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Legislation to Admit Evidence of Propensity When Prosecuting DUI Recidivists

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Legislation to Admit Evidence of Propensity When Prosecuting DUI Recidivists

PATRICK KENNEALLY*

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INTRODUCTION

Despite gains, Illinois has yet to fully tourniquet the bloodletting caused by the selfish faction who persist in driving under the influence (DUI). Among this faction, DUI recidivists are commonplace and the elite threat. As Illinois legislators have done with prosecutions of sex offenders and domestic batterers, this Article advocates for the enactment of legislation allowing the State to admit evidence of a DUI defendant's prior DUIs at trial. Admission of prior DUIs against a defendant will strengthen prosecutions of recidivists, which are inherently difficult, and ensure offenders face criminal sanctions proven to reduce recidivism.

* This Article is dedicated to the best person I know, my wife Colleen. I wish to thank Ken Hudson and Brandy Quance for their edits and other contributions. I am currently the McHenry County State's Attorney. I have worked at the McHenry County State's Attorney Office for nearly ten years.

I. PROPOSED LEGISLATION

Evidence in Driving Under the Influence and Aggravated Driving Under the Influence Cases:

a) In a criminal prosecution in which the defendant is accused of an offense of driving under the influence or aggravated driving under the influence as defined in paragraphs (a)(d) of Section 11-501 of the Illinois Vehicle Code and if the defendant has refused chemical testing requested by a law enforcement officer pursuant to Section 11-501.1 of the Illinois Vehicle Code, evidence of the defendant's commission of another violation of Section 11-501 of the Illinois Vehicle Code or a similar provision is admissible, and may be considered for its bearing on any matter to which it is relevant.

b) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

1) the proximity in time to the charged or predicate offense;

2) the degree of factual similarity to the charged or predicate offense; or

3) other relevant facts and circumstances.

c) In a criminal case in which prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial.

d) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

II. INCIDENCES OF DUI REMAIN PREVALENT AT THE COST OF HUMAN LIFE

Despite vast abatement efforts over the last few decades that have established a downward sloping trend in the number of DUI arrests and volume of bloodshed,¹ impaired driving remains inexorably commonplace. In 2014 alone, there were over thirty-two thousand DUI arrests.² In 2013, 10,076 people were killed nationwide in alcohol-involved crashes where the highest driver Blood Alcohol Concentration in the crash was .08 or higher.³ Of the 991 people killed in fatal car crashes in Illinois in 2013, 389 or 39%, were alcohol-related.⁴ The most frequently recorded blood alcohol concentration (BAC) among drivers involved in fatal crashes is 0.17 grams of alcohol/deciliter of blood (0.17).⁵ The disturbingly inordinate number of alcohol-related traffic deaths is unsurprising after considering that the risk of a driver's death doubles with each 0.02 g/dL increase in BAC, and the risk of a vehicle crash is 382 times higher for a driver with a BAC of 0.15 g/dL or higher for males aged sixteen to twenty-nine that are being killed in a single vehicle crash compared with a non-drinking driver.⁶

1. Since 1995, the number of DUI arrests has decreased by approximately 19%. NATHAN WARREN-KIGENYI & HEIDI COLEMAN, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN.'S, *DWI RECIDIVISM IN THE UNITED STATES: AN EXAMINATION OF STATE-LEVEL DRIVER DATA AND THE EFFECT OF LOOK-BACK PERIODS ON RECIDIVISM PREVALENCE 1* (2014). The number of alcohol-related traffic fatalities in Illinois have been cut by more than half – going from 968 in 1982 to 389 in 2013. *DUI Statistics*, ILL. SEC'Y OF STATE, https://www.cyberdriveillinois.com/departments/drivers/traffic_safety/DUI/stats.html (last visited Oct. 10, 2016).

2. Ill. Sec'y of State, 2016 Illinois DUI Fact Book 8 (2016).

3. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *TRAFFIC SAFETY FACTS*, 42 (2014). The grim consequences arising from DUIs are not solely limited to death. Though perhaps not fatal, approximately one-third of all Americans will be involved in an alcohol-related crash. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *TRAFFIC SAFETY FACTS, 2014 DATA: ALCOHOL-IMPAIRED DRIVING* (2015). The estimated annual cost of all alcohol-related motor vehicle crashes is \$44 billion. These costs include property damage, congestion, insurance administration, medical services and costs, legal and court expenses, workplace losses, and lost productivity. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *TRAFFIC SAFETY FACTS, 2014 DATA: ALCOHOL-IMPAIRED DRIVING 2* (2015).

4. Nat'l Highway Traffic Safety Admin., *supra* note 3, at 182.

5. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 3, at 182. A blood alcohol concentration of 0.17(BAC) is alarmingly high and would generally require an average male of 170 pounds to have consumed more than eight drinks in a two-hour period. *See* ILL. SEC'Y OF STATE, *supra* note 2, at 4.

6. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *A GUIDE TO SENTENCING DWI OFFENDERS 3* (2d ed. 2005), http://pubs.niaaa.nih.gov/publications/Sentencing-DWI/A_Guide2.pdf. It is worth noting that nationally in 2014, a total of 209 children fourteen or younger died in alcohol-impaired driving crashes. Of those, 56% were riding with the drunk driver who had a BAC of .08 g/dL or higher. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 3.

