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November 3, 2025

Ms. Nathalie Molliet-Ribet, Executive Director
Virginia Behavioral Health Commission
411 East Franklin Street
Suite 505
Richmond, VA 23219

Dear Ms. Molliet-Ribet:

Please find enclosed a report of the findings and recommendations of the study of jail diversion programs and initiatives for individuals with a serious mental illness and the feasibility of implementing an expedited diversion to court-ordered treatment (EDCOT), as required by Item 31, Paragraph T, of the 2024 Appropriation Act.

If additional information is needed about this study, please do not hesitate to contact me.

With best wishes, I am

Very truly yours,

Karl R. Hade

KRH:awp
Enclosure

cc: Division of Legislative Automated Systems

Report Pursuant to Item 31T of the 2024 Appropriation Act

Jail Diversion Programs and
Initiatives for Individuals with
Serious Mental Illness and
Expedited Diversion to Court-
Ordered Treatment



Office of the Executive Secretary
Supreme Court of Virginia

Report Pursuant to Item 31T of the 2024 Appropriation Act

Jail Diversion Programs and Initiatives for Individuals with Serious Mental Illness and Expedited Diversion to Court-Ordered Treatment

I. Background

This report was prepared in response to language in the 2024 Appropriation Act that requires the Office of the Executive Secretary to collaborate with the Department of Behavioral Health and Developmental Services to study existing statewide jail diversion programs and initiatives for individuals with serious mental illness in Virginia and other states, and the feasibility of implementing an expedited diversion to court-ordered treatment process to divert individuals with a serious mental illness to court-supervised mental health treatment. Item 31T of the 2024 Appropriation Act reads as follows:

The Office of the Executive Secretary of the Supreme Court (OES) shall contract with the National Center for State Courts (NCSC) and collaborate with the Department of Behavioral Health and Developmental Services (DBHDS) to study existing statewide jail diversion programs and initiatives for individuals with a serious mental illness in Virginia and other states, and the feasibility of implementing an expedited diversion to court-ordered treatment (EDCOT) process to divert individuals with a serious mental illness to court-supervised mental health treatment. In conducting such study, OES shall work with DBHDS to (i) identify existing statewide jail diversion programs and initiatives for individuals with a serious mental illness in Virginia and determine the scope and effectiveness of such programs and initiatives, including the populations served; (ii) assess in what ways and to what extent an EDCOT process could divert individuals with a serious mental illness who are not currently served by existing programs in Virginia; (iii) examine the operational, legal, funding, and other barriers identified by stakeholders that would be required to address EDCOT implementation; and (iv) determine the feasibility of implementing an EDCOT process or similar diversion program in Virginia to allow for diversion of individuals with a serious mental illness not currently served by existing statewide diversion programs. OES shall work with NCSC to evaluate whether other states use diversion best practices that could more effectively and efficiently serve individuals with a mental illness who could be diverted to mental health treatment through an EDCOT process, and who are not currently served by existing statewide diversion programs in the Commonwealth. OES and DBHDS shall provide ample opportunities for meaningful collaboration and cooperation with stakeholders impacted by the potential implementation of an EDCOT process and changes to diversion programs in Virginia. OES shall report on its findings to the Behavioral Health Commission by November 1, 2025.

In 2023, the Behavioral Health Commission (BHC) conducted a limited-scope study to identify factors that may be barriers to effectively implementing Expedited Diversion to Court

Ordered Treatment (EDCOT) in Virginia.¹ As part of that limited-scope study, the BHC examined the concept of EDCOT as explained by Steven Hoge and Richard Bonnie in the *Journal of the American Academy of Psychiatry and the Law*,² and legislation seeking to implement an EDCOT process introduced in the 2023 General Assembly Session.

The BHC limited-scope study identified challenges in implementing EDCOT and recommended further study of the feasibility of implementing EDCOT, and an evaluation of other state diversion programs.³ In the 2024 Appropriation Act, the General Assembly included language directing OES, in collaboration with DBHDS, to further study an EDCOT process. It additionally funded a study by NCSC of diversion practices in other states.

II. Structure of Study

OES in collaboration with DBHDS established a work group comprised of stakeholders (Work Group).⁴ In addition, two subcommittees were formed to examine the barriers to implementation of an EDCOT process. One subcommittee (Legal Subcommittee), led by OES staff, studied the legal and court process barriers to implementation, while the other subcommittee (Services Subcommittee), led by DBHDS staff, examined the services, staffing, and funding that would be needed to implement an EDCOT process.

OES also contracted with NCSC to evaluate other state diversion practices that could serve individuals not currently being served by existing Virginia statewide diversion programs and initiatives. NCSC conducted its research between September 2024 and April 2025 and presented its findings to the Work Group in July 2025.⁵

The full Work Group held four meetings between September 2024 and September 2025, and during its meetings discussed existing Virginia statewide diversion programs, the feasibility of implementing an EDCOT process, other states' diversion practices for diversion of individuals that could otherwise be served by EDCOT and potential alternatives to an EDCOT process for diversion of individuals not served by existing Virginia statewide diversion programs. The full Work Group's findings and recommendations were informed by the work of the two subcommittees, the research and report provided by NCSC, and information provided by DBHDS staff regarding the impact of the number of forensic admissions on the capacity to serve individuals who have been civilly committed.

¹ House Bill 2339 and Senate Bill 1174 were introduced during the 2023 General Assembly Session. The bills created an expedited diversion to court ordered treatment process in lieu of a criminal adjudication. An amendment in the nature of a substitute was offered, however, the bills were tabled/passed by in the House Courts of Justice and Senate Judiciary Committees with a letter requesting that the Behavioral Health Commission study this issue.

² Hoge, S. and Bonnie, R. (2021, November 4). *Expedited Diversion of Criminal Defendants to Court-Ordered Treatment*. The Journal of the American Academy of Psychiatry and the Law.
<https://jaapl.org/content/jaapl/early/2021/10/05/JAAPL.210076-21.full.pdf>

³ Behavioral Health Commission. (2023) *Expedited diversion to court-ordered treatment*. (Report Document Number 92).

<https://bhc.virginia.gov/documents/Expedited%20diversion%20to%20court-ordered%20treatment%20report.pdf>

⁴ A list of Work Group members is attached as Appendix A.

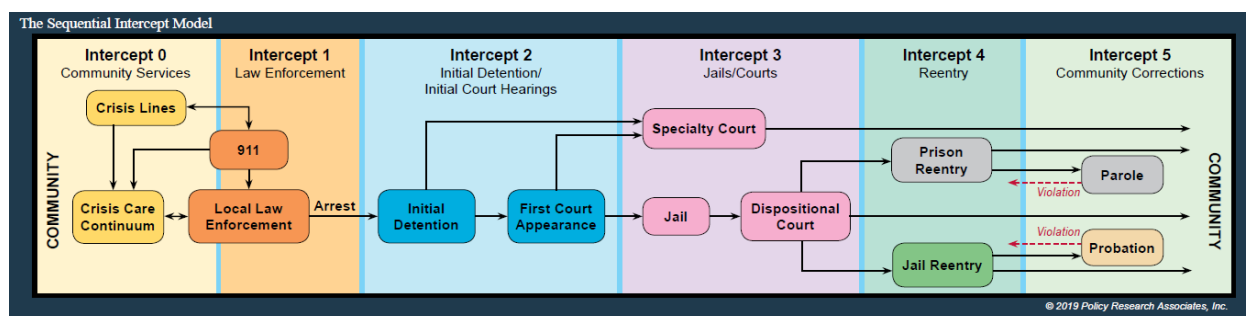
⁵ NCSC's findings are documented in a report attached as Appendix B.

III. Existing Statewide Jail Diversion Programs and Initiatives Serving Individuals with a Serious Mental Illness

As directed by the 2024 Appropriation Act, OES and DBHDS staff identified existing statewide jail diversion programs and initiatives that serve individuals with a serious mental illness, for discussion by the Work Group.⁶ In identifying the programs or initiatives that currently serve individuals with a serious mental illness, OES and DBHDS staff applied the definition of “diversion” used in the 2021 Study of Adult Diversion conducted by the Virginia State Crime Commission: “an initiative or process (formal or informal) which allows an adult defendant to avoid a criminal charge, conviction, or active incarceration by participating in or completing certain programs or conditions.”⁷ For the purpose of this study, the existing statewide jail diversion programs and initiatives are categorized as programs or initiatives serving individuals before criminal charges are brought (pre-charge diversion) and those that serve individuals after such person has been charged with a criminal offense (post-charge diversion). The Work Group categorized these programs and initiatives with reference to the Sequential Intercept Model (SIM).⁸ Pre-charge diversion discussed in this report refers to programs that operate at Intercept 1, whereas post-charge diversion describes the programs and initiatives operating at Intercept 2-3.

The linear version of the Sequential Intercept Model (SIM) was developed as an “applied strategic planning tool to improve cross-system collaborations to reduce involvement in the [criminal] justice system by people with mental and substance use disorders.”⁹ It is designed to show how individuals with a mental or substance abuse disorder interact and move through the criminal justice system.¹⁰

Figure 1. Sequential Intercept Model (SIM)



⁶ OES and DBHDS staff identified programs as statewide if they received funding from DBHDS or are authorized by statute. By defining statewide programs as such, DBHDS and OES staff could provide the Work Group with any necessary background information and data for assessing the scope and effectiveness of such programs.

⁷ Virginia State Crime Commission. (2021). *Diversion*.

<https://vscc.virginia.gov/2022/VSCC%202021%20Annual%20Report%20-%20Diversion.pdf>

⁸ Munetz, M.R. and Griffin, P.A. (2006). Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness. *Psychiatric Services*, 57(4), 544-549.

<https://www.samhsa.gov/communities/criminal-juvenile-justice/sequential-intercept-model>.

⁹ SAMHSA Substance Abuse and Mental Health Services Administration. (September 2019). Sequential Intercept Model Trifold Brochure. <https://library.samhsa.gov/sites/default/files/pep19-sim-brochure.pdf>.

¹⁰ *Id.*

Pre-Charge Diversion

Individuals with a serious mental illness can be diverted from the criminal process before criminal charges have been brought through initiatives that exist at the initial contact with law enforcement officers. Under current law, law enforcement officers are generally afforded discretion in the decision to arrest and charge an individual who is alleged to have committed a criminal offense. An officer may instead choose to refer the individual to specialized programs that exist in the jurisdiction; if criteria are met, seek a temporary detention order; or utilize any partners or resources developed in compliance with the local Marcus Alert protocols.¹¹

Although alternatives to arrest can provide an opportunity to divert individuals from involvement with the criminal justice system, law enforcement stakeholders identified limitations in the effectiveness of these alternatives. Work Group members noted that in most jurisdictions the availability of specialized programs is limited and, even if a specialized program is available, participation in such program is voluntary with no mechanism to require engagement by the individual. With regard to local Marcus Alert protocols, the number of protocols required to be established correlate with the jurisdictions' populations.¹² Thus, if a jurisdiction chooses not to implement all of the local Marcus Alert protocols, the law enforcement officers in these jurisdictions may not have training for a specialized response to calls where an individual is experiencing a mental health crisis, nor would there be an agreement for law enforcement to respond as backup for a mobile crisis or community care team response. The Marcus Alert protocols are designed to deescalate a crisis and give the individual greater access to the resources that may be available to address their mental health needs. According to a recent report by DBHDS, "[t]he 17 areas that have implemented Marcus Alert report positive outcomes, including a reduction in unnecessary law enforcement involvement, increased behavioral health lead responses, and an increase in least restrictive services available to the public."¹³

While specialized programs and the Marcus Alert protocols necessarily require voluntary participation with treatment, a temporary detention order allows for the treatment of an individual with a mental illness who does not agree or does not have the capacity to agree to receive treatment or be hospitalized. However, a temporary detention order can only be issued by a magistrate if specific requirements are met. Individuals with a mental illness who engage in criminal activity that would benefit from diversion may not meet the civil commitment criteria. An individual meets the civil commitment criteria and may be civilly committed when a judge or special justice finds by clear and convincing evidence that "(a) the person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior

¹¹ The background and full description of the Marcus Alert System can be found in DBHDS's annual report required by Va. Code §37.2-311.1(D). The full report on the Marcus Alert System can be found at the following website: <https://rga.lis.virginia.gov/Published/2025/RD96/PDF>.

¹² For instance, jurisdictions with a population less than or equal to 40,000 are only required to establish one protocol, which is to divert calls from 911 to a "crisis call center for risk assessment and engagement, including assessment for mobile crisis or community care team dispatch if available." Va. Code § 9.1-193.

¹³ Virginia Department of Behavioral Health and Developmental Services. (2025, January 14). *Report on Marcus Alert and the Comprehensive Crisis System, FY 2024 (§ 37.2-311.1 of the Code of Virginia)*. <https://rga.lis.virginia.gov/Published/2025/RD96/PDF>

causing, attempting, or threatening harm, and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm to provide for his basic human needs, and (b) all available less restrictive treatment alternatives to involuntary inpatient treatment that would offer an opportunity for the improvement of the person's condition have been investigated and determined to be inappropriate..."¹⁴ Thus, while this alternative to arrest is useful in situations where the individual meets the criteria for temporary detention, it can only be used in those specific circumstances.

After hearing and discussing the reports of the Legal and Services Subcommittees on an EDCOT process, a majority of Work Group members responded to a survey indicating interest in pre-charge diversion opportunities available at Intercept 1, the law enforcement intercept. Work Group members noted that behavioral health resources are limited and believed that focusing the limited number of resources and funding to programs designed at the law enforcement level would avoid the legal barriers to implementation of EDCOT and continue to encourage, improve or develop paths to divert individuals with mental illness before they enter the criminal justice system. Due to time limitations and existing studies of crisis services already in progress in the BHC, this topic was not addressed in depth by the Work Group.

