief that drug courts provide the very best program that the judiciary has to offer in terms of supervision: better than probation-as-usual and better than HOPE Probation. While at \$6,300 per offender per year it is more expensive than probation-as-usual (\$1,000) or HOPE (\$1,500), drug court is lot cheaper than prison in Hawaii, which costs \$46,000 per year.<sup>78</sup>

In drug court in Honolulu, a client sees the judge once a week, every week, to start. They are assigned a counselor and a case manager and given substance abuse treatment. Drug court clients typically live in an Oxford Clean and Sober House (or at the YMCA if they are truly indigent and have no family support on their release from jail). There is no better way to supervise an offender than in drug court. Given the limitations on the size of a drug court, even a greatly expanded one, the best use of those precious drug court slots is to focus on the offenders who need those services the most.

#### 1. Jobs

Ms. Bennett and I also shared the belief that employment was a key part of rehabilitation for drug court clients. The clients need to pay rent at their Oxford House and they always have restitution, court fees or traffic fines to pay. Having a job

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77. Interview with Janice Bennett, *supra* note 72.

78. Interview with Office of Ted Sakai, Dir., State of Haw. Dep't of Pub. Safety, in Honolulu, Haw. (2012); Kristine Uyeno, *Adding Up the Cost of Incarceration*, KHON2 (Feb. 5, 2013), <http://khon2.com/news/local/story/Adding-up-the-cost-of-incarceration/5laloxki8EeJKVLQCU16dA.csp>.

provides a real boost to self-esteem, helps keep the client busy, and places them in the community with “regular citizens” for several hours a day.<sup>79</sup>

When I started as the drug court judge in March 2011, there were 127 clients in drug court. Not counting those in residential treatment (fifteen), on bench warrant status (seven), in custody for program violations or pending termination (six), or having a mental illness or disability which precluded employment (one), there were ninety-eight clients who were employable and of these, sixty-one or sixty-two percent were employed. Ms. Bennett and I thought we could do better.<sup>80</sup>

In the Spring of 2011, I told all of the unemployed drug court clients who weren't in residential treatment or verifiably disabled that I expected everyone in drug court to get a job. I also told them that they shouldn't be too proud or picky. If they were unemployed, any job was better than no job. We were not talking about a career here, but about a job. Once you got a job, it would be much easier to find another job.

In addition, any client who was unemployed would have to report to drug court on other mornings during the week to participate in an “Employment Assistance Group” organized by Ms. Bennett. Those groups would be run by drug court case managers who would help the clients develop a resume, role play job interviews, and assist clients in targeting potential employment prospects.

As soon as a drug court client found a job and informed me about it in court, the entire courtroom (staff, clients, and I) would give the client a round of applause. I would give the client a PayDay candy bar, and he or she did not have to come to court again the following Monday. I would now make his or her next court appearance in two weeks, as a reward for finding employment. If a second drug court client found a job at the same place where another drug court client was already working, I would be sure to recognize that first, “pioneering,” drug court client the next time he or she was in court and offer praise for doing a good job at the job site, making it “safe” for the employer to hire the second drug court client.

At the same time, finding a job and making a payment to restitution, fines, or fees meant that the drug court client didn't have to attend the employment assistance group anymore.

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79. Interview with Janice Bennett, *supra* note 72.

80. *Id.*



At the time I left drug court on September 1, 2014, there were 197 clients enrolled. Setting aside those in residential treatment (fourteen), those on bench warrant status (twenty), those in custody pending termination (ten), or those with a mental illness or disability which precluded employment (nineteen), there were 134 clients who were employable. Of the 134 clients who were employable, 128 clients or ninety-five percent were employed.<sup>81</sup> We have fifteen clients working at McDonald's, fifteen at Pro Park (a private parking company), and other clients working at such places as restaurants (cooks and dishwashers), maintenance companies, landscaping companies, and offices. Part of the culture in drug court in Honolulu now is work.

