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## MENTAL HEALTH COURTS: BRIDGING TWO WORLDS

*Honorable Matthew J. D'Emic\**

The crossroad of mental health and criminal justice is a well-traveled yet rocky one. Each road strains against the other and yet their intersection is inevitable. Hundreds of years of common law jurisprudence are proof of this. Even the definition of legal insanity extant in most jurisdictions today dates back over 170 years to the Rule in *McNaughton's Case*.<sup>1</sup> Recent cases involving the civil commitment of sex offenders under New York Criminal Procedure Law Article 10 are also uneasily at the mental health crossing point.<sup>2</sup> Moreover, it is estimated that about 20% of persons in jails and prisons in this country suffer from serious mental illnesses, such as schizophrenia, bipolar disorder, major depressive disorder, and schizoaffective disorder.<sup>3</sup> More than twice as many people suffering from mental illnesses live in prisons than in state mental hospitals; and if their conditions worsen while incarcerated, they face harsher discipline. A 2003 Human Rights Watch report found “deep-rooted patterns of neglect, mistreatment and even cavalier disregard for the well-being” of mentally ill inmates.<sup>4</sup>

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<sup>1</sup> (1843) 8 Eng. Rep. 718 (H.L.).

<sup>2</sup> See *State v. Donald DD.*, 21 N.E.3d 239 (N.Y. 2014) (holding that “in a Mental Hygiene Law article 10 trial, evidence that a respondent suffers from antisocial personality disorder cannot be used to support a finding that he has a mental abnormality as defined by Mental Hygiene Law § 10.03(i), when it is not accompanied by any other diagnosis of mental abnormality”).

<sup>3</sup> See Dean Aufderheide, *Mental Illness in America's Jails and Prisons: Toward a Public Safety/Public Health Model*, HEALTH AFFAIRS BLOG (Apr. 1, 2014), <http://healthaffairs.org/blog/2014/04/01/mental-illness-in-americas-jails-and-prisons-toward-a-public-safety-public-health-model/>; see generally Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761 (2009).

<sup>4</sup> Emma Schwartz, *Mental Health Courts: How Specialty Courts Can Service Justice and Help Mentally Ill Offenders*, U.S. NEWS (Feb. 7, 2008, 3:17 PM), <http://www.usnews.com/news/national/articles/2008/02/07/mental-health-courts>.

The flood of mentally ill inmates began about forty years ago, when most state run mental hospitals were closed in favor of community-based treatment which, in large part, never materialized. The process of de-institutionalization from warehouse to community turned into trans-institutionalization from warehouse to jail.

Into this mix came the mental health courts, a relatively new bridge between criminal justice and mental health. The first mental health court was established in Broward County, Florida, in 1997, based on principles of “therapeutic jurisprudence.”<sup>5</sup> Therapeutic jurisprudence exercised in problem-solving courts proposes that judges use their authority for the physical and emotional benefit of the accused, as well as for the benefit of society.<sup>6</sup> In other words, the power of the court and threat of traditional prosecution for offenses motivates the individual to remain in treatment and out of trouble. As one of its founders, David Wexler, put it: “Therapeutic jurisprudence looks not merely at the law on the books, but rather at the law in action—how the law manifests itself in law offices, client behavior, and courtrooms around the world. The underlying concern is how legal systems actually function and affect people.”<sup>7</sup> As such, mental health courts are an outgrowth of predecessor problem-solving courts like drug treatment courts and community courts.

Mental health courts vary by jurisdiction but most share a number of characteristics. The Council of State Governments’ Justice Center has defined what it refers to as the “essential elements” of a mental health court, which include: (1) a specialized court docket, which employs a problem-solving approach to court processing for criminally accused individuals suffering from a mental illness as opposed to traditional court procedures; (2) judicially supervised, community based treatment plans for each defendant, designed by a mental health professional; (3) regular status hearings to update the judge on the defendant’s progress and resulting in rewards or sanctions; and (4) detailed definitions of ultimate success or failure.<sup>8</sup>

The first mental health court in New York State, the Brooklyn

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<sup>5</sup> BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY* 7 (2003).