Post-Charge Court Diversion Processes

Individuals with a serious mental illness can be diverted from the criminal court process using existing post-charge court diversion processes: (1) diversion from the criminal process to the civil commitment process, (2) deferral of an adjudication and/or disposition conditioned upon participation in mental health treatment, (3) behavioral health dockets, and (4) dismissal of a criminal charge for an incompetent defendant pursuant to Va. Code § 19.2-169.1(D). The existing post-charge court diversion processes provide flexibility to the parties and the court to address the specific needs of an individual with a mental illness by utilizing the most effective resources available in that jurisdiction.

1. Diversion from the Criminal Process to Civil Commitment Process

Virginia Code §§ 19.2-169.1 and 19.2-169.2 create a process for an individual who is facing certain misdemeanor criminal charges to be diverted from the criminal justice system to the civil commitment process. This diversion occurs after an individual is charged with a criminal offense but before the trial has concluded. More specifically, this process occurs after a court orders a competency evaluation and an individual is found to be incompetent to stand trial.

As delineated in Virginia Code §§ 19.2-169.1 and 19.2-169.2, the eligibility determination for this diversion process begins when the question of an individual's competency to stand trial is raised and the court orders a competency evaluation. If a competency evaluation is ordered and the individual is charged with an offense enumerated in Va. Code § 19.2-169.1(D),¹⁵ the evaluator must include information about whether the defendant should be

¹⁴ Va. Code § 37.2-817(C)

¹⁵ The eligible offenses include petit larceny; altering, defacing, removing, possessing serial number on property, removal of electronic/radio transmitter from: dog, hawk, owl, falcon; larceny of bank notes, checks, etc. with a value less than \$1,000; removal of crop by tenant before rents and advances are satisfied; fraudulently sell, remove, etc.

evaluated to determine if they meet the criteria for temporary detention, should the court find them incompetent to stand trial but restorable or incompetent to stand trial for the foreseeable future. If such information is included in the competency report, a court may order the local community services board (CSB) or behavioral health authority (BHA) to conduct an evaluation to determine if the individual meets the criteria for temporary detention pursuant to Va. Code § 37.2-809. If the CSB or BHA determines that the individual meets the criteria for temporary detention, they file a petition for the issuance of an order for temporary detention. The court would then be notified of such filing and may dismiss the charges without prejudice, with the agreement of the Commonwealth.

2. Deferral of Adjudication and/or Disposition

Under existing law, several statutes establish a deferral process that provides the court and parties with the ability to defer criminal proceedings and impose conditions designed to address the specific needs of individuals with a mental illness. Under Va. Code §§ 19.2-298.02, 18.2-57.3, 18.2-258.1, 19.2-303.2, and 19.2-303.6, the court has the authority to condition the deferral of the criminal proceeding upon mental health treatment. Because these deferrals require a plea or trial, participating individuals must be competent to stand trial. Eligibility requirements and potential outcomes of a case vary based upon which statutory diversion process is used.

Virginia Code § 19.2-298.02, enacted in 2020, creates a general deferral process that does not limit eligibility based upon the criminal charges an individual is facing. Eligibility for this deferral is contingent upon the agreement of the Commonwealth's attorney and allows for the criminal proceeding, entry of a conviction order or the entry of a final order to be deferred. Virginia Code § 19.2-298.02 provides latitude to the parties and the court to condition the deferral on the completion of mental health treatment or any other relevant service. Those conditions may be by agreement, or the court may impose conditions it deems reasonable.

Virginia Code §§ 18.2-57.3, 18.2-258.1, and 19.2-303.2 create diversion opportunities for individuals who have been charged with certain offenses, without prior convictions or deferrals of those same charges. Deferral under these statutes occurs after an individual has entered a plea and the court has found the evidence presented to be sufficient for a finding of guilt. The respective terms and conditions of such deferral vary by statute. Under Va. Code § 18.2-258.1, for instance, the individual must be evaluated and enter a treatment program best suited to address the individual's needs. A similar requirement exists for deferral under § 18.2-57.3, where an individual is required to be placed on probation and complete all treatment, education programs or services that are indicated by an assessment conducted by the local community-based probation services agency. While a deferral under Va. Code § 18.2-303.2 does not require that an individual undergo an evaluation for services, the court may defer proceedings

goods distrained or levied on less than \$1,000; unauthorized use of animal, auto, boat worth less than \$1,000; removal of shopping cart from store premises; take, buy, sell or dispose of milk crates without consent of owner; refuse to return milk crate to owner/agent; deface, erase, cover up, insignia or label of owner of milk crate; shoplift, alter price tags less than \$1,000; make, sell, possess device made to shield shoplifted goods; receive stolen property/goods less than \$1,000; receive goods used in an investigation valued at less than \$1,000; trespass after being forbidden to do so; unlawfully deface or destroy any property or monument; intentionally, damage/destroy any property or monument less than \$1,000; drunk in public, intoxicated from any drug; disorderly conduct; fail to appear in court for misdemeanor offense.

and place a defendant under certain terms and conditions it sets, including services that would address an individual's mental health needs.

For those individuals who have been formally diagnosed with autism spectrum disorder or an intellectual disability, Va. Code § 19.2-303.6 offers an additional deferral opportunity. Unlike Va. Code §§ 18.2-57.3, 18.2-258.1, and 19.2-303.2, Va. Code § 19.2-303.6 does not preclude an individual from receiving a deferred disposition if they have previously been convicted of a criminal offense or had prior proceedings deferred and dismissed but does have some exclusions based the type of offense. To have a charge deferred under this statute, an individual must show that the criminal conduct was caused by or had a direct and substantial relationship to the person's disorder or disability. If the court makes this finding, it may defer any further proceedings and place the individual on probation under certain terms and conditions. The terms and conditions are not limited by statute, therefore, if an individual diagnosed with an autism spectrum disorder or intellectual disability has a co-existing mental illness, the court can order the individual to participate in services designed to address their mental health needs. Additionally, this diversion opportunity does not require the consent of the Commonwealth's Attorney.

As noted throughout this report, the services that are available to individuals with a serious mental illness vary throughout the Commonwealth due to differences in availability of local resources. The statutory diversion opportunities described above allow those most familiar with the individual and their mental health needs to determine the most appropriate, effective and available treatment for such individual. It also allows the jurisdiction to use its available resources in the most meaningful way possible.

The Work Group was unable to gather data pertaining to the effectiveness of such statutes as to individuals with a serious mental illness, as the court case management systems do not capture information on the specific conditions of an individual's deferral. However, the case management systems are able to capture data on the number of cases that are dismissed after being deferred. In fiscal year 2024, 22,374 cases were deferred and dismissed and in fiscal year 2025, 24,079 cases were deferred and dismissed.¹⁶

3. Behavioral Health Dockets

Behavioral health dockets are a type of specialized court docket operating in the existing structure of the district and circuit courts. The behavioral health docket is designed to address the needs of individuals with a serious mental illness, by offering "judicial monitoring of intensive treatment, supervision, and remediation integral to case disposition."¹⁷

Circuit or district courts that wish to establish a behavioral health docket must petition the Supreme Court of Virginia before beginning its operation.¹⁸ The court seeking to operate this type of docket must establish a local behavioral health docket advisory committee ("local

¹⁶ Fairfax County Circuit Court does not use the Virginia's Judicial System's case management system, therefore, data from Fairfax County Circuit Court is not included in these figures.

¹⁷ Va. Sup. Ct. R. 1:25.

¹⁸ *Id.*

advisory committee”), which “ensures quality, efficiency, and fairness in the planning, implementation, and operation of the behavioral health docket...”¹⁹ The local advisory committee also determines the specific eligibility requirements for participation, although participation in the docket is voluntary. Each behavioral health docket is planned based on local needs with local resources. While specific eligibility requirements are determined by the local advisory committee, the State Behavioral Health Docket Advisory Committee created Behavioral Health Docket Standards to establish fundamental standards and practices to which all behavioral health dockets should conform. Included in these standards is the recommendation to “focus on defendants whose mental illness is related to their current offenses,” and “serve participants that are high-risk, high need.”²⁰ The most commonly diagnosed mental illnesses for behavioral health docket participants in fiscal year 2024 were bipolar disorder, schizoaffective disorder, post-traumatic stress disorder, anxiety disorders and personality disorders.²¹

Behavioral health dockets are designed to provide individuals with intensive evidence-based treatment and rehabilitation services as well as intensive supervision. Individuals who are eligible to participate in a behavioral health docket must be competent to stand trial and voluntarily enter the docket. After acceptance into the docket, participants undergo an assessment to determine the treatment and services that are appropriate and adequate to address their mental illness. Based upon that assessment, a treatment plan is created and a team of professionals support and supervise the participant while they are in the behavioral health docket. Participation in a behavioral health docket lasts an average of 10 to 15 months. Upon successful completion, a participant may have the pending criminal charge reduced or dismissed or the length of incarceration reduced or not imposed.

Nineteen behavioral health dockets were operational in fiscal year 2024. Of those behavioral health dockets, fifteen operate in general district courts, three operate in circuit courts, and one operates in a juvenile and domestic relations district court. The behavioral health dockets reported having 442 active participants with 165 participants exiting the program through graduation, termination, or withdrawal.²² One hundred and fifteen of those participants (69.7%) graduated from the behavioral health dockets in 2024.²³

Recidivism rates are also used to evaluate the effectiveness of behavioral health dockets. The behavioral health dockets track rearrest and reconviction rates and utilize those numbers to determine the recidivism rates.²⁴ Offenses classified as good behavior violations, probation

¹⁹ Va. Code § 18.2-254.3(G).

²⁰ Office of the Executive Secretary of the Supreme Court of Virginia. (2024). *Virginia Behavioral Health Dockets Annual Report*. (Report Document Number 874). <https://rga.lis.virginia.gov/Published/2024/RD874/PDF>.

²¹ *Id.*

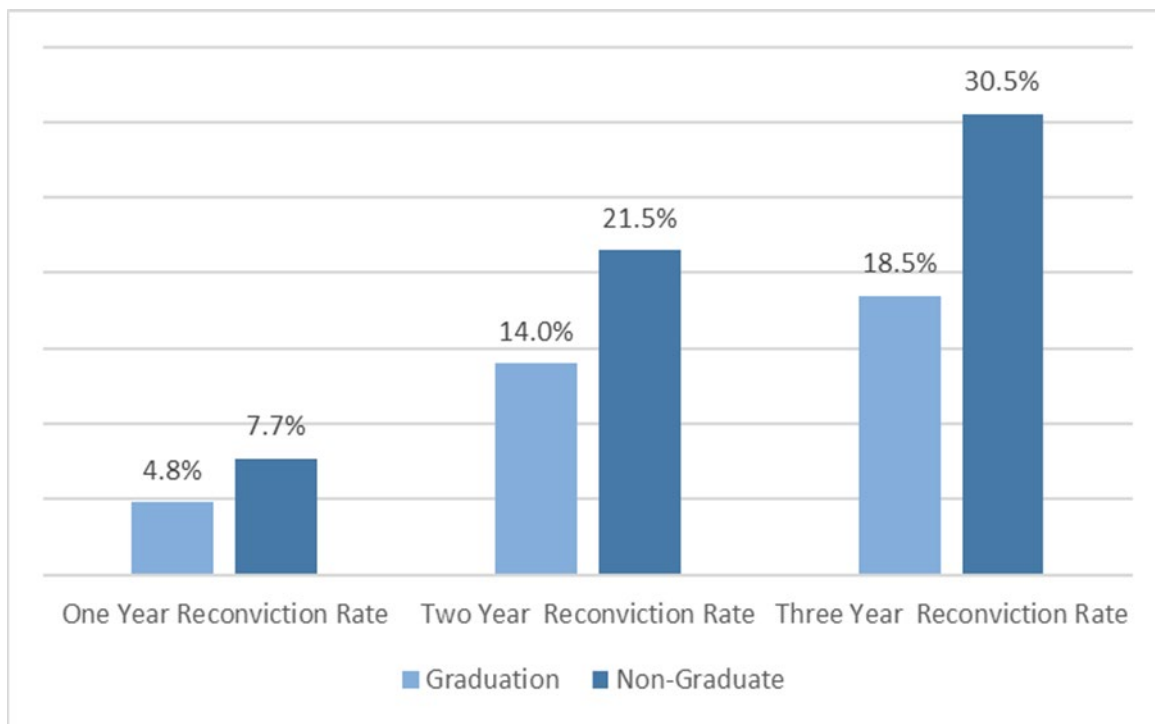
²² In fiscal year 2025, the six DBHDS funded behavioral health dockets enrolled a total of 94 new participants. These six behavioral health dockets had 105 participants discharged in fiscal year 2025 with 73.3% of participants successfully completing the behavioral health docket.

²³ OES publishes an annual report on the behavioral health dockets. The data contained in this document has been updated from the data provided in the 2024 Annual Report published by OES. The full annual report can be found online at <https://rga.lis.virginia.gov/Published/2024/RD874/PDF>.

²⁴ Per national standards, recidivism rates were calculated for one, two, and three-year periods. The one-year recidivism rate includes participants whose first rearrest occurred within 0–365 days of docket departure. The two-year rate includes those whose first rearrest occurred within 0–730 days, while the three-year rate accounts for first rearrests occurring within 0–1,095 days of departure.

violations, and contempt of court are excluded from the analysis below. For individuals who departed the behavioral health docket program in fiscal year 2021, the overall rearrest rate for non-graduates was 1.9 times that of graduates. The reconviction rate for individuals who did not successfully complete the behavioral health docket was 42.6%, whereas the three-year reconviction rate for graduates was 15.9%.²⁵

Figure 2. Adult Recovery Court Graduate and Non-Graduate Completions Reconviction Rates, Post-Departure, Persons Exiting a Docket During FY 2021.