III. DUI RECIDIVISM IS RAMPANT AND RECIDIVISTS POSE AN INCREASED DANGER

Approximately 30% of those arrested for DUI are repeat offenders.⁷ This staggeringly high rate exceeds recidivism rates for both those charged with sex offenses⁸ and domestic violence.⁹ There is reason to believe that the 30% proven recidivism rate based on subsequent arrests is only a scarce account of actual recidivism. It has been estimated that a person can drive impaired between two hundred and two thousand times before being arrested once.¹⁰

Moreover, recidivism increases with each subsequent DUI arrest. A study conducted by the American Public Health Association found that the comparable recidivism rates, based on arrests, among drivers with one, two, and three or more priors were 24.3%, 35.9%, and 50.8%, respectively.¹¹

7. KIGENYI & COLEMAN, *supra* note 1, at 2-3. This study reviewed data between 2007-2011 from thirty- six states on the number of DUI arrestees with prior DUI arrests and convictions. KIGENYI & COLEMAN, *supra* note 1, at 2. The weighted average of DUI arrestees with a prior DUI arrest was 30%. KIGENYI & COLEMAN, *supra* note 1, at 3. This weighted average likely underestimates actual recidivism as many States were only able to provide data regarding prior arrests for periods of ten years or less. KIGENYI & COLEMAN, *supra* note 1, at 2.

8. See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCH. ASSESSMENT 1 (2009). The assessment sought to review and summarize 118 studies from the United States, Canada, United Kingdom, and other countries on the predictive accuracy of various approaches to risk assessment with sexual offenders. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCH. ASSESSMENT 1-3 (2009). The term sexual offense included those related to child molestation, exhibitionism, incest, indecent exposure, pedophilia, rape, and sexual assault. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCH. ASSESSMENT 3 (2009). Based on its large scale meta-analysis, the assessment found a rate of 24% recidivism over a period of fifteen years after the first offense.

9. See R. KARL HANSON, LESLIE HELMUS & GUY BOURGON, *THE VALIDITY OF RISK ASSESSMENTS FOR INTIMATE PARTNER VIOLENCE: A META-ANALYSIS* (2007); Bryan Hendricks, Todd Werner, Lee Shipway, & Greg J. Turinetti, *Recidivism Among Spousal Abusers: Predictions and Program Evaluation*, 21 J. INTERPERSONAL VIOLENCE (ISSUE 6) 703, 703-16 (2006); Lois A. Ventura & Gabrielle Davis, *Domestic Violence: Court Case Conviction and Recidivism*, 11 VIOLENCE AGAINST WOMEN, 255, 255-77 (2005) (collectively attesting that between one-fifth and one-third of domestic violence offenders recidivate).

10. William L. White & David L. Gasperin, *The "Hard Core Drinking Driver"*, 25 ALCOHOLISM TREATMENT Q., no. 3, 2007, at 113, 114. It is estimated further that one in four American motorists will drive while impaired at least once in their lives. U.S. DEPT. OF TRANSP., *DWI (DRIVING WHILE INTOXICATED) DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING II-2* (2006).

11. William J. Rauch, Paul L. Zador, Eileen M. Ahlin, Jan M. Howard, Kevin C. Frissel & G. Doug Duncan, *Risk of Alcohol-Impaired Driving Recidivism Among First Of-*

Moreover, on average, the BAC of repeat offenders is nearly 20% higher than first time offenders.¹²

DUI recidivists pose a higher risk of causing death or injury on roadways. It has been estimated that a driver with one or more prior DUI(s) is nearly twice as likely to be involved in a fatal car crash.¹³ Further, studies have calculated that repeat DUI offenders are 50% more likely to be involved

fenders and Multiple Offenders, 100 AM. J. PUB. HEALTH, 919, 919-24 (2010). The study compiled all DUIs from a 100 million drivers in Maryland from 1973 to 2004 and determined rates of recidivism by comparing to all DUI violations recorded statewide between 1999 and 2004. Casting the results in a different light, on average a subsequent DUI violation was 7.15, 10.6, and 14.9 times higher for drivers with 1, 2, and 3 prior violations, compared to a driver with no violations, respectively. William J. Rauch, Paul L. Zador, Eileen M. Ahlin, Jan M. Howard, Kevin C. Frissel & G. Doug Duncan, *Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders*, 100 AM. J. PUB. HEALTH, 919, 919-24 (2010). The reasons for the increased risk of DUI recidivism among DUI recidivists generally proceed from recidivists's increased dependency on alcohol, general propensity toward deviance, and/or increased likelihood of suffering from mental health disorders. It has been estimated that more than 80% of DUI offenders have a significant problem in their relationship to alcohol and other drugs. White & Gasperin, *supra* note 10, at 115. It is estimated further that 85% of female and 91% of male DUI offenders meet the lifetime criteria for alcohol abuse or alcohol dependence. White & Gasperin, *supra* note 10, at 115. Nearly 40% of recidivists questioned in various states as to why they repeatedly drive under the influence admitted that they "lacked control over" themselves when it came to drinking. C. WILISZOWSKI, P.V. MURPHY, R.K. JONES & J.H. LACEY, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DETERMINE REASONS FOR REPEAT DRINKING AND DRIVING 14 (1996). Based on multiple studies, DUI offenders when compared to first time offenders were more likely than non-recidivists to have more prior offenses for reckless driving, moving-traffic violations, twice as likely to have a criminal record, ten times more likely to commit a homicide, and twice as likely to commit burglaries and assaults. R.K. JONES & J.H. LACEY, U.S. DEPT. OF TRANSP., STATE OF KNOWLEDGE OF ALCOHOL-IMPAIRED DRIVING-RESEARCH ON REPEAT DWI OFFENDERS (2000).

12. Herb M. Simpson & Daniel R. Mayhew, *The Hard Core Drinking Driver*, OTTAWA, ONT.: TRAFFIC INJURY RES. FOUND. OF CAN. 791 (1991). The Simpson study found that the average BAC of the repeat offenders was 0.21 compared to 0.17 for the first-time offenders. Herb M. Simpson & Daniel R. Mayhew, *The Hard Core Drinking Driver*, OTTAWA, ONT.: TRAFFIC INJURY RES. FOUND. CAN. 791 (1991). See also J.C. Fell, *Repeat DWI Offenders: Their Involvement in Fatal Crashes*, INTOXICATED DRIVERS: MULTIPLE & PROBLEM OFFENDERS' CONF., STEVENS POINT, WIS. (Sept. 5-6 1991) (finding that the average BAC of repeat offenders was .18 compared to .15 for first time offenders).