<sup>6</sup> *See id.*

<sup>7</sup> David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 20 (2008).

<sup>8</sup> IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESS: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT, COUNCIL OF STATE GOV’TS JUSTICE CTR. (2007), available at [https://www.bja.gov/Publications/mhc\\_essential\\_elements.pdf](https://www.bja.gov/Publications/mhc_essential_elements.pdf).

Mental Health Court,<sup>9</sup> operating in accordance with these essential elements, opened its doors as a pilot project in spring 2002, with its official start date October 1, 2002.<sup>10</sup> Originally, the court was planned as a non-violent felony court for adults. Violent felons were excluded because of public safety concerns and misdemeanors were not included for fear of criminalizing mental illness. The rationale for the court was concisely expressed by former New York State Chief Judge Judith S. Kaye, who recognized that in these cases “the traditional approach yields unsatisfying results.”<sup>11</sup>

The Chief Judge commented that:

When mental illness is a factor in lawlessness and that fact is ignored, the result can be an unproductive recycling of the perpetrator through the criminal justice system, with dire consequences to us all. The Brooklyn Mental Health Court offers judges the option of providing individuals with a mental illness the specialized attention they need while protecting public safety.<sup>12</sup>

In Brooklyn, a defendant can be referred to the mental health court by any judge, defense attorney or assistant district attorney.<sup>13</sup> If

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<sup>9</sup> The Brooklyn Mental Health Court is described as:

[A] specialized court part that seeks to craft a meaningful response to the problems posed by defendants with mental illness in the criminal justice system. Addressing both the treatment needs of defendants with mental illness and the public safety concerns of the community, the Mental Health Court uses the authority of the court to link defendants with serious and persistent mental illnesses (such as schizophrenia and bipolar disorder) who would ordinarily be jail- or prison-bound to long-term treatment as an alternative to incarceration. The Court aims to improve the court system’s ability to identify, assess, evaluate and monitor offenders with mental illness, create effective linkages between the criminal justice and mental health systems, and improve public safety by ensuring that participants receive high quality community-based services.

*Brooklyn Mental Health Court: Overview*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/project/brooklyn-mental-health-court> (last visited Apr. 7, 2014).

<sup>10</sup> Matthew J. D’Emic, *The Promise of Mental Health Courts: Brooklyn Criminal Justice System Experiments with Treatment as an Alternative to Prison*, 22 CRIMINAL JUSTICE, no. 3, Fall 2007, at 24.

<sup>11</sup> Judith S. Kaye, *Judges Are Learning that a Problem-Solving Approach Can Stop the Cycles of Drug Use and Dysfunction*, NEWSWEEK, Oct. 11, 2000, at 13.

<sup>12</sup> D’Emic, *supra* note 10, at 28 (quoting a Release from the New York State Office of Mental Health, on November 25, 2002).

<sup>13</sup> *See Mental Health Courts: Key Principles*, N.Y. COURTS, <https://www.nycourts.gov/>

both sides agree, an evaluation of the defendant is conducted by a social worker employed by the court and a psychiatrist contracted to do evaluations for it.<sup>14</sup> These psychiatric and psycho-social reports are then provided to the court, defense attorney and prosecutor.<sup>15</sup> The evaluations include a psychiatric history, diagnosis, risk assessment, and recommendation as to eligibility.<sup>16</sup> Generally, if a defendant suffers from a serious and persistent mental illness with some, even tenuous, connection to the criminal behavior, the accused is eligible for participation in the court.<sup>17</sup>

After the evaluations are distributed, the prosecutor and defense counsel negotiate a plea agreement and the court's clinical director, a licensed certified social worker, formulates a treatment plan.<sup>18</sup> If the treatment plan and plea offer are acceptable to the defense, a plea is entered and the defendant is released to treatment.<sup>19</sup> Generally, the court mandate (developed in the court's planning stage) for a first felony offender is 12-18 months, with sentencing deferred until completion.<sup>20</sup> A successful participant's indictment will then be dismissed.<sup>21</sup> A second (or more) felony offender's mandate runs 18-24 months and may result in dismissal or a misdemeanor conviction if successful.<sup>22</sup> In some cases the district attorney insists on a longer court mandate.<sup>23</sup> An attempted kidnapper was required to fulfill a five-year treatment mandate, and, as will be seen a little later in this article, an arsonist stayed with the court for three years.

