



# Expedited diversion to court-ordered treatment 2023

Report Document #92

Commonwealth of Virginia  
2024



## **Behavioral Health Commission**

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## **Purpose**

The Commission is established in the legislative branch of state government for the purpose of studying and making recommendations for the improvement of behavioral health services and the behavioral health service system in the Commonwealth to encourage the adoption of policies to increase the quality and availability of and ensure access to the full continuum of high-quality, effective, and efficient behavioral health services for all persons in the Commonwealth. In carrying out its purpose, the Commission shall provide ongoing oversight of behavioral health services and the behavioral health service system in the Commonwealth, including monitoring and evaluation of established programs, services, and delivery and payment structures and implementation of new services and initiatives in the Commonwealth and development of recommendations for improving such programs, services, structures, and implementation.



# 1 Overview of EDCOT concept and legislation

Expedited diversion to court ordered treatment (EDCOT) is a criminal justice diversion model that is intended to move individuals with serious mental illness out of the criminal justice system and into court-ordered mental health treatment, using a civil commitment process. Legislation introduced during the 2023 Session of the General Assembly sought to implement the concept of EDCOT but was ultimately not enacted.

The Behavioral Health Commission directed staff to conduct a limited-scope study to identify factors that may constitute barriers to effective implementation of EDCOT in Virginia. This limited-scope study provides an overview of the EDCOT process and benefits both in concept, as envisioned by its authors, Steven Hoge and Richard Bonnie, and as operationalized in legislation introduced in Virginia in 2023. The report also describes concerns identified during interviews with a variety of stakeholders that would be involved in the EDCOT process if it were implemented, and who sometimes have differing interests. If the General Assembly wishes to consider legislation to implement EDCOT, it will be necessary to address the issues identified by stakeholders and to weigh competing interests. While certain issues could be resolved through legislative design of EDCOT, others – such as the impact this new process could have on the behavioral health and court systems – will exist no matter how EDCOT is crafted and should be addressed before legislative action on EDCOT is considered.

To conduct this limited-scope study, BHC staff reviewed Virginia statutes and legislation, reviewed a range of secondary sources, and conducted in-depth interviews with stakeholders including the Institute of Law, Psychiatry, and Public Policy; the Department of Behavioral Health and Developmental Services; the Virginia Association of Community Services Boards; the Office of the Executive Secretary of the Supreme Court of Virginia; the Virginia Indigent Defense Commission; and individuals with lived experience and their representatives.

## **EDCOT concept intended to divert individuals with serious mental illness from the criminal justice system to treatment**

EDCOT, as described by the authors of the concept, would create a new civil commitment process that would divert some individuals with a serious mental illness from the criminal justice system and into court-ordered mental health treatment. The new process would be available early in the criminal justice process and would provide complete diversion because the criminal charges against the person would be dismissed and the criminal case would be terminated.

## **EDCOT would create a new civil commitment process for court-ordered mental health treatment**

The EDCOT model would use a new civil commitment process to divert certain individuals with serious mental illness from the criminal justice system and into court-ordered, court-supervised treatment for their underlying mental health condition. Any individual with a serious mental illness charged with a misdemeanor or felony offense, except for a serious violent offense such as murder or armed robbery, could be eligible for EDCOT. Because competence is not required for civil commitment to court-ordered treatment, EDCOT would be available for both competent and incompetent defendants and, due to the nature of involuntary civil commitment, defendants could be ordered to EDCOT assessments and subsequent treatment with or without their assent.

Although EDCOT is a civil process, EDCOT proceedings would be heard by the criminal court that has jurisdiction over the adjudication of the underlying criminal charge. The EDCOT civil commitment process would be initiated by an order for an assessment of a person charged with a criminal offense to determine whether the person may be eligible for EDCOT. The assessment order could be issued upon request of the prosecution or by the court on its own motion. An EDCOT assessment could also be required in any case in which an assessment of a defendant's competency to stand trial is requested. EDCOT assessments would determine the presence of a mental disorder and provide a summary of the person's past problematic behavior, including the behavior that led to the underlying criminal charge. Assessments would be conducted on an outpatient basis by the state mental health agency or its designee.

In cases in which an EDCOT assessment determines that the person is likely eligible for EDCOT civil commitment, the prosecution would have the option to file a petition for an order for mental health treatment. Upon receipt of the petition, the court would be required to conduct a hearing to determine whether the person meets the EDCOT civil commitment criteria. A person would be eligible for EDCOT civil commitment if the court finds, by clear and convincing evidence, that:

1. the person had a serious mental illness,
2. the person engaged in the criminal conduct,
3. the conduct was clinically related to a serious mental illness,
4. there exists a significant likelihood that the person will re-offend in the future in the absence of treatment interventions, and
5. there is a reasonable likelihood, based on expert evidence, that the mental health treatment and accompanying community interventions and services will reduce the risk of reoffending.

An order for mental health treatment entered at an EDCOT hearing would be required to include a detailed treatment plan prepared by the person who completed the EDCOT assessment. Treatment services included in the detailed treatment plan could include inpatient and outpatient services. The duration of court-ordered mental health treatment would depend on the therapeutic needs of the individual and the severity of the underlying crime but should not exceed the duration of the maximum criminal sentence that would be available under the offense charged.

