THE UNIFIED COURT SYSTEM'S RESPONSE TO THE OPIOID EPIDEMIC IN NEW YORK

By Hon. Lawrence K. Marks[*]

I. INTRODUCTION

Heroin addiction and prescription opioid abuse have created a national epidemic. From 2000 to 2015, more than a half million Americans died from drug overdoses.[1] Since 1999, the rate of overdose deaths involving opioids, including prescription pain relievers and heroin, has nearly quadrupled.[2] In 2015, the United States Centers for Disease Control and Prevention reported a grim milestone in the opioid crisis: opioid-related deaths have surpassed deaths due to automobile crashes or firearms.[3] On July 31, 2017, the President's Commission on Combating Drug Addiction and the Opioid Crisis issued a preliminary report describing the severe magnitude and consequences of the opioid addiction crisis that is gripping communities across America.[4] The statistics are staggering, but unfortunately not surprising, once we consider how this epidemic began.

Chronic pain is a significant medical problem in the United States with approximately 100 million Americans living with

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[1] *Understanding the Epidemic: Drug overdose deaths in the United States continue to increase in 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited Nov. 30, 2017).

[2] *Id*.

[3] *See Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/fastats/injury.htm (last visited Nov. 30, 2017).

[4] *See* Christopher Ingraham, *White House opioid commission to Trump: 'Declare a national emergency' on drug overdoses*, WASH. POST (July 31, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/31/white-house-opioid-commission-to-trump-declare-a-national-emergency-on-drug-overdoses/?utm_term=.ec633caa74e5.

serious pain every day.[5] Historically, chronic pain was widely treated with opioids which essentially block pain receptors throughout the body.[6] As a result, people came to rely on opioids on a regular basis, which led to addiction and abuse. To make things worse, new and more addictive types of opioid-based drugs are finding their way onto the street each year.

New Yorkers are not immune to the effects of opioid abuse, and communities across the state are experiencing tragedy as a result. In 2016, our state experienced approximately 2,365 opioid overdose deaths,[7] representing a five percent increase from the approximately 2,253 opioid overdose deaths in 2015.[8] While all branches of state government are diligently working to develop strategies to address this worsening crisis,[9] the New York State

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[5] INST. OF MED. OF THE NAT'L ACAD., RELIEVING PAIN IN AMERICA: A BLUEPRINT FOR TRANSFORMING PREVENTION, CARE, EDUCATION, AND RESEARCH (June 2011), http://www.nationalacademies.org/hmd/~/media/Files/Report%20Files/2011/Relieving-Pain-in-America-A-Blueprint-for-Transforming-Prevention-Care-Education-Research/Pain%20Research%202011%20Report%20Brief.pdf.

[6] *See* Andrew Rosenblum et al., *Opioids and the Treatment of Chronic Pain: Controversies, Current Status, and Future Directions*, 16 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 405 (2016).

[7] *See* N.Y. STATE DEP'T OF HEALTH, N.Y. STATE – CTY. OPIOID QUARTERLY REPORT (July 2017), https://www.health.ny.gov/statistics/opioid/data/pdf/nys_jul17.pdf. *See also* N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, EPI DATA BRIEF (June 2017), https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief89.pdf.

[8] *See* N.Y. STATE DEP'T OF HEALTH, N.Y. STATE - COUNTY OPIOID QUARTERLY REPORT (Jan. 2017), https://www.health.ny.gov/statistics/opioid/data/pdf/ros_jan17.pdf. *See also* N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, EPI DATA BRIEF (Aug. 2016), https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief74.pdf.

[9] For example, Governor Cuomo recently signed legislation that requires the state to invest over $200 million to increase access to treatment, expand community prevention strategies, and limit the practice of overprescribing opioid-based pain medications. *Governor Cuomo Signs Legislation Investing Over $200 Million to Combat the Heroin and Opioid Epidemic in New York*, N.Y. STATE GOVERNOR'S OFFICE (Apr. 19, 2017), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-investing-over-200-million-combat-heroin-and-opioid-epidemic. Last year the state legislature passed bills that enhanced access to medication assisted treatment (MAT). *Senate Passes Package of Bills to Fight Heroin and Opioid Abuse in Communities Statewide*, N.Y. STATE SENATE (June 16, 2016), https://www.nysenate.gov/newsroom/press-releases/senate-passes-package-bills-fight-heroin-and-opioid-abuse-communities. Local governments throughout the state began engaging in grassroots prevention and education efforts to stem the rise in opioid overdose deaths in their communities. Jim Brooks, *Local Governments Continue to Fight the Opioid Crisis*, NAT'L LEAGUE OF CITIES (June 22, 2017), http://www.nlc.org/article/local-governments-continue-to-fight-the-opioid-crisis. The New York State Office of Alcoholism and Substance Abuse Services has launched multiple outreach campaigns to combat heroin and

Unified Court System (UCS), currently under the leadership of Chief Judge Janet DiFiore, has long played a central role in the battle against drug addiction and continues to do so today. Since the state's first drug court was established in Rochester in 1995, the UCS has developed over 140 of these innovative courts.[10] In October 2016, the UCS received funding to launch a new Opioid Intervention Court in Buffalo that provides immediate intervention, treatment, and medication for defendants who screen positive for being at risk of opioid overdose or addiction.[11] Efforts are underway to expand this model to cities and smaller communities across the state. The UCS published a first-of-its-kind resource document on how to incorporate Medication Assisted Treatment (MAT)[12] into drug court programs and will continue to train judges statewide on the efficacy of MAT. UCS court officers are being instructed on how to administer naloxone, also known as "Narcan," a potentially life-saving drug that can reverse the effects of an opioid overdose.[13]

II. THE WAR ON DRUGS AND THE BIRTH OF DRUG COURTS

The drug treatment court model was not New York's first attempt to confront the cycle of addiction and recidivism. In 1973, the state enacted the now infamous Rockefeller Drug Laws, which were designed to "deter citizens from using or selling drugs" by increasing minimum sentences, imposing maximum life sentences for many offenders, mandating prison sentences for certain sale

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prescription drug abuse and connect opioid-addicted individuals with treatment providers. *Current Outreach Campaigns*, N.Y. STATE OFFICE OF ALCOHOLISM & SUBSTANCE ABUSE SERVS., https://www.oasas.ny.gov/.

10 N.Y. STATE UNIFIED COURT SYS., THE FUTURE OF DRUG COURTS IN NEW YORK STATE: A STRATEGIC PLAN 3–4 (Jan. 1, 2017), http://nyadtcp.org/assets/conference-materials/2017/The%20Future%20of%20Drug%20Courts%20in%20NY%20State%20A%20Strategic%20Plan.pdf.

11 Michael Canfield, *Buffalo Opens Nation's First Opiate Centered Court*, BUFFALO L. J. (June 2, 2017), https://www.bizjournals.com/buffalo/news/2017/06/02/buffalo-opens-nation-s-first-opiate-centered-court.html.

12 Sally Friedman & Kate Wagner-Goldstein, *Medication-Assisted Treatment in Drug Courts: Recommended Strategies*, LEGAL ACTION CENTER (2016), https://lac.org/wp-content/uploads/2016/04/MATinDrugCourts.pdf. MAT involves the use of medication to reduce intense cravings during withdrawal from opioids. *Id*. at 3.

13 N.Y. STATE UNIFIED COURT SYS., PRESS RELEASE: COURT SYSTEM ADOPTS STATEWIDE OPIOID OVERDOSE PREVENTION PROGRAM (June 29, 2017), https://www.nycourts.gov/press/PDFs/PR17_09.pdf.

and possession charges, and limiting judicial discretion in sentencing.[14] Prosecutors, not judges, were given control over non-prison dispositions.[15] As a result, the percentage of non-violent offenders within the prison population skyrocketed.[16] Without treatment as an option, recidivism rates soared and many drug-addicted offenders faced long-term prison sentences. This all began to change in October 1993, when the Midtown Community Court (MCC) opened near Times Square as one of the country's first "problem-solving" courts.[17] Handling only misdemeanor cases, MCC sought to reduce crime and incarceration by combining accountability to the community with services for the offender. MCC featured visible community service projects such as painting over graffiti, sweeping the streets, and cleaning local parks, all while providing access to substance abuse and mental health treatment, job training, and support for stable housing.[18] MCC still exists today in much the same form as when it first opened.[19] Along with others that are modeled after it, most notably the Red Hook Community Justice Center, MCC continues to thrive. Partly due to MCC's success, New York's first drug court opened in

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[14] Aaron D. Wilson, *Rockefeller Drug Laws Information Sheet*, PRDI (Aug. 6, 2000), http://www.prdi.org/rocklawfact.html.