13. Fell, *supra* note 12. The Fell study reviewed data from the U.S. Department of Justice on traffic fatalities and whether any of the drivers had previously been convicted of DUI in the past three years. The study found that drivers with one or more DUIs in that period were over-represented among fatal-crash involved drivers by a factor of at least 1.8. In view of the fact that the study only considered prior DUIs over the previous three years, the stated increased risk of involvement in fatal car crashes is likely an underestimate.

in alcohol-related traffic crashes generally¹⁴ and that each prior DUI increases the likelihood of involvement in an alcohol-related crash by 20%.¹⁵

IV. CRIMINAL SANCTIONS PROVEN TO REDUCE DUI RECIDIVISM ARE AVAILABLE TO ILLINOIS JUDGES UPON FINDINGS OF GUILT

Although a daunting number of studies assessing criminal sanctions¹⁶ have yielded varied and sometimes conflicting results, systematic meta-analysis of available studies conducted in 1995, 2005, and 2015¹⁷ have consistently identified a number of sentencing measures that have generally proven effective in reducing recidivism.

- Multimodal treatment programs that include a formal evaluation identifying the extent of a person's alcohol problem, state of mental health, and social adjustment and preventative education or treatment programs, whether educational¹⁸ cognitive behavioral therapy,¹⁹ or twelve-step facilitation therapy based.

14. Larry A. Gould & Kristin Herke Gould, *First-Time and Multiple DWI Offenders: A Comparison of Criminal History Records and BAC Levels*, 20 J. CRIM. JUST., 527, 527-39 (1992) (examining the prevalence of repeat offenders in Louisiana crashes of all degrees).

15. H.N. TASHIMA, & C.J. HELANDER, CAL. OF DEP'T MOTOR VEHICLES, 1998 ANNUAL REPORT OF THE CALIFORNIA DUI MANAGEMENT INFORMATION SYSTEM (1998) (tracking drivers arrested for DUI in 1989 for seven years following their arrest).

16. For the purposes of this Article in support of legislation strengthening DUI prosecutions that result in the imposition of criminal sanctions, the effectiveness of non-criminal sanctions such as license suspensions and installation of BAIID devices are not considered.

17. See E. Wells-Parker, R. Bangert-Drowns, R. McMillen & M. Williams, *Final Results From a Meta-Analysis of Remedial Intervention With Drink/Drive Offenders*, 90 ADDICTION, 907, 907-26 (1995) (conducting an analysis of 215 remedial interventions for DUI offenses in reducing recidivism); JAMES M. BYRNE, DRUNK DRIVING: AN ASSESSMENT OF "WHAT WORKS" IN THE AREAS OF CLASSIFICATION, TREATMENT, PREVENTION AND CONTROL (2003); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 6 at i-ii (describing the most effective sanctions and treatment programs for deterring future DWI); Peter G. Miller, Ashlee Curtis, Anders Sonderlund, Andrew Day & Nic Droste, *Effectiveness of Interventions for Convicted DUI Offenders in Reducing Recidivism: A Systematic Review of the Peer-Reviewed Scientific Literature*, 41 AM. J. DRUG & ALCOHOL ABUSE, 2015, at 16, 16-29 (conducting a systematic review of 96 articles published after 1995 reporting the effectiveness of DUI interventions).

18. Focuses on increasing the awareness of the specific effects of alcohol/drug use on driving ability, as well as provide information and advice for changing DUI behavior.

19. Provides training in ways to confront or avoid everyday situations that might lead to drinking and works to strengthen behaviors that help maintain long-term sobriety.

In Illinois, anyone found guilty of DUI, “shall be required to undergo a professional evaluation to determine if an alcohol, drug, or intoxicating compound abuse problem exists and the extent of the problem, and undergo the imposition of treatment as appropriate.”²⁰

- Fines, increasing in effectiveness with the swiftness in which they are imposed.

In Illinois, judges and prosecutors have broad discretion in imposing or negotiating, respectively, maximum fines increasing with the seriousness of the DUI charge.²¹ In addition, for certain classes of DUI offenses and/or under specific factual circumstances, DUI offenders face mandatory minimum fines.²²

- Intensive probation that requires offenders to have more contact with standard probation programs and to participate in various educational and therapeutic programs in the community.

In Illinois, judges and prosecutors have broad discretion in structuring probationary conditions, including the number of visits an offender has with

20. 625 ILL. COMP. STAT. 5/11-501.01(a) (2016).

21. First and second DUI offenses are Class A misdemeanors with a minimum fine of \$1,000. 625 ILL. COMP. STAT. 5/11-501(c) (2016). Any DUI that is an offender’s third or subsequent offense; is committed while driving a school bus; results in a motor vehicle accident that proximately causes great bodily harm, permanent disability, or death; is committed after a person has been found guilty of reckless homicide; is committed while the offender’s driving privileges were revoked or suspended for a prior DUI; is committed while the offender did not have a valid license or driver’s permit; or that is a person’s second violation and he was transporting a child under the age of sixteen are felony offenses with a maximum fine of \$25,000. 625 ILL. COMP. STAT. 5/11-501(d) (2016).

