

# Judge-Involved Supervision Programs in the Federal System: Background and Research

Stephen E. Vance, Senior Attorney<sup>1</sup>  
Criminal Law Policy Division  
Administrative Office of the U.S. Courts

## I. Background

**IN RECENT YEARS** there has been a growing recognition among policy-makers, practitioners, and researchers of the importance of using the highest quality scientific evidence when developing, implementing, and evaluating criminal justice programs. Since 2006 the Committee on Criminal Law of the Judicial Conference of the United States has supported evidence-based practices as a means to evaluate and implement those supervision practices that best enable federal offenders to function as law-abiding members of society. Additionally, since 2007 the Committee has endorsed strategic resourcing; that is, use of the most cost-effective techniques to achieve the greatest reductions in recidivism.

In 2008, as part of its continuing exploration of evidence-based practices, the Committee began discussing programs in the federal system modeled on state problem-solving courts used by state and local governments since the 1980s.<sup>2</sup> At that time, post-conviction reentry court programs had been implemented by 21

federal districts and were under development in another 31 districts. As the Committee stated in its September 2009 report to the Judicial Conference, these initiatives “reveal an energetic commitment to the betterment of federal offenders and an enthusiasm that should be commended.”<sup>3</sup>

While it considered research demonstrating the effectiveness of some of these programs, particularly pre-conviction or pre-sentence drug courts, the Committee also noted several reasons for further study before endorsing programs modeled on these courts in the federal system. First, a 2006 Department of Justice (DOJ) report did not support federal drug courts.<sup>4</sup> Second, in many states drug courts operate prior to the imposition of sentence, pursuant to state laws that allow judges to reduce (or even waive) an offender’s sentence

<sup>3</sup> Summary of the Report of the Judicial Conference Committee on Criminal Law 5 (September 2009).

<sup>4</sup> See U.S. Department of Justice, Report to Congress on the Feasibility of Federal Drug Courts (June 2006). In this report, the DOJ encouraged the use of “drug courts” in the state criminal justice system, but it said that such programs were “inappropriate and unnecessary” and a poor use of resources in the federal system. The report used the term “drug courts” to refer to both the “front end” diversion programs that represent alternatives to incarceration, as well as the post-conviction/supervised release type of program that existed in many federal districts. U.S. Department of Justice, Reentry Toolkit for United States Attorneys’ Offices (August 2011). On January 19, 2011, the Deputy Attorney General issued a memorandum encouraging United States Attorneys’ Offices to participate in reentry courts. This memorandum formally reversed the DOJ’s previously stated policy that “drug courts” were generally inappropriate and unnecessary in the federal system. *Id.*

upon completion of the program. By comparison, no such authority exists in the federal system, and any diversion authority resides with the prosecutor.<sup>5</sup> Consequently, federal drug courts would necessarily operate after an individual had served his sentence and while on supervised release. Finally, the disparate ways in which these programs were implemented presented a substantial challenge for studying and identifying effective practices.<sup>6</sup>

Due to these and other factors, it was unclear to what extent the reductions in recidivism reported by some state programs could be replicated in the federal system. While the Committee endorsed evidence-based

<sup>5</sup> While diversion authority rests with the prosecutor, the court may sentence certain defendants convicted of simple possession of a controlled substance to a term of probation without entering a judgment of conviction. 18 U.S.C. § 3607.

<sup>6</sup> For example, the selection procedures of the court programs did not appear consistent. Some courts addressed only those offenders with drug issues, whereas others did not. Some court programs accepted only those offenders who chose to participate, while others required participation. Some focused on high-risk offenders, but others did not. Some programs involved informal monthly meetings with a judge, while others included regular status hearings in a courtroom before a district or magistrate judge, with the full panoply of relevant courtroom personnel. Judges in such proceedings function differently, with some performing in a traditional judicial manner, by sitting at the bench, in a robe, and receiving status reports. Other judges, however, performed in a more informal and interactive manner, forgoing a robe, sitting at a table with the offender, and taking on a role more like a supervising probation officer, such as offering advice and counsel to the offender on the conduct of his daily life.

<sup>1</sup> The author would like to thank John Fitzgerald and Carrie Kent for their comments and suggestions when developing this article.

<sup>2</sup> Problem-solving courts seek to reduce recidivism and improve outcomes for individuals, families, and communities by using methods that involve ongoing judicial leadership; a collaborative or team-based approach among criminal justice professionals including the prosecutor, defense attorney, probation officer, and treatment provider; the integration of treatment and/or social services with judicial case processing; close monitoring of and immediate response to behavior; multidisciplinary involvement; and collaboration with community-based and government organizations.

practices and using empirical data in making programmatic resource decisions, federal programs diverged from state programs. The Committee concluded, therefore, that the success of these programs in the federal system was as yet undetermined, and that the development of a national model program required significantly more research.<sup>7</sup> Further, the Committee recognized that programs of this kind are very resource intensive and, because these programs typically involve a relatively small number of offenders, some assessment of cost-effectiveness might be prudent.<sup>8</sup>

As the Committee explained in its September 2009 report to the Judicial Conference, “The proliferation of these programs around the country could have budgetary and other resource impact. Given the varied iterations of these programs, an assessment of their operational aspects and their effectiveness is necessary in order for the Committee . . . to fulfill its obligation of identifying those techniques that are most likely to produce positive results and those that are not successful.”<sup>9</sup> Therefore, “[a] study of these programs will hopefully reveal those approaches that work so that these techniques can be shared with other courts and so that current and future resource implications can be identified.”<sup>10</sup> Upon the Committee’s recommendation, the Judicial Conference endorsed the Committee’s commissioning of a study “to assess the efficacy and cost-effectiveness of reentry court programs,” and it asked the Committee “to consider the results of this study in recommending any appropriate model programs.”<sup>11</sup>

The Criminal Law Committee subsequently asked the Federal Judicial Center (FJC) to design and conduct a formal study of reentry court programs in the federal courts. Specifically, the Committee asked for a study that assesses the operational aspects, outcomes, and cost effectiveness of reentry court programs, including an evaluation of the effectiveness of these programs compared to that of other less costly offender supervision techniques.