4. Dismissal of a Criminal Charge for an Incompetent Defendant Pursuant to Va. Code § 19.2-169.1(D)

Va. Code § 19.2-169.1(D) outlines a diversion process that can occur after a competency evaluation is completed, but before a court orders restoration services. This diversion process is available to individuals who have been evaluated for competency to stand trial and the evaluator recommends that the court find the individual incompetent to stand trial and likely to remain incompetent for the foreseeable future due to an ongoing and irreversible medical condition or that they were previously determined to be unrestorably incompetent within the past two years. If the court finds the defendant unrestorably incompetent, the court could order the defendant to be released, civilly committed or certified pursuant to Va. Code § 37.2-806.

This diversion process addresses individuals who stakeholders have noted continue to cycle through the competency and restoration process without being successfully restored to

²⁵ Office of the Executive Secretary. (2024). Virginia Behavioral Health Dockets Annual Report. <https://rga.lis.virginia.gov/Published/2024/RD874/PDF>.

competency. If recommended by evaluators, the statute provides a court an alternative path to requiring restoration services for individuals who have been found to be unrestorably incompetent in the two years prior or likely to remain incompetent due to an ongoing and irreversible medical condition. Work Group members indicated that this process is not often used. DBHDS staff informed the Work Group that evaluators were aware of and have been trained on this diversion process; however, they indicated that evaluators are not always provided an individual's medical history or prior competency evaluations and findings to make the appropriate recommendation. During the Work Group discussion, stakeholders indicated that there are issues related to getting the necessary information to evaluators to assess if an individual meets the criteria to recommend the individual be found to be unrestorably incompetent.

Existing Jail Diversion Programs Funded by DBHDS

In conducting this study, DBHDS staff presented the Work Group with information on existing initiatives and programs, wholly or partially state-funded, that serve individuals with a serious mental illness who are involved in the criminal justice system. In Virginia, jail diversion efforts began in 2007 when the General Assembly approved funding to promote the diversion of persons with mental illness from unnecessary involvement with the criminal justice system. DBHDS was given the responsibility for oversight of those funds. Jail diversion gained further momentum in 2008 with Executive Order 62, which established the Commonwealth Consortium for Mental Health/Criminal Justice Transformation.²⁶ The Consortium was tasked with the development of a comprehensive approach to address the challenging needs of individuals with mental illness in the Commonwealth's criminal justice system. Under the leadership of the Secretaries of Health and Human Resources and Public Safety, the Consortium hosted two statewide meetings and saw the development of multiple programs and processes for creating positive systems change.

In May 2008 the Governor's Conference for Mental Health and Criminal Justice Transformation was convened, with a goal of assisting localities with initiating or furthering their community planning for jail diversion and improved services. The model soon after adopted by the Commonwealth's jail diversion initiatives was the Sequential Intercept Model. Developed in 2006 by Dr. Mark Munetz and Dr. Patricia Griffin, this model provided a conceptual framework for communities to organize targeted strategies for justice-involved individuals with serious mental illness.

DBHDS jail diversion initiatives come in a variety of forms, but all essentially strive to: (1) identify individuals diagnosed with a serious mental illness and co-occurring disorders (early identification), (2) divert individuals away from the criminal justice system (or from penetrating more deeply, if identified after arrest/incarceration), and (3) connect individuals to meaningful services and treatment (as early as possible, but often during initial court appearance, during incarceration, or upon release from jail). Jail diversion initiatives are executed with funding to the CSBs and are classified by program type as jail diversion programs, behavioral health dockets, or forensic discharge planning programs (FDP). Additional funding for jail diversion programs was approved by the General Assembly in 2009, 2016, and 2019, funding for FDP

²⁶ Executive Order 62 was effective until December 31, 2009.

programs was approved in 2018 and 2022, and funding for behavioral health dockets was approved in 2023. Between 2020 and 2025, the Office of Forensic Services at DBHDS facilitated and supported a 56.5% increase in the number of jail diversion and FDP programs.

DBHDS currently provides funding for six operating behavioral health dockets in Virginia, with \$912,552 appropriated annually by the General Assembly. Behavioral health dockets focus on defendants with a serious mental illness and co-occurring substance use disorders by diverting them from the traditional court process into treatment services that address the factors that contributed to the criminal behavior.

DBHDS currently provides funding for 15 jail diversion programs, with \$3,117,708 appropriated annually by the General Assembly. In fiscal year 2025, jail diversion programs enrolled a total of 904 participants in services. These programs function across all intercepts on the Sequential Intercept Model, with 36% of enrollments occurring at Intercept 2 (Initial Court Hearings/Initial Detention), and 53% of enrollments occurring at Intercept 3 (Jails/Courts). Program type, intent, and goals vary by locality as the local CSB has autonomy in developing and operating the program. This encourages localities to design programs to meet the specific needs of the locality and population they serve. Regarding program eligibility, all jail diversion programs require that participants volunteer for programming and have a primary diagnosis of a serious mental illness. In fiscal year 2025, 54.62% of participants discharged from the programs were reported by CSBs to have completed the program. When an individual does not complete programming, the following are possible explanations for this outcome: non-compliance, voluntary withdrawal, no longer eligible due to legal, psychiatric or physical location, and deceased.

DBHDS currently provides funding for 21 FDP programs, with \$3,700,800 appropriated annually by the General Assembly. These programs function in partnership with not only the CSBs, but 25 local and regional jail sites. In fiscal year 2025, FDP programs enrolled a total of 1,916 participants in services. The programs are expected to follow a baseline protocol for program service delivery, outlined in *Forensic Discharge Planner Protocol for Community Services Boards & Local and Regional Jails*.²⁷ While this protocol standardizes service delivery to a degree, these programs all vary by CSB, locality, and the local and regional jails where they are housed. In fiscal year 2025, 82% of enrollments in FDP programs occurred at Intercept 3 [Jails/Courts]. Regarding program eligibility, all FDP programs require that participants volunteer for programming, have a primary diagnosis of a serious mental illness, and have less than one year remaining in jail custody at the time of enrollment. In fiscal year 2025, 52.19% of participants discharged from the programs were reported by CSBs to have completed the program. When an individual does not complete programming, the following are possible explanations for this outcome: non-compliance, voluntary withdrawal, no longer eligible due to legal, psychiatric or physical location, and deceased. Additionally, in fiscal year 2025, 66% of participants discharged from the programs were successfully linked to community behavioral health services. When an individual is not linked with community behavioral health services at

²⁷ A copy of the Forensic Discharge Planner Protocol for Community Services Boards & Local and Regional Jails is attached as Appendix C.

discharge, the following are possible explanations for this outcome: declined, did not participate, or they were not staying in the jurisdiction.²⁸

In 2023, in response to the growing number of inmates with a serious mental illness in Virginia's local and regional jails, as well as growing numbers of inpatient competency restoration orders to state hospitals, the Office of Forensic Services began efforts to move all jail diversion and FDP programs toward implementing earlier diversion (pre or post-booking which results in a reduction of time in custody) for participants.²⁹ In fiscal year 2025, there were 1,246 admissions to DBHDS hospitals for inpatient restoration, which is a 135.0% increase since fiscal year 2015 with an average length of stay at 84.5 days. Although Virginia provides outpatient and jail-based restoration, evaluators are more likely to recommend inpatient restoration for individuals, especially for defendants only charged with misdemeanor offenses.³⁰ In fiscal year 2025, 29% of all forensic admissions and 34% of restoration admissions were for defendants with only misdemeanor charges. These individuals tend to be of higher clinical acuity and are often unhoused. In addition, 27.8% of individuals admitted on a forensic status to a DBHDS facility between fiscal year 2019 and fiscal year 2023 were readmitted on a subsequent forensic status within 2 years. The effort toward implementing earlier diversion was coordinated to align with best practices and to achieve improved outcomes for individuals.³¹ Some benefits of earlier diversion include reducing time in custody, connection to appropriate levels of care and meaningful supports in the community, cost savings, reducing stigma, reducing collateral consequences, and the possible avoidance of a criminal record. Additionally, an anticipated outcome of earlier diversion may be a reduction in utilization of state hospital beds for inpatient restoration services or other forensic admissions. Office of Forensic Services staff have provided education, training, and coordination related to these strategies, particularly in localities which have shown significant numbers of inpatient orders to state hospitals. DBHDS efforts to move these programs toward earlier diversion occurred without additional funding from the General Assembly. In a questionnaire completed by jail diversion programs in 2023, the most significant barriers to earlier diversion were reported to be housing, stakeholder buy-in (attorneys, courts/judges, jails, magistrates, pre-trial/probation/parole, and other), and client agreement/engagement.

As mentioned above, there is significant variability across CSBs, localities, and local and regional jails which affects how programs are developed, operate, and sustained over time. Significant areas of variability within these three points across the system include but are not limited to: funding, resources, geography, program type and size, local support, stakeholder buy-in, community support, workforce/staffing, variable standards of care as well as available

²⁸ These percentages apply only to those individuals in the community at the time of program discharge.

²⁹ Fader-Towe, H. and Osher, F. (2015) *Improving Responses to People with Mental Illnesses at the Pretrial Stage Essential Elements*. Justice Center The Council of State Governments. https://csgjusticecenter.org/wp-content/uploads/2020/02/Improving_Responses_to_People_with_Mental_Illnesses_at_the_Pretrial_Stage_Essential_Elements.pdf

³⁰ Murrie, D., Gardner, B. and Torres, A. (October 20, 2020). *The Impact of Misdemeanor Arrests on Forensic Mental Health Services: A State-Wide Review of Virginia Competence to Stand Trial Evaluations*. Murrie-Gardner-Torres-2021-misdemeanors-and-competence-crisis-PPPL.asp-1.pdf.

³¹ Tillman, S., Wurzburg, S. and Fader-Towe, H. (November 2019). *Behavioral Health Diversion Interventions: Moving from Individual Programs to a Systems-Wide Strategy*. <https://csgjusticecenter.org/wp-content/uploads/2020/02/Diversion-concept-paper.pdf>.

levels of care, barriers to care, etc. Additionally, current programs vary widely with respect to clinical characteristics of participants, the seriousness of criminal charges targeted, the length and degree of court oversight, the treatment and social services provided, legal outcomes, and the goals of diversion overall. As diversion programs are developed at the local level and are not state mandated, these programs may be difficult to implement and sustain, struggle with the loss of key personnel or program champions, and face difficulty bridging gaps in funding as program costs increase over time.

As a result of variability and inconsistency across programs, there are challenges to determining the overall scope and effectiveness of these programs. There are key metrics applied universally to these programs as quarterly data reporting is required by all programs, but each program's scope and effectiveness must be measured independently and uniquely. DBHDS jail diversion and FDP programs are required to submit target performance goals annually at the beginning of each fiscal year. In fiscal year 2025, 61% of programs met or exceeded their target goals. The majority of programs that did not meet anticipated target performance goals failed to do so by marginal numbers. DBHDS anticipates the publication of a full annual report for jail diversion programs in January 2026.

IV. Expedited Diversion to Court Ordered Treatment (EDCOT)

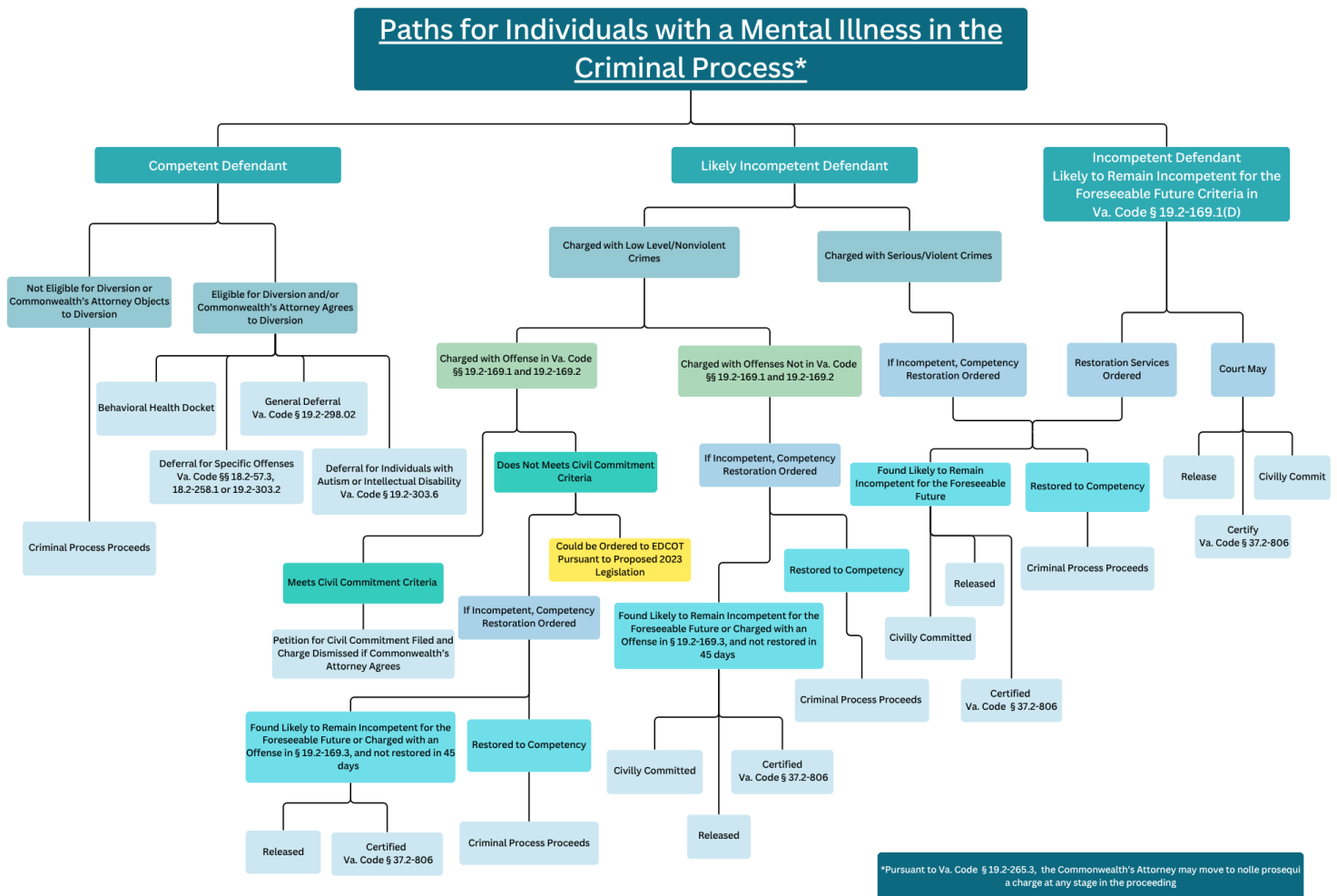
Two subcommittees of Work Group members were formed to examine the feasibility of implementing EDCOT as a concept and as described in legislation introduced in the 2023 General Assembly Session ("2023 EDCOT legislation").³² The Legal Subcommittee examined the legal and court process barriers to implementing EDCOT, while the Services Subcommittee discussed the fundamental elements of EDCOT, and resources needed for implementation.