Once the plea is taken, the defendant begins treatment and returns to court weekly for an update on his or her performance.<sup>24</sup> As the participant progresses, court appearances are less frequent and, at the end of the mandate period, the defendant graduates and the case is

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courts/problem\_solving/mh/key\_principles.shtml#top (last visited Apr. 7, 2015).

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Mental Health Courts: Key Principles*, *supra* note 13.

<sup>19</sup> SHELLI B. ROSSMAN ET AL., URBAN INST., CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 61 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238264>.

<sup>20</sup> *Id.* at 69.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 61.

<sup>23</sup> *See id.*

<sup>24</sup> ROSSMAN ET AL., *supra* note 19, at 70.

dismissed or sentenced as agreed upon at the time of the plea.<sup>25</sup> As mentioned above, the court was planned for adult non-violent felons. Early on, however, referrals for violent crimes poured in, challenging the court in its efforts to protect public safety while fulfilling its promise as a path for persons suffering from mental illness to extricate themselves from criminal justice.

Three of the court's earliest cases provide examples of this challenge. In the first, the young defendant, accused of arson, was originally ruled out of the court by the prosecutor because of the dangerous nature of the charge. However, after further discussion with defense counsel, he looked more carefully into the facts. This young man, a recent college graduate suffering from his first psychotic episode of bipolar disorder, was arrested in a manic state. Later depressed, he attempted suicide in jail, and in that attempt dropped a cigarette resulting in the arson charge. Based on these facts, the district attorney changed his mind. A plea was entered involving a jail term in the event of failure and dismissal of the indictment if successful. As mentioned earlier, the district attorney insisted on a three-year court mandate. The defendant, carefully monitored by the court, successfully completed the court mandate resulting in dismissal.

The second example involves another young man, in college, facing many years in prison for two street robberies. Like the young man described above, he suffered his first psychotic break and was diagnosed with schizophrenia, and was responding to command voice hallucinations. After the entry of his plea and commencement of treatment his case too was dismissed. He has also gone on to earn a master's degree in graphic arts.

The third, and quite challenging case, involves a 64 year-old woman who came to court accused of assaulting her elderly mother who was suffering from dementia. On close analysis, the court discovered that the defendant had recently retired after 34 years in the same job. She was now the sole caregiver for her mother and disabled brother. Referred to the mental health court with an initial diagnosis of single episode depression, the court's clinical director devised a treatment plan consistent with the diagnosis. The defendant pled guilty and began treatment. As the case proceeded, however, the defendant's depression deepened to the point where she decompensated in court, requiring her hospitalization. Her treatment plan was

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<sup>25</sup> *See id.* at 61.

changed to a partial hospitalization program, among other things, including a change of medication by her psychiatrist. After months of struggling, she stabilized and graduated from the court with a dismissal of her indictment.

Not all cases end as happily as these three.

A particularly sad case involved a man in his 50s suffering from major depression and in a completely enmeshed dysfunctional relationship with his mother. Arrested for assaulting her, he was referred to the mental health court, entered a conditional plea and was released to treatment. His progress was inconsistent. An extremely emotive man, he cried easily. At almost all of his weekly court sessions he would sing “[It’s] Too Late to Turn Back Now”<sup>26</sup> to the courtroom (sharing talent is encouraged in the mental health court). After several months of court-mandated treatment, the court learned that he jumped off the roof of his apartment building.

Another young defendant took an overdose of pills, leaving his mother a note that he could no longer live with his mental illness. Yet another hanged himself. These tragedies are not faced by most judges, and leave the court wondering what was missed or could have been done differently. Perhaps the answer is that mental illness can be a terminal illness.

