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MENTAL HEALTH COURTS AND SENTENCING DISPARITIES

E. LEA JOHNSTON* & CONOR P. FLYNN**

INTRODUCTION

MENTAL health courts are an understudied, yet burgeoning, phenomenon.¹ Propelled by federal funding and the strong support of the Council of State Governments' Justice Center,² mental health courts

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1. Generally speaking, mental health courts are specialized criminal courts with dockets restricted to individuals with mental illnesses in which defendants choose a non-adversarial, problem-solving approach involving court-supervised treatment instead of traditional court processing. See E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 520–21 (2012). Mental health courts are idiosyncratic and vary widely in their mental health and criminal eligibility criteria, plea requirements, treatments offered, intensity and length of supervision, use of jail as a potential sanction for condition noncompliance, and the impact of program completion on participants' criminal cases. See *id.*

2. See Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (2004) (codified at 42 U.S.C. § 3797aa) (authorizing funding, training, and technical assistance for collaborative efforts between criminal justice and mental health agencies, including mental health courts); America's Law Enforcement and Mental Health Project Act of 2000, Pub. L. 106-515 (2000) (codified at 42 U.S.C. §§ 3711, 3793, 3796ii–3796ii-7) (granting funding for development or expansion of mental health courts); *The Criminal Justice/Mental Health Consensus Project*, COUNCIL OF ST. GOV'TS' JUST. CTR., <https://csgjusticecenter.org/mental-health-projects/report-of-the-consensus-project/> [<https://perma.cc/FW9H-2PYY>] (last visited Feb. 1, 2017).

have enjoyed exponential growth, expanding from the first court in 1997³ to over 400 courts across 43 states today.⁴ Supporters maintain that these courts deliver much-needed treatment to individuals suffering from mental illness, reduce recidivism, improve quality of life,⁵ and even help diminish mass incarceration.⁶ Proponents also tout the courts as models for treating defendants with dignity, facilitating defendants' "voice," and embodying other important procedural justice principles.⁷

Very little attention has been paid, however, to the effects of mental health courts on criminal justice outcomes.⁸ To date, most research has focused on whether they curtail recidivism.⁹ To a lesser extent, studies

3. See LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF ST. GOV'TS' JUST. CTR., MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 2 (2009), https://www.bja.gov/Publications/CSG_MHC_Research.pdf [<https://perma.cc/WL9Y-FFEUV>].

4. See *Adult Mental Health Treatment Court Locator*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <http://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults> [<https://perma.cc/83TH-B2XE>] (last updated Aug. 19, 2015) (depicting at least one mental health court in each state except Rhode Island, New Jersey, Connecticut, Arkansas, South Dakota, Nebraska, and Wyoming); *How Many Problem-Solving Courts Are There?*, NAT'L DRUG COURT RES. CTR., <http://www.ndcrc.org/content/how-many-problem-solving-courts-are-there> (June 30, 2014) [<https://perma.cc/JWB4-35ST>] (reporting 414 mental health courts as of June 30, 2014).

5. See, e.g., Allison D. Redlich et al., *Is Diversion Swift? Comparing Mental Health Court and Traditional Criminal Justice Processing*, 39 CRIM. JUST. & BEHAV. 420, 431 (2012) ("The short-term benefits of getting out of jail must be juxtaposed with the potential for longer-term benefits of MHC participation (i.e., access to treatment, reductions in recidivism, improved quality of life).").

6. See, e.g., Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 606, 609–13 (2016) (asserting that treatment courts "are generally considered a leading alternative to incarceration" and discussing the role of problem-solving courts in the Department of Justice's Justice Reinvestment Initiative); Roger K. Warren, *A Tale of Two Surveys: Judicial and Public Perspectives on State Sentencing Reform*, 21 FED. SENT'G REP. 276, 282 (2009) (observing that 82% of respondents in 2006 survey by the National Center for State Courts said mental health courts are "a better way to sentence offenders than through the regular court system").

7. See Michael L. Perlin, *"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1, 2, 8, 20–23, 27–28 (2013).

8. See Allison D. Redlich et al., *Patterns of Practice in Mental Health Courts: A National Survey*, 30 L. & HUM. BEHAV. 347, 359 (2006) (highlighting "open questions" of whether mental health courts "Do justice well?," which is an issue "in need of future research").

9. See, e.g., Laura N. Honegger, *Does the Evidence Support the Case for Mental Health Courts? A Review of the Literature*, 39 L. & HUM. BEHAV. 478, 482–85 (2015) (collecting and reviewing extant studies on mental health courts' abilities to reduce recidivism rates); Donald M. Linhorst & P. Ann Dirks-Linhorst, *Development, Outcomes, and Future Challenges*, 54 JUDGES' J. no.2, 2015, at 22 (same); Evan Lowder et al., *Recidivism Following Mental Health Court Exit: Between and Within-Group Comparisons*, 40 L. & HUM. BEHAV. 118, 119 (2016) ("Together, findings of the extant research suggest that participation in MHCs decreases recidivism for justice-involved adults with mental illnesses, though effectiveness can vary as a function of characteristics of the participants and the program."). While the weight of extant studies suggest that mental health courts may reduce recidivism, "limitations and

have also assessed their abilities to improve participants' psychiatric symptoms, connection to behavioral health services, and quality of life.¹⁰ There has thus far been virtually no investigation of differences in sentencing practices between mental health and traditional criminal courts.¹¹ This Article is the first to fill that void.

In an absence of empirical scrutiny, competing narratives have arisen about the sentencing effects of mental health courts. While some defense attorneys and occasional media accounts have observed that these courts may mete out excessive sentences,¹² public discourse largely assumes that mental health courts offer systematic leniency to offenders with mental illness.¹³ This latter understanding may seem credible since mental illness

challenges of mental health court research prevent these problem-solving courts from rising to the level of an evidence-based practice." See Honegger, *supra*, at 484. As Michael O'Hear has observed in the context of drug courts, examining the suitability of mental health courts as instruments of punishment is even more important to the extent that they may offer a questionable social service. See Michael M. O'Hear, *Drug Courts as Communicative Punishment*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?* 237, 238 n.2 (Michael Tonry ed., 2012).

10. See Honegger, *supra* note 9, at 479–82.

11. See, e.g., Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 U. D.C. L. REV. 143, 157 (2003) (surveying twenty mental health courts in 2001 and finding that, in at least 40% of reporting courts, duration of court supervision "significantly exceed[ed] the possible length of incarceration or probation for the offense"); see also Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 PSYCHOL. PUB. POL'Y & L. 587, 592 (2005) (in explaining Brooklyn's decision to restrict its mental health court to felonies and chronic misdemeanor offenders facing one-year jail sentences, reporting defense attorneys' concerns that, because "more than 90% of misdemeanants in Brooklyn serve less than 60 days in jail . . . treatment mandates of at least 1 year and potential jail sentences of a year or longer for program failure [] were disproportionately onerous for misdemeanor offenders facing such short jail sentences"); ALMQUIST & DODD, *supra* note 3, at 3–4 (noting that "some participants remain under court supervision for much longer than if they had been adjudicated in a traditional court" and that "[i]t can be unclear whether participation is always in their best interest").

12. See, e.g., Michelle Andrews, *Mental Health Courts Are Popular, but Effectiveness Is Still Unproven*, DULUTH NEWS TRIB. (Dec 29, 2015, 12:00 A.M.), <http://www.duluthnewstribune.com/features/3908672-mental-health-courts-are-popular-effectiveness-still-unproven> [<https://perma.cc/4ZQY-5HYM>] ("As for the individuals themselves, if they're facing just a few weeks or months behind bars for conviction of a minor crime, they may balk at enrolling in a program that requires them to return to court repeatedly for up to two years." (quoting Dr. Fred Osher)).

13. See, e.g., Robert F. Schopp, *Mental Health Courts: Competence, Responsibility, and Proportionality*, in *PROBLEM SOLVING COURTS* 163, 165–66 (Richard L. Wiener & Eve M. Brank eds., 2013) (observing that, because "MHCs are generally designed to address offenders whose crimes are 'more a product of mental illness than of criminality' . . . they should be punished less severely than ordinary offenders who commit similar offenses because they are less culpable than ordinary offenders"). Scholars and policymakers have not offered a thorough explanation of whether these courts should be more lenient than traditional courts or what leniency should mean in this context (i.e., less incarceration time, a shorter period of supervision, or a less onerous punishment as measured by duration of sentence and its inherent severity). See *infra* note 289 and accompanying text for discussion of studies of offenders' perceptions of sanction severity.

is a common mitigating factor at sentencing.¹⁴ Moreover, the offenders targeted by these specialized courts—those whose serious mental illness was a causal factor in their crimes¹⁵—are particularly likely to have diminished culpability.¹⁶ Thus, leniency would appear consistent with retributive principles of justice. However, examination of sentence severity in drug courts, the specialty courts on which mental health courts are modeled,¹⁷ suggests that treatment courts may be *more* likely to issue harsher sentences than traditional courts.¹⁸ Despite the similarities between

14. See, e.g., 42 PA. CONS. STAT. § 9711(e) (2016) (listing mitigating factors for first-degree murder as including acting while under “extreme mental or emotional disturbance,” while “under the substantial domination of another person,” and while “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”). But see *infra* notes 283–87 and accompanying text for a discussion of how mental illness may aggravate sentences.

15. See Perlin, *supra* note 7, at 10–11 & 11 n.41. The Erie County mental health court targets offenders whose mental illness was a causal factor in their criminal activity. See *infra* note 49 and accompanying text.

16. See Schopp, *supra* note 13, at 168.

17. See ALMQUIST & DODD, *supra* note 3, at 1.

18. See Denise C. Gottfredson et al., *Long Term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study*, 2 J. EXPERIMENTAL CRIMINOLOGY 67, 79 tbl. 1 (2006) (finding that treatment court participants were incarcerated an average of 158.9 days (often for noncompliance), while control group members were incarcerated an average of 156.9 days); Denise C. Gottfredson & M. Lyn Exum, *The Baltimore City Drug Treatment Court: One-Year Results from a Randomized Study*, 39 J. RES. CRIME & DELINQ. 337, 350 & 351 tbl. 5 (2002) (finding that treatment court participants received average probationary sentences of 745 days while the control group received probationary terms of 613 days, and finding that treatment court participants received average suspended sentences of incarceration of 1,252 days while the control group received suspended sentences of 1,068 days); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 49, 62 & 62 n.145 (2000) (revealing that participants typically must plead guilty to the most serious offense charged, consent to participation in a twelve- to eighteen-month drug treatment program, and agree to a suspended sentence of incarceration of two to six years—a sentence “far greater than most first-time drug sale defendants could receive outside of the treatment court by plea-bargain”). Other studies have also found evidence of more severe sentences for drug court participants, especially for those failing to graduate. See, e.g., MICHAEL REMPPEL ET AL., CTR FOR CT. INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 269, 281 (2003), http://www.courtinnovation.org/sites/default/files/drug_court_eval.pdf [<https://perma.cc/E2TC-YWER>] (finding, in study of six drug courts in New York State that, while drug court participants were significantly less likely than control group members to be sentenced to jail or prison on initial case, drug court failures were “significantly more likely than comparison defendants to have received at least some incarceration time as part of their sentence in five of six courts . . . [and that] failures had, on average, longer total incarceration sentences than comparison defendants in all courts except [one]”); SHELLI B. ROSSMAN ET AL., URB. INST.: JUST. POL’Y CTR., THE MULTI-SITE ADULT DRUG COURT EVALUATION 8, 80 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> [<https://perma.cc/3PXV-M3F4>] (examining two-year outcomes from twenty-three adult drug courts and six comparison sites from eight states and finding that, “when isolating the sentence on the precipitat-

drug and mental health courts,¹⁹ researchers have yet to offer a detailed study of sentence severity in the latter context.²⁰

Research on sentencing disparities between mental health and traditional criminal courts is crucial for several reasons. First, mental health courts provide a separate system of justice for a historically stigmatized and disadvantaged population, which continues to be subjected to horrible abuses by the state.²¹ The lure of paternalism is great when it comes to individuals with mental illnesses,²² but principles of equity, fairness, and

ing criminal case that led to drug court or comparison group membership[.] . . . there was not a significant difference in the probability of a custodial sentence (22% for both samples) or in its average length, and the raw data pointed to a slightly higher average length among those in the drug court (97.2 vs. 76.7 days”); Eric L. Sevigny et al., *Do Drug Courts Reduce the Use of Incarceration?: A Meta-Analysis*, 41 J. CRIM. JUST. 416, 416 (2013) (finding that drug courts significantly reduced incidences of incarceration on precipitating offenses but “did not significantly reduce the average amount of time offenders spent behind bars, suggesting that any benefits realized from a lower incarceration rate are offset by the long sentences imposed on participants when they fail the program”). For commentary on this phenomenon, see Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 787–94 (2008); Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice As a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 480–81 (2009); Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 322–23 (2010); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1551–61 (2004).

19. See, e.g., Merith Cosden et al., *Evaluation of a Mental Health Treatment Court with Assertive Community Treatment*, 21 BEHAV. SCIS. & L. 415, 419 (2003) (discussing similarities between non-adversarial proceedings in mental health court model and drug court model).

20. To date, one study has examined the outcomes of individuals who did not complete a preadjudication mental health court. See Bradley Ray et al., *What Happens to Mental Health Court Noncompleters?*, 33 BEHAV. SCIS. & L. 801, 801 (2015) (finding that 63.7% of defendants’ charges were dismissed, 21.0% received probation, and 15.3% received sentences of incarceration).

21. See Johnston, *supra* note 1, at 523–24; Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL., PUB. POL’Y & L. 507, 512 (2005) (argument by Stefan). For merely one instance of the recent abuse of individuals with mental illness in the context of the criminal justice system, see Eyal Press, *Madness*, NEW YORKER (May 2, 2016), <http://www.newyorker.com/magazine/2016/05/02/the-torturing-of-mentally-ill-prisoners> [https://perma.cc/JDN3-V85H] (revealing torture of mentally ill inmates in mental health ward in Dade Correctional Institution in Florida).

22. Liberty is most at risk when the justice system is motivated by paternalism. See *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” (footnote omitted)).

Importantly, this Author prefers the term “individual with mental illness” or “individual with mental disorder.” However, for the sake of variety, at times the Article will use “mentally ill” or “disordered” as adjectives to modify “individuals” or “offenders.” In using these terms in this way, this Author in no way intends to communicate that mental illness is a master status or defines those whom it affects.

anti-discrimination dictate that these individuals not receive more severe punishments than others of equal culpability simply because of their illnesses.²³ A finding that mental health courts systematically subject mentally ill individuals to disproportionately harsh punishment would imperil the legitimacy of the courts.

Second, accurate information on sentencing disparities is necessary to assess one of the chief justifications of treatment courts: their function in diverting individuals from jail and prison.²⁴ Treatment courts may serve a diversionary function if they offer probation to individuals otherwise destined for incarceration. However, offenders may not experience diversion if entering treatment court subjects them to longer and more intensive periods of supervision.²⁵ Indeed, it is possible that mental health courts, to facilitate treatment, could widen the criminal net by extending supervision over a broader swath of individuals than the traditional criminal justice system would otherwise have captured.²⁶ Examining sentencing

23. See Stacey M. Faraci, *Slip Slidin' Away? Will Our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QLR 811, 841–42 (2004) (arguing that subjecting mentally ill defendant to greater surveillance and deprivations of liberty because of his or her mental illness “raises significant equal protection questions” and noting that longer duration of treatment in mental health courts than supervision in traditional systems is particularly problematic because of lack of adversarial and procedural protections in former context).

24. See, e.g., Matthew W. Epperson et al., *Envisioning the Next Generation of Behavioral Health and Criminal Justice Interventions*, 37 INT'L J. L. & PSYCHIATRY 427, 428 (2014) (observing that post-booking diversion programs focus “primarily on diversion of non-dangerous offenders with SMI [serious mental illnesses] from jails and, to a lesser extent, prisons to mental health treatment” and that “[m]ental health courts are the most widely implemented form of post-booking diversion”); Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 L. & HUM. BEHAV. 110, 112 (2011) (classifying mental health courts as a “a specific form of jail diversion” that has “spread prolifically over recent years”). Importantly, this Article uses the term “diversion” to mean diversion from a more intensive entanglement with the criminal justice system to a less intensive one—typically from jail or prison to an alternative to incarceration—as opposed to diversion from the criminal system altogether. For reasons made clear by Professor Christine Scott-Hayward, it is important to keep these two understandings distinct. See Christine Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, BERKELEY J. CRIM. L. 1–2, 6–11 (forthcoming 2017), <https://ssrn.com/abstract=2956021> [<https://perma.cc/5G73-R5FD>].

25. See *supra* note 18 (discussing evidence of more severe sentences for drug court participants, especially for those failing to graduate); *infra* notes 299 & 306 and accompanying text for discussion of possible consequences of intensive supervision and discussion of possible consequences of probation violation, respectively.

26. See, e.g., Stefan & Winick, *supra* note 21, at 518 (argument of Winick) (“There is a risk that mental health courts, if they are seen as an effective means of facilitating the treatment of people in the communities who cause problems as a result of their untreated mental illness, may prompt the police to begin arresting people with mental illness for offenses for which they would not previously have been arrested.”); cf. Transcript of Telephone Interview with Hon. William R. Cunningham, Erie County, Pennsylvania Court of Common Pleas (Dec. 22, 2016), at 9 (on file with author) (“[The mental health court casts a] wider net [than high risk/high need cases] in the sense that you’ll have an offender that really has nui-

differentials allows us to better compare treatment courts' diversionary potential to that of other programs for individuals with mental illness.²⁷

Finally, a nuanced understanding of likely sentencing differentials contributes to conversations on how to improve the next generation of mental health courts. To the extent that mental health courts appear to impose disproportionately severe punishments on individuals convicted of certain grades of offenses—such as misdemeanors—those offense categories should be excluded from these courts' purview.²⁸ Furthermore, evidence of a lack of candid communication about sentencing differentials between defense counsel and defendants could support efforts to strengthen the independence of defense counsel and to buttress the knowing and voluntary nature of decisions to enter mental health court.²⁹

This Article is the first to quantify sentencing disparities between mental health and traditional courts. Using a case study approach, the Article compares how Pennsylvania's Erie County mental health court and county criminal courts sentenced individuals who committed the same offenses and held the same average criminal history score. Mental health court data consist of interviews with key mental health court participants,³⁰ the court's sentencing data from 2010 to 2014,³¹ and information gleaned from court materials.³² Anticipated mental health court

sance charges in the sense that they may be acting out in public a little bit because they're off their meds, the police respond, and there is a scuffle with the police and then there's . . . the next thing you know they're in jail. That's a person that we could help because we could get them stabilized so that they're not in public being disorderly or disruptive or profane or whatever.”). Numerous scholars have discussed the net-widening potential of drug courts. *See, e.g.*, Eaglin, *supra* note 6, at 632–34, 635 (discussing drug courts' net-widening potential); Miller, *supra* note 18, at 1551–61 (assessing the diversionary claims and net-widening potential of drug courts).

27. *See* Skeem et al., *supra* note 24, at 112 & 113 tbl. 1 (characterizing four types of programs for offenders with mental illnesses derived from general criminal justice models).

28. *See, e.g.*, Allison D. Redlich, *The Past, Present, and Future of Mental Health Courts*, in *PROBLEM SOLVING COURTS* 147, 150 (Richard L. Wiener & Eve M. Brank eds., 2013) (discussing recent expansion of mental health courts to felonies and criticism of misdemeanor treatment courts); Bernstein & Seltzer, *supra* note 11, at 154–55, 162 (arguing that mental health courts should be used only when defendants face significant carceral sentences and when part of broad reform of community mental health system).

29. *See infra* note 303 and accompanying text.

30. In particular, I interviewed Judge William R. Cunningham and the following treatment team members: Dante Battles, the Treatment Court Coordinator and Supervisor with the Erie County Adult Probation and Parole Department in Erie County, Pennsylvania; Matthew Cullen, an Assistant District Attorney with the Erie County District Attorney's Office; and Patricia Kennedy, Chief Public Defender of Erie County.

