

**THERAPEUTIC JURISPRUDENCE
STRATEGIES FOR PERSONS WITH
MENTAL DISABILITIES IN THE
MISSISSIPPI CRIMINAL JUSTICE SYSTEM**

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INTRODUCTION

The defense attorney faces a dilemma in determining what legal strategy will best help a client possessing mental disabilities. Without speedy access to adequate mental healthcare in the community where the client lives, the attorney risks their client spending a prolonged period in county jails if the attorney advises the client to take a plea bargain. Because Mississippi mental hospitals possess too few beds to meet the demand created by the number of persons with mental disabilities, the result is psychiatric treatment being delayed for years while these vulnerable individuals wait in county jails or prisons.¹ When those beds reach capacity, there is rarely a concrete answer for an individual on the waiting list who needs to receive psychiatric treatment. However, if the defense attorney cautions against pleading, then they risk the possibility of their client going to prison. But the latter option is not pursuable because the defense attorney has an ethical obligation to raise the issue when their client is possibly incompetent to stand trial.² Either way, the defense attorney realizes the possibility of their mentally disabled client receiving treatment from actors ill-equipped to administer that treatment.

Certain inferences can be drawn from the dilemmas of representing a client with mental disabilities. The disabilities possessed by these individuals require more out of a defense attorney than merely representing legal needs. Since a more well-rounded approach to representation is needed, the rules that govern ethical obligations must expand to include diverse strategies. Under the current professional conduct rules, guidance is provided only for a traditional lawyer-client relationship.³ Moreover, the courts must also take a well-rounded approach to help alleviate the underlying issues exacerbated by mental illness that drive these individuals into the justice system.

Mississippi officials have previously recognized the need for problem-solving courts for vulnerable populations. In 2017, the

¹ Sarah Smith, *Doing Less with Less: Mental Health Care in Mississippi*, PROPUBLICA (Dec. 28, 2017), <https://features.propublica.org/tyler-haire-mississippi/mental-health-care-in-mississippi/> [<https://perma.cc/A85C-G7P8>].

² See Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 2-3 (2017).

³ See discussion *infra* Section III.C.

Mississippi Legislature authorized the first mental health court pilot programs in the state.⁴ However, it did not actually fund the creation of these pilot programs until five years later.⁵ In contrast, the Mississippi Legislature passed the Alyce Griffin Clarke Drug Court Act in 2003, which established problem-solving drug court programs statewide to greater success.⁶ Mississippi mental health courts and drug courts share the primary objectives of reducing recidivism and rehabilitating individuals that make up these populations. Participants in the Mississippi drug court programs volunteer for long-term treatment rather than being incarcerated, and presumably, the mental health courts—if expanded—would operate similarly. These problem-solving courts function as a team with judges, court personnel, probation officers, social workers, and treatment providers working together to help treat participants.

This collaborative strategy to assist vulnerable populations within a community is referred to as “therapeutic jurisprudence.” “[T]herapeutic jurisprudence examines how law affects the therapeutic goals of a treatment relationship.”⁷ Traditional practices of jurisprudence focus exclusively on the legal questions of an individual in the justice system, while therapeutic jurisprudence additionally focuses on remedying the underlying issues that drive vulnerable populations into the justice system.⁸

⁴ See Rivers McGraw Mental Health Diversion Pilot Program Act, 2017 Miss. Laws ch. 416 (codified as amended at MISS. CODE ANN. §§ 9-27-1 to -21). In 2023, it was renamed the “Rivers McGraw Mental Health Treatment Court Act.” 2023 Miss. Laws ch. 356.

⁵ *Five Mental Health Treatment Court Pilot Programs Underway*, ST. MISS. JUDICIARY (Jan. 17, 2023), [https://courts.ms.gov/news/2023/01.17.22Mental%20Health%20Treatment%20Courts%20MKR.php#:~:text=State%20of%20Mississippi%20Judiciary,-Administrative%20Office%20of&text=A%20Mental%20Health%20Treatment%20Court,and%20diagnosed%20with%20mental%20illnesses.\[https://perma.cc/YFL4-URVR\]](https://courts.ms.gov/news/2023/01.17.22Mental%20Health%20Treatment%20Courts%20MKR.php#:~:text=State%20of%20Mississippi%20Judiciary,-Administrative%20Office%20of&text=A%20Mental%20Health%20Treatment%20Court,and%20diagnosed%20with%20mental%20illnesses.[https://perma.cc/YFL4-URVR]).

⁶ 2003 Miss. Laws ch. 515 (codified as amended at MISS. CODE ANN. §§ 9-23-1 to -51).

⁷ Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 467 (2002) (“Therapeutic jurisprudence invites us to think instrumentally and empirically about the law, rather than in terms of intrinsic rights or a priori principles.”); see also *Therapeutic Jurisprudence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the term as “[t]he study of the effects of law and the legal system on the behavior, emotions, and mental health of people; esp., a multi-disciplinary examination of how law and mental health interact”).

⁸ See SUZANNE M. STRONG ET AL., BUREAU OF JUST. STAT., NCJ No. 249803, CENSUS OF PROBLEM-SOLVING COURTS, 2012 2 (2016),

But why should Mississippians feel compelled to implement strategies of therapeutic jurisprudence in their communities? The two answers both involve respect for the local community in which they live and work. The first reason is that Mississippians should feel compassion for the most vulnerable individuals in their community. Persons with mental disabilities possess higher rates of characteristics that naturally play a role in driving them to criminality.⁹ These individuals released from incarceration or institutionalization often have nowhere to go, no one to provide help, and very little money (if any at all) to travel from one place to the next.

The second reason is that communities are safer and more cost-effective when persons with mental disabilities receive adequate care. Ninety-five percent of incarcerated inmates reenter society at some point,¹⁰ so it is in the interest of communities that individuals with mental disabilities in the justice system emerge from that system as stable as possible. Individuals incarcerated with mental disabilities generally have not transitioned well into their communities upon release compared to similar offenders who are not affected by mental illness. Consequently, communities are subject to an increased risk of persons with mental disabilities recidivating because of the underlying characteristics driving these individuals into the justice system.¹¹

This increased risk of recidivism results in increased costs to the state. Individuals with mental disabilities in the justice system require increased staffing to provide psychiatric medications and psychiatric evaluations while sometimes requiring individualized space apart from other inmates or patients. Thus, without adequate

<https://www.bjs.gov/content/pub/pdf/cpsc12.pdf> [https://perma.cc/U9MG-UHVJ] (“Problem-solving courts were established to treat other underlying causes of crime (e.g., drug addiction, mental health issues, or homelessness) or to address the needs of specific populations (e.g., veterans).”).

⁹ See Jason Matejkowski & Michael Ostermann, *Serious Mental Illness, Criminal Risk, Parole Supervision, and Recidivism: Testing of Conditional Effects*, 39 LAW & HUM. BEHAV. 75, 76 (2015) (“[S]tate prison inmates with a mental condition were more likely than other inmates to have a history of alcohol dependence . . . and to have been unemployed before the offense . . .”).

¹⁰ Eric H. Holder, Jr., U.S. Att’y Gen., Speech at the European Offenders Employment Forum (Oct. 8, 2010), <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101008.html> [https://perma.cc/4G9V-USAT].

¹¹ See Matejkowski & Ostermann, *supra* note 9, at 76.

treatment upon release from state-run institutions, the increased probability of these individuals committing additional crimes results in harm occurring to community members and increased costs to the state.

The first therapeutic solution to effectively treat this at-risk population is to expand mental health courts in Mississippi. Similar to drug courts, which are already prevalent in Mississippi, mental health courts take an overtly therapeutic approach to individuals who suffer from mental disabilities in the criminal justice system.¹² These “specialized courts use psychological insights about human behavior and the nature of mental illness to offer services that achieve [more effective] results” for individuals with mental disabilities in the criminal justice system.¹³ Sometimes referred to as “problem-solving courts,” judges in charge of solving a unique problem in the community see their roles as establishing relationships with defendants based on interdisciplinary insights that turn their attention toward healing.¹⁴ This change in motivation is what differentiates therapeutic courts from traditional courts.

Another therapeutic strategy is for criminal defense attorneys in Mississippi—and public defender offices in particular—to implement a holistic response to their clients with mental disabilities. The holistic defense model is one of the most effective in the country.¹⁵ Holistic defense, like mental health courts, “relies on an interdisciplinary team of experts, including . . . social workers, civil attorneys, investigators, and legal advocates.”¹⁶ These individuals work together to address all aspects of a case to provide legal and nonlegal services “under one roof.”¹⁷ Similar to the strategies used by mental health courts, holistic defense recognizes that persons with mental disabilities in the justice system possess a broad range of both “legal and nonlegal social

¹² Christina A. Zawisza, Foreword, *New Voices in Mental Health and Drug Courts*, 2 MENTAL HEALTH L. & POL’Y J. 101, 110 (2013).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013).

¹⁶ *Id.*

¹⁷ *Id.*

support needs” that will likely result in recidivism back into the justice system if they are not addressed.¹⁸

Traditional jurisprudence for those with mental disabilities has tied the hands of the Mississippi justice system so that it cannot effectively treat the needs of those individuals. As this Comment argues, expanding strategies and standards for persons with mental disabilities provides the actors in the justice system with more of the tools necessary to relieve the legal and nonlegal needs of members of this population. Since the prevalence of mental illness in a community causes problems for multiple aspects of the community, the key actors in the criminal justice system must think of individuals possessing mental disabilities as a significant part of their community, not as just one individual piece to be thrown aside.

I. BACKGROUND

Understanding why therapeutic jurisprudence provides a more workable standard for treating persons with mental disabilities in Mississippi requires acknowledging that the mental health policies in the United States and Mississippi produced the current problems for persons with mental disabilities in the justice system.