In June 2016, the final report of the FJC’s

study was released. This paper provides a brief overview of relevant research regarding problem-solving courts to assist the courts and other stakeholders as they consider the study’s findings and implications. Section II describes the background and major research findings of drug courts and reentry courts in the states. Section III reviews the major features and findings of the FJC’s study of federal reentry courts and describes a series of studies of federal reentry courts in individual districts. Finally, section IV discusses the recent emergence of pretrial diversion court programs in the federal system.

## II. Drug Courts and Reentry Courts in the States

### A. Drug Courts in the States

First implemented in Florida during the late 1980s, drug courts have become widespread in local and state jurisdictions. They arose out of necessity due to overcrowded dockets and high recidivism rates.<sup>12</sup> Drug courts provide a judicially supervised regimen of drug abuse treatment and case management services to offenders who are typically nonviolent and who abuse drugs. Depending on the structure of the drug court, successful completion may be accompanied by dropping the charges (pre-plea/diversionary court) or expunging the offense from the record (post-plea court).

Studies of the effectiveness of drug courts in the states have concluded that they offer a promising strategy for reducing recidivism if implemented with key components and if certain implementation challenges are adequately addressed. The Bureau of Justice Statistics (BJA), National Association of Drug Court Professionals (NADCP), Government Accountability Office (GAO), and the National Academy of Sciences (NAS) recently reviewed

a large number of evaluations of drug court programs to assess their effectiveness.<sup>13</sup> The BJA concluded: “When these courts are implemented in an evidence-based manner, they have reduced recidivism and substance abuse among high-risk substance-abusing offenders and increased their likelihood of successful rehabilitation. . . . Drug court programs . . . are required to have certain key components.”<sup>14</sup> Similarly, the NADCP concluded: “Five independent meta-analyses—advanced statistical procedures conducted by rigorous scientific teams—have concluded that drug courts reduce crime and substance abuse.”<sup>15</sup> The NADCP also found, however, that “[r]esearch now confirms that how well drug courts accomplish their goals depends upon how faithfully they adhere to the Ten Key Components.”<sup>16</sup> The GAO determined that drug courts were generally associated with lower recidivism and relapse rates for program participants.<sup>17</sup> Finally, the NAS concluded that “[s]tudies suggest that recidivism rates are lower for drug court participants . . . although the recidivism statistics

<sup>13</sup> For readers interested in reviewing the individual evaluations, the names of the evaluations are listed in these reports.

<sup>14</sup> U.S. Department of Justice Bureau of Justice Assistance, *Evaluation & Research Literature: The State of Knowledge on BJA-Funded Programs 28* (March 2015) (<https://www.bja.gov/Publications/Eval-Research-BJA-Programs.pdf>). Page 20 of this evaluation includes a list and brief description of hundreds of studies regarding drug courts.

<sup>15</sup> National Association of Drug Court Professionals, *supra* note 11, at 1.

<sup>16</sup> *Id.* at 2. The “Ten Key Components” are: (1) the integration of treatment services with justice system case processing; (2) a non-adversarial approach to promote public safety while protecting participants’ due process rights; (3) early identification and placement of eligible participants; (4) access to a continuum of treatment and rehabilitation services; (5) frequent alcohol and other drug testing; (6) a coordinated strategy for responses to participants’ compliance; (7) ongoing judicial interaction with each participant; (8) monitoring and evaluation to measure the achievement of program goals and gauge effectiveness; (9) continuing interdisciplinary education; and (10) partnerships among drug courts, public agencies, and community-based organizations.

<sup>17</sup> U.S. Government Accountability Office, *Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revisions Efforts* (December 2011). The GAO’s analysis of evaluations reporting recidivism data for 32 programs showed that drug-court program participants were generally less likely to be rearrested than comparison group members, with differences in likelihood reported to be statistically significant for 18 of the programs.

<sup>7</sup> September 2009 Criminal Law Committee Report, *supra* note 2, at 7.

<sup>8</sup> Most programs had approximately 10-20 participants.

<sup>9</sup> September 2009 Criminal Law Committee Report, *supra* note 2, at 8.

<sup>10</sup> *Id.*

<sup>11</sup> JCUS-SEP 09, p. 13.

<sup>12</sup> National Association of Drug Court Professionals, National Drug Court Institute, *The Drug Court Judicial Benchbook 1* (February 2011) (“Drug courts sprung out of necessity, not fashion or vogue. Just over twenty years ago when drug courts were born, the court system was in crisis. Dockets were overwhelmed with drug-related cases that rarely seemed to be resolved. Judges would sentence drug offenders to probation or incarceration, only to quickly see them back again on a revocation or new charge. The oft-cited statistics spoke loudly then and continue to speak deafeningly today: two out of three prison inmates arrested for a new offense; fifty to seventy percent of inmates reincarcerated for a new offense or parole revocation; forty to fifty percent of probationers revoked; ninety-five percent of drug offenders continuing to abuse alcohol, other drugs, or both.”).

vary by the characteristics of the specific drug court and its target population.<sup>18</sup>

Despite research finding that drug courts are generally effective, particularly when implemented with certain components, variations in how they determine eligibility, provide substance abuse treatment, supervise participants, and enforce compliance complicate evaluations of their effectiveness.<sup>19</sup> As the CRS explained, “[O]ver the years, numerous program evaluations have been conducted, and the findings have been as varied as the drug courts themselves. Questions remain about the extent to which drug courts reduce substance abuse among participants and lower recidivism, criminal victimization, and costs related to criminal adjudication and incarceration.”<sup>20</sup> The CRS provided the following summary of challenges related to evaluating drug court effectiveness:

Drug court evaluations have been widely criticized for methodological weaknesses and data inconsistencies. Some criticisms stem from the fact that the majority of drug court program evaluations (1) have either no comparison group or a biased comparison group, such as offenders who refused or failed the drug court program; (2) report outcomes only for participants who complete the program (graduates), while excluding participants who did not complete the program (dropouts); and (3) use flawed data-collection methods, such as drug court participants’ self-reported surveys. The variations in the types of drug courts, disparities in the data collected, varied methods used to evaluate drug courts, and limited follow-up of participants are among the data limitations and knowledge gaps that complicate efforts to quantify the effectiveness of the intervention. Nonetheless, many researchers believe that drug courts represent one of the more promising strategies for intervening with drug-abusing offenders, and that these programs outperform virtually all other strategies that have been

attempted for drug offenders.<sup>21</sup>

Related to the issue of evaluation of drug court effectiveness are the implementation challenges that must be addressed for drug courts to be successful. One challenge is the “necessity of taking drug courts to scale.”<sup>22</sup> As the NADCP wrote, “[o]nly by treating sufficient numbers of offenders can drug courts take advantage of the economies of scale that will make their programs not only effective, but cost-effective. . . . Many drug courts have been able to successfully work with a small percentage of offenders with serious substance abuse problems. However, because of the limited number of participants, those programs have not had a substantial or meaningful impact on their community’s substance abuse problem.”<sup>23</sup> An additional challenge is that successful drug courts are often dependent upon the presence of individual “innovator judges.” The NADCP has explained that “dynamic judicial leadership at the inception of a drug court is desirable, even critical, to the program’s initial success. However, while a powerful judicial presence sustains most drug courts for an initial period, when that innovator judge moves on, the drug court may have great difficulty maintaining its focus, structure, and viability.”<sup>24</sup> A final challenge is to provide the continuing training to the drug court team, because “[r]esearch tells us that outcomes are as much as five times better for drug courts that provide training for all of their team members.”<sup>25</sup>

### B. Reentry Courts in the States

Due to the perceived success of drug courts, judges have become more receptive to new

problem-solving approaches to adjudication, and the drug court model has been extended to a variety of court programs, including domestic violence courts, mental health courts, DWI courts, veteran courts, and reentry courts.<sup>26</sup> The reentry court concept, first introduced in 1999 by Attorney General Janet Reno and Jeremy Travis, then-director of the National Institute of Justice, applies drug court principles to the back end of the system to facilitate offender reintegration. The NAS describes the background regarding their development:

As with drug courts, [Jeremy] Travis proposed that active judicial authority could be applied to a “reentry court” to provide graduated sanction and positive reinforcement and to marshal resources for offender support. Drug courts usually operate *prior* to a prison sentence (e.g., as a diversion program); reentry courts would operate *after* prison. . . . In his book, *But They All Come Back*, Travis (2005) noted several benefits to reentry courts, saying that they cut across organizational boundaries, making it more likely that offenders are held accountable and supported in their reentry attempts. Reentry courts can also involve family members, friends, and others in a reentry plan. He also noted that judges command the public’s confidence while, in contrast, the parole system is held in low public esteem. Moreover, judges carry out their business in open courtrooms, not closed offices, so the public, former prisoners, and family members and others can benefit from the open articulation of reasons for a government decision. Travis also believes that a judge is in a unique position, given the prestige of the office, to confer public and official validation on an offender’s reform efforts.<sup>27</sup>

With regard to research on the effectiveness of reentry courts in the states, the BJA reviewed the available research literature, and it concluded that there was not sufficient evidence to determine whether they are effective.<sup>28</sup> Similarly, the NADCP concluded that

<sup>18</sup> National Academy of Sciences, *Parole, Desistance from Crime, and Community Integration* 64 (2007).

<sup>19</sup> Congressional Research Service, *Drug Courts: Background, Effectiveness, and Policy Issues for Congress* 12 (2010).

<sup>20</sup> *Id.*

<sup>21</sup> Congressional Research Service, *supra* note 18, at 13. See also Fred Osher, Director of Health Systems and Service Policy, Council of State Governments Justice Center, *Do Problem Solving Courts Achieve Their Stated Goals: Research Findings and Open Questions* (on file with Administrative Office of U.S. Courts) (“While the current base of research for these programs is promising, additional, more rigorous research is needed to confirm these results and to determine what factors make problem-solving courts work, for whom, and under what circumstances. These future studies need to be stronger methodologically, with larger sample sizes across multiple sites, and with appropriate control groups.”).

<sup>22</sup> National Association of Drug Court Professionals, *supra* note 11, at 15.

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

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.* at xi.

<sup>26</sup> National Academy of Sciences, *supra* note 17, at 65.