22. An offender is subject to a \$1,000 minimum fine if he was transporting a person under the age of sixteen at the time of the offense. 625 ILL. COMP. STAT. 5/11-501(b)(3) (2016). An offender is subject to a minimum fine of \$500 if his BAC was above 0.16 g/dL. § 5/11-501(b)(4). An offender is subject to a minimum fine of \$2,500 if at the time of a third violation he has a BAC of 0.16 g/dL. An offender is subject to a mandatory fine of \$25,000 if at the time of the third or subsequent violation, the offender was transporting a person *under* the age of sixteen. § 5/11-501(d)(2)(B). An offender is subject to a mandatory \$5,000 if at the time of a fourth or subsequent violation, the offender has a BAC of 0.16. § 5/11-501(d). An offender involved in a motor vehicle crash that results in bodily harm, but not great bodily harm to person under the age of sixteen is subject to a minimum \$2,500 fine. § 5/11-501(d)(2)(H). If at the time of second violation, the offender was transporting a child under the age of sixteen, a mandatory minimum fine of \$2,500 shall be imposed or \$5,000 if the child suffers bodily harm, but not great bodily harm. § 5/11-501(d)(2)(I).

a probation officer and the type and extent of involvement with therapeutic and educational programs.²³

There is also evidence that jail or incarceration is an effective deterrent to recidivism. It is self-evident that the recidivism rate for offenders while in-custody is zero. One study has shown that jail/prison sentences greater than 120 days effectively reduced recidivism after release by approximately one-third when compared with other remedial sanctions.²⁴

23. 730 ILL. COMP. STAT. 110 (2016). While “Intensive Probation” is not statutorily based in Illinois, many County Probation Departments have formally developed enhanced probationary programs. For example, McHenry County’s Probation Department offers an Intensive Probation Supervision Program that holds offenders to “more stringent standards and are more highly supervised than defendants on standard probation.” See *Adult Programs*, MCHENRY CTY. ILL., <https://www.co.mchenry.il.us/county-government/departments-j-z/probation-court-services/adult-programs> (last visited Oct. 10, 2016).

24. Michael Weinrath & John Gartrell, *Specific Deterrence and Sentence Length: The Case of Drunk Drivers*, 17 J. CONTEMP. CRIM. JUST., May 2001, at 105, 105-22. In Illinois, first and second DUI offenses are Class A misdemeanors, and an offender can be sentenced up to 365 days in jail or 180 days in jail if the offender receives a concomitant sentence of probation. 625 ILL. COMP. STAT. 5/11-501(c) (2016). Any DUI that is committed while driving a school bus; causes great bodily harm or permanent disability or disfigurement to another; is committed after the offender has been found guilty of reckless homicide; is committed while driving in a speed zone at a time a twenty miles per hour speed limit was in effect and resulted in a motor vehicle accident that resulted in bodily harm, but not great bodily harm or permanent disability or disfigurement to another; is committed when the offender’s driving privileges are revoked or suspended for a prior DUI violation; is committed while the offender did not possess a valid driver’s license or permit or car insurance; is committed while the offender is transporting a child under the age of sixteen and is involved in a motor vehicle accident that results in bodily harm, but not great bodily harm to the child; is an offender’s second DUI offense; or is committed while the person was transporting a child under the age of sixteen is a Class 4 felony for which the offender may be sentenced to two to five years in the Illinois Department of Corrections or a period of jail not to exceed 180 days if probation is imposed. § 5/11-501(d)(1). Any third or fourth DUI offense is a Class 2 felony for which the offender may be sentenced to a period of three to seven years in the IDOC or to 90-180 days in jail if probation is imposed. § 5/11-501(d)(2). A fifth violation is Class 1 felony for which a sentence of four to fifteen years in IDOC shall be imposed. § 5/11-501(d)(2)(D). A sixth or subsequent violation is Class X felony for which a period of six to thirty years in IDOC shall be imposed. § 5/11-501(d)(2) (2016). Any offender committing a DUI that proximately causes death or disability or disfigurement commits a Class 4 felony for which he may be sentenced to one to twelve years in IDOC or 180 days in jail if probation is imposed. 625 ILL. COMP. STAT. 5/11-501(d)(2)(F) (2016). Any DUI offender committing a DUI that proximately causes death commits a Class 2 felony for which a period of three to fourteen years may be imposed if one person is killed or six to twenty-eight if more than one person is killed. § 5/11-501(d)(2)(G). Any person committing a second violation while transporting a child under the age of sixteen commits a Class 2 violation and may be sentenced to three to seven years in IDOC or 180 days in jail if probation is imposed. § 5/11-501(d)(2)(I). Any offender having previously committed a DUI resulting in death commits a Class 3 violation and shall be sentenced to two to five years in IDOC. § 5/11-501 (d)(2)(J).

V. EVIDENCE COLLECTION IN DUI INVESTIGATIONS OF RECIDIVISTS AND SUBSEQUENT PROSECUTIONS ARE MORE CHALLENGING

The effective prosecution of DUI cases depends on the quality and quantity of evidence gathered. Unlike other criminal investigations, however, DUI suspects maintain a great deal of control over the disclosure of incriminating evidence.

In most DUIs, the State is required to prove:

- 1) That the defendant operated a motor vehicle with a BAC of 0.08 or higher;²⁵ or
- 2) That the defendant operated a motor vehicle at a time when, as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care.²⁶

Most “BAC above a 0.08” prosecutions are considered strong cases²⁷ and are relatively straightforward. These cases merely require the admission of a printout produced by a breathalyzer machine delineating a BAC of 0.08

25. 625 ILL. COMP. STAT. 5/11-501(a)(1) (2016). Pursuant to section 11-501(a)(1), an offender is guilty of DUI if he “drive[s] or [is] in actual physical control of any vehicle within this State while: (1) the alcohol concentration in the person’s blood. . . or breath is 0.08 or more” *Id.*

26. 625 ILL. COMP. STAT. 5/11-501(a)(2) (2016). Pursuant to section 11-501(a)(2), a person is guilty of DUI if he “[d]rive[s] or [is] in actual physical control of any vehicle within this State while: (2) under the influence of alcohol.” § 5/11-501(a)(2). Illinois Pattern Criminal Jury Instructions defines a person as “under the influence” “when, as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care.” ILLINOIS PATTERN JURY INSTRUCTIONS No. 23.05 (2d ed. Supp. 1989).

