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## PUTTING TWO DRUG COURTS TO THE TOP TEN TEST: COMPARING ESSEX AND DENVER DRUG COURTS WITH “THE CAREY TEAM’S” BEST PRACTICES

Donna K. Axel and David M. Rosen\*

### I. INTRODUCTION

The first drug court was established in Miami-Dade County, Florida in 1989.<sup>1</sup> Since that time, drug courts have been established in every U.S. state and territory, with 1,438 adult drug courts fully functioning and more to be created.<sup>2</sup> Since these courts are created within an individual state court system, each state has the jurisdiction to set parameters (e.g., guidelines, target population, and requirements for acceptance). “Because drug courts are designed and operated at the local level, there are fundamental differences that make cross-jurisdictional comparisons

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<sup>1</sup> *History: Justice Professionals Pursue a Vision*, NAT’L ASS’N OF DRUG CT. PROF’LS, <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Apr. 8, 2013).

<sup>2</sup> *How Many Drug Courts Are There?*, NAT’L DRUG CT. RES. CTR., <http://ndrc.org/node/348><http://ndrc.org/node/348> (last visited Jan. 7, 2013) (charting the type and number of drug courts nationally); *see also Drug Courts*, NAT’L INST. OF JUST., <http://www.nij.gov/topics/courts/drug-courts/> (last updated May 15, 2012) (providing data on drug courts as of December 31, 2011). *See generally* AM. UNIV. SCH. OF PUB. AFFAIRS, BJA DRUG COURT CLEARINGHOUSE PROJECT: SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (2011) (illustrating state-by-state active drug courts, recently implemented ones, and those which are projected for the future, as of February 2, 2011); AM. UNIV., BUREAU OF JUSTICE ASSISTANCE (BJA) DRUG COURT TECHNICAL ASSISTANCE/CLEARINGHOUSE PROJECT, DRUG COURT ACTIVITY UPDATE (2012), *available at* <http://www1.spa.american.edu/justice/documents/3768.pdf> (providing that as of March 1, 2012, an additional 202 drug court programs were planned). On July 19, 2012, New Jersey passed S-881 to expand and improve upon its existing drug courts. *NJ Courts: New Law Advisory*, N.J. Pub. L. No. 2012, c.23 advisory committee’s notes (July 19, 2012), *available at* <http://www.judiciary.state.nj.us/legis/NLA%202012-28%20-%20P.L.%202012,%20c.23%20%28S-881%29%20-%20Expands%20drug%20court%20program.pdf>.

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difficult.”<sup>3</sup> Consequently, there has been relatively little research comparing the efficacy of different states’ drug courts to each other. Until recently, “largely unknown . . . [were] the practices which lead to success or failure of a drug court.”<sup>4</sup> Then, in 2012, Shannon M. Carey, Juliette R. Mackin, and Michael W. Finigan (“Carey 2012 Team”) published their paper, *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices* (“What Works”), which sets forth practices that have proven successful in reducing recidivism and increasing cost-effectiveness in multiple states and counties.<sup>5</sup> Using the Carey 2012 Team’s best practices (and other related findings) as a basis for comparison, we consider the ways Essex, New Jersey and Denver, Colorado drug courts’ practices stack up. More specifically, we identify areas for improvement in these drug courts. We then consider the potential pitfalls to achieving these best practices presented by each drug court’s unique history and administrative or legal background. In this way, we use the Carey 2012 Team’s best practices as a rubric by which to improve existing drug courts in a practical and cost-effective manner.

In Part I, we contextualize our Article within the framework of the drug court literature, with a focus on providing an overview of the latest research, specifically, the Carey 2012 Team’s What Works. However, before proposing any changes to a drug court, it is important to understand the background of each court, since there may be legal or other institutional barriers to implementing a best practice. Similarly, it is important to consider any precedent for modifying or restructuring a drug court prior to making any recommendation for improvement. Accordingly, in Part II, we offer a brief historical context, including legal grounds and other bases, for the different ways in which Denver and Essex Counties’ drug courts were established and provide a detailed description of any existing case law or legislation that govern—or restrict—improvements to that particular drug court, as well as the target populations for each court.

In Part III, we illustrate the ways that the practices of Denver and Essex County drug courts comport with, or deviate from, the Carey 2012 Team’s top ten best practices for reducing recidivism and for increasing

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<sup>3</sup> RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT: RESEARCH AND ADVOCACY FOR REFORM, DRUG COURTS: A REVIEW OF THE EVIDENCE 2 (2009), [http://www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf)[http://www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf).

<sup>4</sup> *Id.* at 19.

<sup>5</sup> See generally Shannon M. Carey, Juliette R. Mackin & Michael W. Finigan., *What Works?: The Ten Key Components of Drug Court: Research-Based Best Practices*, DRUG CT. REV., Summer 2012, at 6, 6, [http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/nadcp/DCR\\_best-practices-in-drug-courts.pdf](http://d20j7ie7dvmqo0.cloudfront.net/sites/default/files/nadcp/DCR_best-practices-in-drug-courts.pdf).

cost savings. This is followed by Part IV, our analyses of each drug court's shortcomings in light of the Carey 2012 Team's best practices. First, we highlight three practices shared by Denver and Essex County drug courts that do not comport with the Carey 2012 Team's best practices for reducing recidivism. Then, we examine one specific practice that deviates from the best practices for increasing cost savings.<sup>6</sup> In particular, we consider ways each state's history and laws may have a role in why these shortcomings exist. We consider the extent to which each state's history and laws are likely to impact future efforts to comply with the Carey 2012 Team's best practices. We briefly set forth specific proposals regarding ways that each drug court could more fully comply with the top ten best practices.

In the final section, we offer this Article as a first-ever model (but by no means the only one to be used) for consideration of ways to embark on the third generation of research regarding drug courts: using the Carey 2012 Team's top ten lists (and additional findings) to assess and reorganize existing drug courts in a cost-effective and practical manner and taking into consideration the importance of comparative analysis which gives way to the broad spectrum of barriers to implementing these best practices.

Since 1997, the ten key components ("the Key Components") have served as a benchmark for creating drug courts, but they are general in nature.<sup>7</sup> Subsequently, the "first generation" of research contemplated whether drug courts could be effective.<sup>8</sup> In the early 2000s, the "second generation" set out to identify best practices, comparing "characteristics of programs that have significant positive outcomes with those that have

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<sup>6</sup> See *infra* Part III.B (explaining how both counties comply with the best practices to increase cost savings, except that "in both counties, law enforcement does not attend court hearings (status review hearings)").

<sup>7</sup> See generally BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997) [hereinafter *THE KEY COMPONENTS*], <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf> (providing the ten key components).

<sup>8</sup> See Douglas B. Marlowe, *Introduction: Special Issue on Best Practices in Drug Courts*, *DRUG CT. REV.*, Summer 2012, at 1, 1 (summarizing the initial research in which studies set out to determine whether drug court programs significantly outperformed no treatment or alternative programs). For example, "[i]n a 2001 review for the National Drug Court Institute, [Steven] Belenko summarized Drug Court research, both published and unpublished, conducted between 1999 and 2001. Conclusions from his review indicated that Drug Courts were relatively successful in reducing drug use and criminal activity while participants were in the program." Carey et al., *supra* note 5, at 7. See generally STEVEN BELENKO, *THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW* (2001), <http://www.casacolumbia.org/articlefiles/380-Research%20on%20Drug%20Courts.pdf> (providing a summary of the general effectiveness of drug courts).

poor or insignificant outcomes.”<sup>9</sup> Inherent difficulties in conducting cross-jurisdictional studies emerged since different counties vary considerably with respect to socio-economics, population targeted by drug courts, and the type of drugs more commonly used.<sup>10</sup> These differences lead to the seemingly logical conclusion that a best practice in one county would not be necessarily well-suited to another’s drug court. Then, in May 2012, the *Drug Court Review* published Carey, Mackin, and Finigan’s, *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*—“to determine which practices lead to better participant and program outcomes . . . .”<sup>11</sup> In their study, they identified drug court practices “related to lower recidivism and lower costs in sixty-nine Drug Courts nationally.”<sup>12</sup> Thus, the Carey 2012 Team generated the potential for prescribing not only ways to create drug courts, but also a practical, cost-effective means for existing drug courts to conduct self-assessments and reorganize themselves, which will likely result in an effective drug court.