31. I appreciate the generosity of Dante Battles who compiled and supplied this information.

32. *See Treatment Court: Perhaps Your Best Option*, ERIE CTY. (2013) (copy on file with author) (provided by Dante Battles of Erie County, Pennsylvania Adult Probation on March 3, 2016); *Erie County Treatment Court Policy and Procedures*, ERIE CTY. 3

sentences are derived primarily from interview data; the accuracy of those sentences is checked against actual sentencing data for twenty-eight of the thirty-three individuals sentenced to the mental health court over this five-year period.³³ The analysis then uses county-wide sentencing data from the same period, obtained from the Pennsylvania Commission on Sentencing, to compare the sentencing of mental health court participants to the sentencing of individuals with the same average criminal history score convicted of the same offenses in county criminal courts.³⁴ Reflecting the mental health court's practice of accepting both first-degree misdemeanants and felons of all grades, the Article analyzes a total of twelve offenses spanning four offense grades.³⁵ Mental health courts vary widely in their eligibility criteria, procedures, and, presumably, sentencing practices.³⁶ However, this study's findings raise questions that should be asked of mental health courts—and all problem-solving courts—generally.³⁷

(Aug. 2014) (copy on file with author) (provided by Dante Battles of Erie County, Pennsylvania Adult Probation on March 3, 2016). The Article also relied upon past examinations of the Erie County Mental Health Court conducted by the Mercyhurst College Civic Institute. See MARK BEARY & ART AMANN, MERCYHURST CIVIC INST., ERIE COUNTY TREATMENT COURT: MENTAL HEALTH COURT STATUS REPORT: YEAR 2 (2004), <http://www.civicinstitute.org/wordpress/wp-content/uploads/2014/01/ecmh04.pdf> [https://perma.cc/7DEL-RN9M]; KRISTEN BURILLO, MERCYHURST CIVIC INST., ERIE COUNTY TREATMENT COURT: MENTAL HEALTH COURT STATUS REPORT: YEAR 5 (2007), http://www.civicinstitute.org/wordpress/wp-content/uploads/2014/01/ectc_dec07.pdf [https://perma.cc/V7RJ-GTU2]; GEORGE FICKENWORTH & ART AMANN, MERCYHURST CIVIC INST., ERIE COUNTY TREATMENT COURT YEAR 3: MENTAL HEALTH COURT STATUS REPORT 8 (2005), <http://www.civicinstitute.org/ci/docs/ecmh05.pdf> [https://perma.cc/9ZNW-8XL2] (discussing diagnoses and treatment of participants); EMILY REITENBACH & ART AMANN, MERCYHURST CIVIC INST., ERIE COUNTY TREATMENT COURT YEAR 1: MENTAL HEALTH COURT STATUS REPORT (2003), <http://www.civicinstitute.org/ci/docs/ecmh03.pdf> [https://perma.cc/G7KE-HSJB].

33. See *infra* Part I.B & II.

34. See *infra* note 164 and accompanying text (discussing this data set). These were the most recent data available. Telephone Interview with Leigh Tinik, Research and Analysis Manager, Pennsylvania Commission on Sentencing (Oct. 17, 2016). Noting that 68% of mental health court participants from 2010 to 2014 had a prior record score of 0, the analysis uses offense-specific county sentencing data restricted to this criminal history score. See Appendix B; see also *infra* notes 273–80 and accompanying text for a discussion of the extent to which sentencing disparities may exist for those with deeper criminal histories.

35. See *infra* Part II.C. Lesser misdemeanors are also accepted, but this practice is apparently discouraged. See Appendix B; see also Telephone Interview with Dante Battles, Erie County Treatment Court Coordinator (July 13, 2016), at 8 [hereinafter Battles Interview]. Mr. Battles explained that, in “rare cases . . . we have people that have just say one or two offenses and their total maximum is four years, . . . [but] usually [we’re] looking at least [at] misdemeanors of the first degree which carry a maximum penalty of five years.” See Battles Interview, *supra*. He explained that individuals with low prior record scores convicted of lower level misdemeanors “usually they don’t end up in this program, [but instead] they end up on regular supervision.” *Id.*

36. See *supra* note 3 and accompanying text.

37. See *infra* Part III.

The findings are striking. First, the qualitative data show that treatment team members generally expect all mental health court participants to receive sentences at the maximum length of supervision.³⁸ The quantitative data demonstrate, however, that receiving a maximum sentence is likely for misdemeanants but may be less likely for felons.³⁹ Second, comparing anticipated mental health court sentences to those imposed by county criminal courts reveals that anticipated treatment court sentences—for all grades of offense—typically exceed county court sentences by more than a year.⁴⁰ Even for first-degree misdemeanors, the anticipated mental health court sentence exceeds the length of all traditional dispositions for each offense by at least 1.5 years.⁴¹ Third, this comparison suggests that most misdemeanants sentenced to the mental health court would receive probationary, not carceral, sentences in traditional court.⁴² This conclusion appears to be somewhat less applicable to felons sentenced by the mental health court, especially serious felons.⁴³ Fourth, mental health court participants in this dataset with multiple convictions more often received consecutive, as opposed to concurrent, sentences than those sentenced by traditional court.⁴⁴ Fifth, key mental health court actors appear not to comprehend likely sentencing disparities, or the high rate of participant failures, which suggests that these realities may not be communicated to applicants.⁴⁵

This Article consists of three parts. Part I describes the Erie County mental health court, paying particular attention to eligibility criteria, plea bargaining and sentencing practices, lengths and conditions of program phases, incentives and sanctions, graduation rates, dispositional benefits of graduation, and rates of probation revocation. Part II provides an empirical analysis of sentencing in the mental health and county criminal courts. The analysis begins with an evaluation of consecutive sentencing patterns. Next, the analysis compares anticipated and actual mental health court sentences to the average sentences ordered for the same set of crimes by Erie County criminal courts for offenders with similar criminal histories.

38. *See infra* Part I.B.

39. *See infra* Part II.C.

40. *See id.*

41. *See* Appendix A; Figure 4. The one exception—the average jail/probation split sentence imposed on 18% of individuals convicted of terroristic threats—was six months shorter than the anticipated mental health court term. *See* Appendix A; Figure 4.

42. *See* Appendix A; Figure 4; *see also infra* note 225 and accompanying text.

43. *See infra* Part II.B.2. Importantly, this analysis neglects two of the most likely sources of harsh treatment incurred by mental health court participants: the use of jail as a sanction for program noncompliance and the activation or imposition of incarcerative sentences upon mental health court failure. *See supra* note 18; *infra* notes 299, 306 & 307 and accompanying text. Because of these omissions, this examination will understate—perhaps substantially—the severity of sanctions actually experienced by mental health court participants.

44. *See infra* Part II.B.

45. *See infra* Part I.

Part III considers issues arising from findings of sentencing and dispositional disparities and identifies areas for future research.

I. ERIE COUNTY MENTAL HEALTH COURT

Created in 2002, the Erie County mental health court provides supervision, services, and treatment as an alternative sentencing disposition for certain mentally ill defendants charged with misdemeanors or felonies.⁴⁶ Judge William R. Cunningham, who presides over the court, describes the court as fundamentally a “behavior management program.”⁴⁷ The mental health court’s caseload fluctuates between roughly twelve and twenty-five individuals.⁴⁸ The court’s model “treats the severe mental illness as the causative factor in the candidate’s criminal history” and “is based on the philosophy of breaking the cycle of re-offending by untreated mentally ill people.”⁴⁹ Treatment team members seek to provide participants with needed help while holding them “responsible for what they did or a portion of what they did.”⁵⁰ Eligible applicants must have a diagnosis of a

46. See BURILLO, *supra* note 32, at 4; Telephone Interview with Matthew Cullen, Assistant District Attorney Erie County, Pa. (May 23, 2016), at 3 [hereinafter Cullen Interview 1] (estimating that “that at least a third if not most of our people have a felony” and are ideal candidates in the sense that they “may be looking at incarceration or state incarceration but . . . because of their mental illness that may not be necessary or may not be the most effective way to deal with their case”); Telephone Interview with Patricia Kennedy, Chief Public Defender, Erie County, Pa. (May 24, 2016), at 5 [hereinafter Kennedy Interview] (“I think that the vast majority of our mental health court clients were originally charged with felonies that were either withdrawn or pleaded down to misdemeanors.”). The Erie County Treatment Court consists of a mental health court and a drug treatment court component. See *What is Treatment Court*, ERIE CTY. GOV’T, <http://www.eriecountypa.gov/courts/treatment-courts.aspx> [https://perma.cc/EUP7-BDUQ] (last visited May 12, 2016).

47. See Telephone Interview with Hon. William R. Cunningham (Dec. 22, 2016), at 2 [hereinafter Cunningham Interview] (“[A]ny problem solving court is really a behavior management program because it’s governed by a series of sanctions and incentives that you’re hoping to direct their behavior so that they get on the path they need to be on and stay on that path.”); see also *id.* at 5 (“[T]he most important component of their plan is what their mental health treatment is and that they are following that.”).

48. See Kennedy Interview, *supra* note 46, at 4–5.

49. See BURILLO, *supra* note 32, at 4; see also Cullen Interview 1, *supra* note 46, at 2 (“[T]he purpose of the court is to treat the mental . . . illness[,] . . . stabilize this person[,] . . . and then the criminal behavior will dissipate.”); Cunningham Interview, *supra* note 47, at 3 (observing that, “if there is no correlation between [individuals’ mental illness and their crimes] then there’s really no purpose in having them in treatment court”). For a discussion of research suggesting the fallacy of assuming that mental illness drives criminal behavior, see Johnston, *supra* note 1, at 558–75.

50. See Kennedy Interview, *supra* note 46, at 2. The Treatment Team consists of Treatment Court Coordinator Dante Battles, Assistant District Attorney Matthew Cullen, Chief Public Defender Patricia Kennedy, mental health and substance abuse caseworkers and managers, and individuals from probation and various state agencies. See *Treatment Team*, ERIE CTY. GOV’T, <http://www.eriecountypa.gov/>

serious and persistent mental illness,⁵¹ and the circumstances of the instant offense or of past offenses must strongly indicate that mental illness was a contributing factor in the offender's behavior.⁵² The probation office assesses each applicant with a risk/needs assessment tool, and the treatment team excludes individuals "posing a risk of harm in the community, including but not limited to physical violence and sexual offenses," as well as those "whose history demonstrates a strong likelihood of recidivism, an inability to abide by the requirements of community supervision[,] or who [are] not amenable to treatment."⁵³ No prior record score is automatically disqualifying,⁵⁴ but a defendant may be ineligible due to prior firearms convictions, more than two prior felony convictions, a significant history of misdemeanor convictions, or when the instant offense or any prior conviction (including a previous juvenile adjudication) concerns a violent felony.⁵⁵ Dante Battles, a Supervisor with the Erie County Adult Probation and Parole Department and the Erie County Treatment Court Coordinator, observed that most mental health court participants have lower criminal history scores and have committed less serious offenses than those accepted to the Erie County drug court, which targets "high risk/high need" offenders.⁵⁶

courts/treatment-courts/treatment-team.aspx [https://perma.cc/6ME7-5FFQ] (last visited Aug. 12, 2017).

51. See *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 3. For an explication of the diagnoses and treatment of past participants, see BURILLO, *supra* note 32, at 5, 13 & 13 fig.13 (listing applicable Axis I and II diagnoses and diagnoses and treatment of program participants); FICKENWORTH & AMANN, *supra* note 32, at 8 & 8 figs.12–13 (discussing diagnoses and treatment of participants); REITENBACH & AMANN, *supra* note 32, at 8 (detailing program requirements including twice weekly urinalysis).

52. See BURILLO, *supra* note 32, at 4; Cullen Interview 1, *supra* note 46, at 2.

53. See *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 4. Additional ineligible individuals include juveniles, nonresidents of Erie County, prior graduates of the Treatment Court who are no longer under court supervision, and those who committed the instant offense while on probation or parole. See *id.* at 4.

54. See Cullen Interview 1, *supra* note 46, at 6–7.

55. See BURILLO, *supra* note 32, at 4.

56. See Battles Interview, *supra* note 35, at 4 (indicating that most mental health court participants have prior record scores of 0 or 1). Supervisor Battles explained that, because the primary criterion for participation in the mental health court is the individual's severe mental illness, the court tends to accept less serious offenses and individuals with "much lower" prior record scores than those in the drug court, where accepting "high risk/high need" offenders is more of a priority. See *id.* at 5; see also Cunningham Interview, *supra* note 47, at 8–9 (similar observation). Correctional best practices suggest that high-risk/high-need offenders should be the primary beneficiaries of resource-intensive criminal justice responses such as mental health courts. See, e.g., JAMES BONTA & D.A. ANDREWS, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION, PUBLIC SAFETY CANADA 11 (2007), https://cpoc.memberclicks.net/assets/Realignment/risk_need_2007-06_e.pdf [https://perma.cc/CD6U-UGQT] ("The risk principle speaks of who should be treated (the higher risk offender), the need principle speaks to what should be treated (criminogenic needs) and the responsivity princi-

A. *Criminal Eligibility Criteria*

Regardless of the seriousness of the instant offense, participation in the Erie County mental health court is imposed as a condition of probation after the defendant pleads guilty.⁵⁷ The court accepts a wide range of misdemeanor and felony charges, ranging from driving violations to burglary and arson.⁵⁸ Particularly common charges include retail theft, theft, aggravated assault, simple assault, driving under the influence, disorderly

ple helps determine how to treat.” (emphasis omitted)); Kerry Meyer, *Hennepin County Criminal Mental Health Court: Experiences in a Large Metropolitan Mental Health Court*, 42 MITCHELL HAMLINE L. REV. 485, 521 (2016) (“Problem-solving treatment courts are the best way to supervise criminal defendants in the community who present with high needs and a high risk to re-offend absent intervention.”); cf. Mary Ann Campbell et al., *Multidimensional Evaluation of a Mental Health Court: Adherence to the Risk-Need-Responsivity Model*, 39 L. HUMAN BEHAV. 489, 495–500 (2015) (finding that MHC case plans only moderately adhered to risk-need-responsivity model and also finding small but significant improvements in criminogenic needs of MHC completers relative to participants who were prematurely discharged or referred but not admitted to program). For a discussion of the service principles of the risk-need-responsivity model, see James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 125 (1998); D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 10–11 (2006) (identifying most powerful risk and need factors that drive criminal offending and should determine who receives treatment).

57. See *Erie County Treatment Court Policies and Procedures*, *supra* note 32; Cullen Interview 1, *supra* note 46, at 5.

58. See Cullen Interview 1, *supra* note 46, at 3–5 (discussing the court’s acceptance of various kinds of criminal offenses); *id.* at 6 (stating that burglary cases, but not arson cases, have been accepted by mental health court in the recent past); Kennedy Interview, *supra* note 46, at 2–3, 5 (discussing which cases are acceptable to mental health court and consideration process); *id.* at 10 (noting that “we have had some people in mental health court that have committed violent crimes such as robbery and burglary”); *supra* note 46; *infra* note 59. Previous studies have catalogued the offenses accepted by the Erie County mental health court in the past. See BEARY & AMANN, *supra* note 32, at 8 (reporting that charges included DUI, theft, assault, burglary, disorderly conduct, child endangerment, terroristic threats, arson, bad checks, harassment, defiant trespass, criminal attempt, resisting arrest, and receiving stolen property); BURILLO, *supra* note 32, at 14 & 14 fig.14 (finding that participants were charged with retail theft, theft, aggravated assault, driving under the influence [DUI], criminal trespassing, resisting arrest, bad checks, burglary, disorderly conduct, driving violation, endangering the welfare of a child, false reports, harassment, identity theft, illegal firearms, impersonating law enforcement, reckless endangerment, risking a catastrophe, possession of marijuana, criminal mischief, simple assault, stalking, terroristic threats, unauthorized use of a motor vehicle, drug violation with device); FICKENWORTH & AMANN, *supra* note 32, at 9 fig.16 (finding participants were charged with theft, retail theft, DUI, assault, simple assault, endangering a child, burglary, defiant trespass, arson, bad checks, harassment, solvents, criminal attempt, habitual offender, receiving stolen property, firearms, sex crimes, corruption of minors, resisting arrest, and terroristic threats); REITENBACH & AMANN, *supra* note 32, at 8 (“The type of offenses committed included DUI, burglary, disorderly conduct, child endangerment, harassment, terroristic threats, and arson. Severe mental illness is the major causative factor in committing the offenses for this population.”).

conduct, and resisting arrest.⁵⁹ The court's data from 2010 through 2014 suggest that most participants fall into Level 2 of Pennsylvania's Sentencing Guidelines, which call for county incarceration, restrictive intermediate punishment, or restorative sanctions such as probation.⁶⁰

B. *Standardized Plea Bargaining and Sentencing Process*

Erie County has consolidated and standardized the plea bargaining and sentencing processes for mental health court participants.⁶¹

1. *Treatment Team Members' Explanations of Plea Bargaining Process*

When a defendant applies to the court, her application is sent to Assistant District Attorney Matthew Cullen.⁶² As ADA Cullen explained:

[A]ll of the applications for mental health court flow through me. If it's not a case that I'm specifically assigned to in my caseload, I will pull the case from another attorney and usually, pretty much like 99% of the time[,] . . . I will be the person from our office that decides . . . [whether] we recommend this person for . . . mental health court and what the plea offer is going to be.⁶³

ADA Cullen will negotiate the plea bargain with the public defender assigned to a particular defendant; the defense representation function is not consolidated in one attorney.⁶⁴

ADA Cullen does not view mental health court participation as punitive.⁶⁵ Rather, he works to secure the term of supervision he deems appro-

59. See BEARY & AMANN, *supra* note 32, at 8; BURILLO, *supra* note 32, at 14 & 14 fig.14; FICKENWORTH & AMANN, *supra* note 32, at 4 fig.1; Cullen Interview 1, *supra* note 46, at 3–4 (confirming that commonly accepted offenses include retail theft, theft, aggravated assault, simple assault, driving under the influence, disorderly conduct, and resisting arrest).

60. See 204 PA. CONS. STAT. § 303.16(a) (2016).

61. See Telephone Interview with Matthew Cullen, Assistant District Attorney, Erie County, Pa. (May 24, 2016), at 4 [hereinafter Cullen Interview 2]. Judge Cunningham explained that utilizing the same ADA for all mental health court admissions carries many advantages, including uniformity in exercise of discretion, consistency in plea bargains offered, familiarity with diagnoses and community resources, and consistent application of a compassionate mindset. See Cunningham Interview, *supra* note 47, at 4.

62. See *id.* at 4.

63. Cullen Interview 2, *supra* note 61, at 5.

64. See Kennedy Interview, *supra* note 46, at 1–2 (explaining that “the individual public defenders who have at least established a rapport with the client . . . from the preliminary hearing on through the formal arraignment” are in a better position to secure favorable and fair plea bargains).

65. See Cullen Interview 1, *supra* note 46, at 10 (“I try not to approach it so much from a punitive standpoint of saying that okay this what they deserve as like punishment for their crime . . . , but more like what do I think would best mitigate the risk that they impose in terms of supervision.”); Cullen Interview 2, *supra* note 61, at 1 (“For mental health court, . . . the traditional sort of notions of punish-

appropriate for the defendant's risks and needs.⁶⁶ Depending on the situation, ADA Cullen generates the period of supervision either by "go[ing] with the more serious charge or the one that gives this defendant more exposure" or by working with several alleged or possible charges.⁶⁷ He explained, "[U]sually what we like to do is give [participants] enough time that they can get through the program, graduate from the program and still have some supervision after that."⁶⁸ Other treatment team members expressed that periods of supervision are set to ensure that individuals comply with treatment "for a significant amount of time to make sure that they really do get to the point where they are stable and can more or less function independently"⁶⁹ For this reason, the treatment team strongly prefers cases permitting at least four or five years of supervision.⁷⁰

ment and that kind of stuff are sort of set aside and so I'm more focused on . . . how much time are we looking for [supervision].").

66. See Cullen Interview 1, *supra* note 46, at 10 ("[M]y calculus is pretty much in terms of time. How much time do I think this person needs to be given supervision based on their needs and their risks."); Cullen Interview 2, *supra* note 61, at 3 ("I'm not really so concerned about what the charges are necessarily but more so what's the [statutory] maximum and how do we get to a period of probation that we think is appropriate.").

67. See Cullen Interview 2, *supra* note 61, at 2–3 (discussing several approaches for generating satisfactory term of exposure). Despite the importance of the period of exposure, ADA Cullen suggested that he is as likely to agree to a reduction in charges for mental health court participants as for other defendants charged with similar offences, "potentially even more or so." Cullen Interview 2, *supra* note 61, at 1; see also *id.* at 1 ("If somebody is charged with a felony and they don't have a felony on their record or they don't have any kind of record I will . . . usually try to avoid giving a felony for a plea because obviously that can have a pretty adverse effect on their ability to find work and other sorts of things."). While charge bargaining might not have been available to mental health court participants in the past it is "not necessarily the case" that ADA Cullen will be less likely to reduce the most serious charge to gain more sentencing exposure for a mental health court participant. See *id.* at 2, 6. Indeed, Chief Public Defender Kennedy emphasized that charge bargaining is common and expected. See Kennedy Interview, *supra* note 46, at 6 (agreeing that charge bargaining is common practice and commenting: "I think in any case that comes to the courts in Erie County they are always looking to try to bargain things away to get a plea. . . . We don't have a true diversion [whereby] you can successfully complete the program and we'll dismiss the case. So, as the attorneys we are always looking to try to get the best bargain for our clients, especially when they are entering into this program."); *id.* at 5 ("I think that the vast majority of our mental health court clients were originally charged with felonies that were either withdrawn or pleaded down to misdemeanors.").