A key component of this study was to identify the individuals an EDCOT process could divert who are not currently served by existing programs or initiatives. Work Group members identified those individuals as persons with a serious mental illness who appear to be or are incompetent to stand trial, are charged with a low level or nonviolent criminal offense, do not meet the civil commitment criteria of being dangerous to themselves or others, are not unrestorably incompetent for the foreseeable future due to an ongoing and irreversible medical condition, or have not been previously determined to be unrestorably incompetent from the preceding two years. Figure 3, below, maps the available paths to diversion for an individual with a mental illness in the criminal court process and highlights the individuals that the proposed 2023 EDCOT legislation would serve who are not served by existing statewide diversion programs.³³

³² The Subcommittees focused their review of House Bill 2339 and Senate Bill 1174 on the substitute offered in the Courts of Justice and Senate Judiciary Committees.

³³ This chart, created by the Legal Subcommittee, is attached as Appendix D.

Figure 3. Available Paths to Diversion for Individuals with a Mental Illness in the Criminal Process.



Individuals who are competent to stand trial have access to existing deferral and diversion opportunities and, under some circumstances, incompetent individuals have access to diversion opportunities such as the civil commitment process pursuant to Va. Code §§ 19.2-169.1, 19.2-169.2. Individuals who are unrestorably incompetent due to an ongoing and irreversible medical condition or have previously been found to be unrestorably incompetent in the preceding two years are eligible to be diverted out of the criminal justice system before restoration services are ordered.³⁴ Several Work Group members felt that individuals charged with more serious or violent offenses would not likely benefit from a diversion program such as EDCOT that requires the Commonwealth to consent to diversion.

³⁴ Pertinent information, such as medical history or previous history of unrestorably incompetent court findings, is not always provided or known to the evaluator at the time of the competency evaluation.

In identifying the operational, legal, funding, and other barriers to implementation of EDCOT, the Work Group focused its discussion on the individuals that an EDCOT process could divert that are not currently served by existing programs or initiatives. The barriers identified in this section pertain to those identified individuals.

Legal Barriers to Implementation

1. Due Process Concerns

The Legal Subcommittee raised concerns that EDCOT, as a concept, and as drafted in the 2023 EDCOT Legislation, would infringe upon the due process rights and protections that an individual charged with a criminal offense is afforded under the law. Due Process is a fundamental right enshrined in the Bill of Rights in the Constitution of Virginia and the 14th Amendment to the United States Constitution to protect an individual from being “deprived of his life, liberty or property without due process of law.”³⁵

The process described in the 2023 EDCOT legislation would exert a significant amount of control over an individual without an adjudication of guilt and after the unadjudicated criminal matter is dismissed with prejudice. Individuals ordered into EDCOT diversion would have their criminal charge dismissed with prejudice yet still be forced to comply with a treatment plan approved by the court, meet weekly with a diversion case manager, and potentially appear before the court every 60 days while the treatment order remained in effect. This process would compel individuals to comply with extensive requirements impacting their liberty, likely over their objection, when they lack the ability to understand the proceeding or assist their attorney in the process.

The EDCOT treatment plan can create onerous requirements for the individual and may include treatments and services that an individual expressly refuses, such as “outpatient involuntary treatment with antipsychotic medication pursuant to Chapter 11 (§ 37.2-11 et seq.).”³⁶ The 2023 EDCOT legislation required the treatment plan to establish the type, frequency, duration, and conditions for an individual to remain in EDCOT, and determine which providers will assist the individual with specifically designated services.³⁷ While the treatment plan is required to be developed with involvement, participation and consent of the individual, an individual subject to an EDCOT order may be required to participate in a significant number of services that they may not be agreeable to if they lack capacity or desire to consent to treatment and have significant mental health needs.

Additionally, under the 2023 EDCOT Legislation, the “duration of expedited diversion to court-ordered treatment shall be determined by the court based on recommendations of the diversion case manager, community services board, and attorney for the Commonwealth but shall not exceed 180 days unless extenuating circumstances exist.”³⁸ This allows a court to exert control over an individual by requiring them to adhere to a treatment plan and repeatedly return

³⁵ Va, Const. art. I § 11 (amended 2012).

³⁶ H.B. 2339, 2023 Leg. Reg. Sess. (Va. 2023); S.B. 1174, 2023 Leg. Reg. Sess. (Va. 2023).

³⁷ *Id.*

³⁸ *Id.*

to court for further proceedings for up to six months after the criminal charges that provided the basis for the court’s jurisdiction over the person are dismissed, if the providers’ recommendations indicate that such amount of time is warranted, and the court finds it appropriate.

The EDCOT process raises questions about whether criminal protections would apply in the EDCOT evaluation and diversion eligibility hearings, and if so, the Legal Subcommittee raised concerns that there may be inadequate due process protections for those hearings. Individuals who are incompetent to stand trial have a fundamental right not to be tried, convicted, or sentenced for a criminal act; essential rights to a fair trial depend on an individual’s competence.³⁹ As the 2023 EDCOT legislation was drafted, the criminal case remains pending until the court finds that an individual is eligible for EDCOT diversion and orders the criminal case dismissed with prejudice. Not only does the criminal case remain pending while EDCOT diversion hearings are occurring, but both the EDCOT concept and legislation required the court to make a finding regarding the alleged criminal behavior as a requirement for eligibility.

Under the 2023 EDCOT legislation, to determine whether an individual should be evaluated for diversion eligibility, the court must find that there is probable cause to believe “that the defendant is charged with an eligible offense and has a mental illness, and his charged conduct is associated with the mental illness.”⁴⁰ Additionally, in the diversion eligibility hearing EDCOT must be ordered if “the court finds by clear and convincing evidence that (a) the defendant has a mental illness, (b) the defendant engaged in the alleged conduct, (c) the criminal conduct was caused by or had a direct and substantial relationship to the defendant’s mental illness, (d) there is a significant risk of future offending in the absence of treatment, and (e) there is a reasonable likelihood that community-based services will reduce the defendant’s risk of psychiatric deterioration and future offending.”⁴¹ These two hearings require that the court make findings relating to the allegations of the criminal offense. Although the diversion eligibility hearing is designated as a civil hearing, the court is required to make a finding as to whether the individual engaged in the criminal conduct, which the Legal Subcommittee believed could equate to trying an incompetent defendant for a criminal act.

An individual charged with a crime is entitled to a fair trial, including effective assistance of counsel. Whether an individual has been provided effective assistance of counsel is dependent on the person’s competence to stand trial.⁴² As noted above, both the EDCOT concept and 2023 EDCOT legislation tie an individual’s eligibility to criminal conduct. Although both the EDCOT concept and legislation specify that the relevant hearings are civil in nature, members of the Legal Subcommittee believed that the quasi-criminal nature of the proceedings could invoke an individual’s right to effective assistance of counsel. In essence, for the individuals an EDCOT process is designed to serve, the EDCOT process would eliminate such individual’s right to a fair trial as to the criminal conduct, as the individual would be unable to assist their attorney in the defense of an allegation the individual committed a criminal act. The concern that EDCOT infringes on an individual’s criminal due process right is not necessarily alleviated by merely labeling a hearing as civil.

³⁹ *Cooper v. Okla.*, 517 U.S. 348, 354 (1996) (citing *Drope v. Missouri*, 420 U.S. 162, 171-172 (1992)).

⁴⁰ H.B. 2339, 2023 Leg. Reg. Sess. (Va. 2023); S.B. 1174, 2023 Leg. Reg. Sess. (Va. 2023).

⁴¹ *Id.*

⁴² *Cooper v. Okla.*, 517 U.S. 348, 354 (1996) (citing *Drope v. Missouri*, 420 U.S. 162, 171-172 (1992)).

In addition, the EDCOT evaluation and diversion eligibility hearings would allow defendants to put on evidence in their defense, even though the defendant may be incompetent and, therefore, unlikely to be capable of deciding whether to testify and unable to assist their attorney. Because an incompetent individual who objects to treatment may be eligible for EDCOT, the EDCOT process could infringe on such individual's due process right to testify on one's own behalf or to remain silent, or to call the witnesses in their favor.

2. Ethical Concerns for Attorneys

Defense attorneys have an ethical duty to their client, which includes ensuring that a client's due process rights are not violated. As previously mentioned, the Legal Subcommittee expressed concerns that the EDCOT process outlined in the legislation proposed during the 2023 General Assembly Session impedes on an individual's due process protections. Thus, defense attorneys felt that they would be obligated to request competency evaluations and restoration services to protect an individual's due process rights.

A finding of incompetency can raise additional ethical and legal challenges. If an individual is found to be incompetent, the types of proceedings that can still take place are largely constrained to legal arguments challenging the sufficiency of the charge.⁴³ The EDCOT evaluation and diversion eligibility hearings involve far more than determining the sufficiency of the charge and occur before the charges are dismissed. In the EDCOT evaluation hearing, courts would be considering evidence that the individual has a mental illness, and that the charged conduct is associated with the mental illness. This creates a challenge for defense attorneys as the defense may require the personal participation of the defendant. Under the 2023 EDCOT legislation, the defense attorney would be placed in the untenable situation of defending against allegations of criminal conduct without their client understanding the proceeding or being able to assist.

A defendant's inability to make decisions about the objectives of the representation does not allow the defense attorney to make those decisions. Defense attorneys cannot adequately counsel an incompetent defendant about the requirements and consequences of EDCOT, to the extent that the defendant can meaningfully decide whether that is the defendant's objective. As indicated by criminal defense attorney stakeholders, defense attorneys are required to represent the defendants' expressed interest rather than their best interest, but incompetent defendants cannot participate in their own defense. The Legal Subcommittee identified this as a significant barrier, because it places a defense attorney in a position of having to represent an incompetent client in hearings that will result in findings regarding the charged conduct, without adequate knowledge of the individual's objective. For example, a competent individual may want to mitigate incarceration risks, whereas another individual may want to contest the case until the judge or jury determines guilt or innocence. The EDCOT evaluation process places defense attorneys in an ethical and legal bind.

Another area of concern for the Legal Subcommittee was the role of a civil attorney in the diversion eligibility hearings. Because defense attorneys are precluded from participating in the EDCOT diversion eligibility hearings, civil attorneys would be operating in a criminal

⁴³ See Va. Code § 19.2-169.4.

defense capacity when litigating any factual finding that the defendant engaged in the alleged conduct. This is because the criminal case is still pending during this portion of the representation. Civil commitment attorneys may be practicing outside of their practice area and ill-equipped to adequately protect the defendant's constitutional rights without undertaking additional training. Any requirement for civil commitment attorneys to take on these additional responsibilities may result in fewer civil commitment attorneys being available and willing to accept appointments.

The EDCOT process also raises questions about the parameters of a Commonwealth's attorney's ethical obligations under *Brady*⁴⁴ and its progeny in light of the quasi-criminal proceeding. As previously noted, under the 2023 EDCOT legislation, defense attorneys are unable to participate in the civil EDCOT diversion hearing. There is a question as to whether Commonwealth's attorneys have obligations to provide *Brady* disclosures to both the criminal and civil attorney or solely provide the disclosure to the attorney representing the individual in the criminal matter. If only disclosure to the criminal defense attorney is required, and such disclosure includes information that casts doubt on whether the individual committed the criminal act, the attorney representing the individual in the civil hearing would not be privy to such information and may not be able to effectively represent an individual who objects to an EDCOT process.

3. Lack of Authority for Enforcement and Lack of Incentives to Comply

The EDCOT process, in concept and as drafted in the 2023 EDCOT legislation, limits the authority to enforce the court-ordered treatment plan. It specifically limits the consequences for a noncompliant defendant by dismissing the criminal charges at the outset which removes the court's ability to use criminal sanctions. It also limits civil sanctions available to the court. The Legal Subcommittee concluded that the proposed process lacks sufficient incentives for an individual to comply with the treatment order.