In uncovering best practices, the Carey 2012 Team has paved the way for “the third generation of research”: the improvement of existing drug court programs by emulating the Carey 2012 Team’s best practices. In his introduction to the May 2012 *Drug Court Review*, Douglas Marlowe states,

Presumably, services that are provided by effective programs and not provided by ineffective programs are likely to be important ingredients of an effective intervention. . . . [I]n the absence of definitive evidence from controlled research studies, it makes logical sense

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<sup>9</sup> Marlowe, *supra* note 8, at 1. See generally Kimberly Y.W. Holst, *A Good Score?: Examining Twenty Years of Drug Courts in the United States and Abroad*, 45 VAL. U. L. REV. 73 (2010) (evaluating the characteristics and effects of drug courts nationally and internationally). “Since Belenko’s [2001] report, more Drug Court research has focused on identifying the characteristics of an effective Drug Court program and profiling the ideal participant.” Carey et al., *supra* note 5, at 8. “Although research clearly shows that adult Drug Courts can significantly improve treatment outcomes and reduce recidivism, outcomes vary considerably across participants and programs . . . .” *Id.* at 6 (citations omitted).

<sup>10</sup> KING & PASQUARELLA, *supra* note 3, at 2.

<sup>11</sup> Carey et al., *supra* note 5, at 6.

<sup>12</sup> *Id.* “Between 2000 and 2010, NPC Research conducted over 125 evaluations of adult Drug Court program operations.” *Id.* at 10. The Carey 2012 Team studied sixty-nine evaluations—those of which used “consistent methods for collecting detailed process information, included recidivism and cost analyses using the same methodology, and had sufficient sample sizes (total  $n \geq 100$ ) for valid analysis.” *Id.*

to emulate the practices of effective programs and avoid the practices of ineffective or harmful programs.<sup>13</sup>

This sets the stage for this Article, entering the third generation of research on drug courts by emulating the Carey 2012 Team's best practices when restructuring existing drug courts in Denver and Essex counties.

In the Carey 2012 Team's paper, they provide a table of thirty-eight best practices gleaned from sixty-nine adult drug courts in the United States, with a focus on the two determining features of success, essentially (1) best practices used by drug courts that reduce recidivism and (2) best practices that increase cost effectiveness.<sup>14</sup> In addition, the Carey 2012 Team highlights related research, such as Deborah K. Shaffer's *Reconsidering Drug Court Effectiveness: A Meta-Analytic Review*, which found that "a program length between eight and sixteen months provided the best recidivism outcomes[,] demonstrating that "[p]rograms that lasted less than eight or more than sixteen months were significantly less effective."<sup>15</sup> The Carey 2012 Team found programs that were twelve to eighteen months in length had better outcomes than shorter programs, but did not find programs longer than sixteen months to have worse outcomes.<sup>16</sup> This is an area for additional research. The Carey 2012 Team also sets forth "promising practices" – those that are "significantly related to recidivism and costs, but did not meet the more stringent criteria outlined for best practices."<sup>17</sup>

Lastly, the Carey 2012 Team introduced the concept of "interesting practices not significantly related to outcomes," which entails practices that drug courts may be using that are not relevant to success or failure.<sup>18</sup> According to the Carey 2012 Team, "Some practices are important by

<sup>13</sup> Marlowe, *supra* note 8, at 1.

<sup>14</sup> Carey et al., *supra* note 5, at 19–22 tbl.1. The Carey 2012 Team found "over fifty practices with significant correlations with recidivism or cost or both and some practices which were of interest because they were not significantly related to outcomes." *Id.* at 18.

<sup>15</sup> *Id.* at 8 (citing DEBORAH KOETZLE SHAFFER, UNIV. OF NEV., LAS VEGAS DEP'T OF CRIMINAL JUSTICE, *RECONSIDERING DRUG COURT EFFECTIVENESS: A META-ANALYTIC REVIEW* (2006)).

<sup>16</sup> Email from Shannon M. Carey, Ph.D., Executive Vice President, Senior Research Associate, NPC Research, to authors (Feb. 15, 2013) (on file with authors); *see also* Carey et al., *supra* note 5, at 21, 38.

<sup>17</sup> Carey et al., *supra* note 5, at 31; *see also id.* app. D, [http://www.npcresearch.com/Files/Appendix\\_D\\_Promising\\_practices\\_comparing\\_yes\\_to\\_no\\_with\\_N\\_sizes.pdf](http://www.npcresearch.com/Files/Appendix_D_Promising_practices_comparing_yes_to_no_with_N_sizes.pdf) (last visited Apr. 4, 2013) (providing a table detailing the results of each promising practice).

<sup>18</sup> *Id.* at 35.

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virtue of the fact that they were *not* significantly related to better or worse outcomes.”<sup>19</sup>

In this Article, we rely upon existing research from the past two decades to identify ways to improve existing drug courts without wasting time and resources. However, notably missing from the literature are cross-jurisdictional analyses, considering the spectrum of impediments to best practices in various jurisdictions. The Carey 2012 Team provides the foundation for this research to commence. In this first-ever research, we consider ways to improve Essex and Denver County drug courts using the Carey 2012 Team’s research in light of each drug court’s unique history and background.

II. TWO DIFFERENT DRUG COURTS WITH TWO VERY DIFFERENT HISTORIES

In the late 1980s, drug courts emerged in the United States “in response to rapidly increasing felony drug caseloads that strained the Nation’s courts and overflowed its jails and prisons.”<sup>20</sup> Throughout the nation, states needed to manage this increase in drug-related cases, but there was no existing research or rubric regarding ways to create an effective drug court. In 1997, the U.S. Department of Justice set forth the Key Components of drug courts to “provide sound guidance for developing a drug court and offer measurable performance benchmarks that are useful to researchers.”<sup>21</sup> Since that time, these Key Components have been incorporated into almost every drug court created in the United States, but the lag time between the drug-related crime explosion and formation of the Key Components—as well as the ensuing research to prove their validity—has meant that the approximately 1,400 drug courts in the United States have developed more or less independently of each other and in a somewhat ad hoc fashion in response to rising drug

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<sup>19</sup> *Id.* “Three main findings are particularly relevant to programs in determining their target population and their overall model. These findings relate to violence charges, mixing certain participant populations, and frequency of court appearances.” *Id.*

<sup>20</sup> GLENN R. SCHMITT, NAT’L INST. OF JUSTICE, DRUG COURTS: THE SECOND DECADE 1 (2006), <https://www.ncjrs.gov/pdffiles1/nij/211081.pdf>.

By providing a structure that links supervision and treatment, drug courts exert legal pressure on defendants to enter and remain in treatment long enough to realize benefits. . . . [W]ith the goal of reducing substance abuse and criminal behavior while also freeing the court and corrections systems to handle other cases.

*Id.*

<sup>21</sup> *Id.* at 3; THE KEY COMPONENTS, *supra* note 7 (originating the ten key components by which drug courts are evaluated).

epidemics within each community.<sup>22</sup> For example, some drug courts emerged as a result of enabling state legislation, and others found their start as a result of judges, prosecutors, and defense attorneys/public defenders who saw prison as an inappropriate sentence for non-violent drug users.<sup>23</sup>

In this section, we provide historical contexts for the different ways in which Denver and Essex Counties' drug courts were established, including any existing case law or legislation that govern—or restrict—improvements to a particular drug court. Both courts came into being to address specific problems at the intersection of drug use/sales and the criminal justice system in each state. These problems emerged in significantly different ways in each state. Consequently, different legal frameworks grew out of these unique origins, yet both led to the creation of successful drug courts. Oddly enough, both unwittingly fail to comply with four of the same newly recognized top ten best practices. We outline each county's distinct history and legislative framework to better consider the way each drug court may be able to adapt to the changing landscape of knowledge regarding most effectively achieving best practices and, consequently, the best outcomes for drug court participants. Through the comparison of these two counties, we aim to inform future drug courts as they are being created, as well as set the stage for additional comparative research regarding the spectrum of reasons some drug courts fail to comply with specific best practices.