[15] *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS. CRIMINAL JUSTICE INTERIM UPDATE, 2009 DRUG LAW CHANGES JUNE 2012 UPDATE (2012), http://criminaljustice.ny.gov/drug-law-reform/documents/dlr-update-report-june-2012.pdf.

[16] *See* Madison Gray, *New York's Rockefeller Drug Laws*, TIME (Apr. 2, 2009), http://content.time.com/time/nation/article/0,8599,1888864,00.html.

[17] *See* CTR. FOR COURT INNOVATION, https://www.courtinnovation.org/about (last visited Nov. 30, 2017). *See also Professional and Court Services RFP 036: Drug Court Mental Health Services, City of Newburg, New York*, N.Y. STATE CONTRACT REPORTER (Sept. 29, 2017), https://www.nyscr.ny.gov/iframes/openAdDetail.cfm?id=D7CD61FA-91B8-41F1-951A-3573247BBA94.

> [P]roblem-solving courts, among them drug courts, [] help judges and court staff respond to the needs of litigants and the community by . . . look[ing] to the underlying issues that bring people into the court system, employing innovative approaches to address those issues, and seek[ing] to simplify the court process for litigants.

Id.

[18] *See* Julius Lang, *What Is A Community Court? How the Model is Being Adapted Across the United States*, CTR. FOR COURT INNOVATION (2011), http://www.courtinnovation.org/sites/default/files/documents/What%20is%20a%20Community%20Court.pdf.

[19] *See New York City Criminal Court – Court Information by County*, NYCOURTS.GOV (Nov. 1, 2017), https://www.nycourts.gov/courts/nyc/criminal/generalinfo.shtml#MidtownInfo. *See also* Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 132 (2004).

Rochester in 1995.[20]

When the first drug court opened in Miami, Florida in 1989, "it launched a dramatic shift in how courts respond to the criminal behavior of drug-addicted defendants."[21] Today, drug courts work in cooperation with a team of social service providers, treatment providers, and criminal justice professionals in the local community. In return for a promise of a reduced sentence or dismissal of the charges, appropriate non-violent addicted offenders are given the option of entering court-supervised treatment. The rules and conditions of participation are clearly stated in a contract entered by the defendant, the defense attorney, the prosecutor, and the court.[22] Generally, the defendant agrees to comply with court-ordered conditions, including substance abuse treatment, random drug testing, and other supportive social services, all in exchange for a favorable legal outcome. "By combining treatment with close judicial supervision, the drug court model offers a new alternative to the unproductive and costly cycle of addiction, crime and incarceration."[23] "Unlike conventional courts, the success of drug courts is measured . . . [by] achieving tangible impacts—less drug use and crime, gains in employment and education, improved mental and physical health, and cost savings from diverting offenders away from jail and prison."[24] Extensive research has proven drug courts to be effective in all of these areas.[25]

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[20] *See* Amanda B. Cissner et al., *A Statewide Evaluation of New York's Adult Drug Courts: Identifying Which Policies Work Best*, CTR. FOR COURT INNOVATION (June 2013), https://www.urban.org/sites/default/files/publication/23826/412867-A-Statewide-Evaluation-of-New-York-s-Adult-Drug-Courts.PDF.

[21] Amanda B. Cissner & Michael Rempel, *The State of Drug Court Research: Moving Beyond 'Do They Work?'*, CTR. FOR COURT INNOVATION (2005), http://www.courtinnovation.org/sites/default/files/state%20of%20dc%20research.pdf.

[22] *See Problem-Solving Courts: Drug Treatment Courts*, NYCOURTS.GOV (Jan. 26, 2017), https://www.nycourts.gov/courts/problem_solving/drugcourts/index.shtml ("Rules of participation are defined clearly in a contract agreed upon by the defendant, the defendant's attorney, the district attorney and the court.").

[23] Cissner & Rempel, *supra* note 21.

[24] *Id.*

[25] *Id*. *See also* Ojmarrh Mitchell et al., *Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts*, 40 J. OF CRIM. JUST. 60 (2011); Shelli B. Rossman et al., *The Multi-Site Adult Drug Court Evaluation: Executive Summary*, THE URBAN INST. (Nov. 2011), https://www.urban.org/sites/default/files/publication/27361/412353-The-

"In New York, as in other [states], drug courts emerged over the objections of many [in the criminal justice system] who saw them as a form of social work and an inappropriate departure from the business of interpreting law and deciding punishments."[26]

Within months of opening Rochester's drug treatment court,[27] city courts in Buffalo and Syracuse and a district court in Suffolk County also opened drug courts.[28] In 1996, the UCS, in partnership with the non-profit Center for Court Innovation, opened New York City's first drug treatment court in Brooklyn, one of the largest drug courts in the nation.[29] By 2010, the UCS was operating approximately 180 drug treatment courts across the state. Today, drug courts arguably face an even greater crisis than

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Multi-site-Adult-Drug-Court-Evaluation-Executive-Summary.PDF; Erin J. Farley & Michael Rempel, *Testing the Cost Savings of Judicial Diversion*, CTR. FOR COURT INNOVATION (Mar. 2013), https://www.courtinnovation.org/sites/default/files/documents/NY_Judicial%20Diversion_Cost%20Study.pdf.

[26] Paul von Zielbauer, *Court Treatment System is Found to Help Drug Offenders Stay Clean*, N.Y. TIMES (Nov. 9, 2003), http://www.nytimes.com/2003/11/09/nyregion/court-treatment-system-is-found-to-help-drug-offenders-stay-clean.html.

[27] In recognition of Rochester's pioneering achievements, the United States Department of Justice named it a "mentor court" for other jurisdictions throughout the Northeast. *Criminal Justice*, NYCOURTS.GOV, https://www.nycourts.gov/admin/stateofjudiciary/stofjud8/crim.htm (last visited Nov. 18, 2017). The Mentor Court Network provides training and technical assistance to jurisdictions during the planning or implementation stages of a drug court project. U.S. DEP'T OF JUSTICE, ADULT DRUG COURT PLANNING, TRAINING, TECHNICAL ASSISTANCE, AND RESOURCE CENTER INITIATIVES FY 2016 COMPETITIVE GRANT ANNOUNCEMENT (2016), https://www.bja.gov/funding/AdultDrugCourtsTTA16.pdf.

[28] von Zielbauer, *supra* note 26.

[29] After years of demonstrated effectiveness, the Brooklyn Treatment Court was institutionalized in April 2003 and the UCS assumed total administrative oversight over the program. The Brooklyn Treatment Court has been recognized for its innovative program by the Drug Courts Program Office of the U.S. Department of Justice and the National Association of Drug Court Professionals when it was selected as a National Mentor Court. The Court was also the subject of a four-year evaluation by the Urban Institute, which released its results in June 2001. The summary conclusions of the evaluation read, in part: "The Brooklyn Treatment Court did an outstanding job of meeting standards for effective treatment outlined by NIDA (National Institute on Drug Abuse), as well as the model drug court principles outlined by NADCP (National Association of Drug Court Professionals)." ADELE HARRELL ET AL., URBAN INSTITUTE JUSTICE POLICY CTR., DRUG COURT SERVICES FOR FEMALE OFFENDERS, 1996–1999: EVALUATION OF THE BROOKLYN TREATMENT COURT 18 (2001), https://www.urban.org/sites/default/files/publication/61671/410356-Drug-Court-Services-for-Female-Offenders---.PDF. In 2011, the U.S. Department of Justice awarded the Brooklyn Treatment Court its highest rating as an effective state anticrime program. *Program Profile: Brooklyn (NY) Treatment Court*, CRIMESOLUTIONS.GOV (June 8, 2011), https://www.crimesolutions.gov/ProgramDetails.aspx?ID=44.

the crack epidemic of the 1980s and 1990s. Two years ago, opioids overtook all other drugs of choice for New York's drug court participants.[30] Over-prescription of opioids for pain created widespread dependence which in turn led to doctor and pharmacy shopping. As states enacted laws to limit access to prescription pain killers, opioid dependent individuals resorted to cheaper and more readily available street heroin.

Recognizing that drug abuse often stems from other underlying issues, the UCS opened other problem-solving courts as well. Under the direction of the court system's Office of Policy and Planning, the UCS now operates well over 300 problem-solving courts, including Veterans' Treatment Courts, Human Trafficking Intervention Courts, Mental Health Courts, DWI Courts, and Adolescent Diversion Courts.[31] These highly specialized courts are needed more than ever before. Without treatment, many criminal defendants will go to prison where their drug addiction will likely persist after being released, resulting in continued drug use and a possible return to the criminal justice system. Our youth population is experimenting with drugs at alarming rates.[32] Veterans returning from combat are self-medicating their Post-Traumatic Stress Disorder and traumatic brain injuries.[33] Our most vulnerable populations are being forcibly exposed to drugs as part of sex trafficking.[34] Problem-solving court judges and their staff are doing their best to make sure that this does not happen.