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

<sup>28</sup> Bureau of Justice Assistance, *supra* note 13, at

drug courts “simply have far more research on them than other types of problem-solving courts. When a sufficient body of research has identified best practices for other problem-solving court programs, NADCP will release best practice standards for those programs as well.”<sup>29</sup> Finally, the NAS discussed the early state of the research and described the following unanswered questions:

At present, reentry courts are largely experimental, and neither their impact nor their costs and benefits have been rigorously evaluated. . . . Given the importance of the reentry problem and the success of handling other offender populations through the problem-solving court model, the costs and benefits of reentry courts is a subject that begs for more rigorous research. It is critical to understand the impact of reentry courts on reoffending in comparison with traditional services. . . . As is the case for other specialized courts, it is necessary to determine whether it is the charismatic leadership of a judge and the interaction with the client that leads to desistance and other positive outcomes or a strict adherence to a sanctioning protocol. Another possibility is simply that clients are getting more substance abuse treatment and other services than they would have otherwise had. If the last situation is the case, then couldn't those enhanced services be provided by traditional parole agents rather than sitting court judges? These are all important questions in need of more rigorous research.<sup>30</sup>

134. Page 104 of this evaluation includes a list and brief description of dozens of studies regarding reentry courts.

<sup>29</sup> National Association of Drug Court Professionals, *Adult Drug Court Best Practice Standards*, Volume I 2 (2013). See also Caitlin J. Taylor, *Tolerance of Minor Setbacks in a Challenging Reentry Experience: An Evaluation of a Federal Reentry Court*, 24 *Criminal Justice Policy Review* 49, 54 (2013) (“[R]eentry court programs have generally not yet been subject to definitive program standards to the same extent as drug courts.”).

<sup>30</sup> National Academy of Sciences, *supra* note 25, at 68. See also Taylor, *supra* note 28, at 53 (noting the “relative lack of research on reentry courts and the mixed results found in their existing research”).

### III. Studies of Federal Reentry Court Programs

#### A. Federal Judicial Center Studies<sup>31</sup>

In response to the Committee's request that it assess the operational aspects, outcomes, and cost effectiveness of reentry court programs, the FJC designed and conducted a comprehensive two-pronged study. One prong involved a process-descriptive assessment of existing programs.<sup>32</sup> It did not focus on reentry programs per se, but examined the broader range of judge-involved supervision programs. It was not an evaluation of these programs overall, but described the variety of programs, the populations served, the services provided, and how the participants have fared. The final report was presented to the Committee at its December 2012 meeting.

A second prong involved a multi-year randomized experimental study in five districts with new or relatively new reentry court programs.<sup>33</sup> The FJC chose a randomized experimental design to provide the Committee with the most definitive answer to the question of whether reentry court programs can reduce recidivism in a cost-effective manner.<sup>34</sup> The final report was presented to the Committee at its June 2016 meeting.

#### 1. FJC Process-Descriptive Study

This study analyzes the experiences of offenders across 20 judge-involved supervision programs in 19 federal districts. A description of some of its major features and findings is presented below:

- No two of the study programs were exactly alike because each was customized to accommodate the program's purpose, the

<sup>31</sup> Readers interested in more information about these and related FJC studies on judge-involved supervision programs are encouraged to review the full studies, which are available on the FJC's internal website at: <http://fjconline.fjc.dcn/content/309723/overview>.

<sup>32</sup> Federal Judicial Center, *Process-Descriptive Study of Judge-Involved Supervision Programs in the Federal System* (February 2013).

<sup>33</sup> Federal Judicial Center, *Evaluation of a Federal Reentry Program Model* (May 2016).

<sup>34</sup> As the FJC study explained, “Random assignment eliminates the selection process as a factor affecting program and supervision outcomes. For example, if there was a propensity on the part of reentry teams to select certain individuals for the reentry programs, perhaps because they were thought to be more amenable to the intervention or, conversely, had demonstrated a resistance to prior interventions, that is eliminated with random assignment.” *Id.* at 4.

district's local conditions, and agreements worked out among the partner agencies participating on the program teams.

- Although the term “reentry,” which has been defined as the process of leaving prison and returning to society, has been used widely in the judge-involved supervision context, most of the federal supervision programs that feature the active involvement of a judicial officer are modeled on drug court programs rather than limited to offenders returning from prison.
- At the time of the survey:
  - the majority of the programs—11—followed a general “drug court” model, available only to probationers and supervised releasees with a documented history of substance abuse;
  - two were reentry programs targeting higher risk offenders released from prison regardless of their substance abuse history;
  - two were limited to returning prisoners, but only if they had a history of substance abuse (“reentry drug” programs);
  - five targeted any higher risk probationer or supervised releasee who met the risk parameters set by the program, including risk level as measured by the Risk Prediction Index and substance abuse history (“risk management” programs).
- Overall, when compared with a group of similar offenders, offenders being served by judge-involved supervision programs were supervised more closely, were referred for services more often, had their supervision revoked for technical violations more frequently, and were arrested for criminal offenses slightly less often. This “look more, see more” finding is consistent with studies of other intensive supervision programs. These overall findings mask variations across programs, however. There were, for example, three programs for which closer supervision of participants was associated with lower rates of supervision revocation for technical violations, the result of a team commitment to early identification of problems, followed by swift, proactive, community-based responses. This finding suggests that reliance on supervision revocation as the usual response to “looking more” and “seeing more” is more an issue of program implementation and local

culture than of program design.

- Among the key data not available on a consistent basis were the number of drug tests, referrals for services that were not provided under government contract, and instances of and responses to noncompliance that did not result in revocation of the supervision term.
- The experiences of the program participants were compared to the experiences of a comparable group of offenders who did not participate in the programs (i.e., “the comparison group”). Program participants were more likely to have been referred to treatment services such as substance abuse and mental health treatment. According to the study, the “most striking difference was for substance abuse treatment: program participants were more likely to have been referred than the comparison group offenders (61.5% versus 38%).”
- The study compared the participants and the comparison group after 12 months and 18 months of the start of the supervision term. The study found very little difference between the groups in supervision status at 12 months; the revocation rate for both groups was 13 percent. Technical violations were the basis for the majority of revocations in both groups, but the percentage was slightly higher for the participant group. Although revocations for new major criminal conduct were rare during the first year, the comparison group’s revocations were double the number of those of the participant group, 2.8 percent vs. 1.4 percent. After 18 months, more of the participant group than the comparison group had terminated their terms of supervision. This was due to higher proportions of both early terminations (9 percent vs. 1 percent) and revocations (23 percent vs. 19 percent).
- The higher overall revocation rate for participants resulted from more revocations for technical violations (18 percent vs. 13 percent) that were not offset by the slightly higher rate of revocation for new criminal conduct among the comparison group (6 percent vs. 4 percent).
- The study presented the number and percentage of program participants and comparison group offenders who were arrested for new criminal conduct 12 and 18 months from the date they began supervision. Fewer of the program participants than the comparison group offenders—16 percent vs. 19 percent—were arrested for

new criminal conduct during the first 12 months of supervision, and more of the comparison group offenders were arrested for each of the substantive crime types except firearms offenses (for which three offenders in each group were rearrested). After 18 months, the gap between the groups had narrowed to 1.4 percentage points, and participants by then had outpaced the comparison group offenders in the number of arrests for drug crimes, firearms offenses, and public order offenses.