When entering an order for mental health treatment as part of an EDCOT civil commitment proceeding, the court would also be required to designate an “appropriate person in the mental health system” to monitor the individual’s compliance with the detailed treatment plan and make periodic reports regarding the person’s compliance and any problems that may arise to jeopardize continuity of care or public safety. The court that entered the order for mental health treatment would remain responsible for monitoring compliance with the order and the detailed treatment plan. Status hearings would be held periodically but no less frequently than once every six months to review the care and progress of the committed person. In cases of material noncompliance with an order for mental health treatment, the court could authorize “short-term custodial orders ... to provide an opportunity for assessment and intervention.”

### **EDCOT would divert individuals early in the criminal justice process**

Authors of the EDCOT concept anticipated that EDCOT civil commitment would occur early in the criminal justice process, before adjudication of the underlying criminal charge. Because the EDCOT hearing would take place before initiation of criminal proceedings, it could occur prior to any proceeding to determine the individual’s competency to stand trial, allowing for diversion from the criminal justice system to mental health treatment of individuals who might otherwise be required to receive competency restoration services. EDCOT diversion would include dismissal of the underlying criminal charge with prejudice upon entry of an order for mental health treatment, thereby completely eliminating the possibility that the underlying criminal charges could be revived regardless of whether the person complies with court-ordered mental health treatment.

### **EDCOT may provide benefits for individuals with mental illness, the public, and the state**

The authors of the EDCOT concept described multiple benefits that could result from implementing the process. Specifically, EDCOT is expected to:

- reduce the involvement of individuals with mental illness with the criminal justice system, quickly diverting a portion of offenders with serious mental illness to mental health treatment;
- reduce the negative consequences of criminal justice involvement for individuals diverted to mental health treatment, allowing them to avoid a criminal charge on their record and possible negative impacts on access to housing, education, employment, and services and supports;
- reduce demand for expensive inpatient restoration services when individuals are diverted to community-based mental health treatment pursuant to a court order before the competency restoration process can begin. Reduced demand for inpatient competency restoration could reduce the burden on state hospitals and help mitigate the current state hospital bed crisis. The magnitude of savings realized would depend upon the number of individuals eligible for EDCOT and the actual utilization of the strategy; and

- protect public safety by reducing the risk of re-offending and recidivism among individuals with serious mental illness by ensuring that such individuals receive mental health treatment to address the criminogenic factors that contribute to criminal behavior.

## Proposed 2023 legislation would have implemented EDCOT concept with some important differences

During the 2023 Session, the General Assembly considered legislation that would have created an EDCOT process in Virginia. The legislation, as drafted, incorporated many of the elements of the EDCOT model described by the concept’s authors but differed from the model in multiple ways (Table 1-1). In particular, the legislation would have circumscribed eligibility for EDCOT by restricting the process to cases involving a significantly smaller array of misdemeanor offenses, thereby reducing the number of individuals for whom EDCOT was available. The reduction in eligible crimes could have been partly mitigated because the proposed legislation would have applied to all mental illness regardless of severity, unlike the EDCOT concept that was focused on individuals with a serious mental illness. The introduced legislation would have allowed additional parties to request an assessment to initiate the EDCOT process and would have reduced the potential duration of an EDCOT order for mental health treatment from one year to 180 days unless extenuating circumstances existed. The introduced legislation also provided for more frequent status hearings, with hearings occurring at least once every 60 days rather than at least once every six months, as anticipated by the EDCOT concept.

**Table 1-1**  
Key differences between EDCOT concept and process described in the 2023 legislation

| Component                        | EDCOT concept   | Proposed 2023 legislation  |
|----------------------------------|---|--|
| Eligible crimes                  | Any criminal offense other than serious violent felonies like murder or armed robbery | Limited subset of specified misdemeanors including misdemeanors involving larceny and receiving stolen goods, trespassing, damage to certain property, public intoxication, disorderly conduct, and failure to appear <sup>1</sup> |
| Eligible conditions              | Serious mental illness  | Mental illness   |
| Who can request EDCOT assessment | Prosecution or the court  | Law-enforcement officer, jail officer, magistrate, pre-trial services staff, defense counsel, attorney for the Commonwealth, or judge  |

| Component   | EDCOT concept   | Proposed 2023 legislation  |
|---|---|--|
| Assessment process                                      | Prosecution or court may request an assessment performed by the state department of mental health or its designee   | Probable cause hearing to determine eligibility for court-ordered mental health treatment; if probable cause is found, the court may order an evaluation to be performed by a diversion case manager employed by a CSB |
| Initiation of EDCOT hearing                             | Court must hold an EDCOT hearing upon receipt of a petition filed by the prosecution  | If the EDCOT assessment report recommends diversion to mental health treatment, the court must schedule an EDCOT hearing   |
| Duration of court-ordered mental health treatment       | No more than 1 year for a misdemeanor, 3 years for a nonviolent felony, and 5 years or the maximum duration of the sentence that would be available under the offense charged for more serious felonies | No more than 180 days, unless extenuating circumstances exist, in which case the duration does not exceed one year or the maximum duration of the sentence that would be available under the offense charged           |
| Jurisdiction over court-ordered mental health treatment | Not specified   | Upon initiation of court-ordered mental health treatment, the criminal court transfers jurisdiction to the civil court   |
| Status hearings   | No less frequently than once every six months   | Every 60 days  |

Source: BHC staff analysis of 2021 and 2022 articles describing EDCOT concept, and of HB 2339 (Bell) and SB 1174 (Mason) (2023)

<sup>1</sup>Misdemeanor violations of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128

## Several diversion models and strategies already exist in Virginia

Diversion strategies redirect individuals from the traditional criminal justice process of arrest, adjudication, sentencing, and incarceration to services intended to address the underlying causes of criminal behavior while protecting public safety and holding the individual accountable for their criminal behavior. Diversion programs are generally designed to link individuals to necessary services, reduce the likelihood of future criminal behavior, avoid collateral consequences of traditional case processing, improve process efficiency by expediting the resolution of cases, and preserve scarce system resources for more serious criminal cases. Diversion can occur at various points during the criminal justice process: before an arrest is made and the individual is sent to jail, during initial court hearings

and jail intake or booking, and after the individual has been booked into jail. The earlier diversion occurs, the lower the impact of arrests and incarceration on individuals with mental illness and on state financial resources.