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[30] *See* BENJAMIN R. NORDSTORM ET AL., NAT'L DRUG COURT INST., DRUG COURT PRACTITIONER FACT SHEET 1 (Aug. 2016), https://www.ndci.org/wp-content/uploads/2009/04/mat_fact_sheet-1.pdf.

[31] *Problem-Solving Courts Overview*, NYCOURTS.GOV (last updated July 17, 2017), https://www.nycourts.gov/courts/problem_solving (this website has links to the Problem-Solving courts).

[32] *Principles of Drug Abuse Treatment for Criminal Justice Populations – A Research- Based Guide*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations/what-are-unique-treatment-needs-juveniles-in-crimin (last updated April 2014); *Teen Drug and Alcohol Abuse Facts and Statistics*, TEEN REHAB, https://www.teendrugrehabs.com/facts-and-stats/ (last visited Nov. 19, 2017).

[33] Jeremiah A. Schumm & Kathleen M. Chard, *Alcohol and Stress in the Military*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, https://pubs.niaaa.nih.gov/publications/arcr344/401-407.htm (last visited Nov. 19, 2017).

[34] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 26 (June 2016), https://www.state.gov/documents/organization/258876.pdf.

III. DRUG LAW REFORM ACTS AND JUDICIAL DIVERSION

The fundamental paradigm shift from the Rockefeller Drug Laws to the problem-solving court model of today did not happen overnight, and could not have occurred without support from the Legislature. The 2004 Drug Law Reform Act (DLRA)[35] was the first step in reforming the Rockefeller Drug Laws. Among other things, the DLRA changed the sentencing guidelines for felony drug cases by requiring the imposition of determinate rather than indeterminate sentences.[36] As a result, individual sentences no longer have minimum and maximum terms, but now have definite terms of imprisonment. This change was especially significant for those convicted of Class A-I and A-II[37] drug felonies, which required the imposition of maximum life sentences. The DLRA also allowed for the discretionary resentencing of those already sentenced for a Class A-I drug felony under the Rockefeller Drug Laws.[38] The 2005 Drug Law Reform Act (2005 DLRA)[39] extended this discretionary resentencing provision to those convicted of Class A-II drug felonies.[40] The law also required that the inmate meet the eligibility requirements for merit time[41] under the

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[35] *DLRA (Drug Law Reform Act)*, CTR. FOR APPELLATE LITIGATION, http://www.appellate-litigation.org/dlra/ (last visited Nov. 19, 2017).

[36] WILLIAM GIBNEY & TERENCE DAVIDSON, THE LEGAL AID SOC'Y, DRUG LAW RESENTENCING: SAVING TAX DOLLARS WITH MINIMAL COMMUNITY RISK 1 (Jan. 13, 2010), https://www.legal-aid.org/media/127984/drug-law-reform-paper-2009.pdf.

[37] Like many states, New York classifies crimes into two categories: felonies and misdemeanors. N.Y. PENAL LAW § 55.05 (McKinney 2017). Every felony offense has a "class" designation represented by a letter of the alphabet, A through E, with E being the least serious type of felony and A being the most serious. Class A felonies are further broken down into Class A-I felonies and Class A-II felonies, where A-I is the more serious class. Class A felonies, regardless of whether they are Class A-I or A-II, are the most severely punished crimes in the state. N.Y. PENAL LAW § 55.05 (McKinney 2017).

[38] GIBNEY & DAVIDSON, *supra* note 36, at 1–2, 4–5.

[39] *See* NICOLE L. BLACK, CRIMINAL LAW IN NEW YORK § 29:26 (4th ed. 2016).

[40] People v. Mills, 901 N.E.2d 196, 200–02 (2008). *See also* People v. Salvatierra, 859 N.Y.S.2d 752, 753 (App. Div. 2008) (explaining that to qualify for resentencing under either the DLRA or 2005 DLRA, Class A felony drug offenders could not be eligible for parole within three years of their resentencing applications).

[41] N.Y. CORRECT. LAW § 803 (McKinney 2017) (noting the merit time requirement excludes certain inmates from resentencing if they are serving time for other convictions, such as any non-drug Class A-I felony, a violent felony, a sex offense, vehicular manslaughter in the first or second degree, manslaughter in the second degree, criminally negligent homicide and aggravated harassment of an employee by an inmate).

Corrections Law.[42]

While the Drug Law Reform Act and 2005 DLRA were important steps, the biggest change came with passage of the 2009 Drug Law Reform Act (2009 DLRA),[43] which made several sweeping changes for persons convicted of drug felonies in New York. For example, the law authorized discretionary resentencing for inmates convicted of Class B drug offenses committed before January 13, 2005.[44] Inmates serving indeterminate sentences with maximum terms of more than three years, and those convicted of a Class C, D or E drug or marijuana offense, could petition the court for resentencing.[45] Also significant was that imprisonment was no longer mandatory for convictions for Class B drug felonies, and the prosecution's consent was no longer required for the Willard Drug Treatment Program[46] on certain Class D felonies. At the core of the 2009 DLRA, however, is the Judicial Diversion Program for Certain Felony Offenders, codified in CPL Article 216.[47] Under this program, judges may divert felony drug offenders (Class B through E), including second felony drug offenders, to treatment programs in lieu of prison without the consent of the prosecution.

The Judicial Diversion Law was a recognition by New York's Legislature that drug courts and diversion programs are effective alternatives to prison for the drug-addicted offender population. The law put in place procedures for hearings on legal eligibility and set forth clinical screening criteria. Perhaps most significant was that the law emphasized judicial rather than prosecutorial discretion. However, this judicial discretion is not without its limits. The statute lists certain drug- and non-drug related

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42 N.Y. CORRECT. LAW § 803 (McKinney 2017) (the law does not require the inmate to have already earned the merit time, only that he or she be eligible).

43 N.Y. CRIM. PROC. LAW § 446.40 (McKinney 2017).

44 N.Y. CRIM. PROC. LAW § 446.40(1) (McKinney 2017).

45 N.Y. CRIM. PROC. LAW § 446.40(2) (McKinney 2017).

46 *Willard Drug Treatment Program*, N.Y. OFF. OF ALCOHOLISM & SUBSTANCE ABUSE SERVS., https://www.oasas.ny.gov/cj/programs/Willard.cfm.

> Willard is a Drug Treatment Campus (DTC) operated by the New York State Department of Correctional Services and Community Supervision (DOCCS) in collaboration with OASAS. It was created in 1995 as a new sentencing option for low-level drug offenders and parole violators who previously would have been sent to a traditional prison. The Willard program was created as an intermediate sanction — with teeth —to deal with the problem of relapse.

Id.

47 N.Y. CRIM. PROC. LAW § 216.00 (McKinney 2017).

felonies that qualify for diversion, but also specifies certain pending and past felonies that render a defendant ineligible for diversion unless the prosecutor consents.[48] Although a plea of guilty is generally required to enter a diversion program, under exceptional circumstances the court may allow a defendant to participate in Judicial Diversion without the entry of a guilty plea.[49] Upon an eligible defendant's request for Judicial Diversion, the court may reject the request or transfer the case to the designated Judicial Diversion Part for an alcohol and substance abuse evaluation. If the defendant is evaluated, the statute requires the written assessment and report to include:

> (a) an evaluation as to whether the defendant has a history of alcohol or substance abuse or alcohol or substance dependence. . . and a co-occurring mental disorder or mental illness and the relationship between such abuse or dependence and mental disorder or mental illness, if any;
> (b) a recommendation as to whether the defendant's alcohol or substance abuse or dependence, if any, could be effectively addressed by judicial diversion in accordance with this article;
> (c) a recommendation as to the treatment modality, level of care and length of any proposed treatment to effectively address the defendant's alcohol or substance abuse or dependence and any co-occurring mental disorder or illness; and
> (d) any other information, factor, circumstance, or recommendation deemed relevant by the assessing entity or specifically requested by the court.[50]

The statute provides that, "[u]pon receipt of the evaluation report either party may request a hearing on the issue of whether the eligible defendant should be offered alcohol or substance abuse treatment."[51] This hearing requires the judge to consider and make findings of fact as to whether:

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48 N.Y. CRIM. PROC. LAW § 216.00 (McKinney 2017).
49 N.Y. CRIM. PROC. LAW § 216.05(4) (McKinney 2017).
50 N.Y. CRIM. PROC. LAW § 216.00(2) (McKinney 2017).
51 N.Y. CRIM. PROC. LAW § 216.05(3)(a)(i)–(v) (McKinney 2017).