27. The Illinois DUI Law and Practice Guidebook, the preeminent legal treatise setting forth best practices for DUI criminal defense attorneys, provides that “[e]vidence of a failing breath blood or urine test is generally considered to be harder to defend against than evidence that a motorist refused to submit to testing.” DONALD RAMSELL, ILLINOIS DUI LAW AND PRACTICE GUIDEBOOK § 5.3 (2010).

or above after it has received a suspect's breath-sample. Approved breathalyzer machines are a widely-accepted, scientific²⁸ means of establishing an individual's BAC and provide hard evidence that is difficult to refute.²⁹

In most cases, however, a suspect cannot be forced to submit to a breathalyzer test³⁰ and many defense attorneys counsel clients to refuse testing. Accordingly, compelling evidence regarding a suspect's BAC is often unavailable to the prosecution.

Perhaps as a consequence of prior exposure to legal representation, the percentage of subjects refusing BAC testing is higher for repeat offenders

28. There are two basic types of breathalyzer machines approved for use in Illinois—infrared spectroscopy and fuel cell detection. Infrared spectroscopy breathalyzer machines introduce a measured amount of infrared light and allow it to pass through a gas sample exhaled from a suspect's mouth. The amount of light that is not absorbed is collected and converted into an electrical signal called the Differential Voltage Measurement (DVM). Because alcohol absorbs light at specific wavelengths, comparing the DVM before the suspect's gas sample and DVM after the gas sample allows the breathalyzer to extrapolate the amount of alcohol in the breath sample (i.e. the amount of alcohol that diffused from the blood stream into the suspect's lungs) and thereby the BAC. Fuel cell breathalyzer machines use a catalyst to absorb alcohol in the breath sample and apply voltage to the catalyst, which causes any alcohol present to oxidize. *State v. Chun*, 943 A.2d 114, 128 (N.J. 2008). The oxidation process creates electricity, which is then measured to determine the amount of alcohol interacting with the fuel cell. *Chun*, 943 A.2d at 128. The NHTSA has provided a list of approved breathalyzer devices that comply with its rigorous compendium of regulations ensuring reliability and accuracy. 49 C.F.R. § 40 (2016). From this list, the Illinois state police have approved three makes of machines for use in Illinois and its own compendium of regulations regarding use and maintenance to ensure reliability and accuracy. ILL. ADMIN. CODE tit. 20, § 1286 (2004).

29. A survey of prosecutors across the country found that 73% of prosecutors believe that a breathalyzer result is the single most convincing piece of evidence that can be presented to a jury. ROBYN D. ROBERTSON & HERB M. SIMPSON, TRAFFIC INJURY RES. FOUND., DWI SYSTEM IMPROVEMENTS FOR DEALING WITH HARD CORE DRUNK DRIVERS 43 (2002). While breathalyzer results may be difficult to refute, refutation is by no means impossible nor are breathalyzer results necessarily determinative of case outcome. The Illinois DUI Law and Practice Guidebook devotes nearly one hundred pages to outlining workable defenses to breathalyzer results. See RAMSELL, *supra* note 27, at 343-48. Generally, there are three strategies unleashed to defend against breathalyzer results: (1) keep the results out of evidence by challenging whether law enforcement complied with all mandatory breathalyzer maintenance, calibration, operation, recordkeeping, and pre-test procedures; (2) challenge the accuracy of the results on the grounds that the breathalyzer is unreliable or malfunctioned or some externality (such as blood in the subject's mouth, medication, acid reflux, etcetera) undermined the accuracy of the results; and/or (3) raise doubt as to whether results, usually ascertained at the police station after a period of time since the suspect was actually driving, are an accurate reflection of BAC at the time of driving.

30. 625 ILL. COMP. STAT. 5/11-501.2(c) (2016) recognizes a suspect's prerogative to refuse to submit to chemical testing in all DUI investigations except those that "caused the death or personal injury [of] another." However, even in instances of death or great bodily harm to another, law enforcement officers cannot use physical force in obtaining blood, urine, or breath samples without a warrant. *People v. Jones*, 824 N.E.2d 239, 246 (Ill. 2005).

and increases with the number of prior DUI offenses.³¹ In Illinois, it has been shown that recidivists are 50% more likely to refuse chemical testing during a DUI investigation than first-time offenders.³²

When a suspect withholds evidence of BAC, the State's remaining option is to proceed on the more burdensome "ordinary care" charge.³³ Generally, this requires a judge or jury to infer beyond a reasonable doubt from the full repertoire of a suspect's discernible abnormalities, commonly associated with drinking and as testified to by the investigating officer that the suspect's "ability to think and act" has been impaired beyond the uncertain threshold of "ordinary care."³⁴ Proving these cases is not a simple matter and they are especially difficult if a suspect is unwilling to cooperate with the standardized tests and other components of a DUI investigation designed to expose the less pronounced effects of alcohol.

Sixty years of research has firmly established that virtually all drivers are substantially impaired at a BAC of 0.08 in that there are significant decrements in performance of critical driving tasks such as braking, steering, lane changing, judgment, and divided attention.³⁵ However, a BAC of 0.08 does not necessarily equate to gross, obvious, or visible intoxication. A battery of studies have consistently found that trained police officers routinely underestimate the level of impairment of those with BAC's in excess of 0.08 during normal interaction.³⁶ These studies establish further that if signs of

31. RALPH K. JONES, HANS C. JOKSCH & CONNIE H. WILISZOWSKI, Nat'L HIGHWAY TRAFFIC SAFETY ADMIN., IMPLIED CONSENT REFUSAL IMPACT: FINAL REPORT 73 (1991).