#### A. *The Denver Drug Court*<sup>24</sup>

Prior to the Key Components, Denver created a court that handled only drug cases in response to local circumstances. In 1994, judges were frustrated with sentencing drug users to prison.<sup>25</sup> At the time, someone

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<sup>22</sup> SCHMITT, *supra* note 20, at iii–iv. The conditions under which a drug court will be successful are still unclear and remain among the most difficult to isolate and quantify, since each county responds to a myriad of different circumstances, such as the following “factors that may be external (e.g., trends in drug use), internal (e.g., staff turnover), or policy-related (e.g., diversion versus post-disposition).” *Id.*

<sup>23</sup> See *infra* notes 27–28 and accompanying text (offering the Denver Drug Court as an example of a judge, district attorney, and public defender working together to establish a drug court).

<sup>24</sup> See COLO. REV. STAT. ANN. § 18-18-403.5 (West 2013) (providing felony classifications for possession of a controlled substance in Colorado); see also COLO. REV. STAT. ANN. § 18-1.3-401 (West 2013) (breaking down sentences by class).

<sup>25</sup> See DIANE PATRICK & KIM ENGLISH, DIV. OF CRIMINAL JUSTICE, CASE PROCESSING EVALUATION OF THE DENVER DRUG COURT 25–31 (1999), <http://dcj.state.co.us/ors/pdf/docs/drgcrt98.pdf> (providing a general history of the drug epidemic in the Denver area and nationally, as well as the creation of drug courts in Denver as a response). The Denver



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charged with possession of more than one gram of a controlled substance could face two to six years in prison, but would be eligible for a sentence to probation.<sup>26</sup> Often, defendants convicted of these offenses *would* be sentenced to probation. However, after numerous violations of probation—common for defendants dealing with addiction problems—judges were often left with only two options: terminate probation with a minor penalty (essentially give up on the defendant) or sentence the defendant to prison (essentially giving up on the possibility of a truly rehabilitative sentence, or a punishment commensurate with the offense). In response to this dilemma, Judge William Meyer,<sup>27</sup> working with the district attorney and state public defender, established a court that would hear only drug cases.<sup>28</sup> Eventually, no judge wanted to sit in Denver's drug court, and the court ceased to exist; for some time, magistrates were assigned to hear probation violations for drug offenders. In 2007, the Denver Drug Court was re-established as a modern drug court.<sup>29</sup>

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Drug Court emerged at a time when a myriad of community changes were occurring in Denver, including a revitalization effort that brought new residents into a previously long-neglected part of the city, with a moderate amount of warehouse and retail activity that closed by 5pm. *Id.* at 11-12. After hours, this area had become home for much of Denver's homeless population—many of whom were drug-addicted. *Id.* at 11.

<sup>26</sup> Under the current law, four grams or less of most drugs (and two grams of methamphetamine) could expose a defendant to one year to eighteen months in prison. § 18-18-403.5(2)(a)(1) ("Any material, compound, mixture, or preparation weighing four grams or less that contains any quantity of flunitrazepam, ketamine, or a controlled substance listed in schedule I or II of part 2 of this article except methamphetamine commits a class 6 felony."); § 18-18-403.5(2)(b)(1) ("Any material, compound, mixture, or preparation weighing two grams or less that contains any quantity of methamphetamine commits a class 6 felony."); § 18-1.3-401(1)(a)(V)(A) (providing the sentencing for a class 6 felony).

<sup>27</sup> See Judge Meyer's Online Resume, THE NAT'L ACAD. OF DISTINGUISHED NEUTRALS, <http://www.nadn.org/PDF/Bill-Meyer.pdf> (last visited Apr. 9, 2013).

<sup>28</sup> See generally Stuart Steers, *A Chemistry Experiment: The Denver Drug Court Tests a Formula for Reclaiming Addicts*, DENV. WESTWORD NEWS, Sept. 26, 2002, <http://www.westword.com/2002-09-26/news/a-chemistry-experiment/full/>. Some of this history was also gleaned from conversations with Albert Zweig, a public defender in Denver assigned to the drug court. Interview with Albert Zweig, Drug Court Magistrate, Denver, Colo. (Oct. 12, 2012). Prior to becoming Magistrate, Albert Zweig served as Deputy Public Defender for the state of Colorado. *Id.*

<sup>29</sup> DENVER DRUG COURT PROGRAM AGREEMENT 1 [hereinafter DDCPA], available at <http://www.american.edu/spa/jpo/customcf/get.cfm?doc=Denver-Drug-Court-Program-Agreement> (last visited Apr. 9, 2013). The Denver Drug Court was re-established with the assistance of the Crime Prevention and Control Commission. *Id.* "The Commission, created by City Ordinance, is charged with creating and increasing efficiencies and effectiveness in the justice system." *Id.*

Today, the Denver Drug Court serves offenders charged with felony-level drug crimes with a demonstrated substance abuse problem.<sup>30</sup> The court is staffed by four part-time drug court Magistrates (and their clerks), a drug court coordinator, members of the Denver District Attorney's Office, members of the State Public Defender's Office (members of the alternate defense bar also regularly appear in drug court), and Denver District Court probation officers.<sup>31</sup> Treatment representatives often report through probation officers, appear on certain dockets, and attend select staffing/meetings.<sup>32</sup>

Denver is the largest city in Colorado with a population of 634,265.<sup>33</sup> It is a consolidated city and county, and, as such, the area covered by the court system is the same area policed by the Denver Police Department, but law enforcement is not represented on the drug court team.

The Denver Drug Court has viewed part of its goal as attracting the population that likely faces an original sentence of probation (wherever sentenced) by making even better offers than the defendants would likely face in other courts.<sup>34</sup> Another attraction is that they would be less likely to face a prison sentence if unsuccessful on drug court probation than if they were unsuccessful on probation in another court.<sup>35</sup> Today's statute governing simple possession requires that most defendants with simple possession charges face a prison sentence of one year to eighteen months.<sup>36</sup> Every defendant in drug court pleads to an offense that allows for a probationary sentence and is permitted supervised probation through the drug court.<sup>37</sup> The defendant is offered two years of probation with the possibility of graduating from drug court after thirteen months—creating the possibility of putting probation in the rear-view mirror in less than the two years of probation routinely meted out in other courts, where there is little possibility for early successful

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Denver (City), Colorado*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/08/0820000.html> (last updated June 27, 2013).

<sup>34</sup> DDCPA, *supra* note 29, at 2 ("The Denver District Attorney's Office swiftly determines whether an arrested offender is Drug Court eligible.").

<sup>35</sup> *Id.* at 12-13.

<sup>36</sup> *See supra* note 26 and accompanying text (defining low-level drug offenses and their ramifications in Colorado).

<sup>37</sup> Since the mandatory minimum sentences in Colorado only apply to those accused of possessing large quantities of narcotics, they involve defendants who would generally not be considered for participation in drug court. Interview with Ben Collett, Deputy Public Defender for the State of Colorado, in the Office of the State Public Defender, *Denv. Col.* (Nov. 16, 2012); Interview with Albert Zweig, *supra* note 28.

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termination.<sup>38</sup> This ability springs from the flexibility the Denver Drug Court has under Colorado sentencing statutes, where all of the crimes people plead to in drug court are otherwise “probation eligible.”<sup>39</sup> Thus, without the Denver Drug Court, courts would still often sentence these defendants to probation without having the specific tools to help ensure success, including the attitude that failure to comply with probation requirements (i.e., a first failed drug test) should not necessarily result in prison.

B. *The Essex County Drug Court*<sup>40</sup>

The Essex County Drug Court, based in Newark, New Jersey, predates the Denver Drug Court and has a more complex legal history governing its creation. The legislation and case law are further complicated by New Jersey’s unique political divisions, which impact its police force, court structure, and ultimately the composition of its drug court teams. The drug court team includes one judge, members of the Essex County District Attorney’s Office, members of the Public Defender’s Office, Essex County probation officers and Treatment Accountability for Safer Communities (“TASC”).<sup>41</sup> Law enforcement is not part of the team.