Diversion programs are designed to address the specific factors that led to an individual's criminal behavior. Different programs focus on different issues faced by individuals involved with the criminal justice system, including behavioral health, domestic violence, employment, or housing issues. One common focus of diversion programming is the treatment of individuals with mental health or substance use disorders who become involved in the criminal justice system as a result of their disorder.

### **Variety of diversion models exist for individuals with mental illness in Virginia**

In Virginia, diversion programming is a mix of state and local initiatives. State law provides for the creation of Crisis Intervention Teams, drug treatment courts, behavioral health courts, and programs of Assertive Community Treatment to divert individuals from the criminal justice system. The state has also funded services and initiatives designed to help prevent and mitigate mental health crises that could, in some cases, precipitate criminal activity and confrontation that could result in arrests. Examples of pre-arrest diversion initiatives include crisis intervention teams that involve specially trained law enforcement officers who respond to situations in which mental illness might be a contributing factor, and community care teams that include mental health service providers and law enforcement officers working together to stabilize individuals experiencing behavioral health crisis who might otherwise be arrested. State law also allows individual courts to defer adjudication and disposition of criminal cases under terms and conditions intended to address the underlying causes of criminal behavior. Many localities have established diversion programs in addition to these state initiatives. These programs are a function of local initiatives, reflecting local attitudes and priorities and the availability of local resources. As a result, the availability of and access to diversion programming can vary across the state.

### **EDCOT model differs from existing diversion programs in several ways**

Like other diversion strategies, EDCOT seeks to move individuals from the criminal justice system to mental health treatment. However, the EDCOT approach to diversion differs from some existing diversion programs with regard to eligibility, scope, and timing.

#### *EDCOT could be available to defendants charged with a broader range of misdemeanor and felony offenses*

Some diversion programs limit eligibility to individuals charged with lower-level crimes. Enabling legislation creating an EDCOT process in Virginia would ultimately define the specific criminal offenses eligible for diversion, but the conceptual model of EDCOT describes the process as available and appropriate for defendants charged with an extensive array of misdemeanors and felony offenses, other than serious violent offenses such as murder or armed robbery.

*EDCOT would be available to both competent and incompetent defendants*

Diversion options that arise after a defendant has been arrested and charged with a criminal offense may not be available to an individual who is not competent to stand trial. Constitutional protections prohibit a criminal case from proceeding if the defendant's competence is in question, that is if he lacks substantial capacity to understand the proceedings against him or to assist in his own defense. In those cases, the defendant would be required to receive competency restoration services, often in an inpatient setting, before the court can explore diversion options. Because EDCOT diversion is a *civil* commitment process, it occurs outside of the criminal court where competency is relevant. As a result, competency is not an issue, and a court may enter an order for mental health treatment regardless of the person's ability to understand the proceeding or assist in his own defense. Unlike other post-arrest, post-charge diversion options, EDCOT may be ordered in lieu of competency restoration services.

*EDCOT would be available to individuals experiencing a range of behavioral health disorders*

Some diversion programs require individuals to be capable of living in and receiving services in the community to participate. As a result, individuals with serious mental illness may not be able to participate in certain diversion programming when they need more intensive care and supervision. Because EDCOT could include both inpatient and outpatient treatment, it could be available to defendants with serious mental illness.

*EDCOT would be available statewide with more uniform and consistent program requirements*

Some diversion programs are established at the local level and operated in accordance with local attitudes, interests, and resources. As a result, the scope and availability of diversion programs varies by locality. Authors of EDCOT call for the adoption of legislation codifying the process. Adopting a statute would make EDCOT available statewide and would help ensure that program requirements are consistent across localities.

*EDCOT would result in dismissal of criminal charges and termination of criminal proceedings upfront*

Some diversion programs that occur after formal charges have been filed defer adjudication of the underlying criminal charge while the individual participates in required services. If the individual successfully completes all program requirements, charges may be dismissed, but if the individual fails to comply with requirements imposed by the court, prosecution may resume, and the individual could be subject to criminal penalties if convicted of the underlying criminal offense or another criminal offense. EDCOT would provide for the dismissal of the underlying criminal charge at the time the individual is ordered to participate in court-ordered treatment, eliminating the chance that the individual will be subject to criminal penalties and avoiding the appearance of charges on the individual's criminal record.

*EDCOT would be available to individuals after they have been arrested and have become involved in the criminal justice system*

Diversion programs are available at various points in the criminal justice process. Some programs divert individuals away from the criminal justice system prior to arrest, avoiding involvement with the criminal justice system altogether. Other programs offer opportunities for diversion after a person has been arrested and charged with a criminal offense. Post-arrest, post-charge diversion programs may occur under the auspices of the criminal court, rendering the individual subject to potential criminal penalties and negative consequences associated with criminal justice involvement.