32. *Id.* 92% of prosecutors surveyed across the country reported that breathalyzer test refusal is more common among repeat offenders. ROBERTSON & SIMPSON, *supra* note 29, at xiii.

33. *See supra* text accompanying note 26.

34. *See supra* text accompanying note 26.

35. C. RODRIGUEZ-IGLESIAS, C.H. WILISZOWSKI & J.H. LACEY, Nat'L HIGHWAY TRAFFIC SAFETY ADMIN., LEGISLATIVE HISTORY OF .08 PER SE LAWS (2001); *See also* John Brick & Carlton Erickson, *Intoxication Is Not Always Visible: An Unrecognized Prevention Challenge*, 33 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RES. 1489, 1489-1507 (2009).

36. *See* James W. Langenbucher & Peter E. Nathan, *Psychology, Public Policy and the Evidence for Alcohol Intoxication*, 38 AM. PSYCHOLOGIST 1070-77 (1983) (finding that police officers were only able to identify the correct level of impairment for subjects with BACs of 0.0, 0.05, and 0.10 25% of the time after given the opportunity to interact with the subjects for three minutes and consistently underestimated BACs); Joanne K. Wells, Michael A. Green, Robert D. Foss, Susan A. Ferguson & A.F. Williams, *Drinking Drivers Missed at Sobriety Checkpoints*, 58 J. STUD. ALCOHOL 513-17 (1997) (finding that of the 182 drivers not detained at a DUI checkpoint, ninety had BACs at 0.08 or above); Frederick L. McGuire, *The Accuracy of Estimating the Sobriety of Drinking Drivers*, 17 J. SAFETY RES. 81-85 (1986) (finding that police officers at a DUI checkpoint missed 79% of drivers with BACs above the legal limit); John Brick & John A. Carpenter, *The Identification of Alcohol Intoxication by Police*, 25 ALCOHOLISM CLINICAL EXPERIMENTAL RES. 850-85 (1997) (finding that only 67% of police officers did not think it was "okay" for subjects with a BACs of 0.15-.16 to drive upon casual observation); U.S. DEP'T OF TRANSP., DWI (DRIVING WHILE INTOXICATED) DETECTION &

visible intoxication are readily apparent, the suspect is probably intoxicated in excess of the legal definition.³⁷ However, when a suspect cooperates to the extent that police can apply standardized and/or accepted investigatory techniques,³⁸ such as field sobriety tests (FSTs), the vast majority of driver's with a BAC in excess of 0.08 are identified.³⁹

Recidivists with BACs in excess of the legal limit are more difficult for police to identify. Repeat offenders are more likely to be alcohol dependent.⁴⁰ As such, many recidivists have developed a functional tolerance, in which they display markedly reduced signs of intoxication even at high BACs.⁴¹ Multiple studies have demonstrated that, among chronic drinkers, most will not appear visibly intoxicated at BACs of less than 0.15.⁴²

Moreover, recidivists can readily conceal their impairment by not cooperating with the investigation or interacting with police. The shield of the Fifth Amendment looms especially large in "ordinary care" cases because

STANDARDIZED FIELD SOBRIETY TESTING (2006) (estimating that for every DWI violator arrested, three others are contacted face to face by police, but are not arrested).

37. Langenbucher & Nathan, *supra* note 36; Wells, Green, Foss, Ferguson & Williams, *supra* note 36; McGuire, *supra* note 36; Brick & Carpenter, *supra* note 36; U.S. DEP'T OF TRANSP., *supra* note 36; *see also* Brick & Erickson, *supra* note 35.

38. Most officers are trained to follow the protocols set forth by NHTSA in its DWI Detection and Standardized Field Sobriety Testing Student Manual. NHTSA instructs that the DUI investigation should be broken down into three phases: (1) Vehicle In Motion Phase, (2) Personal Contact Phase, and (3) Pre-arrest Screening. U.S. DEP'T OF TRANSP., *supra* note 36. During the Vehicle in Motion Phase, the officer is instructed to observe the vehicle in operation. Based on this observation, the officer should decide whether there is sufficient cause to command the driver to stop. U.S. DEP'T OF TRANSP., *supra* note 36. The officer's second task is to observe the stopping sequence. During the Personal Contact Phase, the officer is instructed to observe and interview the driver face-to-face. Based on this observation, the officer must decide whether there is sufficient cause to instruct the driver to step from the vehicle for further investigation and observe the driver's exit and walk from the vehicle. During the Pre-arrest Screening, the officer is instructed to administer structured, formal psychophysical tests (such as the walk-and-turn, one-leg-stand, and horizontal-gaze-nystagmus test). Based on the tests, the officer must decide whether there is sufficient probable cause to arrest the driver for DUI. U.S. DEP'T OF TRANSP., *supra* note 36.

39. Police correctly identify over 90% of subjects that fail the walk-and-turn, one-leg-stand, and horizontal-gaze-nystagmus as having a BAC at 0.08 or more. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., STANDARDIZED FIELD SOBRIETY TEST VALIDATED AT BACs BELOW 0.10 PERCENT 196 (1999).

40. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., STATE OF KNOWLEDGE OF ALCOHOL-IMPAIRED DRIVING: RESEARCH ON REPEAT DWI OFFENDERS (2000).

41. *See id.* *See also* Brick & Erickson, *supra* note 35.

