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The Mentally Ill Offender: A Brighter Tomorrow through the Eyes of the Mentally Ill Offender Treatment and Crime Reduction Act of 2004

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THE MENTALLY ILL OFFENDER: A BRIGHTER TOMORROW
 THROUGH THE EYES OF THE MENTALLY ILL OFFENDER
 TREATMENT AND CRIME REDUCTION ACT OF 2004

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I. INTRODUCTION

Rhonda Atkins poured her heart out when she testified to Congress, in the summer of 2004, about her concerns that this country faces in combating the problem of obtaining the necessary treatment for mentally ill offenders. This problem is especially close to her heart because her daughter Reese was diagnosed with bipolar disorder, a severe mental disorder, when she was fifteen years old.¹ For years, Reese's conditions went untreated and she began to slowly deteriorate. Reese tried to control her conditions by abusing various substances, like so many other individuals suffering from mental illnesses. Reese's behavior would range from severe mania, to extreme irrationality, to paranoia. When her daughter's behavior became uncontrollable, Rhonda's only resource was to call the police.²

Through the countless times that the police were called to her residence because of her daughter's behavior, some police officers were compassionate to her illness, while others were rough. Sometimes, the officers escalated Reese's conditions where she or the officers could have been injured. One officer stated, "if you were my daughter, I would knock you across the room."³ The officer's behavior exemplifies the growing problem that the criminal justice system is ill-equipped to properly handle mentally ill offenders.

At the time of Reese's first arrest for trespassing, there were no resources available to give her daughter the necessary treatment she required. Even after she was later diverted into a drug court, following a drug charge, her daughter was still

¹*Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S.1174 Before the Comm. on Senate Judiciary*, 108th Cong. (2004) (statement of Rhonda Atkins, mother of a mentally ill offender) [hereinafter "Atkins, *Statement*"].

²*Id.*

³*Id.*

left without the necessary treatment. One social worker even discouraged the integration of substance abuse treatment and mental health treatment.⁴ The reality of Reese Atkins is a sad but true story. The Atkins family is not alone in this fight.

Beginning in the early 1950s and '60s, states began to close their public mental health hospitals. This process was known as "deinstitutionalization." In recent years, following the massive wave of deinstitutionalization, a substantial number of institutionalized persons with mental disabilities were relocated from civil mental hospitals into jails and prisons.⁵ Despite this shift in population, correctional facilities remain ill-equipped to handle and deal with offenders with mental disabilities. One study found that approximately 6.5-10% of inmates suffered from a serious mental illness, while another 15-40% suffered from a moderate mental illness.⁶ Another study done by the Bureau of Justice Statistics indicated that 16% or an estimated 283,800 inmates were identified as being mentally ill by mid-year 1998.⁷ Cheri Nolan, Deputy Assistant Attorney General of the Office of Justice Programs, testified to Congress that "the increasing number of people with mental illnesses in the criminal justice system is one of the most pressing issues facing our police departments, jails, prisons, and courts."⁸

Despite such statistics, offenders' rights to mental health treatment have been slow to reach many of incarcerated inmates who require treatment. The landmark case of *Estelle v. Gamble*⁹ and its modern predecessors have only reactively

⁴*Id.*

⁵TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 13 (ROBERT M. WETTSTEIN ed., 1998).

⁶Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers* (Bureau of Justice Statistics 1999). Statistics gathered by the Bureau of Justice Statistics indicated that mentally ill offenders are more likely to commit violent offenses; more likely to report three or more prior offenses; more likely to be violent recidivists; and more likely to have been homeless in the time prior to their current incarceration. Mentally ill offenders are also more likely to report higher rates of alcohol and drug abuse, prior physical and sexual abuse, and more likely to have a family history of incarceration, when compared to those who are not mentally ill.

⁷Allen J. Beck & Laura M. Maruschak, *Mental Health Treatment in State Prisons, 2000* (Bureau of Justice Statistics 2001). The study indicated of the facilities that housed state prisoners, seventy percent reported that they screened inmates at intake; 65% conducted psychiatric assessments; 51% provided twenty-four hour mental health care; 71% provided therapy or counseling to their inmates by trained mental health professionals; 73% distributed psychotropic medications; and 66% of the facilities helped to obtain community mental health treatment upon the inmates' release from the facility.

⁸*Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S.1174 Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Cheri Nolan, Deputy Assistant Attorney General of the Office of Justice Programs). In the Fiscal Year 2003 appropriation, the BJA received grants totaling \$5.5 million for mental health courts for thirty-seven jurisdictions located in twenty-nine different states. Each site received a two-year grant worth about \$150,000 total, have help launch these newly developed mental health courts and have helped mental health courts already in place to update and add key components to their existing mental health courts.

⁹*Estelle v. Gamble*, 429 U.S. 97 (1976).

addressed the egregious actions of correctional facilities that deny mentally ill offenders the proper mental health care treatments. The United States Supreme Court formulated the appropriate test in *Estelle*, concluding “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ that violates the Eighth Amendment.”¹⁰ Such a standard makes it difficult for inmates to receive the necessary treatment they require, or to prove that current treatment is inadequate. The courts have said for years what the constitutional minimums were concerning rights to mental health treatment. If the courts were to raise such minimums to allow for greater access to treatment, or uniformly apply the standards used by many proactive correctional facilities, mental health professionals could possibly treat the mental illnesses that may have inevitably led to the vast majority of mentally ill offenders’ current incarceration.

With the signing into law of The Mentally Ill Offender Treatment and Crime Reduction Act of 2004, government agencies and health care providers will now be able to act more proactively in attempting to reduce the amount of crime committed by mentally ill individuals. But only time will tell how such legislation will help combat the problem of the inadequacy of mental health treatment that mentally ill offenders receive while incarcerated. This Note will examine the evolution of health care rights that incarcerated persons are afforded, specifically looking at the rights to mental health treatment. Through this process, the many problems will be illustrated that this issue creates, and look towards the future at what could be done by examining what currently works and what is still needed to alleviate the problem of mentally ill offenders.

II. DUTY TO PROVIDE OR THE RIGHT TO RECEIVE HEALTH CARE SERVICES

Under the common law, a private hospital had no obligation to provide medical treatment, regardless of whether there existed an emergency.¹¹ This absence of duty followed from the common law tort principle that a person had no duty to help another in peril, absent a special relationship. At common law, physicians had no affirmative duty to accept a particular patient for the purposes of treatment.¹² However, once a physician chose to treat a patient, the physician was then under a legal obligation to provide continuous necessary medical treatment until their physician-patient relationship had been terminated.¹³

As discussed above, early common law principles placed no affirmative duty upon the state to provide medical care to those in need, or at least made it difficult to obtain the care needed. Modern rights to health care have emerged via the Federal Constitution. The question of whether there is a constitutional right to health care lies in the debated cases that deal with the funding of abortions. In *Harris v. McRae* and *Maher v. Roe*, the Supreme Court held that the government is not obligated to

¹⁰*Id.* at 104.

¹¹Hill v. Ohio County, 468 S.W.2d 306, 308 (Ky. 1970).

¹²See Agnew v. Parks, 343 P.2d 118, 123 (Cal. Dist. Ct. App. 1959).

¹³See Annotation, *Liability of Physician Who Abandons Case*, 57 A.L.R.2d 432, 435 (1958).

provide for such services.¹⁴ The Court drew the distinction between a duty to provide necessary medical care or treatment and the impeded access to such medical services as a result of state action.¹⁵ Relying on the above cases, the Eleventh Circuit has held that individuals do not have a general constitutional right to medical care or treatment provided by the state,¹⁶ but there are exceptions when a special relationship exists between the state and the patient.

III. EXCEPTIONS TO THE GENERAL RULE THAT THE STATE HAS NO DUTY TO PROVIDE HEALTH CARE: PERSONS UNDER STATE CUSTODY

The modern principle that draws an inference of the state's duty to provide those individuals under its control or custody with the necessary medical care is known as the *DeShaney* principle.¹⁷ The Supreme Court held that the state had no affirmative duty to protect a child from the abuse of his father.¹⁸ Simply stated, the Due Process Clause of the Fourteenth Amendment does not require a state to affirmatively protect the life, liberty, or property of a citizen, regardless of how severe or detrimental those actions taken by private citizens may be. The Fourteenth Amendment provides a blanket of protection for citizens only against the egregious actions of the state, not the actions of private citizens.¹⁹

The Supreme Court has stated that an exception to the general rule exists only when a special custodial or other relationship exists between the government and the individual seeking medical care.²⁰ Constitutional violations may arise when the

¹⁴See *Harris v. McRae*, 448 U.S. 297, 319 (1980); *Maher v. Roe*, 432 U.S. 464, 469 (1977).

¹⁵*Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1033 (11th Cir. 1987). The plaintiff was four months pregnant when she was ordered by her obstetrician to come immediately to Piedmont hospital. After she called 911, the ambulance arrived and she told them to take her to Piedmont, but instead she was taken to Shallowford Community Hospital. After a substantial delay, the plaintiff was transferred to Piedmont, but she gave birth to a premature baby boy who only survived for a mere four hours. The court held that her claim failed, because there is no constitutional right to medical care or treatment provided by the state or municipality.

¹⁶*Id.* at 1034-36.

¹⁷*DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). A minor child, through his guardian ad litem filed suit against the Winnebago County Department of Social Services for failing to protect the child from the abuse of his father. The department was contacted for the alleged abuse but after several hearings, there was insufficient evidence to remove the child from his father's custody. Even after several trips to the emergency room and various suspicious bruises on the child, the department took no action. Finally, several years after the first instances, the child's father beat him so horrifically, the child was left brain damaged and expected to live the rest of his life in an institution as a result of his profound retardation. *Id.* at 191-93.

¹⁸*Id.* at 202.

¹⁹*Id.* at 196.