The EDCOT process is available after an individual has been arrested and charged with an offense but before adjudication of the underlying criminal charge begins. The EDCOT model does not prevent entry into the criminal justice system, as pre-arrest diversion strategies do, but is intended to expedite a defendant's transition out of the criminal justice system and into the civil system where court-supervised mental health treatment can be provided and many of the negative consequences of criminal justice involvement avoided.

## **Proposed EDCOT civil commitment process would differ from existing civil commitment in Virginia**

The civil commitment criteria for mental health treatment under the proposed 2023 EDCOT legislation would differ from existing Virginia civil commitment criteria. EDCOT would employ a "substantial deterioration" standard for civil commitment that is broader than the existing standard for civil commitment in Virginia, although the population of individuals for whom EDCOT could be ordered (individuals who have committed a qualifying misdemeanor offense) is substantially smaller than the population of individuals who may be eligible for civil commitment. Adopting a "substantial deterioration" standard for civil commitment would represent a significant departure from Virginia's current standard, as would applying this new process to only a small group of individuals.

The proposed legislation provided for court-ordered mental health treatment for an individual if (i) the person committed the elements of the charged offense, (ii) the conduct underlying the charged offense was related to a serious mental illness, (iii) there exists a significant likelihood that the person will re-offend in the future absent treatment, and (iv) there is a reasonable likelihood, based on psychiatric evidence, that the mental disorder could be effectively treated.

Virginia's existing civil commitment statute does not include "substantial deterioration" criteria. Under existing state law, a person may be civilly committed for mental health treatment if they (i) have a mental illness and there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to themselves or others evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to their lack of capacity to protect themselves from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment.

# 2 EDCOT implementation challenges

Multiple issues need to be resolved before legislation creating an EDCOT process in Virginia can be considered. Stakeholders representing a broad array of interests impacted by the proposed EDCOT process identified multiple barriers to the effective implementation of an EDCOT process in Virginia. The challenges identified pertain to both the conceptual framework of EDCOT, as described by its creators, and specific provisions of the legislation introduced during the 2023 Session of the General Assembly. That legislation ultimately did not advance through the legislative process due to concerns about conceptual and technical elements of the introduced bill, as well as questions about whether the EDCOT model offered unique advantages that could not be realized through existing diversion programs and strategies.

Advocates of EDCOT acknowledge that the 2023 introduced legislation was a preliminary proposal requiring further refinement, rather than a finished product. Patrons of the bills and other stakeholders recognized the need to resolve a range of substantive and procedural issues before legislation creating an EDCOT process could be considered. If the General Assembly were to consider moving forward with implementing an EDCOT process for diverting individuals from the criminal justice system to mental health treatment, sufficient time would be needed to examine and resolve all legal, procedural, and practical issues identified by stakeholders. Once issues have been addressed, clear and concise enabling legislation would be required to establish an effective EDCOT process. Effectively preparing such legislation would require opportunities for meaningful collaboration and cooperation among stakeholders representing diverse interests.

## **EDCOT could create burdens on mental health and legal systems, requiring additional resources**

Many stakeholders expressed concerns about the burdens that EDCOT could impose on Virginia's mental health and court systems. Treatment, monitoring, and oversight responsibilities required by both the conceptual EDCOT model and legislation introduced during the 2023 Session of the General Assembly would likely require a substantial investment of financial and human resources. Appropriate mental health services would have to be available to meet the needs of individuals diverted from the criminal justice system to court-ordered mental health treatment, and CSBs and courts would need proper staffing to effectively monitor and oversee adherence to EDCOT orders and treatment plans. An EDCOT process cannot be implemented in Virginia without concurrent funding to ensure sufficient resources are available to meet these needs.

### **EDCOT treatment requirements could further strain existing mental health system, requiring additional resources**

Many stakeholders noted the burdens that implementing an EDCOT process would impose on Virginia's existing mental health service system. The EDCOT process, as described in concept and in the 2023 introduced legislation, would divert individuals out of the criminal justice system to court-ordered mental health services, creating additional demand for community-based mental health services. Demand for community-based mental health services already exceeds the availability of such services and adding more individuals to the population requiring services could further reduce access for everyone in need of services unless resources are invested in building system capacity. Additionally, individuals diverted from the criminal justice system to court-ordered mental health treatment could require new types of services to address their unique mental health and criminogenic needs, which may not currently exist in the array of community-based mental health services available in Virginia. Creating new mental health services required to meet the needs of individuals diverted from the criminal justice system to court ordered mental health services would also require additional financial resources.

Additional human resources would also be required to provide the new and expanded services necessary to effectively treat individuals diverted from the criminal justice system to court-ordered mental health treatment. Even if funding were made available for the additional staff needed, hiring and retaining this staff may be challenging due to the workforce shortages that continue to plague the broader behavioral health system. Several state and nonprofit entities are working on ways to increase the pool and pipeline of behavioral health professionals, and the state provided for a compensation increase for CSB staff in its last budget, but CSBs continue to face challenges with hiring and retention. Without the proper types and number of staff available to serve individuals diverted through EDCOT, effective implementation of the new process may not be possible.

Advocates who support the adoption of an EDCOT process in Virginia indicate that the new process could result in savings in the longer-term, as defendants with a mental illness are diverted away from costly inpatient competency restoration services, adjudication, and incarceration. Advocates suggest that avoiding the costs of inpatient competency restoration and other criminal justice costs could offset some of the cost of adding new services and expanding existing services for individuals diverted to mental health treatment. Still, an upfront investment would be required before savings can be realized.