The EDCOT concept, as delineated by Steven Hoge and Richard Bonnie, would be available if a Commonwealth's attorney files a petition requesting the individual be civilly committed under the EDCOT requirements. If such petition is granted and the individual is committed under the EDCOT criteria, it was anticipated that the criminal charges would be dismissed. The role of the judge or special justice in the EDCOT concept was simply to approve the treatment plan, monitor implementation of the mandated services, and assure compliance. However, as detailed by the authors, such consequences for noncompliance would exclude criminal sanctions or punitive restraint.⁴⁵

The 2023 EDCOT legislation similarly restricted a court's authority to enforce the EDCOT order, although the legislation created a different process to obtaining an EDCOT order as noted earlier. For an individual who is not complying with EDCOT, a court could direct the person to fully adhere, make modifications to the plan that are acceptable to the CSB or

⁴⁴ *Brady v. Maryland*, 373 U.S. 83 (1963)

⁴⁵ Hoge, S. and Bonnie, R. (2021, November 4). *Expedited Diversion of Criminal Defendants to Court-Ordered Treatment*. The Journal of the American Academy of Psychiatry and the Law. <https://jaapl.org/content/jaapl/early/2021/10/05/JAAPL.210076-21.full.pdf>

treatment provider, or impose consequences such as reflective exercises, increased frequency of court appearances, or increased frequencies of reporting to a diversion case manager. The proposed legislation specifically stated that the consequences for noncompliance could not include contempt of court or criminal sanctions, which bars incarceration for any period of time.⁴⁶

The Legal Subcommittee felt that limiting the court's authority to enforce the EDCOT order disincentivizes individuals to comply with treatment, and consequently, for Commonwealth's attorneys to agree to the EDCOT process. Since the 2023 EDCOT legislation required the dismissal of the criminal case that brought the individual before the court, without the ability to bring the charge back if an individual is noncompliant, the enforcement mechanisms inherent in a criminal matter would not be available to the parties. Thus, as articulated by the Legal Subcommittee, the only remaining incentive for compliance would be the individual's desire to address the underlying mental illness. However, the 2023 EDCOT legislation specifically allowed the court to order individuals into EDCOT who objected to treatment.

Stakeholders also noted that limiting the court's enforcement authority creates the potential that continual noncompliance with the treatment plan would result in a rescission of the EDCOT order rather than an escalation in sanctions. With limited consequences, and after trying the reflective exercises to no avail, the court only has the option of rescinding the treatment order.

The Legal Subcommittee noted that any changes in the court's authority to enforce EDCOT with criminal sanctions would increase the due process concerns and ethical concerns for defense attorneys identified above. In this instance, addressing the concerns of one group of stakeholders would create additional concerns for a different group of stakeholders.

4. Collateral Consequences for Findings Made in EDCOT Diversion Eligibility

The EDCOT concept and 2023 EDCOT legislation included an eligibility requirement that the court make a finding, by clear and convincing evidence, that the defendant engaged in the criminal conduct. In addition to the due process concerns previously noted, the Legal Subcommittee also noted that such a finding could result in collateral consequences for the individual in other civil matters.

Operational Barriers

1. Workforce Shortage

EDCOT would create several complex new court procedures for a limited number of individuals. To effectuate an EDCOT process, each request for diversion requires the involvement of mental health professionals, criminal defense attorneys, prosecuting attorneys, civil attorneys, and judges. As noted by both the Legal and Services subcommittees, the workforce necessary for an EDCOT process is facing a shortage. The workforce availability is a

⁴⁶ H.B. 2339, 2023 Leg. Reg. Sess. (Va. 2023).

major operational barrier to EDCOT, and if an EDCOT process were created, it would divert the current limited workforce to serve a small group of eligible individuals.

The Services Subcommittee discussed the staffing needs to implement an EDCOT process, and concluded that any EDCOT process should include requirements that individuals who perform evaluations and draft treatment plans be credentialed as a qualified mental health provider, a licensed mental health provider, or a licensed or license-eligible individual trained to be a prescriber. It should be noted, however, if some of these recommended credentials are mandated, the local CSB may be unable to perform EDCOT evaluations and subsequent treatment.

The Services Subcommittee also questioned whether Virginia currently has sufficient community supports and programming in place to effectively implement an EDCOT process. In some localities that have community supports and programs, the necessary workforce may need to increase by one or more individuals, whereas locations without the necessary community supports and programs would need to attract a new workforce entirely. The Services Subcommittee recommended that a state-wide survey of CSBs be conducted before implementing EDCOT to determine the provider and implementation needs for each jurisdiction. Additionally, the Services Subcommittee indicated that implementing EDCOT in a few areas of Virginia, such as a rural and urban area, would illuminate the full impact of EDCOT and identify the necessary services and workforce needed for statewide implementation. The stakeholders noted that attracting individuals into the mental health workforce has already been a challenge in some localities, and increasing the number of programs and necessary staff may exacerbate this issue.

The 2023 EDCOT legislation required individuals subject to a hearing on EDCOT be appointed an attorney with experience in civil commitment practice, in addition to the attorney appointed on the pending criminal matter. As noted in the legislation, the criminal defense attorney is prohibited from participating in the civil proceeding. Thus, every case in which EDCOT is contemplated requires the involvement of two court-appointed attorneys. As noted by the Legal Subcommittee, many jurisdictions have a very limited pool of available attorneys.⁴⁷ The problems associated with a limited pool of available attorneys may be further exacerbated for jurisdictions that have attorneys on the court-appointed list who also have experience in civil commitment hearings. In essence, a court in such circumstance may not have enough attorneys to appoint for these proceedings.

2. Workload Impacts

The Legal and Services Subcommittees concluded that the EDCOT process would increase the workload for any necessary professionals. Work Group members expressed concerns that current workforce shortages might be further exacerbated with the additional workload that the EDCOT process creates. As envisioned and as proposed, EDCOT creates new evaluations,

⁴⁷ The compensation caps for court-appointed counsel were increased, effective January 1, 2025 in an attempt to increase the number of attorneys willing to serve in this capacity. Since the new caps have been in effect for less than a full year, the full impact of these increases on the numbers of court-appointed counsel is not yet known.

treatment plans, and oversight procedures, requires additional court hearings and appearances, and also adds additional responsibilities for clerks of court.

The Legal Subcommittee expressed concerns that an EDCOT process would increase the workload for public defenders and court-appointed attorneys, who are already experiencing an increased workload with dwindling numbers. EDCOT requires additional court hearings and increases the responsibilities of court-appointed attorneys. As seen in the 2023 EDCOT legislation, court-appointed counsel or public defenders would represent an individual at the hearing to determine if an EDCOT evaluation should be performed. At this hearing, a court may order an evaluation be performed if they find “that there is probable cause to believe the defendant is charged with an eligible offense and has a mental illness, and his charged conduct is associated with the mental illness.”⁴⁸ Attorneys who represent clients objecting to the diversion evaluation would be required to prepare for a “mini-trial” on the merits of the criminal case.

Additionally, attorneys with civil commitment experience representing individuals in the EDCOT hearings would be required to attend hearings while the EDCOT order is in effect. Some of the additional hearings that attorneys may be required to attend are status hearings, hearings on contested issues, enforcement or recission hearings and any additional hearings required by the court for nonadherence to the treatment plan. Under the 2023 EDCOT legislation, civil commitment attorneys would be paid for each hearing, which will increase the amounts paid to civil commitment attorneys from the involuntary mental commitment fund.

The Services Subcommittee also highlighted that the workload for CSB staff and other program providers would increase if an EDCOT process were adopted. The Services Subcommittee noted that the potential impact to the workload is unclear and could vary across the state depending on the current staffing numbers, programming, and services in place that could be used by individuals ordered to EDCOT.

Funding Barriers

The Services Subcommittee identified that the lack of funds for client assistance, treatment, interventions, and staffing would be a barrier to implementation of EDCOT. To address this barrier, the Services Subcommittee identified the resources that would be required if EDCOT were adopted. These resources for staffing needs include funding for treatment providers, diversion case managers, peer services, DBHDS staff to train localities on EDCOT, and a DBHDS staff member designated as an EDCOT statewide coordinator. The Services Subcommittee also concluded that funding for cell phones, housing, transportation services, and specialized person-centered case management and treatment services for individuals subject to an EDCOT order would be necessary for implementation of EDCOT.

The Services Subcommittee concluded that there would be minimal cost savings with implementing EDCOT if the eligible offenses remain consistent with the 2023 EDCOT legislation and recommended the list of charges be expanded for a broader impact. They noted that approximately 7.74% of individuals currently receiving restoration services in a state facility could be diverted under EDCOT. The Services Subcommittee also concluded that it was likely

⁴⁸ H.B. 2339, 2023 Leg. Reg. Sess. (Va. 2023); S.B. 1174, 2023 Leg. Reg. Sess. (Va. 2023).

each CSB would need to hire at least one diversion or case manager for the purposes of assessing eligibility for EDCOT and monitoring compliance. The Services Subcommittee calculated the funding necessary for one additional CSB worker in each office to be in excess of \$2 million, less benefits. This number would increase if the EDCOT process required licensed staff to conduct the treatment plans.

In determining the funding barriers, the Services Subcommittee noted that Medicaid recipients may need less funding than individuals not currently served by Medicaid, as Medicaid provides services such as transportation. However, the Services Subcommittee was unable to determine the amount per individual of additional funding necessary to provide the resources enumerated above for individuals with and without Medicaid funding.

The Legal Subcommittee did not reach the question of whether there were any funding barriers, as the subcommittee concluded there were insurmountable legal barriers to implementing an EDCOT process.

V. Options Introduced as Alternatives to EDCOT

After hearing and discussing the findings and recommendations of the Legal and Services Subcommittees regarding EDCOT, Work Group members were surveyed to ask if they wanted to continue discussing the feasibility of EDCOT. Sixteen of the twenty-one members who responded to the survey indicated a preference to stop discussing the feasibility of EDCOT given the insurmountable barriers identified. Although the majority of Work Group members did not want to continue the conversation around EDCOT, Work Group members expressed interest in identifying an alternative option for individuals who were incompetent to stand trial, but did not meet the civil commitment criteria.

Work Group members discussed several options identified by stakeholders as potential alternatives to an EDCOT process. Fourteen of the twenty-nine Work Group members participated in a poll to determine what potential alternatives to EDCOT should be included in this report. Nine out of fourteen participants supported a recommendation that the Behavioral Health Commission consider legislation that would amend Va. Code § 19.2-169.2 to allow courts the discretion to dismiss low-level misdemeanor charges when an individual is found incompetent to stand trial rather than ordering restoration services. Some stakeholders articulated that this option could provide a path out of the criminal justice system for individuals who cycle through the competency and restoration process. Other stakeholders questioned if this option would be utilized by the court, as it does not provide any services to help an individual address their mental health needs. If an individual is restored to competency, as noted above, mental health treatment can be ordered as part of a deferral or sentence.

Eight out of the fourteen participants voted to recommend that an alternative similar to an Assisted Outpatient Treatment (AOT) process identified in the National Center for State Courts Report be studied by the BHC for feasibility and to establish other details such as the standard for qualification and the target population. This alternative would create a process for individuals charged with a criminal offense and found incompetent to stand trial based on the existing court procedure in Va. Code §§ 19.2-169.1 and 19.2-169.2, to mandate treatment for individuals who

meet a standard that is lower than the current civil commitment criteria. Stakeholders noted that this alternative could apply more broadly than just to those individuals who are involved in the criminal justice system and would be a preventative model to avoid hospitalization due to mental health needs. Work Group members in support of this alternative highlighted other states that have this preventative model. Mandatory Outpatient Treatment (MOT) that currently exists in Virginia was discussed, and stakeholders indicated that, though not available in all localities, MOT has grown.⁴⁹ DBHDS assigned MOT to the Crisis Division to provide CSBs with technical support and state oversight in hopes it encourages greater use of MOT. Work Group members that did not support this alternative highlighted the constitutional concern for civilly committing an individual under a lower standard than dangerousness to oneself or others. While such a standard has been upheld by courts in some states that have implemented it, the constitutionality of these standards has not been addressed by the Supreme Court of the United States or any Virginia court. An organization representing individuals with lived experience indicated a concern that this option risks undermining core recovery principles, particularly autonomy, empowerment, and person-centered care.

VI. Recommendations

The Work Group recognized and agreed that diversion programs designed to assist individuals in obtaining mental health treatment are beneficial. However, the Work Group concluded that it is not feasible to implement an EDCOT process for diversion of the population identified as not being served by existing statewide diversion programs given the insurmountable legal barriers. The Work Group also agreed that early diversion is preferable and avoids the barriers to implementation of EDCOT.

Instead of creating an EDCOT process, the majority of Work Group members expressed interest in recommending that Virginia continue to fund and support programs that divert individuals prior to being charged with a criminal offense. Of the 14 Work Group members that participated in the discussion of alternative diversion options to EDCOT, the majority supported an amendment to Va. Code § 19.2-169.2 allowing the court discretion not to order restoration services if an individual is found incompetent to stand trial. In addition, they recommended that the BHC consider a study of a process similar to an Assisted Outpatient Treatment Program identified in NCSC's report that would target persons unable to agree to jail diversion programs due to the severity of their illness. However, the extent to which such a process would divert individuals not currently served by existing statewide jail diversion programs or initiatives is unknown.

⁴⁹ MOT in Virginia is similar to the AOT processes in other states that create a less restrictive alternative to involuntary hospitalization or as a stepdown process upon release from the hospital. MOT in Virginia requires a finding that the individual meets the civil commitment criteria. AOT in some other states requires an individual meet different criteria than the state's civil commitment criteria.

Appendix A

Study of Jail Diversion/Expedited Diversion to Court-Ordered Treatment (EDCOT) Workgroup Members

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Appendix B

Mental Health Diversion

National Scan

FINAL REPORT | 9.26.2025

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Introduction

In 2023, the Virginia General Assembly considered legislation that would have created an expedited diversion to court-ordered treatment (EDCOT) process targeting individuals diagnosed with a mental health disorder arrested for low-level, non-violent crimes who would otherwise be certified as incompetent to stand trial. This statute would allow for judges to order mental health treatment over objection of the defendant while dismissing the criminal charges.