> (i) the defendant is an eligible defendant as defined in [CPL 216];
> (ii) the defendant has a history of alcohol or substance abuse or dependence;
> (iii) such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
> (iv) the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
> (v) institutional confinement of the defendant is or may not be necessary for the protection of the public.[52]

Based on these factors, it is left to the judge to decide whether to allow a statutorily eligible defendant to participate in Judicial Diversion.

The body of case law interpreting Article 216 highlights how judges throughout New York have embraced Judicial Diversion as an alternative to incarceration whenever practical.[53] At the same time, defendants with significant criminal histories and/or propensities for violence have been consistently excluded,[54] and those who fail to complete their mandated programs may be sentenced to prison.[55] Overall, New York's drug courts and judicial diversion laws have played an important role in reducing drug-related crime. By identifying individuals whose substance abuse is a contributing factor to their criminal behavior and connecting them with drug treatment services, the UCS is reducing incarceration and recidivism rates throughout the state. To date, courts across New York State have diverted thousands of defendants with opioid disorders to treatment.[56]

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[52] N.Y. CRIM. PROC. LAW § 216.05(3)(b)(i)–(v) (McKinney 2017).

[53] *See* People v. Smith, 30 N.Y.S.3d 19, 22–23 (App. Div. 2016).

[54] *See, e.g.*, People v. Chavis, 56 N.Y.S.3d 744, 745–46 (App. Div. 2017); People v. Pittman, 33 N.Y.S.3d 443, 444 (App. Div. 2016); People v. O'Keefe, 976 N.Y.S.2d 663, 664 (App. Div. 2013).

[55] *See, e.g.*, People v. Labaff, 7 N.Y.S.3d 682, 683 (App. Div. 2015); People v. Landry, 17 N.Y.S.3d 533, 534–35 (App. Div. 2015); People v. Disotell, 999 N.Y.S.2d 240, 241 (App. Div. 2014); People v. Cooney, 991 N.Y.S.2d 676, 676 (App. Div. 2014); People v. Dawley, 945 N.Y.S.2d 496, 497 (App. Div. 2012).

[56] *See* AMANDA B. CISSNER, ET AL., URBAN INST. JUSTICE & POLICY CTR., A STATEWIDE EVALUATION OF NEW YORK'S ADULT DRUG COURTS: IDENTIFYING WHICH POLICIES WORK BEST 2, 28, 74 (2013), https://www.courtinnovation.org/sites/default/files/documents/NYS_Adult_DC_Evaluation_Effective_Policies.pdf; SHELLI B. ROSSMAN ET AL., URBAN INST. JUSTICE & POLICY CTR., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 5–6 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/237108.pdf.; MICHAEL REMPEL ET AL., URBAN INST. JUSTICE &

IV. THE OPIOID EPIDEMIC

Drug treatment courts emerged as a successful response to the crack epidemic of the 1980s and early 1990s. By the late 1990s, however, healthcare providers were increasingly prescribing opioid medications for pain based on assurances from pharmaceutical companies that their patients would not become addicted.[57] As it became clear that these medications were in fact highly addictive,[58] overdose rates began to increase. In 2015, more than 33,000 Americans died of opioid overdoses from prescription pain medication, heroin, and illicitly manufactured fentanyl, a powerful synthetic opioid.[59] Fentanyl is deadly because it is so much stronger than other opioids. According to the Centers for Disease Control and Prevention, fentanyl is much more potent than heroin and up to "100 times more potent than morphine."[60] What is even more frightening than the extraordinary potency of fentanyl, is the sheer quantity that is available on the streets of New York. As an example, in June 2017, a twenty-five-year-old man from Colorado was arrested in the Bronx on charges of possessing more than forty pounds of fentanyl.[61] Authorities, who originally thought that the man's bag contained heroin, said it was "the largest DEA seizure of fentanyl in New York history."[62]

Fentanyl is not just found on the crowded streets of New York City; it is available in all corners of our state and country. As recently as September 2017, a thirty-four-year-old parolee in

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POLICY CTR., THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 2 (2003), http://www.courtinnovation.org/sites/default/files/drug_court_eval_exec_sum.pdf.

[57] *See Opioid Crisis*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/drugs-abuse/opioids/opioid-crisis (last updated June 2017).

[58] *See* Natalia E. Morone & Debra K. Weiner, *Pain as the Fifth Vital Sign: Exposing the Vital Need for Pain Education*, 35 CLINICAL THERAPEUTICS 1728, 1728 (2013); Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 223, 225 (2009).

[59] *See* Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths – United States, 2010–2015*, 65 MORBIDITY AND MORTALITY WKLY. REP., 1445, 1445–46, 1448 (2016).

[60] *See Synthetic Opioid Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/fentanyl.html (last updated Dec. 16, 2016).

[61] *See* Carlos Ramirez, *Lakewood Man Arrested in New York City for Possessing 40 Pounds of* Fentanyl, DENVER POST (Aug. 1, 2017, 3:57 PM), http://www.denverpost.com/2017/08/01/lakewood-man-arrested-new-york-city-possessing-fentanyl/.

[62] *Id.*

Oneida, New York, was arrested for possessing several dozen individual bags of fentanyl.[63] The extreme danger of fentanyl lies not only in its potency, but also in its appearance: it looks exactly like heroin, yet is far deadlier. Unsophisticated opioid users are generally unable to recognize when the drug they have purchased is laced with fentanyl. For these individuals, an injection of what they believe is their usual quantity of heroin, can inadvertently and tragically result in a deadly overdose. To make matters worse, heroin dealers frequently lace their product with fentanyl to improve its potency, but their measuring tools are usually inadequate to ensure that the quantity of fentanyl added will not be lethal.[64] The fentanyl being illegally manufactured and sold to thousands of unwitting users is different from the pharmaceutical version and has more unpredictable effects on the body. The toll of fentanyl and other opioids on their users, some of them hooked by legitimate prescriptions for pain, have required a change in the response by the courts.

V. MEDICATION ASSISTED TREATMENT

People who do not suffer from addiction often fail to "understand why or how other people become addicted."[64] The non-addicted frequently and mistakenly believe "that those who use drugs lack moral principles or will power and that they could stop their drug use" if they simply chose to do so.[65] We now know that "drug addiction is a complex [brain] disease, and quitting usually takes more than good intentions or a strong will. Drugs change the brain in [substantive] ways that make quitting hard, even for those who" desperately wish to do so.[66] Researchers now understand more about "how drugs affect the brain, and have [discovered medical] treatments that can help people recover from drug addiction and

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[63] *See Oneida City Woman had Thousands Worth of Opioid Fentanyl*, ONEIDA DAILY DISPATCH (Sept. 15, 2017), http://www.oneidadispatch.com/article/OD/20170915/NEWS/170919915.

[64] *See* Allison Bond, *Why fentanyl is deadlier than heroin, in a single photo,* STAT (Sept. 29, 2016), https://www.statnews.com/2016/09/29/fentanyl-heroin-photo-fatal-doses/.

[64] *Understanding Drug Use and Addiction*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/drugfacts/understanding-drug-use-addiction (last updated Aug. 2016).

[65] *Id.*

[66] *Id.*

lead productive lives."[67] Until recently, however, there has been a dramatic disconnect between this research and drug court operations with consequences including relapse, overdose, and death.

While drug courts were designed to accommodate those in need of medical care, some operated under the misguided and dangerous practice of requiring defendants, as part of their successful program completion, "to stop taking life-saving addiction medication" prescribed by their physicians.[68] This practice, which is "at odds with decades of scientific [and medical] research," put individuals with opioid addictions in the precarious position of either having to stop taking their "effective medication and risk relapse" or use their medication and face incarceration.[69] To complicate matters further, New York courts did not have a uniform policy regarding defendants in need of medication. Instead, a patchwork of local practices meant that a defendant in one jurisdiction might be permitted to use medication to reduce powerful and debilitating cravings while a similarly situated defendant in another jurisdiction might not. This lack of uniformity changed with the UCS's adoption of MAT.[70] Recommendations for implementing MAT into New York's drug courts were outlined in a 2015 report by the Unified Court System, Center for Court Innovation, and the Legal Action Center entitled "Medication-Assisted Treatment in Drug Courts: Recommended Strategies."[71]

> MAT involves the use of medications, in combination with counseling and behavioral therapies, to provide a whole-patient approach to the treatment of substance use disorders. When used to treat opioid addiction, MAT stabilizes brain chemistry, blocks the euphoric effects of opioids (the "high"), relieves physiological cravings, and normalizes body functions. Numerous studies have shown that MAT

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67 *Id.*

68 *NY Governor and Legislature Applauded for Drug Court Efforts*, NAT'L COUNCIL ON ALCOHOLISM & DRUG DEPENDENCE (Oct. 6, 2015), https://www.ncadd.org/blogs/in-the-news/ny-governor-and-legislature-applauded-for-drug-court-efforts.