²⁰See *Wideman*, 826 F.2d at 1034.

government fails to provide the necessary medical services when a special relationship exists.²¹

This custodial relationship arises when the government exercises a significant degree of custody or control over a person, and the government's isolation of the person places him in a worse situation than he would have been had the government failed to act.²² Such situations exist when the state places an individual in a position of vulnerability, effectively stripping that person of his ability to defend himself, or denying him sources of aid.²³ In recent years, the Court has stated that such special or custodial relationships that create a duty for the state to provide medical care include the following: incarcerated persons;²⁴ involuntarily committed mental patients;²⁵ pretrial detainees;²⁶ persons injured while being apprehended by police;²⁷ and children placed in foster care.²⁸ The above examples illustrate situations in which the state exercises a substantial degree of custody or control over such persons, therefore, creating a constitutional duty to provide the necessary medical care.

Absent such a duty by the state to provide for certain medical treatments or services, how can individuals under the state's control obtain the necessary medical care that they ultimately require? Just as parents are expected to provide their children with the proper and necessary medical care, so too should the state provide those individuals under its control with the necessary medical care.

A. Rights to Health Care for Children in State Custody

The government has a constitutional duty to provide medical care through custodial relationships such as foster care.²⁹ In *Taylor v. Ledbetter*, Court of Appeals for the Eleventh Circuit held that the foster child stated a cause of action for the physical injuries suffered as a result of placement in an abusive foster home, caused by the government's gross negligence and deliberate indifference in placing the child there.³⁰ The court held that the situation of a child being involuntarily placed in a foster home is so analogous to a prisoner being placed in a correctional institution

²¹*Id.*

²²*Id.* at 1035.

²³*See* Walker v. Rowe, 791 F.2d 507, 511 (7th Cir. 1989).

²⁴*See Estelle*, 429 U.S. at 102-103.

²⁵*See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

²⁶*See, e.g.*, Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985).

²⁷*See, e.g.*, City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 245 (1983); Maddox v. City of Los Angeles, 792 F.2d 1408, 1415 (9th Cir. 1986) ("the due process clause requires responsible governments and their agents to secure medical care for persons who have been injured while in police custody").

²⁸*See, e.g.*, Taylor v. Ledbetter, 818 F.2d 791, 820-21 (11th Cir. 1987).

²⁹*Id.*

³⁰*Id.* at 816.

that the foster child may bring a Section 1983 action for violations of the Fourteenth Amendment.³¹

B. Rights to Health Care for Persons in Mental Institutions

Persons in mental institutions have a substantive due process right to receive necessary medical treatment.³² In *Youngberg v. Romeo*, the Supreme Court recognized the existence of certain protected rights to one's liberty that apply to persons confined in state institutions with mental illnesses.³³ When the state acts to restrict a person's freedom of his own actions, by means of institutionalization or other restraints of personal liberty, the state then creates a duty in protecting that person from harm.³⁴ The Court stated that the Due Process Clause of the Fourteenth Amendment establishes an affirmative duty upon the state to provide involuntarily committed mentally ill patients with the necessary services that will ensure the patients' safety from themselves and others. The state "may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training."³⁵ The Court stated that medical care is an essential service that the state is obligated to provide to its mentally ill patients who are confined in its state mental health institutions.³⁶

C. Rights to Health Care for Prison Inmates, Pretrial Detainees, and Arrestees

In the last half of the century, emerging case law has established that correctional facilities have a constitutional duty to provide some level of medical care to its inmates.³⁷ The question remained as to what level of medical care was required. Such medical care that was required included reasonable medical assistance to inmates, which would include a medical examination, access to sick call, dental care, and suicide prevention.³⁸ Medical care should also be provided when such deprivation of medical treatment would immediately threaten an inmate's life or limb.³⁹ Earlier case law established the foundation to inmates' access to receive medical treatment. There were considerable amounts of disagreements between the courts concerning the specific basis for these rights to medical care and treatment.⁴⁰ It was not until the end of the twentieth century that the Supreme Court held what the constitutional justification was, and where it came from.

³¹*Id.*; see also *Wideman*, 826 F.2d at 1035.

³²*Youngberg*, 457 U.S. at 307.

³³*Id.*

³⁴*DeShaney*, 489 U.S. at 189.

³⁵*Youngberg*, 457 U.S. at 324.

³⁶*Id.*

³⁷Carl T. Drechsler, Annotation, *Relief Under Federal Civil Rights Acts to State Prisoners Complaining of Denial of Medical Care*, 28 A.L.R. Fed. 279 (2005).

³⁸*Collins v. Schoonfield*, 344 F. Supp. 257, 277 (D. Md. 1972) (stating that "the Jail is constitutionally required 'to provide reasonable medical assistance to inmates'").

³⁹*Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972).

⁴⁰Drechsler, *supra* note 37.

The principle established in *DeShaney*, which creates limited situations when a state has an affirmative duty to protect and care for individuals, applies not only to mental institutions, but also to jails and prisons.⁴¹ The Court in *DeShaney* stated, “when the State takes the person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”⁴² This duty is created when the person or inmate is rendered helpless, isolated from the necessary care that may be needed.⁴³ The state is responsible for the inmate’s helplessness; therefore, the state has a duty to care for the inmate while in its custody.⁴⁴

A jailer owes a duty to the prisoners to keep them safe, to protect them from unnecessary harm, and to exercise reasonable care for their lives and their health.⁴⁵ State government subdivisions that are responsible for the operation of local jails have a legal obligation to supply needed medical treatment, and local jails are subjected to the same deliberate indifference standards as state and federal prisons.⁴⁶ Even though the Eighth Amendment does not come into play until a person is convicted, pretrial detainees and arrestees may enjoy the same constitutional rights to medical care that are afforded to convicted prisoners.⁴⁷

IV. THE LANDMARK DECISION OF *ESTELLE V. GAMBLE*: INMATES ACCESS TO HEALTH CARE

The leading case that established the test for determining when an inmate’s right to medical care had been violated is *Estelle v. Gamble*. *Estelle* established the constitutional right of prisoners to adequate medical care and treatment. The Court established that deliberate indifference to an inmate’s serious medical needs violates the Eighth Amendment and its prohibition of cruel and unusual punishment.⁴⁸

The plaintiff, J.W. Gamble, was an inmate of the Texas Department of Corrections.⁴⁹ While Gamble was performing a prison work assignment, a bale of cotton fell on him.⁵⁰ Gamble was later admitted to the prison hospital after the pain grew extremely intense.⁵¹ The next day, Gamble’s injury was diagnosed as a back

⁴¹*DeShaney*, 489 U.S. at 198.

⁴²*Id.* at 200.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*See State of Miss. for Use of Derrow v. Durham*, 444 F.2d 152, 158 (5th Cir. 1971).

⁴⁶*See Lutheran Med. Ctr. of Omaha v. City of Omaha*, 281 N.W.2d 786, 788-89 (Neb. 1988); *see also Starbeck v. Linn County Jail*, 871 F. Supp. 1129, 1141 (N.D. Iowa 1994) (stating “A medical need is serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention”).

⁴⁷*See City of Revere*, 463 U.S. at 239.

⁴⁸*Estelle*, 429 U.S. at 97.

⁴⁹*Id.* at 98.

⁵⁰*Id.* at 99.

⁵¹*Id.*

strain, and he was given a cell-pass that allowed him to refrain from his work duties.⁵² Another doctor then prescribed him additional medications for his high blood pressure and continued back pain.⁵³ Because Gamble refused to work on several occasions, he was twice brought before the prison disciplinary committee. Subsequent to the second hearing, Gamble was placed in solitary confinement.⁵⁴

While in solitary confinement, Gamble complained of chest pains and black outs, but it was not until the fourth day that a medical assistant ordered him to be hospitalized.⁵⁵ The next day, a doctor prescribed him medication, but a few days later, Gamble continued to complain of chest, arm, and back pains.⁵⁶ Initially, the prison guards refused to allow Gamble to see the doctor, but after a few days, he was allowed access to one of the prison's medical staff. Gamble formed his complaint pursuant to Section 1983 of the Civil Rights Act, alleging that he was subjected to cruel and unusual punishment prohibited by the Eighth Amendment.

The Court's reasoning in *Estelle* centered on the idea that the Eighth Amendment demands that incarcerated persons receive the basic human needs and protection from inadequate living conditions. In years preceding *Estelle*, the Supreme Court had stated that the Eighth Amendment proscribes more than just "physically barbarous punishments."⁵⁷ The Eighth Amendment embodies the basic concepts of dignity, humanity, and decency that infers a civilized standard that this country's penal system must be measured against. The early principles of the Eighth Amendment established that the government had an obligation to provide the necessary medical care to inmates who were punished through means of incarceration.⁵⁸

The government is responsible for the inmates' medical needs because the inmates are isolated from the outside world; therefore, they are unable to seek the necessary medical treatment on their own.⁵⁹ The government fails to alleviate their medical conditions when it fails to provide the inmates with the necessary medical treatment, and such inaction becomes analogous with actual physical torture. The Eighth Amendment seeks to prohibit such physical torture.⁶⁰ In instances that are less serious, but nonetheless, create suffering for an inmate through such denial of medical care, the government could hardly argue that this suffering serves any

⁵²*Id.* at 100. For the next several weeks, Gamble took prescribed pain medications to ease the pain. Despite the continued pain, the doctor took away his cell-pass, which restored him to his full work duties, even though Gamble refused to work.

⁵³*Id.*

⁵⁴*Id.* at 100-101.

⁵⁵*Id.* at 101.

⁵⁶*Id.*

⁵⁷*Id.* at 102; *see, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 171 (1976); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *Weems v. United States*, 217 U.S. 349, 373 (1910).

⁵⁸*Estelle*, 429 U.S. at 103-104.

⁵⁹*Id.*

⁶⁰*Id.*

legitimate penological purpose.⁶¹ Therefore, the government demonstrates deliberate indifference to the inmates' serious medical needs when it fails to provide inmates with the necessary medical treatment, thus amounting to unnecessary and wanton pain onto an inmate.⁶²

The essential test formulated in *Estelle* consists of two elements – deliberate indifference and the inmates' serious medical needs – that must be found to exist for an inmate or class of inmates to show such denial of medical care violated their Eighth Amendment right against cruel and unusual punishment.

