

Preliminary Observations from an Evaluation of the Broward County Mental Health Court

John Petrilu, Norman G. Poythress, Annette McGaha, and Roger A. Boothroyd

According to a report issued by the United States Department of Justice in 1999, there are approximately two million people with mental illness, substance abuse disorders, or both under the control of federal, state, and local correctional systems at any one time.¹ Of the ten million adults booked into United States jails in a given year, it is estimated that approximately 700,000 have serious mental disorders, while 75% of those people also have a substance abuse disorder.²

Mental illness is not, nor should it be, exculpating in every instance. Many individuals with the most serious mental illnesses, however, are often arrested for minor offenses, such as disorderly conduct or trespassing. There is a growing sense that many of these individuals would benefit much more from treatment than from disposition by the criminal justice system.³ In fact, some have suggested that the criminal justice system has replaced the mental health system, by default, as the primary provider of mental health treatment for impoverished individuals with mental illness, though the treatment provided in jails and prisons is often grossly inadequate.⁴ People with mental illness stay longer in jails than people charged with similar offenses, and their confinement may exacerbate their illness.⁵ Providing care for people with mental illness and significant substance abuse problems also may create management issues for jail officials, while increasing costs to the localities that operate most jails in the United States.

There have been a number of efforts to address these issues. Two types of responses worth noting here are those initiatives designed to divert people from the criminal justice system *prior* to booking and those initiatives, especially specialty or single-jurisdiction courts, designed to divert people from the criminal justice system into treatment *after* arrest.

Efforts to divert people into treatment prior to arrest concentrate, not unexpectedly, on the police, because police officers are the primary gatekeepers between the criminal justice and other human services systems. A recent analysis⁶ of such efforts found that there were three major categories of pre-arrest diversion programs: (1) programs in which officers are specially trained to identify and respond to mental health issues in the community; (2) programs in which the police department uses mental health professionals to provide consultations to police in the field; and (3) programs that utilize partnerships between police and mobile mental health teams to address mental health crises.⁷ The common goal of these programs is to identify and provide access to treatment for individuals experiencing a serious mental illness or substance abuse problem that may have caused the behavior that brought the individual to police attention.

Post-arrest initiatives have often resulted in the development of specialty courts. The most common has been the drug treatment court, developed in response to the overwhelming number of defendants entering the criminal justice system

Footnotes

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1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH & TREATMENT OF INMATES AND PROBATIONERS(1999).
 2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1997. A recent review of studies on the prevalence of mental illness in jails suggests that between 6% and 15% of jail inmates have a severe mental illness. Richard H. Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCH. SERV. 483 (1998).
 3. Randy Borum, Jeffrey Swanson, Marvin Swartz & Virginia Hiday, *Substance Abuse, Violent Behavior and Police Encounters Among Persons with Severe Mental Disorder*, 13 J. CONTEMP. CRIM. J. 236 (1997).
 4. Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1, A18; E. Fuller Torrey, *Jails and Prisons—America's New Mental Hospitals*, 85 AMER. J. PUB. HEALTH 1611 (1995). A good discussion of legal issues involved in the

care of incarcerated individuals with mental disorder can be found in FRED COHEN, *THE MENTALLY DISORDERED INMATE & THE LAW* (Civic Research Institute 1998).

5. Risdon N. Slate, *Courts for Mentally Ill Offenders: Necessity or Abdication of Responsibility*, in COURTS & JUSTICE: A READER 435-36 (G. Larry Mays & Peter R. Gregware, eds., 2d ed. 2000).
6. RANDY BORUM, *JAIL DIVERSION STRATEGIES FOR MISDEMEANOR OFFENDERS WITH MENTAL ILLNESS: PRELIMINARY REPT.* (Dep't. of Mental Health Law & Policy, Louis de la Parte Florida Mental Health Institute, University of South Florida 1999).
7. A summary of specific local initiatives designed to address the needs of people with co-occurring disorders in the criminal justice system can be found in *THE COURAGE TO CHANGE: A GUIDE FOR COMMUNITIES TO CREATE INTEGRATED SERVICES FOR PEOPLE WITH CO-OCCURRING DISORDERS IN THE JUSTICE SYSTEM* (Nat'l. Gains Ctr., Albany, New York (1999)).

because of drug-related offenses.⁸ The Department of Justice defines a drug treatment court as a “court with the responsibility of handling cases involving . . . less serious drug-using offenders through an intensive supervision and treatment program. Drug court programs bring the full weight of all interveners (e.g., the judge, probation officers, correctional and law enforcement personnel, prosecutors, defense counsel, treatment specialists and other social service personnel) to bear, forcing the offender to deal with his or her substance abuse problem or suffer consequences.”⁹

There was one drug court in 1989; by 1997, there were approximately 325 drug court programs planned or in operation.¹⁰ In general, drug courts are perceived as successful in reducing recidivism, through court monitoring and by causing defendants to obtain treatment.¹¹ By definition, however, drug courts concentrate on individuals charged with drug-related offenses and may be ill-equipped to address mental illness issues.¹²

In an effort to address the needs of at least some individuals who enter the criminal justice system with serious mental ill-

nesses, about a dozen jurisdictions in the last three years have created mental health courts,¹³ and Congress has enacted legislation to create up to 125 mental health courts around the country.¹⁴ This article describes Florida’s Broward County Mental Health Court, the first mental Health Court in the United States, and reports on preliminary findings of an evaluation of that court being conducted by the authors.