68. Cullen Interview 1, *supra* note 46, at 9.

69. See Battles Interview, *supra* note 35, at 18; see also Cunningham Interview, *supra* note 47, at 5 ("I try to design a sentence, especially in the mental health side, that is reasonable in length but allows enough time to make sure that we can have the resource in place to, as I always say, we need to get you on the path you need to be on and stay on that path."); Kennedy Interview, *supra* note 46, at 8 ("I think the time that we have in mental health court is more designed for, let's make sure they complete the program and let's make sure they are stable.").

70. See Cullen Interview 1, *supra* note 46, at 9 ("[U]sually I'm looking for four years at the least So obviously the judge gives them the sentence, but I would

2. *Mental Health Court Judge's Sentencing Process*

Judge Cunningham, who has presided over the Erie County mental health court since its inception,⁷¹ sentences all individuals admitted to the court.⁷² When interviewed, Judge Cunningham explained that, in his early years on the treatment court, he would regularly impose the maximum supervisory sentence permitted for each offense and order multiple sentences to run consecutively.⁷³ This practice often resulted in sentences of thirty or forty years in length, which provided useful “flexibility” in responding to participants’ behavioral and treatment needs.⁷⁴ Because these terms of supervision dwarfed those that individuals would otherwise have received, however, defendants became unwilling to participate in the treatment court.⁷⁵ As a result, Judge Cunningham reformed his sentencing practices and now tends to order sentences spanning only five to ten years.⁷⁶ To reach this supervision period, Judge Cunningham—at least when confronted with individuals with single charges of conviction—will typically order the maximum term of supervision for misdemeanors and,

give them a plea that would expose them for four years. If for some reason based on the charges, if it was less than that then we would look for at least two years.”); *see also* Battles Interview, *supra* note 35, at 8 (stating that “we’re usually looking [at] at least misdemeanors of the first degree which carry a maximum penalty of five years” and saying there may be “a handful” of cases which involved shorter probationary terms). If the supervision period is too short, an individual can “max out” of supervision without having completed mental health court. *See* Cullen Interview 1, *supra* note 46, at 11.

71. *See* Cunningham Interview, *supra* note 47, at 1.

72. *See* Cullen Interview 1, *supra* note 46, at 5.

73. *See* Cunningham Interview, *supra* note 47, at 5 (“When I first started doing drug court I basically gave everybody a community based sentence but I gave them the maximum amount of time available for every offense that they entered a plea to, which resulted in a number of people having probationary periods of 30 and 40 years. . . . [A]nd my thought was, that just provides us the flexibility that if someone isn’t completing the program then . . . we can still have all our options available. Well over time I realized that that really was a disincentive for people, they didn’t want to go into Treatment Court if they knew they were going to have to be on probation for 30 or 40 years. . . . [S]o then when I realized that I needed to modify that approach I did it. So now . . . I try to design a sentence, especially in the mental health side, that is reasonable in length but allows enough time to make sure that we can have the resource in place to, as I always say, we need to get you on the path you need to be on and stay on that path.”).

74. *See id.*

75. *See id.* Treatment team members concurred that the decades of probation that Judge Cunningham used to impose at sentencing were so “obviously abnormal” that they deterred mentally ill defendants from applying to the mental health court. Cullen Interview 1, *supra* note 46, at 12; Kennedy Interview, *supra* note 46, at 20 (“[T]here are more members of the bar association here and even members of this office who remember the inception of treatment courts when the judge was giving people 50 years of probation, pretty good. Those people are still very hesitant to apply people to the program.”).

76. *See* Cunningham Interview, *supra* note 47, at 5 (stating that he crafts sentences “to be about five years of supervision or if they have a lot of restitution they owe it might be up to ten years, but you know I don’t go past ten years in most cases”); *id.* at 7.

depending on the offense and underlying conduct, third-degree felonies.⁷⁷ Longer sentences may be warranted for defendants who present a high risk to the public, commit serious crimes, have greater treatment needs, or have steep restitution obligations.⁷⁸ In reaching the desired supervision length, the judge may order multiple sentences to be served concurrently or consecutively.⁷⁹ Judge Cunningham characterized the exact sentence for a given charge or set of charges as “almost just an academic point because the original sentence is always going to be of a sufficient amount of time that we can work with the person, and if they do get revoked, there is still going to be time . . . to work with them one way or the other.”⁸⁰

As sentences sometimes extend beyond the five- to ten-year range and may be reached through a variety of methodologies,⁸¹ treatment team members tend to assume for purposes of plea bargaining that the court will sentence defendants to the longest supervision terms authorized by Pennsylvania law.⁸² State statute permits probationary sentences of twenty years for a first-degree felony, ten years for a second-degree felony, seven years for a third-degree felony, five years for a misdemeanor of the first degree, two years for a misdemeanor of the second degree, and one year for a misdemeanor of the third degree.⁸³ Though a defendant may ulti-

77. *See id.* at 13 (“Now if they have like a misdemeanor in the second degree, which is a two year maximum, I’d have to give them that maximum sentence because otherwise we wouldn’t have enough time to work with the person.”); *id.* (agreeing that, if individual was convicted of single first-degree misdemeanor, he would sentence him or her to a five-year supervisory term); *id.* at 13–14 (explaining that whether he will impose the maximum supervisory term of seven years for a single third-degree felony will depend upon the nature of the charge (particularly whether it involves violence), the nature of the underlying conduct, and treatment team members’ recommendations).

78. *See id.* at 6–7.

79. *See id.* at 6.

80. *See id.* at 14; *see also infra* Part I.G (Revocation of Probation).

81. *See supra* note 79 and accompanying text; *infra* notes 88–89 and accompanying text.

82. *See* Cullen Interview 1, *supra* note 46, at 10 (“I can pretty much rely on [the judge] giving [mental health court participants] the statutory maximum term of supervision, and so that’s kind of how I’ll formulate a plea. Now sometimes he’ll go below that but I guess I approach my plea offers assuming that he’s [going to] give them the statutory maximum.”); Cullen Interview 2, *supra* note 61, at 4 (“So, if I give somebody a sentence that exposes them to six years maximum the judge is probably going to give them that.”); *see also* Battles Interview, *supra* note 35, at 1 (agreeing that Judge Cunningham tends to sentence defendants accepted into mental health court to maximum authorized terms of supervision); Kennedy Interview, *supra* note 46, at 6–7 (explaining how, previously, person charged with three third-degree felonies would receive twenty-one years of probation but now would receive concurrent sentences such that he or she would serve only seven years).

83. *See* 18 PA. CONS. STAT. § 1103 (2016) (sentencing for felonies); 18 PA. CONS. STAT. § 1104 (2016) (sentencing for misdemeanors); *see also* Battles Interview, *supra* note 35, at 3 (commenting that the maximum sentence typically “doesn’t really extend beyond . . . 10 or 15 years, but of course we still see the

mately receive a shorter probationary term for a given offense, team members opined that defendants should be prepared to receive the maximum sentence.⁸⁴

Treatment team members differed in their expectations regarding consecutive sentencing.⁸⁵ Because the primary aim of the judge—like that of the treatment team—is to impose supervision of a particular duration, the likelihood that an individual will receive a consecutive sentence may vary by the number and severity of charges.⁸⁶ According to Chief Public Defender Patricia Kennedy, the probationary terms ordered by Judge Cunningham typically exceed those imposed by some judges but perhaps not those of others, particularly when restitution is at issue.⁸⁷

3. *Empirical Analysis of Mental Health Court Sentencing*

An analysis of the court's sentencing data from 2010 to 2014 reveals that participants' total periods of supervision varied between 2.5 and 17 years, with an average supervisory period of 7.42 years and a median of 6.91 years.⁸⁸ Two of the 28 participants over this time period received sentences exceeding ten years.⁸⁹

Fifty percent (14/28) of persons sentenced to the mental health court between 2010 and 2014 were convicted of a single offense per sentencing proceeding.⁹⁰ Analysis reveals that 57.1% (8/14) of single-offense participants received sentences of at least 97% of the maximum length of supervision.⁹¹ More specifically, 85.7% (6/7) of single-offense misdemeanants

felony one case where [the judge] may give a 20 year stamp on it"). Defendants are aware of these periods of exposure: maximum sentences for each charge are included in the standard plea sheet prepared by the District Attorney's Office. *See* Cullen Interview 2, *supra* note 61, at 6.

84. *See* Battles Interview, *supra* note 35, at 3 (observing that "maybe if someone had no prior criminal history but had a serious charge [the judge] might go less than the maximum, but it depends on what the maximum is"); *supra* note 82 and accompanying text.

85. *See* Cullen Interview 2, *supra* note 61, at 5 (noting that Judge Cunningham's typical sentencing pattern is to order consecutive sentences and that ADA Cullen anticipates this sentencing practice in his plea bargains, although the judge "has been giving more concurrent sentences lately . . . maybe [over] the last three years"); Kennedy Interview, *supra* note 46, at 7 (noting Judge Cunningham's current sentencing practice of ordering concurrent sentences).

86. *See* Battles Interview, *supra* note 35, at 2–3 (explaining that, when there are multiple charges, Judge Cunningham tends to sentence defendant to maximum authorized term of supervision for most serious charge and, if that is a very serious charge, then any additional charges would likely carry concurrent sentences; however, if defendant pleads guilty to multiple low-grade offenses, then judge might order sentences to run consecutively). *But see infra* Part II.B (analyzing patterns of consecutive sentencing in five years of mental health court data).

87. *See* Kennedy Interview, *supra* note 46, at 7–8.

88. *See* Appendix B.

89. *See id.* (showing sentences of eleven and seventeen years).

90. *See* Appendix B (showing that 14 of 28 participants were convicted of two or more offenses per sentencing proceeding).

91. *See id.*

received the maximum (or nearly maximum) permissible sentence, while 28.5% (2/7) of single-offense felons did.⁹²

Fifty percent of persons sentenced to the mental health court over this period were convicted of multiple offenses.⁹³ Analysis shows that 71.4% (10/14) of multiple-offense participants received—for their most serious offense—sentences of at least 97% of the maximum length of supervision.⁹⁴ Specifically, 90.9% (10/11) of multiple-offense misdemeanants received at least 97% of the maximum sentence for their most serious offense; contrarily, none of the multiple-offense felons did.⁹⁵

Of those with multiple convictions, 92.9% (13/14) of mental health court defendants received at least one consecutive sentence.⁹⁶ For more detail on consecutive and concurrent sentencing practices in the Erie County mental health court—and how these practices compare to those in Erie County criminal courts generally—see Part II.B.

C. *Length and Conditions of Phases of Program*

The Erie County mental health court program involves “intensive and comprehensive supervision, case management, and treatment.”⁹⁷ Participants are given an individualized treatment plan, must comply with treatment directives, and must report to the Treatment Court Probation Officer and case manager at least twice a month.⁹⁸ The mental health court may require periods of inpatient treatment or transitional housing.⁹⁹ Prior to graduation, the program consists of three phases with decreasing responsibilities.¹⁰⁰ The goal of Phase I is the stabilization of mental and physical health and the discontinuation of any drug use.¹⁰¹ In

92. *See id.*

93. *See id.* (showing that 14 of 28 participants were convicted of two or more offenses per sentencing proceeding). On the other hand, 28.82% of individuals with a PRS of 0 sentenced in Erie County criminal courts between 2010 and 2014 had multiple offenses of conviction (1235 out of 4285 sentenced defendants). *See* PA. COMMISSION ON SENT'G, STATEWIDE SENTENCING DATA: 2010–14 (copy on file with author).

94. *See* Appendix B.

95. *See id.*

96. *See id.*; *see also infra* Part II.B (analyzing patterns of consecutive sentencing in mental health and traditional courts).

97. *See* BURILLO, *supra* note 32, at 4.

98. *See Erie County Treatment Court Policy and Procedures, supra* note 32, at 4–5; *Treatment Court: Perhaps Your Best Option, supra* note 32.

99. *See Treatment Court: Perhaps Your Best Option, supra* note 32; Kennedy Interview, *supra* note 46, at 8–9 (describing thirty-day and six-month residential treatment options for participants).

100. *See Erie County Treatment Court Policy and Procedures, supra* note 32, at 5; *Treatment Court: Perhaps Your Best Option, supra* note 32.

101. *See* E-mail from E. Lea Johnston to Dante Battles, Erie County Treatment Court Coordinator, (Aug. 12, 2016, 12:48 p.m. EST) (on file with author); *see also* E-mail from Dante Battles, Erie County Treatment Court Coordinator, to E. Lea Johnston (Aug. 12, 2016, at 01:07 p.m. EST) (on file with author) (stating that he modified the phase descriptions “to be more accurate”).

Phases II and III, participants aim to remain drug free and maintain mental health stability.¹⁰² All three phases involve urinalysis two to three times per week, individual and group therapy, attendance at a support group, a needs assessment, and payment of court fees and fines.¹⁰³ The frequency of court hearings decreases from weekly in Phase I to every four weeks in Phase III.¹⁰⁴ The court may impose sanctions for noncompliance.¹⁰⁵

Graduates vary in their progression through the first three phases of the Erie County mental health court.¹⁰⁶ The treatment court policy and procedures manual advises individuals that their progress through each phase is “directly contingent upon the participant’s effort and investment in recovery”¹⁰⁷ but represents that participants typically complete these phases in fifteen months.¹⁰⁸ Interestingly, treatment team members estimated that the mental health court program takes “around two years” or “a year and a half to two years” to complete.¹⁰⁹ However, data from July 2013 through June 2016 show that graduates took between 14.8 months and 19.4 months to complete Phases I through III.¹¹⁰ The average completion period was 16.4 months.¹¹¹ Previous studies of the Erie County mental health court by the Mercyhurst Civic Institute found an average program length of 21.57 months for those who graduated between July

102. See E-mail from E. Lea Johnston to Dante Battles, *supra* note 101; E-mail from Dante Battles to E. Lea Johnston, *supra* note 101.

103. See E-mail from E. Lea Johnston to Dante Battles, *supra* note 101; E-mail from Dante Battles to E. Lea Johnston, *supra* note 101.

104. See E-mail from E. Lea Johnston to Dante Battles, *supra* note 101; E-mail from Dante Battles to E. Lea Johnston, *supra* note 101.

105. See E-mail from E. Lea Johnston to Dante Battles, *supra* note 101; E-mail from Dante Battles to E. Lea Johnston, *supra* note 101.

106. See *infra* notes 111–13 and accompanying text.

107. See *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 8.

108. See *id.* at 8 (“Generally, it takes up to six months to complete Phase I; five months to complete Phase II and four months to complete Phase III.”); see also *id.* (“Because of the nature of recovery, it cannot be expected that a participant will complete Treatment Court within twelve months.”).

109. See Battles Interview, *supra* note 35, at 7 (stating that “the average length in the program is usually a couple of years, twenty-something months, maybe a little more”); *id.* at 8 (characterizing the “time for [mental health court participants] to be in the program and to complete it” as “usually around two years”); Kennedy Interview, *supra* note 46, at 7, 18 (estimating, “on average, a year and a half to two years”); see also Cullen Interview 1, *supra* note 46, at 9 (“[W]e’re looking at about . . . a little over a year to like—a year and a half to two years on average of somebody being able to complete the program. So anywhere from I guess sixteen to you know, let’s say twenty months.”).

110. See E-mail from Dante Battles, Erie County Treatment Court Coordinator, to E. Lea Johnston (July 5, 2016, 04:06 p.m. EST) (on file with author) (reporting that the average program length was 457 days (15.0 months) for graduates from July 2013 to June 2014, 451.3 days (14.8 months) for graduates from July 2014 to June 2015, and 589 days (19.4 months) for graduates from July 2015 to June 2016).

111. See *id.*

2006 through June 2007,¹¹² and an average length of 36.3 months for graduates and current participants assessed between March 2004 and February 2005.¹¹³ The court holds graduations twice a year, so, if a person misses one graduation date, participation in the program is necessarily extended by a minimum of six months.¹¹⁴

After the successful completion of these three phases, each graduate participates in an additional post-graduation phase, which may last for the remainder of her sentence.¹¹⁵ Phase IV requires appearing quarterly for a judicial status review hearing, monthly check-ins plus random field visits by a probation officer, a reduced number of random drug tests, and compliance with recommended treatment conditions, including medication compliance and attendance at all meetings and recommended therapy sessions with mental health professionals.¹¹⁶ When describing the requirements of this phase, court materials publicize only the quarterly status review hearings and reduced number of random drug tests.¹¹⁷ Depending on the individual's remaining sentence, Phase IV may last only a few months.¹¹⁸ At most, it may last up to eighteen years.¹¹⁹

D. *Incentives and Sanctions*

The Erie County mental health court uses a variety of incentives and sanctions to encourage program compliance. Rewards for "sober, responsible behavior" include applause, praise, tickets to a monthly drawing, passport stamps, tickets to community events, decreased supervision or community service hours, gift certificates or YMCA passes, and advancement to the next program phase.¹²⁰ Treatment noncompliance, positive drug tests, failure to meet supervision requirements, or other violations may be met with a range of graduated sanctions. Sanctions include judi-

112. See BURILLO, *supra* note 32, at 8 fig.3, 16 (finding that graduates spent average of 21.57 months (656 days) in mental health court—with shortest duration being 15.22 months (463 days) and longest being 37.84 months (1151 days)—despite published court materials advertising an estimated maximum length of fourteen months and a minimum length of twelve months).

113. See FICKENWORTH & AMANN, *supra* note 32, at 11 (finding average stay for graduates and current participants of 36.3 months, "the shortest being 18 months, and the longest at 63 months," despite published court materials advertising estimated maximum length of fourteen months and minimum length of twelve months).

114. See Kennedy Interview, *supra* note 46, at 19.

115. See Cullen Interview 1, *supra* note 46, at 12.

116. See Battles Interview, *supra* note 35, at 17.

117. See *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 5.

118. See Cullen Interview 1, *supra* note 46, at 9 (stating that minimum term of supervision is two years). ADA Cullen prefers a minimum term of supervision of at least four years. See *id.* at 9.

119. See *id.* at 12 ("[G]enerally I would say the maximum [term of supervision] we're looking at now is usually around 15 years of supervision; 15-20 [years] would be the maximum."); see also Battles Interview, *supra* note 35, at 11 (similar).

120. See *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 7.

cial admonishment in open court, assignment of an essay, increased treatment or supervision requirements, increased frequency of drug testing, demotion to a prior phase of the program, community service, fines, electronic monitoring, intensive supervision, confinement in prison, and, ultimately, termination of the program.¹²¹

E. *Graduation Rates*

Recent graduation rates for the Erie County mental health court are low. While studies from 2005 and 2007 found graduation rates of 55.6% and 68.2%, respectively, recent graduation rates hover between 30.0% and 37.5%.¹²² Notably, in recent years pre-graduation revocation rates—the rate at which participants are terminated from the program prior to graduation and have their probation revoked—have ranged between 22.7% and 50.0%, commonly equaling or exceeding graduation rates.¹²³ To graduate, an individual must complete the first three phases of the program, achieve at least ninety consecutive days of sobriety, and be current on fines and costs.¹²⁴ A study of the court's first year found that substance abuse often accounts for noncompliance, with approximately 25% of offenders relapsing into drugs or alcohol during their time in the program.¹²⁵

121. *See id.*

122. *See* Table 1. No offenders graduated from the program in the first two years of its existence. *See* BEARY & AMANN, *supra* note 32, at 4; REITENBACH & AMANN, *supra* note 32, at 9.

123. *See supra* note 122 and accompanying text; Table 1.

124. *See Erie County Treatment Court Policy and Procedures, supra* note 32, at 9. Prior to graduation, an individual also must write an essay describing her experience in treatment court and complete an exit survey. *See id.* at 9.

125. *See* REITENBACH & AMANN, *supra* note 32, at 9; *see also* Cullen Interview 1, *supra* note 46, at 15–16 (agreeing that noncompliance often stems from dirty urine tests); Cunningham Interview, *supra* note 47, at 11 (stating that violations typically include drug relapse or mental decompensation).