A. *The Consequences of Institutionalization*

Mental health policies in the United States from the 1920s until the turn of the twenty-first century steadily shifted from institutionalization to deinstitutionalization. An “institution,” for purposes of this Comment, is “[a]n established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons.”¹⁹ Policies of institutionalization are a concerted effort to confine persons with mental disabilities in an institution for a prolonged period. Conversely, deinstitutionalization policies attempt to depopulate persons with mental disabilities from those institutions.

From the 1920s to the 1950s, the United States institutionalized persons with mental disabilities at high rates. At

¹⁸ *Id.* at 987.

¹⁹ *Institution*, BLACK’S LAW DICTIONARY (11th ed. 2019).

the peak in 1948, 627 out of every 100,000 adults were institutionalized.²⁰ Mississippi followed the trend of institutionalization like the rest of the nation. Whitfield, the colloquial name for the Mississippi State Hospital, has been the primary public mental institution in Mississippi since 1848, and it counted “four thousand patients and more than eight hundred employees” in 1955.²¹

Negative consequences arise from implementing policies of institutionalization for persons with mental disabilities. First, institutionalization can result in these vulnerable individuals spending an extended period in jail holding facilities that are ill-equipped to address their needs while waiting for an available room at a state psychiatric hospital.²² In other words, persons with mental disabilities first become institutionalized in state prisons before being transferred to mental health institutions. When they finally receive a transfer to the state mental institution, their problems are not over. The average “length of stay at Whitfield’s continuing care unit was 4.5 years and 1,200 patients admitted to state hospitals between 2015 and 2017 remained for longer than two months.”²³ In *Olmstead v. L.C. ex rel. Zimring*, the U.S. Supreme Court expressed its concerns with policies of institutionalization for persons with mental disabilities.²⁴ The Court held that the Americans with Disabilities Act (the “ADA”) requires that individuals who do not oppose community care placement should receive mental health treatment in community settings rather than in institutions.²⁵ This case “established the principle of least restrictive environment” for government agencies

²⁰ Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39, 41 (2011).

²¹ Lucius M. Lampton, *Whitfield (Mississippi State Hospital)*, MISS. ENCYCLOPEDIA, <https://mississippiencyclopedia.org/entries/whitfield/> [https://perma.cc/7UZY-HN4X] (Apr. 15, 2018).

²² See *id.*

²³ Steve Wilson, *Lawsuit Against State’s Mental Health System Coming to a Close*, NORTHSIDE SUN (June 3, 2021, 1:00 PM), <https://www.northsidesun.com/local-news-top-stories/lawsuit-against-states-mental-health-system-coming-close> [https://perma.cc/7MYR-NJX3].

²⁴ 527 U.S. 581, 600-01 (1999).

²⁵ *Id.* at 596-97.

assigning treatment options for individuals with mental disabilities.²⁶

Due to the extended length of stay in institutions, institutionalization policies have the effect of segregating a portion of the population away from society. In *United States v. Mississippi*, Judge Reeves concluded that Mississippi was segregating persons with mental disabilities into state-run hospitals rather than treating those individuals within community centers, which violated the ADA.²⁷ Title II of the ADA prohibits unjustified segregations of individuals with mental disabilities and requires states and other public entities to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.²⁸

Further, policies of institutionalization can violate the due process rights of persons with mental disabilities. When a person with mental disabilities is determined incompetent to stand trial, they usually wait in local jails to be transferred to a state mental hospital. However, due to the limited number of beds available in the state mental hospitals, these individuals wait extended periods in those jails. The U.S. Supreme Court held, in *Bell v. Wolfish*, that due process rights depend on whether the pretrial condition amounted to punishment.²⁹ The Court said, “[I]f a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees”³⁰ Thus, without resources to adequately hold those individuals in institutions, policies that institutionalize persons with mental disabilities violate their due process rights.

²⁶ LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW § 7:12, Westlaw (database updated Oct. 2023).

²⁷ 400 F. Supp. 3d 546, 576 (S.D. Miss. 2019) (“Overall, when the evidence is evaluated under the precise standard set forth in *Olmstead*, the United States has proven that Mississippi’s system of care for adults with [serious mental illness] violates the integration mandate of the ADA.”), *rev’d*, 82 F.4th 387 (5th Cir. 2023).

²⁸ See 42 U.S.C. § 12132; *Olmstead*, 527 U.S. at 596-97.

²⁹ 441 U.S. 520, 535 (1979).

³⁰ *Id.* at 539.

B. The Consequences of Deinstitutionalization

“Deinstitutionalization [has] characterized all mental health policies since the 1970s.”³¹ These policies and treatment innovations drove “the half-million-person decrease in the mental hospital population [in the United States] between 1955 and the present.”³² Deinstitutionalization occurs when “persons with mental illness [are] discharged from large psychiatric institutions into the community.”³³ Given the negative consequences stemming from institutionalization, policymakers thought a shift toward deinstitutionalization would result in better outcomes for persons with mental disabilities.³⁴

These policymakers argued for deinstitutionalizing persons with mental disabilities on the belief that individuals with serious mental illness “could be treated effectively in community mental health centers.”³⁵ However, in practice, communities were ill-equipped to provide adequate care like “housing, medical and psychiatric care, social services, and social and vocational rehabilitation” for the formerly institutionalized patients.³⁶ Throughout the 1950s and 1960s, the mental hospital inpatient rate in the United States was triple that of the prison incarceration rate.³⁷ After the 1960s, inpatient rates in the United States dropped significantly, “falling below the incarceration rate in the mid-1970s and continuing to decline in later decades.”³⁸ Similarly, “during the

³¹ Lewis H. Lee & Daphne S. Cain, *Mental Health Policy for Justice-Involved Persons: Exploring History, Perspectives, and Models in the United States*, 16 BEST PRACS. MENTAL HEALTH 55, 58 (2020) (citing E. Fuller Torrey et al., *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TREATMENT ADVOC. CTR. (Apr. 8, 2014), <https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf> [<https://perma.cc/JX28-J7FK>]).

³² Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 190 (2013); see also H. Richard Lamb & Linda E. Weinberger, *Understanding and Treating Offenders with Serious Mental Illness in Public Sector Mental Health*, 35 BEHAV. SCIS. & L. 303, 304 (2017).

³³ Lamb & Weinberger, *supra* note 32, at 304.

³⁴ *Id.* As discussed in this Section, this is not usually the case.

³⁵ Lamb & Weinberger, *supra* note 32, at 305.

³⁶ *Id.*; see also Ginger Lerner Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577, 581 (2010).

³⁷ Raphael & Stoll, *supra* note 32, at 188.

³⁸ *Id.* at 188-89.

1980s and 1990s, the country experienced a nearly fivefold increase in incarceration rates.”³⁹

The fallout from this policy shift “produced a rapid increase in . . . prison populations and the criminalization of mentally disordered behavior.”⁴⁰ By the 1980s, policymakers began to agree that a contributing factor in “the increasing number of individuals with mental disorders in the criminal justice system” was deinstitutionalization policies.⁴¹ This policy swing was “poorly planned in the United States because the majority of patients were discharged from psychiatric hospitals without follow-up psychiatric care.”⁴² Policymakers began to realize that releasing individuals with mental illness “without ensuring proper [follow-up] treatment in the community increased the number of crimes committed” by persons with mental disabilities.⁴³ Currently, in Mississippi, discharge plans from mental institutions are “frequently boilerplate and disconnected from the skills individuals need in order to live in the community.”⁴⁴

This lack of follow-up care upon release from state institutions results in some former patients committing crimes arising from their untreated mental illness.⁴⁵ “Rates of serious mental illness are much higher in the criminal justice system than in the general population.”⁴⁶ “17% to 34% of offenders are diagnosed with serious mental illness . . . [compared] with approximately 4-6% of the general population who have a serious mental illness.”⁴⁷ Some studies show that “[a]pproximately half of state and federal prison inmates and over 60 percent of jail inmates report having mental health problems or symptoms indicative of mental illness.”⁴⁸ These studies suggest that persons with serious mental illness are

³⁹ *Id.* at 189.

⁴⁰ Lee & Cain, *supra* note 31, at 58.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Complaint at 12-13, *United States v. Mississippi*, 400 F. Supp. 3d 546 (S.D. Miss. 2019) (No. 16-CV-622), 2016 WL 4260801.

⁴⁵ Lee & Cain, *supra* note 31, at 58.

⁴⁶ Roger H. Peters et al., *Evidence-Based Treatment and Supervision Practices for Co-Occurring Mental and Substance Use Disorders in the Criminal Justice System*, 43 AM. J. DRUG & ALCOHOL ABUSE 475, 475 (2017).

⁴⁷ *Id.*

⁴⁸ Raphael & Stoll, *supra* note 32, at 187.

overrepresented in prison and jail populations, showing “that the criminal justice interactions with the untreated mentally ill extend beyond being jailed for safekeeping.”⁴⁹

A similar cycle exists in Mississippi mental hospitals. “Thousands of adults with mental illness in Mississippi needlessly cycle in and out of the [state mental hospitals] each year because they do not receive the supports they need in the community.”⁵⁰

One twenty-seven year old man admitted to the Mississippi State Hospital on a randomly selected day in March 2015 had *22 prior admissions* to the Hospital. Individuals with persistent needs cycle through the [state mental hospitals] over and over again, to say nothing of admissions to local emergency rooms, private psychiatric hospitals, and jails.⁵¹

In one 2014 survey of the Mississippi State Hospital in Whitfield, the U.S. Department of Justice found that fifty-five percent of the 206 adults in short-term care had two or more prior admissions and just over eleven percent had more than ten prior admissions.⁵² “Readmissions typically result from insufficient services in the community and inadequate coordination between treating professionals in facilities and those who support the individuals when they are in the community.”⁵³

C. United States v. Mississippi

What solution would effectively help those with mental disabilities in the justice system? Should there be more institutionalization or deinstitutionalization policies? Given the outcomes resulting from deinstitutionalization policies of increased risk to the community and a cycle of recidivism for persons with mental disabilities, Mississippi could justify separating this subset of the population from the rest of the community. However, the U.S. Department of Justice and federal courts do not feel the same way.