69 *Id.*

70 *See* John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L. J. 277, 279 (2000).

71 Friedman & Wagner-Goldstein, *supra* note 12.

> reduces illicit drug use, disease rates, overdose, mortality, and criminal behavior. With the opioid epidemic ravaging communities across the country, there was an increasing call by the government, families, public health officials, and others to use all tools available to treat opioid addiction and save lives. In September 2015, Governor Cuomo signed a law to create uniform access to MAT in the state's judicial diversion program.[72] The law amended the [CPL] to explicitly state that judicial diversion programs may include "medically prescribed drug treatments" for opioid abuse or dependence and that participation in such treatment cannot be the basis for finding that a defendant has violated release conditions.[73]

There are three medications currently approved by the FDA to treat opioid addiction: methadone, buprenorphine (Suboxone), and naltrexone (Vivitrol).[74] Methadone is an agonist, which means that it binds to receptors in the body to produce the intended response, in this case reducing and hopefully extinguishing one's opioid cravings.[75] It has been used for decades and, when taken as prescribed, is safe and effective.[76] Buprenorphine was approved by the FDA in 2002 and is a partial agonist.[77] Unlike methadone,

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72 *See* S.B. 4239, 2015–2016 Reg. Sess. (N.Y. 2015).

73 Friedman & Wagner-Goldstein, *supra* note 12, at 3.

> Strictly speaking, the new provisions apply only to cases processed under Article 216 – the judicial diversion program for individuals charged with certain felony offenses. Nevertheless, the legislative history evidences the unequivocal intent to promote the use of MAT in drug treatment courts when prescribed by an authorized and qualified physician.

Id. See also N.Y. CRIM. PROC. LAW § 216.05(5) (McKinney 2017); N.Y. CRIM. PROC. LAW § 216.05(9)(a) (McKinney 2017).

74 Melissa M. Ferrara, *The Disparate Treatment of Addiction-Assistance Medications and Opiate Pain Medications Under the Law: Permitting the Proliferation of Opiates and Limiting Access to Treatment*, 42 SETON HALL L. REV. 741, 742 (2012).

75 *Id.* at 743.

76 *Methadone,* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medication-assisted-treatment/treatment/methadone (last updated Sept. 28, 2015).

77 *Buprenorphine,* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medication-assisted-treatment/treatment/buprenorphine (last updated May 31, 2016).

which must be administered in a clinic, buprenorphine was the first opioid dependency medication permitted to be prescribed and dispensed in a physician's office.[78] Naltrexone, unlike methadone and buprenorphine, is an antagonist that blocks the effects of opioids so that users cannot experience their effects.[79] Naltrexone is injected monthly by a doctor.[80] It is not as commonly prescribed as methadone and buprenorphine because it first requires the patient to abstain from using opioids for a period of at least seven to ten days.[81]

Critics of Medication-Assisted Treatment (MAT) suggest that it substitutes one form of addiction for another, prevents true recovery, and should not serve as a long-term treatment.[82] Although methadone and buprenorphine are opioid-based, they are fundamentally different from heroin and other opioids because they help participants slowly disengage from drug-seeking and related criminal behavior.[83] While some people may need daily treatment for the rest of their lives, others will only require small doses of medication for a short period of time, MAT offers a chance for people to break their addictions and lead normal, healthy lives.[84] To address the different treatment needs of the people they serve, drug courts may utilize a variety of approaches when it comes to MAT; however, research has shown that successful MAT programs generally incorporate the same components:

- MAT must be supplemented with counseling and other services from licensed treatment providers;
- Judges must be selective about the treatment programs to which, and the private physicians to whom, they refer participants;
- Drug courts must develop strong relationships with treatment programs and require regular

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78 *Id.*

79 Friedman & Wagner-Goldstein, *supra* note 12, at 8.

80 *Id.*

81 *Naltrexone*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/medication-assisted-treatment/treatment/naltrexone (last updated Sept. 12, 2016).

82 Jake Harper, *Price's Remarks On Opioid Treatment Were Unscientific And Damaging, Experts Say*, NPR (May 16, 2017), https://www.npr.org/sections/health-shots/2017/05/16/528614422/prices-remarks-on-opioid-treatment-were-unscientific-and-damaging-experts-say.

83 *Id.*

84 Friedman & Wagner-Goldstein, *supra* note 12, at 10.

communication to keep apprised of each participant's progress;

- Screening and assessment must consider all clinically appropriate forms of treatment, including, but not limited to, MAT;
- Judges must rely upon the judgment of treatment providers, as well as the court's own clinical staff, when determining the proper course of treatment;
- To the extent possible, MAT must be endorsed by the entire drug treatment court team;
- Courts must carefully monitor for illicit use of MAT medication;
- MAT medication should be insured through government or private insurance programs; and
- MAT should operate in a similar manner to other kinds of drug treatment, through regular drug testing.[85]

The UCS is committed to ensuring that all of its MAT programs incorporate these fundamental concepts. In this regard, the UCS has been supported by the federal government, which has recognized that MAT is important for protecting individuals with disabilities.[86] In a 2014 report, the Substance Abuse and Mental Health Services Administration (SAMHSA) also recognized the importance of MAT in drug court programs:

> Many drug court participants need treatment for opioid dependence. Medications can be an important part of effective treatment for offenders who are dependent on opioids, decreasing craving and withdrawal symptoms, blocking euphoria if relapse occurs, augmenting the effect of counseling, and reducing recidivism and re-incarceration . . .
>
> Methadone, buprenorphine, and extended-release injectable naltrexone are effective treatments for opioid use disorder and could decrease recidivism and avert drug-related crimes. Many national and international organizations strongly support the use of MAT as an evidence-

[85] *Id.* at 13–16.
[86] *Id.* at 4.

based practice for treatment of opioid dependence.[87]

The 2015 Best Practices Standards Report issued by the National Association of Drug Court Professionals recommends that courts grant access to addiction medications when recommended by a physician.[88] Nevertheless, surveys reveal that only about half of the drug courts in the United States permit participants to enroll in, and be maintained on, MAT.[89] A potential obstacle to the expansion of MAT in our drug courts is that not all communities have access to opioid treatment programs. To address this problem, the UCS is increasing its efforts to obtain federal funding. In 2017, the UCS received a grant from SAMHSA for funding the Brooklyn Treatment Court.[90] This grant will be used to enhance its existing Adult Drug Court, Veterans' Treatment Court, and DWI Court through the creation of a MAT track for early identification of offenders with an opioid use disorder and through the prompt intervention of optional pharmacotherapeutic services for those determined to be clinically appropriate. The UCS is also committed to educating and training drug court personnel about the benefits of MAT. In this regard, the court system's Office of Policy and Planning has organized regional training programs for judges and court staff to learn about the benefits of drug treatment and to stay apprised of best practices and standards, including MAT.

VI. NEW YORK STATE'S OPIOID INTERVENTION COURT

The opioid epidemic has dramatically impacted drug court demographics. The past twenty years have seen significant increases in the number of individuals incarcerated or under other forms of criminal justice supervision in the United States, and an estimated one-half of these meet the criteria for diagnosis of drug

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87 *Adult Drug Courts and Medication-Assisted Treatment for Opioid Dependence*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Summer 2014), https://store.samhsa.gov/shin/content/SMA14-4852/SMA14-4852.pdf.

88 Friedman & Wagner-Goldstein, *supra* note 12, at 4.

89 Harlan Matusow et al., *Medication Assisted Treatment in US Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Dec. 3, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3602216.

90 N.Y. STATE UNIFIED COURT SYS., DRUG COURT TREATMENT SERVS., KINGS CTY., N.Y. – REQUEST FOR PROPOSALS 1 (July 19, 2017), https://www.nycourts.gov/admin/bids/PDFs/RFP%20029%20BTC%20Treatment%20Provider.pdf.

abuse or dependence.[91] Although New York State has bucked the national trend with reductions in the number of incarcerated individuals—"[f]rom 2007 through 2016, the total inmate count fell by nearly 11,000, or 17.3 percent, to around 52,000,"[92]—the NYS Department of Correctional Services and Community Supervision estimates that "80 percent of the inmates incarcerated in state prisons are in need of alcoholism/substance abuse treatment."[93] The original drug treatment court model was based on a formal linkage to the behavioral health system that provides licensed drug and mental health treatment services. We now know that this may not be enough to address the opioid epidemic. In the last decade, the trend of over-prescribing pain killers has created a tidal wave of opioid-related addiction that necessitates major changes to the traditional drug treatment court model. Drug courts must be capable of more rapid linkage to treatment and must fully integrate behavioral and medical treatment necessary for initiating and sustaining recovery. The current screening tools do not detect this "hidden population" and court personnel may not be equipped to immediately place an opioid addict into treatment or trained to know when they should.