Essex County is the third most populous county in New Jersey, with an estimated population of 783,969.<sup>42</sup> In New Jersey, the county is the division significant for the state court system, and each county is governed by its county court vicinage. Essex County is made up of twenty-two separate municipalities,<sup>43</sup> each with its own police force and municipal court.<sup>44</sup> More than half of Essex County’s population resides

<sup>38</sup> DDCPA, *supra* note 29, at 6–8 (“[T]he soonest an offender may graduate from Drug Court is 13 months after a plea of guilty.”).

<sup>39</sup> This assessment of how the plea offer structure works in the Denver Drug Court is gleaned from conversations with Albert Zweig and Ben Collett, public defenders who have practiced in the Denver Drug Court a great deal, as well as one of the author’s experiences as a public defender in Denver. See Interview with Alert Zweig, *supra* note 28; Interview with Ben Collett, *supra* note 37.

<sup>40</sup> N.J. STAT. ANN. § 2C:45-2 (West 2005 & Supp. 2012).

<sup>41</sup> NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, MANUAL FOR OPERATION OF ADULT DRUG COURTS IN NEW JERSEY 3, 28–34 (2002) [hereinafter DRUG COURT MANUAL], <http://www.judiciary.state.nj.us/drugcourt/dctman.pdf> (indicating the parties that constitute the “drug court team,” as well as their roles and expectations).

<sup>42</sup> *Essex County, New Jersey*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/34013.html> (last updated Mar. 13, 2013).

<sup>43</sup> THE COUNTY OF ESSEX N.J., <http://www.essex-countynj.org/#> (last visited Apr. 10, 2013) (move mouse over “Municipalities” tab for a drop-down list of the municipalities).

<sup>44</sup> *General Information*, THE COUNTY OF ESSEX N.J., <http://www.essex-countynj.org/index.php?section=essex/gi> (last visited Apr. 12, 2013). Each municipal court handles

in the urban areas of Newark, East Orange, and Irvington,<sup>45</sup> and the vast majority of drug-related cases are alleged to have occurred in these areas.<sup>46</sup>

In New Jersey, the legislative, legal, and administrative background of drug courts is significantly more complex than it is in Colorado. In 1986 the New Jersey legislature passed New Jersey's Comprehensive Drug Reform Act, creating a class of drug offenders who faced mandatory prison. This class included those convicted of: (1) possession of a controlled substance with the intent to distribute within 1,000 feet of a school;<sup>47</sup> (2) a second or subsequent offense of possession of a controlled substance with the intent to distribute; and (3) possession of a controlled substance with the intent to distribute within 500 feet of public property (usually public housing, a public park, or library).<sup>48</sup> If convicted of one of these offenses at trial, a defendant faces, in some cases, a sentence that involves three years with no parole, and in others a prison sentence of five to ten years. In most of these cases the court is required by statute to sentence the defendant to a prison term—there is little or no probation option.<sup>49</sup> A review of “school zone” maps of the major urban areas in New Jersey demonstrates the problem with this. For example, schools and public zones cover seventy-six percent of Newark after removing the area covered by Newark Liberty Airport.<sup>50</sup> Most likely, this percentage increases by excluding other industrial areas in Newark, as well as the highways that run through the city. In one of

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traffic offenses and disorderly persons offenses (roughly equivalent to misdemeanors in other jurisdictions). *See id.*

<sup>45</sup> *See East Orange (City), New Jersey*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/3419390.html> (last updated Jan. 10, 2013) (showing an estimated population of 64,365 in 2011); *Newark (City), New Jersey*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/3451000.html> (last updated Jan. 10, 2013) (showing an estimated population of 277,540 in 2011); THE TOWNSHIP OF IRVINGTON, [www.irvington.net](http://www.irvington.net) (last visited Apr. 10, 2013) (showing a population of 65,000). If you add the populations of these three municipalities, it comes to 406,905. Anecdotally, most of the cases dealt with by public defenders in Essex come from these three municipalities.

<sup>46</sup> This statement is based on the author's ten years of experience as a public defender in Essex County, as well as conversations with other Essex County public defenders.

<sup>47</sup> The most recent version of the 1,000 foot statute allows certain offenders to be sentenced to probation, giving courts a number of factors to consider, but still leaves a class of offenders who are not probation eligible. N.J. STAT. ANN. § 2C:35-7b (West 2005).

<sup>48</sup> N.J. STAT. ANN. § 2C:35-7 (possession on school property); N.J. STAT. ANN. § 2C:35-7.1 (West 2005) (public housing); N.J. STAT. ANN. § 2C:43-6(f) (West 2005) (previous conviction).

<sup>49</sup> *See supra* notes 47–48 (providing statutes governing the possession of drugs in various contexts).

<sup>50</sup> The N.J. Comm'n to Review Criminal Sentencing, *Report on New Jersey's Drug Free Zone Crimes & Proposal for Reform*, 18 FED. SENT'G REP. 146, 149 (2005).

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the author's ten years of experience as a public defender in Essex County, virtually every drug distribution case that comes from the urban areas in the county is alleged to have occurred within 1,000 feet of a school, within 500 feet of public property, or both.

As a consequence of the 1986 Drug Reform Act, many defendants facing sentencing on low-level drug "dealing" offenses are prison-bound by operation of law, even if they were selling drugs to support their own habits.<sup>51</sup> As part of its comprehensive reform, in 1986, the legislature addressed this dilemma by passing New Jersey Statute section 2C:35-14, allowing a court to sentence these "prison-bound" defendants to "special probation" – probation with the requirement that the probationer successfully complete drug treatment. Because the probationer receives the opportunity to avoid a mandatory prison sentence, even though the legislature had previously found that these defendants should be prison-bound, this "special probation" came with some strings attached, including: (1) the necessity that lengthy in-patient treatment be part of any sentence (although this requirement has been eased a bit by the latest version of statute); (2) the requirement that the length of probation must be five years, the maximum length of probation under the laws of New Jersey (this requirement has also been eased for some offenders under the latest version of the statute); and (3) the statute creates a presumption that probation should be terminated and a prison sentence imposed upon a second or subsequent violation.<sup>52</sup>

This general scheme and these requirements became part and parcel of the Essex County Drug Court. Even defendants not facing mandatory sentencing under the drug laws faced long-term in-patient treatment, the possibility of lengthy prison sentences (that they would not likely face if given probation in other courts), and five-year terms of probation (which would also be unusual in other courts).<sup>53</sup> Consequently, defendants charged with simple possession of a controlled substance or a first offense of some other crime related to drug use, who could benefit from drug treatment, are nonetheless counseled away from drug court and

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<sup>51</sup> Cf. Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin's Efforts to Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689 (2013) (criticizing the effects that Wisconsin's truth-in-sentencing law has had in Wisconsin). Similar to New Jersey's 1986 Drug Reform Act, Wisconsin has been filling its prisons with many low-level drug offenders. *Id.*

<sup>52</sup> N.J. STAT. ANN. § 2C:35-14 (West Supp. 2012); N.J. STAT. ANN. § 2C:45-2 (West Supp. 2012).

<sup>53</sup> Telephone Interview with Elaine Wladyga, First Assistant Deputy Public Defender, State of New Jersey & Janine Beer, First Assistant Deputy Public Defender, State of New Jersey (Sept. 27, 2012). Both Ms. Wladyga and Ms. Beer have been assigned to the Essex County Drug Court with Ms. Wladyga assigned as the supervisor.

remain in non-specialized courts, since the ultimate penalties may be much greater in drug court.<sup>54</sup> As a result, the Essex County Drug Court has never been a “user” drug court. It is hard to imagine anyone charged with simple possession being counseled toward drug court unless his motivation was extremely high and his record so bad that a judge elsewhere would be unlikely to give him probation even for a charge of simple possession.