Post-arrest initiatives have often resulted in the development of specialty courts.

I. THE BROWARD COUNTY MENTAL HEALTH COURT

Broward County, Florida, has a population of approximately 1.5 million people. It had 112,508 reported crimes in 1997, a rate of 79 crimes per 1,000 residents.¹⁵ In 1996, the Broward County jail had housed 3,882 individuals with a mental illness

8. The Department of Justice estimated that one-third of the offenses committed by adult offenders in 1996 had alcohol use or abuse as a factor, and that in 1997 more than 570,000 of state and federal inmates, or 51% of all prisoners, indicated that they used alcohol or drugs at the time of their offense. Dess A. Grangetto, *Reducing Recidivism by Substance Abusers Who Commit Drug and Alcohol Related Crimes*, 10 J. CONTEMP. LEGAL ISSUES 383, 390 (1999). In the federal courts, increased criminal caseloads, in large measure because of drug-related charges, caused Chief Justice William H. Rehnquist to observe that the federal courts were becoming national narcotics courts. See *Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 302 (1996). See also Jeffrey W. Stempel, *Two Cheers For Specialization*, 61 BROOKLYN L. REV. 67, 80 (1995) (“[I]n America’s urban areas, federal trial courts are perilously close to becoming specialized criminal courts. Indeed, they may be on their way to becoming specialized drug courts.”). The impact of drug-related offenses on state courts has also been overwhelming in many jurisdictions. James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23N.E. J. CRIM. & CIV. CON. 63, 80 (1997).
9. NAT’L ASS’N OF DRUG CT. PROF. & OFFICE OF COMMUNITY-ORIENTED POLICING SERVICES, U.S. DEP’T. OF JUSTICE, COMMUNITY POLICING AND DRUG COURTS/COMMUNITY COURTS: WORKING TOGETHER WITHIN A UNIFIED COURT SYSTEM App. vii (1998).
10. DRUG CT. CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJ., U.S. DEP’T. OF JUSTICE, DRUG COURT ACTIVITY: SUMMARY INFORMATION 1 (May 1997).
11. Lynne M. Brennan, *Comment: Drug Courts: A New Beginning for Non-Violent Drug Addicted Offenders—An End to Cruel and Unusual Punishment*, 22 HAMLINE L. REV. 355, 380-81 (1998).
12. The difficulties that courts may have in addressing both substance abuse and mental illness issues may reflect not only the mission of a drug court (i.e., to concentrate on substance abuse issues) but also difficulties in the manner in which treatment is organized. There have been historic difficulties in integrating the treatment of mental illness and substance abuse, in part because providers of care have usually focused on one, but not both, issues. Increasingly, treatment providers are attempting to create approaches to treatment that acknowledge that many individuals

with serious mental illnesses often have substance abuse disorders as well. See, e.g., Robert E. Drake, Carolyn Mercer-McFadden, Kim T. Mueser, et al., *Review of Integrated Mental Health and Substance Abuse Treatment for Patients with Dual Disorders*, 24 SCHIZOPHRENIA BULL. 589 (1998); NAT’L. ADV. COUNCIL, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., U.S. DEP’T. OF HEALTH & HUMAN SERV., ACTION FOR MENTAL HEALTH & SUBSTANCE-RELATED DISORDERS: IMPROVING SERVICES FOR INDIVIDUALS AT RISK OF, OR WITH, CO-OCCURRING SUBSTANCE-RELATED & MENTAL HEALTH DISORDERS: A SAMHSA CONFERENCE REPORT & A NATIONAL STRATEGY (1997).

13. Brandy Tomhave, Legislative Assistant to Representative Ted Strickland, at a panel titled, “Mental Health Courts: A Jurisprudent Therapy Perspective,” comments at the American Bar Association Annual Meeting, New York, New York, July 8, 2000. There has been growing press coverage of mental health courts in the last two years. See, e.g., Stefanie Thomson, *Mentally Ill Helped in Special New Court*, COLUMBIAN (Vancouver, Wash.), May 6, 2000, at A1; Sheila Toomey, *Innovative Justice; Anchorage Judges Find New Ways to Slow Revolving Door of Defendants*, ANCHORAGE DAILY NEWS, Feb. 27, 2000, at A1; Kate Nash, *City Council Split Over Big-I Reconstruction Money*, ALBUQUERQUE TRIB., Jan. 18, 2000, at A4 (reporting that the Albuquerque City Council was advocating for the creation of a mental health court); Elaine Jarvik Deseret, *Touchy Topic: Mental Health Violence*, DESERET NEWS (Salt Lake City), Jan. 16, 2000, at A01; Editorial, *Real Help for Inmates*, DENVER POST, Nov. 14, 1999, at G4.
14. Officially called America’s Law Enforcement and Mental Health Project, Pub. L. No. 106-515 (codified at 42 U.S.C. §§ 3796ii et seq.), the bill was sponsored by Senators DeWine and Domenici and was signed into law on November 13, 2000. In the statute, Congress found that a large number of inmates in state prisons and local jails suffered from mental illness; Congress also found that Broward County, Florida, had “created separate Mental Health Courts . . . to place nonviolent mentally ill offenders into judicially monitored inpatient and outpatient mental health treatment programs, where appropriate, with positive results.” Pub. L. No. 106-515, § 2.
15. FLA. DEP’T. OF LAW ENFORCEMENT, CRIME IN FLA., 1997 ANN. RPT.

