



Judges' Guide to **Mental Health Diversion**

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NATIONAL JUDICIAL TASK FORCE
TO EXAMINE STATE COURTS' RESPONSE TO MENTAL ILLNESS



This guide is intended to serve as a resource framework for courts and judges to use to promote and implement diversion strategies for individuals with behavioral health needs. Ideally, judges would collaborate with a range of system stakeholders to examine the entire diversion continuum but could also focus on one step of the process at a time. This guide focuses on jail diversion systems, post arrest and pre plea.

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With support from the Sozosei Foundation, pilot sites will be engaged to test the usefulness of this guide and to identify needed modifications.

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The Problem

People living with mental illness are overrepresented in the courts and in the incarcerated population. The rate of serious mental illness is four to six times higher in jail (14.5% of men and 31% of women in jails) than in the general population. Substance use disorders are even more prevalent than serious mental illnesses in jails and prisons; 68% of people in custody in jails, 53% of people in custody in state prisons, and 46% of people in custody in federal prisons report symptoms consistent with SUD in the year prior to their incarceration.¹

The incarceration of people with serious mental illness, often for minor crimes, is expensive and results in negative outcomes for the individuals, their families, and their communities. Even short stays in jail often make mental illness symptoms worse and increase the likelihood of recidivism.

In response, courts and communities are increasingly looking to design and implement diversion strategies that identify those individuals who can and should be steered away from the criminal justice system, and toward appropriate treatment.

In this context, diversion is not a point in the criminal justice process, but rather an intentional and continuous approach to proactively and systematically identify individuals who have come into contact with the justice system who can be diverted from further penetration into that system.² These individuals are referred (and sometimes compelled) to a stepped down intervention generally involving treatment for the relevant behavioral health disorder.

Diversion strategies combine community-based treatment and supervision to achieve public safety goals—reduced time spent in jail, reduced arrests, fewer victims, and reduced violence—along with public health objectives. Although it varies by program, in addition to treatment compliance, diversion conditions often include probation supervision, day reporting to pretrial services, or periodic reporting to court. Supervision is generally in addition to case management by a mental health services provider. Diversion can be pre-plea and post-plea, though this guide focuses on post-arrest, pre-plea opportunities.

¹ National Center for State Courts (2022). [Prevalence of Serious Mental Illness and Substance Use Disorders](#)

² Deflection is generally what occurs before arrest or jail booking, and diversion occurs at any stage after that.

Why Me?

Judges are uniquely positioned to convene system partners and to lead collaboration and change. Michigan Chief Justice Bridget McCormack argues that “judges are not only *permitted* to engage in reform efforts, but also have an ethical *obligation* to do so. That is, a judge cannot ignore inequities once she becomes aware of them.”³ New resources provide a detailed roadmap specifically for judges to successfully lead system reform in their local jurisdiction⁴ and at a statewide level.⁵

Why Now?

In July 2022, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) unanimously adopted a joint resolution finding that “members of CCJ and COSCA are uniquely positioned to assume a leadership role to address the impacts of serious mental illness on the court system in every state and territory.”⁶ Also adopted was a comprehensive series of findings and recommendations, many of which focused on diversion from courts and the criminal justice system.⁷ This expansive expression of support provides a catalyst to engage in collaborative system examination and reform.

Now is the time to engage in these efforts because of the research and resources recently marshalled by the Task Force⁸ and by other entities focused on these same issues.⁹ For the first time there is sufficient information and experience to make clear what works, and how to implement it.

³ Yale Law Journal, (2021). [Staying Off the Sidelines: Judges as Agents for Justice System Reform](#)

⁴ National Center for State Courts (2022). [Leading Change Guide for Trial Court Leaders: Improving the Court and Community's Response to Mental Health and Co-Occurring Disorders](#)

⁵ National Center for State Courts (2022). [Leading Change Guide for State Court Leaders: Improving the Court and Community's Response to Mental Health and Co-Occurring Disorders](#)

⁶ National Center for State Courts (2022). [Resolution 1: In Support of the Recommendations of the National Judicial Task Force to Examine State Courts' Response to Mental Illness](#)

⁷ National Center for State Courts (2022). [Findings and Recommendations of the National Judicial Task Force to Examine State Courts' Response to Mental Illness](#)

⁸ National Center for State Courts (2022). [Task Force Publications and Resources](#) and [Task Force Final Report and Recommendations](#)

⁹ A curated compilation of relevant research and resources is found in the [Behavioral Health Resource Hub](#), National Center for State Courts (2022).