In the 2007 case of *State v. Meyer*, the New Jersey Supreme Court faced the question of whether someone who violated the criteria of receiving “special probation” under New Jersey Statute section 2C:35-14 should be allowed entrance into drug court when that person was *not* charged with one of the mandatory prison offenses that drug courts typically face (in other words, a person who would be eligible for probation under any circumstances).<sup>55</sup> The court held that since a drug court is not mentioned in section 2C:35-14, the statute does not impinge on a court’s ability, including a drug court, to place someone on probation who is generally qualified for a probationary sentence.<sup>56</sup> One way of looking at this is that a drug court is a place as opposed to a sentencing scheme. One of the sentencing schemes it uses is the one in section 2C:35-14. Therefore, the eligibility requirements of that statute only apply when someone *must* be sentenced under that statute. An obvious corollary to this is that the onerous requirements of “special probation” need only apply to those who need to be sentenced under New Jersey Statute section 2C:35-14 (presumption of prison for repeated failure, lengthy in-patient treatment, and five year probationary terms). It seems that *Meyer* creates the possibility that defendants charged with simple possession of a controlled substance, or other offenses that would have them facing a likely probationary sentence in any court, could enter drug court with shorter probation terms, shorter or no in-patient treatment if clinically appropriate, and no strong presumption that failure should lead to prison. The Essex County Drug Court *has not* interpreted *Meyer* this expansively, so this drug court is not recommended to those users only involved in less serious offenses and not caught up in active participation in the drug trade.<sup>57</sup>

Recently, the New Jersey Legislature passed an amendment to New Jersey Statute section 2C:35-14. Among other changes, it gives the judge more discretion in admitting certain offenders, while removing the

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<sup>54</sup> *Id.*

<sup>55</sup> *State v. Meyer*, 930 A.2d 428, 430 (N.J. 2007).

<sup>56</sup> *Id.* at 436.

<sup>57</sup> Telephone Interview with Elaine Wladyga & Janine Beer, *supra* note 53.

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ability of the prosecutor to bar otherwise eligible offenders.<sup>58</sup> This would seem to expand the potential pool of applicants for the Essex County Drug Court. On the other hand, even the comments to the legislation refer to section 2C:35-14 as the “drug court” program.<sup>59</sup> This demonstrates the deep thinking that stands in the way of following the full potential of *Meyer* to open up the Essex County Drug Court to the simple possessor not facing a mandatory prison sentence. This administrative/psychological barrier is interesting, considering the fact that in the 2002 *Manual for Operation of Adult Drug Courts in New Jersey* the New Jersey Administrative Office of the Courts recognized that there were two tracks for admission into drug court: one for those who were only eligible for probation under section 2C:35-14 and one for those who were generally eligible for probation.<sup>60</sup> That manual recognized that, for those who were otherwise eligible for probation, the drug court team would have much greater flexibility in determining the conditions of probation and that those conditions would not be entirely determined by section 2C:35-14.<sup>61</sup>

The relationship between section 2C:35-14 and drug courts is further complicated by the legislative drive in New Jersey to greatly expand the number of drug courts in the state until every county has one.<sup>62</sup> This drive toward “mandatory” drug court is also taking the form of making a sentence to special probation (under section 2C:35-14) mandatory for more and more drug-dependent individuals, unless a sentence to “regular probation” is sufficient to address treatment needs.<sup>63</sup> How will Essex and the other counties in New Jersey deal with this? Some counties are likely to end up with courts aimed at users, since not all counties in New Jersey have a significant number of prosecutions directly related to drug sales. Will these counties assume that they must sentence users to special probation, or will they try to come up with a viable, less expensive alternative to special probation that seems to be

<sup>58</sup> S. 881, 215th Leg., 1st Sess. (N.J. 2012), available at [http://www.njleg.state.nj.us/2012/Bills/S1000/881\\_I1.htm](http://www.njleg.state.nj.us/2012/Bills/S1000/881_I1.htm) (last visited Jan. 17, 2013).

<sup>59</sup> *Id.*

<sup>60</sup> DRUG COURT MANUAL, *supra* note 41, at 10-18 (guidelines for admission).

<sup>61</sup> *Id.* at 17.

<sup>62</sup> See N.J. STAT. ANN. § 2C:35-14.3 (West, Westlaw through 2013 legislation) (stating that the program will be fully implemented no later than the fifth fiscal year following enactment); Susan K. Livio, *Trial Mandatory Drug Court Program Bill Clears N.J. Assembly*, NJ.COM (June 25, 2012, 7:27 PM), [http://www.nj.com/news/index.ssf/2012/06/trial\\_mandatory\\_drug\\_court\\_pro.html](http://www.nj.com/news/index.ssf/2012/06/trial_mandatory_drug_court_pro.html) (“The Assembly tonight approved a bill that would launch a trial mandatory drug court program for nonviolent offenders as an alternative to serving time in prison.”).

<sup>63</sup> N.J. STAT. ANN. § 2C:35-14.1 (West, Westlaw through 2013 legislation); N.J. STAT. ANN. § 2C:35-14.2 (West, Westlaw through 2013 legislation).

permissible under the new law?<sup>64</sup> A move in the direction of “user courts” in these other counties renders the possibility for Essex County (and other counties) to open their drug courts to simple possessors, or to set up specific “sister” courts for such defendants.

Although this new legislation seems to further solidify the link between special probation and drug court in New Jersey, in spite of the promise of *Meyer*, it also seems to open the possibility of “user courts” so that a county could ensure that regular probation would be sufficient to address the needs of certain offenders for whom special probation would be overkill.

### III. CHARTS

The Carey 2012 Team’s latest research regarding best practices provides an opportunity to determine concrete ways to improve upon an existing drug court’s practices and to conduct meaningful cross-jurisdictional research with a view toward better understanding impediments to achieving best practices. In this section, we modify the Carey 2012 Team’s table of thirty-eight best practices to create two unique charts. In these charts, we include the Carey 2012 Team’s top ten lists for (1) reducing recidivism<sup>65</sup> and (2) increasing cost savings,<sup>66</sup> as well as information regarding whether Denver and Essex Counties’ practices comply or deviate from the Carey 2012 Team’s best practices. Using the Carey 2012 Team’s best practices as a rubric, we demonstrate whether Denver and Essex County comply with the items on the top ten lists. We have highlighted in bold the specific areas in which both Denver and Essex fall short of the best practices.

For the purposes of comparing Denver and Essex County drug courts with the Carey 2012 Team’s top ten best practices, we largely relied on interviews with members of each county’s drug court teams.<sup>67</sup>

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<sup>64</sup> See § 2C:35-14.2(b) (authorizing a court to sentence an individual to regular probation, for whom sentencing under section 2C:35-14 would be mandatory, if certain conditions are met). These conditions include that regular probation would be adequate to meet the clinical needs of the individual, and sentencing under section 2C:35-14 would not better meet those needs. *Id.* § (b)(2)(a)–(b). One way to ensure that regular probation would meet these criteria would be to set up a regular probation drug court program for those individuals not facing mandatory minimum sentences.

<sup>65</sup> Carey et al., *supra* note 5, at 22–27.

<sup>66</sup> *Id.* at 28–31.

<sup>67</sup> In the fall of 2011, Denver sent out an internal report entitled, *Site Specific Best Practices Report for Denver Adult Drug Court* based on NPC Research’s *Colorado Statewide DWI and Drug Court Process Assessment and Outcome Evaluation: Final Report*. NPC RESEARCH, COLORADO STATEWIDE DWI AND DRUG COURT PROCESS ASSESSMENT AND OUTCOME EVALUATION: FINAL REPORT (2012), [http://www.npcresearch.com/Files/CO\\_Statewide\\_](http://www.npcresearch.com/Files/CO_Statewide_)



## A. Top Ten Best Practices for Reducing Recidivism

Denver and Essex County comply with most of the top ten best practices for reducing recidivism with three notable exceptions. Both counties fail to maintain a caseload of less than 125 participants per judge or magistrate; the amount of time a judge or magistrate spends with each participant, on average, is likely to be less than the requisite minimum; and law enforcement is not a member of the drug court team.

Table 1.