In *United States v. Mississippi*, “[t]he key point of contention between [Mississippi and the federal government] is how much

⁴⁹ *Id.* at 192.

⁵⁰ Complaint, *supra* note 44, at 10.

⁵¹ *Id.* at 11.

⁵² *Id.*

⁵³ *Id.*

community care is needed” in Mississippi.⁵⁴ The “[a]ttorneys for the federal government and for Mississippi agree that the state needs to improve access to mental health services – but that’s about the only thing they can agree on.”⁵⁵ In July 2021, during a hearing at the federal courthouse in Jackson, attorneys for the Department of Justice and attorneys for Mississippi disagreed over what type of plan was needed to ensure that Mississippi improved access to community mental healthcare.⁵⁶

The federal government says that the state’s mental health programs unnecessarily require those with serious mental illnesses to receive services in the state’s four mental health hospitals, rather than in their communities. The state says that it is now meeting the standard and should be released from court monitoring.⁵⁷

Attorneys for Mississippi argued that the state “enacted programs that enable people to obtain [community-based] treatment . . . and avoid hospitalizations, such as mobile crisis teams, supportive housing and peer support services”; however, attorneys for the Department of Justice argued that those services must expand along with creating metrics to ensure the services are working.⁵⁸ The court had previously found that “Mobile Crisis services remain ‘illusory’ in many parts of Mississippi,”⁵⁹ and at the

⁵⁴ Wilson, *supra* note 23.

⁵⁵ Taylor Vance, *Attorneys for Federal, State Government, Clash over Scope of Mental Health Remedy*, DAILY J. (July 12, 2021), <https://www.djournal.com/news/state-news/attorneys-for-federal-state-government-clash-over-scope-of-mental-health-remedy/article5ab88e9b-95e5-570d-bd1f-3c410fe372b4.html> [https://perma.cc/X9QA-ULD4].

⁵⁶ Leah Willingham, *What Will Happen to Mental Health Care System in Mississippi? Judge Nears Decision*, CLARION-LEDGER (July 13, 2021, 5:00 AM), <https://www.clarionledger.com/story/news/politics/2021/07/13/mental-health-system-mississippi-lawsuit-hearing-2021-judge-reeves/7937443002/> [https://perma.cc/C675-5WH9].

⁵⁷ Wilson, *supra* note 23.

⁵⁸ Leah Willingham, *Mississippi Appeals Order Requiring Mental Health Plan*, ASSOCIATED PRESS (Oct. 6, 2021, 1:24 PM), <https://apnews.com/article/mississippi-united-states-mental-health-courts-health-e1e2f0ed79d952ed71fa4413b583e37e> [https://perma.cc/CMA3-7FBJ].

⁵⁹ Nick Judin, *Department of Justice Reveals Plan for Ailing Mississippi Department of Mental Health*, MISS. FREE PRESS (May 25, 2021), <https://www.mississippifreepress.org/12485/department-of-justice-reveals-plan-for-ailing-mississippi-department-of-mental-health> [https://perma.cc/K44M-2LCG].

hearing, the Department of Justice argued to implement a plan for independent oversight over mental health services in Mississippi.⁶⁰ The proposed plan stated that “Mobile Crisis Teams shall be available for phone and in-person responses to individuals experiencing mental health crisis 24 hours a day, 7 days a week, and 365 days a year throughout each [community mental health center] region.”⁶¹ In 2019, the court had acknowledged that “Mississippi has set up 14 regional community mental health centers, but the services they provide are very often underfunded, understaffed, underutilized or unavailable.”⁶²

Following the hearing, Judge Reeves agreed with the Department of Justice and entered an order adopting its proposed plan, including the appointment of an independent monitor to oversee the plan’s implementation.⁶³ In October 2021, Mississippi appealed the district court’s ruling,⁶⁴ and nearly two years later, the Fifth Circuit reversed.⁶⁵ In siding with the state, the circuit court of appeals held that the federal government failed to prove Mississippi had violated the ADA and that even if it had, the plan adopted by the district court was an “overly broad” remedy.⁶⁶

Despite the existing problems in the Mississippi mental healthcare system, the federal mandate was insufficient to help Mississippians with mental disabilities. Attorneys for Mississippi have consistently expressed that Mississippi has been “transitioning to community-based care responsibly.”⁶⁷ They argued that no state possesses the resources to provide “a mental health service system [with] no ‘gaps’ and no ‘unmet needs.’”⁶⁸

⁶⁰ Willingham, *supra* note 56.

⁶¹ Judin, *supra* note 59.

⁶² Jodine Mayberry, *Mississippi Overinstitutionalizes People with Mental Illness, Court Says: U.S. v. Mississippi*, WESTLAW J. HEALTH L., Oct. 9, 2019, at 11.

⁶³ *See generally* United States v. Mississippi, No. 16-CV-622, 2021 WL 2953672 (S.D. Miss. July 14, 2021).

⁶⁴ Willingham, *supra* note 58.

⁶⁵ United States v. Mississippi, 82 F.4th 387, 401 (5th Cir. 2023).

⁶⁶ *Id.* at 398.

⁶⁷ Larrison Campbell, *Jim Hood Long Railed Against Mississippi’s Mental Health System. Now, Amid His Campaign for Governor, He Must Defend It in Court*, MISS. TODAY (June 3, 2019), <https://mississippitoday.org/2019/06/03/jim-hood-long-railed-against-mississippis-mental-health-system-now-amid-his-campaign-for-governor-he-must-defend-it-in-court/> [<https://perma.cc/K3HP-RWDM>].

⁶⁸ *Id.*

Instead of focusing on narrow mental health policies to implement, the most effective way to help persons with mental disabilities in Mississippi is through implementing therapeutic jurisprudence strategies like specialized mental health courts that focus solely on this vulnerable population and holistic defense strategies to meet both the legal and nonlegal needs of these individuals.

II. THERAPEUTIC JURISPRUDENCE IN THE COURTS: MENTAL HEALTH COURTS

A. *Mental Health Courts v. Traditional Criminal Courts*

Therapeutic jurisprudence, at its most basic level, views the practice of law as a “healing profession.”⁶⁹ Those who follow this notion of the law “have coined terms like holistic law, therapeutic jurisprudence, preventive law, restorative justice, collaborative law, transformative (or transformational) law, creative problem-solving and procedural justice.”⁷⁰ Justice is “‘therapeutic’ if it is beneficial for the mental, emotional, and/or physical health of the parties involved, while a consequence is ‘anti-therapeutic’ when it produces results that are detrimental to the mental, emotional, or physical health of individuals” in the justice system.⁷¹ Specialized mental health courts intentionally focus on a therapeutic approach for those individuals with mental disabilities in the justice system.⁷²

Until the mid-1990s, most persons with mental disabilities in the justice system were processed similarly as individuals without mental disabilities.⁷³ One solution that a variety of states have implemented—and that Mississippi has at least authorized—has been providing mental health courts for this subsection of the

⁶⁹ J. Kim Wright & Dolly M. Garlo, *Law as a Healing Profession: New Trends Are Expanding Choices in Law Practice*, OR. ST. BAR (Apr. 2003), <https://www.osbar.org/publications/bulletin/03apr/healing.html> [<https://perma.cc/KDS9-S3DM>].

⁷⁰ *Id.*

⁷¹ Zawisza, *supra* note 12, at 109.

⁷² *Id.* at 110.

⁷³ SHELLI B. ROSSMAN ET AL., NAT’L INST. JUST., NCJ No. 238264, CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 6 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238264.pdf> [<https://perma.cc/QJ92-3R52>].

population. These specialized courts typically begin by establishing a specialized docket or court program to increase attention to “the needs of individuals with mental illness who come before the criminal court.”⁷⁴ Mental health courts tend to focus less on punishment and more on “linking defendants to community-based treatment and other problem-solving strategies” to oversee their involvement in the criminal justice system.⁷⁵

One difficulty of institutionalizing persons with mental disabilities is that county jails and prisons are often ill-equipped to handle their needs. Whether the mentally disabled defendant is sentenced to treatment in a facility or awaiting a trial, they all spend some time in the county jail after being arrested. The due process clause prohibits pretrial detainees from being punished before conviction, and any delay in transferring court-ordered pretrial detainees to the state hospital for evaluation or treatment amounts to a punishment of the detainees.⁷⁶ Despite this constitutional requirement, county jails are often unable to transport a mentally disabled inmate because of the limited amount of resources available for mental healthcare in Mississippi, such as a lack of beds.⁷⁷

In addition, “[i]nmates with serious mental illness are significantly more costly to house and treat . . . for a variety of reasons, including increased staffing needs, psychiatric medications, and psychiatric evaluations.”⁷⁸ Persons with mental disabilities often require “increased staffing and individualized space.”⁷⁹ Prison and jail staff sometimes place those inmates in isolation for the protection of the inmate or others, to “await the inmate’s transfer, [or to] punish the inmate for violating a facility

⁷⁴ *Id.* at 8.

⁷⁵ *Id.* at 8-9.

⁷⁶ *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 942 (E.D. Ark. 2002) (“[I]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, . . . the proper inquiry is whether those conditions amount to punishment of the detainee.” (omission in original) (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 (1979))).

⁷⁷ *See Smith*, *supra* note 1.

⁷⁸ E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 517-18 (2019).