Editorial support for the court, and for the appointment of a judge knowledgeable about mental health issues, was immediate.

at a cost of \$14.2 million; on average, these individuals were jailed for 23 days.¹⁶ Police estimated that they were arresting six people with mental illness per day, with the average arrest costing about six hours of an officer's time.¹⁷ The jail was under scrutiny because of overcrowding and perceived problems in care.

County officials already had in place a task force

examining issues at the interface of the criminal justice and mental health systems. This task force, chaired by Circuit Judge Mark Speiser, comprised various county stakeholders, including the courts, the state's attorney office, the public defender, the county sheriff, and various health and mental health officials. The task force had focused much of its attention on mental health issues within the jail, and the idea for a "mental health court" grew from members of this task force.¹⁸ Broward County had in the early 1990s established one of the nation's earliest drug courts, so county officials were familiar with the development and use of special jurisdiction courts.¹⁹

The Broward County Mental Health Court was established on June 6, 1997 by administrative order of Judge Dale Ross, chief judge of Florida's Seventeenth Judicial Circuit, which consists of Broward County. Judge Ross's order²⁰ said that it was "essential that a new strategy be implemented to isolate and focus upon individuals arrested for misdemeanor offenses who are mentally ill or mentally retarded in view of the unique nature of mental illness and mental retardation, and the need for appropriate treatment in an environment conducive to wellness and not punishment, as well as the continuing neces-

sity to insure the protection of the public."²¹ The order also found that there was "a recognized need to treat defendants qualified to participate in the Court before a specialized trained Judge who possesses a unique understanding and ability to expeditiously and efficiently move people from an overcrowded jail system into the mental health system, without compromising the safety of the public."²² The order observed that Broward County had experienced a "rapidly increasing" number of misdemeanor cases involving mental illness or mental retardation leading to "congesting and overburdening" of the court dockets, as well as jail overcrowding, and that there had been a "continuing shrinkage" of mental health resources, necessitating the centralization of such resources into a system to make them more accessible.²³

The order created a part-time mental health subdivision to be housed within the county court's criminal division. The court's jurisdiction was limited to defendants arrested for misdemeanors suffering from mental illness or mental retardation. Domestic violence cases and driving under the influence charges were excluded, as were charges of battery, a violent misdemeanor, absent the victim's consent.²⁴ In addition, defendants charged with violent misdemeanor offenses occurring at mental health treatment facilities were assigned under the order to the mental health court.

The court was assigned to Judge Ginger Lerner-Wren, who had been elected the previous year. Judge Lerner-Wren was chosen for the court because of her extensive background with mental health and human services issues: She had been the Broward County Public Guardian, and had also served as the plaintiffs' monitor to oversee implementation of a settlement agreement in a federal class action lawsuit seeking to improve conditions within South Florida State Hospital and the surrounding community mental health system. Editorial support for the court, and for the appointment of a judge knowledgeable about mental health issues, was immediate.²⁵

16. John De Groot, *Mental Trap: The State's Mentally Ill Are Caught in a Vicious Cycle That Clogs Jails and Costs Florida Taxpayers*, SUN-SENTINEL (Ft. Lauderdale), Oct. 12, 1997, at A1.

17. *Id.*

18. The importance of this task force in the creation of the mental health court cannot be exaggerated. The task force had met regularly since 1994 and provided a forum for community leaders to engage in frequent conversations regarding a variety of issues that faced the local criminal justice and mental health systems. Participants have indicated that the task force conversations created enough trust among the participants to ease the creation of the mental health court. Other communities have gone through similar experiences prior to the creation of drug courts. See, e.g., Brown, *supra* note 8, at 95 ("[T]he coalition [that created the Boston drug court] actively involved community groups, treatment providers, and business leaders in the planning and implementation process. The importance of collaboration and cooperation cannot be overestimated. Often competing for scarce resources, including space, staff, and money, criminal justice agencies have rarely cooperated at the level demonstrated by the coalition that supported Boston's drug court.").

19. DEPT OF COMM. AFFAIRS, STATE OF FLA., AN EVALUATION OF THE BROWARD AND HILLSBOROUGH COUNTIES DRUG COURTS (Fla. St. Univ.

Inst. for Health & Human Serv. Res. Dec. 1993).

20. Administrative Order No. VI-97-I-1A, *In re Creation of a Mental Health Court Subdivision within the County Criminal Division*, 17th Cir. Ct., Broward Co., Fla.

21. *Id.*

22. *Id.*

23. *Id.*

24. On occasion, with the consent of the victim, the mental health court does accept jurisdiction in cases involving domestic violence.

25. In an editorial, the Ft. Lauderdale *Sun-Sentinel* called Judge Lerner-Wren a "perfect fit for the judge's job," Editorial, *Nonviolent Offenders, Community Will Benefit from New Kind of Court*, SUN-SENTINEL, June 19, 1997, while the *Miami Herald* applauded creation of the court as "a significant tightening of the threads that bind together the patchwork system for treating mental illness" and noted Judge Lerner-Wren's "broad experience in mental health law." *A Stitch in the Patchwork*, MIAMI HERALD, May 31, 1997, at A26.

II. EVALUATION OF THE MENTAL HEALTH COURT

There have been more than 20 evaluations of drug courts since their inception.²⁶ These evaluations have been important in providing policy makers with information about the operation and effect of drug courts. Given the growing interest in issues involving mental illness in the criminal justice system, we thought it important, and participants in the mental health court agreed, that the court be evaluated. Funding for an evaluation has been provided by the John D. and Catherine T. MacArthur Foundation, a private foundation with a long track record in funding research in mental health, health care, and mental health law²⁷ and by the Florida legislature.