Top Ten Practices for Reducing Recidivism <sup>68</sup>		Location)	
KC <sup>69</sup>	Practice	Denver County, CO	Essex County, NJ
3	1. Program caseload (number of individuals actually participating at any one time) is less than 125.	No. 850-900, but 225/magistrate.	No. Over 500.
5	2. Participants are expected to have greater than 90 days clean (negative drug tests) before graduation.	Yes.	Yes.
7	3. Judge spends an average of three minutes or greater per participant during status review hearings.	Unknown.	Unknown.

Process\_Assessment\_and\_Outcome\_Evaluation\_0912.pdf. Both reports relied upon self-reported information from members of the Drug Court Team. The authors of this Article used the Denver site specific report to support information gained from interviews, observations, emails, and telephone conversations with various members of the Denver Drug Court Team, but please note that this Article reflects the more up-to-date information, as data was collected in Fall 2012. Some of the information has changed from—and perhaps due to—NPC Research’s fall 2011 data, so any discrepancies between our research and their findings simply reflect this dynamic. From the Denver Drug Court, we thank Albert Zweig and Jessica Peterson, in particular. We also express appreciation to Magistrate Melanie Names who the authors observed. From Essex County, we thank Elaine Wladyga and Janine Beer.

<sup>68</sup> Carey et al., *supra* note 5, at 22-27. According to the Carey 2012 Team, these are the top ten practices related to reducing recidivism ranked by effect size, starting with the largest. *Id.*

<sup>69</sup> “KC” stands for Key Component from the 1997 study. THE KEY COMPONENTS, *supra* note 7. Table 1 lists the specific Key Component and the corresponding practice from most effective to tenth most effective as found by the Carey 2012 Team. The last two columns identify whether Denver and Essex Counties comply with the Key Component via this particular best practice.

1	4. Treatment communicates with court via e-mail.	Usually in-person or via probation officer and/or in a written report; sometimes email.	Usually in-person or via telephone; sometimes email.
1	5. A representative from treatment attends drug court team meetings (staffings).	Yes, on certain dockets.	Yes.
8	6. Review of the data and/or regular reporting of program statistics has led to modifications in drug court operations.	Yes (In-process).	Yes.
1	7. A representative from treatment attends court sessions (status review hearings).	Yes, on certain dockets.	Yes.
2	8. Drug court allows nondrug charges.	Yes.	Yes.
1	9. Law enforcement is a member of the drug court team.	No.	No.
8	10. The results of program evaluations have led to modifications in drug court operations.	Yes (In-process).	Yes.

*B. Top Ten Best Practices for Increasing Cost Savings*

Denver and Essex County comply with most of the top ten best practices for increasing cost savings with one overlapping exception: in both counties, law enforcement does not attend court hearings (status review hearings).

Table 2.

Top Ten Practices for Cost Savings <sup>70</sup>		Location)	
KC	Practice	Denver County, CO	Essex County, NJ

<sup>70</sup> See Carey et al., *supra* note 5, at 28–31 (according to the Carey 2012 Team, these are the top ten practices related to increasing cost savings ranked by effect size, starting with the largest).

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8	1. Review of the data and/or regular reporting of program statistics has led to modifications in drug court operations.	Yes (In-process).	Yes.
8	2. The results of program evaluations have led to modifications in drug court operations.	Yes (In-process). (Also, evaluations done by clerks.)	Yes.
6	3. Sanctions are imposed immediately after noncompliant behavior (e.g., drug court will impose sanctions in advance of a participant's regularly scheduled court hearing).	Yes.	Yes.
1	4. The defense attorney attends drug court team meetings (staffings).	Yes (However, this does not include staffings for reviews).	Yes.
6	5. In order to graduate, participants must have a job or be in school.	Yes (This is a requirement of the program, but not necessary to graduate).	Yes.
1	6. A representative from treatment attends court sessions (status review hearings).	Yes (Select dockets).	Yes.
6	7. Team members are given a copy of the guidelines for sanctions.	Yes.	Yes.
5	8. Drug test results are back in two days or less.	Yes.	Yes.
5	9. In the first phase of drug court, drug tests are collected at least two times per week.	Yes.	Yes.
1	<b>10. Law enforcement attends court sessions (status review hearings).</b>	<b>No.</b>	<b>No.</b>

## IV. ANALYSES OF EACH DRUG COURT IN LIGHT OF THE CAREY 2012 TEAM'S BEST PRACTICES

In this section, we analyze the results of our comparison of Denver and Essex Counties' drug court practices with the Carey 2012 Team's best practices. For the purposes of this Article, we examine best practices that are clearly *not* in place in either county. In this way, we aim to better grasp potential impediments to implementing a best practice, approaching an understanding of the scope of these barriers.

A comparison with the top ten best practices provides a starting point to contemplate different reasons a drug court may not be in compliance with one particular best practice. First, we consider the three ways in which Denver and Essex County drug courts fail to implement the Carey 2012 Team's best practices to reduce recidivism. Then, we analyze Denver and Essex Counties' failure to comply with one of the top ten best practices to increase cost effectiveness. Within the discussion of the ways both Denver and Essex fail to implement the top ten best practices, we also incorporate a consideration of related (1) best practices not among the top ten, but the top thirty-eight; (2) "promising practices"; and (3) "practices not significantly related to outcomes," since these additional practices may contribute to a drug court's failure to comply with a top ten best practice. For example, if a court is spending precious resources on individuals who do not need to be seen every week according to a practice not related to outcomes, that court might have less time to spend with each participant.

A. *Reducing Recidivism*

Denver and Essex County drug courts both fail to comply with three of the Carey 2012 Team's top ten best practices found to reduce recidivism: (1) drug courts with a program caseload of less than 125 active participants (#1 Best Practice); (2) judge spends an average of at least three minutes per participant (#3 Best Practice); and (3) a law enforcement representative is on the drug court team (#9 Best Practice).<sup>71</sup>

The drug court team is an essential ingredient in drug court success. The first two best practices that we examine reflect the important role of the judge/magistrate, and the third demonstrates the importance of law enforcement.

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<sup>71</sup> See *id.* at 22-32. For the purposes of this Article, we focus solely on the practices in which both Denver and Essex fail to comply with the Carey 2012 Team's "Top Ten Lists" based upon interviews and observations from fall 2012.

1. The Role of the Judge or Magistrate

The drug court team is a crucial component of a successful drug court and each member holds an important role. A drug court team may include representatives from the following offices: district attorney, public defender, judge or magistrate, law enforcement, TASC (treatment coordinator), probation, and a drug court coordinator. In particular, the role of the judge/magistrate in reducing recidivism emerges twice on the top ten list of best practices.

Offenders report that interactions with the judge are one of the most important influences on the experience they have while in the program. They respond to the judge's interpersonal skills and ability to resolve legal problems expeditiously and provide ready access to services. Offenders who interact with a single drug court judge, rather than multiple judges, may be more likely to comply with program demands.<sup>72</sup>

In this section, we consider the important role of the judge/magistrate with respect to reducing recidivism in Denver and Essex drug courts.

a. *Drug Courts with a Program Caseload of Less than 125 Active Participants*

The Carey 2012 Team identified the number of active participants per judge or magistrate as the highest ranked best practice contributing toward reducing recidivism. "Drug Courts with a program caseload (number of active participants) of less than 125 had more than five times greater reductions in recidivism than programs with more participants."<sup>73</sup> Comparatively, programs with populations of greater than 125 participants only averaged a six percent reduction in recidivism.<sup>74</sup> Neither Denver nor Essex County drug courts have program caseloads with less than 125 participants. Denver Drug Court has approximately 860-900 active participants, with four part-time magistrates. This means that each magistrate handles approximately 200-225 participants. Essex County Drug Court has one judge with well over 500 participants.<sup>75</sup>

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<sup>72</sup> SCHMITT, *supra* note 20, at iii.

<sup>73</sup> Carey et al., *supra* note 5, at 22.

<sup>74</sup> *Id.* at 23.