⁷⁹ Katherine B. Cook, Note, *Revising Assisted Outpatient Treatment Statutes in Indiana: Providing Mental Health Treatment for Those in Need*, 9 IND. HEALTH L. REV. 661, 675 (2012).

rule.”⁸⁰ “While in isolation, inmates are often placed in small cells . . . for up to twenty-three hours a day.”⁸¹ Some argue that “[d]espite the well-documented need for mental health treatment among this population, jails may knowingly choose to provide fewer psychiatric services to those in isolation confinement.”⁸²

Unfortunately, treatment for those individuals can be neglected while in local jails because the correctional officers do not possess the tools necessary to oversee mentally disabled persons.⁸³ These officers rarely “apply to work with this subsection of the population,” and they usually do not know how to effectively treat persons with mental disabilities.⁸⁴ Small facilities may lack medical staff with psychiatric training and sometimes might not even have the information that a detainee has been deemed incompetent.⁸⁵ The “lack of [psychiatric] training not only presents concerns with identifying mental health issues” but also with how persons with mental disabilities receive treatment.⁸⁶ Often, “low staffing can also lead to treatment models that focus solely on crisis prevention,” which results in staff only addressing “the most pressing, and likely disruptive, symptoms.”⁸⁷

B. Characteristics of Mental Health Courts

“In response to the need for criminal justice reform for mentally ill prisoners, several states have enacted mental-health courts” that predominately operate on a state or local level.⁸⁸ These courts “function at state and municipal levels to divert eligible offenders from the criminal justice system to community treatment services.”⁸⁹

⁸⁰ Margaret Wilkinson Smith, Note, *Restore, Revert, Repeat: Examining the Decomensation Cycle and the Due Process Limitations on the Treatment of Incompetent Defendants*, 71 VAND. L. REV. 319, 331 (2018).

⁸¹ *Id.*

⁸² *Id.* at 331-32.

⁸³ *Id.* at 332-33.

⁸⁴ Cook, *supra* note 79, at 675-76.

⁸⁵ Smith, *supra* note 80, at 333-34.

⁸⁶ *Id.* at 334.

⁸⁷ *Id.*

⁸⁸ Courtney Black, Note, *Mental-Health Courts: Expanding the Model in an Era of Criminal Justice Reform*, 63 WASH. U. J.L. & POL’Y 299, 308-09 (2020).

⁸⁹ *Id.* at 300.

The essence of a problem-solving court is to treat an underlying cause of crime by diverting offenders to specialized dockets and programs. By utilizing the problem-solving court model, mental-health courts have developed three distinct features: (1) treatment, (2) incentives for program participation, and (3) judicial oversight and evaluation of defendants' progress in the program.⁹⁰

“Providing safe and effective treatment and supervision to eligible defendants in the community, [rather than in jails or prisons], is one of the principal purposes of mental health courts.”⁹¹

The majority of mental health courts share characteristics that qualify them as therapeutic jurisprudence. Most mental health courts incorporate “[a] specialized court docket, which employs a problem-solving approach.”⁹² This approach differs from “more traditional court procedures for certain defendants with mental illnesses” which group mentally disabled defendants into the same category as nonmentally disabled defendants.⁹³ Mental health courts also qualify as therapeutic jurisprudence because they incorporate “[j]udicially supervised, community-based treatment plans for each defendant participating in the court” program.⁹⁴ These plans are designed and implemented by “a team of court staff and mental health professionals.”⁹⁵ Further, mental health courts typically offer regular status hearings to review participants on their progress.⁹⁶ They provide incentives to reward compliance with court conditions while sanctioning participants who do not.⁹⁷ Lastly, most mental health courts utilize specific criteria to determine when a participant has completed the program.⁹⁸

⁹⁰ *Id.* at 309 (footnote omitted).

⁹¹ MICHAEL THOMPSON ET AL., BUREAU JUST. ASSISTANCE, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 3 (2007), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/MHC_Essential_Elements.pdf [<https://perma.cc/97EH-TPNJ>].

⁹² *Id.* at vii.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Mental health courts function similarly to drug courts, which are other problem-solving courts that address the problems in the justice system caused by drugs and alcohol. Drug courts have become popular in Mississippi and began because of a need to address the challenges in a specific portion of the population (drug and alcohol abusers) while reducing recidivism rates in that target population. The Mississippi Legislature recognized “the critical need for judicial intervention to reduce the incidence of alcohol and drug use, alcohol and drug addiction, and crimes committed as a result of alcohol and drug use.”⁹⁹ Problem-solving courts like drug courts and mental health courts are typically created through statute,¹⁰⁰ and mental health courts were founded first “on the assumption that treating a criminal justice-involved person’s mental illness would lower recidivism rates and increase psychiatric functioning.”¹⁰¹

“Cumulative research . . . indicates that drug courts increase retention in treatment and reduce recidivism over follow-up periods of up to several years.”¹⁰² “There are now a wide variety of mental health courts . . . that provide diversion from custody for persons with mental disorders.”¹⁰³ Like drug courts, mental health courts “feature voluntary participation, use of a multidisciplinary team, supervised involvement in treatment, and incentives . . . for program completion.”¹⁰⁴ “Several studies have examined recidivism following participation in [mental health courts], and most have found reductions in recidivism over different periods of time.”¹⁰⁵ Mental health courts “also appear to enhance engagement and retention in treatment” while linking persons with mental disabilities with community services.¹⁰⁶

⁹⁹ MISS. CODE ANN. § 9-23-3(1) (West, Westlaw through 2023 Reg. Sess.).

¹⁰⁰ See, e.g., Alyce Griffin Clarke Drug Court Act, 2003 Miss. Laws ch. 515 (codified as amended at MISS. CODE ANN. §§ 9-23-1 to -51); Rivers McGraw Mental Health Treatment Court Act, 2023 Miss. Laws ch. 356 (codified at MISS. CODE ANN. §§ 9-27-1 to -21).

¹⁰¹ Jacqueline Landess & Brian Holoyda, *Mental Health Courts and Forensic Assertive Community Treatment Teams as Correctional Diversion Programs*, 35 BEHAV. SCIS. & L. 501, 506 (2017).

¹⁰² Peters et al., *supra* note 46, at 479.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Despite the positive research for therapeutic jurisprudence and positive reception for drug courts in Mississippi, mental health courts have not thus far garnered the same favor in the state. In 2017, the Mississippi Legislature passed the Rivers McGraw Mental Health Diversion Pilot Program Act.¹⁰⁷ Although this legislation authorized the creation of mental health court pilot programs, the state legislature did not allocate the funding necessary to do so until July 1, 2022.¹⁰⁸ As of August 2023, the only therapeutic court that would resemble an established mental health court in Mississippi is the Hattiesburg Behavioral Health Court.¹⁰⁹ This court was established in 2010 and targets individuals charged with misdemeanors.¹¹⁰ The approximate annual enrollment is just *ten participants*.¹¹¹

Recent developments, however, may indicate a positive future for mental health courts in Mississippi. Chief Justice Mike Randolph of the Mississippi Supreme Court has stated, “Unquestionably, we are committed to expanding.”¹¹² Furthermore, the Mississippi Legislature amended the mental health court legislation earlier this year, renaming it the “Rivers McGraw Mental Health Treatment Court Act” and removing references to “pilot programs.”¹¹³ If mental health courts were to become more established in Mississippi, they would likely act similarly to other therapeutic courts that increase attention and resources to address unique problems in the justice system.

C. *The Role of the Judge*

In mental health courts, a crucial task of the judge is to “help offenders achieve emotional wellness [while deterring] unlawful

¹⁰⁷ 2017 Miss. Laws ch. 416 (codified as amended at MISS. CODE ANN. §§ 9-27-1 to -21).

¹⁰⁸ *Five Mental Health Treatment Court Pilot Programs Underway*, *supra* note 5.

¹⁰⁹ *See Adult Mental Health Treatment Court Locator*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults?field_gains_mhc_state_value=MS [https://perma.cc/Q496-X9J5] (last visited Aug. 20, 2023).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Five Mental Health Treatment Court Pilot Programs Underway*, *supra* note 5.

¹¹³ 2023 Miss. Laws ch. 356 (codified at MISS. CODE ANN. §§ 9-27-1 to -21).

activity.”¹¹⁴ A central feature of therapeutic jurisprudence is the contrast between judges in traditional courts and judges practicing therapeutic jurisprudence.¹¹⁵ In mental health courts, judges envision themselves practicing a “healing profession.”¹¹⁶ These judges “promote accountability . . . and encourage respect and compassion” for the struggles of the mentally disabled in the justice system.¹¹⁷ They recognize that processes focusing on the entire “human experience [of an individual] are likely to result in better outcomes for participants, who will see the law as more legitimate.”¹¹⁸ The role of the judge as a healer fostering this environment in the justice system is critical for maximizing the success of the mental health court.¹¹⁹

For instance, a therapeutic court equips the judge to identify that most “‘survival’ crimes, such as theft and panhandling,” committed by a person with mental disabilities probably occurred due to a lack of community resources, such as “food, housing, psychosocial support, and adequate treatment.”¹²⁰ The judge can discern the possibility of diverting that individual into “pre-booking or pre-plea diversion schemes [that] focus on enhanced community treatment and resources targeting the underlying problem.”¹²¹ The judge can weigh which option “would work best to decrease recidivism and increase functioning while respecting” the autonomy of the mentally disabled defendant and protecting them from discrimination.¹²² The increased attention for a specific subsection of the population also equips these courts to identify risk to the community, which is a factor when determining whether a person with mental disabilities should receive early release.¹²³ A judge trained in therapeutic jurisprudence strategies can implement “a condition of attendance in outpatient treatment” as

¹¹⁴ Ursula Castellano, *The Politics of Benchcraft: The Role of Judges in Mental Health Courts*, 42 LAW & SOC. INQUIRY 398, 400 (2017).

¹¹⁵ Lamb & Weinberger, *supra* note 32, at 306-08.

¹¹⁶ Wright & Garlo, *supra* note 69.

¹¹⁷ Landess & Holyda, *supra* note 101, at 505.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 505-06.