The evaluation, being conducted by faculty within the Department of Mental Health Law and Policy at the University of South Florida, has four parts. The first is a series of “key informant interviews” with individuals closely involved with the creation and implementation of the mental health court. The interviews provide qualitative data on the reasons for the creation of the court, whether participants believe the initial goals of the court have been met, and issues that have arisen in implementing the court.

The second part of the evaluation is examining the court process itself, comparing the mental health court to a conventional misdemeanor court in Hillsborough County.²⁸ As noted below, the mental health court is established on the premise that it is a “treatment court” and it is by design much more informal and less adversarial than an ordinary criminal court. By observing and coding several dozen hearings, as well as analyzing hearing transcripts, we will be able to describe in some detail the roles of the participants, comparing and contrasting those roles with a more traditional court.

The third part of the evaluation is a follow-up study of 100 people whose cases have been heard by the mental health court and 100 people with similar backgrounds whose cases were heard in traditional misdemeanor court. A series of interviews

are being conducted with these individuals over a 16-month period from their enrollment in the study. Enrollment in the study, which is voluntary, occurs after the initial hearing in mental health court or the first appearance in misdemeanor court at the comparison site. An interview is also conducted with a family member or other person identified by the individual. Individuals are asked to describe their experiences

with the court and after. The mental health court is organized explicitly on the premise that individuals who come before the court are to be given “voice” and treated respectfully; it has been suggested that individuals who believe that they have been treated fairly report greater satisfaction with judicial outcomes and may be more willing to accept treatment as well.²⁹ The interviews seek to determine whether individuals perceive the court as fair and whether individuals perceive their participation in the court as voluntary or coerced.³⁰ The interviews also examine whether individuals have engaged in behaviors constituting a risk to others, utilizing questions developed by the MacArthur Foundation Research Network on Mental Health and the Law.³¹ Finally, individuals are asked questions regarding their use of mental health services, compliance with prescribed medications and other treatments, current mental status, and community adjustment.

The final part of the evaluation will gather data from a variety of sources, including days incarcerated, use of emergency mental health services, and associated costs for individuals

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26. OFFICE OF JUST. PROG., U.S. DEP'T OF JUSTICE, DRUG COURT MONITORING, EVALUATION, AND MANAGEMENT INFORMATION SYSTEMS (1998).

27. In 1988 the foundation approved funding for a research network on mental health and the law. This network, headed by Professor John Monahan of the University of Virginia, conducted over the next 10 years research into the core mental disability law issues of risk, coercion, and civil and criminal competency. The network's work constitutes the most far-reaching and productive research yet conducted in the mental disability law field. See, e.g., TOM GRISSO AND PAUL APPELBAUM, ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS (1998); Randy Otto, Norman G. Poythress, Robert Nicholson, et al., *Psychometric Properties of the MacArthur Competence Assessment Tool—Criminal Adjudication*, 10 PSYCH. ASSESSMENT 435 (1998); Charles Lidz, Steven K. Hoge, William Gardner, et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCH. GEN. PSYCH. 1034 (1995); John Monahan, Henry Steadman, Paul Appelbaum, et al., *Developing A Clinically Useful Actuarial Tool For Assessing Violence Risk*, 176 BRIT. J. PSYCH. 312 (2000).

28. Hillsborough County, Florida, was chosen as a comparison site because it is similar demographically to Broward County and

because it is geographically proximate to the University of South Florida in Tampa, which is conducting the evaluation.

29. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment*, 46 SMU L. REV. 433 (1992); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

30. Legal status does not necessarily predict whether an individual will perceive himself or herself as being coerced in a given situation. For example, some individuals who were on “voluntary” status for mental health treatment reported that they had been coerced into care, while some on involuntary commitment status reported that they did not perceive themselves as having been coerced (though the majority did). S. Ken Hoge, Charles W. Lidz, M. Eisenberg, et al., *Perceptions of Coercion in the Voluntary and Involuntary Patients*, 20 INT'L. J. L. & PSYCH. 167 (1997). It is possible that individuals who remain under the jurisdiction of the mental health court for an extended period of time, going through the status hearings noted below, may perceive themselves as being more coerced over time. On the other hand, they may not, and if they perceive themselves as being treated fairly, it may ameliorate perceptions of coercion.

31. See note 27 *supra*.

[M]ost individuals seen by the court in its first two years had a psychiatric diagnosis.

who enter treatment through the mental health court.

The evaluation will not attempt to determine categorically whether the Broward County Mental Health Court “works.” Whether such a court “works” depends in large measure on the goals

established for such a court. It is also worth noting that there is not a single model or “type” of mental health court, and that information derived from one court may or may not be applicable to others.³² The evaluation will provide useful information regarding this particular court, however, and at least some of that information may prove useful to policy makers and other localities considering the creation of a mental health court.

III. PRELIMINARY OBSERVATIONS FROM THE EVALUATION

It is premature to draw conclusions from those portions of the evaluation that rely on interviews with individuals enrolled in the study after entering the mental health court or the comparison misdemeanor court. This is because individuals are still being enrolled in the study, and interviews are ongoing. However, it is possible to make some preliminary observations based on the key informant interviews and observations of the mental health court process. The observations that follow are necessarily tentative, and more conclusive observations await the final collection and analyses of data.