### **EDCOT could impose additional burdens on CSBs, requiring additional resources**

Many stakeholders raised concerns about the burdens an EDCOT process could impose on CSBs responsible for conducting EDCOT evaluations and preparing and monitoring an individual's adherence to an EDCOT treatment plan. The EDCOT conceptual model requires "the state department of mental health or its designee" to perform an initial assessment of an individual to determine eligibility for diversion through the EDCOT process and, in cases in which an individual is determined to be eligible, prepare a detailed treatment plan for the individual. The court entering an EDCOT order for mental health treatment would also

designate an “appropriate person in the mental health system” to monitor the individual’s compliance with the EDCOT order. The designated person would be tasked with providing regular, periodic reports to the court regarding the person’s adherence to the EDCOT treatment plan and any problems that may arise to jeopardize continuity of care or public safety.

In the 2023 introduced legislation, a “diversion case manager designated by the local community services board” would perform the evaluation and prepare the detailed treatment plan. The diversion case manager would have to be a mental health professional employed by a CSB. The diversion case manager would also be responsible for monitoring an individual’s adherence to an EDCOT treatment plan, attempting to remediate and resolve any instances of material nonadherence, and reporting any material nonadherence occurring despite attempts at remediation and resolution to the court. In cases in which the court conducts a hearing to review an EDCOT treatment plan, the diversion case manager would be required to participate in the hearing and to perform any additional evaluations of the individual that may be required. The diversion case manager would also be required to participate in regular status hearings to review the person’s progress and treatment. In any case in which a hearing is required, the diversion case manager and CSB would be required to arrange transportation for the individual if the individual did not otherwise have transportation (Table 2.1).

Stakeholders indicate that CSBs would likely require additional staff to fulfill the responsibilities set forth in the 2023 introduced legislation. Specifically, CSBs would need to hire at least one qualified diversion case manager. Additional financial resources would be needed to allow CSBs to hire the necessary staff. Further, as with the provision of services, hiring additional staff to perform these functions may prove challenging in light of existing workforce shortages.

### **EDCOT could impose burden on the court system, requiring additional resources**

Stakeholders expressed concerns about burdens an EDCOT process could impose on courts. Both the EDCOT conceptual model and the 2023 introduced legislation would require courts to oversee an individual’s adherence to the EDCOT treatment plan and compliance with the EDCOT order. Courts would be required to receive and review regular reports provided by diversion case managers charged with monitoring. Oversight obligations would include both regular status hearings, during which the individual’s progress and treatment are reviewed, and other hearings, which are designed to review, enforce, revise, or rescind an EDCOT treatment plan and order. Each hearing would require the court to schedule an expedited hearing within seven days of receipt of a petition, provide notice to interested parties, and conduct a hearing on the matter (Table 2.1).

**Table 2-1**  
**Court and CSB responsibilities associated with different types of EDCOT hearings**

|                         | Status hearing  | Review hearing  |
|-------------------------|---|---|
| Timing                  | <ul style="list-style-type: none"> <li>Periodically but no less frequently than once every 60 days</li> </ul>   | <ul style="list-style-type: none"> <li>When person materially fails to adhere to treatment plan</li> <li>Upon petition of CSB, diversion case manager, treatment provider, health care provider, or the individual or guardian</li> </ul>   |
| Purpose                 | <ul style="list-style-type: none"> <li>Review the care and progress of the committed person</li> </ul>  | <ul style="list-style-type: none"> <li>Review and enforce, modify, or rescind EDCOT order</li> </ul>  |
| <b>Responsibilities</b> |   |   |
| Court                   | <ul style="list-style-type: none"> <li>Provide notice of the hearing to the person subject to the order, the diversion case manager, and CSB</li> <li>Appoint counsel if none retained</li> </ul> | <ul style="list-style-type: none"> <li>Hold expedited hearing within 7 days</li> <li>Provide notice of the hearing to the person subject to the order, diversion case manager, CSB, and all service providers identified in the treatment plan</li> <li>Appoint counsel if none retained</li> <li>Order a new evaluation if needed</li> <li>Enter mandatory examination order and a <i>capias</i> directing law enforcement to transport the person to the required examination if they fail to appear</li> </ul> |
| CSB                     | <ul style="list-style-type: none"> <li>Arrange transportation to the hearing if they are not detained and do not have another source of transportation</li> </ul>                                 | <ul style="list-style-type: none"> <li>Conduct new evaluation if ordered</li> <li>Arrange transportation to the hearing if they are not detained and do not have another source of transportation</li> </ul>  |

Source: BHC staff analysis of HB 2339 (Bell) and SB 1174 (Mason) (2023)

**EDCOT representation requirements could necessitate greater availability of qualified court-appointed counsel**

Stakeholder described potential challenges related to the appointment and compensation of court-appointed counsel to represent individuals in the EDCOT process. Both the EDCOT conceptual model and the 2023 introduced legislation would require criminal defense counsel representing the individual in the underlying criminal case to recuse himself from all civil commitment proceedings occurring during the EDCOT process. Courts would have to appoint additional counsel with experience in civil commitment practice to represent an

individual in the EDCOT process unless the individual retained his own counsel. Some stakeholders noted the scarcity of qualified counsel available for appointment. Because public defenders are not available for appointment in civil cases, the pool of attorneys available for appointment in cases involving EDCOT hearings would be limited to private attorneys appointed by the court. Additionally, because court-appointed counsel would likely be compensated out of the Criminal Fund, additional financial resources would be required to offset increased expenditures.