A. The Deliberate Indifference and Serious Medical Needs Test

The Court in *Estelle* formulated the deliberate indifference test. The Court stated that deliberate indifference to an inmate's serious medical needs constitutes cruel and unusual punishment prohibited by the Eighth Amendment.⁶³ This test is made up of two components, the first one being that prison officials exhibit deliberate indifference, and the second being the inmate complaining of a serious medical need.

Deliberate indifference may be manifested by any of the correctional facility's staff.⁶⁴ This includes the doctor's response to the inmate's medical needs, or by the correctional officers' intentional denial or delay of the necessary medical care.⁶⁵ Prison officials exhibit deliberate indifference when there is a substantial risk of serious harm to an inmate's safety or health, and the official knows of or disregards such a substantial risk.⁶⁶ Under the deliberate indifference standard, an inmate must show that the correctional facility's inaction caused an unnecessary and wanton infliction of pain, and the prison officials willfully disregarded this need with specific knowledge that such treatment was necessary.⁶⁷ Deliberate indifference is not established by the mere allegation of inadequate medical care received by the inmate,⁶⁸ as the inmate in *Estelle* argued. Furthermore, accidents alone, do not establish deliberate indifference, nor does a physician's negligence to treat an inmate.⁶⁹

Prison or jail officials may exhibit deliberate indifference based upon their particular knowledge of certain risks to certain inmates.⁷⁰ Certain risks or situations include: suicidal tendencies,⁷¹ withholding of medication for a serious medical

⁶¹*Id.*

⁶²*Id.* at 104.

⁶³*Id.*

⁶⁴*Id.* at 104-05.

⁶⁵*Id.*

⁶⁶*Id.* at 105.

⁶⁷*Id.* at 104-05.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*See, e.g.,* *Sauders v. City of Steuben*, 693 N.E.2d 16, 19 (Ind. 1998).

⁷¹*Id.*

condition,⁷² failure to promptly and reasonably procure competent medical aid for a serious illness or injury,⁷³ intentionally denying or delaying prescribed medical treatment,⁷⁴ or the failure to allow inmates to make their medical problems known to the prison's medical staff.⁷⁵ Even though the prison or jail official may have been deliberately indifferent to an inmate's medical needs, if the medical need is not serious, liability may be precluded.⁷⁶

A serious medical need that would support an Eighth Amendment claim for deliberate indifference arises where the failure to treat the prisoners' conditions could result in further significant injury or the unnecessary and wanton infliction of pain.⁷⁷ A serious medical need exists: when a reasonable doctor or individual would find a particular injury important and worthy of treatment or complaint; where a medical condition significantly affects an individual's daily activities; or when chronic and substantial pain indicates that a individual has a serious need for medical treatment.⁷⁸ Other situations that manifest serious medical needs are: when an inmate has been diagnosed as having a condition that mandates treatment;⁷⁹ conditions that even a lay person would recognize as requiring medical attention,⁸⁰ or Hepatitis C.⁸¹ Courts may determine whether or not the medical needs of the inmates rises to the level of "serious" by drawing a legal conclusion from the established facts of each case.⁸²

Courts apply the deliberate indifference test of *Estelle* when an inmate complains of or suffers from an untreated illness. This Note will look at how the courts go from protecting inmates who not only suffer from physical illnesses, but those who suffer from mental illnesses as well. Just as inmates fought for their right to receive

⁷²See, e.g., *Cooper v. Casey*, 97 F.3d 914, 916 (7th Cir. 1996); *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995).

⁷³See *Shannon v. Lester*, 519 F.2d 76, 79 (6th Cir. 1975) ("[a] person detained in custody is entitled to medical treatment when necessary on account of illness or injury"); see also *City of Revere*, 463 U.S. at 239 (holding that the Due Process Clause requires the responsible government agency to provide the necessary medical care to individuals injured while they were being apprehended by police); *Maddox*, 792 F.2d at 1415.

⁷⁴*Alexander v. Fed. Bureau of Prisons*, 227 F. Supp. 2d 657, 664 (E.D. Ken. 2002) (stating that the alleged acts or omissions must be sufficiently harmful to establish deliberate indifference to an inmate's serious medical needs).

⁷⁵See *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

⁷⁶See *Hamilton v. Leavy*, 117 F.3d 742, 748 (3d Cir. 1997).

⁷⁷See *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other grounds*.

⁷⁸*Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995) (citing *McGuckin*, 974 F.2d at 1059-60).

⁷⁹See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

⁸⁰*Id.*

⁸¹See *Johnson v. Wright*, 234 F. Supp. 2d 352 (D.N.Y. 2002); see also *McKenna v. Wright*, 2002 U.S. Dist. LEXIS 3489, at *8 (D.N.Y. Mar. 4, 2002); *Corbonell v. Goord*, 2000 U.S. Dist. 8227, at *9 (SDNY June 13, 2000).

⁸²*Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994).

adequate medical treatment and care for their physical ailments, so too will they have to fight for their rights to receive mental health treatment and care while they are incarcerated. Just as inmates once had no proclaimed rights to medical care while incarcerated, involuntarily committed mental patients had no express rights to mental health treatment while they were institutionalized. Statistics show that a vast majority of incarcerated offenders in this country suffer from some form of mental illness. Before exploring the current structure of mental health care in prisons and jails, the emergence of mental health care in state mental hospitals will be examined

V. RIGHTS TO MENTAL HEALTH CARE TREATMENT

Before the middle of the Twentieth century, persons suffering from mental illnesses who were committed to mental hospitals had no express right to treatment while they were institutionalized. In *Youngberg v. Romeo*, the Supreme Court recognized the existence of certain protected rights to one's liberty that apply to persons confined in state institutions for persons with mental illnesses. The Court recognized that when an individual is completely dependent on the state, through his involuntary confinement in the state mental institution, an affirmative duty is then created for the state to provide certain necessary services to the individuals, which would include mental health care and treatment. Courts across the country would soon realize that just as it is unjust to deny involuntarily committed persons in mental institutions the required mental health treatment, so too is it to deny those persons incarcerated in local jails and prisons.

A. Rights to Mental Health Care in State Treatment Facilities

In 1966, *Rouse v. Cameron* became the first decision that conceptualized a right to treatment or habilitation as the logical quid pro quo for allowing the State to involuntarily confine someone who was mentally ill.⁸³ This right was not absolute by any means of the imagination. The court in *O'Connor v. Donaldson* held that merely warehousing residents was unconstitutional,⁸⁴ and a non-dangerous person could not be confined in an institution if a family or community resource was available for that person to live safely in the community.⁸⁵ However, the Court in *O'Connor* specifically stated that they would not answer as to whether there was a right to treatment for those posing a danger to themselves or others involuntarily committed by the state.⁸⁶ The court in *Zinermon v. Burch* reasoned that the state must also find some level of dangerousness to himself or others to initiate or sustain involuntary institutionalization.⁸⁷

Once a person is confined in a state mental institution, the question then becomes what constitutional protections or rights to care and treatment is the individual

⁸³*Rouse v. Cameron*, 373 F.2d 451, 454 (D.C. Cir. 1966), *rev'd on other grounds*.

⁸⁴*O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975). Prior to the plaintiff's lawsuit, it was debatable as to whether or not Florida law provided an affirmative right to treatment for involuntarily committed persons, but years later, Florida law enacted a statutory duty upon the state to provide treatment.

⁸⁵*Id.*

⁸⁶*Id.* at 573.

⁸⁷*See Zinermon v. Burch*, 494 U.S. 113, 134 (1990).

afforded. Justice Stewart stated in *O'Connor* that a full right to treatment was premature for those confined involuntarily, but the decision did not preclude this.⁸⁸ In *Youngberg v. Romeo*, the state involuntarily placed the individual in a Pennsylvania State mental institution after his mother was unable to care for her twenty-six year old son who suffered from mental retardation.⁸⁹ The boy's mother filed suit against the institution after noticing her son had suffered from several injuries while he was confined.⁹⁰ The complaint alleged that he had sustained injuries on at least sixty-three instances as a result of his own aggressive behavior and the reactions of the other residents to his initial behaviors.⁹¹

In *Youngberg*, the Court recognized that when an individual, as it was shown here, is completely dependent on the state through his involuntary confinement in the state mental institution, an affirmative duty is then created for the State to provide certain necessary services to the individuals.⁹² The Court went on to say that such services include minimally adequate or reasonable training for the individual so that he may protect himself from undue restraint or harm that he may inflict upon himself or others.⁹³

Youngberg also announced the prevailing professional standards of care articulated in Chief Judge Seitz's concurring opinion in the Eleventh Circuit's decision.⁹⁴ There, the Court stated that the constitutional and federal civil rights of institutionalized persons were to be judged by a reasonable exercise of professional judgment.⁹⁵ The Court emphasized "that courts must show deference to the judgment exercised by a qualified professional, [and] . . . there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions."⁹⁶ The professional judgment standard is the primary consideration in most right to treatment cases, and theories are limited to those in state custody.⁹⁷ The minimum requirements that states must provide include: (1) the necessities of life; (2) a reasonably safe living condition; (3) the freedom from undue restraints; and (4) such minimally adequate training needed to enhance or further the residents' ability to exercise their constitutional rights (i.e. safety within the institution).⁹⁸ Mentally ill persons cannot simply be placed into an institution without the proper mental health treatment.

⁸⁸*O'Connor*, 422 U.S. at 573.

⁸⁹*Youngberg*, 457 U.S. at 310.

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.* at 312.

⁹⁴*Id.* at 314.

⁹⁵*Id.* at 321.

⁹⁶*Id.* at 322-23.

