

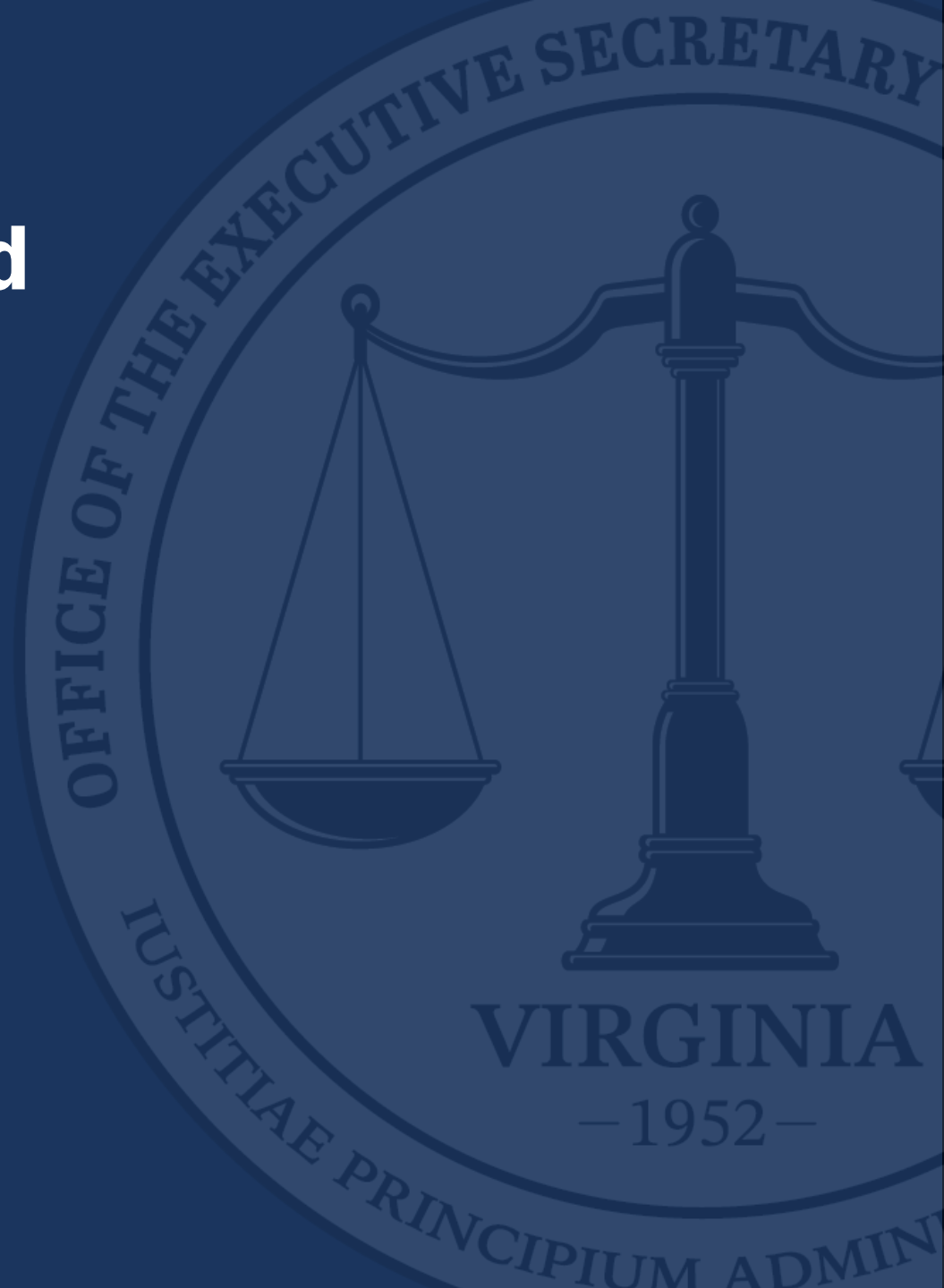
Jail Diversion and Expedited Diversion to Court-Ordered Treatment

Virginia Behavioral Health Commission 2025

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Office of the Executive Secretary
Supreme Court of Virginia