## 2. Dual Diagnosis Treatment for Those with Substance Abuse and Mental Health Issues

The criminal justice system is awash with individuals who are battling both mental health issues (e.g., schizophrenia, bipolar disorder, depression) and substance abuse issues.<sup>82</sup>

In 2012, Ms. Bennett applied for and received a grant to set up a separate track for the dual diagnosis drug court clients. Drug court set up a treatment track with both group and individual counseling for those clients called "Mea Kokua," separate from the substance abuse-only clients. In the Hawaiian language "mea kokua" means "the helper."<sup>83</sup>

While the grant originally called for thirty clients to receive these services, drug court staff could see the value of the separate track and the clients liked the group and counseling so much that the Mea Kokua program was eventually expanded to serve seventy clients.<sup>84</sup>

## 3. Target Population

In our new drug court, we have followed the appropriate research principles: focus on the high-risk clients, do not over treat the low-risk clients, and don't mix the two groups.<sup>85</sup>

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81. *Id.*

82. Kevin Johnson, *Mental Illness Cases Swamp Criminal Justice System*, USA TODAY (Jul. 21, 2014), <http://www.usatoday.com/longform/news/nation/2014/07/21/mental-illness-law-enforcement-cost-of-not-caring/9951239>.

83. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY: HAWAIIAN-ENGLISH, ENGLISH-HAWAIIAN 162 (1986).

84. Interview with Janice Bennett, *supra* note 72.

85. MARLOWE, *supra* note 62, at 7; Public Safety Performance Project, *supra* note 11; Steven S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1181, 1188-89 (2013).

First, our drug court is now focusing mostly on the higher-risk probationers. They are the ones most in need of drug court services, and drug court gets a better cost-benefit return for our investment by focusing on them.<sup>86</sup> At the same time, we still allow some lower-risk pretrial clients to enter drug court (in the interests of collegiality with the prosecutors and the public defenders offices who advocate for admission of these clients).

Second, we do not “over-treat” the lower-risk clients. Drug court coordinates these clients’ drug court appearances and needed treatment so they do not interfere with these clients’ existing pro-social activities like work or school. Intense programs like drug court may offer small benefits for this population but providing too much treatment or supervision is a waste of these precious resources.<sup>87</sup>

Third, we do not mix the two groups. The lower-risk pretrial clients typically live at home rather than with the higher-risk (probation) clients at an Oxford House or the YMCA. We also schedule the lower-risk clients’ court appearances on alternate Tuesday afternoons rather than Monday mornings with the higher-risk (probation) drug court clients. We also have separate treatment groups for them, as needed. Mixing the two groups exposes the lower-risk group to the more destructive and antisocial higher-risk group and can increase crime and substance abuse.<sup>88</sup>

## VI. SUPERVISION CONTINUUM IN HONOLULU

A number of those offenders convicted in Honolulu of a felony (or on a deferral to keep their records clean) can be effectively supervised on probation-as-usual or, in certain circumstances, minimally supervised in an administrative or “banking” unit. Currently, there are approximately 8,000 felony offenders on probation or deferral status in this circuit. Approximately half, or 4,000 cases (as assessed by the Level of Service Inventory-Revised instrument, or its proxy), are determined to be low enough risk to be placed in the administrative or “banking” section. That means the other 4,000 will be actively supervised by a probation officer.<sup>89</sup>

As of February 2015, approximately 2,140 of these felony probationers were being supervised in HOPE. I supervise ap-

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86. MARLOWE, *supra* note 62, at 2.

87. *Id.* at 4.

88. *Id.* at 3.

89. Interview with Cheryl Marlow, *supra* note 15.

proximately 1,870 of them and Judge Edward H. Kubo, Jr. supervises approximately 270. The remainder are in a HOPE program for domestic violence misdemeanor probationers.<sup>90</sup>

If those individuals on probation-as-usual are having problems complying with their conditions of probation, they are referred to HOPE (or were referred at sentencing by the judge). If they abscond repeatedly on HOPE, they are sent to state prison. If, on the other hand, they have tried a treatment program or two while in HOPE but they just can't stop using drugs, they are then referred to either a two-year drug treatment program or to drug court as alternatives to sentencing them to prison for several years. Drug court is now dealing with many of the most troubled, most addicted offenders on supervision.