⁹⁷*Id.*

⁹⁸*Id.*

As *Youngberg* opened the door to affirmative mental health treatment to those involuntarily confined in state mental institutions, the decision would eventually lead to inmates' right to receive mental health treatment as well. Like mentally ill patients who were institutionalized, inmates who suffer from mental illnesses also have a right to such treatment. Just as it was unjust to confine persons in mental institutions and deny them the very treatment that they need, so too is it to deny mentally ill offenders who are incarcerated in a correctional facility.

B. Rights to Mental Health Care in Correctional Facilities

As earlier cases established the duty on the State to provide the necessary medical care to inmates in its custody, *Ramos v. Lamm* stated that such medical care that states are to provide includes care for physical ills, dental care, and psychological or psychiatric care.⁹⁹ The requirement to provide inmates with adequate mental health care stems from the obligation of the correctional facility to provide inmates with basic human needs.¹⁰⁰ The deliberate indifference test established in *Estelle v. Gamble* is equally applicable to assessing whether or not the treating of psychological or psychiatric ailments in a correctional facility was constitutionally sufficient.¹⁰¹

If an inmate's mental health is sufficiently serious, such denial of psychiatric or mental health care may constitute a violation of the inmate's Eighth Amendment rights against cruel and unusual punishment,¹⁰² just as if he was denied access to basic medical treatment. Inmates do not have a right to the best possible mental health care, but merely reasonable care in accordance with the state's minimum standards of mental health treatment.¹⁰³ Such inadequate care does not exist when the inmates do not allege a deprivation that was sufficiently serious that required urgent care, such that would result in "death, degeneration or extreme pain."¹⁰⁴

The burden of proof that inmates must overcome is high to successfully challenge these constitutional rights, and to prevail, the mental health care must be extraordinarily inadequate.¹⁰⁵ An inmate's refusal to cooperate with prison

⁹⁹*Ramos v. Lamm*, 639 F.2d 559, 574-75 (10th Cir. 1980).

¹⁰⁰*Coleman*, 912 F. Supp. at 1298; *Doty*, 37 F.3d at 546; *Hoptowit*, 682 F.2d at 1253.

¹⁰¹*Partridge v. Two Unknown Police Officers of City of Houston, Tex.*, 791 F.2d 1182, 1187 (5th Cir. 1986) (stating "[a] psychological or psychiatric condition can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies").

¹⁰²*McCoy v. Goord*, 255 F. Supp. 2d 233, 258-59 (D.N.Y. 2003).

¹⁰³*Merriweather v. Sherwood*, 235 F. Supp. 2d 339, 347 (D.N.Y. 2002).

¹⁰⁴*Id.*

¹⁰⁵*See, e.g., Sibley v. Lemaire*, 184 F.3d 481, 489-90 (5th Cir. 1999) (stating that liability was not found when deputies failed to call a doctor after it appeared that the inmate's mental condition worsened, and the deputies were unable to determine that he was a threat to his own safety); *Williams v. Kelso*, 201 F.3d 1060, 1065-66 (8th Cir. 2000) (stating that deliberate indifference was not found after jail booking officer failed to immediately contact a mental health professional after detainee's mental state was disoriented, confused, and out of touch with reality); *Bozeman v. Orum*, 199 F. Supp. 2d 1216, 1231-32 (M.D. Ala. 2002) (stating that deliberate indifference was not found when nurses at the county correctional facility failed to

psychologists is a factor that may preclude a claim that prison officials were deliberately indifferent to the inmate's medical needs.¹⁰⁶

The Court has held that inmates have a right to treatment for their serious injuries or illnesses that require medical care, otherwise known as their serious medical needs.¹⁰⁷ Denial of psychiatric or mental health care, if sufficiently serious, may constitute an Eighth Amendment violation.¹⁰⁸ Various serious medical needs include: acute depression;¹⁰⁹ paranoid schizophrenia;¹¹⁰ nervous collapse;¹¹¹ transsexualism;¹¹² and other severe mental disturbances.¹¹³ Such general situations that may constitute serious medical needs include: an injury that a reasonable doctor or patient would find important and worthy of treatment or commitment;¹¹⁴ the presence of a medical condition that significantly affects an individual's daily activities;¹¹⁵ and the existence of chronic and substantial pain.¹¹⁶

To further define what psychological or psychiatric care that an inmate is entitled, courts have reverted to the Fourth Circuit's discussion in *Bowring v. Godwin*.¹¹⁷ The court stated that prison inmates have a limited right to psychiatric and psychological treatment if a mental health care provider, while exercising ordinary skill and care, concludes with reasonable medical certainty that such treatment is medically necessary to the inmates' well-being and not merely desirable by the inmates.¹¹⁸ A prison inmate is entitled to psychological or psychiatric treatment if a physician or health care provider, exercising ordinary care at the time of observation, concludes with reasonable certainty that: (1) the inmate's symptoms demonstrate a serious disease or injury; (2) the disease or injury is curable or may be substantially alleviated as a result of necessary treatment; and (3) the potential for harm to the inmate through unnecessary delay or ultimate denial of care would be substantial to the inmate's health.¹¹⁹ Prisoners do not have a right to state-provided psychiatric treatment, absent a reliable medical diagnosis of a serious mental illness

obtain mental health treatment for an inmate who had been evaluated for mental illnesses and proscribed medication for those illnesses in the past).

¹⁰⁶Long v. Nix, 86 F.3d 761, 766 (8th Cir. 1996).

¹⁰⁷*Estelle*, 429 U.S. at 97.

¹⁰⁸*McCoy*, 255 F. Supp. 2d at 233.

¹⁰⁹Robert E. v. Lane, 530 F. Supp. 930, 939 (N.D. Ill. 1981).

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

¹¹³*Partridge*, 791 F.2d at 1182.

¹¹⁴*Wood v. Housewright*, 900 F.2d 1332, 1334-35 (9th Cir. 1990).

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977).

¹¹⁸*Id.* at 47.

¹¹⁹*Id.*

that can be alleviated symptomatically for some known treatment.¹²⁰ Therefore, an inference may be drawn that inmates are entitled to treatment for illnesses that are known to be curable, or a level of treatment that alleviates some minimal level of pain.¹²¹ Also, the importance of diagnosis or access to being diagnosed seems to be an important element in this constitutional debate. What happens when inmates are not diagnosed properly or not diagnosed at all? How can they seek the appropriate treatment they need?

The court in *Bowring* contradicted the *Estelle* deliberate indifference standard when it stated, “[t]he right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.”¹²² This begs the question, as to which factor the Court considers the most important factor: the cost factor or the medical necessity factor? Does the inmate’s medical necessity yield to the government’s fiscal responsibilities, or does the inmate’s health trump financial considerations? Or as an alternative analysis, are they equally important considerations?

Under this analysis, the Court would allow correctional officials to use cost considerations in determining the appropriate level of treatment afforded to the inmates.¹²³ Such discretion may allow the correctional officials to determine the constitutional rights to treatment, instead of the judiciary, the legislature, or a mental health professional.¹²⁴ The general Eighth Amendment jurisprudence does not look to cost considerations when evaluating inmates’ Eighth Amendment claims.

The question then becomes what is the purpose behind the Court’s statement. Was the Court narrowing the *Estelle* standard even more, or was this merely dicta that future courts may use when faced with outrageous requests for medical treatment, whether for physical or mental ills? Some light has been shed on this discussion by a United States District Court in Virginia. In a footnote, the court stated that decisions involving cost considerations only become deliberately indifferent when the decision is based solely on the cost, rather than any medical rationale.¹²⁵

The medical professional judgment standard articulated in *Bowring* gives discretion to medical professionals who ultimately determine the level of treatment that an inmate may receive. Some critics argue that once the treatment is deemed necessary for an inmate, the least expensive treatment should be afforded to the

¹²⁰*Bailey*, 940 F.2d at 1152.

¹²¹*See, e.g., Starbeck*, 871 F. Supp. at 1143 (stating “A condition for which there is no known or generally recognized method of treatment cannot serve as a predicate for the conclusion that failure to provide treatment constitutes ‘deliberate indifference to the serious medical needs of prisoners’”).

¹²²*Bowring*, 551 F.2d at 47.

¹²³Marc J. Posner, *The Estelle Medical Professional Judgment Standard: The Right to Those in State Custody to Receive High-Cost Medical Treatments*, 18 AM. J. L. AND MED. 427 (1992).

¹²⁴*Id.*

¹²⁵*Taylor v. Barnett*, 105 F. Supp. 2d 483, 489 (E.D. Va. 2000).

inmate, thus conserving governmental resources.¹²⁶ This is possible because the medical staff personnel are the ones prescribing the appropriate treatments, not the correctional officials.¹²⁷ When such medical personnel are employed by the government, they have an even greater incentive to choose the least expensive treatment.¹²⁸ In the end, medical staff and correctional facilities are universally inadequate for providing even the minimally adequate care that is necessary to treat certain illnesses, and they are likely to choose the easiest and least expensive treatments.¹²⁹

In *Farmer v. Brennan*, the Supreme Court narrowed the deliberate indifference standard of *Estelle*.¹³⁰ The plaintiff, Dee Farmer, was diagnosed by the Bureau of Prisons as suffering from a rare psychiatric disorder known as transsexualism.¹³¹ Farmer typically wore women's clothing and displayed feminine characteristics.¹³² Upon a transfer to another federal penitentiary, Farmer was beaten and raped by another cell-mate.¹³³ Farmer complained about his placement in the prison's general population, despite the prison officials' knowledge of his transsexualism and the vulnerability of attacks to which he would be subjected.¹³⁴ Farmer alleged that these actions established deliberate indifference to his Eighth Amendment rights.¹³⁵

In applying the *Estelle* deliberate indifference test to Farmer's mental disorder, the Court stated that deliberate indifference lies somewhere between the principles of negligence and purpose or knowledge.¹³⁶ In defining the level of culpability required to establish deliberate indifference, the Court held it required a prison official to know of and disregard a substantial risk to the inmate's health or safety.¹³⁷ The prison official must both be aware of certain facts from which an inference could be drawn that a substantial risk of harm exists, and he must draw that inference from those facts.¹³⁸ Where an official should have perceived a substantial risk but did not, liability is precluded.¹³⁹ The Court explained that there must be an inquiry into the prison official's state of mind when the inmate alleges that the official has inflicted

¹²⁶See generally Posner, *supra* note 123.