There are many more stories of individual human beings who have come before the Brooklyn Mental Health Court in the past thirteen years, not all success stories, but all poignant. In considering whether to impose sentence, the court must, however, consider public safety in its decisions. One such failure involved a middle-aged pharmacologist charged with driving while under the influence of prescription drugs and alcohol. After receiving several chances from the court to re-enter treatment after relapsing, he was finally sentenced to the prison term of his plea after getting behind the wheel of a car because the safety of the community was being put at risk.

In the past, mental health courts have been criticized as a poor solution to the lack of adequate funding for mental health care,<sup>27</sup> or as an assault on our adversary system, making judges advocates and not arbiters.<sup>28</sup> To some extent, however, these criticisms have been mut-

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<sup>26</sup> CORNELIUS BROTHERS & SISTER ROSE, *TOO LATE TO TURN BACK NOW* (United Artists 1972).

<sup>27</sup> Heather Barr, *Mental Health Courts: An Advocate’s Perspective*, URBAN JUSTICE CTR. (2001).

<sup>28</sup> Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1480, 1533

ed by the documented success of mental health courts, showing they reduce the risk of violence among criminally involved persons suffering from a mental disorder in a way that enhances public safety.<sup>29</sup> An early evaluation of the Brooklyn court documented improvements by participants in several outcomes measures including substance abuse, psychiatric hospitalizations, homelessness and recidivism.<sup>30</sup> A more recent study found the participants, both in the Brooklyn and Bronx Mental Health Courts, were significantly less likely to re-offend than similar offenders whose cases were handled in the traditional court system.<sup>31</sup> Another study has shown that defendants who completed a mental health court were significantly less likely to be re-arrested and went longer before re-offending than those who did not.<sup>32</sup> The suggestion is that mental health courts can reduce criminal recidivism among offenders with mental illness and that this effect is sustained for several years after defendants are no longer under the court's supervision.<sup>33</sup>

Over the past thirteen years, the Brooklyn Mental Health Court has accepted over 1,000 participants, graduated 693 and sentenced 192. There are now over 200 such courts in this country.<sup>34</sup> Prior to their existence, the system offered only two choices: plea or trial. Now, treatment as an alternative to incarceration with a dismissal on successful completion, offers those suffering from mental illness involved in criminal justice a third option, a fairer and more just one.

This article began with a reference to the crossroad between mental health and criminal justice—an analogy to a place where two

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(2000).

<sup>29</sup> Dale McNeil et al., *Prospective Study of Violence Risk Reduction by a Mental Health Court*, PSYCHIATRIC SERV. (Feb. 17, 2015) (this article was published online and can only be viewed with a paid subscription); see also *New Research Explores the Effectiveness of Mental Health Courts in Preventing Violence*, UNIV. CALIF. DEP'T OF PSYCHIATRY (Feb. 25, 2015, 2:20 PM), <http://psych.ucsf.edu/news/new-research-explores-effectiveness-mental-health-courts-preventing-violence>.

<sup>30</sup> KELLY O'KEEFE, CTR. FOR COURT INNOVATION, THE BROOKLYN MENTAL HEALTH COURT EVALUATION: PLANNING, IMPLEMENTATION, COURT DYNAMICS AND PARTICIPANT OUTCOMES vii-viii, 3 (2006), available at <http://www.courtinnovation.org/sites/default/files/BMHCevaluation.pdf>.

<sup>31</sup> ROSSMAN ET AL., *supra* note 19, at 61.

<sup>32</sup> *Id.* at 18.

<sup>33</sup> See generally *id.* at 53.

<sup>34</sup> Mikel Chavers, *Judges Find Hope in Different Approach for People with Mental Illness*, COUNCIL OF STATE GOV'TS, [http://www.csg.org/pubs/capitolideas/jul\\_aug\\_2010/hottopic\\_mentalhealthincourts.aspx](http://www.csg.org/pubs/capitolideas/jul_aug_2010/hottopic_mentalhealthincourts.aspx) (last visited Apr. 7, 2015).



roads meet. Of course, a crossroad is also a crucial point in a person's life. Hopefully, mental health courts will pave the way toward both disciplines working together, and aiding a criminally accused person suffering from mental illness through a painful and crucial point in life.