- According to the study, “the takeaway from both analyses [of revocation and arrest rates] is the same: Within 12 or 18 months of starting their sentences of community supervision, program participants were arrested and/or had their supervision revoked for new criminal conduct slightly less frequently—by 1.5 to 3 percentage points—than similarly situated offenders in the comparison group.”
- The study concluded: “The analyses comparing offenders who participated in judge-involved supervision programs with similarly situated offenders indicate that, in the aggregate, the programs generated more intensive supervision. Since the two groups of offenders are matched on many of the risk and need factors for which current federal supervision policy dictates the level and type of supervision, it may be that the value added by judge-involved supervision programs is the enhanced delivery of supervision interventions. This finding is not unexpected.”

## 2. FJC Randomized Experimental Study

The FJC conducted a multi-year randomized experimental study in five districts with new or relatively new reentry court programs. These districts were the Central District of California, the Middle District of Florida, the Southern District of Iowa, the Southern District of New York, and the Eastern District of Wisconsin. Below is a description of some of the major features and findings of the study.

- The study began in September 2011 and followed randomly selected offenders throughout their terms of supervision, and beyond, to compare their experiences and outcomes.
- The FJC designed an experimental study with random assignment to treatment (reentry program) and control groups (standard post-conviction supervision) that tested a reentry court program model

developed by the AO.<sup>35</sup> The findings of the study are limited to the implementation of the reentry court model in the study districts. This model “is comprehensive, outlining the duties of each member of the reentry team, the length and phases of the program for participants, and the responsibilities of participants. The policy draws upon evidence-based practices and principles and best practices outlined by the National Association of Drug Court Professionals.”

- As the study explained, the AO prepared the model at the request of the FJC for two reasons. First, existing reentry programs have “taken a variety of forms. Many of these programs shared common features, . . . but there was not enough common ground upon which to conduct a formal study. These programmatic differences could create competing explanations for any study results and make interpretation of any positive or negative effects difficult if not impossible.” Second, when the Committee requested the study, it expressed the need for a national model for federal reentry programs. This study “would test a model policy whose elements could provide the framework for an eventual national policy.”
- The study design called for two treatment groups and a control group. Group A would be a reentry program administered by a reentry team, led by a district or magistrate judge, and composed of a U.S. probation officer, a federal defender, an assistant U.S. attorney, and a service provider such as a drug treatment or mental health counselor. Group B’s reentry program would have a reentry team identical to Group A except without the judge, led by a U.S. probation officer. Finally, Group C would be standard post-conviction supervision.
- This configuration of groups would enable several comparisons. The comparison of Groups A and B to Group C would give an estimate of the impact of the reentry team approach on recidivism relative to standard supervision. The comparison of Group A to Group B would give an estimate of the impact of having a district or magistrate judge on the reentry team. As the study explained, “[b]y examining the impact of

<sup>35</sup> See Probation and Pretrial Services Office, Administrative Office of the U.S. Courts, *Experimental Reentry Court Model* (Mar. 2010) (<http://fjconline.fjc.dcn/content/oppo-model-policy-experimental-reentry-programs>).

judge participation, in isolation, we may be able to estimate whether or to what degree judge participation is critical to the success of the reentry program in reducing recidivism. From the beginning, this study was intended to be a true experiment with random assignment to treatment (reentry program) and control (standard supervision) groups.”

- According to the study, “[t]he difficulties of implementing such a design in a real setting, such as a federal court, often center around the selection process. Program officials may change the random assignment with good (wanting to help deserving candidates) or bad (wanting the program to appear successful) intentions. There may be changes to the program or intervention midway through the study, perhaps in an effort to implement ‘lessons learned.’ Finally, there may be a failure to follow the research protocols and deliver the treatment as designed. In short, fidelity to the experimental design is more difficult to maintain in the real world.”
- According to the study, “[t]he participating districts had difficulty fully implementing the program model. . . . Among the issues observed with the study sites’ efforts to maintain [adherence to the model] were the ability of probation officers to provide the level of supervision called for in the model program policy, changes in the length of the program phases, changes in the requirements for advancement from one phase to another, and the level of involvement of team members such as representatives from the federal defenders and the U.S. attorney’s office.”
- The model program called for voluntary participation in the reentry program. Among those study individuals assigned randomly to a reentry program, the refusal rate for participation in the assigned program was approximately 60 percent.
- Among participants in the reentry programs, completion or graduation rates averaged between 50 and 60 percent. Almost half of all participants left the program or were terminated for failure to adhere to program rules.
- A comparison of supervision revocation rates after 24 months post-release from prison showed no statistically significant difference between reentry program participants and those individuals assigned to standard supervision.
- A comparison of recidivism rates after 30

months post-release from prison showed no statistically significant difference between reentry program participants and those individuals assigned to standard supervision.<sup>36</sup>