¹²⁰ *Id.* at 507.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Lamb & Weinberger, *supra* note 32, at 308.

part of the mental health court program to “maintain a low risk for criminal activity” similar to attendance conditions in drug court programs.¹²⁴

Moreover, studies have found that “[f]or those defendants with mental illness who engage in more serious crimes, [mental health court] participation might be the only option to avoid incarceration and expedite treatment.”¹²⁵ The most recent trend in mental health courts nationally is the expansion for the courts to hear violent criminal cases.¹²⁶ “This expansion often occurs once a mental-health court has [proven] effective in a jurisdiction.”¹²⁷

[U]nlike drug courts, which typically limit participants to nonviolent drug crimes, many mental health courts are willing to accept participants who are charged with more serious felony offenses or violent crimes, in part because the longer sentences available for participants charged with felonies allow the [mental health] court to coordinate and supervise community-based treatment for longer periods of time.¹²⁸

Even if mental health courts were more established in Mississippi, state law currently prohibits defendants accused of violent crimes from participating in these programs unless the crime was a burglary.¹²⁹

¹²⁴ *Id.*

¹²⁵ Landess & Holyda, *supra* note 101, at 507 (“Although some [mental health courts] decide to only accept defendants who commit non-violent crimes and low-level felonies, it is not entirely clear that this strategy enhances participant success. In other words, a defendant’s chance of recidivating is higher if he/she has multiple criminogenic risks and needs that are not addressed, regardless of the specific crime or mental illness. Core criminogenic risk factors include history of antisocial behaviors, antisocial cognition, criminal companions, antisocial personality patterns, family problems, substance abuse, lack of healthy recreational pursuits, and work or school problems.”).

¹²⁶ Black, *supra* note 88, at 310; *see also* Sara Gordon, *About a Revolution: Toward Integrated Treatment in Drug and Mental Health Courts*, 97 N.C. L. REV. 355, 368 (2019).

¹²⁷ Black, *supra* note 88, at 310.

¹²⁸ Gordon, *supra* note 126, at 368 (footnote omitted).

¹²⁹ MISS. CODE ANN. § 9-27-11(1) (West, Westlaw through 2023 Reg. Sess.).

III. THERAPEUTIC JURISPRUDENCE IN REPRESENTATION: HOLISTIC DEFENSE STRATEGIES

A. *Holistic Defense v. Traditional Criminal Defense*

How do criminal defense lawyers typically represent their clients? The traditional practice of representation tends to focus narrowly on the criminal case while not focusing on the underlying issues related to the arrest.¹³⁰ Traditional defense attorneys believe that their most important function is to address the immediate legal needs of a client to minimize the threat of incarceration.¹³¹ Holistic defense attorneys, on the other hand, have a broader view of their function, which focuses on all aspects of a client's needs, not just the most immediate legal needs.¹³² Holistic defense advocates argue that public defenders and other criminal defense attorneys "must address [the] collateral, legal consequences of criminal justice involvement," like lack of employment, housing, child custody, and mental health status, "as well as underlying nonlegal issues that often play a role in driving clients into the criminal justice system in the first place."¹³³

This departure from traditional defense representation to a more holistic defense approach has seen increased support over the previous decades.¹³⁴ "The holistic defense model arose partly in response to widespread criticism of existing systems for delivering defense services to indigent clients, and partly as a component of the larger problem-solving movement taking hold in the criminal justice system"¹³⁵ Many public defenders have expressed frustration with the current limitations existing in the "traditional representation model that seeks only to satisfy the minimal

¹³⁰ Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1068 (2004).

¹³¹ Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004).

¹³² James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821 (2019).

¹³³ *Id.*

¹³⁴ Cynthia G. Lee et al., *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1216 (2014).

¹³⁵ *Id.*

constitutional [and ethical] requirements.”¹³⁶ “The basic focus in holistic law is looking at the whole picture,” evaluating the role of the lawyer and the community impact, while carving out strategies for their clients that obtain “the greatest good and promote[] healing.”¹³⁷ Essentially, holistic defense is the practice of criminal defense attorneys “work[ing] in interdisciplinary teams to address both the immediate case and the underlying life circumstances[, such as mental illness,] that contribute to client contact with the criminal justice system.”¹³⁸ “[A]dvocates of holistic defense argue that it [reduces] incarceration,” especially for persons with mental disabilities, because addressing the “underlying social and environmental problems that may have contributed to a client’s involvement in crime” reduces recidivism.¹³⁹

In the twenty-first century, agencies at the federal, state, and local levels intersect in ways that make it difficult for criminal defense attorneys to represent their clients through “the traditional approach of focusing only on the criminal case.”¹⁴⁰ This interconnectedness creates difficulties because vulnerable defendants, like individuals with mental illness, can easily get tangled in “a web of government agencies once they become involved in the criminal justice system.”¹⁴¹ Criminal defense attorneys need to “become aware of the many traps, hidden punishments, and . . . losses of liberty” that can await their vulnerable clients.¹⁴²

The most famous example of mental health courts working together with holistic defense is the Bronx Mental Health Court and The Bronx Defenders. The Bronx Mental Health Court is “a collaboration comprised of criminal justice personnel (judge, defense attorneys, and prosecuting attorneys), a clinical team (clinical director, case managers, and psychiatrists), and

¹³⁶ *Id.*

¹³⁷ Wright & Garlo, *supra* note 69.

¹³⁸ Anderson et al., *supra* note 132, at 820.

¹³⁹ Lee et al., *supra* note 134, at 1216-17.

¹⁴⁰ Steinberg, *supra* note 15, at 973.

¹⁴¹ *Id.*; *see also id.* at 987 (“Our clients spend their lives navigating one indifferent administrative bureaucracy after the next: the welfare office, the child welfare system, school bureaucracies, the housing authority, and Medicare systems.”).

¹⁴² *Id.* at 974.

coordinating staff (administrative project director).¹⁴³ The Bronx Defenders often represent criminal defendants who participate in the Bronx Mental Health Court.¹⁴⁴ A ten-year study of The Bronx Defenders showed that throughout that period, “holistic representation in the Bronx . . . resulted in nearly 1.1 million fewer days of custodial punishment.”¹⁴⁵ While first established in New York, “the holistic defense model has spread to multiple other jurisdictions” as part of a larger strategy to move “many traditionally oriented defender offices . . . toward the holistic model.”¹⁴⁶ If states like Mississippi also move toward a holistic defense approach, then “the model could result in thousands or even tens of thousands of fewer custodial sentences each year,” saving money for the state and promoting the well-being of its mentally disabled population.¹⁴⁷

B. Characteristics of Holistic Defense

Four essential pillars define the holistic defense model, and under this framework, these pillars function similarly to the elements of a criminal statute.¹⁴⁸ A criminal defense attorney must meet each pillar to qualify as a practitioner of holistic defense.¹⁴⁹ The first pillar is to provide “seamless access to legal and nonlegal services” to meet the needs of a client.¹⁵⁰ To satisfy nonlegal needs, the attorney and the interdisciplinary team ask questions that go beyond the story surrounding the arrest, diving deeper into the mental health, employment, children, housing, and other aspects of the client’s life.¹⁵¹ Inquiring into issues beyond the traditional attorney-client relationship allows the team to build a complete strategy tailored for unique needs.

The second pillar is interdisciplinary communication.¹⁵² The communication between criminal defense attorneys and local

¹⁴³ ROSSMAN ET AL., *supra* note 73, at 32.

¹⁴⁴ *Id.* at 34.

¹⁴⁵ Anderson et al., *supra* note 132, at 885.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Steinberg, *supra* note 15, at 986.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 987.

¹⁵¹ *Id.* at 988.

¹⁵² *Id.* at 991.

advocates in other professions allows the team to “strategize more effectively and to assist clients with collateral consequences and social service needs in a more efficient manner.”¹⁵³ Holistic defense offices tend to be complex with multiple, different advocacy teams working together. Throughout a specific case, a holistic defense attorney may need to talk with investigators about witness statements, social workers about mental health issues or housing, civil attorneys to preserve housing or custody, and a civil legal advocate to apply for food stamps or secure a bed in a mental health treatment facility.¹⁵⁴

The third pillar calls for advocates to have an interdisciplinary skill set.¹⁵⁵ Lawyers who implement holistic defense strategies train themselves and their team in nontraditional aspects of the law, such as housing, employment, immigration, and mental illness.¹⁵⁶ This training allows the attorney to “identify a client’s legal and social work needs and make appropriate referrals within the office or to other community-based providers.”¹⁵⁷ These interdisciplinary skills impact legal representation because they can enable attorneys “to identify issues before they pose insurmountable challenges for clients” and to consult specific team members who are relevant for the defense of a client.¹⁵⁸

The last pillar requires “a robust understanding of, and connection to, the community” the office is serving.¹⁵⁹ This understanding of the community at-large allows the lawyer “to argue for more individually tailored case dispositions,” provide quicker support, and increase collaboration with residents “to create long-term change.”¹⁶⁰ A connection to the community gives the holistic defense attorney a deeper understanding of the problems that drive individuals into the justice system and provides attorneys with the tools to address the challenges for a client with mental disabilities seeking to reenter their community.¹⁶¹

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 992.

¹⁵⁵ *Id.* at 995.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 995-96.

¹⁵⁹ *Id.* at 997.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Adding these four pillars together results in representation for persons with mental disabilities in the justice system that places a higher value on each aspect of their well-being. On the other hand, some could argue that holistic defense places a higher burden on the defense attorney incorporating this strategy because of the increased overall attention beyond the legal issues.¹⁶² Regardless, the current rules guiding the professional conduct of Mississippi attorneys do not adequately provide for this higher level of responsibility. To avoid conflicting duties presented to the defense lawyer, a more workable set of professionalism obligations may be necessary for holistic defense representation to be feasible in Mississippi.