## **Incentives may not be appropriate to encourage use of EDCOT process**

Diversion of a person from the criminal justice system to court-ordered mental health treatment through the EDCOT process described in both the conceptual model and the 2023 introduced legislation would require agreement from both the prosecutor and, in cases in which the defendant is competent to stand trial, the defendant; however, stakeholders indicated that it is not clear whether the EDCOT process would provide sufficient incentives to induce such agreement. Some stakeholders noted that prosecutors may not feel that EDCOT provides sufficient public safety protections and assurances of treatment compliance to justify diverting people out of the criminal justice system for serious offenses. Some stakeholders also noted that individuals who are eligible for diversion may not believe that civil commitment to a potentially long period of involuntary mental health treatment is in their best interest when they are charged for minor offenses, which tend to carry short jail sentences or low fines. For EDCOT to achieve its intended goals, incentives must be properly aligned between prosecutors and defendants.

## **Prosecutors may not have sufficient incentives to consent to court-ordered treatment in lieu of criminal penalties**

Some stakeholders suggested that the 2023 introduced legislation may not include sufficient enforcement mechanisms to ensure adherence to EDCOT treatment plans and compliance with EDCOT orders to assuage prosecutors' concerns about public safety, which may remove incentives for prosecutors to consent to the diversion of an individual from the criminal justice system to mental health treatment through the EDCOT process. Prosecutors consider public safety concerns in determining whether to consent to EDCOT, and they may object if they do not believe the process includes sufficient safeguards to ensure that diverted individuals adhere to their mental health treatment plan, and to guarantee public safety. If the prosecutor objects, the court cannot enter an EDCOT order.

In the 2023 introduced legislation, CSBs would be required to monitor an individual's adherence to an EDCOT treatment plan, and courts would be required to hold regular status hearings to review the individual's progress and treatment to ensure compliance with the EDCOT treatment order. In cases in which an individual was found to have materially failed to adhere to an EDCOT treatment plan, the diversion case manager would be required to meet with the individual, representatives of the CSB, and services providers to "identify the factors leading to material nonadherence and develop a remediation plan for addressing the factors," and to report the meeting and the remediation plan to the court. If the individual continued

to materially fail to adhere to the EDCOT treatment plan despite efforts to remediate factors leading to material nonadherence, the court would be required to hold a hearing to enforce the EDCOT order. Upon finding that the person had materially failed to adhere to the treatment plan, the court could “direct the person to fully adhere” to the EDCOT order and treatment plan. The court could also “impose sanctions on the person, including reflective exercises such as writing an essay about his nonadherence, increased frequency of status hearings, and increased frequency of reporting to the diversion case manager.” The 2023 introduced legislation specifically stated that “sanctions for nonadherence shall not include contempt of court or criminal sanctions, including incarceration of any duration.”

Because the 2023 introduced legislation required dismissal of the underlying criminal charges with prejudice at the time an EDCOT order for mental health treatment is entered, the court cannot use the penalties for the underlying criminal behavior as an incentive to require the individual to adhere to the EDCOT treatment plan and comply with the EDCOT treatment order.

An individual who is subject to an EDCOT order for mental health treatment may not be involuntarily admitted to inpatient treatment unless he meets the existing civil commitment criteria. Specifically, the individual cannot be ordered to inpatient care unless a court finds that there is a substantial likelihood that, as a result of his mental illness, the individual will, in the near future, cause serious harm to himself or others or suffer serious harm due to his lack of capacity to protect himself from harm. Because Virginia’s existing civil commitment criteria is different from the criteria for issuance of an EDCOT order for mental health treatment, not all individuals who are subject to court-ordered mental health treatment through the EDCOT process will meet the standard for civil commitment to inpatient care, even if they fail to adhere to their EDCOT treatment plan.

### **Competent defendants may lack sufficient incentives to consent to court-ordered treatment in lieu of criminal penalties**

Some stakeholders suggested that the 2023 introduced legislation may not include sufficient incentives to encourage competent individuals to consent to EDCOT in lieu of criminal penalties. Both the EDCOT concept and the 2023 introduced legislation provide that EDCOT cannot be ordered over the objection of a defendant who is competent to stand trial. As a result, competent defendants must decide between receiving mandatory mental health treatment and proceeding with adjudication of the underlying criminal offense, which could result in a period of incarceration. Some defendants may choose adjudication and potential incarceration over mandatory mental health treatment that would help address the underlying causes of their criminal behavior, particularly in cases in which the offense for which they are charged carries a short sentence or minimal fine.

Stakeholders noted that specific provisions of the 2023 introduced legislation may have further limited the incentives for competent individuals to consent to diversion through the EDCOT process. The 2023 introduced legislation limited the types of crimes eligible for diversion through the EDCOT process to a small group of misdemeanors for which a defendant would likely be sentenced to a very short period of incarceration or to time served, if found guilty. Because the period of incarceration a defendant faces upon conviction of these

offenses is likely to be less than the duration of involuntary mental health treatment ordered through EDCOT, stakeholders indicated that it was not clear that eligible competent defendants would opt to pursue mental health treatment instead of proceeding with the adjudication process.

## **EDCOT model might not always serve the best interests of individuals receiving treatment**

Both the EDCOT conceptual model and the 2023 introduced legislation call for the creation of a highly structured, intensive mandatory treatment process in which adherence to an EDCOT treatment plan is closely monitored and overseen by CSBs and the courts. EDCOT includes an involuntary commitment process that imposes intensive monitoring and oversight requirements that may be inappropriate for the needs of some individuals subject to an EDCOT order. EDCOT also eliminates the requirement for some individuals to consent to services, and the infringement on individual autonomy raises concerns for some stakeholders. Differing goals and objectives in the criminal and civil proceedings may also conflict and could disadvantage the individual in a criminal proceeding.