TABLE 1: OUTCOMES IN ERIE COUNTY MENTAL HEALTH COURT¹²⁶

Outcomes	Mar. 2004– Feb. 2005 ¹²⁷	July 2006– June 2007 ¹²⁸	July 2013– June 2014	July 2014– June 2015	July 2015– June 2016
Graduated (% , n)	55.6% (10/18)	68.2% (15/22)	37.5% (3/8)	30.0% (3/10)	37.5% (3/8)
Revoked prior to graduation (% , n) ¹²⁹	44.4% (8/18)	22.7% (5/22)	50.0% (4/8)	30.0% (3/10)	37.5% (3/8)
Transfer to other probation services (% , n)		9.1% (2/22)	12.5% (1/8)	10.0% (1/10)	
Transfer to another problem-solving court (% , n)				20.0% (2/10)	25.0% (2/8)
Sentence expired prior to program completion (% , n)				10.0% (1/10)	

Crucially, neither ADA Cullen nor Chief Public Defender Kennedy was aware of the recent low graduation rates.¹³⁰ The Chief Public Defender, while admitting a lack of knowledge of graduation rates, expressed that she “find[s] the mental health court graduate rate to be fairly high” and noted her belief that participants “really, really succeed.”¹³¹ As the Chief Public’s Defender’s job as a member of the treatment team is to “sell” the mental health court to potential applicants, this misinformed and apparently inaccurate perception is troubling.¹³²

126. See Email from Dante Battles, Erie County Treatment Court Coordinator, to E. Lea Johnston (July 8, 2016, 03:36 p.m. EST) (on file with author) (conveying outcomes for July 2013 through June 2016); Email from E. Lea Johnston to E. Lea Johnston (July 8, 2016, 03:50 p.m. EST) (on file with author) (documenting one correction to information conveyed by Supervisor Battles in phone conversation).

127. See FICKENWORTH & AMANN, *supra* note 32, at 4 fig. 1.

128. See BURILLO, *supra* note 32, at 6.

129. Notably, these figures do not include revocations of probation that occur *after* graduation. For an analysis of this variable in a different data set, see Table 2 (showing that—of Erie County mental health court participants sentenced between 2010 and 2013—35.7% had their probation revoked prior to graduation, while 10.7% had their probation revoked after graduation, for a total revocation rate of 46.4%).

130. See Cullen Interview 1, *supra* note 46, at 15; Kennedy Interview, *supra* note 46, at 13.

131. See Kennedy Interview, *supra* note 46, at 13.

132. See *id.* at 1 (“I’m the resource and the officer in the office for the purpose of maybe selling mental health court to either the clients or to the victim at the time of the preliminary hearing.”); *id.* at 11 (describing how she tries to “sell” mental health court to defendants).

F. *Dispositional Benefits of Graduation*

Successful graduation and satisfaction of probation conditions may carry important dispositional benefits for mental health court participants. Unlike other mental health courts that accept misdemeanors,¹³³ the Erie County court does not offer a dismissal of charges or expungement of conviction at any point in the process.¹³⁴ Court materials advertise two possible dispositional benefits: reduction of sentence at graduation and early discharge from supervision during the fourth phase of the program.¹³⁵ Although the treatment brochure states that “[i]t is likely upon graduation from Treatment Court that your remaining sentence will be reduced,”¹³⁶ ADA Cullen and Supervisor Battles report that such reductions are rare.¹³⁷

133. See, e.g., *Alachua County Mental Health Court*, OFF. OF THE ST. ATT’Y, EIGHTH JUD. CIR., <http://www.sao8.org/mental.html> [<https://perma.cc/9AE8-WGP2>] (last visited Aug. 2, 2016) (“The defendant’s participation will end upon the successful completion of the discharge plan. The charges will then be dismissed by the State Attorney or the violation of probation will be dismissed by the Mental Health Court judge.”); *Mental Health Diversion Program*, TEMPE MUN. COURT, <http://nacmconference.org/wp-content/uploads/2014/05/Tempe-Mental-Health-Court-brochure.pdf> [<https://perma.cc/L35T-AM7A>] (last visited Aug. 22, 2017) (“If the defendant successfully completes the Mental Health Court Program, he/she will receive a certificate of completion from the court and charges will be dismissed.” (emphasis omitted)).

134. See Cullen Interview 1, *supra* note 46, at 14.

135. See *Treatment Court: Perhaps Your Best Option*, *supra* note 32; *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 9.

136. See *Treatment Court: Perhaps Your Best Option*, *supra* note 32; cf. *Erie County Treatment Court Policy and Procedures*, *supra* note 32, at 9 (stating that “consideration will be given to a reduction in the graduate’s remaining sentence” at graduation); *id.* at 7 (listing “possible reduction of remaining sentence at graduation” and “possible early discharge from further supervision” as potential rewards for positive behavior). Mental health court applicants also receive this message orally from Judge Cunningham and members of the treatment team. See Cullen Interview 1, *supra* note 46, at 13 (stating that he informs the defense attorney that the defendant “can earn an early discharge . . . if [he or she is] successful upon graduation”). According to ADA Cullen, Judge Cunningham communicates to a defendant during sentencing language to this effect: “I realize I’m giving you a pretty lengthy term of probation or supervision, but you need to understand that you can earn an early discharge from the supervision if you graduate and are successful upon completion.” Cullen Interview 1, *supra* note 46, at 13. The Chief Public Defender stated that defendants receive their sentences with “the promise that, if you do well, it’s going to get cut anyway,” but conceded that this is not a promise that is part of the plea offer. Kennedy Interview, *supra* note 46, at 11–12.

137. See Battles Interview, *supra* note 35, at 11 (agreeing that reduction in sentence at graduation is “rare”); Cullen Interview 1, *supra* note 46, at 13–14 (stating that mental health court participants have received reductions in remaining sentences, typically of three to six months, upon graduation only “once or twice in the last three years”); cf. Kennedy Interview, *supra* note 46, at 6 (“[W]hat we have been doing upon graduation [the judge] will cut some of the sentence to kind of reward them with some supervision in them. It’s usually a year or two depending on how much time they have; it may be less than that.”).

Early discharge from probation—possibly as soon as a year after graduation—appears more likely than sentence reduction.¹³⁸ Supervisor Battles explained that, every six months, the court reviews each remaining graduate’s performance on supervision and whether she is current on fines, costs, and restitution.¹³⁹ Graduates in good standing are “very likely” to receive an early discharge.¹⁴⁰ Data for individuals sentenced to the mental health court between 2010 and 2013 show that, of the twenty-eight individuals who entered the program, ten graduated, six of whom received early discharges.¹⁴¹ Thus, 60% of graduates ultimately received an early discharge of probation.

TABLE 2: ERIE COUNTY MENTAL HEALTH COURT PARTICIPANTS SENTENCED BETWEEN 2010 AND 2013 WHO GRADUATED, RECEIVED EARLY DISCHARGE FROM PROBATION, AND WHOSE PROBATION WAS REVOKED¹⁴²

Year of Sentence	No. of Participants	Graduates			No. of Non-Graduates with Revoked Probation ¹⁴³
		Total No. of Graduates	No. Receiving Early Discharge	No. with Revoked Probation	
2010	10	4	1	2	3
2011	4	2	2	—	—
2012	4	1	—	1	1
2013	10	3	3	—	6
Total (%)	28	10 (35.7%)	6 (21.4%)	3 (10.7%)	10 (35.7%)
					13 (46.4%)

Supervisor Battles opined that participants typically receive an early discharge approximately two to three years after graduation, or roughly four to five years after admission, regardless of their terms of supervision or the severity of their offenses.¹⁴⁴ However, the average sentence served

138. See Cunningham Interview, *supra* note 47, at 10 (“[G]enerally speaking normally [a grant of early discharge would] have to be at least a year after graduation.”).

139. See Battles Interview, *supra* note 35, at 6.

140. See *id.*

141. See Table 2.

142. See Email from Dante Battles to E. Lea Johnston, *supra* note 101, at 3 (conveying outcomes for individuals sentenced to mental health court between 2010 and 2014).

143. In addition, eight participants, not reported as graduates or revoked non-graduates, either received an administrative discharge and were transferred to another form of probation, are still on probation, were transferred to another problem-solving court, or died. See Email from Dante Battles to E. Lea Johnston, *supra* note 101, at 3 (conveying outcomes for individuals sentenced to mental health court between 2010 and 2014).

144. See Battles Interview, *supra* note 35, at 7 (explaining that, for longer terms of supervision, “the average length in the program [until graduation] is usually a couple of years, twenty-something months, maybe a little more and . . .

by the four individuals sentenced between 2010 and 2013 and who were discharged early was only 27.5 months.¹⁴⁵ These individuals had been serving sentences of five to eleven years,¹⁴⁶ so each secured release from supervision upon serving between 17% and 50% of his or her total sentence. The length of their sentences bore no relationship to the severity of their offenses or the number of their convictions, while the percentage of the total sentence they served tended to hold an inverse relationship to both elements.¹⁴⁷

These data should be viewed with caution as they only include four data points. Supervisor Battles indicated that individuals with longer sentences who struggle to pay their fines, costs, or restitution, who are unstable, or who relapse into substance abuse may receive early discharges after many more years have passed.¹⁴⁸ He relayed an anecdote involving a woman convicted in 2003 of first-degree arson who received a twenty-year sentence in the mental health court and obtained an early discharge twelve years later.¹⁴⁹ This example underscores that individuals can struggle to meet the conditions of Phase IV, participants are not entitled to—and should not expect to—receive an early discharge within a certain length of time after graduation, and the actual length of sentence served varies widely.

someone gets discharged usually . . . two to three years after that . . . if they're in compliance"); *id.* at 8 (explaining that, for shorter terms of supervision, individuals are typically discharged "about a couple of years" after they graduate).

145. See Email from Dante Battles to E. Lea Johnston, *supra* note 101, at 3 (conveying outcomes for individuals sentenced to mental health court between 2010 and 2014). Two additional graduates received early discharges from probation, but it was impossible to calculate the actual sentences served by these individuals due to a lack of information regarding date of sentence.

146. See Appendix B. One individual had a single charge; the other individuals were convicted of multiple charges. Most serious charges of conviction ranged from first-degree misdemeanors to ungraded and third-degree felonies. For individuals with multiple offenses, Judge Cunningham ordered at least one sentence to run consecutive to the first. See *id.*

147. See Email from Dante Battles to E. Lea Johnston, *supra* note 101, at 3 (conveying outcomes for individuals sentenced to mental health court between 2010 and 2014). Four Erie County mental health court participants sentenced between 2010 and 2013 received early discharges. One participant serving a carceral sentence of twenty-eight months for a first-degree misdemeanor received an early discharge after serving 33.74% of her sentence; one participant serving a twenty-three-month sentence of intermediate punishment and probation for a third-degree felony, an ungraded felony, and a first-degree misdemeanor received an early discharge after serving 17.42% of her sentence; one participant serving a thirty-month sentence of intermediate punishment and restorative sanctions for a first-degree misdemeanor received an early discharge after serving 50.00% of his sentence; one participant with a twenty-nine-month sentence of intermediate punishment, restorative sanctions, and probation for an ungraded felony and two ungraded misdemeanors received an early discharge after serving 40.28% of his sentence. An additional two participants received early discharges, but no data were available regarding date of sentence.

148. See Battles Interview, *supra* note 35, at 9.

149. See *id.* at 9.

G. Revocation of Probation

Evidence suggests that mental health court participants are much more likely to fail than succeed in the program. While 21.4% of participants in the four-year sample ultimately graduated and received an early discharge from probation, 46.4% failed to satisfy program conditions and had their probation revoked.¹⁵⁰ Most of these individuals experienced the revocation prior to graduation.¹⁵¹ Twenty-three percent of revoked individuals, however, were unable to complete Phase IV of the program and were revoked after graduation.¹⁵²

Dire consequences can follow unsuccessful termination from mental health court.¹⁵³ For the vast majority, termination results in probation revocation and resentencing up to the statutory maximum for the offense or offenses of conviction.¹⁵⁴ Participants will not receive credit against their maximum sentence for time spent in mental health court except for any time spent under electronic monitoring.¹⁵⁵ Individuals may—but may not—receive credit for any ordered stay in an inpatient treatment facility.¹⁵⁶ The sentencing guidelines do not apply to a resentencing upon

150. As conveyed in Table 2, six of twenty-eight individuals sentenced by the mental health court between 2010 and 2013 received an early discharge, while thirteen had their probation revoked before or after graduation. *See* Table 2.

151. Ten of thirteen revoked individuals received their revocations prior to graduation. *See* Table 2.

152. Three of thirteen revoked individuals received their revocations after graduation. *See* Table 2.

153. *See Erie County Treatment Court Policy and Procedures, supra* note 32, at 8 (“If it becomes clear to the Treatment Team that a participant is not going to graduate, then the participant may be revoked from the program and resentenced. Alternatively, a participant need not be revoked but can simply be terminated from the program and placed on standard supervision within the probation department.”).

154. *See* Cullen Interview 1, *supra* note 46, at 15; *see also* *Pennsylvania v. Tann*, 79 A.3d 1130, 1133 (Pa. Super. Ct. 2013) (“[W]hen such a criminal defendant violates the terms of his probation, he may be resentenced up to the statutory maximum, regardless of the fact that the lesser sentence induced him to plead guilty in the first place.”). *But see infra* note 159 and accompanying text regarding Judge Cunningham’s attestation that he considers sentencing guidelines at resentencings. Occasionally, individuals—typically those with intellectual disabilities or traumatic brain injury—may be terminated from mental health court and moved to “field services” or standard supervision. *See* Cullen Interview 1, *supra* note 46, at 15; Kennedy Interview, *supra* note 46, at 16; Table 1. These individuals receive an administrative discharge. In addition, individuals may be transferred to another problem-solving court, such as drug treatment court. *See* Table 1.

155. *See* Battles Interview, *supra* note 35, at 15 (“We call [time spent in mental health court] ‘street time.’ They lose their street time usually. I don’t think I’ve ever seen it granted.”); Kennedy Interview, *supra* note 46, at 14–16.

156. *See* Kennedy Interview, *supra* note 46, at 14–15; *see also* *Pennsylvania v. Fowler*, 930 A.2d 586, 596 (Pa. Super. Ct. 2007) (stating that, “[g]enerally, it is within the trial court’s discretion whether to credit time spent in an institutionalized rehabilitation and treatment program as time served ‘in custody’” and holding that Judge Cunningham did not err in denying drug court participant, whose

probation revocation,¹⁵⁷ and the resentencing will be unconstrained by the terms of any previous plea agreement.¹⁵⁸ However, Judge Cunningham reported that he considers the guidelines when resentencing.¹⁵⁹

Although he offers the option to defendants to recuse himself because of his deep familiarity with each failed participant, Judge Cunningham typically resentences each individual upon probation revocation.¹⁶⁰ Treatment team members report that nearly all revoked participants are incarcerated.¹⁶¹ Judge Cunningham defends this disposition by explaining that, after a person has failed in mental health court, she has proven that she is not amenable to rehabilitation.¹⁶² A revoked individual may

probation was ultimately revoked, time credit for time served in court-ordered inpatient treatment programs).

157. See 204 PA. CODE § 303.1(b) (2015).

158. See *Pennsylvania v. Wallace*, 870 A.2d 838, 843 (Pa. 2005).

159. See Cunningham Interview, *supra* note 47, at 12.

160. See *id.* at 10 (explaining that no revoked participant has taken him up on his offer of recusal “[b]ecause I think they get a feeling like not only do I get to know them but they get to know me that they find they trust that guy does really know what my circumstances are”); see also Battles Interview, *supra* note 35, at 14 (explaining that Judge Cunningham will resentence individual upon revocation of probation unless individual has accrued new charges); Cullen Interview 1, *supra* note 46, at 16. The drug court literature suggests that, when the same judge oversees a defendant’s participation in treatment court and then resentences her upon program failure, the judge may issue a harsher sentence as a result of being offended or as “double punishment.” See, e.g., Richard Boldt, *The “Tomahawk” and the “Healing Balm”*: Drug Treatment Courts in Theory and Practice, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 69 (2010); Bowers, *supra* note 18, at 788; NAT’L ASS’N OF CRIM. DEF. LAWS., AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 29 (2009); O’Hear, *Rethinking Drug Courts*, *supra* note 18, at 481. An appellate court has reversed at least one of Judge Cunningham’s sentences, imposed after a drug court participant’s probation was revoked, for excessiveness. See *Pennsylvania v. Ferguson*, 893 A.2d 735, 739–40 (Pa. Super. Ct. 2006) (holding that trial court did not abuse its discretion in sentencing defendant convicted of six felony drug offenses to two to six years of imprisonment after his probation was revoked, but that court’s probationary sentence of thirty-six years was “manifestly excessive and constitutes too severe a punishment”).

161. See Battles Interview, *supra* note 35, at 15 (averring that he is “99.9% sure [that mental health court participants whose probation is revoked are] going to get jail”); Kennedy Interview, *supra* note 46, at 16 (characterizing Judge Cunningham’s sentences upon probation revocation as “really fair” and noting that Judge Cunningham “really respects the fact that people try and they work hard, and he acknowledges improvements that . . . they make,” and so, when participants “put forth that effort and the chips just don’t fall . . . and [participant ends] up getting revoked, his sentence on revocation tends to be a county level sentence” of shorter duration than Kennedy would otherwise expect). A judge may not impose a sentence of total incarceration unless certain conditions are met. See 42 PA. CONS. STAT. § 9771(c) (2017) (“The court shall not impose a sentence of total confinement upon revocation unless it finds that: (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that he [or she] will commit another crime if he or she is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court.”).

162. See Cunningham Interview, *supra* note 47, at 12 (“I look at it [as] it’s a failed opportunity at rehabilitation, so I’m not sure that we can give them commu-

receive a sentence of imprisonment, as opposed to a shorter jail sentence, if she originally committed a serious charge that provided for imprisonment or if she committed a new offense while under the mental health court's supervision.¹⁶³

II. EMPIRICAL ANALYSIS OF SENTENCING DIFFERENTIALS BETWEEN THE ERIE COUNTY MENTAL HEALTH AND CRIMINAL COURTS

This part uses Erie County criminal court sentencing data from 2010 to 2014 to compare the sentences imposed by the Erie County mental health court to those sentences that individuals might have received if they had remained in the mainstream justice system. The Pennsylvania Commission on Sentencing provided the county-level data sets.¹⁶⁴ Each data set includes 313 fields of information, including demographic, sentencing, and criminal history details for each individual sentenced in a given year.

Comparing treatment team members' anticipated sentencing outcomes to county-level sentencing data demonstrates that, at the moment of entry to the Erie County mental health court, defendants should typically expect to receive considerably longer sentences in the mental health court than they would have received had they remained in the traditional justice system.¹⁶⁵ Because 67.9% (19/28) of Erie County mental health court participants sentenced between 2010 and 2014 had a prior record score of 0, this analysis compares the anticipated mental health court sentences to county sentencing data limited to that prior record score.¹⁶⁶ The analysis reveals that anticipated mental health court sentences often extend *years* longer than traditional sentences.¹⁶⁷ In addition, consecutive and concurrent sentencing patterns show that participants in the mental health court with multiple charges of conviction were 44.23% more likely

nity supervision anymore, although there are times where I will kind of go well you've done enough jail time because you may have been detained for different periods of time before you got revoked.").

163. See Cullen Interview 1, *supra* note 46, at 16 (agreeing that mental health court participants who are revoked are "generally . . . looking at a state [prison] sentence . . . , depending on the charges obviously," but also noting that judges have discretion in re-sentencing and "are pretty amenable to giving somebody a county little sentence versus a state sentence if they're revoked"); Kennedy Interview, *supra* note 46, at 16 (mentioning that those offenders who receive sentences of imprisonment upon probation revocation typically would have received prison sentences had they declined participation in mental health court altogether); see also Battles Interview, *supra* note 35, at 15 (stating that revoked individuals usually receive jail sentences, "especially if there's no commission of any new offenses").

164. Data may be requested from the Commission through an order form available through this website: *Request Sentencing Data Sets*, PA. COMMISSION ON SENT'G, <http://pcs.la.psu.edu/data/request-and-obtain-data-reports-and-data-sets/sentencing/data-sets> [<https://perma.cc/PB73-NW7N>] (last visited Feb. 3, 2017).

165. See *infra* Part III.C.

166. See Appendix B; *supra* note 56. For a discussion of how the variance in actual PRS scores affects the significance of the article's findings, see *infra* notes 274–80 and accompanying text.

167. See *infra* Part III.C.

to receive at least one consecutive sentence than defendants in traditional court.¹⁶⁸ A higher likelihood of consecutive sentencing could compound sentencing inequities. Finally, these data also suggest that the individuals most often accepted to the mental health court are typically not avoiding otherwise likely jail or prison sentences. Instead, the data suggest that the sentencing exchange merely involves the participant's receipt of a longer term of supervision with much more intensive monitoring and participation requirements, presumably with increased support.¹⁶⁹

A. Pennsylvania's Sentencing Scheme

Sentencing courts in Pennsylvania have broad discretion to choose the punishment most appropriate for a particular defendant and the circumstances surrounding the crime.¹⁷⁰ When selecting a disposition, a sentencing court must consider "the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."¹⁷¹ It must order the minimum degree of confinement consistent with those objectives and impose an individualized sentence.¹⁷² In addition, when selecting a sentencing disposition and length, a judge must consult the sentencing guidelines,¹⁷³ which articulate a purpose of "provid[ing] sanctions proportionate to the severity of the crime and the severity of the offender's prior conviction record."¹⁷⁴

The vast majority of sentences imposed in Pennsylvania cohere with the sentencing guidelines.¹⁷⁵ As is generally the case in guideline states,¹⁷⁶ sentences under the guidelines are a function of the seriousness

168. See *infra* Part III.B.

169. See Kennedy Interview, *supra* note 46, at 11 (stressing that mental health court offers possibility of ultimate self-reliance and flourishing and "support[] . . . that they are not going to get on regular supervision").