C. Limitations Under the Rules of Professional Conduct

The *Mississippi Rules of Professional Conduct* state in Rule 1.14(a) that when a client is unable “to make adequately considered decisions” because of a mental disability, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.”¹⁶³ When a defense attorney “reasonably believes that the client cannot adequately act in the client’s own interest,” the lawyer may seek to appoint a guardian “*or take other protective action with respect to a client*” pursuant to Rule 1.14(b).¹⁶⁴ The comment to Rule 1.14 acknowledges that “maintaining the ordinary client-lawyer relationship may not be possible” when the client possesses a mental disability.¹⁶⁵

The comment also notes that “[i]nformation relating to the representation is protected by Rule 1.6,” and in some circumstances, disclosure of the mental disability could “lead to proceedings for involuntary commitment.”¹⁶⁶ Under Rule 1.6, the lawyer cannot disclose that information “unless the client gives informed consent, the disclosure is impliedly authorized,” or a permitted exception under Rule 1.6(b) applies.¹⁶⁷ However, the comment to Rule 1.14 states that “[w]hen taking protective action

¹⁶² Anderson et al., *supra* note 132, at 822.

¹⁶³ MISS. RULES OF PRO. CONDUCT r. 1.14(a) (Westlaw through Dec. 1, 2023).

¹⁶⁴ *Id.* at r. 1.14(b) (emphasis added).

¹⁶⁵ *Id.* at r. 1.14 cmt.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at r. 1.6(a).

pursuant to paragraph (b), the lawyer is *impliedly* authorized to make the necessary disclosures [to the court], even when the client directs the lawyer to the contrary,”¹⁶⁸ but the lawyer may do so “only to the extent necessary to protect the client’s interest.”¹⁶⁹ The comment further suggests that before consulting with other individuals or entities, “the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client’s interests.”¹⁷⁰ The comment unhelpfully concludes by stating that “[t]he lawyer’s position in such cases is an unavoidably difficult one.”¹⁷¹

This admission shows that defense attorneys practicing in accord with the traditional notions of the lawyer-client relationship often encounter a “collision of duties.”¹⁷² A collision of duties occurs when an individual faces two or more obligations, each of which is satisfiable separately, but “it is impossible to [satisfy] both.”¹⁷³ For criminal defense attorneys in Mississippi who would like to implement holistic defense strategies, it can seem like their hands are tied due to conflicting obligations.

Defense attorneys struggle with the dilemma of raising competency concerns when doing so would prolong the time a client spends in an institution.¹⁷⁴ The collision of duties becomes evident when defense attorneys face a choice of raising the competency issue, which may result in prolonged detention, or allowing a client who may not be able to comprehend the situation to stand trial.¹⁷⁵ For instance, the defense attorney may need to determine whether to pursue a plea bargain, even though the mentally disabled individual could be confined longer, or whether to hold out for a bed in a facility to open (despite the limited number of beds available), which could also result in confinement longer than necessary.

¹⁶⁸ *Id.* at r. 1.14 cmt. (emphasis added).

¹⁶⁹ *Id.* at r. 1.14(c).

¹⁷⁰ *Id.* at r. 1.14 cmt.

¹⁷¹ *Id.*

¹⁷² See Ivó Coca-Vila, *Conflicting Duties in Criminal Law*, 22 NEW CRIM. L. REV. 34, 41 (2019).

¹⁷³ *Id.*

¹⁷⁴ See Orihuela, *supra* note 2, at 2.

¹⁷⁵ *Id.* at 3.

Moreover, the collision of duties intensifies when the lawyer and client disagree.¹⁷⁶ Disagreements can occur in therapeutic courts, like mental health courts and drug courts, where the client prefers the treatment option over prison time, yet the lawyer is worried that the client may never complete the treatment and find themselves institutionalized for longer than they would have been if they had accepted a plea bargain.¹⁷⁷ What should defense attorneys do when faced with these dilemmas? In therapeutic courts, the lawyer “must demand that his or her client receives adequate time to make a fully informed, and therefore, genuine choice.”¹⁷⁸ However, public defenders and other criminal defense attorneys in Mississippi may not have the time or resources to develop a decision on their own, so a more workable standard is needed for defense attorneys who want to adequately represent the entirety of the struggles of their client in the justice system with the help of an interdisciplinary team.

The Mississippi Supreme Court should expand Rule 1.14(b) to create a more effective ethical standard and help enable holistic defense strategies in Mississippi. In New York, where The Bronx Defenders practiced holistic defense for the first time, their Rule 1.14(b) counterpart is more substantial. New York’s Rule 1.14(b) begins similarly to the Mississippi rule by stating that a lawyer may act when they have a reasonable belief of (1) a client’s diminished capacity, (2) a risk of substantial harm to the client, and (3) a client’s inability to “adequately act in the client’s own interest.”¹⁷⁹ But the New York rule provides the lawyer with more options when that reasonable belief arises. It states that a lawyer “may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.”¹⁸⁰

Unlike the comment to the Mississippi Rule 1.14, the comment to the New York rule lists the protective measures a lawyer can follow instead of merely acknowledging that the question is

¹⁷⁶ Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 424 (2004).

¹⁷⁷ *Id.* at 424-25.

¹⁷⁸ Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1290 (1998).

¹⁷⁹ N.Y. RULES OF PRO. CONDUCT r. 1.14(b) (Westlaw through Nov. 15, 2023).

¹⁸⁰ *Id.*

difficult.¹⁸¹ The comment to the New York Rule 1.14 states that such measures could include “consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.”¹⁸²

For holistic defense to work in Mississippi, the *Mississippi Rules of Professional Conduct* should be expanded to allow more options for an interdisciplinary team to intervene when necessary. While acknowledging that, ultimately, the client is the one who makes the final decision regarding representation strategies,¹⁸³ the current rules offer little concrete guidance on how to proceed when the client lacks the proper decision-making capabilities. For Mississippi defense attorneys who seek to follow a holistic approach for their mentally disabled clients, a standard that guides them through the maze of ethical considerations for a mentally disabled client in the justice system, rather than simply lamenting that the question is a difficult one, is crucial.

IV. THERAPEUTIC JURISPRUDENCE HYPOTHETICAL CASE STUDY

To show the benefits therapeutic jurisprudence could offer Mississippi, it could be beneficial to give a hypothetical scenario and analyze how therapeutic jurisprudence would play out. Hypothetically, there is a woman named Terri who lives with her sister in Bay St. Louis, Mississippi. Terri has struggled with a mental disability for some years now. Terri is middle-aged, but when she was in her late teens, she was diagnosed with schizophrenia. She functions as a person without a mental disability when she takes her medication; however, when Terri forgets to take her medication, she possesses a profound belief that the mafia is trying to kidnap her and human traffic her out of the country. One day, while her sister was at her job in the shipyard, Terri forgot to take her medication before going to the grocery store.

¹⁸¹ *Id.* at r. 1.14 cmt. 5.

¹⁸² *Id.*

¹⁸³ *See* MISS. RULES OF PRO. CONDUCT r. 1.2 (Westlaw through Dec. 1, 2023).

After paying for her groceries, Terri walked into the parking lot and saw two men exit a work-van equipped with an out-of-state license plate. Seeing this activated her mental disorder. Inside her mind, these men intended to tie her up, put her in the van, and drive her to the docks to human traffic her out of the country. She grabbed a metal rod next to the store and swung it at the men violently. She hit one of the men on the shoulder, and the police came to take Terri to the station, charging her with aggravated assault.

Terri met with her public defender Susan for the first time during her arraignment. Susan is one of these “new-age lawyers” who implements holistic defense strategies at her public defender office. Since Susan followed The Bronx Defenders, she knew that she had to ask Terri the right questions to evaluate what legal and nonlegal services Terri needed.¹⁸⁴ Susan asked Terri about children, public benefits, current employment, and mental health. Terri’s face raised at the mention of mental health. Terri told Susan that she was diagnosed with schizophrenia some years ago but that she has never felt comfortable talking about her disorder, which is why she did not inform the police officers of her condition after her arrest. After receiving this information, Susan contacted Jim, the social worker at Susan’s office.¹⁸⁵ He came to the courthouse to conduct various mental health assessments, which allowed him to analyze her situation and walk her through the various treatment resources the team could pursue on her behalf.

The team decided to utilize the new mental health court program in their community to help meet Terri’s mental health needs. Judge Jones implemented this program to help the rising level of persons with mental disabilities entangled in the justice system. Judge Jones is a respected circuit court judge with a disposition to help vulnerable populations in his community. He has volunteered for various charitable organizations and is considered the best Sunday School teacher in South Mississippi. When Susan met with Terri during the arraignment, she informed

¹⁸⁴ See Steinberg, *supra* note 15, at 988 (“In arraignments, attorneys at The Bronx Defenders are trained to ask not just the names of witnesses or how the client was arrested, but also about the client’s immigration status, children, public benefits, mental health, employment, housing, student loans, and more.”).

¹⁸⁵ See *id.* (“Social workers conduct psycho-social assessments of the client, identify mental health and substance abuse problems, and recommend treatment.”).

Terri that she was eligible to be diverted to participate in the mental health court program instead of facing criminal punishment.¹⁸⁶

After discussing with Susan about a possible referral to the program, Judge Jones tried to figure out what he could do for Terri to get her the help she needed.¹⁸⁷ He called her case, and they began to talk to each other. Terri was hesitant at first to disclose her mental condition. Judge Jones felt her uncertainty and told Terri and Susan to meet with him during recess. Terri stated that she wanted to participate in the program but was afraid of being stigmatized after admitting her condition in front of others. Judge Jones told Terri compassionately that he took great care to ensure that the confidentiality of program participants was maintained. He informed Terri that in his program, her clinical documents containing information about her disability would remain separate from her criminal files so that if she chose to quit the program, her participation in the program would not hurt her criminal case.¹⁸⁸ After Terri and Susan talked over all the positives of this program and the consequences of not adhering to it, Terri felt that participating in the mental health program would help her get the treatment she needed.¹⁸⁹

Judge Jones laid out the parameters for her participation in the mental health court program.¹⁹⁰ He advised her that the terms of the program required Terri to adhere to an individualized treatment plan developed after consulting with his

¹⁸⁶ See THOMPSON ET AL., *supra* note 91, at 2 (explaining that “[m]ental health courts should . . . focus on defendants whose mental illness is related to their current offenses”).