42. *See id.* *See also* J.A. Perper, A. Twerski & J.W. Wienand, *Tolerance at High Blood Alcohol Concentrations: A Study of 110 Cases and Review of the Literature*, 31 J. FORENSIC SCI. 212, 212-21 (1986) (finding that of alcoholics with BACs of 0.20 or more who entered a detoxification center, 25% had no sign of clinical intoxication, 67% exhibited no sign of impaired speech, 40% exhibited no sign of impaired gait, and 76% exhibited no sign of impaired verbal comprehension).

the incriminating evidence is the defendant himself and how far his inhibitions, psychomotor functions, and cognitive state deviates from “normal.” Specifically, a suspect, by invoking his Fifth Amendment right can remain silent and refuse to speak, interact with officers, submit to FSTs, or perform any number of otherwise voluntary actions that may denote impairment.⁴³ Accordingly, a “system sophisticated”⁴⁴ recidivist who is not “fall down” drunk can significantly obstruct the collection of evidence necessary to convict beyond a “reasonable doubt.”

Lastly, it is worth noting that prosecutions of DUI recidivists are made even more challenging because recidivists may not present as a typical repeat criminal offender. Rather, because substance abuse affects people from every walk of life and one in four drivers⁴⁵ have at one time driven while legally under the influence; jurors often relate to and sympathize with the DUI defendant.⁴⁶

VI. ADMISSION OF PROPENSITY EVIDENCE AGAINST A DEFENDANT IS PERMISSIBLE IN DOMESTIC VIOLENCE AND SEX RELATED OFFENSES THAT ARE OFTEN FRAUGHT WITH INHERENT DIFFICULTIES

By longstanding common law tradition, the prosecution cannot introduce evidence of a defendant’s prior “bad” or criminal acts to prove he acted in conformance with the prior act at the time of the alleged criminal conduct or has a propensity to engage in a type of criminal conduct.⁴⁷ “The underlying rationale is that such evidence ‘is objectionable not because it has no appreciable probative value, but because it has too much.’”⁴⁸ Such evidence, it is maintained, may risk persuading the jury, on the basis of past conduct, to convict simply because the defendant is a bad person deserving of punishment.⁴⁹

43. In other words, a recidivist can effectively eliminate the better part of two of the three phases of a DUI investigation by invoking his right to remain silent and refusing Field Sobriety Tests. See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 35.

44. Recidivists are often referred to as “system sophisticated” due to their ability to manipulate both the criminal justice system and the treatment system in order to avoid the consequences of their drinking and driving behavior as well as the consequences for their non-compliance with sentencing conditions. White & Gaserpin, *supra* note 10.

45. See U.S. DEPT. OF TRANSP., *supra* note 10.

46. The Bureau of Justice Statistics found that “[c]ompared to other offenders, DWI offenders are older, better educated, and more commonly white and male.” LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION I (1999).

47. *People v. Haas*, 127 N.E. 740, 741 (Ill. 1920).

48. *People v. Romero*, 362 N.E.2d 288, 290 (Ill. 1977).

49. *Id.*

The Illinois legislature has carved out two recent exceptions to this tradition. Pursuant to 725 ILCS 5/115-7.3⁵⁰ and 725 ILCS 5/115-7.4,⁵¹ a judge,

50. 725 ILL. COMP. STAT. 5/115-7.3 (2016):

(a) This Section applies to criminal cases in which:

1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, criminal transmission of HIV, or child abduction as defined in paragraph (10) of subsection (b) of Section 10-5 of the Criminal Code of 1961 or the Criminal Code of 2012;

2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 11-0.1 of the Criminal Code of 2012, or

3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1), (2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.

(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

1) the proximity in time to the charged or predicate offense;

2) the degree of factual similarity to the charged or predicate offense; or

3) other relevant facts and circumstances.

(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(e) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

Id.

in his discretion and provided certain safeguards are met, may allow the State in domestic violence or sex offense cases to admit propensity evidence in the form of a defendant's prior domestic violence or sexual offenses, respectively. Challenges to both these laws have been addressed and dispensed with by the Illinois Supreme Court.

In *People v. Donoho*, the supreme court held that section 115-7.3 abrogated the common law rule barring the admission of propensity evidence in sex offense related cases and did not violate the state or federal equal protection clauses.⁵² In concluding that section 115-7.3 was intended by the legislature to allow for the admission of propensity evidence, the court reviewed the legislative history.⁵³ The court found that legislators believed propensity evidence to be particularly apropos in sex offense cases because sex offenders are proven to have higher rates of recidivism.⁵⁴ The court noted further that legislators intended the law to bolster prosecutions of sex offenders that

51. 725 ILL. COMP. STAT. 5/115-7.4 (2016):

(a) In a criminal prosecution in which the defendant is accused of an offense of domestic violence as defined in paragraphs (1) and (3) of Section 103 of the Illinois Domestic Violence Act of 1986, or first degree murder or second degree murder when the commission of the offense involves domestic violence, evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:

- 1) the proximity in time to the charged or predicate offense;
- 2) the degree of factual similarity to the charged or predicate offense; or
- 3) other relevant facts and circumstances.

(c) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(d) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.

Id.

52. *People v. Donoho*, 788 N.E.2d 707, 718-20 (Ill. 2003).

53. *Id.* at 716.

54. *Id.* at 718.

often have proof problems as these crimes are usually committed in private, may involve children, and feature conflicting testimony of the defendant and victim.⁵⁵

In dispensing with the equal protection challenge⁵⁶ that section 115-7.3 is merely a pretext to discriminate against sex offenders as a class, the court answered that the law serves the legitimate purpose of protecting society against sex crimes, by “promoting effective prosecution of sex offenses.”⁵⁷

In *People v. Dabbs*, the supreme court similarly held that section 115-7.4 sanctions the admission of propensity evidence in domestic violence cases and did not violate equal protection.⁵⁸ The court concluded that section 115-7.4 had a “rational basis” similar to 115-7.3— promoting the effective prosecution of domestic batterers.⁵⁹ The court stated:

When it enacted [section 115-7.4], the General Assembly was legitimately concerned with the effective prosecution of crimes of domestic violence, which pose some of the same concerns as sex crimes. An abuser may have a pattern of targeting victims who are vulnerable. Such a victim may be reluctant to testify against her abuser, or the effectiveness of her testimony in court may be affected by fear or anxiety. The abuser may also be adept at presenting himself as a calm and reasonable person and his victim as hysterical or mentally ill. Evidence that the defendant has been involved in a similar incident may persuade a jury that the present victim is

55. *Id.* at 716-18.