As directed in Virginia's 2024-2025 Biennium State Budget Appropriation Act, the Office of the Executive Secretary of the Supreme Court (OES) contracted with the National Center for State Courts to conduct an inventory of statewide Behavioral Health Diversion Programs that have been in operation for more than three years. This report is a deliverable of that contract and includes a summary of Virginia's Expedited Diversion to Court-Ordered Treatment (EDCOT), details of statewide Behavioral Health Diversion Programs, and states currently providing Assisted Outpatient Treatment as directed by statute.

Nearly every state has statutes pertaining to specialized treatment and oversight of individuals diagnosed with mental illness and involved in the criminal justice system. While statutory language usually includes implementation and program design specifics, states often give authority to local jurisdictions to determine if a program is needed. Therefore, there are few statewide jail diversion and/or statewide mental health diversion programs. While EDCOT is not categorized as Assisted Outpatient Treatment (AOT) in statute, many of the facets of EDCOT are closely aligned with AOT. AOT is the practice of providing outpatient treatment under civil court order to individuals with severe mental illness which can be preempted with or without a criminal charge (which is later dismissed), whereas jail diversion involves programs designed to keep low-level offenders out of the jail system. This report also includes states that have executed AOT as a statewide initiative.

Expedited Diversion to Court-Ordered Treatment (EDCOT)

The EDCOT eligibility requirement includes that (a) the defendant has a mental illness, (b) the defendant engaged in the alleged conduct, (c) the criminal conduct was caused by or had a direct and substantial relationship to the defendant's mental illness, (d) there is a significant risk of future offending in the absence of treatment, and (e) there is a reasonable likelihood that community-based services will reduce the defendant's risk of psychiatric deterioration and future offending. Civil counsel is to be appointed to represent the defendant in the hearing to determine eligibility. Defense counsel is prohibited from participating in the eligibility hearing but does not withdraw from representation unless treatment is ordered and defense counsel confirms that the defendant is not objecting to the EDCOT order.

Under EDCOT, the duration of treatment shall not exceed 180 days unless extenuating circumstances exist, in which case the duration shall not exceed the shorter of one year or the maximum sentence that would be available for the charge. Treatment is monitored by the local Community Service Board (CSB), who reports to the court every two weeks. Status hearings are required every 60 days. Nonadherence to the treatment plan, which may include rearrest, is reported to the court, and the CSB may petition the court for a review hearing. Upon review, the court may enforce, modify, or rescind the EDCOT order or order a re-evaluation.

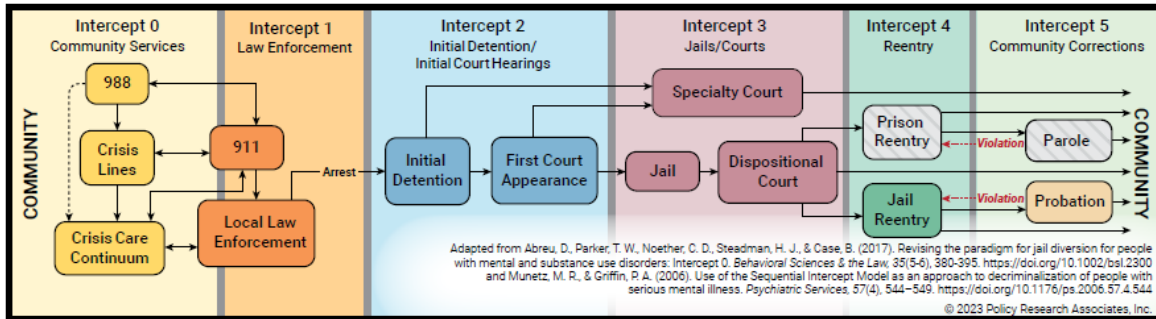
Statewide Jail Diversion Programs

NCSC conducted a nationwide scan of statewide mental health diversion statutes and/or programs and found three states that have enacted and implemented statewide mental health jail diversion programs via state statute (i.e., Connecticut, New Jersey, and Vermont). The intention was to focus on states that implemented mental health diversion programs at least three years ago; however, only one state (i.e., Connecticut) has enacted statutes for at least three years. All three state programs are in Intercept 2, as criminal charges are required to participate in the jail diversion program.

A noteworthy difference between the three states who have enacted statewide jail diversion programs and the proposed EDCOT statute is that none of the three states dismiss the charges at the beginning of the process. All three states keep the cases open until successful completion of the program and then dismiss the charges and some expunge the record. Additionally, all three states require an individual to consent to the evaluation and agree to participate in the program.

FIGURE 1: SEQUENTIAL INTERCEPT MODEL¹

The Sequential Intercept Model



Key Issues at Each Intercept

Intercept 0

Mobile crisis outreach teams and co-responders. Behavioral health practitioners who can respond to people experiencing a mental or substance use crisis or co-respond to a law enforcement encounter.

Emergency department (ED) diversion. ED diversion can consist of a triage service, embedded mobile crisis, or a peer specialist who provides support to people in crisis.

Law enforcement-friendly crisis services. Law enforcement officers can bring people in crisis to locations other than jail or the ED, such as stabilization units, walk-in services, or respite centers.

Dispatcher training. Dispatchers should coordinate with 988 and understand triage protocols.

Intercept 1

Dispatcher training. Dispatchers can identify mental or substance use crisis situations and pass that information along so that Crisis Intervention Team officers can respond to the call. They should coordinate with 988 and understand triage protocols.

Specialized law enforcement responses. Law enforcement officers can learn how to interact with people experiencing a crisis in ways that promote engagement in treatment and build community partnerships.

Intervening with people who have frequent behavioral health crises and/or jail contact and providing follow-up after the crisis. Law enforcement officers, crisis services, and hospitals can provide specialized responses to people who frequently use 911 and ED services.

Intercept 2

Screening for mental and substance use disorders. Brief screens can be administered universally by non-clinical staff at jail booking, holding cells, court lock ups, and prior to the first court appearance.

Data-matching initiatives between the jail and community-based behavioral health providers. Jail-led efforts to share information with community-based providers may be effective due to more restrictive rules related to information sharing for behavioral health providers.

Pretrial supervision and diversion services to reduce episodes of incarceration. Risk-based pre-trial services can reduce incarceration of people with low risk of criminal behavior or failure to appear in court.

Intercept 3

Treatment courts for high-risk/high-need individuals. Treatment courts or specialized dockets can be developed, examples of which include adult drug courts, mental health courts, and Veterans treatment courts.

Jail-based programming and health care services. Jail health care providers are constitutionally required to provide behavioral health and medical services to persons needing treatment.

Collaboration with the Veterans Justice Outreach (VJO) specialist from the Veterans Health Administration (VHA). VJO specialists can support Veterans by connecting them with VHA-provided services and other benefits to support recovery.

Intercept 4

Transition planning by the jail or in-reach providers. Transition planning improves reentry outcomes by organizing services around a person's needs in advance of release.

Medication and prescription access upon release from jail or prison. People should be provided with a minimum of 30 days' medication at release and have prescriptions in hand upon release.

Warm hand-offs from corrections to providers increase engagement in services. Case managers and peer support specialists can play an important role in supporting individuals in their recovery and community reintegration. They can assist with navigating the myriad demands placed on an individual, including transportation and scheduling, increasing positive outcomes.

Intercept 5

Specialized community supervision for people with mental and substance use disorders. Officers trained on the complexities of mental and substance use disorders can support connection to community-based services and supports.

Medication-assisted treatment (MAT) for people with substance use disorders. MAT approaches can reduce relapse episodes and overdoses among individuals returning from detention.

Access to recovery supports, benefits, housing, and competitive employment. Housing and employment are as important to criminal legal system-involved individuals as access to treatment services. Removing barriers to access is critical.

¹ <https://www.prainc.com/sim/>

States and Statutes

The tables below outline the specific details of each statute-driven statewide program. The state statutes vary widely in their contents. All three states require the consent of the individual to be assessed for eligibility. Due to the requirement of the filing of criminal charges prior to evaluation, as well as dismissing charges upon completion, these programs align closely with pretrial programs and behavioral health dockets that occur in Intercept 2 of the Sequential Intercept Model. Referrals into the diversion programs can be completed by jail staff, defendant's attorney, prosecutors, judges and other judicial staff.

Table 1: States and Statute Links

STATE	STATUTE	ENACTED
CONNECTICUT	Sec. 17a-486	2000
NEW JERSEY	2C § 43-34	2023
VERMONT	3 V.S.A. § 164	2024

Eligibility/Target Population

State statutes describe the eligibility requirements or the target population for the statewide diversion program to clarify the population intended to benefit from the program. All three states require the individual to have a mental health disorder diagnosis that requires treatment and resources. Connecticut specifically indicates that the mental illness cannot be primarily due to substance use, while the other two states do not include that language in the statute.

Table 2: Eligibility/Target Population

STATE	ELIGIBILITY/TARGET POPULATION
CONNECTICUT	1) have a diagnosis of a psychiatric and/or a substance use disorder; 2) without treatment, psychiatric symptoms are severe enough to significantly impair function in key areas or significantly interfere with essential aspects of adult role performance; 3) would be at risk of psychiatric hospitalization if not participating in treatment; and, 4) role disturbances and psychiatric symptoms are not due primarily to substance use.
NEW JERSEY	1) person who is mentally competent, 2) allegedly committed an eligible offense, and 3) has been diagnosed with a mental disorder, either previously or through a mental health evaluation conducted through the program, and there is a nexus between the person's mental disorder and the commission of the alleged crime as determined by a licensed mental health professional.

VERMONT	Pre-charge or post-charge for persons charged with a first or second misdemeanor or a first nonviolent felony, or other offenses as the prosecutor deems appropriate and have mental health treatment needs.
---------	--

Exclusions

Two of the three states specify offenses that exclude individuals from entry into the diversion program. Excluded offenses were violent, serious offenses that could compromise public safety. Vermont statutes do not specify exclusionary offenses but instead define allowable offenses in the eligibility criteria (e.g., first or second misdemeanor or a first nonviolent felony).

Table 3: Exclusions

STATE	EXCLUSIONS
CONNECTICUT	Offenses: any person charged with a class A felony, class B felony, any person charged with a crime or motor vehicle violation that causes the death of another person. Person has previously twice participated in the supervised diversionary program.
NEW JERSEY	A crime involving violence or the threat of violence, a victim sustaining bodily injury, the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon or threatens to inflict bodily injury. A crime of the first degree, sexual offenses or a presumptively ineligible offense.
VERMONT	N/A

Time Limitations

Of the three states with mental health diversion statutes, only New Jersey specifies a time limit for the duration of the diversion programs. Many of the other states that do not have statutes supporting statewide diversion programs did limit the duration of time a person could be on diversion programs.

Table 4: Time Limits

STATE	TIME LIMITS
CONNECTICUT	N/A
NEW JERSEY	Not to exceed 2 years unless the prosecutor requests extension based on treatment needs and progress.
VERMONT	N/A

Outcomes

All three states include dismissal of charges as a benefit of successfully completing mental health diversion. Two states specify that records will be erased or deleted.

Table 5: Outcomes

STATE	OUTCOMES
CONNECTICUT	Satisfactory completion: person may apply for dismissal of the charges or court may also dismiss the charges upon successful completion and all records shall be erased.
NEW JERSEY	Successful completion: dismissal of charges and is not deemed a conviction for 1) purposes of disqualifications of disabilities but shall be reported to the State Bureau of Identification for purposes of determining future eligibility or exclusion from other diversion programs and 2) a conviction for the purpose of determining whether a second or subsequent offense has occurred under any law.
VERMONT	Successful completion: automatic deletion of records.

Statewide Assisted Outpatient Treatment (AOT)

AOT is the practice of providing outpatient treatment under civil court order to individuals with severe mental illness who have demonstrated difficulty engaging with treatment on a voluntary basis². The essential elements of an AOT program include:

- identification of individuals who meet criteria,
- gathering of information and application to the court by the mental health system,
- safeguarding due process rights,
- clear lines of communication between the court and treatment team,
- providing evidence-based treatment services,
- continuous evaluation of the treatment plan and adjust as needed,
- use of specific protocols should the participant disengage from treatment,
- evaluation of the participant at the end of the commitment period to either seek renewal of commitment or transition to voluntary care,

² <https://www.tac.org/wp-content/uploads/2023/12/White-Paper.pdf>

- ensuring connection to treatment services upon transitioning out of the program.

A recent study prepared for the Office of the Assistant Secretary for Planning and Evaluation at the U.S. Department of Health & Human Services³ found that AOT is associated with “improvements in treatment adherence, clinical functioning, and social functioning outcomes from baseline to 6-month and 12-month follow-ups. During and after AOT, clients increased appointment and medication adherence . . . as well as significant improvements in client symptomology, perceived mental health, and life satisfaction.” Ultimately, the study concluded that individuals who remained in AOT for at least six months had better outcomes than those who were involved for shorter periods of time, that AOT was effective for those with criminal justice-involvement, that psychiatric inpatient hospitalization decreased after mandated AOT, and AOT provides cost savings by reductions in psychiatric department and inpatient visits.

At the time of this report, 47 states and the District of Columbia have statutory authority for AOT, with variation in implementation. The Commonwealth of Virginia is included in the 47 states with statutes that statutorily allow for mandated AOT, which is referred to as Mandatory Outpatient Treatment (MOT) in Virginia. This section highlights statewide efforts to implement AOT within three states; it should be noted that criminal charges are not a requirement in any of the three states described below.