¹⁸⁷ See Steve Leifman & Hallie Fader-Towe, *Improving the Courts’ Response to People with Mental Illnesses*, CRIM. JUST., Winter 2020, at 18, 18.

¹⁸⁸ See THOMPSON ET AL., *supra* note 91, at 7 (“To minimize the likelihood that information about defendants’ mental illnesses or their referral to the mental health court will negatively affect their criminal cases, courts whenever possible should maintain clinical documents separately from the criminal files and take other precautions to prevent medical information from becoming part of the public record.”).

¹⁸⁹ See *id.* at 5 (“Defense attorneys play an integral role in helping to ensure that defendants’ choices are informed throughout their involvement in the mental health court.”).

¹⁹⁰ See *id.* at 4 (“Within these parameters, the terms of participation should be individualized to each defendant and should be put in writing prior to his or her decision to enter the program.”).

interdisciplinary mental health court team.¹⁹¹ He told Terri that the consequences of noncompliance with the plan could result in removing her from the program. Even though Judge Jones viewed himself as a healer, he knew that if participants viewed the program as a lax alternative to criminal punishment, the participants would not take the treatment program seriously. This is why he let Terri know that the program was so difficult that some defendants requested prison time over participation. He also told Terri that the duration of her individualized treatment program would depend upon her progress.¹⁹² Judge Jones said that upon completion of the program, Terri would have her criminal charges dismissed.¹⁹³ He concluded by telling her that the program is voluntary, reiterating that she could withdraw from the program at any time without having her participation reflect negatively on her criminal case.¹⁹⁴

Once Terri was placed on the specialized docket, Judge Jones, Susan, Jim, and the rest of the team worked collaboratively to establish a treatment program for Terri. Together, they worked to design and connect Terri to the available mental health services in the local community.¹⁹⁵ Susan mentioned to Judge Jones that her team was having trouble contacting the regional mental health center. The regional mental health center was in the middle of a transitional period, and they were not answering many phone calls at that time. Judge Jones told Susan he would schedule a meeting with the mental health center. Susan did not seem

¹⁹¹ *See id.* at 6 (“When a participant is identified and linked to a service provider, the mental health court team should design a treatment plan that takes into account the results of a complete mental health and substance abuse assessment, individual consumer needs, and public safety concerns.”).

¹⁹² *See id.* at 4 (“The length of mental health court participation should not extend beyond the maximum period of incarceration or probation a defendant could have received if found guilty in a more traditional court process. In addition, program duration should vary depending on a defendant’s program progress.”).

¹⁹³ *See id.* (“When a mental health court participant completes the terms of his or her participation in the program, there should be some positive legal outcome.”).

¹⁹⁴ *See id.* (“Mental health court participants, when in compliance with the terms of their participation, should have the option to withdraw from the program at any point without having their prior participation and subsequent withdrawal from the mental health court reflect negatively on their criminal case.”).

¹⁹⁵ *See id.* at 3 (“Providing safe and effective treatment and supervision to eligible defendants in the community, as opposed to in jail or prison, is one of the principal purposes of mental health courts.”).

confident at this prospect. Judge Jones reassured her by saying, “[W]hen a judge calls a meeting, people come.”¹⁹⁶ Because Judge Jones was an influential member in the community and knew people involved with the regional mental health center, he and the rest of the team were able to devise a treatment plan for Terri.¹⁹⁷

While Terri was getting psychiatric treatment from community-based resources, she was still required to meet at the courthouse every Wednesday afternoon to evaluate her progress. Every participant in this mental health court program has “all aspects of their life . . . monitored by the [mental health court] team.”¹⁹⁸ The team monitors whether the participants are taking their medications, attending treatment sessions, and adhering to the conditions of the program.¹⁹⁹ This interdisciplinary team includes Judge Jones, law enforcement officers, prosecutors and defense attorneys, court managers, mental health treatment providers, and case managers.²⁰⁰ Judge Jones instructed this team that they should communicate regularly regarding the effectiveness of the treatment plan, and he periodically inquired whether there were any adjustments needed to the participants’ individualized plans. The case manager, Ryan, helps Judge Jones to monitor the mental health court’s caseload and develop the overall conditions for program participation.²⁰¹ Ryan provides updates on the progress of each participant to Judge Jones as well as ensures that treatment services will remain available even after a participant has graduated from the program.

¹⁹⁶ Leifman & Fader-Towe, *supra* note 187, at 21.

¹⁹⁷ See THOMPSON ET AL., *supra* note 91, at 6 (“Mental health courts should anticipate the treatment needs of their target population and work with providers to ensure that services will be made available to court participants.”).

¹⁹⁸ See Edward M. Blau, *Mental Health Courts*, 78 OKLA. BAR J. 2823, 2826 (2007).

¹⁹⁹ See THOMPSON ET AL., *supra* note 91, at 8 (“The court team functions include conducting screenings, assessments, and enrollments of referred defendants; defining terms of participation; partnering with community providers; monitoring participant adherence to terms; preparing for all court appearances; and developing transition plans following court supervision.”).

²⁰⁰ See ROSSMAN ET AL., *supra* note 73, at 32.

²⁰¹ See THOMPSON ET AL., *supra* note 91, at 6 (“Case managers—whether they are employees of the court, treatment providers, or community corrections officers—should have caseloads that are sufficiently manageable to perform core functions and monitor the overall conditions of participation. They should serve as the conduits of information for the court about the status of treatment and support services.”).

Even though each member of the team has contributed to the success of the new mental health court, Judge Jones' energy for the program has been essential to its success.²⁰² He frequently oversees the work of the team while facilitating collaboration with community-based treatment providers. Judge Jones instructed his team that their role was to provide "safe and effective treatment and supervision" to persons with mental disabilities in the justice system rather than merely sending this vulnerable population off to jails or prisons.²⁰³ Since Judge Jones viewed his role as a healer, instead of the traditional judges who view their role as just "call[ing] balls and strikes,"²⁰⁴ he made clear to the team to seek out vulnerable individuals entangled in the justice system who would be eligible for his program.²⁰⁵

Judge Jones also prioritized the interdisciplinary nature of his mental health court program.²⁰⁶ Like Susan, who trained herself in nontraditional areas of criminal defense that would become beneficial to meet the needs of her clients, Judge Jones also trained himself and his team beyond the traditional court functions. He ensured that his team familiarized themselves with other mental health courts around the United States because no mental health court functions exactly like another. The team traveled together to attend national and regional training sessions that shed light on the practices of mental health courts across the county. He also reviewed their performance from time to time to ensure that they

²⁰² See *id.* at 8 ("Regardless of the composition of the team, the judge's role is central to the success of the mental health court team and the mental health court generally. He or she oversees the work of the mental health court team and encourages collaboration among its members, who must work together to inform the judge about whether participants are adhering to their terms of participation.").

²⁰³ *Id.* at 3.

²⁰⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States).

²⁰⁵ See THOMPSON ET AL., *supra* note 91, at 3 ("Mental health courts should identify potential participants early in the criminal justice process by welcoming referrals from an array of sources such as law enforcement officers, jail and pretrial services staff, defense counsel, judges, and family members.").

²⁰⁶ See *id.* at 8 ("Mental health court planners should carefully select team members who are willing to adapt to a nontraditional setting and rethink core aspects of their professional training.").

improved the function of the newly created mental health court program.²⁰⁷

As Terri moved through the mental health court program, she participated in status hearings where Judge Jones praised her for adhering to the conditions of the program.²⁰⁸ He expressed that she was making psychiatric progress through continually taking her medication and attending therapy sessions at the regional mental health center. Terri was rewarded by graduating to the next phase of the program. The other participants clapped and cheered for her while Judge Jones smiled. His smile faded as the next participant walked in front of the bench. Jake, diagnosed with bipolar disorder, became a participant after his arrest for burglarizing two houses, and he had not attended any of his appointments at the regional mental health center. Judge Jones explained to Jake that for the program to work, participants must follow their treatment plans. Judge Jones told Jake that he was knocking him down a phase and that if he continued to disregard his treatment plan, then Judge Jones would have to remove him from the program.²⁰⁹

Despite all the positive psychiatric help that Terri received as a participant in the mental health court program, her mental disability was not the only problem in her life. Terri was unaware that her sister's job at the local shipyard had become precarious when she first met Susan. Unfortunately for the two sisters, the man Terri hit with the metal rod was the son of her sister's boss. He had just graduated college and returned home to work for his father at the shipbuilding plant. The news of Terri's attack on his son angered the boss, and he fired her sister. Subsequently, Terri and her sister were evicted from their apartment and lived in a shelter for almost a week before Terri finally called Susan.

²⁰⁷ *See id.* ("Periodic review and revision of court processes must be a core responsibility of the court team. Using data, participant feedback, observations of team members, and direction from the advisory group and planning committee . . . , the court team should routinely make improvements to the court's operation.")

²⁰⁸ *See id.* at 9 ("Status hearings allow mental health courts publicly to reward adherence to conditions of participation, to sanction nonadherence, and to ensure ongoing interaction between the participant and the court team members.")

²⁰⁹ *See id.* ("In some cases, sanctions are necessary. . . . As a participant's commission of violations increases in frequency or severity, the court should use graduated sanctions that are individualized to maximize adherence to his or her conditions of release.")