Jail Diversion

The What and Why of Jail Diversion

Intercept 2 of the Sequential Intercept Model (SIM), Initial Detention and Initial Court Hearing, is the stage at which defendants are most accessible to the courts. Here, they are either engaged in the booking process or appearing in court pursuant to a summons or citation. These contact points provide an opportunity to screen the defendant for substance use disorders, mental health disorders, criminogenic risk and needs, and trauma.¹⁰

- ▶ **The goal should be to identify individuals who are appropriate for diversion based on objective criteria.**¹¹ Individuals with indications of behavioral health disorders should be considered for diversion to treatment, criminogenic risk levels should be matched to an appropriate level of supervision,¹² and serious trauma histories should inform adaptations or accommodations in court processes that follow.¹³ Current charges and past criminal history provide very little reliable information relative to the person's needs, risk of recidivism, or violence risk.¹⁴

JAIL BOOKING

- ▶ Ideally, **everyone who is booked, even if it is a book-and-release process, is screened.** There are validated behavioral health, risk/needs, and trauma screens that are free, do not require clinicians to administer them or significant time to perform, and are extremely accurate. Jurisdictions should select tools that match their staffing and budgetary resources, and they should consider screening tools that match their assessment instruments.¹⁵

¹⁰ National Center for State Courts (2022). [Screening and Assessment](#)

¹¹ Using subjective information leads to perceptions of, if not actual, implicit or explicit bias, and poor public safety outcomes.

¹² Policy Research Associates (2018). [The Most Carefully Studied, Yet Least Understood Terms in the Criminal Justice Lexicon: Risk, Need, and Responsivity](#)

¹³ National Center for State Courts (2022). [Trauma and Trauma-Informed Responses](#)

¹⁴ National Center for State Courts (2022). [Violence and Mental Illness Myths and Reality](#)

¹⁵ Substance Abuse and Mental Health Administration (2019). [Screening and Assessment of Co-Occurring Disorders in the Justice System](#)

OUT-OF-CUSTODY APPEARANCES

For those defendants not booked in jail, a parallel screening process needs to be created, preferably in the community rather than by referring them to the jail. Some courts have created this screening function at the court using existing court or community supervision personnel.

- ▶ **The results of these screens need to be promptly communicated to all appropriate system partners.** The results should then be used to create a presumptive path forward both for the defendant and the case. If assessments are indicated, they should be promptly scheduled. These initial screens also provide system partners with indicators regarding diversion i.e., a mental health screen recommendation for further assessment may trigger a referral to a mental health court review process, to a dedicated diversion review team, or to a specialized docket for cases involving individuals with mental health disorders.¹⁶
- ▶ This stage in the criminal justice proceedings is also an appropriate time to **gather other relevant system data about the defendant.** Prior screen and assessment results, current and past treatment engagement and history information, and supportive resource information may all be helpful in determining an appropriate diversion plan.

For in-custody defendants, a separate pretrial risk process may be occurring. Note that pretrial risk assessment tools predict the likelihood of failing to subsequently appear for court and some predict the likelihood of pretrial recidivism and the risk of violent recidivism; these are different tools than criminogenic risk tools, and one should not be substituted for the other.

This doesn't mean, however, that the results may not be concurrent; both the criminogenic and pretrial risk tools may well suggest that intensive supervision is indicated pretrial. If the person screens as needing behavioral health assessments, specialized supervision personnel with dedicated behavioral health caseloads have been shown to be more effective than generic supervision.¹⁷

¹⁶ Defense counsel, appropriately, often have concerns about exactly what is shared with prosecutors and others. Only the resulting score or result should be communicated. For example, the result of a Brief Jail Mental Health screen may be: "Defendant is recommended for a mental health assessment." Some protection for specific respondent answers may also be needed, through a Memorandum of Understanding, court rule, or statute prohibiting non-emergency disclosure of specific responses.

¹⁷ CSG Justice Center (2021). [Implementing Specialized Caseloads to Reduce Recidivism for People with Co-Occurring Disorders](#)

▶ **Judges should be familiar with the risk and need screen and assessment tools used in their jurisdiction.** SAMHSA has excellent resources that evaluate these tools and assess their utility for criminal justice populations.¹⁸

For defendants who screen low risk and low need, research is clear that outcomes will be worse if they are over supervised or given behavioral health treatment they do not need. These individuals should be diverted out of the criminal justice system entirely. If they are low risk yet need treatment, civil options may be most appropriate.¹⁹ In some courts, judges with criminal case jurisdiction have been given additional civil authority to order outpatient mental health treatment, rather than refer the case to another court or judge.²⁰