The mental health court became operational in July 1997. The court, like the mental health courts established since, has a separate docket for its cases. In addition to the consolidation of cases before a particular judge, the state attorney and the public defender’s office assign attorneys specifically chosen for the court. Both the public defender, which provides representation in the vast majority of cases, and the state’s attorney choose representatives for the court based on potential “fit” between the lawyers and the goals and processes of the mental health court.

The state mental health agency also has a representative at each session of the court, as does the county’s largest mental health provider. Representatives from other treatment agencies, as well as sheriff’s deputies assigned to the jail’s mental

health unit, are also routinely present at the court.

In the first two years of the court’s operation (1997-1999), the court assumed jurisdiction over 882 cases, at a rate of approximately 40 per month.³³ More recently, however, that number has grown to an average of 53 cases per month.³⁴ The court also retains jurisdiction over a large number of cases for the purpose of monitoring their progress, generally through periodic status hearings. Over time, this has the effect of enlarging the court’s docket, because the overall number of cases for which the court has responsibility continues to grow. As a result, and because of the goal of the mental health court to get people with mental illness out of jail quickly, the mental health court meets more frequently than originally anticipated, sometimes meeting every day of the week. Cases today are sometimes heard within a few hours of referral, and the speed with which the court gets to cases is a core feature of the court.³⁵

Individuals, who must accept the court’s jurisdiction voluntarily, qualify for the court relatively easily. The order establishing the court directed that anyone charged with a nonviolent misdemeanor would be preliminarily qualified for the court if “they previously or currently have been diagnosed by a mental health expert as suffering from mental illness or mental retardation or have manifested obvious signs of mental illness or mental retardation during arrest or confinement or before any court.” Motions to assign an individual to the court may be made by any court or the defense or state attorney. In addition, any participant in the criminal justice system (arresting officer, jail officials, attorneys, magistrates) or family member or advocate may refer a person to the mental health court. Doctoral level clinical students from Nova Southeastern University, under the supervision of mental health staff from the public defender’s office, screen clients at the daily magistrate court and make recommendations to the magistrate for referral to the mental health court.³⁶ In practice, magistrates make the most referrals.

Because the gate into the mental health court was designed to be open wide, no formal diagnostic criteria or screens are used prior to the court’s exercise of jurisdiction.³⁷ Despite this, treatment histories made available to the court at an initial hearing showed that most individuals seen by the court in its first two years had a psychiatric diagnosis. These diagnoses included 18% diagnosed with schizophrenia; 10% with depression; 29% with

32. For example, as noted in the text that follows, the Broward County mental health court does not impose diagnostic screens before an individual can be admitted to the court. In contrast, it is reported that the Marion County, Indiana, mental health court requires that a person have a diagnosis of schizophrenia, bipolar disorder, or major depression and sign an agreement to participate in the program. Amy Watson, Daniel Luchins, Patrick Hanrahan, et al., *Mental Health Court: Promises and Limitations*, 28 J. AMER. ACAD. PSYCH. & L. 476 (2000).

33. These figures, and those that immediately follow, are taken from the mental health court’s *Second Year Progress Report: July 1998-June 1999, The Nation’s First Mental Health Court*. The report is available online at www.broward.org/ojss/ and is also available from Judge Ginger Lerner-Wren’s office at 201 SE 6th Street, Rm. 429, Ft. Lauderdale, Florida 33301.

34. OFFICE OF JUSTICE SYSTEM SERV., BROWARD CO., FLA., MENTAL

HEALTH CONSUMERS IN THE BROWARD COUNTY JUSTICE SYSTEM (presented to the Mental Health Task Force, April 24, 2000).

35. The administrative assistant to the mental health court judge is responsible for preparing the court’s docket. The administrative assistant also calls treatment providers to notify them of the need to be in court for a hearing, and coordinates the transfer of clients from Broward County jails to the court. Although paperwork to formally transfer a case to mental health court is supposed to be completed prior to transfer, as a practical matter cases may be heard before this occurs because of the mental health court’s goal of minimizing jail stays for people with mental illness.

36. Lisa Rabasca, *A Court That Sentences Psychological Care Rather Than Jail Time*, 31 MONITOR ON PSYCH. 58 (2000).

37. In contrast, at least one other mental health court requires that individuals meet certain diagnostic criteria before being accepted by the court. See note 32 *supra*.

dual diagnoses of mental illness and substance or alcohol abuse; 13% with bipolar disorders; 10% with schizoaffective disorders; 20% unknown; and only 2% with mental retardation or developmental disability as a primary diagnosis. Of the individuals seen by the mental health court in its first two years, 69% were male, and most were between the ages of 28 and 40. Approximately one-quarter were homeless.³⁸

Observations from Key Informants

Key informant interviews have been conducted to date with approximately two dozen individuals involved in some way with the creation or implementation of the mental health court. Informants include judges, representatives of the public defender's office and the state's attorney office, family members, and treatment professionals within the community. In general, there is consensus among those interviewed regarding why the court was created. Nearly all cite the presence of large numbers of people with mental illness in the local jails and a desire to divert such individuals into treatment. Most also expressed the hope that treatment would reduce recidivism among people who came through the mental health court, though the major articulated goal was to reduce the number of people with mental illness in the jail and the time spent there.

Informants also expressed general satisfaction with the work of the mental health court to date, believing that it had met its articulated goals. Individuals noted the respect with which people are treated in the mental health court, as well as anecdotal successes in obtaining treatment for people. Most informants cited the judge presiding over the court as the key factor in the perceived success of the court. Informants agreed that support for the court, particularly among lawyers and judges involved with it, was very high, and that communication in general between the various agencies and individuals involved with the court and with the cases coming before the court was generally very good, although it could be improved.