## **Intensity of EDCOT process may not be appropriate to address individuals' mental health and criminogenic needs**

Some stakeholders reported concerns about the intensity of the EDCOT monitoring and oversight requirements described in both the conceptual model and the 2023 introduced legislation and their impact on individual outcomes. Stakeholders were particularly concerned by the potential impacts in cases involving low-risk individuals with less intensive treatment needs. EDCOT calls for a highly structured system of treatment, monitoring, and oversight of individuals diverted from the criminal justice system to mental health treatment. The 2023 introduced legislation provides that the period of court ordered mental health treatment “shall not exceed 180 days, unless extenuating circumstance exist, in which case the duration shall not exceed one year or the maximum sentence that would be available for the charge.” Thus, a person diverted from the criminal justice system to mental health treatment through the EDCOT process could be subject to an intense, highly structured program of treatment for a lengthy period of time.

Some stakeholders suggested that the intensity of monitoring and oversight required by the 2023 introduced EDCOT legislation could be contrary to the tenets of the risk-needs-responsivity (RNR) model and could reduce the effectiveness of treatment. The RNR model, a widely accepted model of correctional intervention, is a collection of evidence-based practices for identifying and prioritizing individuals with criminal justice involvement for appropriate treatment to reduce their likelihood of re-incarceration. The model is based on the idea that the risks and needs of the individual should determine the strategies appropriate for addressing their criminogenic factors. The model is built upon three principles:

## Chapter 2: EDCOT implementation challenges

1. The level of services should match the individual's risk of reoffending. Higher-risk individuals should receive higher intensity interventions while lower-risk individuals should receive lower intensity interventions.
2. Treatment interventions should be tailored to the individual's specific criminogenic needs. High-risk individuals should receive intensive treatment while low-risk individuals should receive minimal or no treatment.
3. Treatment should maximize the individual's ability to learn from the rehabilitative intervention by providing cognitive behavior treatment and tailoring the intervention of the individual's learning style, motivation, abilities, and strengths.

Stakeholders suggested that the intensity of monitoring and oversight required by the introduced legislation may be inappropriate for individuals with a lower risk of reoffending. The fact that monitoring and oversight requirements are static and do not take into account individual risk and needs could undermine the success of treatment services provided through EDCOT, reducing the effectiveness of the model. If the General Assembly moves forward with legislation implementing EDCOT in the future, it may be necessary to ensure that enabling legislation balances the need for monitoring and oversight of individuals subject to an EDCOT order against the need to ensure that monitoring and oversight reflect the appropriate level of intensity to address the individual's risk of reoffending in the future.

### **Involuntary mental health treatment limits individual autonomy and may be contrary to individual choice**

Some stakeholders voiced concerns about the loss of autonomy inherent in civil commitment and mandatory mental health treatment, and the possibility that involuntary mental health treatment may be contrary to the best interests of the individual ordered to receive treatment. The EDCOT process includes court-ordered mental health treatment for individuals diverted from the criminal justice system. When individuals are not competent to stand trial, EDCOT may be ordered over the individual's objection. Individuals who are competent to stand trial must consent to participating in EDCOT, but treatment no longer requires the individual's consent once an order for mental health treatment is entered and a treatment plan is approved by the court.

Some stakeholders noted that not all individuals with mental illness want or are ready to participate in treatment, and that court-ordered treatment may be contrary to their wishes and personal understanding of their best interests. Stakeholders also noted that the mixing of treatment and punitive approaches that form the foundation of the EDCOT model may create an adversarial relationship between treatment providers and individuals receiving treatment. An adversarial relationship would be inconsistent with the therapeutic model and could limit the effectiveness of the treatment provided. Stakeholders recommended that EDCOT, if adopted, should allow for person-centered approaches to treatment planning and delivery that take into account the wishes of the individual receiving services.

### **Goals of criminal and civil proceedings may conflict**

EDCOT hearings may occur prior to or during adjudication of the underlying criminal charge, and they are held before the same court as the criminal proceeding. Some stakeholders expressed concerns that information disclosed as part of an EDCOT hearing could be detrimental to the defendant's criminal trial, which would proceed if a determination is made that the defendant should not be diverted to court-ordered mental health treatment. For example, EDCOT requires a defendant to admit they engaged in the criminal behavior with which they are charged as a condition of eligibility. Stakeholders indicated that this admission could conflict with the defense's arguments in the criminal trial. The conflict between strategies employed in the civil and criminal proceedings may be made more likely by the fact that EDCOT requires recusal of defense counsel and appointment of new civil counsel to represent the defendant during the EDCOT proceeding.

### **Design of EDCOT program may impact amount of resources necessary for effective implementation**

Stakeholders highlighted the importance of decisions regarding the design of any EDCOT process adopted in Virginia because of their potential impact on the effectiveness of the EDCOT process. Decisions regarding the types of criminal charges that are eligible for EDCOT can be expected to have a significant impact on the number of individuals diverted from the criminal justice system to court-ordered mental health treatment. The broader the array of crimes eligible for EDCOT diversion, the greater the number of individuals who could be expected to be diverted through the new process. Decisions about the balancing of incentives to utilize EDCOT—including decisions about the type and nature of enforcement options available to courts charged with oversight of EDCOT cases as well as the nature of protections for individual autonomy and choice—could also influence the number of cases in which prosecutors and competent defendants consent to EDCOT diversion. The number of individuals for whom EDCOT is ordered will, in turn, impact the amount of upfront financial and human resources necessary to implement EDCOT effectively as well as the potential longer-term cost savings that may result from reduced utilization of inpatient competency restoration services and engagement in the criminal justice system. For these reasons, decisions about the scope and nature of any EDCOT process implemented in Virginia should include sufficient opportunity for input from relevant stakeholders and thorough exploration and consideration of EDCOT program design options and of the potential impacts of decisions made during the legislative drafting process.