DIVERSION OPPORTUNITY

JAIL DIVERSION OPTIONS

- ▶ Ideally, universal jail screening is in place and rules or a written protocol is established that automatically or presumptively identifies categories of screen results that lead to direct referral to the appropriate diversion track. For example, a low-risk, high-need profile would direct that individual to dismissal with a referral to a treatment track; a high-risk, high-need profile would presumptively send that individual to a treatment court intake process.
- ▶ Another option is to create a standing review team²¹ within the prosecutor's office that routinely reviews all defendants whose screen results indicate a behavioral health need and tracks those defendants to an option with the appropriate level of treatment and supervision.
- ▶ Diversion from the criminal justice system to the civil courts is an option. If a person meets the standard for involuntary civil commitment, that can be a better option than proceeding with criminal prosecution. If the person does not meet that high standard, Assisted Outpatient Treatment is another good option.²²
- ▶ If universal screening is not available, a dedicated team is created that proactively seeks diversion referrals from law enforcement, jail personnel, line prosecutors, and defense counsel.

¹⁸ Substance Abuse and Mental Health Administration (2019). [Screening and Assessment of Co-Occurring Disorders in the Justice System](#)

¹⁹ National Center for State Courts (2022). [Civil Court-Ordered Treatment Responses](#)

²⁰ See e.g., [Miami-Dade Eleventh Judicial Circuit Criminal Mental Health Project](#)

²¹ Prosecutors should create units within their office, with specially trained staff, to handle cases involving individuals with mental health needs. Prosecutors can also establish internal guidance to promote diversion, for example by establishing policies that people who have behavioral or mental health needs and are charged with low-level, nonviolent crimes should be diverted to treatment, without a conviction; and people charged with violent crimes should receive appropriate treatment and be diverted unless they present an ongoing danger to the public. Ideally these review teams also include treatment professionals. See e.g., [National Center for State Courts \(2022\) Prosecution Practices](#)

²² National Center for State Courts (2022). [Civil Responses](#)

JAIL POPULATION REVIEW PROCESS

Some defendants with serious behavioral health needs who are not released or diverted from jail are nonetheless good candidates for diversion upon a second look. To identify this group of individuals, **judges should support a jail population review process.**

Additional diversion opportunities emerge for defendants who proceed with arraignment and the pretrial process.

DIVERSION OPPORTUNITY

JAIL PRETRIAL RELEASE

When a magistrate reviews a pretrial detainee's release eligibility, they can also make a diversion referral based on information contained in the pretrial risk assessment information or any other indicia that a behavioral health condition may exist.

DIVERSION OPPORTUNITY

JAIL POPULATION REVIEW

Several jurisdictions have implemented such processes in which jail personnel, prosecution, defense, case managers, and community partners meet regularly to review release options for these defendants. Often, by sharing information about the individual and by collaboratively identifying resources that could be brought to the table for that person, a release and transition to resources and care plan can be put in place.

DIVERSION OPPORTUNITY

ARRAIGNMENT OR FIRST APPEARANCE

This interaction with a defendant presents another opportunity for the court, prosecutor, or defense counsel to initiate diversion to an appropriate alternative, whether it be a straight dismissal and diversion to treatment, a referral to a civil alternative, or a referral to a treatment court process.

DESIGNATED CALENDARS

As with the earlier diversion considerations, objective screen and assessment data should create presumptive off-ramps from traditional prosecution pathways. Designated calendars comprised of the same prosecutor, defense counsel, and judge, augmented by appropriate treatment providers, provide the best forum for evaluating the most effective legal and treatment options for individuals with behavioral health needs.²³ Collaborative teams and specialized dockets or calendars also provide stability and consistency in system responses to behavioral health issues.



JUDICIAL ROLE

Adopting principles of procedural fairness²⁴ is particularly important in establishing a courtroom environment conducive to positive outcomes. It is also helpful if everyone, including the judge, is versed in trauma and its effect on individuals with behavioral health needs.²⁵

²³ National Center for State Courts (2022). [Specialized Behavioral Health Dockets](#)

²⁴ Research and resources for judges to implement procedural fairness principles can be found at [ProceduralFairness.org](#)

²⁵ National Center for State Courts (2022). [Trauma and Trauma-Informed Responses](#)

COMPETENCE TO STAND TRIAL

▶ EMPHASIZE POST-ARREST STAGES AND MAXIMIZE DIVERSION OPPORTUNITIES

If the court is proceeding with competency evaluations, restoration, and trial, the court must, to the extent possible, manage the progress of the case to avoid an individual languishing in jail and decompensating at any point in the process. Creating specialized dockets that facilitate access to appropriate diversion and restoration resources for these complex cases is one approach to consider.²⁶