170. See 42 PA. CONS. STAT. § 9721(a) (2016) (listing seven sentencing alternatives); *Pennsylvania v. Antidormi*, 84 A.3d 736, 760 (Pa. Super. Ct. 2014).

171. See 42 PA. CONS. STAT. § 9721(b); *Pennsylvania v. Walls*, 846 A.2d 152, 157–58 (Pa. Super. Ct. 2004).

172. See 42 PA. CONS. STAT. § 9721(b); *Walls*, 846 A.2d at 157–58.

173. See 42 PA. CONS. STAT. § 9721(b).

174. See 204 PA. CODE § 303.11(a) (2016). While the guidelines "establish[] a sentencing system with a primary focus on retribution," its "recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation." See *id.*

175. See PA. COMMISSION ON SENT'G, SENTENCING IN PENNSYLVANIA: 2014 ANNUAL REPORT 43 (2015), <http://pcs.la.psu.edu/publications-and-research/annual-reports/2014/view> [<https://perma.cc/Z9X7-JG2B>] ("During 2014, 89% of the 100,317 sentences imposed, for which conformity could be determined, conformed to the guidelines. . . . Most (74%) were within the 'standard' range."); see also *id.* at 78 tbl.17 (showing that 79% of sentences in Erie County were within standard guideline range, 11% were in aggravated range, and 6% were in mitigated range).

176. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1202 (2005).

of an offense and a defendant's prior criminal record. The Pennsylvania Sentencing Guidelines assign to each offense an "offense gravity score" (OGS), which ranges from 1 to 15.¹⁷⁷ Each defendant's criminal history will be reflected in one of eight "prior record scores" (PRS).¹⁷⁸ For each combination of OGS and PRS, the guidelines provide standard, aggravated, and mitigated ranges in a Basic Sentencing Matrix.¹⁷⁹ The matrix groups these combinations into five levels that specify a particular, graduated set of authorized sanctions.¹⁸⁰ The guidelines authorize more severe sanctions—and carceral terms of longer durations—for offenders in higher levels. Authorized sanctions may include, in increasing order of perceived severity, restorative sanctions (such as probation), restrictive intermediate punishment (such as electronic home monitoring), county incarceration (jail), and state incarceration (prison).¹⁸¹ For jail and prison sentences, the guidelines prescribe minimum and maximum terms of confinement.¹⁸² While the guidelines direct that the duration of any restrictive intermediate punishment should not exceed the range given for a carceral sentence,¹⁸³ Pennsylvania law permits terms of probation up to an offense's statutory maximum term of confinement.¹⁸⁴ Participation in the Erie County mental health court may be imposed either as a condition of a probationary sentence or a county intermediate punishment.¹⁸⁵

B. *Disparities in Consecutive Sentencing*

A defendant's sentence will consist of two components: the sentence (disposition and duration) ordered for each conviction and, if an individual has been convicted of multiple offenses, direction as to whether those sentences will run concurrently or consecutively. Mental health court sen-

177. See 204 PA. CODE § 303.15 (assigning OGS to each criminal offense).

178. See *id.* § 303.4 (setting forth the eight prior record score categories of "Repeat Violent Offender (REVOC), Repeat Felony 1 and Felony 2 Offender (RFEL), and point-based categories of 0, 1, 2, 3, 4 and 5").

179. See *id.* § 303.16(a) (Basic Sentencing Matrix).

180. See *id.*

181. See *id.*

182. See *id.*

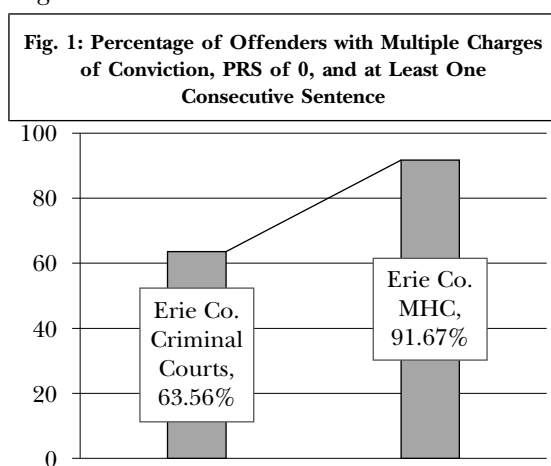
183. See 42 PA. CONS. STAT. § 9763(a) (2016); 204 PA. CODE § 303.12(a)(4)(iv).

184. See 42 PA. CONS. STAT. § 9754(a).

185. See Cullen Interview 1, *supra* note 46, at 5–6; Kennedy Interview, *supra* note 46, at 13–14; see also 42 PA. CONS. STAT. § 9804(a) (county intermediate punishment programs). State funding incentivizes mental health and other problem-solving courts to accept individuals eligible for restrictive intermediate punishments. See 42 PA. CONS. STAT. §§ 9806, 9808 (providing for establishment and funding of county intermediate punishment programs). The Erie County mental health court typically uses three or four months of electronic monitoring or time served to fulfill the restrictive intermediate punishment portion of a county intermediate punishment sentence and then also imposes mental health court participation as a condition of the remaining probationary term. See Battles Interview, *supra* note 35, at 5–6; Cullen Interview 1, *supra* note 46, at 5–6.

tencing data from 2010 to 2014 indicate that 50% (14/28) of participants were convicted of multiple offenses.¹⁸⁶

To the extent defendants weigh likely sentencing consequences when selecting between participation in the mental health and traditional court, they should consider the courts' relative likelihood of ordering sentences to run consecutively. Rather than provide guidance on consecutive and concurrent sentencing, Pennsylvania law leaves the matter to judges' broad discretion.¹⁸⁷ Figure 1 conveys that 63.56% of defendants with multiple charges of conviction with a PRS of 0 sentenced in Erie County criminal courts between 2010 and 2014 received a consecutive sentence. In the mental health court, on the other hand, 91.67% of similarly situated defendants received a consecutive sentence.¹⁸⁸ According to Judge Cunningham and treatment team members, this tendency reflects a desire to achieve a period of supervision sufficient to assure stability and independent functioning.¹⁸⁹



186. See Appendix B (showing that 14 of 28 participants were convicted of two or more offenses per sentencing proceeding). On the other hand, 28.82% of individuals with a PRS of 0 sentenced in Erie County criminal courts between 2010 and 2014 had multiple offenses of conviction (1235 out of 4285 sentenced defendants). See PA. COMMISSION ON SENT'G, STATEWIDE SENTENCING DATA: 2010-14, *supra* note 93.

187. Pennsylvania law does not provide guidance on when sentences should be imposed consecutively. See Steven L. Chanenson, *Sentencing Guidelines in the United States*, in 9 ENCYCLOPEDIA OF CRIMINOLOGY & CRIM. JUST. 4751 (E. Gerben Bruinsma & David Weisburd eds., 2013), <http://ssrn.com/abstract=2246826> [<https://perma.cc/6QEH-2RQD>] (“Other jurisdictions, like Pennsylvania, do not speak to multiple convictions at all and thus afford the judge nearly unfettered discretion to impose sentences concurrently or consecutively. Then-Judge (now U.S. Supreme Court Justice) Breyer criticized that discretionary model by observing that ‘[a] moment’s thought suggests, however, that this approach leaves the prosecutor and the judge free to construct almost any sentence whatsoever.’”).

188. See Appendix B.

189. See *supra* notes 66-69 and accompanying text; see also *supra* notes 79, 85, 86 and accompanying text discussing consecutive sentencing.

Patterns of consecutive sentencing for misdemeanants and felons are revealing. As conveyed in Figures 2 and 3, in Erie County criminal courts, 60.1% (496/826) of misdemeanants with a PRS of 0 received at least one consecutive sentence between 2010 and 2014, while 70.7% (289/409) of offenders convicted of a felony received such treatment.¹⁹⁰ Rates of consecutive sentencing in the mental health court were significantly higher for both categories of offenders. In the treatment court, 88.9% (8/9) of misdemeanants with a PRS of 0 received at least one consecutive sentence, while 100% (3/3) of those convicted of a felony did so.¹⁹¹

Fig. 2: Percentage of Misdemeanants with Multiple Charges of Conviction, PRS of 0, and at Least One Consecutive Sentence

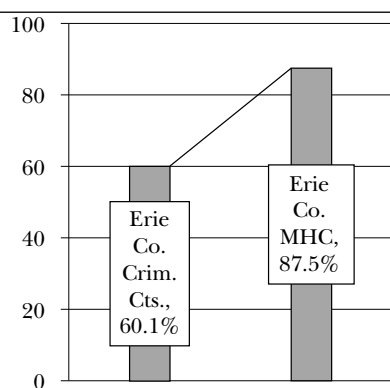
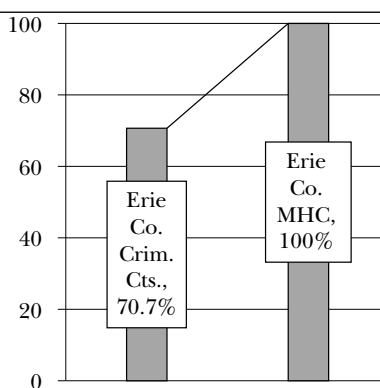


Fig. 3: Percentage of Felons with Multiple Charges of Conviction, PRS of 0, and at Least One Consecutive Sentence



Sentencing data from the mental health court suggest that, regardless of the number of offenses of conviction, the court will typically only order two or three sentences to run consecutively in order to achieve its desired supervisory length of roughly five to ten years.¹⁹² Three out of four defendants with two charges of conviction received consecutive sentences. All seven defendants with three charges of conviction received at least one consecutive sentence; of this group, four received two consecutive sentences.¹⁹³ Both defendants with four charges of conviction received

190. See PA. COMMISSION ON SENT'G, STATEWIDE SENTENCING DATA: 2010–14, *supra* note 93.

191. See Appendix B.

192. See *supra* notes 88–89 and accompanying text explaining that the total periods of supervision of Erie County mental health court participants sentenced between 2010 and 2014 varied between 2.5 and 17 years, with an average supervisory period of 7.42 years and a median of 6.91 years.

193. See Appendix B. Please note that this Article treats offender JAB as having one sentencing proceeding for three charges of conviction, as opposed to two sentencing proceedings each for three charges of conviction. See *infra* note 319. This classification is necessitated by offender JAB's identical docket numbers, dates of sentence, and charges in the state coding system. JAB's classification has been confirmed by Supervisor Battles. See Email from Dante Battles, Erie County Treatment Court Coordinator, to E. Lea Johnston (Jan. 19, 2017, 09:44 EST) (on file with author).

only one consecutive sentence. However, the sole defendant in the sample with five charges of conviction received three consecutive sentences.¹⁹⁴

The significance of these observations is limited by the small sample size from the mental health court. However, the data suggest that, for a defendant charged with multiple offenses, the choice to enter the mental health court may carry a heightened risk of consecutive sentencing. To the extent this conclusion holds, differential likelihood of consecutive sentencing could compound inequities between the two court systems.

C. *Disparities in the Sentencing of Offenses*

A comparison of sentencing in Erie County criminal and mental health courts suggests that participants in the latter should generally expect to receive significantly longer sentences for a wide range of offenses. This section analyzes the sentencing outcomes of twelve offenses ranging from first-degree misdemeanors to first-degree felonies issued over a five-year period.

Figures 4 through 7 convey, for particular offenses in each grade, anticipated mental health court sentences and the range of sentence dispositions imposed for each offense in Erie County criminal courts between 2010 and 2014.¹⁹⁵ Depicted mental health court sentences reflect treatment team members' expectations that the court sentences offenders to the maximum supervisory terms permitted by statute.¹⁹⁶ The discussion following each graphical representation evaluates the extent to which actual sentencing data from the Erie County mental health court confirm or conflict with these predictions. The criminal court sentencing data portrayed by the figures include mean maximum terms of incarceration in county and state facilities, mean minimum terms of probation, and split sentences consisting of both carceral and probationary terms.¹⁹⁷ Appendix A portrays additional data, including mean minimum terms of incarceration, the composition of split sentences, coefficients of variation for these figures, and the percentage of offenders who receive intermediate

194. See Appendix B.

195. See PA. COMMISSION ON SENT'G, STATEWIDE SENTENCING DATA: 2010–14, *supra* note 93.

196. See *supra* notes 82–84 accompanying text; *cf. supra* note 76–79 and accompanying text regarding Judge Cunningham's desire to impose sentences totaling five to ten years in length in typical cases.

197. Split sentencing figures denote the sum of mean maximum carceral terms plus mean minimum terms of probation. State data document that prisoners tend to serve around 121% of their minimum sentences prior to release on parole, and that jail inmates are often released on parole upon the expiration of their minimum sentences. See SENTENCING IN PENNSYLVANIA: ANNUAL REPORT 2014, *supra* note 175, at 26 (reporting release data for jail inmates); PA. COMMISSION ON SENT'G, SENTENCING IN PENNSYLVANIA: ANNUAL REPORT 2013 25 (2013), <http://pcs.la.psu.edu/publications-and-research/annual-reports/2013/view> [<https://perma.cc/XR6H-FSAN>] (reporting that this figure for prisoners has deviated only by around four percentage points since 2001).

punishments in county criminal courts.¹⁹⁸ Appendix B details mental health court participants' sentencing data from 2010 to 2014.

Sentencing disparities are striking. For five common first-degree misdemeanors, the anticipated mental health court sentence exceeds the length of all traditional dispositions for each offense by at least 1.5 years.¹⁹⁹ Sentencing data confirm that most of these misdemeanants would receive probationary, not carceral, sentences in traditional court.²⁰⁰ For felony offenses, the anticipated mental health court sentence also exceeds each average disposition ordered in traditional Erie County courts by a period of years.²⁰¹ For three common third-degree felonies, the anticipated mental health court sentence substantially exceeds—by nearly two years—every sentencing option Erie County traditional courts typically impose.²⁰² Analysis of two second-degree felonies reveals that the anticipated mental health court sentence exceeds every average sentencing disposition by more than 4.5 years.²⁰³ With one exception,²⁰⁴ sentencing data for two first-degree felonies show that the anticipated mental health court term exceeds all average sentencing dispositions by more than ten years.²⁰⁵ Data suggest that the mental health court may only reliably serve a diversionary function for individuals convicted of the most serious felonies.²⁰⁶

198. Intermediate punishments may include inpatient or outpatient treatment, house arrest with electronic monitoring, or partial confinement through work release, a work camp, or a halfway facility. See 42 PA. CONS. STAT. § 9763(c)(2) (2016).

199. See Appendix A; *infra* Figure 4. The one exception—the average jail/probation split sentence imposed on 18% of individuals convicted of terroristic threats—was six months shorter than the anticipated mental health court term. See Appendix A; Figure 4.

200. See Appendix A; Figure 4; see also *infra* note 225 and accompanying text.

201. See *infra* Part III.C.2.

202. See Appendix A; *infra* Figure 5.

203. See Appendix A; *infra* Figure 6.

204. The remaining disposition—prison/probation split sentences imposed on 19% of individuals convicted of robbery and consisting of an average maximum prison sentence of ninety-eight months and mean minimum probationary terms of 120 months—was twenty-two months shorter than the anticipated supervisory term in the mental health court. See *infra* Appendix A; Figure 7.

205. See Appendix A; *infra* Figure 7. But see *supra* notes 76–78; *infra* 231–35, 264 and accompanying text discussing Judge Cunningham's preference not to impose sentences longer than ten years and how this sentencing policy would affect sentencing disparities.

206. See *infra* Part III.C.2. Importantly, this analysis neglects two of the most likely sources of harsh treatment incurred by mental health court participants: the use of jail as a sanction for program noncompliance and the activation or imposition of incarcerative sentences upon mental health court failure. See *supra* note 18 and accompanying text; *infra* notes 299, 306, 307 and accompanying text. Because of these omissions, this examination will understate—perhaps substantially—the severity of sanctions actually experienced by mental health court participants.

1. *Misdemeanors*

Misdemeanors were the most serious charge of conviction for 64.3% (18/28) of individuals sentenced by the Erie County mental health court between 2010 and 2014.²⁰⁷ These data reveal that mental health court misdemeanants received sentences, on average, at 93.6% of the total permitted period of supervision.²⁰⁸

A comparison of county-level sentencing data for five common misdemeanors suggests that the mental health court imposes considerably longer sentences—often twenty months longer—on misdemeanants than such offenders would have received through traditional sentencing. Moreover, for this grade of offense, the mental health court does not divert most individuals from an otherwise likely jail or prison sentence. Rather, the court appears primarily to extend criminal justice supervision over individuals with serious mental illnesses in order to induce treatment.

Interview data suggest that the Erie County mental health court sentences individuals convicted of first-degree misdemeanors to five-year terms of intensive supervision, the longest term Pennsylvania law permits for this grade of offense.²⁰⁹ Actual sentencing data from the mental health court from 2010 to 2014 confirm that most individuals convicted of first-degree misdemeanors receive sentences of approximately five years.²¹⁰ On average, individuals convicted of this grade of offense received terms of supervision equivalent to 85.63% of the authorized limit, or 51.4 months of supervision.²¹¹

207. *See* Appendix B.

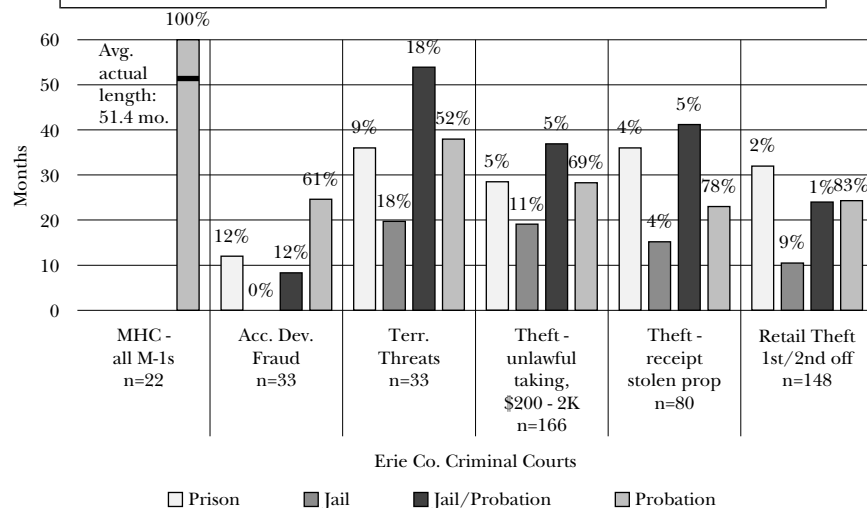
208. *See id.*

209. *See* Battles Interview, *supra* note 35, at 8; *supra* notes 81–84 and accompanying text.

210. Thirty-three individuals were sentenced by the Erie County mental health court between 2010 and 2014. *See* Email from Dante Battles to E. Lea Johnston, *supra* note 101 (conveying outcomes for individuals sentenced to mental health court between 2010 and 2014). Sentencing data was available for twenty-eight of these individuals. *See* Appendix B. Sentences for twenty-two first-degree misdemeanors were included in this dataset. Fifteen of these sentences included terms of supervision of approximately sixty months. *See id.* Considering only individuals convicted of a misdemeanor as the most serious offense of conviction, fifteen of eighteen misdemeanants were sentenced at the maximum period of supervision for their most serious charge. *See id.*

211. The average term of supervision imposed for the twenty-two first-degree misdemeanors included in this dataset was 51.4 months of supervision, which is equivalent to 85.63% of the authorized maximum term of supervision. *See* Appendix B.