### **Cost-benefit of EDCOT model needs to be weighed against existing diversion models**

A variety of diversion options exist at various points in the criminal justice process in Virginia. Stakeholders noted that some of these options, particularly those available prior to arrest and involvement with the formal adjudication process, could achieve many of the same benefits as EDCOT proposes, but their effectiveness has reportedly been limited by a lack of capacity caused by scarce resources. For example, implementation of the "Marcus Alert" system and

funding of more mobile crisis teams are expected to lower the involvement of individuals with mental illness in the criminal justice system by diverting individuals before arrest occurs. Behavioral health dockets—which are available to eligible defendants later in the criminal justice process after adjudication has begun but before a verdict has been rendered—also offer opportunities for complete dismissal of charges if the defendant complies with mental health treatment and other program requirements. While each of these differs from EDCOT in key ways, including the timing of diversion, both options offer opportunities to shift individuals away from the criminal justice system and into mental health treatment. Information about the effectiveness of these and other existing diversion programs exists, but it is not available for all diversion programs, and some programs are too new to have robust outcomes data.

Some stakeholders believe that the investment that would be required to implement EDCOT could be more effectively and efficiently used to build capacity in existing diversion programs rather than to create a new one. One of the additional advantages of this approach would be avoiding complex revisions to the legal statutes governing civil commitment and the drafting of new Code language detailing the implementation and operation of EDCOT.

Other stakeholders argue that while EDCOT does overlap to some degree with existing diversion options, EDCOT may offer the opportunity to divert some individuals who might not otherwise be able to take advantage of other options, such as those who are not competent. Investing in EDCOT could therefore further reduce inappropriate involvement of individuals with mental illness in the criminal justice system. Investment in EDCOT would not necessarily have to reduce investment in other diversion programming, and expanding access to new diversion programs that may keep additional individuals with mental illness out of the criminal justice system would be beneficial.

If Virginia chooses to consider implementing EDCOT, the state may wish to explore existing diversion programs and initiatives in Virginia and in other states; assess whether and how EDCOT might surpass the positive impact of initiatives that exist in Virginia and best practices employed in other states; determine the costs and benefits of implementing EDCOT and addressing associated implementation challenges of EDCOT as compared to investing in existing diversion programs; and determine how Virginia should invest in diversion programming to optimize individual outcomes, public safety, and state resources.

### OPTION 1

The General Assembly may wish to consider adopting a study resolution directing the Office of the Executive Secretary of the Supreme Court (OES) to contract with the National Center for State Courts and collaborate with the Department of Behavioral Health and Developmental Services (DBHDS) to (1) determine the availability, scope, and effectiveness of existing statewide diversion programs and initiatives in Virginia; (2) assess in what ways and to what extent expedited diversion to court ordered treatment (EDCOT) could divert individuals not currently served by existing programs in Virginia; (3) examine the operational, legal, and funding changes identified by stakeholders that would be required to address the EDCOT implementation challenges; and (4) determine the feasibility of implementing EDCOT or a similar diversion program to allow for diversion of individuals not currently served by existing programs in Virginia. In conducting their work, OES shall work with the National Center for State Courts to evaluate whether other states use diversion best practices that may be more effective and efficient than EDCOT. OES and DBHDS shall provide ample opportunities for meaningful collaboration and cooperation with stakeholders impacted by the potential implementation of an EDCOT model and changes to diversion programs. OES should report on its findings to the Behavioral Health Commission by November 1, 2025.

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### OPTION 2

The General Assembly may wish to consider adopting a joint resolution directing the Joint Legislative Audit and Review Commission (JLARC) to study how to maximize the availability and effectiveness of diversion opportunities for individuals with mental illness who are involved in the criminal justice system in Virginia. As part of this study, JLARC should (1) determine the availability, scope, and effectiveness of major diversion programs and initiatives in Virginia, including pre-arrest models; (2) assess in what ways and to what extent expedited diversion to court ordered treatment (EDCOT) could benefit the state and eligible individuals compared to the benefits of existing diversion programs; (3) examine the operational, legal, and funding changes that would be required to effectively implement EDCOT and address concerns raised by stakeholders; (4) evaluate the costs and benefits of implementing EDCOT compared to those of maximizing the availability of existing diversion programs; and (5) make recommendations about the diversion programs that Virginia should offer to optimize individual outcomes, public safety, and the use state resources. In conducting their work, JLARC staff should consider diversion best practices used in other states. JLARC should report on its findings by November 1, 2025.

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## Chapter 2: EDCOT implementation challenges

## Options: Expedited diversion to court-ordered mental health treatment

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BHC staff typically offer recommendations or options to address findings identified in its reports. Staff will usually propose options, rather than recommendations, when (i) the action proposed is a policy judgment best made by the General Assembly or other elected officials, (ii) the evidence indicates that addressing a report finding could be beneficial but the impact may not be significant, or (iii) there are multiple ways to address a finding, and there is insufficient evidence to determine the single best way to address the finding.

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