Buffalo, New York has a long and established track record of robust treatment courts that serve defendants with substance use disorders as well as veterans and mentally ill persons who find themselves caught up in the criminal justice system.[94] Notwithstanding an established infrastructure for treatment

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91 Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States*, U.S. DEP'T OF JUST. 6 (Nov. 2006), https://www.bjs.gov/content/pub/pdf/ppus05.pdf.

92 Thomas P. DiNapoli, *New York State's Aging Prison Population*, OFF. OF THE N.Y. ST. COMPTROLLER (Apr. 2017), http://osc.state.ny.us/reports/aging-inmates.pdf.

93 *Department of Correctional Services and Community Supervision (DOCCS)*, OFF. OF ALCOHOLISM & SUBSTANCE ABUSE SERVS. (last visited Nov. 29, 2017), https://www.oasas.ny.gov/cj/programs/DOCS.cfm.

94 *See* Neale Gulley, *Nation's first veterans court counts its successes*, REUTERS (Jan. 9, 2011, 3:04 PM), https://www.reuters.com/article/us-court-veterans/nations-first-veterans-court-counts-its-successes-idUSTRE7082U020110109 (reporting on Buffalo's Veterans Court success). *See also Buffalo's C.O.U.R.T.S. (Court Outreach Unit: Referral and Treatment Services) Program*, CTR. FOR CT. INNOVATION (July 25, 2006), https://www.courtinnovation.org/articles/buffalos-courts-court-outreach-unit-referral-and-treatment-services-program ("'We basically can meet any need of a person who comes through the doors,' Director [of the C.O.U.R.T.S. program] Hank Pirowski says.") [hereinafter "Buffalo C.O.U.R.T.S."].

courts staffed by experienced professionals from all disciplines, the Buffalo treatment court system, and other treatment courts nationwide, were losing individuals to opioid overdose before they could even be screened, evaluated, and admitted to a drug court program. Desperate for a new and more effective approach to this crisis, the UCS applied for and received funding from the Bureau of Justice Assistance to pilot a specialized Opioid Intervention Court (OIC) for defendants who screen positive for risk of opioid overdose.

On May 1, 2017, the OIC—the first of its kind in the nation—began operating in Erie County, an area hard hit by opioid addiction and a dramatic increase in overdose deaths.[95] The court works exclusively with people addicted to painkillers, heroin, and other opioids. The Court Outreach Unit: Referral and Treatment Services Program (C.O.U.R.T.S. Program), which houses all of Buffalo's treatment courts, developed and manages the OIC.[96] The three-year grant of nearly $300,000 supports immediate, targeted, and intensive treatment and court supervision for individuals with an opioid use disorder. The UCS subcontracts most of the funding to the University of Buffalo School of Family Medicine (UBFM) to support a Rapid Integration Specialist, a Rapid Integration Coordinator, and an Integration Monitor, all of whom dedicate significant time to the project. The grant also funds a physician specialist in Medication Assisted Treatment, a Project Development Specialist, and a Project Evaluator. The court's goal, initially, was to successfully treat at least 200 people each year and provide a model for potential replication in other jurisdictions.[97]

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[95] *See* Eric Westervelt, *To Save Opioid Addicts, This Experimental Court Is Ditching The Delays*, NPR (Oct. 5, 2017, 5:02 AM), https://www.npr.org/sections/health-shots/2017/10/05/553830794/to-save-opioid-addicts-this-experimental-court-is-ditching-the-delays. Figures released by the Erie County Health Department show a major increase since 2014 when there were 127 opioid-related deaths. That number soared to 256 in 2015 and 301 in 2016. *See* ERIE CTY. DEP'T OF HEALTH, OPIOID OVERDOSE PREVENTION TRAINING (Oct. 13, 2017), http://www2.erie.gov/health/sites/www2.erie.gov.health/files/uploads/pdfs/Presentation NaloxoneECDOH.pdf.

[96] *See Buffalo C.O.U.R.T.S.*, *supra* note 94 (stating that "the [C.O.U.R.T.S.] program links individuals . . . with a full range of social services, including drug treatment.").

[97] *See First Opioid Court in the U.S. Focuses on Keeping Users Alive*, NBC NEWS (July 9, 2017, 8:40 PM), https://www.nbcnews.com/storyline/americas-heroin-epidemic/first-opioid-court-u-s-focuses-keeping-users-alive-n781121. *See also Goal of nation's first opioid court: Keep users alive*, CBS NEWS (July 10, 2017, 12:07 PM), https://www.cbsnews.com/news/nations-first-opioid-court-drug-users-treatment/ ("In April, the National Governors Association announced that eight

The court is currently handling between forty-five to sixty active participants at any given time, and is on track to double its original goal of 200 participants.

What is unique about this court is that its work begins *prior* to the initial arraignment of a defendant in the Buffalo City Court. Members of the C.O.U.R.T.S. staff go to the pre-arraignment holding facility where they screen everyone awaiting arraignment for risk of opioid overdose. The six-question screening instrument is brief and focuses exclusively on past and current opioid use. Everyone whom the staff identifies as high risk is flagged for the program. Immediately following arraignment, they will receive a complete psycho-social assessment by an onsite team of treatment professionals and case coordinators.[98] With few exceptions, the entire process of OIC screening, arraignment, assessment, and placement occurs within twenty-four hours of arrest and is carried out by trained personnel. UBFM staff are engaged to monitor program participants, link them to MAT when indicated, and adjust treatment plans as necessary.[99] An individualized treatment plan is developed for each participant based on the severity and circumstances of his or her addiction.[100] Each participant is personally transported from the jail or courthouse to the treatment facility.[101] Once participants begin outpatient

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states – Alaska, Indiana, Kansas, Minnesota, North Carolina, New Jersey, Virginia and Washington – will together study, among other things, how to expand treatment within the criminal justice system.").

98 *See Buffalo C.O.U.R.T.S.*, *supra* note 94. *See also* Westervelt, *supra* note 95 (stating that the defendant will be entered in the program "[i]f the defendant wants help to kick heroin or opioids," if a defendant does not consent to continue with a treatment alternative, the case will proceed along the traditional case processing path).

99 *See UB Family Medicine Plays Key Role in Nation's First Opioid Court*, JACOBS SCH. OF MED. & BIOMEDICAL SCI. – U. AT BUFF. (July 20, 2017), https://medicine.buffalo.edu/news_and_events/in_the_news.host.html/content/shared/smbs/media/2017/07/opioid-intervention-court-7387-8.detail.html. *See also Buffalo C.O.U.R.T.S.*, *supra* note 94 (expanding on the fact that a patient is granted "individualized treatment," where a treatment plan may recommend a 5-day detox, 28-day rehab or, in cases where the individual is sufficiently stable, out-patient treatment).

100 *See C.O.U.R.T.S.*, BUFF. VETERANS TREATMENT CT. (last visited Nov. 29, 2017), http://www.buffaloveteranscourt.org/c-o-u-r-t-s. *See also Buffalo's Chief Judge Leads First Opiate Intervention Court*, CONGRESSMAN BRIAN HIGGINS – PRESS RELEASE (May 31, 2017), https://higgins.house.gov/media-center/press-releases/buffalo-s-chief-judge-leads-first-opiate-intervention-court (announcing that community partners to the Opiate Intervention Court include the University of Buffalo Family Medicine, Horizon Health Services and the HOPE Program).

101 *See First Opioid Court in the U.S. Focuses on Keeping Users Alive*, *supra*

treatment after arraignment, or as soon as they have completed any inpatient programming, they must report to a designated court part every single business day for six weeks where they are drug tested and then appear before the presiding judge.

UBFM staff are in the courtroom every day to measure the participant's blood pressure, assess his/her medical status, and report to the court on home visits and curfew checks (curfew is 8:00 PM for the duration of the six-week reporting phase).[102] During this six-week period, program participants are also engaged in daily, outpatient treatment. Throughout the duration of the program the Erie County District Attorney's Office suspends prosecution of the case.[103] However, the prosecutor and defense attorney may use this time to investigate the case and negotiate a plea agreement to occur after the six-week intensive supervision period ends. This initial stabilization period is known as "Phase One." After Phase One is complete, many of the program participants will be diverted either to the drug treatment court or the mental health court. In the event a plea agreement is not reached, or the individual is otherwise ineligible for diversion, he or she will have been linked with treatment and MAT to help them through the very difficult withdrawal phase.