<sup>75</sup> See *New Jersey Judiciary, Adult Drug Court Programs*, ADMIN. OFFICE OF THE COURTS CRIMINAL PRACTICE DIV., <http://www.judiciary.state.nj.us/criminal/dccoords2.pdf>

In the Carey 2012 Team's study, all of the drug courts "were single-judge programs and therefore the larger programs had a single judge seeing up to 400 active participants."<sup>76</sup> However, the Carey 2012 Team did not recommend that larger programs become smaller or that programs be single-judge. Rather, they identified this as an area for further research. Moreover, the Carey 2012 Team did not identify the underlying reason for this result, stating, "Although the reason for this result is not clear from the available data, this finding had the largest effect size by far of any finding in this study."<sup>77</sup> Thus, Denver provides a drug court suitable for research, since there are multiple magistrates, each with caseloads well above the 125 participant benchmark, yet not so far away as to make this goal appear unachievable, either by caseload reduction or the addition of another magistrate.<sup>78</sup> Moreover, it is plausible that single-judge counties with larger numbers of participants would be better served by increasing the number of judges, since judges "report difficulty in getting to know participants to the extent that they need to when they see over 100 participants."<sup>79</sup> Therefore, Essex too provides a model for more extensive research, especially since it boasts success.<sup>80</sup> Governor Chris Christie and the legislature are expanding their drug court programs, anticipating that the new laws in New Jersey, which are making sentencing under 2C:35-14 mandatory for more

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(providing an outline of the judicial offices in the drug court program and naming the drug court judge of each county).

<sup>76</sup> Carey et al., *supra* note 5, at 23.

<sup>77</sup> *Id.*

[R]eductions in recidivism decrease as programs get larger. Likely, as the Drug Court gets larger, the caseloads per case manager and treatment provider also get larger. The larger programs may be tempted to decrease the level of supervision or otherwise "water down" the Drug Court intervention. In addition, the role of the judge has been demonstrated to be a key factor in participant success.

*Id.*

<sup>78</sup> The Denver Drug Court has demonstrated an interest in reducing the number of participants per magistrate. The caseload has dropped from about 1,400 participants in 2008 to approximately 860 in 2012. Previously, there were only two magistrates. Now, there are four part-time magistrates. There are eight prosecutors who handle both drug court and juvenile court; three full-time public defenders in drug court, plus one supervisor. There are also four probation officers who handle drug court and sex offenders (they cycle in about every two years). Each magistrate handles approximately twenty-five percent of the participants, about 215.

<sup>79</sup> Carey et al., *supra* note 5, at 23.

<sup>80</sup> See STUART RABNER, GLENN A. GRANT, ROBERT W. SMITH, JOSEPH J. BARRACO, KEVIN M. BROWN & CAROL A. VENDITTO, N.J. COURTS, A MODEL FOR SUCCESS: A REPORT ON NEW JERSEY'S ADULT DRUG COURTS 6-7 (2010) <http://www.judiciary.state.nj.us/drugcourt/DrugCourtReport.pdf> (detailing the development and expansion of the drug court system in New Jersey).

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individuals, will mandate larger dockets and longer probation for more participants.<sup>81</sup>

Decreasing a judge or magistrate's caseload also increases cost savings by thirty-five percent more than drug courts with higher participants per judge numbers. Therefore, reaching the 125 participant per judge/magistrate benchmark—perhaps by hiring additional drug court teams—needs to be a top priority for any restructuring of existing drug courts both for reducing recidivism and for saving costs to the state.

*b. Judge Spends an Average of at Least Three Minutes per Participant*

“Drug Courts where the judge spent an average of three minutes or greater per participant during court hearings had 153% greater reductions in recidivism compared with programs where the judge spent less time.”<sup>82</sup> Neither Denver nor Essex has collected precise data regarding the average time a judge or magistrate spends per participant.<sup>83</sup> The amount of time that each judge/magistrate spends with each participant is related to the number of participants that each judge/magistrate has in her program. Therefore, improving each drug court's success is linked with decreasing the judge/magistrate to participant ratio, as well as isolating the exact amount of time the judge/magistrate spends with each participant on average.

“Moving from under three minutes to just over three minutes effectively doubles the reduction in recidivism, while spending seven minutes or more effectively triples the positive outcome.”<sup>84</sup> In both Denver and Essex County, judges and magistrates speak at length with

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<sup>81</sup> See MaryAnn Spoto, *Gov. Christie Signs Bill that Gives Non-Violent Drug Offenders Rehab Instead of Jail Time*, NJ.COM (July 19, 2012, 2:08 PM), [http://blog.nj.com/ledgerupdates\\_impact/print.html?entry=/2012/07/gov\\_christie\\_signs\\_bill\\_that\\_g.html](http://blog.nj.com/ledgerupdates_impact/print.html?entry=/2012/07/gov_christie_signs_bill_that_g.html).

<sup>82</sup> Carey et al., *supra* note 5, at 24.

<sup>83</sup> In the fall of 2011, NPC Research, led by Shannon Carey, conducted research regarding drug courts in Colorado, published in the *Colorado Statewide DWI and Drug Court Process Assessment and Outcome Evaluation, Final Report*. NPC RESEARCH, *supra* note 67. The collected data, which was self-reported, indicated that some drug court team members believe that Denver magistrates spend at least three minutes per participant on average. *Id.* at 40 (“100% of the Colorado programs reported that their judges spend at least 3 minutes per participant during drug court hearings . . .”). However, no timing of these important criteria has occurred to scientifically demonstrate this result. When the authors of this Article observed approximately three hours of drug court reviews in Denver, the average amount of time spent with each participant did not appear to reach three minutes. Obviously, this is a relatively small sample, but Denver Drug Court team members acknowledge that there has not been any official time-check conducted.

<sup>84</sup> Carey et al., *supra* note 5, at 24.

participants who report having difficulties.<sup>85</sup> These conversations take place either during the hearing or meeting, or immediately following the official status hearing, again with no timer. Accordingly, this time must be counted when conducting studies to determine the average time spent with each participant.

*c. Other Practices Related to Program Caseload and the Average Time a Judge/Magistrate Spends with Each Participant*

The failure to comply with reduced participants per judge and minimal level of interaction during hearings as recommended by the Carey 2012 Team's best practices are inter-related: If a judge or magistrate has 200–250 active participants, their courtrooms are busy—overflowing—then how can she spend more time with each participant? Yet, as researchers have shown, the judge or magistrate has an enormous role to play in preventing recidivism.<sup>86</sup> It is not practical to propose to Denver and Essex Counties that the judge or magistrate spend more time with each participant or see fewer participants. The underlying reasons for failure to comply with these two top ten best practices may be related to other important practices. For example: (1) Did the judge or magistrate volunteer for drug court? (2) Does the program last twelve months? (3) Do status meetings occur weekly?

A relevant best practice that is not among the top ten is that the “judge was assigned to Drug Court on a voluntary basis.”<sup>87</sup> The Carey 2012 Team has shown that when a judge or magistrate volunteered or requested to be part of drug court, the reduction in recidivism was eighty-four percent greater, and the increase in cost savings was four percent greater.<sup>88</sup> This result logically flows from the fact that the role of judges is significant. Thus, we must consider his or her interest in holding this key position. In Denver, magistrates are used. By definition, a magistrate in drug court has applied for the position, so Denver fulfills this best practice. In Essex County, however, judges are appointed to drug court for set terms. This means that individual judges may have different degrees of interest in drug court.

Both Shaffer and the Carey 2012 Team agree that programs lasting twelve months are effective. Shaffer's finding from 2006 that “a program

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<sup>85</sup> Interviews and Conversations with Members of both Denver and Essex County Drug Court Teams and Observations; Telephone Interview with Elaine Wladyga and Janine Beer, *supra* note 53; Interview with Albert Zweig, *supra* note 28.

<sup>86</sup> Carey et al., *supra* note 5, at 24.

<sup>87</sup> *Id.* at 22 tbl.1.