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Farmer v. Brennan*, 511 U.S. 825 (1994).

¹³¹*Id.* at 829.

¹³²*Id.*

¹³³*Id.* at 830.

¹³⁴*Id.* at 830-31.

¹³⁵*Id.*

¹³⁶*Id.* at 836.

¹³⁷*Id.* at 836-37.

¹³⁸*Id.* at 837.

¹³⁹*Id.* at 838.

him with cruel and unusual punishment.¹⁴⁰ Eighth Amendment claims against prison officials must satisfy a subjective requirement, as opposed to an objective requirement.¹⁴¹ The subjective standard to be applied to the inmates' Eighth Amendment claims is the analogous subjective recklessness standard used in criminal law.¹⁴² A prison official may demonstrate his knowledge of a substantial risk through direct or circumstantial evidence presented to the fact finder.¹⁴³ After *Farmer*, courts have used this standard to require actual knowledge of a risk, and if the official acted reasonably in response to a known risk, liability is precluded.

Over the past several decades, inmates in correctional facilities have fought for their right to be provided the necessary medical care, and eventually this included a constitutional right to the necessary mental health care in certain situations. Despite such rights to treatment, inmates face many barriers in obtaining the necessary mental health treatment for their illnesses. Such barriers include understaffed and unqualified correctional staff, ineffective mental health screening procedures, lack of training for law enforcement officers, and the lack of collaboration between the criminal justice system and the mental health care system. Though the judicial system has provided a greater access to mental health care, it has only done this reactively. It is now time to proactively seek the proper amount of mental health care that a vast majority of persons incarcerated ultimately need.

VI. BARRIERS TO EFFECTIVE AND EFFICIENT TREATMENT FOR MENTALLY ILL OFFENDERS

In past decades, detailed guidelines have been established that illustrate the necessary components of mental health care in prisons and jails by the National Commission on Correctional Health Care (NCCHC), correctional mental health experts, court rulings, and private settlement agreements.¹⁴⁴ In determining whether a particular correctional facility allows its inmates access to the necessary and adequate mental health care, a court should focus on several basic fundamental components that various courts and experts have said make up a constitutionally minimum mental health care system.¹⁴⁵ Prisons must be equipped with the necessary

¹⁴⁰*Id.*

¹⁴¹*See* *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *see also* *Helling v. McKinney*, 509 U.S. 25, 35 (1993); *Hudson v. McMillian*, 503 U.S. 1, 8 (1991).

¹⁴²*Farmer*, 511 U.S. at 839-40.

¹⁴³*Id.*

¹⁴⁴Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness* (Oct. 2003), <http://www.hrw.org/reports/2003/usa1003> (last visited Feb. 21, 2006). The Human Rights Watch organization conducts regular investigations of the various human rights abuses that occur in over seventy countries around the world. They address the human rights practices of all levels of government, political stripes, geopolitical alignments, and across all ethnic and religious boundaries. The Human Rights Watch defends the freedom of thought and expression, and due process and equal protection of the law for all. Their goal is to hold governments accountable for violating the rights of their people.

¹⁴⁵*See* *Coleman*, 912 F. Supp. at 1298; *Balla v. Idaho Bd. of Corr.*, 595 F. Supp. 1558, 1577 (D. Id. 1984) (citing *Ruiz v. Estelle*, 503 F. Supp. at 1339), *rev'd in part*, *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461 (9th Cir. 1989).

procedures for screening and identifying inmates with mental illnesses.¹⁴⁶ The prison or jail must have various services for treating those with mental illnesses. Such services may include various therapeutic interventions or necessary medications.¹⁴⁷ Services also include methods and techniques for dealing with and treating suicidal inmates. The prison must contain an appropriate number of mental health professionals to provide the necessary mental health care to the inmates.¹⁴⁸ Facilities must also house adequate and confidential clinical records for the inmates. Studies have shown that many correctional facilities around the country implement many of the various components suggested above, but no single facility implements every necessary component.¹⁴⁹

The initial screening or identification process utilized in correctional facilities is the first step in acquiring the necessary mental health care for mentally ill offenders. Under the subjective standard of *Farmer*, procedures such as screening or identifying inmates' mental health disorders become even more crucial, because of the actual knowledge requirement. When an inmate is initially screened upon intake at the correctional facility, mental health care professionals can identify which inmates suffer from mental illnesses and what illnesses they suffer from. Absent an initial screening procedure, correctional officials may be immune under the standard of *Farmer*, because *Farmer* requires actual knowledge of the risk. Untrained and unqualified correctional officers and staff are unable to actually know what mental disorders an inmate may suffer from, absent a medical diagnosis by a trained mental health professional.

A. Correctional Facilities Must Implement Adequate Screening Procedures to Properly Identify Mentally Ill Offenders

In 2000, nearly 95% of all state adult correctional facilities screened inmates for mental health problems, and of the nation's 1,558 state public and private adult facilities, 1,394 reported that they provided mental health services to their inmates.¹⁵⁰ By midyear 2000, 13% of state prisoners were receiving some form of mental health therapy or counseling services, and nearly 10% of state prisoners were receiving psychotropic medications.¹⁵¹ The number of inmates receiving mental health care could be even higher if uniform screening and identifying procedures were implemented in all state and federal correctional facilities across the country.

Despite such known statistics, the United States District Court for the District of Colorado recently raised the very issue of a constitutional right to a full screening examination for inmates at intake. The District Court stated that there is no

¹⁴⁶Human Rights Watch, *supra* note 144, at 94.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰*Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S.1174 Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Cheri Nolan, Deputy Assistant Attorney General of the Office of Justice Programs) [hereinafter "*Nolan, Statement*"].

¹⁵¹*Id.*

constitutional requirement that every person taken into custody receive a full physical examination to determine any present medical problems.¹⁵² Furthermore, the court stated that there was no requirement to hire a person to screen all persons coming into the jail to determine their mental and emotional status.¹⁵³ The United States Supreme Court has not addressed this issue thus far, because the substantive issues of the case have not yet been argued in the District Court, but only the procedural issue of class certification. At some time in the near future, the Court should address such conclusions made by the District Court and decide whether or not inmates have a constitutional right to receive a full physical examination to determine if any such mental or physical illnesses exist upon intake.

One of the most crucial steps in attaining the proper mental health treatment for an inmate is through the initial screening and identification process.¹⁵⁴ Inmates who fail to be identified as suffering from a mental illness when they are initially screened upon their entry into the jail or prison, will likely never receive the necessary treatment that they require.¹⁵⁵ Inmates are often times placed in the general population as a result of this misclassification. Segregation is often necessary for the safety of mentally ill inmates. Inmates are usually screened upon their initial entry into a facility or upon a transfer, and this usually consists of a questionnaire.¹⁵⁶ Through this short questionnaire, correctional personnel should be able to determine whether the inmate is in need of any mental health treatment, or whether a further evaluation is needed to determine the seriousness of the inmate's mental illnesses.¹⁵⁷ There is a caveat that self-reports do not always produce an accurate number, especially when dealing with mental illnesses. Inmates may not even know that they are suffering from an illness or they may be embarrassed of admitting that they suffer from a mental illness.¹⁵⁸ This emphasizes the need for implementing uniform assessment and screening tools in every correctional facility.¹⁵⁹

Even though the Michigan Bureau of Forensic Mental Health Services has implemented a comprehensive screening process, officials believe that they still fail to identify between six and eight serious mentally ill inmates per month.¹⁶⁰ However, the Michigan system is able to detect these inmates who fall through the cracks by using subsequent follow-up screening procedures. The system can also monitor the clinicians that failed to identify the specific inmates who suffered from a

¹⁵²Shook v. Bd. of County Comm'rs, 2003 U.S. Dist. LEXIS 13513, at *11-12 (D. Colo. July 29, 2003), *rev'd on other grounds*. The Court of Appeals has only addressed the procedural issue of class certification as of January 2005.

¹⁵³*Id.*

¹⁵⁴Human Rights Watch, *supra* note 144, at 94.

¹⁵⁵*Id.* at 101.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸Nolan, *Statement*, *supra* note 150.

¹⁵⁹*Id.*

¹⁶⁰Human Rights Watch, *supra* note 144, at 101.

mental illness.¹⁶¹ Some other states however are not as advanced as others. At the end of 2002, Alabama had barely begun to computerize any aspect of the mental health systems throughout their state correctional facilities.¹⁶² Likewise, in Wisconsin, a legislative audit conducted in 2001 found that the Wisconsin Department of Corrections had no way of calculating the total number of serious mentally ill inmates contained in the state's correctional facilities.¹⁶³

The United States District Court for the Middle District of Alabama ordered the Alabama State Prison System to incorporate some systematic procedure for identifying inmates with psychological deficiencies, drug or alcohol dependencies, and other substances abuses problems that the inmates may suffer from.¹⁶⁴ Such systematic procedures must be administered by adequately trained medical or correctional personnel who are equipped with the knowledge and skills to identify the inmates' need for mental health care.¹⁶⁵ When inmates or pretrial detainees in need of mental health care are cast into the institutions' general population, they are vulnerable to abuse from other inmates.¹⁶⁶ Mentally ill offenders can often be placed in the general population if they are not screened by trained and qualified persons prior to their initial integration among other inmates.¹⁶⁷

The Idaho State Correctional Institution (ISCI) was ordered to develop a systematic screening process for inmates to determine whether the incoming inmates had any legitimate medical or psychological needs.¹⁶⁸ The court found that the correctional institution had little or no initial testing of the inmates subsequent to their placement in the institution.¹⁶⁹ ISCI was ordered to implement a system where each inmate is evaluated upon his or her entry into the institution to determine if the inmate required any psychological treatment.¹⁷⁰

The district court concluded that a California prison's failure to implement a systematic program for screening and evaluating inmates violated the Eighth Amendment.¹⁷¹ A county policy existed that required a "full-time clinical mental health worker at the [county] jail to perform screenings," but constitutional violations arose when the county jail ceased the full-time mental health worker after disputes arose between the correctional facility and the mental health care provider.¹⁷²

¹⁶¹*Id.*

¹⁶²*Id.* at 102.