A number of informants did express concern that certain types of services, for example, housing, continued to be difficult to obtain. Some informants also indicated that the needs of certain types of individuals, including those with substance abuse problems, individuals with head injuries, and women who had been traumatized, were not always met by the service system. As noted below, this has led in some circumstances to the creation of additional services within Broward County.

In addition, a number of informants noted that the court's increasing caseload could over time create problems for the court over time. This is primarily because the mental health court was created out of existing resources; no new resources

were added for judges or attorneys. As the caseload grows, questions have been raised about the capacity of the current system to handle those cases.

IV. THE MENTAL HEALTH COURT PROCESS

Not all clients who come before the mental health court for an initial hearing have their cases remain before the mental health court. At the first hearing, the court determines whether the case is appropriate for the mental health court. The client's participation in the court is also voluntary, an issue discussed in more detail below in the discussion of the role of counsel.

The court may decide not to qualify the individual for the mental health court for a variety of reasons. These include a perceived lack of a mental health issue, a perception that the client is poorly motivated for treatment, or pending felony charges. Some clients are referred for a preliminary examination under Florida's civil commitment law, while others may be referred for an evaluation of competency to stand trial. The court operates on a pre-adjudicatory basis, and will only resolve criminal charges upon agreement of the parties. The court generally does not consider, and cautions individuals from discussing, the particulars of pending charges. If the person decides to go before the mental health court, charges usually are dismissed when the court decides to end its jurisdiction (which can extend for one year). This is in contrast to other mental health courts that may require pleas of guilty or no contest as a condition for entering the program.³⁹

Role of the Court

In making these decisions, the mental health court bases its actions on the principle of "therapeutic jurisprudence."⁴⁰ David Wexler, who coined the phrase and has written most extensively about it, has posited therapeutic jurisprudence as a way for lawyers and courts to examine "the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences."⁴¹ Christopher Slobogin, in a commentary on therapeutic jurisprudence, characterized it as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."⁴² In recent years, the notion that courts should consider the ther-

In making these decisions, the mental health court bases its actions on the principle of "therapeutic jurisprudence."

38. *Second Year Progress Report: July 1998-June 1999, The Nation's First Mental Health Court*. 17th Judicial Circuit, Broward County, Florida (1999).

39. JOHN S. GOLDKAMP AND CHERLY IRONS-GUINN, *EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE* (2000).

40. Judge Lerner-Wren has written that "through the application of Therapeutic Jurisprudence, the Court has been able to establish an effective and innovative method of utilizing the Court system

in a positive, and in many cases, empowering mechanism for individuals with severe mental disability." *Progress Report: July 1997-June 1998, The Nation's First Mental Health Court*, 17th Judicial Circuit, Broward County, Florida (1998).

41. David B. Wexler & Bruce J. Winick, *Introduction*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick, eds. 1992).

42. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *Psych., Pub. Pol'y & L.* 193, 196 (1995).

The difference from drug courts is a fundamental one.

apeutic or nontherapeutic effects of their processes and decisions appears to be gaining advocates among at least some judges.⁴³

This philosophic orientation has had a significant impact on the operation of the mental health court and the roles played by the various participants. First, the presiding judge often states explicitly to individuals coming before the mental health court that the court is a “treatment court.” She also may emphasize to the individual that the goal of the court, if the person accepts the court’s jurisdiction, is to obtain necessary services.

Second, the court attempts to treat individuals respectfully and to elicit the individual’s views regarding his or her situation. The court greets the individual by name, and clearly attempts to engage each individual in a conversation regarding his or her thoughts on the types of resources that might prove beneficial. The court is designed to attempt to give “voice” to the individual. A commentator has described this issue in the following terms: “The judge should listen attentively to the patient and convey the impression that what he or she has to say is important and will be given full consideration. According voice and validation in this way can considerably enhance the patient’s feeling of participation and can inspire trust in the judge.”⁴⁴ In practice, this means that hearings before the mental health court often run from several minutes to a half-hour, longer particularly than initial proceedings in misdemeanor court ordinarily last.

Third, the court may attempt to gain access to treatment, or encourage a non party to obtain treatment, during the proceeding. For example, in one case we observed, the mental health court was conducting a status hearing for an individual whose condition apparently had improved after treatment in the community. During the hearing, a probation officer from a prior case came to court, indicating to the judge that he had just now located the individual who had been missing and now faced a potential charge for violation of probation. The mental health court judge, in the middle of the hearing, called the judge involved with the other case, and asked that judge to

forego a probation violation hearing at that time because the individual was doing well in treatment. The other court agreed, though it asked that the individual appear before that court so the arrangement could be spelled out. In a different case, a mother accompanied her son to a status hearing. During the hearing the mother indicated that she had previously been abused by her husband, with whom she was now living again, and expressed concern that the home environment would not be conducive the mental health of her son, the mental health court defendant. The court urged her to seek treatment in a program for traumatized women that had begun in large part to respond to women coming into the mental health court. While the mother was not a defendant before the court, the mental health court judge urged her to contact the program, saying, “I think you will really like it. I think that you will be able to benefit from it.”⁴⁵

Finally, the mental health court rarely if ever uses punitive sanctions for noncompliance with treatment. This is in marked contrast to many drug treatment courts (and some mental health courts), which rely on what former Attorney General Janet Reno described as a “carrot and stick” approach to treatment. In many drug courts, a defendant who does not comply with treatment may be jailed or face other sanctions—in the Broward County Mental Health Court, the court attempts, typically through a status hearing, to persuade the person to continue with treatment on a voluntary basis. The difference from drug courts is a fundamental one. Drug courts often rely on urine screens to determine whether a person is using drugs; if the results are positive, punitive measures are available, in part because the drug use itself was illegal and likely in violation of bond or probation conditions. Mental illness, in contrast to many forms of substance abuse, is not itself a crime, nor is there an equivalent to the urine screen as a monitoring device.