## VII. MEASURES OF SUCCESS

### A. HOPE

Many offenders are successful on HOPE Probation. In 2007, Dr. Angela Hawken of Pepperdine University (and the principal cost-benefit analyst for California's treatment versus incarceration experiment—Proposition 36) received funding from the National Institute of Justice and the Smith Richardson Foundation to review existing data on HOPE Probation and to conduct an original gold-standard research project.<sup>91</sup>

Dr. Hawken found that during the first three months from baseline (the Warning Hearing), the HOPE probationers positive drug tests were reduced by 83% (from 53% to 9%).<sup>92</sup> Extending the observation period to six months improved the HOPE probationers' reduction to 93% (53% to 4%).<sup>93</sup> Dr. Hawken saw that the comparison group improved as well (from 22% to 19%).<sup>94</sup> In interviews, the POs attributed the improved performance by the comparison group to a "spillover effect" of HOPE.<sup>95</sup> As both HOPE and comparison group probationers sat in the same waiting room, the latter group saw the HOPE probationers getting arrested on the spot.<sup>96</sup> They then improved

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90. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., DEP'T OF THE ATTORNEY GEN., STATE OF HAW., HOPE PROBATION STUDY GROUPS, CASE SUMMARY (as of Dec. 31, 2014) (on file with author).

91. HAWKEN & KLEIMAN, *supra* note 17, at 7.

92. *Id.* at 18.

93. *Id.* at 19.

94. *Id.*

95. *Id.*

96. *Id.*

because they didn't want to get transferred to HOPE or they didn't realize it was a distinct program.<sup>97</sup>

Similarly the missed probation appointment results at three months from baseline improved for the HOPE group from fourteen percent to four percent, a reduction of seventy-one percent.<sup>98</sup> The comparison group on the other hand increased their missed appointments from nine percent to eleven percent, a twenty-two percent increase.<sup>99</sup> At six months, the HOPE group decreased further, down to one percent, while the comparison group decreased slightly from nine percent to eight percent.<sup>100</sup>

Dr. Hawken also conducted a gold-standard, randomized controlled trial of 493 felony offenders in 2007.<sup>101</sup> The probationers were identified by the probation officers as having substance abuse problems and other problems complying with their conditions of probation.<sup>102</sup> This group of 493 were in their mid-thirties, three-fourths were male, and they had an average of sixteen to seventeen prior arrests.<sup>103</sup> They were currently on felony probation for property, drug, and violent crimes.<sup>104</sup>

Dr. Hawken ran the 493 names through a randomizing computer program and two thirds were placed into HOPE (n=330) and the remaining one third were to stay on probation-as-usual (n=163).<sup>105</sup> All ten felony judges in Honolulu were carrying HOPE caseloads at the time and the following week did Warning Hearings for the vast majority of those 330 in the HOPE study group.<sup>106</sup>

One year later, Dr. Hawken compared the HOPE study group with those in the control group on probation-as-usual.<sup>107</sup>

The HOPE probationers tested positive for drugs 72% less often and missed PO appointments 61% less often.<sup>108</sup> The

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97. *Id.*

98. *Id.* at 22.

99. *Id.*

100. *Id.*

101. *Id.* at 60.

102. *Id.*

103. *Id.* at 62

104. *See id.* at 62; "Swift and Certain" Sanctions in Probation Are Highly Effective: Evaluation of the HOPE Program, NAT'L INST. JUST., <http://www.nij.gov/topics/corrections/community/drug-offenders/pages/hawaii-hope.aspx> (last modified Feb. 3, 2013).

105. HAWKEN & KLEIMAN, *supra* note 17, at 60.

106. *Id.* at 38, 63.

107. HAWKEN & KLEIMAN, *supra* note 17, at 64.

108. *See id.* (citing Appendix 3: Summary of Results of the Randomized

HOPE study group was arrested for new crimes and had their probation revoked half as often. As a result, they served or were sentenced to 48% fewer days in state prison.<sup>109</sup>