¹⁶³*Id.*

¹⁶⁴*Pugh v. Locke*, 406 F. Supp. 318, 333 (M.D. Ala. 1976).

¹⁶⁵*Id.*

¹⁶⁶*Dawson v. Kendrick*, 527 F. Supp. 1252, 1289 (D. W. Va. 1981).

¹⁶⁷*Id.* at 1289-90.

¹⁶⁸*See Balla*, 595 F. Supp. at 1578.

¹⁶⁹*See id.*

¹⁷⁰*See id.*

¹⁷¹*Coleman*, 912 F. Supp. at 1298.

¹⁷²*Gibson v. County of Washoe*, 290 F.3d 1175, 1184 (9th Cir. 2002).

Once a court has determined that the institution has implemented a constitutionally sufficient screening or classification process, it will next look to the staff or persons conducting such screening or identifying procedures.

B. Correctional Facilities Must Staff Adequately Trained Mental Health Care Professionals

A court must determine whether there is a sufficient number of staff, or ratio of inmates to mental health care staff, conducting the necessary procedures, and that they are qualified to provide the essential care to the inmates. A wide range of mental health professionals are needed in prisons and jails to provide the necessary mental health care to the inmates.¹⁷³ Such professionals include: psychiatrists, psychologists, counselors, nurses, and recreational or occupational therapists.¹⁷⁴

In *Ramos v. Lamm*, inmates claimed that the prison mental health services were inadequate and violated their Eighth Amendment rights.¹⁷⁵ Despite such high instances of inmates suffering from one form of mental illness or another, the prison had not one on-site psychiatrist or licensed psychologist to provide daily care for the mentally ill inmates.¹⁷⁶ The court held that the facility's omission to obtain the necessary treatment constituted deliberate indifference to the inmates' serious mental health needs, and ordered the prison to employ at least one full-time psychiatrist.¹⁷⁷ Despite such an order, the Indiana State Prison had additional inadequacies present in its penal system.

In *Wellman v. Faulkner*, the court held that the Indiana State Prison demonstrated "deliberate indifference [to the inmates'] serious medical needs" when the prison failed to provide an on-site psychiatrist to maintain continued treatment and deal with the inmates' psychiatric problems.¹⁷⁸ Even though the prison employed two part-time behavioral clinicians and one Ph.D. psychologist, the lack of an on-site psychiatrist or psychologist is a crucial piece to maintaining a constitutionally minimum level of adequate staffing to serve the needs of the institution's mentally ill inmates.¹⁷⁹

In *Cortes-Quiones v. Jimenez-Nettleship*, the jury found that the Puerto Rico prison system demonstrated deliberate indifference to an inmate's serious psychiatric needs when the inmate was mutilated and murdered four months after his placement in the prison's general population.¹⁸⁰ The inmate was transferred to the Arcido District Jail following a riot at the state penitentiary.¹⁸¹ Even though the inmate's

¹⁷³Human Rights Watch, *supra* note 144, at 95; *see also* Tillery v. Owens, 719 F. Supp. 1256 (W.D. Pa. 1989), *order aff'd*, 907 F.2d 418 (3d Cir. 1990).

¹⁷⁴Human Rights Watch, *supra* note 144.

¹⁷⁵*Ramos*, 639 F.2d at 562.

¹⁷⁶*Id.*

¹⁷⁷*Id.*

¹⁷⁸*Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983).

¹⁷⁹*Id.*

¹⁸⁰*Cortes-Quiones v. Jimenez-Nettleship*, 842 F.2d 556, 559 (1st Cir. 1988).

¹⁸¹*Id.*

records revealed that he suffered from serious psychiatric disorders and that he required ongoing psychiatric treatment, his transfer was deemed an emergency due to the riot and his files arrived five days subsequent to his transfer.¹⁸² The jail's superintendent was the only person present on the night of the transfer, but he was unqualified to make any evaluation of the inmate's medical or psychological needs.¹⁸³ Consequently, the inmate was never properly screened by an appropriate mental health care professional. His psychiatric disorders went unidentified, and he was not properly segregated from the general population, which led to his eventual death.¹⁸⁴ This illustrated the importance of adequately and accurately identifying those inmates who suffer from mental illnesses.

The United States District Court for the District of South Dakota laid out what a constitutionally adequate system of staffing and care would include.¹⁸⁵ Prior to the lawsuit, the South Dakota State Prison (SDSP) had only one psychiatrist whom the inmates had access to for treatment.¹⁸⁶ The psychiatrist was not a full-time caregiver but a volunteer, and he worked at the prison one day a week for only five hours.¹⁸⁷ Treatments were limited to prescribing medications, brief counseling, follow-up examinations, and referrals.¹⁸⁸ There was only one psychologist whose primary function was to screen and evaluate new inmates.¹⁸⁹ The prison housed only two specialized mental health care providers, with only one of them a full-time position.¹⁹⁰ The court found that such mental health staffing deficiency constituted deliberate indifference and was unconstitutional.¹⁹¹

The court then discussed what a constitutionally sufficient staff should include. The inmates required acute (first level) and intermediate (second level) care from the prison that would include "twenty to twenty-five beds."¹⁹² "Eight to ten of these beds would be devoted to psychiatric care" that required twenty-four hour nursing and support staff.¹⁹³ Staffing would require a full-time psychiatrist, two full-time psychologists, approximately six nurses, full-time counselors or social workers to provide support, and the appropriate number of "correctional staff to provide twenty-four hour security."¹⁹⁴

¹⁸²*Id.*

¹⁸³*Id.* at 559-60.

¹⁸⁴*Id.*

¹⁸⁵*Cody v. Hillard*, 599 F. Supp. 1025, 1044 (D.S.D. 1982).

¹⁸⁶*Id.* at 1041-42.

¹⁸⁷*Id.*

¹⁸⁸*Id.* at 1042.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 1042-43.

¹⁹¹*Id.*

¹⁹²*Id.* at 1044.

¹⁹³*Id.*

¹⁹⁴*Id.*

During a study done by the Human Rights Watch, where correctional officials and mental health experts were interviewed, all said that an adequate level of staffing is the single most important factor in providing good mental health services.¹⁹⁵ The lack of funding is most often stated as the reason for inadequate levels of staffing.¹⁹⁶ As adequately trained mental health care professionals are required in correctional facilities, law enforcement officers must also be adequately trained to handle mentally ill persons whom they encounter, whether those persons are incarcerated or on the streets.

C. Results of the Lack of Training for Law Enforcement Officers for Dealing with Mentally Ill Offenders

Law enforcement officers are most often times the first persons that a mentally ill offender comes in contact with before they formally enter the criminal justice system. Many law enforcement officers are untrained or unqualified to handle mentally ill offenders.¹⁹⁷ A police officer is often left without the proper training to attend to a person suffering from a mental illness, while a mental health clinician is often unqualified to handle a mentally ill person who demonstrates criminal behavior in the outside world. Sheriff Sexton testified to Congress that a rise in these types of instances is due to the decline in large mental institutions that were once equipped and able to handle mentally ill persons.

This decline resulted in many mentally ill persons resorting to homelessness, which often led to low-level criminal activity, because they were now left without the proper treatment to their mental illnesses.¹⁹⁸ Because law enforcement officers are the first lines of defense when dealing with mentally ill offenders, there is a great need to properly train law enforcement officers to handle criminal situations that involve mentally ill offenders.¹⁹⁹ Law enforcement officers must be able to understand the offender, and how the illness may affect that person in that particular situation. Sheriff Sexton and his senior staff have set out a program to effectively train law enforcement officers in handling mentally ill offenders. Such training is not just limited to patrol officers, who may come in contact with a mentally ill offender most often, but provides this training to other law enforcement agencies, fire/rescue squads, EMTs, and volunteer fire departments. This program will serve as a pilot program and will be eventually implemented statewide.²⁰⁰

VII. PROBLEMS THAT RESULT FOR THE FAILURE TO PROPERLY TREAT MENTALLY ILL OFFENDERS

As a result of the rapid period of deinstitutionalization during the 1950s, '60s, and '70s, many offenders were unable to quickly adjust to the outside world upon

¹⁹⁵Human Rights Watch, *supra* note 144, at 95.

¹⁹⁶*Id.* at 96.

¹⁹⁷*See* Sexton, *infra* note 245.

¹⁹⁸*Id.*

¹⁹⁹*Id.*

²⁰⁰*Id.*

their release.²⁰¹ Absent these basic living skills necessary to function on their own, traditional psychiatric treatment was likely unsuccessful.²⁰²

A. Lack of Treatment in Correctional Facilities for Mentally Ill Offenders

The main concern involving those offenders with mental illnesses is when they commit less-serious or low-level crimes that often do not require lengthy sentences.²⁰³ Persons who commit less-serious crimes often remain in jail for short periods of time, if any time at all.²⁰⁴ Offenders who suffer from mental illnesses will often not receive any treatment for their mental illnesses while incarcerated in local jails prior to their release back into the community, because of the short period of incarceration and opportunity to seek proper treatment. Treatment is often reserved to those individuals serving larger sentences, usually in state or federal prisons.²⁰⁵ State and local governments must develop programs and policies that are individualized to their system's and inmates' needs to respond to the demanding problems that managing mentally ill offenders and the increasing costs to provide such programs to these offenders across all levels of incarceration.²⁰⁶

One study indicated that there are multiple problems and hurdles that correctional facilities face when attempting to provide mentally ill offenders with the appropriate treatments.²⁰⁷ Such barriers to an effective mental health treatment program included the correctional environment, the lack of coordination with other prison staff and services, mental health staff training and support, and the lack of adequate fiscal resources.²⁰⁸ Many prisons lack the appropriate levels of mental health care services and the separate space that is required to treat the mentally ill inmates.²⁰⁹ The lack of financial resources affects areas such as the inability to provide adequate treatment programs to every inmate that requires participation, the effects of fatigue and

²⁰¹WETTSTEIN, *supra* note 5, at 2.