Fig. 4: Prevalence and Length of Sanctions for First-Degree Misdemeanors in Erie Co. Mental Health and Criminal Courts



County data indicate that the five-year anticipated mental health court term likely substantially exceeds the period of supervision an individual would receive outside the mental health court.²¹² Analyzed data include five common first-degree misdemeanors:²¹³ terroristic threats,²¹⁴ retail theft involving a first or second offense of at least \$150,²¹⁵ access device fraud attempting or obtaining between \$50 and \$500,²¹⁶ theft by an unlawful taking of between \$200 and \$2000,²¹⁷ and theft by receiving stolen property of between \$200 and \$2000.²¹⁸ As conveyed in Figure 4, with one exception, the anticipated sixty-month mental health court sentence exceeds the average sentence length for all offenses by at

212. Most Erie County criminal sentences imposed for these offenses (for offenders with PRS of 0) are also significantly shorter than the sentences actually received by the twenty-two mental health court participants sentenced between 2010–2014. *See* Appendix B. Indeed, the average actual sentence imposed for a first-degree misdemeanor on a mental health court participant—51.38 months (n = 22)—substantially exceeds the length of every average sentence imposed for each misdemeanor studied with the exception of one disposition received by a minority of offenders with a PRS of 0 convicted of terroristic threats. *See* Appendix B. Eighteen percent of these offenders received a split jail/probation sentence with an average maximum jail sentence length of 13.9 months and an average minimum probationary term of forty months, for a combined total of 53.9 months.

213. These offenses constitute some of the most common misdemeanors within the Erie County criminal court system and appear to be commonly accepted by the Erie County mental health court. *See supra* notes 58–59 and accompanying text.

214. *See* 18 PA. CONS. STAT. § 2706 (2016).

215. *See id.* § 3929(b)(1)(iii).

216. *See id.* § 4106(c)(1)(ii).

217. *See id.* § 3921.

218. *See id.* § 3925.

least 1.5 years.²¹⁹ The one disposition that cannot be so characterized—the average jail/probation split sentence imposed on 18.2% of individuals convicted of terroristic threats—was six months shorter than the anticipated mental health court term.²²⁰

Importantly, the county criminal data suggest that most individuals with a prior record score of 0 who are convicted of these first-degree misdemeanors would otherwise receive probationary terms 50% shorter than the anticipated mental health court term. For all five offenses assessed, over 50% of defendants sentenced in Erie County criminal courts between 2010 and 2014 received straight probationary terms ranging from twenty-three to thirty-eight months.²²¹ Indeed, regarding convictions for four of five misdemeanors, between 60.6% and 83.1% of individuals received probation with average minimum probationary terms shorter than thirty months—2.5 years shorter than the anticipated mental health court term.²²² For these individuals, the mental health court may impose a more onerous form of supervision—intensive supervision probation, as opposed to supervision through the standard or mental health court probation docket²²³—for twice as long a period as they would have otherwise received.²²⁴

The data suggest that few misdemeanants would receive sentences of incarceration if they remained in the traditional justice system. For each misdemeanor surveyed, between 54.5% and 87.8% of offenders received a non-carceral sentence of either probation or an intermediate punishment.²²⁵ For the first-degree misdemeanors surveyed, between 8.8% and 36.4% received sentences that included a jail term.²²⁶ In addition, a small percentage—between 2.0% and 12.1%—of defendants received prison sentences.²²⁷ Thus, for most defendants with a prior record score of 0 convicted of first-degree misdemeanors—which was both the most popular offense accepted by the mental health court and the most common most serious offense of conviction²²⁸—the Erie County

219. See Appendix A; *supra* Figure 4.

220. See Appendix A; *supra* Figure 4.

221. See Appendix A; *supra* Figure 4.

222. See Appendix A. The omitted offense is terroristic threats.

223. See Battles Interview, *supra* note 35, at 18.

224. The sentences imposed in traditional criminal courts are also considerably shorter than those actually received by the individuals who were convicted of first-degree misdemeanors in the mental health court. See *supra* note 211; Appendix A.

225. See Appendix A.

226. These figures include both straight jail and jail/probation split sentences. See Appendix A; *supra* Figure 4.

227. See *supra* Figure 4 (showing that between 2 and 12% of first-degree misdemeanants sentenced between 2010 and 2014 with PRS of 0 received prison terms); *id.* (showing that, for three of five of these misdemeanors, 5% or fewer misdemeanants received prison sentences). This dataset did not include any split prison/probation sentences.

228. See Appendix B.

mental health court does not appear to serve a diversionary function. Rather, the court appears primarily to serve as a lever to coerce treatment and extend government supervision over individuals with mental illness.

2. *Felonies*

Approximately 35.7% (10/28) of individuals sentenced in the Erie County mental health court between 2010 and 2014 were convicted of felony offenses.²²⁹ A comparison of sentencing data for certain first-, second-, and third-degree felonies reveals that the mental health court sentences anticipated by treatment team members exceed—and typically drastically exceed—the length of corresponding sentences ordered by Erie County criminal courts between 2010 and 2014. Indeed, in most instances, the anticipated mental health court sentence exceeds each average disposition county courts ordered by years. In addition, although felony offenses are certainly more likely to be punished with incarcerative sentences than misdemeanors, individuals convicted of third- and second-degree felonies often are punished with non-carceral sentences in the traditional justice system. For these offenders, the mental health court may not be serving a diversionary function. Persons convicted of first-degree felonies, however, are much more likely to be incarcerated. To the extent the mental health court opens its doors to these individuals, it may offer a means to avoid otherwise near-certain incarceration.

Importantly, in accord with treatment team members' expectations, this analysis assumes individuals will receive the maximum sentences authorized by law.²³⁰ However, Judge Cunningham noted—at least in recent years—he typically orders five- to ten-year supervisory terms.²³¹ Longer sentences, he explained, may be warranted for higher risk individuals and those who committed more serious offenses.²³² These rationales would presumably justify ten-year (or perhaps longer) sentences for those convicted of serious felonies.²³³ Assuming the application of this logic, an individual convicted of a single third-degree or second-degree felony could receive the maximum term of supervision of seven or ten years, respectively.²³⁴ However, this logic suggests that a person convicted of a first-degree felony may receive only half of the permitted twenty-year sentence.²³⁵ Similarly, individuals convicted of multiple felonies—were such

229. *See id.*

230. *See supra* notes 82–84 and accompanying text.

231. *See* Cunningham Interview, *supra* note 47, at 13 (stressing that “in the last few years” he has not given maximum amount of supervision authorized for each count consecutively); *supra* notes 76–78 and accompanying text.

232. *See supra* note 78 and accompanying text.

233. *See supra* notes 82–84 and accompanying text.

234. *See supra* note 83 and accompanying text.

235. *See id.*

individuals accepted by the treatment court, an unlikely scenario²³⁶—would either receive shorter supervisory terms or sentences that would run concurrently.²³⁷ Unfortunately, the paucity of mental health court sentencing data involving felonies does not allow for rigorous testing of these hypotheses.²³⁸

a. Third-Degree Felonies

Treatment team members expect that mental health court entrants pleading guilty to third-degree felonies will receive supervisory sentences at the maximum length of supervision, or seven years.²³⁹ Judge Cunningham explained that he might sentence an individual to the maximum supervisory term for certain third-degree felonies, such as assault or criminal trespass pleaded down from residential burglary, but not for others, such as repeat retail theft.²⁴⁰ Mental health court sentencing data from 2010 to 2014 only include four third-degree felonies. For these offenses, the court sentenced two individuals to seven-year terms of supervision and two individuals to five-year sentences.²⁴¹ The individuals sentenced at the maximum terms of supervision had extensive criminal histories,²⁴² while those who received five-year sentences had a PRS of 0.²⁴³

Figure 5 conveys that the anticipated mental health court sentence of eighty-four months substantially exceeds—by nearly two years—every sentencing option Erie County criminal courts typically imposed for the three third-degree felonies analyzed. This Article analyzes the three most common third-degree felonies the Erie County mental health court is likely to

236. See *supra* note 53 and accompanying text regarding public safety considerations; *supra* note 55 and accompanying text noting that an individual may be excluded if she has “more than two prior felony convictions . . . or prior convictions . . . for [any] violent felon[ies].” Only one individual admitted to the mental health court between 2010 and 2014 was convicted of multiple felonies, and she had only one ungraded felony and one third-degree felony. See *infra* note 237.

237. See *supra* note 79 and accompanying text. The limited sentencing data involving mental health court participants convicted of multiple felonies does not support the hypothesis that such individuals will receive concurrent sentences. In particular, one mental health court participant was convicted of a third-degree felony with a seven-year maximum sentence and an ungraded felony with a three-year maximum sentence, as well as a first-degree misdemeanor with a five-year maximum sentence. See Appendix B. She received three-year sentences for the ungraded felony and the first-degree misdemeanor and a five-year sentence for the third-degree felony, all ordered to run consecutively for a total term of eleven years.

238. See Appendix B.

239. See *supra* notes 82–84 and accompanying text regarding Judge Cunningham’s tendency to sentence offenders to maximum supervisory terms permitted by statute.

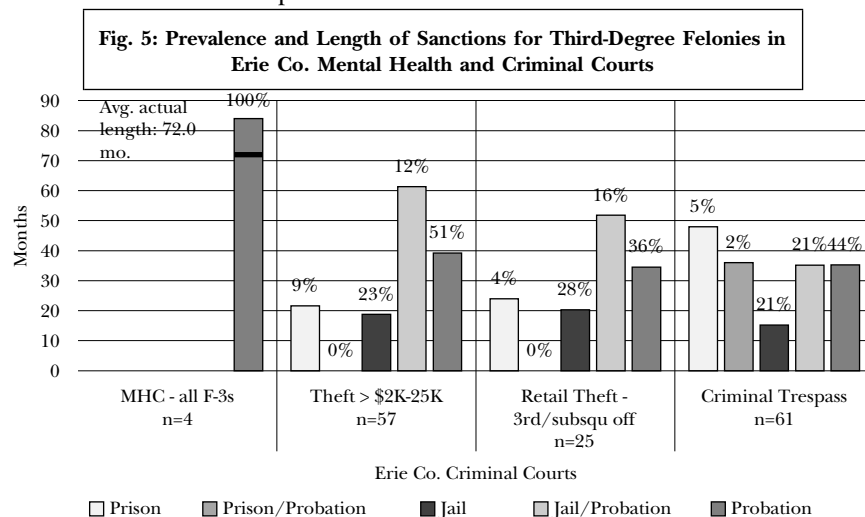
240. See Cunningham Interview, *supra* note 47, at 13–14.

241. See Appendix B.

242. These individuals had prior record scores of five and RFEL (repeat felony offender). See *supra* note 178 and accompanying text.

243. See Appendix B.

accept: theft by an unlawful taking of movable property worth \$2,000 to \$25,000 or a vehicle,²⁴⁴ criminal trespass of a building,²⁴⁵ and retail theft involving a third or subsequent offense.²⁴⁶ The longest average disposition imposed by Erie County criminal courts, which was given to 12.3% of individuals convicted of theft, was a jail/probation split sentence with a mean maximum jail term of fifteen months and a mean minimum probationary sentence of 46.3 months.²⁴⁷ This sentence is nearly two years shorter (22.7 months) than the anticipated mental health court sentence.²⁴⁸ All other dispositions are at least thirty-two months (2.7 years) shorter than the anticipated mental health court term.²⁴⁹



b. Second-Degree Felonies

The disparity between anticipated mental health court sentencing and traditional sentencing was even greater for second-degree felonies. Treatment team members expect that mental health court entrants pleading guilty to second-degree felonies will receive supervisory sentences at the maximum length of supervision, or ten years.²⁵⁰ Only two mental health court participants were convicted of second-degree felonies be-

244. See 18 PA. CONS. STAT. § 3921 (2016).

245. See *id.* § 3503(a)(1)(i).

246. See *id.* § 3929(b)(iv).

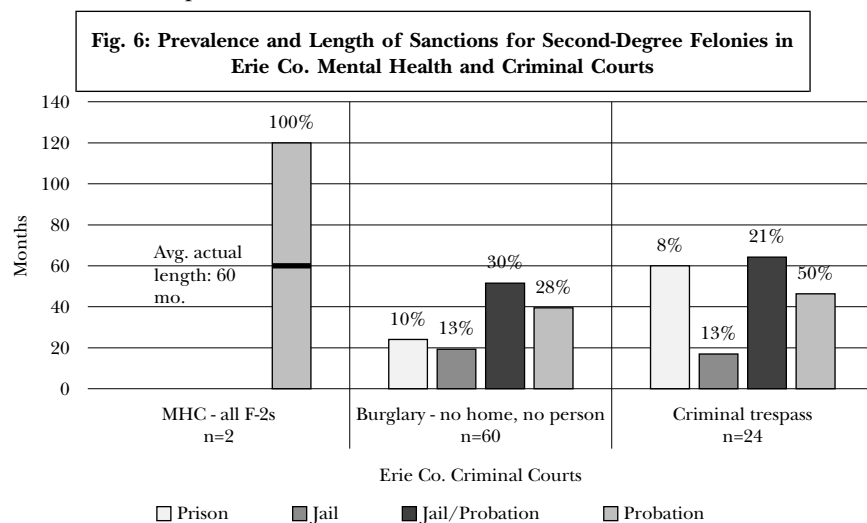
247. See Appendix A; *supra* Figure 5.

248. See Appendix A; *supra* Figure 5.

249. See Appendix A; *supra* Figure 5.

250. See Cullen Interview 1, *supra* note 46, at 12 (observing that maximum sentences in mental health court typically do not extend beyond fifteen to twenty years and explaining, “for example an aggravated assault, that’s a maximum Felony 2, it comes with a maximum of 10 years of incarceration so . . . that’s what the judge may very well give them if they plead to that.”); *supra* notes 82–84 and accompanying text regarding Judge Cunningham’s tendency to sentence offenders to the maximum supervisory terms permitted by statute.

tween 2010 and 2014, so no firm conclusions can be drawn as to the accuracy of this prediction.²⁵¹ County sentencing data for certain second-degree felonies accepted by the Erie County mental health court²⁵²—burglary not of a home with no person present²⁵³ and criminal trespass involving breaking into a building²⁵⁴—reveal that every average sentencing disposition ordered for these two offenses was more than 4.5 years shorter than the anticipated mental health court sentence.²⁵⁵



c. First-Degree Felonies

Sentencing data suggest that even greater disparities may exist for first-degree felonies. Treatment team members appear to expect that

251. Only two individuals sentenced by the mental health court between 2010 and 2014 were convicted of second-degree felonies. One was convicted of burglary not a home and no person present under title eighteen, section 3502(a)(4) of the Pennsylvania consolidated statutes; the other was convicted of criminal trespass—breaking into a building under title eighteen, section 3503(a)(10(ii)) of the Pennsylvania consolidated statutes. Both had a PRS of 0 and faced a maximum term of supervision of 120 months. The burglar received a restrictive intermediate punishment of 3.16 months followed by a restorative sanction of probation for 56.86 months. The trespasser received a restrictive intermediate punishment of one month followed by a restorative sanction of probation for fifty-nine months. Both punishments constituted approximately 50% of the statutorily authorized maximum length of supervision under the statute. In addition, the second defendant received a sixty-month sentence of probation for a first-degree misdemeanor that was ordered to be served consecutively to the trespassing sentence.

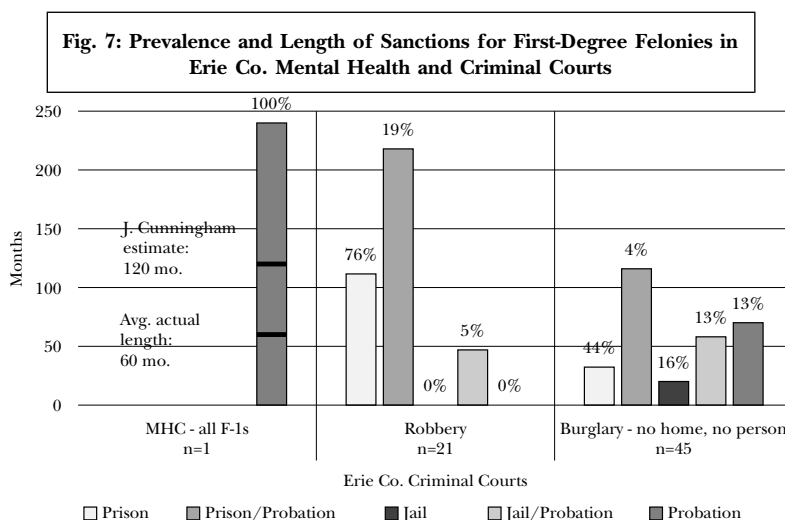
252. See *supra* notes 58–59.

253. See 18 PA. CONS. STAT. § 3502(c)(2) (2012); *id.* § 3502(a)(4). Analyzed sentencing data include sentences reported under either provision between 2010 and 2014 for “burglary—not a home/no person present” with an OGS of 5. See *infra* Figure 7.

254. See 18 PA. CONS. STAT. § 3503(a)(1)(ii).

255. See Appendix A; *supra* Figure 6.

mental health court entrants pleading guilty to first-degree felonies will receive supervisory sentences at the maximum length of supervision, or twenty years.²⁵⁶ Actual sentencing data for mental health court participants convicted of first-degree felonies and sentenced between 2010 and 2014 were too meager to draw firm conclusions on the degree to which practice matches prediction.²⁵⁷



Sentencing data from Erie County criminal courts for two offenses accepted by the Erie County mental health court²⁵⁸—burglary of a home with no person present²⁵⁹ and robbery involving threat of serious bodily injury²⁶⁰—show that the twenty-year anticipated mental health court term

256. See *supra* notes 82–84 and accompanying text regarding Judge Cunningham’s tendency to sentence offenders to the maximum supervisory terms permitted by statute; *infra* note 257 and accompanying text.

257. Only one individual sentenced by the mental health court between 2010–2014 was convicted of a first-degree felony. This individual, who had a PRS of 0, was convicted of burglary of a home with no person present under title 18, section 3502(a)(2) of the Pennsylvania consolidated statutes. The statutory maximum for this offense was 240 months, and the standard guidelines range prescribed a minimum state or county carceral sentence—or, alternatively, a restrictive intermediate punishment—of six-to-fourteen months. The mental health court judge imposed a mitigated sentence of one month of restrictive intermediate punishment (likely served with electronic monitoring) paired with fifty-nine months of probation as a restorative sanction. In addition, Supervisor Battles also recounted the history of a woman sentenced by the mental health court in 2003 to 240 months of supervision for a first-degree felony arson. Battles Interview, *supra* note 35, at 9.

258. See *supra* notes 58–59.

259. See 18 PA. CONS. STAT. § 3502(c)(1) (2016); *id.* § 3502(a)(2). Analyzed sentencing data include sentences reported under either provision between 2010 and 2014 for “burglary—home, no one present” with an OGS of 7. See *infra* Figure 7.

260. See 18 PA. CONS. STAT. § 3701(a)(1)(ii).

exceeds, with one exception,²⁶¹ all average sentencing dispositions imposed between 2010 to 2014 for these two offenses by more than ten years.²⁶² The remaining disposition—prison/probation split sentences imposed on 19.0% of individuals convicted of robbery and consisting of an average maximum prison sentence of ninety-eight months and mean minimum probationary terms of 120 months—was twenty-two months shorter than the anticipated supervisory term in the mental health court.²⁶³

To the extent mental health court entrants convicted of felonies with a prior record score of 0 do not receive sentences at the maximum authorized term of supervision, these observations about likely sentencing disparities obviously will not hold. Judge Cunningham stressed that he typically does not impose sentences longer than ten years so as not to disincentivize participation in the mental health court.²⁶⁴ In addition, treatment team members noted that sometimes individuals—especially those with low prior record scores—will not receive maximum sentences,²⁶⁵ and actual sentencing data confirm this reality.²⁶⁶

d. Diversion

Finally, Erie County sentencing data suggest that, in many instances, the mental health court is not diverting individuals convicted of third- or second-degree felonies from otherwise likely incarcerative sentences. Only a minority of the offenders convicted of the third-degree felonies of theft by an unlawful taking of movable property worth \$2,000 to \$25,000 or a vehicle,²⁶⁷ criminal trespass of a building,²⁶⁸ and retail theft involving a third or subsequent offense²⁶⁹ with a PRS of 0 received carceral sentences between 2010 and 2014.²⁷⁰ Similarly, 58.3% of individuals convicted of second-degree criminal trespass in Erie County criminal courts between 2010 and 2014 did not receive a carceral sentence, while 46.6% of individuals convicted of second-degree felony burglary received a straight

261. *See supra* note 263 and accompanying text.

262. *See* Appendix A; *supra* Figure 7.

263. *See* Appendix A.

264. *See supra* notes 76–78 and accompanying text. This statement, however, was not in reference to first-degree felonies.

265. *See supra* note 84.

266. *See supra* notes 241, 243, 251, 257 and accompanying text discussing few actual sentencing data for felony offenders from Erie County mental health court from 2010 to 2014.

267. *See* 18 PA. CONS. STAT. § 3921 (2016).

268. *See id.* § 3503(a)(1)(i).

269. *See id.* § 3929(b)(1)(iv).