Now in operation almost a year, the number of individuals screened and served by the OIC have exceeded projections. The court credits this accomplishment to its stakeholders, who are fully committed to the process and meet on regular basis. In addition, the OIC has conducted multiple trainings within Erie County to alert the community of its existence. As a result, in March of 2018, local town and village courts began to refer cases to the OIC. Most importantly, however, as part of a grant awarded through the New York State Office of Alcoholism and Substance Abuse Services (OASAS) from SAMHSA, BestSelf Behavioral Health (BestSelf) has introduced the region's first mobile units equipped with medical exam rooms, health care professionals, and telemedicine equipment to provide counseling and MAT for individuals with opiate addiction. On a daily basis, BestSelf dispenses MAT from one of its mobile units in front of Buffalo City Court, and is able to start MAT for all eligible participants within forty-eight hours of arraignment. Other than arraignment, no case processing occurs

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note 97. Defendants held on bail are referred to the treatment program that operates within the Sheriff's jail.

102 *See* Westervelt, *supra* note 95.

103 *See id.*

until participants are stabilized.

Although the OIC holds great promise as an effective criminal justice response to individuals in the throes of opioid addiction, it is resource intensive, particularly in terms of the behavioral health and judicial personnel required to manage the multiple aspects of the program. Fortunately, the grant supports an evaluation of the outcomes around reductions in recidivism and drug use, as well as a process evaluation that will examine how the program works and its sustainability over time.[104] The OIC demonstrates how state court systems can be proactive in devising better approaches to meet the extremely difficult challenges such as opioid addiction.

As National Public Radio reported:

> Federal, county and city court officials are looking hard at Buffalo, N.Y.'s new opioid crisis intervention court as one potential model solution to the epidemic of heroin and opioid overdoses that continue to devastate families and communities across America, taxing local governments, first responders and the nation's criminal justice system.[105]

Similar reports have appeared on NBC Nightly News,[106] CBS News,[107] and HBO's "Vice."[108]

Moving forward, the UCS is poised to replicate the OIC in other jurisdictions in New York, where that is feasible. To be truly successful, however, we must support local initiatives and innovative responses to the opioid crisis. Unlike the OIC, a new Staten Island opioid program represents a grassroots effort to divert high-risk opioid users to existing treatment services in the community. Because only misdemeanor offenders are eligible,

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104 *See* Richard Washousky et al., *The City Court of Buffalo (New York) – Process Evaluation*, BUFF. DRUG TREATMENT CT. (2001), http://www.recovery-solutions.org/Data/Sites/1/userfiles/pdf/buffalo-drug-court-evaluation-(2001).pdf.

105 Westervelt, *supra* note 95.

106 *See* Gabe Gutierrez, *Buffalo's Opioid Court Hopes to Show New Path in Addiction Fight*, NBC NIGHTLY NEWS (July 22, 2017), https://www.nbcnews.com/nightly-news/video/buffalo-s-opioid-court-hopes-to-show-new-path-in-addiction-fight-1006597699816.

107 *See Goal of Nation's First Opioid Court: Keep Users Alive*, *supra* note 97.

108 *See* Antonia Hylton, *Inside the First Court Designed to Keep Opioid Addicts Alive*, VICE NEWS, https://video.vice.com/en_ca/video/inside-the-first-court-designed-to-keep-opioid-addicts-alive/597f82a0c8acb545623e9567# (last visited Nov. 27, 2017).

charges are generally dismissed upon their completion of the recommended intervention. This project has garnered widespread support and represents another way in which courts can proactively devise ways to combat the opioid crisis.

In Bronx County, which has one of the highest number of opioid-related overdoses and deaths in the state, a new program has been developed as a collaboration between the court, prosecutors, and the defense bar, to divert to treatment opioid-addicted defendants charged with misdemeanor drug possession.[109] With its innovative approach, the Bronx Overdose Avoidance and Recovery (OAR) part is in its fourth month of operation. OAR cases are adjourned directly from arraignment and, with the consent of defense counsel, a preliminary screening for risk of overdose is conducted by Bronx Community Solutions, which also communicates participant progress to the court and engages participants in a range of clinical and supportive services. OAR judges have found there to be fewer absconders than expected and, in general, those who have been referred successfully participate. Based upon frequent interactions with participants, the OAR judges are able to assess whether individuals are embracing help so as to keep cases open no longer than appropriate for the charge. While it is too early to assess outcomes, early indicators are promising, and the project will likely be expanded to other courts.

VII. OPIOID USE DISORDER IN FAMILY COURT

Not surprisingly, family courts are also experiencing the devastating effects of the opioid epidemic. Within New York State's family treatment courts (FTC),[110] opioids rank first as the drug of choice for parents[111] facing petitions of abuse and neglect.

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109 N.Y. STATE UNIFIED COURT SYS., PRESS RELEASE: NEW BRONX DRUG COURTS AIM TO DIVERT OPIOID DRUG OFFENDERS AT HIGH RISK OVERDOSE (Jan. 29, 2018), https://www.nycourts.gov/press/PDFs/PR18_01.pdf.

110 Family treatment courts are specialized courts that "use a multidisciplinary, collaborative approach" to serve families that require substance use disorder treatment and are involved in the child welfare system. CHILDREN & FAMILY FUTURES & NAT'L DRUG COURT INST., TRANSITIONING TO A FAMILY CENTERED APPROACH: BEST PRACTICES & LESSONS LEARNED FROM THREE ADULT DRUG COURTS 5 (2017), https://www.ndci.org/wp-content/uploads/2016/05/Transitioning-to-a-Family-Centered-Approach.pdf.

111 References to the term "parents" throughout this narrative should be read to also include non-parent caregivers. *See* Joanne M. Cannavo, *Drug of Choice Trends in a Family Treatment Court*, J. SUBSTANCE ABUSE & ALCOHOLISM 1, 1–3 (2015).

FTCs have proven to be an effective strategy for expediting permanency for children while providing for sustained treatment and recovery for parents.[112] Unfortunately, the proportion of parents involved in the child welfare system who are affected by substance use disorders (SUDs), and who are engaged in FTCs, is small, compared to the universe of parents facing abuse and neglect proceedings who are in need of treatment for their SUD.[113]

In 2014, the UCS sought to explore alternative program models that incorporated FTC principles into all child welfare proceedings in a targeted, sustainable way. The UCS applied for and received nearly one million dollars from the Office of Juvenile Justice & Delinquency Prevention (OJJDP) to launch statewide system reform designed to serve more families affected by neglect and SUDs, which today translate overwhelmingly into opioid disorders. For the past three years, the UCS has led the effort to integrate child welfare, substance abuse treatment, and family court systems, to improve outcomes for families impacted by opioid and other substance disorders. This effort, known as the Statewide System Reform Project (SSRP), has succeeded in piloting a universal substance use screening instrument in eight counties, along with the incorporation of "evidence-based" practices to address opioid and other SUDs that prevent children from having safe and permanent homes.[114] Additionally, SSRP staff created a bench card for judges to help them ensure that respondent parents were being assessed for SUDs and, when indicated, linked to appropriate treatment services.[115] Based on the preliminary success of this initiative, OJJDP has renewed funding in the amount of one million dollars to expand the SSRP model to even more counties throughout the state.

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112 *See* Beth L. Green et al., *How Effective are Family Treatment Drug Courts? Outcomes from a Four–Site National Study*, 12 CHILD MALTREATMENT 43, 52, 56 (2007).

113 *See* CHILDREN & FAMILY FUTURES, NATIONAL STRATEGIC PLAN FOR FAMILY DRUG COURTS 8 (2017), http://www.cffutures.org/files/FDC_StrategicPlan_V1R1.pdf.

114 *See* N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., N.Y. STATE'S CHILD & FAMILY SERVS. PLAN FY 2015–2019 ANNUAL PROGRESS & SERVS. REPORT 10, 38 (2016), http://ocfs.ny.gov/main/reports/2017%20NYS%20APSR.pdf.

115 N.Y. STATE UNIFIED COURT SYS., 2016 ANNUAL REPORT 8 (2016), http://www.nycourts.gov/reports/annual/pdfs/16_UCS-Annual_Report.pdf.