#### B. DRUG COURT

In the Hawaii (Honolulu) Drug Court, the percentage of higher-risk probationers successfully graduating, compared to lower risk pretrial clients, has increased over the years. In the six drug court graduations from October 5, 2012 to the end of my tenure as drug court judge on September 1, 2014, fifty of the ninety-eight graduates had been on HOPE Probation prior to their admission into drug court. These individuals were having real problems stopping their drug use and were likely headed to state prison. At my last drug court graduation on May 1, 2014, all fourteen graduates had been on HOPE Probation. As I told the audience at the time, “in the old days” this graduation would literally not have taken place because the vast majority of the graduates would not have been accepted into drug court to begin with. As a group, those fourteen paid a total of \$30,000 in restitution, fines, and court fees. In the six drug court graduations since October 5, 2012, the fifty Drug Court graduates who had previously been in HOPE and were failing and headed for state prison and paid a total of \$81,811 in restitution, fines, and court fees; and by going to and graduating from drug court, they saved the state a total of \$6,573,057 in prison costs. In addition, of those fifty HOPE graduates, forty-six were employed and paying taxes, one was in college, and the remaining three were volunteering at the zoo, the Humane Society, and at a church.

Even though they were a higher-risk group, the drug court clients who had come from HOPE were arrested for new crimes no more often than those clients who came from the lower-risk pretrial population.<sup>110</sup>

#### VIII. HOPE AND EVIDENCE-BASED PRINCIPLES: ADDRESSING CRIMINOGENIC RISK FACTORS

For more than a decade, POs in Hawaii (as well as pretrial officers, case managers in prison, and parole officers) have been using EBP to more effectively supervise offenders. They are all trained in Motivation Interviewing (MI), Cognitive-Behavioral

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Controlled Trial of HOPE).

109. *Id.*

110. Interview with Janice Bennett, *supra* note 72.

Therapy (CBT) and case planning.<sup>111</sup>

The POs use the Level of Service Inventory-Revised (LSI-R), a fifty-four item assessment tool that measures ten criminogenic risk factors. (The POs here focus their work with their clients on the National Institute of Corrections “Central 8,” including criminal history, employment, family marital relationships, leisure time activities, substance abuse, personal/emotional, companions, and attitudes.)<sup>112</sup> The LSI-R has been shown to be a good predictor of risk for recidivism and is used in many probation offices across the country.

While HOPE Probation only directly addresses the substance abuse criminogenic risk factor (and does so very effectively), it also helps to create an environment where denial is reduced. The probationer is much more likely to be sober, attend their appointments with their POs,<sup>113</sup> attend and persevere in treatment,<sup>114</sup> and be open to change.<sup>115</sup> HOPE empowers the POs and allows them to be more effective in working with their clients.<sup>116</sup> The POs can now more effectively address the other criminogenic risk factors and use their skills like MI, CBT, and case planning to help offenders to succeed.

The PO supervisor, Ms. Inouye, had to take special care when HOPE started—and to this day—to educate and train the POs on how to most effectively blend the HOPE strategy with currently employed EBP. The two, HOPE and EBP, make for a very powerful combination. This was the approach used, after all, by the study group, the HOPE group, in Dr. Hawken’s gold-standard research. (The control group on probation-as-usual, was subject to EBP, without the HOPE approach.)

I encourage jurisdictions to actively use EBP, as they are effective in reducing recidivism. Using those strategies with HOPE will allow them to get even better outcomes.

### CONCLUSION

As a judge now doing community supervision full time, I feel we have designed a more effective continuum of supervision for those on felony probation or deferral. We are using research and data to drive our policy decisions.

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111. *See supra* note 12.

112. *Supra* note 11.

113. HAWKEN & KLEIMAN, *supra* note 17, at 21.

114. *Id.* at 32.

115. Interview with Cheryl Inouye, *supra* note 35.

116. HAWKEN & KLEIMAN, *supra* note 17, at 36, 38.

We try to supervise the offenders appropriately, whether that be on probation-as-usual, HOPE Probation, or drug court.

While HOPE Probation only directly targets the substance abuse criminogenic risk factor, it helps to provide an environment where the probationers are in denial less, are more open to change, are more sober and more likely to attend their PO appointments and their various treatment programs, and thus have a better chance to succeed on probation.

For those offenders where probation-as-usual or even HOPE Probation are not enough (and who don't abscond repeatedly), our new drug court, now redirected to focus its wraparound services on the higher-risk probation population, including those with violent histories, is the appropriate placement.

The combination of HOPE Probation and the new drug court gives us the tools and structure to make our community supervision more effective and holds the promise of having fewer arrests for new crimes, helping offenders avoid long prison terms, and saving millions of taxpayer dollars.