²⁰²*Id.*

²⁰³Nolan, *Statement*, *supra* note 150.

²⁰⁴*Id.*

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷Roger H. Peters, Ph.D., Michelle E. LeVasseur, B.A., & Redonna K. Chandler, Ph.D., *Correctional Treatment for Co-Occurring Disorders: Results of a National Survey*, 22 BEHAV. SCI. & L. 563, 578 (2004). The study surveyed twenty co-occurring disorder treatment programs (CDT) in correctional settings from thirteen different states. Within the CDT institutions, there were fifteen percent of the inmates were receiving some form of mental health care treatment, and twenty-four percent of the inmates were receiving substance abuse treatment. Inmates that were suffering from mental health disorders were found to be the most problematic among those participating in the CDT programs. Several of the programs included staff members who were trained to recognize the inmates' behavioral problems during various group activities that might reflect the effect of their mental health problems impairing their insight and judgment. The trained staff members reintegrated the philosophy behind the importance of adequate and qualified staffing.

²⁰⁸*Id.*

²⁰⁹*Id.*

burnout to the understaffed facilities, and the failure to quickly integrate the necessary training and education of the correctional staff to the needs of the mentally ill inmates.²¹⁰ Financial shortcomings result in a substantial number of inmates who require various types of mental health treatment, but are unable to receive the necessary care.²¹¹

Some mental health experts have said that excessive periods of institutionalization or hospitalization can often decrease an offender's chance of a positive return to society upon his or her release.²¹² The problem most often related to releasing mentally ill offenders is the lack of treatment that they receive while incarcerated prior to their release. If their mental illnesses are related to their criminal behavior, the lack of treatment for their mental illnesses may likely result in high levels of recidivism.

B. Recidivism Rates Among Mentally Ill Offenders Upon Their Release

Offenders with mental illnesses report extremely high rates of recidivism; therefore, the cycle continues for most mentally ill offenders.²¹³ The criminal justice system acts as a "revolving door" to these offenders, who constantly move in and out of jail and the community. According to a study, more than 70% of the mentally ill offenders who were released from the Lucas County Jail in Lucas County, Ohio, were re-arrested within a three-year period.²¹⁴ A second study showed that 90% of the mentally ill inmates in the Los Angeles County Jail were repeat offenders, and nearly 10% of those mentally ill offenders had been incarcerated on ten or more instances.²¹⁵ Mentally ill offenders must be afforded the proper treatment to some how cease their criminal behavior.²¹⁶ How could the criminal behavior cease, when the likely cause of the behavior is ignored, rather than treated? Correctional facilities must be adequately equipped with the resources to properly treat mentally ill offenders. Such resources start with the proper allocation of money to fund such treatment programs.

VIII. PUBLIC POLICY DEMANDS THAT MENTALLY ILL OFFENDERS RECEIVE THE NECESSARY MENTAL HEALTH CARE TREATMENT WHILE INCARCERATED

On any given day in the United States, there are over one million individuals under the supervision of the criminal justice system who suffer from a serious mental illness.²¹⁷ Judge William Wayne Justice expressed concern for mentally ill offenders when he stated,

²¹⁰*Id.*

²¹¹*Id.* at 579.

²¹²WETTSTEIN, *supra* note 5, at 3.

²¹³Nolan, *Statement*, *supra* note 150.

²¹⁴*Id.*

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷*Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S.1174 Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of John Monahan, Ph.D. & Henry and Grace

It is deplorable and outrageous that this state's prisons appear to have become a repository for a great number of its mentally ill citizens. Persons who, with psychiatric care, could fit well into society, are instead locked away, to become wards of the state's penal system. Then, in a tragically ironic twist, they may be confined in conditions that nurture, rather than abate, their psychoses.²¹⁸

Despite the high number of mentally ill offenders incarcerated in the United States, only one-third of men and one-quarter of women who suffer from a mental illness reported they received treatment while detained in jail.²¹⁹

A. The Mentally Ill Offender Treatment and Crime Reduction Act of 2004

In the summer of 2003, each Chamber of Congress introduced nearly identical bills designed to encourage local collaborations which would ensure that resources are effectively and efficiently used within the criminal justice, juvenile justice, and mental health systems.²²⁰ Each bill was designed to be an amendment to Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3711 et seq.).²²¹ The bills sought to provide grant funding to state and local government agencies to implement programs and strategies aimed at solving the modern problems that such agencies deal with concerning criminals, mental health illnesses, and substance abuse problems.²²² Such agencies would not only help adult offenders, but juveniles as well. Many of these juveniles become the same adults who enter the criminal justice system later on in life.

The majority of individuals with a mental illness or emotional disorder who are involved in the criminal or juvenile justice systems are responsive to medical and psychological interventions that integrate treatment, rehabilitation, and support.²²³ Collaborative programs between mental health, substance abuse, and criminal or juvenile justice systems that ensure the requirement of services for those with mental illness or co-occurring mental illness and substance abuse disorders can reduce the number of such individuals in adult and juvenile corrections facilities, while providing improved public safety.²²⁴

Doherty, Professors of Law, University of Virginia) [hereinafter Monahan & Doherty, *Statement*].

²¹⁸ Ruiz v. Johnson, 37 F. Supp. 2d 855, at 915 (D. Tex. 1999); *rev'd on other grounds*.

²¹⁹ Monahan & Doherty, *Statement*, *supra* note 217.

²²⁰ The Mentally Ill Offender Treatment and Crime Reduction Act of 2004, S. 1174, 108th Cong. §1 (2004) (enacted). This bill was enacted into law on October 30, 2004, and was codified as 42 U.S.C. § 3797aa. Mental Illness means "a diagnosable mental, behavioral, or emotional disorder – of sufficient duration to meet diagnostic criteria within the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association."

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* The Act will seek to provide adults as well as juveniles with the necessary mental health treatment.

On October 21, 2004, President George W. Bush signed the Mentally Ill Offender Treatment and Crime Reduction Act of 2004 into law.²²⁵ The purpose of this bill “is to increase public safety by facilitating collaboration among criminal justice, juvenile justice, mental health treatment, and substance abuse systems.”²²⁶ Such collaboration is needed to reduce re-arrests among adult and juveniles with mental illnesses and substance abuse problems.²²⁷ Courts, including mental health courts, must be provided with the appropriate treatment options for those suffering from mental illnesses and substance abuse problems, and to maximize their use of alternative diversions from prosecution of non-violent offenders.²²⁸ The criminal justice system must promote adequate training of their personnel concerning mental illnesses and substance abuse disorders, which they may have little knowledge and/or experience dealing with.²²⁹ On the other hand, mental health personnel must be informed about adequate training for handling criminals who suffer from mental illnesses.²³⁰ Finally, and most importantly, there must be adequate levels of communication between all support systems (criminal and juvenile justice, mental health, and substance abuse), and between all levels of government.²³¹

Congress has found that a bill of this type has proved to be of great importance to this country through its several findings dealing with the overwhelming number of mentally ill offenders.²³² Through the many hearings, Congress found that over 16% of adults incarcerated in United States jails and prisons have a mental illness.²³³ Approximately 20% of youth in the juvenile justice system have serious mental health problems, and many have co-occurring mental health and substance abuse disorders. Up to 40% of adults who suffer from serious mental illness will come into contact with the American criminal justice system at some point in their lives.²³⁴ Over 150,000 juveniles who come in contact with the juvenile justice system each year meet the diagnostic criteria for at least one mental or emotional disorder. A significant number of adults with a serious mental illness who are involved with the criminal justice system are homeless or at imminent risk of homelessness.²³⁵

²²⁵*Id.*

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Id.* The Act seeks to help juveniles, because they are the ones who sooner than later become the many adults who are suffering from mental illnesses.

²²⁹*Id.*

²³⁰*Id.*

²³¹*Id.*

²³²*Id.* As a juvenile, a mentally ill offender could not truly be expected to be cured as an adult if they did not receive the proper treatment when they are in their earlier developmental stages.

²³³*Id.*

²³⁴*Id.*

²³⁵*Id.*

This legislation is necessary to provide the resources to effectively divert offenders away from jails and prisons and into the appropriate treatment programs. But is this enough? Government agencies, local law enforcement agencies, and mental health care providers must now proactively seek the available funds and provide the necessary care to those suffering from mental illnesses.²³⁶ One study has shown that when the proper amounts of resources are allocated and individuals receive the proper amount of mental health treatment, those individuals have lower recidivism rates than those individuals who receive inadequate amounts of mental health treatment.

B. Properly Implemented Treatment Programs in Correctional Facilities Can Lower Recidivism Rates for Mentally Ill Offenders

The MacArthur Violence Risk Assessment Study considered over 1,000 people who had been hospitalized for various mental illnesses, and looked at the effect of the various levels of treatment given to the particular groups of offenders.²³⁷ The study compared three groups by administering different levels of treatment and then comparing their levels of violence. The study attempted to determine whether the appropriate level of treatment was in any way related to the offender's risk of violent behavior.²³⁸ Of the group who received no treatment, medication or therapy, subsequent to their release from the hospital, 14 percent soon reported acts of violence. The group that received inadequate levels of treatment, meaning some treatment but not the necessary levels they need, had a reduced rate of violent acts, from 14 percent to about 9 percent. However, the group that received the appropriate levels of treatment necessary to combat their mental illnesses had a rate of violence that was reduced from 14 percent to less than 3 percent.²³⁹ Therefore, the study found that offenders who received the appropriate levels of mental health treatment were less likely than those not receiving the treatment to commit an act of violence upon their release into the community.²⁴⁰

The above study illustrates that when mentally ill offenders are given the proper amounts of mental health treatment, their recidivism rates decrease significantly. The Mentally Ill Offender Treatment and Crime Reduction Act of 2004 will now fund the necessary treatment that so many mentally ill offenders require. Without the proper treatment and funds to provide for such treatment programs, the problem of mentally ill offenders will continue to grow. Federal, state, and local governments who were previously fiscally restrained from providing the necessary mental health care to its inmates may now be provided with the adequate resources to provide for the necessary treatment. Each discipline, however, cannot combat this problem

²³⁶*Id.* Each applicant must apply to the Attorney General to be eligible for funding of planning and implementation grants to prepare a comprehensive plan to collaborate between adult and juvenile programs. The applicant must provide a budget or budget justification for any such plan proposal. The amount of any such planning grant may not exceed \$75,000, without the Attorney General's otherwise approval. 42 U.S.C. § 3797aa (2005).