<sup>88</sup> *Id.*



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length between eight and sixteen months provided the best recidivism outcomes” further supports the practice of limited caseloads and extended interaction with participants.<sup>89</sup> Shaffer found “[p]rograms that lasted less than eight or more than sixteen months were significantly less effective.”<sup>90</sup> However, the Carey 2012 Team’s results differ slightly from Shaffer in that they did not find programs greater than 16 months to have worse outcomes.<sup>91</sup> In fact, “programs that were 18 months have better outcomes than programs that were 12 months, and 24 months is better than 18 months.”<sup>92</sup> Denver and Essex County drug courts both meet the twelve month requirement. In Denver, the drug court program has the potential to last less than sixteen months, but it is longer when participants fail to comply with the terms of the program.<sup>93</sup> In Essex, there is a statutory requirement that many of the participants’ sentences include five years of probation.<sup>94</sup> Thus, by its interpretation of the law, the Essex County program fails to comply with this best practice, since there is no evidence that blanket participation in a program for this length of time is helpful, and some research indicates that it is problematic.

If Denver and Essex could graduate some of these approximately 250 participants per judge and magistrate in shorter periods of time, both counties would be on their way to conforming to numbers one and three on the top ten best practice list for reducing recidivism. Although the latest version of New Jersey Statute section 2C:35-14 gives the judge the power to terminate special probation early, it still requires that the participant complete at least two years of special probation. If Essex County could study the difference in participant success rates between graduates of five years and two years, then meaningful data would be a practical addition to the existing literature for New Jersey and elsewhere. Clearly, the optimal length of time for drug court programs is an area ripe for further research.

A third finding relevant to the discussion is the “interesting practices not significantly related to outcomes.”<sup>95</sup> “Drug Courts that see participants at court sessions weekly during the first phase had no better

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<sup>89</sup> *Id.* at 8 (citing SHAFFER, *supra* note 15, at 4).

<sup>90</sup> *Id.*

<sup>91</sup> Email from Shannon M. Carey, *supra* note 16; *see also* Carey, et al., *supra* note 5, at 21, 38.

<sup>92</sup> Email from Shannon M. Carey, Ph.D., Executive Vice President, Senior Research Associate, NPC Research, to authors (Apr. 28, 2013) (on file with authors).

<sup>93</sup> DDCPA, *supra* note 29, at 6-9 (illustrating how a participant can get through the system in thirteen months).

<sup>94</sup> N.J. STAT. ANN. § 2C:45-2 (West Supp. 2012).

<sup>95</sup> Carey et al., *supra* note 5, at 35.

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outcomes than courts that saw them every two weeks.”<sup>96</sup> This means that, in general, weekly court sessions with participants is *not* significantly related to a better or worse outcome than bi-weekly court sessions. In Essex, participants attend weekly court sessions in the first phase of drug court; in Denver, bi-weekly. It is important to recall that Denver’s drug court includes the simple user:

Overall, what is important is assessing the risk and need level of participants and determining the appropriate level of court supervision needed at the time of entry. . . . Perhaps for very high-risk and high-need participants, weekly court appearances might be appropriate, while participants that are more in the middle of the risk/need range might perform adequately with less frequent supervision.<sup>97</sup>

Thus, Essex County’s drug court might have more reason to have weekly status meetings with more of its participants than Denver.

## 2. Law Enforcement Representative on Drug Court Team

Drug Courts that had a law enforcement representative on the Drug Court team had 88% greater reductions in recidivism than programs that did not.

Programs that include a law enforcement representative on the team describe that role as crucial for two main reasons:

- Law enforcement often has more frequent contact than Drug Court personnel with Drug Court participants on the street and in home settings and therefore provides good insight into what is happening to participants in their lives outside of court and treatment.
- Including law enforcement creates a two-way process where law enforcement representatives not only contribute an important perspective to the Drug Court, but also return information to law enforcement organizations, which promotes

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<sup>96</sup> *Id.* at 36.

<sup>97</sup> *Id.* (citation and italics omitted).

a better understanding of the value of Drug Court.<sup>98</sup>

Neither Denver nor Essex drug courts have a law enforcement representative on their drug court teams. Denver and Essex County drug courts each have distinct institutional barriers to having a member of law enforcement on the drug court team, which would require further study and analysis. In this section, we briefly compare their particular barriers.

Currently, Denver is considering different ways to include a law enforcement representative on its drug court team. In Denver there are four separate dockets, each meeting on a different day. Would it be feasible to have one law enforcement representative at all four dockets, removing a police officer from the street for most of the work week? This would contradict the underlying rationale for this best practice, which presumes the possibility of a law enforcement drug court member running into participants on the street. Given this, a better alternative would be including four different drug court representatives from the Denver Police Department, one for each docket. This would mean that each representative is only taken away from regular duties for a short time each week while being given the opportunity to become more acquainted with the drug court and its participants. Other institutional issues emerge by requiring four law enforcement representatives to participate on the drug court team, but none that contravene the underlying principles set forth in the Carey 2012 Team's What Works.

Essex County has distinct institutional issues regarding the inclusion of law enforcement on the drug court team. Since most of the municipalities do not have any significant drug trade, including one representative from each of the twenty-two municipal police forces on the court is not only impractical but also a great waste of resources. Instead, we propose that law enforcement representatives from Newark, East Orange, and Irvington—places within whose borders the majority of the drug trade transpires—participate on the drug court team. Further study should be conducted to determine the necessity of a distinct representative from all three places. Finally, the Essex County Sheriff's Department has its own county-wide Bureau of Narcotics. Since that department also provides security at the courthouse, many of these officers are already familiar with various court personnel and would be comfortable in the courtroom setting. Therefore, the Bureau of

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<sup>98</sup> *Id.* at 27.

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Narcotics is likely the best point of departure to identify a court representative from law enforcement.

*B. Increasing Cost Effectiveness: Law Enforcement Attends Court Sessions*

Denver and Essex drug courts adhere to most of the Carey 2012 Team's findings regarding increasing cost savings, but both could increase compliance in one significant way.

1. Law Enforcement Attends Court Sessions (Status Review Hearings)

Having a member of law enforcement attend court sessions also corresponds to cost savings: "Drug Courts where a law enforcement representative attended court sessions had 64% greater cost savings than courts where law enforcement did not."<sup>99</sup> According to the Carey 2012 team, "A law enforcement team member provides a unique perspective on participants and can contribute information that is invaluable to the team and the participants."<sup>100</sup> However, neither Denver nor Essex includes law enforcement as part of the drug court team. As discussed above, law enforcement participating on the drug court team is a key factor in reducing recidivism (number nine on the top ten list of best practices for reducing recidivism) and is number ten on the top ten list of best practices for increasing cost savings. Therefore, it behooves both counties to bring in law enforcement as soon as is practicable, not only for reducing recidivism, but also for increasing cost savings.

V. BROADER PROPOSAL: USING THE CAREY 2012 TEAM'S RESEARCH TO RESTRUCTURE EXISTING DRUG COURTS IN A COST-EFFECTIVE AND TIME EFFICIENT MANNER

Prior to the development of the list of best practices, it could have taken years to design research and collect data in an attempt to make drug courts as efficient and effective as possible. Now, as of May 2012, we have a type of instruction manual. Our broader proposal is to use the Carey 2012 Team's top ten lists (and additional findings) to assess and refine existing drug courts, as well as to conduct cross-jurisdictional analyses regarding each best practice to identify the scope of barriers to achieving each one. Then, newly-forming drug courts, as well as drug courts seeking to re-establish or modify themselves, may consider far-reaching consequences of their own methods to implement a best

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<sup>99</sup> *Id.* at 31.

<sup>100</sup> *Id.*

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practice. By creating this new body of cross-jurisdictional literature on specific best practices in drug courts in which a best practice is not feasible, team members may look to alternative ways of achieving underlying goals or rationales of the specific best practice when attempting to find their own alternative practice.

The Carey 2012 Team's latest research allows entry into another ground-breaking opportunity: it allows for the possibility to compare one drug court with another on specific issues, looking to each court's history and institutional background and practices to ascertain the ways these factors impact implementing a best practice. With this Article, we have set forth one example of this type of analysis. For drug courts that are starting from scratch, the Carey 2012 Team's research provides a simple—and important—how-to, but for drug courts already in place, restructuring can be complicated politically, financially, legally, and personally. Therefore, the best practices are an essential guide to reorganizing any existing drug court, so long as the top ten lists are used as goals with consideration for other best practices, practices not significantly related to outcomes, and other promising practices in light of the drug court's unique history.