270. *See* Appendix A; *supra* Figure 5 (showing that 44% of individuals convicted of theft, 48% of those convicted of retail theft, and 49% of those convicted of criminal trespass received straight or split jail or prison sentences). Remaining individuals received sentences of straight probation or intermediate punishment.

sentence of probation or a restrictive intermediate punishment and restorative sanctions.²⁷¹

However, to the extent that the Erie County mental health court accepts individuals convicted of first-degree felonies—which appears to be a rare occurrence—the court likely serves to divert these offenders from otherwise probable prison or jail sentences. For example, 77.7% of individuals convicted of first-degree felony burglary within the sample period received a prison or jail sentence, and 100% of individuals convicted of robbery received a carceral sentence.²⁷²

D. *Limitations*

Limitations exist in this analysis of sentencing disparities between the Erie County criminal and mental health courts. First, the Erie County mental health court data set is very small, consisting only of twenty-eight participants. However, these twenty-eight participants represent almost all (84.8%) of the defendants processed through the mental health court during the 2010- to 2014-time period. In addition, these data serve merely to supplement and act as a partial check on the accuracy of treatment team members' beliefs, as expressed through their interviews, regarding anticipated sentence length.

Second, the analysis compares anticipated mental health and county court sentences given to individuals with a PRS of 0,²⁷³ but 32.1% (9/28) of mental health court participants had a PRS of 1 or higher.²⁷⁴ In the mainstream justice system, offenders with a higher PRS will tend to receive longer and more severe sentences than those with a lower PRS,²⁷⁵ so the sentencing differentials between the mental health and the traditional justice system will likely be narrower than those found in this Article.²⁷⁶

Although a detailed analysis of sentencing differentials for those with a deeper criminal history is beyond the scope of this study, analysis of an illustrative offense at a higher PRS is useful for illuminating the possible extent of a sentencing discrepancy. Approximately 44.4% (4/9) of the mental health court participants with a PRS higher than 0 had a PRS of 1, all of whom were convicted of first-degree misdemeanors.²⁷⁷ The most

271. See Appendix A; *supra* Figure 6.

272. See Appendix A; *supra* Figure 7.

273. See *supra* note 34.

274. Specifically, 14.3% (4 of 28 participants) had a PRS of 1; 3.6% (1 participant) had a PRS of 2; 3.6% (1 participant) had a PRS of 3; 3.6% (1 participant) had a PRS of 5; and 7.2% (2 participants) were repeat felons. See Appendix B. Correctional best practices suggest that, in contrast to the practice of the Erie County mental health court, problem-solving courts should focus their efforts on high-risk/high-need offenders. See *supra* note 56.

275. See 204 PA. CODE § 303.16(a) (2016) (Basic Sentencing Matrix).

276. However, mental health court sentencing data from 2010 to 2014 suggest that individuals with more extensive criminal histories are particularly likely to receive sentences at the full authorized term of supervision. See Appendix B.

277. See *id.*

commonly occurring offense for offenders with a PRS of 1 was theft by an unlawful taking of between \$200 and \$2000.²⁷⁸ Consistent with treatment team interview testimony, the two mental health court participants with a PRS of 1 convicted of this offense received five-year terms of supervision.²⁷⁹ Analysis of county court sentencing data suggests that, had these individuals declined participation in the mental health court, they likely would have received much shorter, non-carceral, supervisory terms. In particular, between 2010 and 2014, 68.5% (37/54) of offenders convicted of this offense with a PRS of 1 in Erie County criminal courts received non-carceral sentences, with 55.6% (30/54) receiving probationary terms averaging 30.1 months, or 50.2% of the authorized five-year sentence. These sentences resemble those given to county criminal court defendants convicted of the same offense with a PRS of 0: 78.9% (131/166) of these individuals received non-carceral sentences, with 69.3% (115/166) receiving probationary terms averaging 28.3 months.²⁸⁰ This analysis of an exemplar suggests that the sentencing differentials found in this Article will extend—though to a lesser degree—to those with a PRS of 1, the second-most common criminal history score found in the Erie County mental health court.

Third, the Erie County criminal court sentencing data include data from the mental health court and the two other problem-solving courts in the county.²⁸¹ Problem-solving court data are unlikely to affect overall averages too dramatically, however, as treatment courts serve only a small fraction of defendants.

Fourth, one could argue that mental health court participants' unifying characteristic—their serious and persistent mental illness—is relevant to a number of sentencing factors,²⁸² so the punishment of these individuals will likely deviate from “average” county sentences for the same offenses. This is a valid concern, but it is unclear how the trait cuts.²⁸³ Unfortunately, little research has examined how offenders' mental health status affects sentencing outcomes.²⁸⁴ Descriptive reports from the Bureau of Justice Statistics published in 1999 and 2006 both found that state prisoners with a mental health problem reported longer mean maximum

278. See 18 PA. CONS. STAT. § 3921 (2016); Appendix B.

279. See Appendix B.

280. See Appendix A; *supra* Part III.C.1.

281. See *Treatment Courts*, ERIE COUNTY, PA., <http://www.eriecountypa.gov/courts/treatment-courts.aspx> [<https://perma.cc/RWZ4-WLB2>] (last visited Dec. 5, 2016).

282. See *supra* note 14.

283. See Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296–300 (1989) (explaining that, although mental illness itself is mitigating, it can often contribute to numerous aggravating factors).

284. See Megan L. Davidson & Jeffrey W. Rosky, *Dangerousness or Diminished Capacity? Exploring the Association of Gender and Mental Illness with Violent Offense Sentence Length*, 40 AM. J. CRIM. JUST. 353, 355–58 (2015) (literature review).

sentences than non-ill prisoners, while mentally ill jail inmates reported shorter sentences than non-ill inmates.²⁸⁵ Differences in average criminal history did not completely explain discrepancies in sentence length.²⁸⁶ Some research suggests that individuals with mental illnesses, especially those who commit violent crimes, may tend to receive more severe sentences because of higher perceived risk of future dangerousness.²⁸⁷ On the other hand, mental illness may serve as a mitigating factor to the extent that it contributes to perceptions that an offender had a reduced ability to understand the nature of her acts or their wrongfulness, had a reduced ability to control her actions, had a diminished capacity to form the necessary mens rea for a crime, is amenable to treatment, acted under the influence of extreme emotional disturbance, or acted under duress.²⁸⁸ To the extent mental health court participants would tend to receive lower than average sentences because of the mitigating effect of their illnesses, the Erie County criminal court sentencing data may overestimate the sen-

285. See PAULA M. DITTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 8 (1999), <http://www.bjs.gov/content/pub/pdf/mhtip.pdf> [<https://perma.cc/ZMY3-GXPJ>] (“Overall, mentally ill State prison inmates were sentenced to serve an average of 171 months in prison, or about 12 months longer than other offenders Mentally ill jail inmates typically had sentences shorter than other jail inmates. On average, mentally ill inmates had a maximum sentence of 20 months, while other inmates an average of 26 months.”); DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 8 (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> [<https://perma.cc/8ZMY-X8GB>] (finding that state prisoners with a mental health problem reported mean maximum sentences that were, on average, five months longer than non-ill offenders (146 months compared to 141 months) and that among jail inmates, mentally ill offenders reported mean sentences that were five months shorter than non-ill offenders (40 months compared to 45 months)). These reports were primarily descriptive and did not include control variables.

286. Offenders who reported a mental health problem in both prison and jail were more likely to have significant criminal history, more likely to be violent recidivists, and less likely to have no prior criminal history than offenders who did not report a mental health problem. See JAMES & GLAZE, *supra* note 285, at 8 tbls.10 & 11; see also DITTON, *supra* note 285, at 4–5 (finding that mentally ill offenders were more likely to be violent recidivists and report having three or more prior sentences than non-ill offenders in both jail and prison).

287. See generally Leona Deborah Jochnowitz, *How Capital Jurors Respond to Mitigating Evidence of Defendant's Mental Illness, Retardation, and Situational Impairments: An Analysis of the Legal and Social Science Literature*, 47 CRIM. L. BULL. 839 (2011) (collecting and analyzing empirical literature regarding how capital jurors respond to mitigating factors of mental health and cognitive and situational impairments). Importantly, a recent study suggests that, at least in the context of offenders charged with violent crimes, mental illness may function as an aggravating factor for men but a mitigating factor for women. See Davidson & Rosky, *supra* note 284, at 353 (analyzing national data from 2004 Survey of Inmates in State Correctional Facilities and finding that “mental illness in the context of a violent conviction may be interpreted as evidence of diminished capacity for females and future dangerousness for males”).

288. See, e.g., *supra* note 14 for list of mitigating factors included in 42 PA. CONS. STAT. § 9711(e).

tencing consequences they would face if they declined participation in the mental health court.

Finally, Figures 4 through 7, while useful for showing descriptive differences in dispositions and sentence lengths, do not purport to portray disparities in the overall severity or onerousness of sentences issued by the Erie County mental health and criminal courts. Studies of offenders' perceptions of sanction severity suggest that defendants may consider periods of intensive supervision probation to be more onerous than a short jail term.²⁸⁹ Social scientists concerned about the interchangeability of custodial and non-custodial sanctions have proposed a series of equivalency ratios for intensive supervision, regular probation, jail, and prison.²⁹⁰ Assuming that mental health court participation functions as a form of intensive probation, these ratios could be used to compare the relative onerousness of mental health court with conventional sanctions for each of the twelve offenses analyzed in this Article.

III. AVENUES FOR FUTURE STUDY

The above analysis suggests that the terms of intensive probation imposed by the Erie County mental health court often dwarf those of the traditional criminal justice system.²⁹¹ Moreover, dispositional data reveal that rates of probation revocation—and attendant resentencing for each offense of conviction—far exceed rates of successful graduation and early discharge.²⁹² Yet information on graduation rates, rates of probation revocation, and sentencing differentials appears not to be clearly understood by treatment team members,²⁹³ and thus is unlikely to be communicated

289. See, e.g., Joan Petersilia, *When Probation Becomes More Dreaded than Prison*, 54 *FED. PROB.* 23, 24 (1990) (observing that about one-third of individuals eligible for intensive supervision probation chose imprisonment rather than participation in community supervision program); Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 *PRISON J.* 306, 318 tbl.3, 322, 324 (1994) (finding that inmates judged one year of intensive probation to be equivalent in severity to six months of jail and three years of probation); Peter B. Wood & Harold G. Grasmick, *Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison*, 16 *JUST. Q.* 19, 28 tbl.2 (1999) (finding that 26.3% of inmates serving brief prison terms for nonviolent offenses refused to participate in any amount of intensive supervision probation to avoid four months in prison, and nearly 19% of inmates refused to participate in any amount of intensive supervision probation to avoid a year of imprisonment). For explanations of why offenders perceive some community sanctions as more onerous than imprisonment, see David C. May et al., *The Lesser of Two Evils? A Qualitative Study of Offenders' Preferences for Prison Compared to Alternatives*, *PROB. & PAROLE* 71, 79 tbl.1 & 80 (2008); Wood & Grasmick, *supra*, at 30–31 & 31 tbl.4 (assessing 415 inmates' reasons for preferring or avoiding participation in alternative sanctions).

290. See *supra* note 289.

291. See Part III.

292. See *supra* Table 2.

293. See Kennedy Interview, *supra* note 46, at 8 (voicing her opinion that, “[o]n average[,] I think that [sentencing is] about the same now” inside and

to individuals weighing whether to forego traditional sentencing in favor of entry into the mental health court.

These findings suggest myriad avenues for future study. The Chief Public Defender's unsupported, rosy view of sentencing differentials and the success rate of mental health court participants,²⁹⁴ for instance, suggests a possible tarnishing of the traditional adversarial role of defense counsel²⁹⁵ and perhaps a greater allegiance to the mental health court than to the individuals to whom she is "selling" the treatment court option.²⁹⁶ In addition, the longer terms of supervision and high rates of probation revocation raise the specter that mental health courts are, especially for misdemeanants, non-diversionary and possibly net-widening.²⁹⁷ However, whether the mental health court, with its presumably greater

outside the mental health court); *supra* notes 127–28 (professing a lack of knowledge of current graduation rates).

294. *See supra* note 293.

295. *See* Steven Erickson et al., *Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution*, 42 COMMUNITY MENTAL HEALTH J. 335, 340 (2006) (observing that mental health courts "place defense attorneys in a potentially conflicting position between a traditional role of zealously advocating for their clients and an emerging role of collaborating with the various members of the mental health court to ensure treatment adherence" and that this dual role may "marginaliz[e] the need for counsel to pursue the client's 'self-interest goals'" (internal citations omitted)); Perlin, *supra* note 7, at 17–20; Allison D. Redlich et al., *Enrollment in Mental Health Courts: Voluntariness, Knowingness, and Adjudicative Incompetence*, 34 L. & HUM. BEHAV. 91, 92 (2010) ("With therapeutic jurisprudence at their base, MHCs have the potential to become paternalistic in nature. At its extreme, an overly paternalistic court could either not present the choices or override the wishes of a potential client deemed to be too unstable to make the 'proper' decision to enroll." (internal citations omitted)). This abdication of the traditional role of counsel in the context of mental health cases is not new and indeed is lamentably common in the civil commitment context. *See* Perlin, *supra* note 7, at 17 n.71 (collecting sources); Michael L. Perlin, "Who Will Judge the Many When the Game Is Through?": *Considering the Profound Differences Between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts* 1–8 (Oct. 27, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860052 [<https://perma.cc/3QG7-SJTN>].

296. *See* Kennedy Interview, *supra* note 46, at 1, 11 (describing how she tries to "sell" mental health court to defendants). The Chief Public Defender's misperceptions are unlikely to be corrected by the individual member of the public defender's office assigned to the defendant. This attorney will likely view the Chief Public Defender's assertions as educated, given her years of experience on the treatment team. *See* Kennedy Interview, *supra* note 46, at 1 (noting her involvement with mental health court since its inception). Even if not, the Chief Public Defender's position as the supervisor of the public defender's office renders dissent and differential client counseling by her subordinates unlikely.

297. *See supra* Table 2 (showing that 46% of mental health court participants sentenced between 2010 and 2013 experienced probation revocation, while only 21% successfully graduated and received early release); Part III.B. (differential rates of consecutive sentencing); Part III.C (sentencing differentials between mental health and traditional court); note 26 (discussing the possibility of net-widening).

level of support and tolerance for minor technical violations,²⁹⁸ results in greater probation revocation rates than standard or specialized probation is an empirical question that merits further investigation.²⁹⁹

In addition, a lack of transparency regarding graduation rates, revocation rates, and sentencing differentials³⁰⁰—coupled with overly optimistic characterizations of early release figures³⁰¹ and average program

298. See Battles Interview, *supra* note 35, at 6–7 (stating: “[W]e don’t expect people to be perfect. Sometimes there [are] minor technical violations, or you could have someone who has had a relapse but has recovered from the relapse and has responded well to you know additional treatment,” and explaining that these individuals would still be eligible to stay in the program and even may even receive an early discharge from supervision); Cunningham Interview, *supra* note 47, at 10–11 (stating that “by the time they get revoked we’ve given them a couple of chances” and noting that violations often involve relapses into substance abuse and mental decompensation); *supra* note 169 and accompanying text; see also Linhorst & Dirks-Linhorst, *supra* note 9, at 24 (citing a study finding “that 21.1 % of mental health court participants were arrested during supervision, of whom 33.7% were still able to successfully complete the program, while another study reported that 23.2% of mental health court participants were arrested during supervision, of whom 51.1% successfully completed the program” (citations omitted)).

299. Studies document that more intensive supervision increases the likelihood that an individual’s noncompliance will be discovered and punished. See Phyllis Solomon et al., *Predicting Incarceration of Clients of a Psychiatric Probation and Parole Service*, 53 PSYCHIATRIC SERVS. 50, 53–55 (2002) (finding that intensive monitoring of probationers and parolees with mental illness was associated with substantially increased discovery and punishment of poor behavior); Redlich et al., *supra* note 8, at 358–59 (detailing “growing literature indicating that offenders with mental illness who are subject to intense supervision fare worse (in terms of returning to jail) as an artifact of the supervision”); see also ALMQUIST & DODD, *supra* note 3, at 4 (observing that “the intensive supervision provided through mental health courts may increase the chance of individuals being caught committing minor infractions, which could lead to additional charges and deeper involvement with the criminal justice system”). Studies show that supervised individuals with mental illness—because of their greater concentration of criminogenic risk factors and parole officers’ greater scrutiny and lower thresholds for revocation—have much higher rates of revocation than those without mental illness. See, e.g., Jennifer L. Skeem et. al., *Offenders with Mental Illness Have Criminogenic Needs, Too: Toward Recidivism Reduction*, 38 L. & HUM. BEHAV. 212, 217 (2014) (finding that parolees with mental illnesses were 60% more likely to return to prison, largely due to increased commission of technical violations, than those without mental illness and explaining this finding by showing that offenders with mental illness tend to have more general risk factors for recidivism); Jennifer L. Skeem & Jennifer Eno Loudon, *Toward Evidence-Based Practice for Probationers and Parolees Mandated to Mental Health Treatment*, 57 PSYCHIATRIC SERVS. 333, 334 (2006) (reviewing existing research on failure rates of probationers and parolees with serious mental illness and observing that “research consistently indicates that individuals with mental illness are at double the risk of supervision failure” as individuals without mental illness).

300. See *supra* note 293. These subjects are also not addressed in the court’s brochure or policy and procedures manual.

301. See *supra* notes 136–37.

length³⁰²—may lead to an uninformed entry³⁰³ and worse outcomes.³⁰⁴ This Article investigates variation in initial sentencing consequences; a full assessment of the sentencing consequences of mental health and traditional court would require data on revocation rates attending parole, standard probation, and specialized probation,³⁰⁵ as well as resentencing consequences for supervision failures.³⁰⁶ Finally, a full assessment of the diversionary potential of the mental health court would also require assessment of the use of jail as a sanction to induce condition compliance,³⁰⁷ whether entry into the mental health court speeds or retards a detainee's release from jail prior to adjudication,³⁰⁸ and the extent that participation

302. The policy and procedures manual—which represents that participants typically complete Phases I through III in fifteen months—appears to underestimate the time that participants typically take to graduate from the mental health court. See *supra* notes 110–13 and accompanying text.

303. See *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996) (“A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable.” (citing MODEL CODE OF PROF'L RESPONSIBILITY, EC 7-7 (AM. BAR ASS'N 1992) (emphasis omitted)); Bernstein & Seltzer, *supra* note 11, at 154 (“If a guilty plea is required, a defendant should be given information that would allow him or her to weigh the likely jail or prison time associated with a conviction against the scope and duration of treatment that would be monitored by a mental health court.”).

304. See Allison D. Redlich & Woojae Han, *Examining the Links Between Therapeutic Jurisprudence and Mental Health Court Completion*, 38 L. & HUM. BEHAV. 109, 109 (2014) (demonstrating that not making knowing and voluntary mental health court entry decisions leads to higher rates of new arrests, incarceration, and bench warrants, which lead to lower graduation rates).

305. See *supra* note 299.

306. See *supra* notes 160–63; cf. Sevigny et al., *supra* note 18, at 416 (performing series of meta-analyses of various incarceration outcomes and finding that drug courts significantly reduced incidence of incarceration on the precipitating offense but “did not significantly reduce the average amount of time offenders spent behind bars, suggesting that any benefits realized from a lower incarceration rate are offset by the long sentences imposed on participants when they fail the program”).

307. See Cunningham Interview, *supra* note 47, at 8 (explaining that jail is used as a “last resort” in mental health court). Mental health courts around the country use jail as a sanction, at least infrequently, to induce condition compliance. See Redlich et al., *supra* note 8, at 355–56, 358 (finding, in their survey of ninety mental health courts, that 92% of mental health courts were willing to jail people for nonadherence, but that 33% estimated they placed noncompliant participants in jail in less than 5% of all cases); cf. Jaime S. King, *Innovation in Second Generation Mental Health Courts* 241, 256–58, 265 (Oct. 14, 2008), <http://ssrn.com/abstract=1284559> [<https://perma.cc/KEW5-2K9H>] (finding that the seven assessed mental health courts still used jail as sanction but that several had adapted its use to minimize predictable decompensation of mentally ill individuals when incarcerated, often without medication).

308. See Redlich et al., *supra* note 5, at 429–30 (comparing length of time from arrest to enrollment into three mental health courts with that for arrest to disposition for offenders with and without mental illness traditionally processed and finding that diversion took about twice as long in comparison to traditional processing of offenders with mental illness from the same jurisdictions); cf. Allison D. Redlich et al., *The Second Generation of Mental Health Courts*, 11 PSYCHOL., PUB., POL'Y & L. 527, 535 (2005) (finding that time from referral to first mental health

in the mental health court—for graduates and those who ultimately fail to complete the program—tends to reduce future criminal justice involvement.³⁰⁹ All of these issues are important and merit further attention.

court appearance ranged from 0 to 129 days, with an average of 28 days across the seven “second-generation” courts assessed).