Since Susan had spent time training in holistic defense strategies, she possessed an interdisciplinary skill set. Not only was she a competent criminal defense attorney, but also she possessed experience in family, housing, employment, and healthcare law.²¹⁰ Although Susan had some knowledge and experience with housing and employment from her holistic defense training,²¹¹ she felt that referring Terri's and her sister's housing challenges to her friend, Lisa, would be the most effective solution.²¹² During Susan's first few years as a holistic public defender, she encountered a local housing advocate named Lisa who proved adept in remedying many housing situations for vulnerable populations. Lisa went with Susan to chancery court to advocate on their behalf. Even though Susan was not as fluent in housing law as in other areas, her interdisciplinary familiarity with various advocates and social workers provided her with the ability to meet Terri's legal and nonlegal needs.

Although Lisa was able to help the team resolve Terri's and her sister's immediate housing needs, Susan knew that Terri would need additional support from the local community to stay on track in the program. Through the holistic defense training Susan had received, she had a strong understanding and connection to the Bay St. Louis community.²¹³ She had hosted a number of community events to gain a better understanding of the needs of vulnerable community members that led her to create local organizing tactics and collaborate with various groups in the community.²¹⁴ This

²¹⁰ See Steinberg, *supra* note 15, at 995 ("Newly hired criminal attorneys should receive basic training in family, housing, employment, and immigration law; they should be educated on the complexities of school, welfare, and health care bureaucracies; and they should be taught about the different types of addictions and mental illnesses.").

²¹¹ See *id.* ("While advocates are not expected to become experts in disciplines other than their own, their familiarity with other legal and nonlegal issues is critical to their ability to effectively meet their clients' needs.").

²¹² See *id.* at 992 ("The team model encourages each advocate to seek advice and assistance from a variety of experts, depending on the needs of the client, and regular team meetings provide an opportunity to highlight examples of effective interdisciplinary communication and collaboration.").

²¹³ See *id.* at 997 ("A deep understanding of the community enables public defenders to argue for more individually tailored case dispositions, get clients the social services support they need faster, and collaborate with residents to create long-term change through policy initiatives and local organizing.").

²¹⁴ See *id.* at 999 ("The Bronx Defenders also strives to change the underlying conditions that drive Bronx residents into the criminal justice system through

involvement in the community allowed Susan to make the connections necessary to get an individually tailored solution with the social support the sisters needed quicker than would have been possible without her influence in various community organizations.

V. CRITICISMS

Despite the positive outcomes that therapeutic jurisprudence brings to a community, potential drawbacks exist for this approach as well.

A. *Issues of Funding*

First, if history is any indication, the Mississippi Legislature may not fund these therapeutic jurisprudence programs.²¹⁵ As a consequence of the 2008 financial crisis, “Mississippi saw its state support for mental health care slashed by \$42 million from 2009 to 2011, roughly 15 percent of the Department of Mental Health’s budget.”²¹⁶ Although the mental health budget has steadily declined over the previous decades, in 2015, “the Mississippi Department of Mental Health spent \$202.5 million on its state hospitals.”²¹⁷ This amount suggests that the state government possesses the ability to fund mental health courts and holistic public defender offices. However, these institutions would largely be administered at the local level, and Mississippi’s community resources are already limited. Mississippi is a rural state whose local governments do not possess the same level of resources as cities and counties in other states might. Without adequate resources given to these therapeutic programs through statewide funding, the problems resulting from persons with mental disabilities in the community and the justice system will likely continue.

community outreach, community legal education, and policy change. Community events . . . enable us to build stronger connections to community members, and foster goodwill in the South Bronx.”).

²¹⁵ See *supra* text accompanying note 108.

²¹⁶ Smith, *supra* note 1.

²¹⁷ Complaint, *supra* note 44, at 3.

B. Increased Caseloads

Another problem exists when implementing holistic defense programs specifically. Lack of funding for new holistic public defender programs combined with increased caseloads in a holistic public defender office can negatively affect a mentally disabled person's "constitutional entitlement to effective criminal representation."²¹⁸ The problem of lack of funding results in holistic public defender offices not replacing members of the team who leave the office, which results in an increased workload for those who remain.²¹⁹ Often, attorneys who depart from holistic defense organizations do so as a result of low salaries or lack of raises, which the increased workloads exacerbate.²²⁰

C. Differing Ethical Obligations

Moreover, increased caseloads caused by the lack of funding can also lead to holistic defense attorneys violating the *Mississippi Rules of Professional Conduct*. The traditional model of criminal defense promotes the view of focusing solely on getting their client "as little time in jail or prison as possible."²²¹ The holistic defense model requires the attorney to focus on not just the liberty of the client but also on the client's best interests overall.²²² However, this approach can conflict with professional conduct obligations when the holistic defense attorney and the client have differing views on what the client's best interests are.²²³ Personal autonomy is an important value in the criminal justice system.²²⁴ If a holistic defense attorney acts against the wishes of their client, then they will make a decision that violates their ethical obligations. Ethical violations may be more likely with a team partially made up of nonlawyers. The interdisciplinary nature of holistic defense includes social workers and advocates who may not have the same

²¹⁸ Kathy Boudin et al., *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y.C. L. REV. 203, 225 (2008).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Lee, *supra* note 176, at 421.

²²² *Id.*

²²³ *Id.* at 424-25.

²²⁴ *Id.* at 426.

ethical obligations toward the client as an attorney does.²²⁵ Further, these individuals may not receive training on what they can or cannot do regarding a legal proceeding. Social workers may be required to report something about a client that would break the confidentiality rules applicable to lawyers or deprive the client of a fundamental aspect over their case: autonomy.

* * *

Although the list of criticisms for therapeutic jurisprudence strategies is undeniable, the point remains that these strategies—if properly implemented in the Mississippi criminal justice system—could go a long way in helping vulnerable individuals with mental disabilities in Mississippi. The U.S. Department of Justice has acknowledged that Mississippi is doing a disservice to persons with mental disabilities.²²⁶ Instead of continuing to fight this problem in the same way, judicial programs involving interdisciplinary teams that focus on the entirety of legal and nonlegal needs that drive persons with mental disabilities into the criminal justice system could be an effective remedy for these individuals.

CONCLUSION

Traditional approaches to the lawyer-client relationship have hampered the ability of Mississippi to effectively care for its mentally disabled population in the criminal justice system. Defense attorneys struggle daily to navigate this labyrinth of a justice system for their mentally disabled clients. The current *Mississippi Rules of Professional Conduct* provide little guidance on how to move their client through this system effectively while maintaining ethical standards, and traditional jurisprudence

²²⁵ *Id.* at 428 (“The attorney advocates for the client’s liberty interests, while the social worker is trained to protect the client’s best interests—to ‘understand the underlying causes of the “problem” or “issue” that the client presents.’ ‘Sometimes the two [interests] coincide, but sometimes, they do not’ (alterations in original) (footnote omitted) (first quoting Lisa A. Stanger, Note, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 *FORDHAM L. REV.* 1123, 1150 (1996); and then quoting Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 *MD. L. REV.* 288, 343 (2003))).

²²⁶ See discussion *supra* Section I.C.

practices can make the defense attorney feel like their hands are tied to remedy their client's problems. Judges in traditional settings may be unaware of a mental illness possessed by a criminal defendant if the condition is not raised as a defense per the client's wishes or for other reasons. Courts might also lack the resources necessary to oversee this vulnerable population adequately through the judicial process.

Coupled with the internal pressure expressed by the actors involved on the ground, Mississippi has also faced external pressure from the federal government. Traditional practices of institutionalizing persons with mental disabilities in Mississippi have led to a federal lawsuit seeking to move the state further toward community-based treatment. Furthermore, crime statistics show that persons with mental disabilities could further harm themselves and the community when released from mental institutions without proper follow-up care. The community-based response effort in Mississippi has proven thus far to be inadequate, and that trend could continue if Mississippi further deinstitutionalizes its mentally disabled population without the necessary resources in place.

Therapeutic jurisprudence strategies like mental health courts and holistic defense models could effectively alleviate the strain on persons with mental disabilities in the justice system. Mental health courts provide a specialized focus for these individuals and their surrounding circumstances. Like drug courts already popular in Mississippi, mental health courts offer programs that look beyond the traditional lawyer-client relationships found in traditional courts. The focus is on holistic factors like the underlying conditions leading these individuals to incarceration while also increasing attention to their healthcare needs. Since these courts are already authorized under state law, the Mississippi Legislature simply needs to fund them at a larger scale.

Similarly, holistic defense is another possible strategy that could prove effective for persons with mental disabilities in Mississippi's justice system. Instead of continuing the traditional method of criminal defense, which focuses just on legal outcomes, holistic defense strategies expand beyond the traditional practices to meet a more diverse group of needs their clients possess. This method can decrease the recidivism rate of the mentally ill in the

criminal justice system because it focuses on the external factors contributing to criminal behavior instead of focusing solely on the immediate legal issues of their client.

These therapeutic jurisprudence strategies in the justice system could help alleviate Mississippi's problem with criminal defendants with mental disabilities in several ways. First, mental health courts with increased attention toward this population and through partnerships with community organizations could better identify which methods of treatment an individual requires. This increased focus on community partnerships will help provide adequate community-based care for those with mental illness. The increased attention could also help alleviate the problems of deinstitutionalization because a specialized program should be able to identify which mentally ill defendants need community-based treatment and which defendants can better have their needs met in an institutional setting. Finally, implementing holistic defense strategies, particularly in public defender offices, will help mentally ill defendants because social workers and other actors outside the legal system can help them in situations outside of an institutional environment like helping them to find housing or adequate healthcare options. If these simple, cost-effective programs gain support and are implemented properly, therapeutic jurisprudence can keep Mississippi's most vulnerable citizens out of the criminal justice system and provide them with the treatment they desperately need.