Role of Counsel

Counsel in the mental health court also play very different roles than in a traditional criminal proceeding. The proceedings are very informal, and there are few occasions where motions are filed or more formal “lawyering” occurs. This is by design. The assumption is that the adversarial process is often antithetical to obtaining appropriate services for the individ-

43. See, e.g., Deborah J. Chase & Peggy Fulton Hora, *The Implication of Therapeutic Jurisprudence for Judicial Satisfaction*, COURT REVIEW, Spring 2000, at 12; William Schma, *Judging for the New Millennium*, COURT REVIEW, Spring 2000, at 8; Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, COURT REVIEW, Spring 2000, at 28; Peggy Fulton Hora, William G. Schma, & John T. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 440 (“[W]e propose to establish therapeutic jurisprudence as the [Drug Treatment Court] movement’s jurisprudential foundation. . . . We suggest that the concepts and ideas contained in this Article offer new tools and methods for dealing with the problems of crime and drug use—problems that have been ineffectively addressed by current laws and jurisprudential methodologies.”). Judge Judith Kaye, Chief Judge of the New York Court of Appeals,

has argued that the role of lawyers and courts must change dramatically in the future. Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 4 (in drug treatment courts, “the lawyers also have new roles. The prosecution and defense are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs. When this goal is attained, everyone wins. Defendants win dismissal of their charges—not to mention improvement of their lives—while the public wins safer streets and reduced recidivism.”). Judge Kaye has also recently directed the courts in New York State to focus their efforts in drug cases on obtaining treatment and other services for defendants, rather than focusing on punishment. Katherine E. Finkelstein, *New York to Offer Most Addicts Treatment Instead of Jail Terms*, N.Y. TIMES, June 23, 2000, at A1.

44. Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. L. ISSUES 37, 58 (1999).

45. Transcript, Case No. 00-577MM10A, Broward Co. Cir. Ct., at 11.

ual. As a result, the most substantive conversations in a given case usually occur between the court, the defendant, the defendant's family if present, and the treatment staff representing local treatment providers that are usually at a hearing.

When lawyers adopt a less adversarial role, some may question whether the rights of individuals are being sacrificed. For example, an individual who chooses to proceed before the mental health court effectively waives speedy trial rights. This is because the mental health court puts off resolution of the charges until the person obtains the treatment agreed to in the proceeding before the court. In addition, an individual may be under the jurisdiction of the mental health court for a longer period of time than would have been the case in a traditional misdemeanor court. In the latter setting, many charges are disposed of through a plea and time served.⁴⁶ However, the mental health court assumes that the routine handling of misdemeanor cases when mental illness is involved is in part responsible for the fact that defendants may experience a cycle of release and rearrest. In the mental health court, status hearings to determine how the person is faring may be held over a period extending up to a year. Some might argue that the continuing jurisdiction of the court is an imposition on the person's liberty that would not occur in a more traditional setting, while others might argue that this feature of the mental health court is integral to enabling the individual to improve his or her life.

The question of the appropriate role of counsel in proceedings designed to obtain nonpunitive dispositions is not without controversy.⁴⁷ It is an issue that has arisen in other contexts such as civil commitment hearings and juvenile justice hearings.⁴⁸ In key informant interviews, representatives from the legal system suggested that these potential problems are ameliorated because the individual makes an informed, voluntary choice to have his or her case heard by the mental health court. These informants estimated that about 5% of individuals who might otherwise qualify for the mental health court decide to not proceed before it. The mental health court also has a variety of devices to obtain information about a person's competency to proceed, including ordering an evaluation of criminal competency. The importance of the issue of voluntariness has been raised in other discussions of mental health courts.⁴⁹

V. THE MENTAL HEALTH COURT AND THE ALLOCATION OF HEALTH CARE RESOURCES

Courts play an important role in the allocation of health, mental health, and human service resources through their decisions in individual cases.⁵⁰ Because the creation of the Broward County Mental Health Court was not accompanied by the creation of additional mental health services, the court effectively has had to compete with other needs within the community in gaining access to services for clients coming through the mental health court. The court does have intrinsic advantages in gaining access: while courts are often frustrated by a lack of available services for defendants, few mental health providers will simply ignore a client referred for services by a court. But this, in turn, raises a potential collateral issue: If a specialty court becomes perceived as a more certain way to gain access to services, it may create incentives to use the criminal justice system as a vehicle for obtaining care. In part, this explains the preference in some quarters for interventions that divert individuals *prior* to arrest.

At a more general level, the mental health court has had an impact on the overall development of mental health services within Broward County. There have been two programs created specifically since the inception of the mental health court based on needs identified by the court. The state legislature appropriated funds for temporary residential placements for clients referred by the mental health court, addressing what the key informant interviews have identified as a critical gap in services. In addition, one of the local mental health providers has created a program for women admitted to the court who have been victims of trauma.