Referrals to a competency to stand trial process often disproportionately increase jail stays, delay diversion to treatment options, and exacerbate individuals' mental illness symptoms. Courts have a range of methods at their disposal to limit the use of competency evaluations and to ensure that evaluations, when conducted, protect the defendant's rights, ensure procedural justice, and promote public safety. Those methods include:²⁷

- ▶ Encourage diversion earlier in the process.
- ▶ Restrict referrals to competency proceedings whenever possible.
- ▶ Create a presumption for outpatient treatment in alternative evaluation sites.
- ▶ Revise restoration protocols and address jail-based restoration.
- ▶ Enforce rational timelines for restoration/dismissal.
- ▶ Address inefficiencies in the competency process, for example:
 - ▶ Invest in evaluator training and remote technologies;
 - ▶ Use templates for evaluation reports;
 - ▶ Discourage multiple opinions on competency;
 - ▶ Review case management strategies, including the use and role of navigators or liaisons;
 - ▶ Create centralized competency calendars;
 - ▶ Schedule frequent, meaningful court reviews; and
 - ▶ Develop interdisciplinary teams to process these cases.

²⁶ National Center for State Courts (2021). [A New Model for Collaborative Court and Community Caseflow Management](#), page 16

²⁷ National Center for State Courts (2021). [Leading Reform: Competence to Stand Trial Systems](#)



- ▶ Train staff to identify needs and refer individuals to appropriate treatment resources.
- ▶ Coordinate the collection and use of data to inform policy and practice, and
- ▶ Develop partnerships that promote community-based treatment and transitions back to the community upon reentry.

More comprehensive court programming designed to increase diversion from competency proceedings may include:

- ▶ Utilizing mental health liaisons, peer navigators, and similar positions—benefiting from their ability to identify and track community resources and diversion opportunities.
- ▶ Using treatment courts as diversion, following best practices including:
 - ▶ Risk-Need-Responsivity (RNR) model: diagnosing a defendant’s risk of reoffending, criminogenic needs, and responsivity needs, to inform treatment and supervision decisions;²⁸ and
 - ▶ Best practice standards for treatment courts.²⁹
- ▶ Encouraging best practices for treatment and maximizing the use of community treatment providers in the sentencing policy, and
- ▶ Adopting the Pathways approach, including system assessment, evidence-based responses along the SIM, and institutionalization of those approaches.³⁰

²⁸ National Institute of Corrections. [The Risk-Need-Responsivity Model for Assessment and Rehabilitation](#)

²⁹ National Association of Drug Court Professionals (2018). [Adult Drug Court Best Practice Standards](#)

³⁰ Equitas Project (2022). [Pathways to Care: A Roadmap for Coordinating Criminal Justice, Mental Health Care, and Civil Court Systems to Meet the Needs of Individuals and Society](#)

REENTRY

In this context, reentry refers to all stages at which an individual returns from an inpatient or carceral setting. This can be pretrial, after a jail stay, after a custodial treatment stay, after a custodial competency evaluation, after an inpatient restoration proceeding, or post-sentence. Reentry from any jail or an inpatient treatment setting must be well-planned, resourced, and individual-centric to help set up individuals for success. **Judges have a role in ensuring that conditions of release include provisions for supports designed to timely link appropriate services with individuals as soon as they are returned to the community.**

Transitions should be carefully planned,³¹ and the challenges for individuals with behavioral health needs who are reentering the community can often have dangerous and life altering consequences. In addition to health and personal safety risks, there can also be public safety concerns as individuals without appropriate services are more likely to relapse and engage in criminal activity than those without behavioral health challenges. **Collaboration between the court and community partners is essential,**³² and a teams approach can facilitate this collaboration.

Using trained peers can be an effective strategy.³³ Peers can provide individualized support to those re-entering a community. Sharing unique experiences and challenges is helpful in navigating common challenges. Moreover, peer support groups can provide insight to identify potential triggers and relapses.

Specialized supervision caseloads have been shown to be particularly effective, both pre- and post-plea,³⁴ and ACT/FACT teams are proven models.