- The cost of operating the reentry programs for this study varied from district to district. These cost estimates reflect the time judges, probation officers, federal defenders, and other reentry program team members devoted to experimental program operations, expressed in monetary terms, over the period in which the program participated in this study.
- Probation officers spent far more time on program operations than any other team members. This difference persists when probation-specific activities, such as drug testing, field contacts, and other supervision activities, are factored out of the time estimates.
- According to the study, “[t]he task of estimating the cost-effectiveness of the . . . model reentry program is made simple by the fact that, compared to [its] control group, we found no reductions in revocations nor in felony arrests for those offenders who participated in a reentry program. Participants who were in a judge-led reentry program fared no better than those in a probation-led reentry program, and neither group did better than participants who received standard probation supervision. Given the program costs outlined in [its] cost reports . . . , we conclude that the . . . reentry program model was not cost effective as a means of reducing revocations and rearrests among newly released offenders. The . . . model was comprehensive, covering virtually all aspects of a reentry program operation, but it was never fully implemented in the districts participating in this study.”
- With regard to the question of whether full implementation of the model would have produced better outcomes, the FJC study stated: “Although speculative, that result is doubtful, at least with respect to revocations. Among the challenges the reentry programs faced was meeting the supervision goals set forth by the program model. A full implementation would mean supervision of participants at even greater levels

than the districts were able to achieve. This in turn could result in more violations of program rules and fewer graduations, or at least longer times to graduation. It could also result in more revocations as more violations of supervised release conditions were uncovered. Many of the other implementation issues were more peripheral to the central concept of a judge-led reentry team working collaboratively as team members guide participants through different phases of the participants’ reintegration into society. That the control group and those who refused to participate fared about as well as the reentry groups on [its] measures of revocation and recidivism could indicate that the efforts of federal probation are a baseline upon which it is difficult to improve.”

- The study concluded that, given the findings of no impact on revocation and recidivism rates, and in light of the cost studies, the model policy “cannot be said to be a cost-effective method for reducing revocation and recidivism.” Furthermore, “[r]evocation and recidivism are not the only measures of program effectiveness—employment, sobriety, and quality of life are other possible indicators of a program’s effectiveness at reintegrating former prisoners into society. However, for [its] purposes, revocation and recidivism can be readily measured, compared across supervision populations within and between districts, and have financial consequences for the operation of the federal criminal justice system.”

### *B. Studies of Federal Reentry Court Programs in Individual Districts*

In 2005, the District of Oregon established a reentry court program, and it subsequently initiated an evaluation of its effectiveness.<sup>37</sup> The study included 114 people. There were 28 people in a “Comparison group” (comprising individuals under traditional supervision), 25 people in the “Current Reentry Court Participants group,” 31 people in the “Reentry Court Graduates group,” and 30 people in the “Reentry Court Terminators group.” According to the study, “significant differences were found among the Comparison, Current Reentry Court Participants, Reentry Court

<sup>36</sup> Recidivism was defined as a felony-level arrest. Arrests for infractions (e.g., minor traffic violations), misdemeanor violations, and technical violations of supervised release conditions were not included.

<sup>37</sup> Close, D., Aubin, M., Alltucker, K., *The District of Oregon Reentry Court: Evaluation, Policy Recommendations, and Replication Strategies* (2009) (<http://www.orp.uscourts.gov/documents/ReentryCourtDoc.pdf>).

Graduates and Reentry Court Terminators on three outcome variables: total sanctions, number of urinalyses, and the number of support services used.<sup>38</sup> The study concluded that “it appears that the comparison group outperformed the treatment groups on multiple, important dimensions. For example, the comparison group underwent less monitoring and supervision and had fewer drug and mental health services and yet had more employment and fewer sanctions.”<sup>39</sup> The study warned that it “has several limitations that restrict interpretation and generalizability of findings,” including the relatively small sample size.<sup>40</sup>

In 2005, the Western District of Michigan established a reentry court named the Accelerated Community Entry Program

<sup>38</sup> The Comparison group had the lowest average total sanctions compared with other groups. The Comparison group had the fewest number of urinalyses, while the Graduated group had the highest number of urinalyses. Finally, the Comparison group participated in support services at the lowest level compared with the other three groups. Support services included agencies that address housing, workforce development, substance abuse treatment, mental health services, children and family supports, educational opportunities, and health care.

<sup>39</sup> *Id.* at 94.

<sup>40</sup> *Id.* See also Taylor *supra* note 28, at 53 (“There were several notable limitations of the Oregon court study. In addition to using a fairly small sample size . . . [the comparison] groups were not comparable on several key predictors of success on supervision.”); Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based Model*, 22 Federal Sentencing Reporter 39, 41 (2009) (“Due in part to a limited sample size, there were no statistically significant differences between reentry court completers and a comparison group that underwent conventional supervision. The quantitative study did, however, demonstrate that those currently participating in reentry court, those who graduated from it, and those in the comparison group under conventional supervision were more likely to be employed than those who were terminated from reentry court. Those results comport with the more general and uncontroversial point that sustained employment contributes to success upon reentry. The practices in use at the District of Oregon reentry court are evidence-based and guided by the conclusions of experimental and quasi-experimental studies of effective interventions in reentry, treatment, and problem-solving courts. As the data set grows, further research will assist in identifying effective interventions or variables linked to successful completion or termination. Longitudinal study is required to compare recidivism rates for reentry court participants and those under conventional supervision. Because reentry courts in general are relatively new, few such studies are available, but early findings suggest that the model can be effective at reducing recidivism.”).

(ACE).<sup>41</sup> The district initiated an evaluation of the program, which was completed in 2010. The purpose was to “provide some initial outcome results” related to the program participants. The sample size for the preliminary analysis consisted of 36 ACE participants. The researchers used a comparison group of 121 offenders that did not participate in the ACE program. The study concluded that program participants had lower recidivism rates than the offenders that did not participate in the program. It also warned that the sample sizes were “rather small and this serves as a limitation for the statistical analysis as well as the reliability and generalizability of the results.”