VIII. OPIOID OVERDOSE PREVENTION PROGRAM

When a medical-related emergency arises, every second matters. To ensure that we are prepared to respond to an overdose incident in a courthouse, the UCS has established the Opioid Overdose Prevention Program.[116] New York State Court Officers and Sheriff's Deputies who work in UCS facilities in every judicial district have been trained to administer naloxone or Narcan, a fast-acting prescription treatment drug that has proven effective in reversing the effects of opioid overdoses, and training programs are ongoing. Naloxone kits supplied to the courts by the New York State Department of Health are available in every courthouse in the state. The UCS program uses a needle-free nasal inhalant that poses no risk of side effects.[117]

The UCS Court Officer Academy has been approved by the State Department of Health to serve as an Opioid Overdose Prevention Center.[118] Academy faculty have received authorization from the New York State Division of Criminal Justice Services to train additional court personnel to administer naloxone, and refresher training for those individuals authorized to administer naloxone will be conducted biannually. The UCS will work with medical providers to deliver services relating to this program, including a review of any incidents where naloxone is administered.

The Opioid Overdose Prevention Program has already saved lives. In March 2017, a man who is believed to have overdosed at a courthouse in Suffolk County was revived by a court officer who had received naloxone training.[119] In the one-week period from October 27 through November 3, 2017, court officers administered Narcan on three occasions, saving the lives of three people in Bronx County, Nassau County, and Suffolk County. While we cannot predict where and when incidents like this might happen again, we can continue to save lives by ensuring that this lifesaving drug is available in every courthouse and that court security personnel throughout the state are trained to use it.

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116 N.Y. STATE UNIFIED COURT SYS., *supra* note 13.

117 *See id.* *See also Understanding Naloxone*, HARM REDUCTION COAL., http://harmreduction.org/issues/overdose-prevention/overview/overdose-basics/understanding-naloxone/ (last visited Nov. 26, 2017) ("Naloxone only works if a person has opioids in [his or her] system.").

118 N.Y. STATE UNIFIED COURT SYS., *supra* note 13.

119 Laura Blasey, *Court officer with Narcan training stops overdose at courthouse*, NEWSDAY (Mar. 3, 2017), http://www.newsday.com/long-island/suffolk/court-officer-with-narcan-training-stops-overdose-at-courthouse-1.13201439.

IX. THE FUTURE OF DRUG COURTS IN NEW YORK STATE: A STRATEGIC PLAN[120]

Drug treatment courts are a proven criminal justice model that can break the cycle of addiction and incarceration as well as reduce recidivism. However, due to budget constraints brought on by the economic downturn, the number of drug treatment courts in New York has declined somewhat in recent years.[121] Faced with staff reductions, it was imperative for the UCS to develop strategies to maximize efficiency among drug court teams and to enhance and strengthen partnerships with key stakeholders such as probation, treatment agencies, and other public and private agencies dedicated to the public welfare.[122] In 2014, the UCS set out to develop a statewide strategic plan for drug treatment courts. Led by the court system's Office of Policy and Planning and assisted by the Center for Court Innovation, this effort was intended to create a comprehensive plan to guide the operation and coordination of the state's drug treatment courts for the foreseeable future.[123] To produce the plan, a committee consisting of judges and non-judicial staff was formed to examine five main subject areas: fidelity to the drug treatment court model; developing a sustainable training strategy; data collection and evaluation; strengthening partnerships; and staffing and resource management. The committee's final report included the following goals:

- Adopt a clearly-defined fidelity review model for all drug courts in the state.
- Establish training requirements for drug court judges.
- Establish guidelines for the ongoing training of drug court teams.
- Identify performance indicators that will enable courts and administrators to assess drug court operations, and facilitate effective data collection and management.
- Work with partner agencies to integrate evidence-based practices into all stages of the drug treatment court process, from assessment

120 N.Y. STATE UNIFIED COURT SYS., *supra* note 10.
121 *Id.* at 4.
122 *Id.*
123 *Id.* at 5.

to treatment.
- Establish best practices for case management and explore methods of supporting drug court case managers.
- Create comprehensive statewide protocols for drug testing and enhance drug testing infrastructure.
- Enhance supportive services through community partnerships, training, and staffing resources.[124]

The plan seeks to ensure that drug courts incorporate evidence-based practices and that drug court staff are trained in Adult Drug Court Best Practice Standards as promulgated by the National Association of Drug Court Professionals.[125] The plan also supports a sustainable training strategy, effective allocation of resources, sophisticated data collection, and strong partnerships with substance abuse and mental health treatment providers, law enforcement, legal stakeholders, and community-based service providers.[126]

Recognizing the importance of drug courts and their impact on New Yorkers, the UCS adopted the committee's recommendations and formally launched the strategic plan at the New York Association of Drug Treatment Court Professionals' annual conference on March 9, 2017 in Saratoga Springs, New York.[127] Since then, a major focus has been placed on the expansion and implementation of evidence-based practices such as validated risk-need assessments, MAT, and Moral Reconation Therapy (MRT). MRT is an evidence-based, cognitive-behavioral intervention with structured exercises designed by Correctional Counseling, Inc. to foster moral development in treatment-resistant clients and reduce recidivism.[128] MRT focuses on "moral reasoning, consequential thinking, for criminal behavior."[129] Participants

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[124] *Id.* at 10–12.

[125] *Id.* at 16.

[126] N.Y. STATE UNIFIED COURT SYS., *supra* note 10.

[127] *See Conference Materials*, N.Y. ASS'N OF DRUG TREATMENT CT. PROFESSIONALS CONF., http://nyadtcp.org/conferences/20-years-of-drug-court-success-preparing-for-the-next-decade/conference-materials/ (last visited Nov. 20, 2017).

[128] *About*, CORRECTIONAL COUNSELING, INC., https://www.ccimrt.com/about/our-story/ (last visited Nov. 20, 2017).

[129] DENNIS REILLY & COREY CALABRESE, YOUNG PARTICIPANTS IN ADULT DRUG COURTS 5, http://www.courtinnovation.org/sites/default/files/documents/Young%

meet in groups, typically once a week, and can complete all steps of the MRT program in three to six months. To date, dozens of UCS employees have become certified MRT facilitators and it is our intention to train additional employees in the coming months as we expand the use of this important intervention tool.

In addition to promoting evidence-based practices, the Office of Policy and Planning conducts ongoing training for judges, court staff, and community parties. The UCS has recently delivered regional drug court training programs in Rochester, Saratoga Springs, and Brooklyn. These trainings provide an opportunity for UCS drug treatment court staff to learn about drug court best practices and engage with non-UCS stakeholders who work with drug treatment courts, including treatment providers, prosecutors, defense attorneys, probation officers, and law enforcement officials. The peer review process outlined in the strategic plan has already been piloted in several upstate drug courts, beginning with a self-assessment and a two-day site visit. Each peer review has culminated in a report detailing which aspects of the court are working and those that need improving, as well as recommendations for how to address any deficits.[130] These enhanced efforts will strengthen the ability of New York State's drug courts to address the unique needs of the opioid dependent population.

X. CONCLUSION

By investing in our drug courts, which are one of the most effective criminal justice innovations in modern times, the UCS has reduced crime, reduced drug use, and saved money. Drug courts help unite families and reintegrate former substance abusing offenders into productive members of the community. Drug court graduates hold jobs, pay taxes, support their families, and make their neighborhoods safer and healthier. Drug courts are most successful when their teams are well trained, are faithful to the core drug treatment court model, incorporate evidence-based practices, adhere to the principles of procedural justice, and build strong partnerships with their key stakeholders. And so, with the support of Chief Judge DiFiore, the UCS is improving the drug

20Participants%20in%20Adult%20Drug%20Courts_final.pdf (last visited Nov. 20, 2017).

130 *See* N.Y. STATE UNIFIED COURT SYS., *supra* note 10, at 32.

courts we already have and working to create new ones.

When New York's first drug court opened in Rochester in 1995, we could never have imagined today's horrific and pervasive opioid epidemic. It knows no geographic, economic, or ethnic boundaries and has affected families of all sizes and backgrounds in communities both large and small. The UCS is committed to serving these communities and providing access to meaningful and effective justice for those whose criminal behavior is motivated by their opioid addiction. To combat the opioid crisis, the UCS is establishing mechanisms to engage justice partners in collaborative and innovative efforts to reduce recidivism, linking offenders, parents, and juveniles with services to treat their opioid disorders, providing training to drug court personnel, and investing significant resources in evidence-based practices like MAT and MRT. The UCS is also considering a more comprehensive statewide approach to addressing litigants in the throes of opioid addiction, which continues to devastate families and communities. By working together with our partners in government and local communities, the UCS will continue to do everything it can to connect the victims of opioid addiction with the help they need to create a brighter future for themselves and for all New Yorkers.