56. Equal protection requires the government to treat similarly situated people in a similar manner. *People v. Reed*, 591 N.E.2d 455, 457 (Ill. 1992). In evaluating an equal protection challenge, the court must first determine whether the statute implicates a “substantial right” (i.e. those rights that lie at the heart of the relationship between individual and republican form of nationally integrated government, such as voting, due process, speech, etcetera) or whether it discriminates against a suspect class (i.e. a class of individuals that have been historically subject to discrimination, such as minorities, women, aliens, etc.). *Reed*, 591 N.E.2d at 457. Where no suspect class or fundamental right is involved, as in the case of sex offenders, domestic abusers, and impaired drivers, the court evaluates the statute using the rational basis test, under which the court will uphold the statute if it has a rational relationship to a legitimate purpose and is neither arbitrary nor discriminatory. *People v. Fuller*, 714 N.E.2d 501, 508-09 (Ill. 1999).

57. *Donoho*, 788 N.E.2d at 719.

58. *People v. Dabbs*, 940 N.E.2d 1088, 1098-99 (Ill. 2010).

59. *Id.* at 1098-99.

worthy of belief because her experience is corroborated by the experience of another victim of the same abuser.⁶⁰

VII. INTRODUCTION OF PROPENSITY EVIDENCE IN DUI CASES IS CONSTITUTIONAL AND WOULD ENHANCE THE PROSECUTIONS OF DUI RECIDIVISTS

As discussed, DUI recidivism and its devastating consequences can be reduced through a number of criminal sanctions available to judges in Illinois that can be tailored by combination or intensity. However, and as discussed, DUI suspects, and especially recidivists, can substantially obstruct the collection or conceal the detection of incriminating evidence, thereby eluding or limiting the imposition of criminal sanctions. Stated more broadly, like domestic violence and sex related offenses, DUI prosecutions must inordinately contend with proof deficiency challenges particular to the nature of the charge and its underlying criminal investigation. Accordingly, the legislature would clearly have a “rational basis” in enhancing the effective prosecution of DUIs, both for purposes of trial⁶¹ and strengthening the State’s bargaining power in negotiated pleas.

As with sex offenses, propensity evidence in DUI cases is far more probative in that rates of DUI recidivism based on documented arrests is exceptionally high, even exceeding rates of recidivism for sex related offenses.⁶² Even these high estimates of DUI recidivism should be deemed drastic underestimates of actual rates considering that one would need to drive under the influence up to two thousand times before being arrested once.⁶³ Accordingly, as with sex offenses, the inference that because the defendant committed a prior DUI that he is more likely to have committed the current DUI is eminently reasonable and especially apropos.

Moreover, in “ordinary care” cases where the defendant refuses to submit to a breathalyzer and/or cooperate fully with the investigation, the defendant may contend that the State lacks evidence to convict beyond a reasonable doubt. Evidence that the defendant has previously committed the offense of DUI, has experienced or suffered the consequences of cooperating with a DUI investigation, and/or exhibited similar signs of impairment when committing a prior DUI places these defense claims on far less secure footing. Specifically, where jurors or a judge may be inclined to question the

60. *Id.* at 1098.

61. Prosecutors surveyed across the country report that, following an acquittal, many jurors stated that they would have convicted had they known about the suspect’s prior convictions. ROBERTSON & SIMPSON, *supra* note 29.

62. *See supra* text accompanying notes 8-9.

63. *See supra* text accompanying note 10.

sufficiency of the evidence, the admission of prior DUIs recasts the lack of evidence more accurately as a “system sophisticated” offender conscious of his own guilt who actively concealed evidence of impairment.

A defendant may contend further that there is an innocent explanation to the signs of impairment testified to by the arresting officer. Where a jury might otherwise consider a defense claim that a diabetic episode caused the defendant’s bloodshot eyes, slurred speech, and loss of balance, evidence of a prior DUI conviction based on similar symptoms is crucial to assessing the plausibility of such a claim.

The proposed law effectively incorporates safeguards that reasonably limit the prejudice and scope of propensity evidence. The law does not allow the State to indiscriminately admit evidence of all of a defendant’s past indiscretions, but only prior DUIs upon evidence that the defendant is inhibiting the investigation by refusing to submit to chemical testing. In addition, prior to admission, a judge must determine that undue prejudice of the proposed evidence is not outweighed by its probative value. Lastly, a judge has inherent authority to limit the details of prior crimes to only that which is necessary to establish propensity and ensure that the focus of the proceedings remains on the charges being adjudicated.⁶⁴ In most cases, the prior DUI violation could be proved merely by the admission of certified court copies of convictions or deferred prosecutions.

VIII. CONCLUSION

The legislative proposal is firmly grounded in the principles underlying the enactments of 115-7.3 and 115-7.4. It permits the use of prior DUI violations in DUI cases wherein the defendant has obstructed the investigation and provides appropriate safeguards to limit the additional burden and prejudice imposed on the defendant. The result would be another tool in the hands of prosecutors to achieve justice and continue stalled advances in protecting the public from the deadly consequences of DUI.

64. *People v. Walston*, 900 N.E.2d 267, 287-88 (Ill. App. Ct. 2010).