The creation of these programs illustrates the power that a special jurisdiction court such as the mental health court can have in identifying service needs. In addition, the task force that had created the court provided a vehicle for lobbying the state legislature for the monies needed to establish the residential program. This was not the only such effort in Florida—another group in central Florida, composed of judges, the local sheriff, other law enforcement officials, mental health providers, and families of people with mental illness, gained \$5

[A]bout 5% of individuals who might otherwise qualify for the mental health court decide not to proceed before it.

46. A previous study of misdemeanor cases at Hillsborough County, our comparison site in this study, revealed that 94% were resolved with a plea of *nolo contendere*, usually as part of a plea agreement for "time served." Norman G. Poythress, Richard J. Bonnie, Steven K. Hoge, et al., *Abilities to Assist Counsel and Make Decisions in Criminal Cases: Findings from Three Studies*, 18 LAW & HUMAN BEHAV. 437 (1994).

47. See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1206 (1998). Boldt argues that "a reduced advocacy role defense counsel is not warranted" in drug court proceedings, because defendants face the

potential of coercive and punitive interventions. *Id.* at 1216. He also argues that the shift in role for the court, from neutral party to active involvement in treatment, may further compromise the role of counsel in advocating for his or her client because of the "therapeutic relationship" established between court and defendant. *Id.* at 1261-63.

48. Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. L. ISSUES 37 (1999).

49. GOLDKAMP & IRONS-GUYN, *supra* note 39.

50. John Petrila, *Courts as Gatekeepers in Managed Care Settings*, 17 HEALTH AFFAIRS 109 (1998).

The emergence of therapeutically oriented courts raises important questions about the role of judges and lawyers

million dollars in additional funding for mental health services, and a statewide coalition, called Partners in Crisis, is emerging from these efforts.⁵¹

The emergence at the local level of coalitions involving judges, law enforcement officials, families, consumers of mental health services, and

providers to lobby for increased funding for mental health services represents an important development in the mental health field. It has often been difficult to attract political support for increased funding for mental health services in many jurisdictions, and these emerging coalitions can wield significant political power. As noted earlier, such groups can also play an important role in planning for services locally, and for addressing the issues that often arise when multiple human service and criminal justice systems are attempting to deal with complex, individual cases.

SUMMARY

The Broward County Mental Health Court, and the emergence of similar courts around the United States, is an important development in efforts to address issues raised by the numbers of people with mental illness entering the criminal justice system. The mental health court has some similarities to the drug treatment courts that have emerged in the last decade, but there are important differences as well. For example, the Broward County court is based explicitly on the premise that punishment and treatment should be separated; as a result, the court almost never applies the type of punitive sanction that has been part of the development of most drug courts.

The emergence of therapeutically oriented courts raises important questions about the role of judges and lawyers in disposing of individual cases.⁵² Mental health and drug treatment courts also highlight the role that the courts increasingly play in the allocation of mental health and other human services resources. It seems unlikely that the courts in the near future will adopt formal responsibility for administering treatment programs. Mental health courts and drug treatment courts, however, may draw judges squarely into local and state planning and, in some instances, advocacy for increased funding for services. These are important developments that are certain to stimulate much discussion and debate in the future.



John Petrila, is chair and a professor in the Department of Mental Health Law and Policy at the Louis de la Parte Florida Mental Health Institute at the University of South Florida. He received his law degree and an advanced degree in mental health law from the University of Virginia School of Law. He writes frequently on forensic mental health issues, as well as legal and ethical issues in managed care. Petrila is a co-author, with Norman Poythress and two others, of the book, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (2d ed. 1997).



Norman G. Poythress is a professor in the Department of Mental Health Law and Policy at the University of South Florida. He has published extensively in the area of psychology and law and is a coauthor, along with John Petrila and two others, of the book, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*. Poythress received his Ph.D. in clinical psychology from the University of Texas at Austin in 1977 and is a past president of the American Psychology-Law Society (1992-1993).



Annette McGaha is an assistant professor in the Department of Mental Health Law and Policy at the University of South Florida. After receiving her Ph.D. in applied and experimental psychology from St. Louis University in 1998, she completed a two-year National Association of State Mental Health Program Directors fellowship in mental health services research at the Florida Mental Health Institute. She is the project director for the Broward County Mental Health Court evaluation.



Roger A. Boothroyd is an associate professor in the Department of Mental Health Law and Policy at the University of South Florida, where he has worked for the past five years. He received his Ph.D. in educational psychology and statistics from the University at Albany, State University of New York, in 1990, specializing in measurement, evaluation, and research design. In addition to his work on the Broward County Mental Health Court Evaluation, Boothroyd is co-principal investigator on the evaluation of Florida's prepaid medicaid waiver demonstration program and an NIMH-funded grant to support the design and delivery of a training course on research ethics. He also has been a co-principal investigator on grants funded by NAMI and SAMHSA examining the impact of managed care on persons with mental illness. He formerly was a research scientist in the Bureau of Evaluation and Services Research at the New York State Office of Mental Health, where he worked for ten years.

51. *Focus on Mental Illness; Policy-Makers Must Become Partners in Solving the Crisis and Muster the Resolve to Move Beyond Discussion into Action on Behalf of the Mentally Ill*, ORLANDO SENTINEL, June 18, 2000, at G2.

52. In addition to the substantive questions about the role of judging

and the role of counsel noted in this article, some judges have concluded that adoption of an explicitly therapeutic orientation may increase judicial job satisfaction. Deborah J. Chase & Peggy Fulton Hora, *supra* note 43.