²³⁷Monahan & Doherty, *Statement*, *supra* note 217.

²³⁸*Id.*

²³⁹*Id.*

²⁴⁰*Id.*

alone, but they work together, combining their strengths, to provide a brighter tomorrow for mentally ill offenders, and a safer community for its citizens.

C. Collaboration Between Systems to Combat the Barriers Affecting the Treatment of Mentally Ill Offenders

One of the most important factors that the Mentally Ill Offender Treatment and Crime Reductions Act stressed was collaboration. Collaboration between the various disciplines is a key ingredient to the success of this legislation. Mental health professionals must come to grips with the reality that mentally ill offenders are as much their responsibility as they are the responsibility of the criminal justice system.²⁴¹

Collaboration between the criminal justice system and the mental health system may decrease the rates of incarceration for mentally ill offenders, and may be a significant benefit for both systems, as they can learn from each other in dealing with mentally ill offenders.²⁴² State and local governments must encourage their police departments to develop crisis intervention teams and pretrial screening procedures for defendants and newly admitted inmates with mental illnesses. Local court systems must establish mental health courts that are specialized to treat the offenders' mental illnesses that are inevitably causing the offenders to commit crime. Probation officers must be given a specialized caseload that deal strictly with mentally ill offenders, and work with multidisciplinary teams to develop the inmates' re-entry planning. Correctional facilities and mental health care providers must establish a therapeutic community offenders program with co-occurring substance abuse and mental health disorders.²⁴³ No single agency or discipline can solve the ongoing problem of dealing with mentally ill offenders; therefore, only working together by involving all disciplines can begin to solve the problem.²⁴⁴ As the various disciplines begin to work with one another, there is a need for new and continuous training so that each discipline can truly understand the mentally ill offender.

D. Law Enforcement Agencies Must Be Trained to Deal with Mentally Ill Offenders

Sheriff Ted Sexton also testified to Congress about his concern about the lack of training that law enforcement officers receive on how to handle the mentally ill offender.²⁴⁵ A majority of offenders who suffer from mental illnesses are non-violent, low-level criminals who show a continued pattern of criminal behavior as their mental illnesses go untreated.²⁴⁶ Many calls that his department receives are

²⁴¹Phyllis Solomon, Ph.D., *Response to A Model Program for the Treatment of Mentally Ill Offenders in the Community*, 35 COMMUNITY MENTAL HEALTH J. 473, 473 (1999).

²⁴²*Id.* at 474.

²⁴³Nolan, *Statement, supra* note 150.

²⁴⁴*Id.*

²⁴⁵*Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S.1194 Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Ted Sexton, Sheriff of Tuscaloosa County, Alabama) [hereinafter "Sexton, *Statement*"].

²⁴⁶*Id.*

from family members who are concerned for their loved ones suffering from mental illnesses, who may be posing a risk to them.²⁴⁷ Individuals may be posing a risk as a result of certain circumstances that the person is faced with, or that they have not taken their prescribed medication and their behavior is altered as a result.²⁴⁸

Senator John Campbell of Vermont, a former police officer and attorney, testified to Congress due to the same concerns as Sheriff Ted Sexton.²⁴⁹ As a former police officer, he encountered many situations that involved less-serious crimes committed by persons that appeared to be suffering from mental illnesses.²⁵⁰ He was qualified to handle the criminal aspect of the situation, but was unqualified to handle the mental health aspect. Often times, the individual is in need of mental health or substance abuse treatment, but resources were scarce and unavailable to provide the necessary treatment.²⁵¹ Police officers are unable to act as quasi-mental health care providers, and this places an unreasonable burden upon them.²⁵²

The Mentally Ill Offender Treatment and Crime Reduction Act of 2004 will provide police departments, correctional facilities, mental health providers, and various other agencies and disciplines the necessary training on how to deal with situations that involve mentally ill offenders. As illustrated above, without the necessary training, situations cannot be dealt in the most effective manner. This Act will provide these agencies and disciplines the necessary funding to begin combating the problem in the most efficient and fiscally responsible manner.

E. Alternatives to Incarceration for Mentally Ill Offenders

Besides the need to train law enforcement agencies to effectively handle individuals with mental illnesses, there is a need to utilize the available alternatives and implement them to the current plans of action.²⁵³ In instances when mentally ill offenders are more of a disturbance than a threat to society, the choices are to take the person to jail, or to leave them at the scene.²⁵⁴ Either way, the person likely will not receive the necessary treatment that he or she ultimately requires. If the person is left where the police originally found the person, it will be a matter of time until the police are again summoned to deal with the same person. On the other hand, if the person is taken to jail following the incident or after a continued pattern of criminal

²⁴⁷*Id.*

²⁴⁸*Id.*

²⁴⁹*Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S.1194 Before the Comm. on Senate Judiciary*, 108th Cong. (2004) (statement of State Senator John Campbell of Vermont, former police officer and attorney) [hereinafter "Sen. Campbell, Statement"].

²⁵⁰*Id.*

²⁵¹*Id.*

²⁵²*Id.*

²⁵³Sexton, *Statement*, *supra* note 245.

²⁵⁴*Id.*

behavior, the county jail will often be ill-equipped to handle the person as well, and again, nothing is accomplished.²⁵⁵

Mental health courts have been implemented in various cities to provide an alternative to those offenders who suffer from mental illnesses.²⁵⁶ One such court exists in Broward County, Florida, where mentally ill offenders who commit misdemeanor offenses are offered the choice to accept mental health treatment in the community or to have their cases proceed, which likely will lead to jail time.²⁵⁷ Nearly 95 percent of the offenders choose to receive mental health treatment in the community.²⁵⁸ These offenders are twice more likely to receive treatment than offenders in other counties that do not have mental health courts. When offenders choose to accept mental health treatment, their jail sentences are most often reduced, saving valuable tax dollars. However, there is no one way to successfully divert mentally ill offenders away from jail, and each program must be unique to the needs and resources of the community.²⁵⁹

IX. CONCLUSION

In the last three to four decades, federal courts have seen an influx of lawsuits involving a correctional facility's denial of adequate levels of mental health care. However, past decisions, such as *Estelle* and *Farmer* have led courts to reactively amend the problems that mentally ill offenders face each day while they are incarcerated. Courts have only amended these inadequate levels of treatment when they were so egregious that the courts had no choice but to demand the implementation of mental health care treatment. Correctional facilities house a substantial percentage of offenders who require various types of mental health care treatment, but the fact is that many correctional facilities still remain ill-equipped to handle these offenders' mental health needs.

Although the number of mentally ill offenders who are incarcerated in this country are astounding, the continued practice to allow such offenders to go untreated is just plain unacceptable. As mentally ill offenders continue to be incarcerated without affording them the proper mental health care treatment, their problems will continue to increase. Many of the mental illnesses that offenders struggle with are often the causes of their incarceration or continued acts of disorderly conduct. If mentally ill offenders were given the appropriate levels of treatment they require, their levels of incarceration and rates of recidivism will likely decline as a result. And when their levels of incarceration and rates of recidivism decrease, valuable tax dollars could be saved and applied to other areas of governmental need.

²⁵⁵*Id.* Sheriff Sexton reiterated that a "jail is not designed nor equipped to provide treatment for the mentally ill. Jails are designed for holding those individuals awaiting trial or incarceration of those serving sentences and should not be viewed as an alternative treatment facility for the mentally ill."

²⁵⁶Monahan & Doherty, *Statement*, *supra* note 217.

²⁵⁷*Id.*

²⁵⁸*Id.*

²⁵⁹*Id.*

The MacArthur Violence Risk Assessment Study has shown that when mentally ill offenders are given the appropriate levels of treatment that they require, their recidivism rates have decreased significantly.²⁶⁰ Further studies seek to find the same results, which are when you fix what is broken, the reoccurring problems will cease to exist. Affording mentally ill offenders the appropriate levels of treatment encompasses the idea of proactive implementation. Courts can only address or amend already inadequate levels of treatment or the complete denial of sufficient mental health care treatment for incarcerated mentally ill offenders. That is, courts can only react to the egregious actions towards mentally ill offenders. Government agencies and private mental health care providers must begin to work proactively to combat this problem.

The Mentally Ill Offender Treatment and Crime Reduction Act of 2004 is one of the first proactive pieces of legislation that can truly make a difference in solving the problem that this country faces in dealing with mentally ill offenders. This legislation seeks to encourage various federal, state, and local government agencies, as well as private mental health and substance abuse providers, to proactively seek solutions to allow mentally ill offenders the access to the necessary treatment.

Rhonda Atkins' daughter could have been saved years ago if legislation like the Mentally Ill Offender Treatment and Crime Reduction Act had been implemented sooner. The time has come when society must address this immense problem that mentally ill offenders are creating. If Rhonda's daughter was suffering from a cold, she could have been taken to her family doctor for the proper treatment. Mental disorders are not as curable as a cold, but they do require some level of affirmative action, rather than no action at all. For years, there has been exactly that, no action towards attaining the necessary mental health treatment that so many mentally ill offenders require. Only time will tell how legislation and others alike will help combat the problem of the thousands of mentally ill offenders entering and remaining in the criminal justice system each year.

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²⁶⁰*Id.*

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