³¹ National Center for State Courts (2022). [Transition and Aftercare Plans](#)

³² National Center for State Courts (2022). [Reentry Practices](#)

³³ National Center for State Courts (2022). [Peers in Courts](#)

³⁴ Council of State Governments Justice Center (2021). [Implementing Specialized Caseloads to Reduce Recidivism for People with Co-Occurring Disorders](#)



Getting Started

How to Get Started

Foundational Steps to Implement a Mental Health Diversion System

All diversion programs have several steps in common:

- ▶ Assess the current process and any relevant data to identify where gaps and opportunities exist
- ▶ Collaboratively review existing research and other resources to identify options for successful program designs
- ▶ Gather all affected stakeholders and agree on the diversion goals—recidivism reduction, cost savings, increased treatment connections, jail usage reduction, etc.
- ▶ Create a consensus about how to move forward toward the identified goal or goals
- ▶ Memorialize the roles and responsibilities of all stakeholders through Memoranda of Understanding (MOUs) or other mechanisms, including what individual information will be shared and with whom
- ▶ Collect baseline data so progress can be measured
- ▶ Implement any rule or process changes that need to be made
- ▶ Institutionalize periodic reviews of the program to analyze data and to make course adjustments that align with the originally identified goals.



▶ CONVENE STAKEHOLDERS

Judges may be in the best position to take the lead in convening local system stakeholders to work collaboratively to establish and maintain the continuum.³⁵ These stakeholders should include court personnel, jail administrators, law enforcement, prosecution and defense, behavioral health service providers, pretrial/probation, elected officials, and community representatives, among others. It is helpful if one person is clearly responsible for coordinating the group and moving things forward.

▶ ENGAGE IN SYSTEM SELF-ASSESSMENT

Once stakeholders are convened, the first task is to assess court users' need for services. This includes reviewing data on who in the jail has behavioral health needs, what those needs are, and what services exist that address those needs.³⁶

After learning about the individual and community needs, the stakeholder group can map the system by identifying available resources and deficiencies or gaps in treatment availability. The group should use the SIM to identify the key entry and diversion points, then work to adapt local programs and diversion efforts across the intercepts.

³⁵ Council of State Governments Justice Center (2020). [A Look Into Court-Based Behavioral Health Diversion Interventions](#)

³⁶ National Center for State Courts (2022), [Behavioral Health Data Guide](#)

▶ ESTABLISH A DIVERSION CONTINUUM

The stakeholder group can then establish its goals for the diversion continuum that promotes a range of community-based responses to behavioral health needs. To build support, the group should articulate its goals and vision and take steps to inform court users, those working in the legal system, and the local community about its efforts. Group members should establish consistent protocols and memorialize new policies; for courts, these may be in state or local rules or administrative orders. The court should also enter into MOUs with partner agencies to clarify roles, procedures, and to facilitate information sharing.

Finally, the court and stakeholder group should assess the availability of funding, reorganize existing resources and structures to increase efficiency, and explore new funding opportunities from government and private organizations.

▶ EVALUATE AND IMPROVE

It is incumbent upon the stakeholder group to seek continuous improvement in the response to individuals with behavioral health needs and to ensure those individuals are diverted from the criminal legal system at every appropriate opportunity. The stakeholder group should collect and analyze information—both quantitative data and qualitative assessments—on a regular basis. The stakeholder group should use the data to inform their policies and practices and to change course whenever necessary to ensure all individuals have their needs met in the most supportive and least restrictive ways possible.

Putting It All Together

Foundational Steps to Implement a Mental Health Diversion System

Even with careful planning, coordination, and preparation, diversion strategies ultimately require resources to which individuals can be linked. Judges and justice system personnel have a fundamental role to play in successful diversion programs, but collaboration with behavioral health systems is also essential. Community-based treatment systems are part of the “divert to what” continuum, as are recovery community and outreach centers, supportive housing resources, supported employment, peer supports, and inpatient and residential treatment options. Several resources describe evidence-based options and examples of this continuum of needed diversion options.^{37,38,39,40}

There is now a sufficient body of research that tells us what works, there are numerous examples of successful models around the country that show us what works, and there is a new focus on the intersection of individuals with mental health disorders and the justice system that provides momentum for change. Judges are key to initiating, coordinating, and sustaining diversion systems, and the time to do so is now.



³⁷ Council of State Governments Justice Center (2019). [Behavioral Health Diversion Interventions: Moving from Individual Programs to a Systems-Wide Strategy](#)

³⁸ Bazelon Center for Mental Health Law (2019). [Diversion to What? Evidence-Based Mental Health Services that Prevent Needless Incarceration](#)

³⁹ National Alliance on Mental Illness (2020). [Divert to What? Community Services That Enhance Diversion](#)

⁴⁰ National Center for State Courts (2021). [Certified Community Behavioral Health Clinics \(CCBHCs\) and the State Courts](#)



www.ncsc.org/behavioralhealth