309. *See supra* note 9. The benefits of decreased recidivism from mental health court participation appear to be concentrated in graduates. *See* Campbell et al., *supra* note 56, at 490 (collecting sources).

APPENDIX A: AVERAGE SENTENCES ORDERED IN ERIE COUNTY CRIMINAL COURTS BETWEEN 2010 AND 2014 FOR OFFENDERS WITH PRS OF ZERO

Charges	Sample Size	Grade OGS	Prison		Prison/Prob.		Jail		Jail/Prob.		Other ³¹⁰		
			% prison sentence (min, max)	% prison split sentence (min, max) Prob. term	% jail sentence (min, max)	% jail split sentence (min, max) Prob. term	% jail split sentence (min, max) Prob. term	% jail split sentence (min, max) Prob. term	% jail split sentence (min, max) Prob. term				
Robbery—threatens SBI; 18 Pa. Cons. Stat. § 3701(a)(1)(ii) (2016)	21	F-1	76.2% (42, 111.6) ³¹¹	19.0% (49, 98)	0.0%	4.8%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
		CoV ³¹²	(.36, .47)	(.23, .23)		(0, 0)							
		CoV		120		24							
		CoV		0		0							
Burglary of home—no one present; 18 Pa. Cons. Stat. § 3502(c)(1)*, (a)(2) (2016)	45	F-1	44.4% (12.1, 32.4)	4.4% (13, 26)	15.6% (8.6, 20.1)	13.3%	13.3%	13.3%	13.3%	13.3%	13.3%	8.9%	
		7											
		CoV	(.15, .23)	(.08, .08)		(.32, .29)							
		CoV		90		42							
		CoV		0.33		0.25							

³¹⁰ “Other” dispositions include county and state restrictive intermediate punishments, which are typically paired with restorative sanctions. See *supra* note 183 and accompanying text.

³¹¹ All term lengths are in months.

³¹² A Coefficient of Variation (CoV) is a tool for comparing degrees of variations when, as in this case, the means are drastically different from each other. It is calculated as follows: (standard deviation)/(mean). The standard deviation is not indicated on this chart because it has little comparative value given the drastically different means.

Charges	Sample Size	Grade OGS	Prison		Prison/Prob.		Jail		Jail/Prob.		Other
			% prison sentence (min, max)	% prison split sentence (min, max)	% prison sentence (min, max)	% prison split sentence (min, max)	% jail sentence (min, max)	% jail split sentence (min, max)	% prob. only Prob. term	% prob. only Prob. term	
Burglary—not a home/no person present; 18 Pa. Cons. Stat. § 3502(a) (4), (c) (2) (2016)		F-2	10.0% (8.7, 24)	0.0%	13.3% (6.4, 19.2)	30.0% (5.1, 15.7)	28.3% (39.5)	18.3%			
	60	CoV	(.34, .4)		(.16, .25)	(.56, .4)	0.42				
		CoV				35.8					
		CoV				0.51					
Criminal Trespass—buildings—break in; 18 Pa. Cons. Stat. § 3503(a) (1) (ii) (2016)		F-2	8.3% (3, 60)	0.0%	12.5% (4.7, 17)	20.8% (4, 16.2)	50.0% (46.3)	8.3%			
	24	CoV	(0, 0)		(.97, .46)	(.96, .51)	0.66				
		CoV				48					
		CoV				0.32					
Theft by unlawful taking—movable property (>\$2k-\$25k/or veh.); 18 Pa. Cons. Stat. § 3921* (2016)		F-3	8.8% (7.4, 21.6)	0.0%	22.8% (4.7, 18.8)	12.3% (6.2, 15)	50.9% (39.2)	5.3%			
	57	CoV	(.16, .22)		(.6, .28)	(.37, .39)	0.52				
		CoV				46.3					
		CoV				0.4					
Retail theft—(3rd/subsq off); 18 Pa. Cons. Stat. § 3929(b) (iv) (2016)		F-3	4.0% (1, 24)	0.0%	28.0% (1.4, 20.3)	16.0% (2.8, 15.8)	36.0% (34.5)	16.0%			
	25	CoV	(0, 0)		(.81, .14)	(.65, .27)	0.66				
		CoV				36					
		CoV				0.41					

Charges	Sample Size	Grade OGS	Prison		Prison/Prob.		Jail		Jail/Prob.		Other
			% prison sentence (min, max)	% prison split sentence (min, max) Prob. term	% prison sentence (min, max)	% jail sentence (min, max) Prob. term	% jail split sentence (min, max) Prob. term	% prob. only Prob. term			
Criminal Trespass— buildings; 18 Pa. Cons. Stat. § 3503(a)(1)(i) (2016)	61	F-3	4.9%	1.6%	21.3%	21.3%	44.3%	6.6%			
		3	(1, 48)	(3, 12)	(2.6, 15.2)	(3.3, 11.5)	35.3				
		CoV	(0, .35)	(0, 0)	(1.19, .55)	(.92, .49)	0.56				
		CoV		24		23.7					
Access Device Fraud— attempt/obtain \$50 < \$500; 18 Pa. Cons. Stat. § 4106(c)(1)(ii) (2016)	33	M-1	12.1%	0.0%	0.0%	12.1%	60.6%	15.2%			
		4	(3, 12)			(2.5, 8.3)	24.6				
		CoV	(0, 0)			(.45, .47)	0.61				
		CoV				24					
Theft—Unlawful Taking, \$200–\$2,000; 18 Pa. Cons. Stat. § 3921 (2016)	167	M-1	4.8%	0.0%	10.8%	5.4%	69.3%	9.6%			
		3	(1.6, 28.5)		(1.5, 19.1)	(2.1, 9.3)	28.3				
		CoV	(1.02, .42)		(.97, .32)	(1.25, .8)	0.55				
		CoV				27.6					
Theft—Receiving Stolen Property, \$200–\$2,000; 18 Pa. Cons. Stat. § 3925 (2016)	80	M-1	3.8%	0.0%	3.8%	5.0%	77.5%	10.0%			
		3	(1, 36)		(1, 15.2)	(1.2, 7.7)	23				
		CoV	(0, .54)		(0, .62)	(.35, .55)	0.5				
		CoV				33.5					
		CoV				0.41					

Charges	Sample Size	Grade OGS	Prison		Prison/Prob.		Jail		Jail/Prob.		Other
			% prison sentence (min, max)	% prison split sentence (min, max) Prob. term	% jail sentence (min, max)	% jail split sentence (min, max) Prob. term	% prob. only Prob. term				
Terroristic Threats; 18 Pa. Cons. Stat. § 2706 (2016)		M-1	9.1% (7.3, 36)	0.0%	18.2% (3.9, 19.7)	18.2% (3.7, 13.9)	51.5%	3.0%			
	33	CoV	(.26, .27)		(.92, .32)	(.56, .31)	38	0.43			
		CoV				40					
		CoV				0.22					
Retail Theft—1st/2nd offense & \$150 or more; 18 Pa. Cons. Stat. § 3929(b) (iii) (2016)		M-1	2.0% (13.7, 32)	0.0%	8.8% (1.8, 10.5)	1.4% (.4, 12)	83.1%	4.7%			
	148	CoV	(.57, .35)		(.55, .84)	(0, 0)	24.3	0.63			
		CoV				12					
		CoV				0					

APPENDIX B: DATA ON ERIE COUNTY MENTAL HEALTH COURT
PARTICIPANTS SENTENCED BETWEEN 2010 AND 2014³¹³

Year of Sentence/ Offender ID ³¹⁴	Grade; Offense Label; Statutory Citation ³¹⁵	PRS ³¹⁶	OGS ³¹⁷	Disposition ³¹⁸
2014/ NLW	M-1; Retail theft - take merchandise (1st/2nd off & >=\$150); 18 Pa. Cons. Stat. § 3929(a)(1)	1	2	INC = 1–23 mo. PROB = 36 mo. min., consec.
2014/ DAP	M-1; Terroristic Threats; 18 Pa. Cons. Stat. § 2706	0	3	IP = 0.99 mo. min. RS = 47 mo. min
2014/ DAP	M-2; Recklessly Endangering Another Person; 18 Pa. Cons. Stat. § 2705	0	3	PROB = 24 mo. min., concur.
2014/ CLD	M-1; Terroristic Threats— intent to terrorize; 18 Pa. Cons. Stat. § 2706(a)(1)	2	3	INC = 6–23.49 mo. PROB = 24 mo. min., consec.
2014/ AJD	M-2; Recklessly Endangering Another Person; 18 Pa. Cons. Stat. § 2705	0	3	PROB = 24 mo. min.
2014/ CXB	F-2; Burglary—not a home/no person present; 18 Pa. Cons. Stat. § 3502(a)(4)	0	5	IP = 3.16 mo. min. RS = 56.86 mo. min.

313. See Email from Dante Battles to E. Lea Johnston, *supra* note 101 (conveying outcomes for individuals sentenced to the mental health court between 2010 and 2014); STATEWIDE SENTENCING DATA: 2010–14, *supra* note 93.

314. Offender identification is represented by the offender's first, middle (where available), and last initials.

315. Grade definitions are defined as follows: F-1 for first-degree felony; F-2 for second-degree felony; F-3 for third-degree felony; F for ungraded felony; M-1 for first-degree misdemeanor; M-2 for second-degree misdemeanor; M-3 for third-degree misdemeanor; M for ungraded misdemeanor.

316. See *supra* note 178 (defining PRS levels); see also 204 PA. CODE § 303.4(a)(2) (2016) ("Offenders who have previous convictions or adjudications for Felony 1 and/or Felony 2 offenses which total 6 or more in the prior record, and who do not fall within the Repeat Violent Offender Category, shall be classified in the repeat Felony 1 and Felony 2 Offender Category.").

317. See *supra* note 177 and accompanying text for definition of OGS levels.

318. Disposition acronym definitions include INC for county incarceration, IP for intermediate punishment, PROB for probation, and RS for restorative sanction.

Year of Sentence/ Offender ID	Grade; Offense Label; Statutory Citation	PRS	OGS	Disposition
2013/ CXF	F; Acquisition of Controlled Substance by Fraud: Narc. Rx Pills Sch. II (Oxycontin, etc) (1-20 pills); 35 Pa. Cons. Stat. § 780-113(12)	RFEL 6	6	IP = 1.48 mo. min. RS = 118.53 mo. min.
2013/ WTM	F-1; Burglary - home/no person present; 18 Pa. Cons. Stat. § 3502(a) (2)	0	7	IP = 0.99 mo. min. RS = 59 mo. min.
2013/ TRD	M-1; Theft - Unlawful Taking; \$200-\$2,000; 18 Pa. Cons. Stat. § 3921	0	3	INC = 1 - 23 mo.
2013/ TRD	M-1; Retail Theft—1st/2nd offense & \$150 or more; 18 Pa. Cons. Stat. § 3929(b) (iii)	0	2	PROB = 60 mo. min., consec.
2013/ MDD	M-1; Terroristic Threats; 18 Pa. Cons. Stat. § 2706	1	3	INC = 6 - 23.49 mo. PROB = 36 mo. min., consec.
2013/ MDD	M-3; Criminal Mischief - over \$500; 18 Pa. Cons. Stat. § 3304(b)	1	1	PROB = 12 mo. min., consec.
2013/ ADD	M-1; Theft - Unlawful Taking; \$200-\$2,000; 18 Pa. Cons. Stat. § 3921	1	3	IP = 0.99 mo. min. RS = 59.03 mo. min.
2013/ NLM	F-3; Unlawful Device-Making Equip. - produce or traffic in equip.; 18 Pa. Cons. Stat. § 4106.1(a) (1)	0	6	IP = 1.48 mo. min. RS = 58.53 mo. min.
2013/ NLM	F; Acquisition of Controlled Substance by Fraud: Schedule IV; 35 Pa. Cons. Stat. § 780-113(12)	0	5	PROB = 36 mo. min., consec.
2013/ NLM	M-1; Bad Checks; \$1,000 < \$75,000; 18 Pa. Cons. Stat. § 4105(c) (1) (iv)	0	3	PROB = 36 mo. min., consec.
2013/ MNT	F-3; Retail Theft—3rd/subsequent offense; 18 Pa. Cons. Stat. § 3929(b) (iv)	5	3	IP = 0.99 mo. min. RS = 83 mo. min.

Year of Sentence/ Offender ID	Grade; Offense Label; Statutory Citation	PRS	OGS	Disposition
2013/ SLK	M-1; Access Device Fraud - unauthorized use of device (\$50 < \$500); 18 Pa. Cons. Stat. § 4106 (a) (1) (ii)	0	4	IP = 1.97 mo. min. RS = 58.03 mo. min.
2013/ SLK	M-3; Theft - Deception; < \$50; 18 Pa. Cons. Stat. § 3922	0	1	PROB = 12 mo. min., consec.
2013/ SLK	M-3; Theft—Unlawful Taking; < \$50; 18 Pa. Cons. Stat. § 3921	0	1	PROB = 12 mo. min., concur.
2013/ SLK	M-3; Theft by unlaw. taking - movable property (< \$50/no threat); 18 Pa. Cons. Stat. § 3921(a)	0	1	PROB = 12 mo. min., concur.
2013/ BSC	M-2; Retail Theft—2nd offense & < \$150; 18 Pa. Cons. Stat. § 3929(b) (ii)	0	2	INC = 0.33 - 23.49 mo.
2013/ BSC	M-1; Theft by unlaw. taking—movable property (\$200–\$2,000/no threat); 18 Pa. Cons. Stat. § 3929(a)	0	3	PROB = 18 mo. min.
2013/ NAW	M; DUI—controlled substances: Sched I (1st off); 75 Pa. Cons. Stat. § 3802(d) (1) (i)	0	1	INC = 0.10 - 6 mo.
2013/ NAW	M-2; Resisting Arrest, etc.; 18 Pa. Cons. Stat. § 5104	0	2	PROB = 24 mo. min., concur.
2013/ NAW	M-2; Resisting Arrest, etc.; 18 Pa. Cons. Stat. § 5104	0	2	PROB = 24 mo. min., consec.
2013/ NAW	M-2; Resisting Arrest, etc.; 18 Pa. Cons. Stat. § 5104	0	2	PROB = 24 mo. min., concur.
2012/ EMB	F-2; Criminal Trespass—buildings—break-in; 18 Pa. Cons. Stat. § 3503(a) (1) (ii)	0	4	IP = 0.99 mo. min. RS = 59 mo. min.
2012/ EMB	M-1; Theft—Unlawful Taking; \$200–\$2,000; 18 Pa. Cons. Stat. § 3921	0	3	PROB = 60 mo. min., consec.
2012/ SNG	F; Acquisition of Controlled Substance by Fraud: Schedule I, II; 35 Pa. Cons. Stat. § 780-113(12)	0	5	IP = 0.99 mo. min. PROB = 59 mo. min., consec.

Year of Sentence/ Offender ID	Grade; Offense Label; Statutory Citation	PRS	OGS	Disposition
2012/ RKL	M-2; Simple Assault; 18 Pa. Cons. Stat. § 2701(b)	0	3	INC = 1 - 23.49 mo.
2012/ RKL	M-2; Recklessly Endangering Another Person; 18 Pa. Cons. Stat. § 2705	0	3	PROB = 24 mo. min., consec.
2012/ RKL	M-3; Disorderly Conduct; 18 Pa. Cons. Stat. § 5503(b)	0	1	PROB = 12 mo. min., consec.
2012/ JAB ³¹⁹	M; DUI: Controlled Substances—1st offense; 75 Pa. Cons. Stat. § 3802(d)	0	1	IP = 0.99 mo. min. RS = 5.03 mo. min.
2012/ JAB	M; Simple Possession; 35 Pa. Cons. Stat. § 780–113(16)	0	3	PROB = 12 mo. min., consec.
2012/ JAB	M; Possession of Drug Paraphernalia; 35 Pa. Cons. Stat. § 780–113(32)	0	1	PROB = 12 mo. min., consec.
2012/ JAB	M; DUI: Controlled Substances—1st offense; 75 Pa. Cons. Stat. § 3802(d)	0	1	IP = 0.99 mo. min. RS = 5.00 mo. min.
2012/ JAB	M; Simple Possession; 35 Pa. Cons. Stat. § 780–113(16)	0	3	PROB = 12 mo. min., consec.
2012/ JAB	M; Possession of Drug Paraphernalia; 35 Pa. Cons. Stat. § 780–113(32)	0	1	PROB = 12 mo. min., consec.
2011/ NJL	M-1; DUI: Highest Rate of Alcohol—(BAC .16+)—2nd offense; § 75 Pa. Cons. Stat. 3802(c)	0	5	IP = 2.96 mo. min. RS = 57.03 mo. min.
2011/ MJB	F; Possession w/ Intent to Deliv.: Marijuana (1–< 10lbs.); 35 Pa. Cons. Stat. § 780–113(30)	0	5	IP = 0.99 mo. min. RS = 59.03 mo. min.
2011/ MJB	M; Possession of Drug Paraphernalia; 35 Pa. Cons. Stat. § 780–113(32)	0	1	PROB = 12 mo. min., consec.
2011/ MJB	M; Simple Possession; 35 Pa. Cons. Stat. § 780-113(16)	0	3	PROB = 12 mo. min., concur.

319. Due to his classification in the state coding system, this Article treats of-fender JAB as having one sentencing proceeding for three charges of conviction. See *supra* note 193.

Year of Sentence/ Offender ID	Grade; Offense Label; Statutory Citation	PRS	OGS	Disposition
2011/ MLA	M-1; Theft - Deception; \$200– \$2,000; 18 Pa. Cons. Stat. § 3922	3	3	IP = 1.48 mo. min. RS = 58.46 mo. min.
2010/ TWJ	F-3; Criminal Trespass— buildings; 18 Pa. Cons. Stat. § 3503(a)(1)(i)	REFL	3	IP = 1.97 mo. min. PROB = 82.00 mo. min., consec.
2010/ CLM	M-1; DUI: General Impairment/Incapable of Driving Safely—(refused testing)—2nd offense; 75 Pa. Cons. Stat. § 3802(a)(1)	0	5	IP = 2.96 mo. min. RS = 57.00 mo. min.
2010/ CLM	M-3; Disorderly Conduct; 18 Pa. Cons. Stat. § 5503(b)	0	1	PROB = 12 mo. min., consec.
2010/ CLM	M-3; Accident Involving Damage to Attended Vehicle or Property; 75 Pa. Cons. Stat. § 3743(b)	0	1	PROB = 12 mo. min., concur.
2010/ SJT	M-2; Resisting Arrest; etc.; 18 Pa. Cons. Stat. § 5104	0	2	IP = 0.99 mo. min. RS = 21.03 mo. min.
2010/ SJT	M-2; Simple Assault; 18 Pa. Cons. Stat. § 2701(b)	0	3	PROB = 24 mo. min., consec.
2010/ SJT	M-3; Disorderly Conduct; 18 Pa. Cons. Stat. § 5503(b)	0	1	PROB = 12 mo. min., concur.
2010/ CMK	M-1; Identity Theft—total value < \$2000; 18 Pa. Cons. Stat. § 4120(c)(1)(i)	1	3	INC = 6 - 23.49 mo.
2010/ CMK	M-1; Access Device Fraud— att./obtain \$50 < \$500; 18 Pa. Cons. Stat. § 4106(c)(1)(ii)	1	4	PROB = 60 mo. min., consec.
2010/ CMK	M-1; Theft - Deception; \$200– \$2,000; 18 Pa. Cons. Stat. § 3922	1	3	PROB = 60 mo. min., consec.
2010/ CMK	M-1; Theft - Unlawful Taking; \$200–\$2,000; 18 Pa. Cons Stat. § 3921	1	3	PROB = 60 mo. min., consec.

Year of Sentence/ Offender ID	Grade; Offense Label; Statutory Citation	PRS	OGS	Disposition
2010/ CMK	M-1; Theft - Deception; \$200– \$2,000; 18 Pa. Cons. Stat. § 3922	1	3	PROB = 60 mo. min., concur.
2010/ JXR	F-3; Retail Theft - 3rd/subsequent offense; 18 Pa. Cons. Stat. § 3929(b)(iv)	0	3	IP = 1.48 mo. min. PROB = 58.55 mo. min., consec.
2010/ TRM	M-1; DUI: Highest Rate of Alcohol—(BAC .16+)—2nd offense; 75 Pa. Cons. Stat. § 3802(c)	0	5	IP = 2.96 mo. min. PROB = 57.00 mo. min., consec.
2010/ TRM	M-1; DUI: Highest Rate of Alcohol—(BAC .16+)—2nd offense; 75 Pa. Cons. Stat. § 3802(c)	0	5	IP = 2.96 mo. min. PROB = 57.00 mo. min., consec.
2010/ TRM	M-1; Theft - Unlawful Taking; \$200–\$2,000; 18 Pa. Cons Stat. § 3921	0	3	PROB = 36 mo. min., consec.