Texas

Texas implemented AOT statewide, as defined under Texas Health & Safety Code § 574.0345(a), § 574.0355(a) & (b), and § 574.061. There are three types of AOT orders, including temporary AOT, extended AOT, and AOT by modification. Temporary AOT is for up to 90 days, extended AOT is for up to one year, and AOT by modification involves modifying an inpatient commitment order to an AOT order. AOT in Texas is a probate court commitment, not requiring criminal behavior as an impetus to court action and can be ordered over defendant objection. The standard of dangerousness in Texas includes the individual having the inability to participate in outpatient treatment services effectively and voluntarily demonstrated by any of the proposed individual’s actions occurring within the two-year period which immediately proceeds the hearing or specific

³ <https://aspe.hhs.gov/sites/default/files/documents/80d688432865e71adcb9ca865081cf42/aot-grant-program-smi-outcome-report.pdf>

characteristics of the proposed patient's clinical condition that make impossible a rational and informed decision whether to submit to voluntary outpatient treatment. The court ultimately finds that, if not treated, the individual will continue to suffer severe and abnormal mental, emotional, or physical distress and experience deterioration of the ability to function independently to the extent that the proposed patient will be unable to live safely in the community without court ordered outpatient services.

The process in Texas starts with an AOT referral, which may or may not be predicated by a criminal charge, followed by an assessment. If the assessment finds the individual appropriate for the AOT program, the county attorney submits the petition to the court and makes a recommendation for treatment from the Local Mental Health Authority. The court schedules a hearing date within 30 days of application and appoints counsel if needed. If an extended AOT is requested, the hearing can be heard by a jury or judge and Medical Examiners must be present. If temporary AOT is requested, the hearing is heard by a judge, and Medical Examiners do not have to be present if the respondent stipulates. The court is then responsible for oversight while the court order is in effect. An individual's noncompliance during the AOT term is not grounds for punishment by contempt of court (Tex. Health & Safety Code § 574.037(c-4)). Instead, the case is scheduled for a status conference to review the treatment plan or a modification hearing where a temporary order of detention may be issued.

Should the defendant be charged with an offense that does not involve an act, attempt, or threat of serious bodily injury to another person, the criminal trial court may release the defendant on bail while charges against the defendant remain pending and enter an order transferring the defendant to the appropriate court for court-ordered outpatient mental health services (Article 16.22(c)(5)) The state of Texas does allow the option for the state to dismiss the criminal charges and divert the individual to the appropriate court for AOT proceedings, targeting non-violent, misdemeanor offenses and defendants who are deemed low criminogenic risk as assessed on a validated risk assessment tool.

New Mexico

In 2021, New Mexico passed the "Assisted Outpatient Treatment Act" (§43-1B-1 to § 43-1B-14) which is defined as "categories of outpatient services ordered by a district

court, including case management services, comprehensive community support services, intensive outpatient services, case coordination or assertive community treatment team services, prescribed to treat a patient's mental disorder and to assist a patient in living and functioning in the community or to attempt to prevent a relapse or deterioration” The individual must be 18 years or older, has a primary diagnosis or a mental disorder, has demonstrated a history of lack of compliance with mental health treatment, is unwilling or unlikely to participate in voluntary outpatient treatment, is in need of assisted outpatient treatment as the least restrictive placement, and will likely benefit from assisted outpatient treatment services. New Mexico AOT referrals can be either a step-down process for those who are currently hospitalized at a psychiatric hospital with plans of discharge or a step-up process for those in the community as an alternative to full hospitalization. The standard of dangerousness includes the individual having demonstrated a history of lack of adherence with treatment for a mental disorder that has:

- 1) at least twice within the last 48 months, been a significant factor in necessitating hospitalization or necessitating receipt of services in a forensic or other mental health unit or a jail, prison, or detention center;
- 2) resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last 48 months; or
- 3) resulted in the person being hospitalized, incarcerated or detained for 6 months or more and the person is to be discharged or released within the next 30 days or was discharged or released within the past 60 days.

The process begins with filing a petition with the court, which can be done by family members, hospital directors, mental health services, or treatment professionals. The petition must include an affidavit from a qualified professional who has examined the individual within 10 days of filing the petition and state that the individual has refused voluntary treatment efforts. The qualified professional is the same resource that would examine the individual should a competency evaluation be ordered. The qualified professional must also submit a written proposed treatment plan to the court. A hearing on the petition must be held no sooner than three or later than seven days after the date of service or before discharge of the respondent if they are hospitalized. The burden of

proof under the AOT statute is by clear and convincing evidence and the AOT order is not to be construed as a determination of competency.

Should the court order AOT, initial outpatient treatment is not to exceed one year and must follow the recommendations of the qualified professional. Prior to the expiration of the AOT, the court can grant an order authorizing continued AOT for a period not to exceed one additional year. Should there be failure to comply with AOT, a qualified professional must certify the need for detention and transport the respondent for an emergency mental health evaluation. A respondent's failure to comply is not grounds for involuntary civil commitment, a finding of contempt of court, or for the use of physical force or restraints to administer medication to the respondent.

The New Mexico statute does not require the dismissal of criminal charges, but it is highly encouraged by the Judicial Branch of New Mexico. Ultimately, it is dependent on District Attorney's discretion whether the case is dismissed upon referral or acceptance to the AOT program. Should competency concerns be raised in the criminal proceedings, the AOT law is designed to act as an offroad within the criminal court. However, should the District Attorney choose to do so, the AOT process can be ordered alongside the criminal case process, and the cases would then run parallel to each other. Should the District Attorney choose this route, the same evaluator would complete both the AOT examination and the incompetency evaluation. It should be noted that the District Attorney's Office is a party to the AOT civil case. As the program is in its infancy, practice currently varies in the pilot sites with plans for further study and consistency as outcomes are examined.

Hawaii

The state of Hawaii enacted Assisted Community Treatment (ACT) in 2020, which is court-mandated treatment that provides a mechanism to engage individuals in treatment when there is diminished to no insight into the need for treatment over a person's objection. Criteria includes that the person is mentally ill or suffering from substance abuse and is unlikely to live safely in the community without available supervision, is now in need of treatment in order to prevent a relapse or deterioration that would predictably result in the person becoming imminently dangerous to self or others, and the person's current mental status or the nature of person's disorder limits or negates the person's ability to make an informed decision to voluntarily seek or comply with

recommended treatment. The individual must have been diagnosed with a mental illness that has caused that person to refuse needed and appropriate mental health services in the community; or history of lack of adherence to treatment for mental illness or substance abuse that resulted in the person becoming dangerous to self or others and that now would predictably result in the person becoming imminently dangerous to self or others.

An ACT petition can be filed with the court by an individual or a provider and must be filed with an ACT Certificate of Licensed Psychiatrist or advanced practice registered nurse who examined in the person within 20 days of the filing. The Hawaii Department of the Attorney General is tasked with assisting in the filing of the petition as well as presenting the case to a judge. The case is ultimately heard in family court. Information pertaining to the process when criminal charges are pending was unable to be attained.

States Supporting Local Diversion Efforts

Many states have enacted legislation establishing programs for criminally court-involved individuals experiencing mental illness, however, these programs are not statewide nor are they mandated in each locality. The following tables identify the specific types of programs, the states who have statutes supporting those programs, the corresponding statute and the year in which the statute was enacted. It should be noted that the listed programs are akin to a behavioral health docket or a treatment court, where the charge remains pending throughout the duration of the program. These programs also require participant consent to participate and therefore are not an alternative to EDCOT.

Table 6: Mental Health Courts

STATE	STATUTE	ENACTED
ALASKA	7/3 CHAPTER 64 SLA 01	2001
ARKANSAS	AR Code § 16-100-204 (2024)	2024
ILLINOIS	730 ILCS 168/1	2022
MISSISSIPPI	MS ST § 9-27-1	2023
MONTANA	MT Code § 46-1-1204	2017
NEW HAMPSHIRE	NH Rev Stat § 490-H:2 (2024)	2024
PENNSYLVANIA	42 PA Cons Stat § 916 (2024)	2020

SOUTH CAROLINA	2015 Act No. 30 (S.426), Section 1	2015
TEXAS	TX Govt Code § 125.001	2013
VIRGINIA	§ 18.2-254.3.	2020

For purposes of this report, mental health courts are defined as a specialized judicial program that offers an alternative to traditional criminal court for non-violent defendants with diagnosed mental illnesses. These courts use a collaborative team approach in a non-adversarial court process that individualizes participant intervention approaches and allows for accessing services to reduce recidivism.

Table 7: Judicial Diversion Programs

STATE	STATUTE	ENACTED
CALIFORNIA	CA Code- PEN § 1001.36	2025
MAINE	34-B §1219	1995
NEW YORK	NY Crim Pro L § 216.05	2014
RHODE ISLAND	RI Gen L § 8-8-1.2.	2022
TENNESSEE	2015 Act No. 30 (S.426), Section 1	2015
WYOMING	W.S. 5-12-104	2025
VIRGINIA	§ 19.2-298.02.	2020

For purposes of this report, judicial diversion programs are defined as a criminal justice alternative to traditional prosecution where a judge guides a defendant to participate in rehabilitative or treatment programs instead of facing conviction, jail, or a criminal record. This program requires judicial involvement.

Table 8: Pretrial Diversion Programs

STATE	STATUTE	ENACTED
FLORIDA	Title XLVII, Ch. 948.08	2023
MASSACHUSETTS	General Law, Part IV, Title II, Ch. 276A	Unknown
MINNESOTA	M.S. Ch. 401§401.065	1993
OHIO	O.R.C. 29 Ch. 2935.36	2018
TENNESSEE	TN Code § 40-15-105	2016
WASHINGTON	RCW 69.50.4017	2023
WEST VIRGINIA	WVC §61-11-22	2024

For purposes of this report, pretrial diversion is defined as an alternative to the traditional criminal justice process where an eligible individual accused of crime agrees to a period of supervision and services instead of facing prosecution and a conviction. Successful completion of the program conditions can result in dismissal of the charge. It should be noted that while Virginia does not have a statute dedicated strictly to pretrial diversion; several pretrial diversion programs exist in the Commonwealth.

Table 9: Jail Diversion Programs

STATE	STATUTE	ENACTED
MICHIGAN	MCL- Sec.330.1207	1996
OREGON	ORS Ch. 430.450	Unknown

For purposes of this report, jail diversion is defined as a program that redirects individuals with behavioral health needs away from jail by connecting them with community-based treatment and support services, often in lieu of traditional court-ordered punishment. Within the Commonwealth of Virginia, there are several jail diversion programs including, but not limited to, the Diversion First in Fairfax County, the Mount Rogers Jail Diversion in Smyth and Wythe Counties, the Jail Diversion/Forensic Case Management in Arlington County, the Mental Health Diversion Program in Henrico County, and the Pre-Release Program in Roanoke City.

Table 10: Prosecutor-led/Pre-prosecution Diversion Programs

STATE	STATUTE	ENACTED
GEORGIA	O.C.G.A. § 15-18-80	2006
MISSOURI	RSMo 557.014	2019
NEVADA	NV Rev Stat § 174.032	2023
NEW MEXICO	NM Stat § 31-16A-7	2019
UTAH	U.C. Title 77, Ch. 2	2021

For purposes of this report, prosecutor-led/pre-prosecution diversion is defined as an alternative to a traditional criminal justice sentence where a prosecutor, rather than a judge, decides on the defendant's eligibility, conditions, and the outcome of a diversion

program for low-level offenses and upon completion of the program, the charges are dismissed by the prosecutor.



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Appendix C



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Forensic Discharge Planner Protocol for Community Services Boards & Local and Regional Jails

What is Forensic Discharge Planning?

Provided in conjunction with internal service delivery at the jail, forensic discharge planning begins with the screening and assessment of psychiatric, medical, social services, employment, and residential needs, as well as risk factors, as soon as possible after an individual's admission to jail. Eligibility for Forensic Discharge Planning services includes: Serious Mental Illness, less than one year remaining in custody at the time of referral, and voluntary agreement. Forensic Discharge Planning programs provide services to both sentenced and Pre-Trial individuals in local and regional jails. Forensic discharge planning includes intensive case management and the development of discharge plans which prioritize goals and objectives that reflect needs. It also consists of care coordination with state hospitals, community providers, and community supervision agencies which includes but is not limited to the exchange of treatment records, communication of treatment needs, and linkage of clients with available services and support options upon release. Forensic discharge planning should begin as soon as possible upon entry into the jail and prior to release, and it should continue into the community until the individual is connected with the appropriate services and supports, ideally no less than 30 days (and up to 90 days) post-release to ensure a smooth transition.

Definition of Serious Mental Illness & Priority Populations for Discharge Planning

For the purposes of this protocol, Serious Mental Illness (SMI) is defined as a mental, behavioral, or emotional disorder in adults 18 years of age or older, which is of sufficient duration, intensity, and functional impairment to meet criteria specified within the Diagnostic and Statistical Manual of Mental Disorders. SMI substantially interferes with or limits one or more major life activities, including personal relationships, self-care skills, living arrangements, or employment. Individuals with co-occurring substance abuse disorders or developmental disabilities are not excluded from this definition. Mental disorders typically meeting the criteria for SMI include schizophrenia, schizoaffective, psychotic, major depressive, bipolar disorders, PTSD and personality disorders.

Adults with SMI as defined above should be the priority population targeted for forensic discharge planning from the jails.

APIC and RNR: Recommended Models for Forensic Discharge Planning

The APIC Model, which stands for *Assess, Plan, Identify, and Coordinate* is a set of elements that, when implemented, have been shown to improve clinical and legal outcomes for individuals being released from jail who have behavioral health disorders. The Risk Need Responsivity model (RNR), which primarily focuses on the risk of reoffending, is also a useful tool for connecting behavioral health needs to criminogenic risk in order to identify and prioritize individuals with behavioral health disorders, who are also at a greater risk of reoffending, to receive appropriate interventions.