In 2006, the District of Massachusetts established the Court Assisted Recovery Effort (C.A.R.E.), a program where offenders who have a significant drug abuse history and are serving terms of supervised release or probation voluntarily enroll in the program. The District of Massachusetts initiated an evaluation of the program, which was completed in 2009.<sup>42</sup> In total, 46 offenders participated in C.A.R.E. between May 2006 and May 2009. Sixty-eight comparison group members were selected for inclusion in the study during this period.

The study found that program participants were “at least marginally more successful at avoiding new charges, securing employment and remaining drug-free than a comparable group of offenders under traditional supervision.” It warned, however, that the study has “important limitations,” including small sample size. Because the number of participants in the treatment and control groups was small, the study findings were “not particularly strong,” and “a few cases in one direction or another might change outcomes of our analysis, for example rendering a statistically

<sup>41</sup> For a description and evaluation of this program, see Lowenkamp, C., and Bechtel, K., *An Evaluation of the Accelerated Community Entry Court Program* (2010) (on file with the Administrative Office of the U.S. Courts). For a summary of this evaluation, see Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75 Federal Probation 64 (2011) (<http://www.uscourts.gov/statistics-reports/publications/federal-probation-journal/federal-probation-journal-september-2011>).

<sup>42</sup> For a description and evaluation of this program, see Farrell, A., and Wunderlich, K., *Evaluation of the Court Assisted Recovery Effort (C.A.R.E.) Program—United States District Court for the District of Massachusetts* (2009) (on file with the Administrative Office of the U.S. Courts). For a summary of this evaluation, see Stephen E. Vance, *supra* note 40.

significant result to be non-significant.”

In 2007, the Eastern District of Pennsylvania established the Supervision to Aid Reentry (STAR) program, a reentry court for residents of Philadelphia. In 2014, an outcome evaluation of the STAR program was completed on the first 164 reentry court participants.<sup>43</sup> The evaluation assessed the success of the program “by comparing the first 164 Reentry Court participants to a group of similarly situated individuals under supervised release. Comparisons between the two groups [were] analyzed in services offered or received, sanctions imposed, employment status, supervision revocation and new arrests in the 18 months following prison release.”

According to the study, STAR program participants were “significantly more likely to receive employment, housing, education, healthcare, mentoring and legal services.” They were “also more likely to participate in community service activities and receive intermediate sanctions of curfew restrictions and confinement.” Moreover, “[a]lthough no significant differences were found for new arrests, Reentry Court participants were statistically less likely to have their supervision revoked and much more likely to be employed at the end of the eighteen month study period.” Finally, “Reentry Court graduates were found to be particularly successful and were less likely than non-graduates and comparison group individuals to have a new arrest.”<sup>44</sup>

The evaluation then used multivariate regression analysis to isolate the unique effect of STAR participation on recidivism and supervision revocation.<sup>45</sup> It concluded that

<sup>43</sup> Caitlin J. Taylor, *Program Evaluation of the Federal Reentry Court in the Eastern District of Pennsylvania: Report on Program Effectiveness for the First 164 Reentry Court Participants* (November 2014) ([http://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1000&context=soc\\_crj\\_faculty](http://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1000&context=soc_crj_faculty)). In 2013, an outcome evaluation of the first 60 program participants was published. See Taylor, *supra* note 28.

<sup>44</sup> The study did not analyze whether there were other explanatory variables besides reentry court graduation that differentiate graduates from non-graduates and from members of the comparison group and that may account for the difference in arrest rates.

<sup>45</sup> As the study explains, “multivariate analyses can measure the relationship between Reentry Court participation and an outcome of interest while holding constant other variables that may also be associated with that outcome. In other words, multivariate analyses can isolate the unique effect of Reentry Court participation on recidivism or supervision revocation.” Specifically, the evaluation

“the multivariate analyses reveal that Reentry Court participation does not have a unique effect on the likelihood of a new arrest or a new violent arrest.” Additionally, “participation is significantly related to the likelihood of supervision revocation. Even after controlling for other factors related to the likelihood of supervision revocation, participation in the Reentry Court program was still associated with a decrease in the odds of supervision revocation.” Finally, the evaluation warned that a limitation of the study is that “the relatively small pool of eligible comparison group members” prevented the creation of a comparison group that matched the group of STAR participants on certain variables that may be related to recidivism and other relevant outcomes.<sup>46</sup>

In 2010, the Northern District of Florida established the Robert A. Dennis Reentry Court. That district is in the midst of a randomized experimental study of the program and is awaiting final permission from the FBI to access rearrest records of program

controlled for age; risk score as measured by the Risk Prediction Index; length of original incarceration; whether they received employment assistance, substance abuse treatment, education, legal services; whether they engaged in community service; and whether they received confinement as an intermediate sanction.

<sup>46</sup> As the evaluation explained, “the comparison group closely matches the Reentry Court group in terms of age and RPI. Although it would have been ideal to select comparison group members that also matched Reentry Court participants in terms of the type of offense for which they were originally sentenced and the length of incarceration sentence they most recently served, the relatively small pool of eligible comparison group members prevented such matching.” See also Taylor, *supra* note 28, at 64 (“Several limitations of this study should be noted. . . . The construction of an appropriate comparison group was limited by the relatively small number of individuals returning to Philadelphia on supervised release. . . . [T]he comparison group included more white collar and drug offenders and the STAR group included more violent offenders. Additionally, one-third of the comparison group were individuals who had been offered participation in the STAR program, but declined to participate. Although one third is a small portion of the comparison group, it is possible that individuals who agreed to participate in the STAR program were more motivated to change. Thus, differences in individuals’ readiness to change may have accounted for some of the findings. While it would have been ideal to match STAR participants and comparison group individuals on additional characteristics, such as offense type and readiness to change, the small pool of eligible comparison group individuals prohibited the inclusion of such criteria. Priority was given to matching the groups on age, gender, date of release, and risk prediction index score.”).