DBHDS strongly recommends that forensic discharge planning follow the principles of the APIC model and the RNR model when providing forensic discharge planning services and supports. DBHDS also encourages forensic discharge planners to collaborate with the local pretrial and probation agency serving the jail and request copies or results of any risk/need assessment tools that may have previously been administered.

Assess:

- Screening for the presence of a SMI should occur as soon as possible after admission to jail. Budget language introduced in 2017 requires all jails to utilize a validated screening tool. DBHDS has recommended the use of the Brief Jail Mental Health Screen or the Correctional Mental Health Screen.
 - A positive screening should prompt an immediate referral for a comprehensive mental health assessment by internal jail staff, or contracted behavioral health staff. Following comprehensive assessment and confirmation of SMI, Forensic Discharge Planners (FDPs) should respond to referrals for programming in no more than 14 days. FDPs will conduct screenings and assessments for enrollment as determined by their individual CSB.
- Criminogenic risk factors (i.e., antisocial thinking, antisocial peer associations, poor family relationships, substance use) can be assessed using a validated assessment tool. Again, DBHDS encourages forensic discharge planners to collaborate with the local pretrial and probation agency serving the jail and request copies or results of any risk/need assessment tools that may have previously been administered.
- Clinical or treatment needs (i.e., mental health case management, psychiatric services, substance abuse treatment, individual or group therapy) and responsivity factors should be identified during the FDP assessment, which should consist of a combination of structured clinical interview and validated assessment instruments. Careful consideration should be given to the inmate's ability to effectively participate in treatment and respond to the required interventions. The presence of substance use or

dependence itself should not exclude an individual from eligibility, but it should be addressed carefully in the discharge plan (both as a risk factor and responsivity factor).

- Eligibility for receiving discharge planning services should be prioritized based on the presence of an SMI as defined in an earlier section of this report. Services to individuals who do not meet these criteria but who have identified needs can be considered only if resources are available.
- If the need to provide for individuals with SMI outweighs the resources, communities should prioritize medium to high-risk inmates for forensic discharge planning services, as discharge planning services have been shown to have the greatest impact on recidivism for this group.
- Participation in forensic discharge planning services should be voluntary. However, at times individuals with SMI may lack the capacity to make informed decisions or may make decisions which ultimately are not in their best interest. Thus, providers should still offer services and make appropriate after-care referrals. Communities should conduct a thorough assessment of community treatment capacity to see if the needs of the identified target population and available services align. If not, services/interventions may need to be added or adjusted to meet the needs of the target population.

Plan and Identify

- Based on the risk assessment and clinical assessment conducted at the earliest stage possible of incarceration, a detailed written discharge plan should be developed that addresses the identified risks and needs.
- The level of intensity of services and community supervision in the discharge plan should align with the individual's assessed levels of risk and identified needs, and should take into consideration the individual's ability to respond to those interventions.
- Plans should include services and interventions that the individual will receive not only in the community upon release from jail, but also those that will begin in the jail prior to release, such as referrals to psychiatric services, medical services, and treatment programming if available in the jail.
- If an individual is at a state hospital for competency restoration or emergency treatment, the FDP will coordinate with state hospital social work and treatment staff for appropriate planning for both returning to jail, as well as to the community post-release from the jail. The state hospital's discharge summary will be integrated into the FDP discharge plan. Ongoing coordination is expected.

- Please reference *"The Community Services Performance Contract Exhibit K: Collaborative Discharge Requirements for Community Services Boards and State Hospitals"*
- FDPs will consider further case consultation for Super Utilizers and complex cases
- Jail staff and community partners should be involved in the development of the discharge plan, as well as the individual inmate. As applicable, family members and other supportive individuals should be included in planning.
- All providers, both in the jail and in the community, should be clearly identified and their specific roles in the implementation of the plan should be clearly delineated. The plan should be individualized, comprehensive, and well-coordinated with jail staff and administrators, community based supervision providers, and community based mental health and social services providers. Once written, the discharge plan should be routinely reviewed and modified as needs change.

Memorandum of Understanding (MOU) and Memorandum of Agreement (MOA)

- The CSB and the jail should develop a memorandum of understanding or memorandum of agreement, outlining the specific role of both the CSB and the jail in regards to discharge planning and supervision of the FDP, the functions and limitations of the FDP position, and the level of participation and financial obligations of all entities in the process of discharge planning.
- Policies and procedures should be in place to ensure effective communication between jail medical and behavioral health providers, jail security and administrative staff, and the FDP(s) to ensure that any changes in the inmate's mental or physical health, level of risk to self or others, or discharge needs are effectively communicated and incorporated into the discharge plan.

Roles and Responsibilities: The Role of the CSB and Forensic Discharge Planner

- Forensic discharge planning should involve linkage and rapid admission to continuous, comprehensive, and evidence-based treatment and supports upon release, to ensure the best possible outcomes. The CSB should institute policies and procedures to allow for prioritization of this population for case management and psychiatric appointments immediately following release.

- The forensic discharge planner is the single point of contact responsible for coordinating all necessary referrals and linkages within the jail and in the community upon release. This individual should be a “boundary spanner,” capable of navigating various criminal justice, clinical, and social services systems to ensure proper linkage.
- This role involves the development of a written discharge plan which prioritizes goals and objectives that reflect the assessed needs of the inmate. It also consists of care coordination with community providers and community supervision agencies, including the exchange of treatment records, communication of treatment needs, and linkage of clients with available services and support options upon release.
- The CSB is responsible for providing required data and reporting to DBHDS.
- The forensic discharge planner should focus on the following areas in the development and implementation of a discharge plan, and these services should begin in jail and continue following release:
 - Linkage to a mental health provider in the community (CSB or private provider) that provides psychiatric, therapy, and/or case management services. This includes scheduling an appointment for follow-up services, and providing necessary records to the provider to facilitate the intake process.
 - Linkage to emergency or transitional housing (shelter, crisis stabilization, halfway houses).
 - Linkage to long-term residential service providers/resources (referral to assisted living facilities, nursing homes, group homes, permanent supportive housing programs, rental assistance programs, housing grant programs, etc.).
 - Photo ID assistance (gathering necessary documentation to get DMV identification).
 - Birth certificate assistance (gathering necessary information and submitting application for certified copies of birth certificates).
 - Medicaid and/or GAP application/reinstatement assistance (completing necessary paperwork and providing documentation to begin the process prior to release).
 - Transportation assistance (providing bus tokens, cab vouchers, or actually providing direct transportation from the jail to the follow up appointments/providers/discharge placement).
 - Emergency food or clothing assistance (linkage to a food bank, food vouchers, clothing donation assistance centers, etc.).
 - SOAR/Social Security disability/SSI assistance (completing the necessary paperwork and providing documentation to begin process of reinstatement/application prior to release).
 - Linkage to medical providers for treatment of any identified medical conditions.

- Connection to community support groups (AA, NA, Grief and Loss, etc.).
 - Linkage to the Department for Aging and Rehabilitative Services or other employment assistance services in the community.
 - Linkage to the Department of Veterans Affairs.
 - Linkage to substance use services.
 - Coordination with community-based supervision (state/local probation or pretrial).
 - Coordination with Virginia State Hospitals for coordination of care and discharge planning.
 - Coordination with VADOC and District Mental Health Clinicians when necessary.
 - Coordination with defense counsel, clerks, and other legal partners when necessary.
 - Linkage to peer support services (individual peer counseling or peer-led groups such as WRAP) or consumer-operated service programs.
- DBHDS recommends that the forensic discharge planner continue to provide support and follow-up at the point of release and until successful linkage with outpatient providers for no less than 30 days post-release, and up to 90 days.

Roles and Responsibilities: The Role of the Jail

- The local and regional jails are responsible for providing the jail-based mental health screening as soon as possible after an individual's admission to the jail.
- The jail should develop mechanisms for recording positive screening results and referring individuals who screen positive for the possible presence of an SMI to appropriately qualified staff.
- Jails should develop mechanisms to refer individuals with SMI to the forensic discharge planner. While the individual remains incarcerated, jails should provide sufficient mental health services/supports as available (to include psychiatric assessment, access to psychotropic medications, group/individual therapies, etc.) to facilitate the individual remaining psychiatrically stable.
- Ideally, the jail will have a direct point of contact who will support the forensic discharge planner in providing referrals and updates, monitoring release date/time, and coordinating care within the jail to include medication referrals and refills prior to release.
- As noted in the previous section, the jail should enter into a memorandum of understanding or agreement, with the CSB outlining its role in the provision of discharge planning services.

- The jail should provide adequate physical space for the forensic discharge planner to perform their duties in the jail and liberal physical access to the individual so that services can be coordinated.
- Jails should distribute an agreed upon amount of medications to all inmates receiving forensic discharge planning services upon release. DBHDS recommends that every inmate who is participating in this service be provided no less than two weeks of medication and a written prescription for a refill.
- When possible, the jail should notify the forensic discharge planner of the scheduled release date and time for each inmate served. If this is known in advance, all possible attempts should be made to release the individual during regular business hours, and with notification of the discharge planner in advance.
- If possible, jails should include notations in their information management systems when an individual is being served by the forensic discharge planner, so that when releases are unscheduled or unexpected, they can be notified and potentially respond to the jail to see the inmate prior to leaving the facility.
 - Additionally, jails should coordinate with contracted behavioral health and medical providers in permitting access to electronic health records systems for FDPs so that clinical information can be shared and reviewed for individuals enrolled in programming.
- Jails should partner with CSBs to develop or review existing protocols for the secure and reliable exchange of this information (e.g., by encouraging interagency agreements for information sharing, working towards compatibility of information management systems and electronic health records systems, and employing written releases to satisfy legal requirements).

Data and Reporting

- DBHDS requires quarterly reporting of data on Forensic Discharge Planner activities and outcomes. CSBs will submit the required data elements using the same mechanism as CCC3 data uploads. A data collection template will be provided by DBHDS.

DBHDS Support

For more information and technical assistance please contact:

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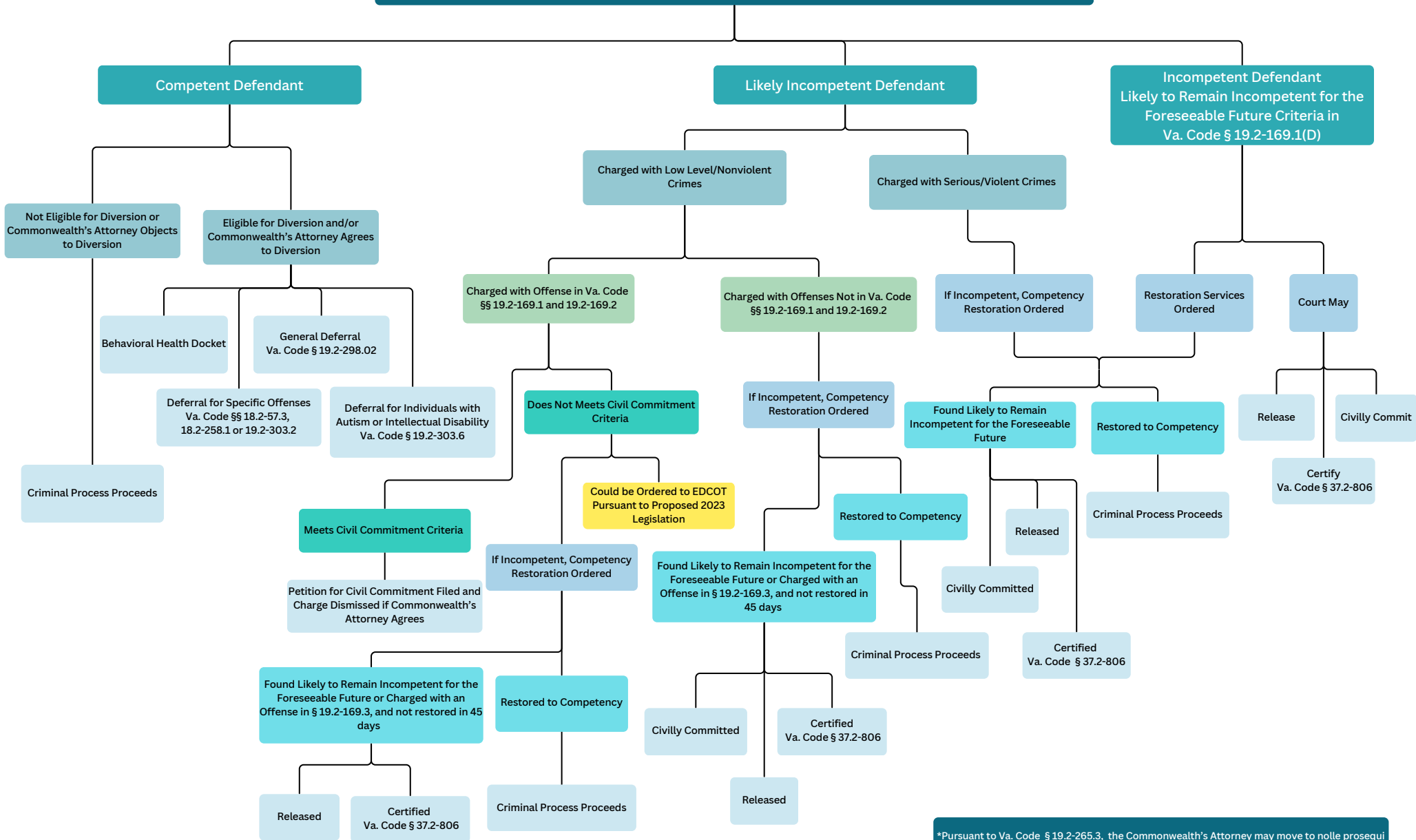
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Appendix D

Paths for Individuals with a Mental Illness in the Criminal Process*



*Pursuant to Va. Code § 19.2-265.3, the Commonwealth's Attorney may move to nolle prosequi a charge at any stage in the proceeding