participants.<sup>47</sup> In 2011, the Northern District of California started a reentry court for high-risk offenders with a documented history of substance abuse. According to a description of preliminary analyses of the program, “participants performed better on three of four outcomes compared to control groups (fewer violation reports, arrests, and revocations in the post intervention period).”<sup>48</sup> That description also warned that “[i]t is important to note that the sample sizes are small, and long-term persistency has not been evaluated yet. The resources required to run these programs is not insubstantial. Moreover, given the upfront nature of these costs, they are not always easily empirically linked to the future savings from reduced recidivism.”<sup>49</sup>

#### IV. Emergence of Federal Pretrial Diversion Court Programs

In the federal system, pretrial diversion programs modeled on state drug courts are in their infancy, but the number of such programs has increased rapidly in recent years. According to a survey conducted by the Administrative Office, there are approximately 25 initiatives in the federal courts that provide alternatives to incarceration or

reduced sentences for certain defendants.<sup>50</sup>

While there has been a significant amount of promising research about the effectiveness of front-end drug courts in the states, there is not a significant amount of research about their effectiveness in the federal system. Pretrial diversion court programs would arguably cost the same as reentry court programs, but the potential cost savings (in the form of avoidance of incarceration in the Bureau of Prisons) is significantly greater than the savings in reentry programs (i.e., a reduction in the term of supervised release).<sup>51</sup>

The Judicial Conference has not specifically considered pretrial diversion court programs. It has, however, supported alternatives to criminal prosecution for several decades.<sup>52</sup> Pretrial diversion in the federal system is an alternative to prosecution that diverts certain persons from traditional criminal justice processing into a program of supervision and services administered by the probation and pretrial services system. Under Judicial Conference policy, the program’s focus is on (1) diverting the person from traditional prosecution, (2) providing community supervision that allows for the divertee’s needs to be identified and addressed, and (3) if applicable, for the divertee to make reparation. A review of data on court filings reveals that pretrial diversion is an underutilized program in the federal criminal justice system. In fiscal year 2015, only 737 of 94,276 activated cases (less than one percent) were pretrial diversions.

The DOJ has expressed support for greater

<sup>47</sup> See M. Casey Rodgers, *Evidence-Based Supervision in the Northern District of Florida: Risk Assessment, Behavior Modification, and Prosocial Support—Promising Ingredients for Lowering Recidivism of Federal Offenders*, 28 Federal Sentencing Reporter 239, 243 (April 2016) (“We also have committed to a long-term research study of our program by the University of West Florida . . . to include the random assignment of participants. The decision to undergo a long-term study was based on our firm belief that reentry programs of any nature should be evidence based, supported by the latest corrections and community supervision research, and evaluated based on outcomes. It is our hope this study will provide sound evidence of the effectiveness of reentry efforts in general and, more specifically, reentry courts. By participating in a research study, we have gained invaluable insight from the researchers’ observations of our program. Their input has helped to improve the quality and effectiveness of our Reentry Court through specifically designed phases and benchmarks and by frequently reminding us of the importance of fidelity to program design, assessment, and evaluation. The researchers’ ongoing involvement ensures that our Reentry Court program and services adhere to the principles of evidence-based intervention. In the end, the results of our research study will provide the much-needed data to tell us whether our efforts are paying off.”).

<sup>48</sup> Laurel Beeler, *Federal Reentry Courts and Other New Models*, 60 Federal Lawyer 55, 58 (2013).

<sup>49</sup> *Id.*

<sup>50</sup> See also United States District Court, Eastern District of New York, *Alternatives to Incarceration in the Eastern District of New York*, Second Report to the Board of Judges (August 2015) (cataloguing some of the existing diversion programs and describing the different methods of diversion from traditional criminal justice processing including by: (1) dismissal of charges, (2) reduction in charge to a lesser offense, (3) the vacatur of convictions, (4) avoiding prison through probationary sentences (agreed upon under Federal Rule of Criminal Procedure 11(c)(1)(C)), and (5) receiving a reduced sentence (e.g., a downward departure (or a variance) from the applicable Guidelines range based on post-conviction rehabilitation)).

<sup>51</sup> See *id.* (cataloguing presentence diversion court programs in the federal system and listing the estimated cost savings for each program in the form of avoidance of incarceration).

<sup>52</sup> In March 1980, the Judicial Conference agreed to support a bill to establish alternatives to criminal prosecution for certain persons and procedures for judicial involvement in pretrial diversion proceedings designed to standardize practices and to require equal treatment of similarly situated persons. JCUS-MAR 80, p. 43.

use of pretrial diversion court programs. Among the components of the DOJ's "Smart on Crime" initiative is the expanded use of alternatives to incarceration prior to sentencing. In particular, the DOJ has encouraged federal prosecutors to consider interventions "such as drug courts, specialty courts, or other diversion programs" to reduce unnecessary incarceration.<sup>53</sup> In a recent report, the DOJ's Inspector General found that the use of pretrial diversion "varied significantly among the different districts."<sup>54</sup> Moreover, the IG found that "there is substantial potential for pretrial diversion and diversion-based court programs to reduce both prosecution and incarceration costs."<sup>55</sup> Finally, the IG report urged the DOJ to evaluate the potential for pretrial diversion and diversion-based court programs to reduce recidivism.<sup>56</sup>

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<sup>53</sup> U.S. Department of Justice, Office of Inspector General, *Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration* 45 (July 2016).

<sup>54</sup> *Id.* at 9.

<sup>55</sup> *Id.*

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