Diversion

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.¹

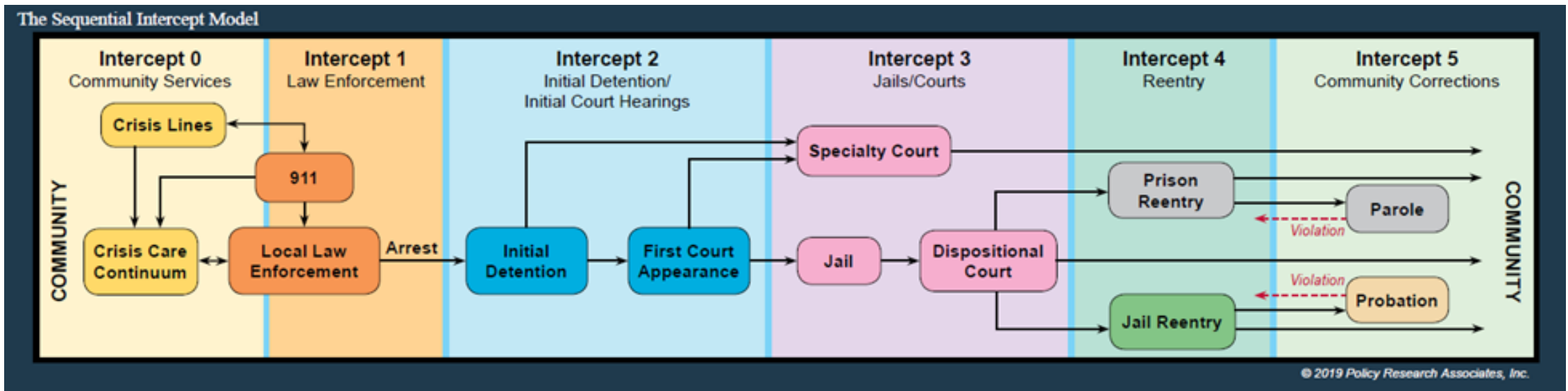


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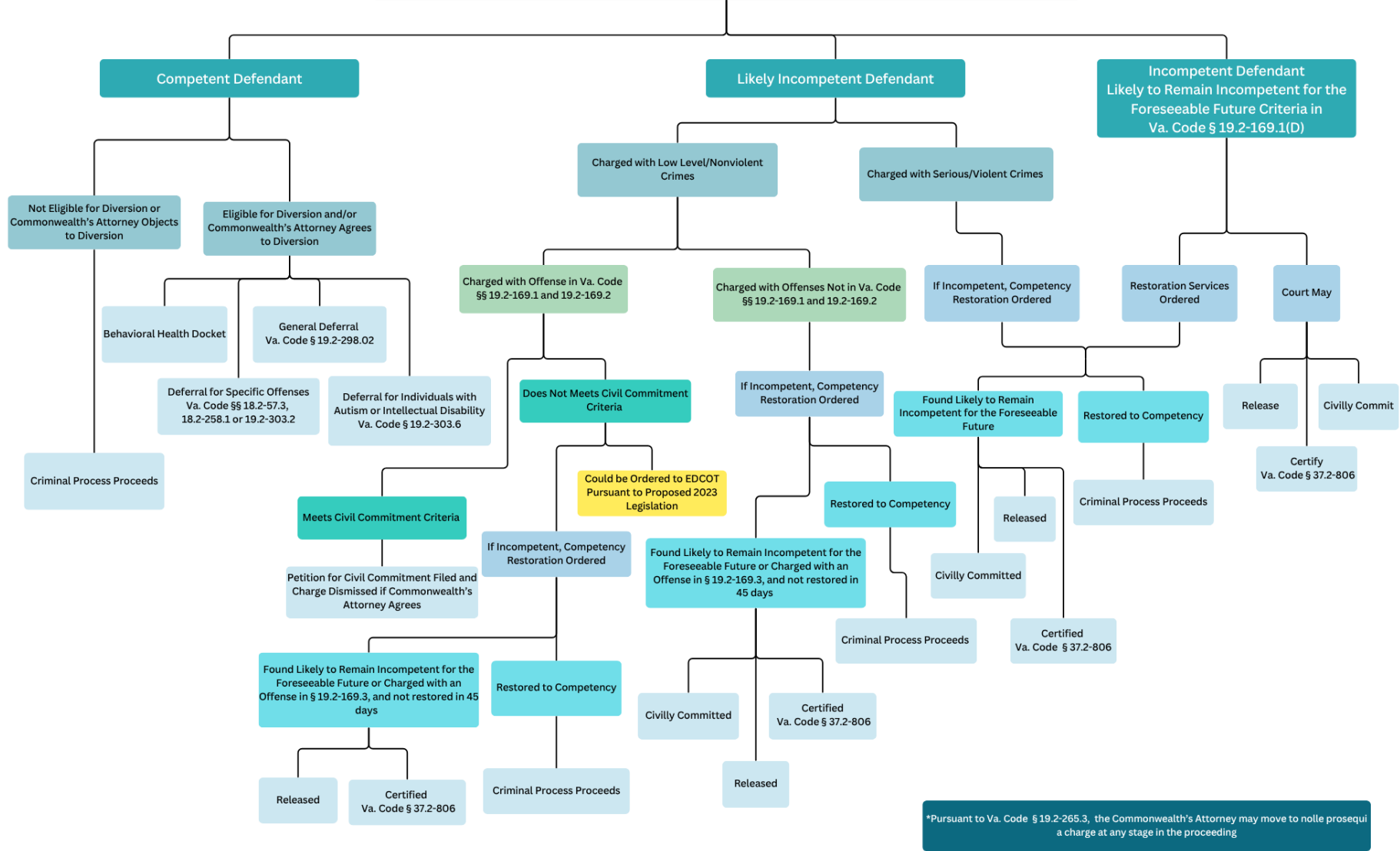
¹ Virginia State Crime Commission. (2021). *Diversion*.

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

Sequential Intercept Model (SIM)²



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



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

Individuals Who Would Be Served By an EDCOT Process Who are Not Served by Existing Court Diversion Processes

- Persons with a serious mental illness who are incompetent to stand trial, are charged with a low level/nonviolent offense, do not meet the civil commitment standard,
 - AND are not unrestorably incompetent for the foreseeable future due to an ongoing and irreversible medical condition or have not been determined to be unrestorably incompetent in the preceding two years (Va. Code § 19.2-169.1(D)).
- This population can be served by pre-charge diversion (intercepts 0-1).



Expedited Diversion to Court-Ordered Treatment

- Diversion of individuals with mental illness from the criminal court process to a civil court-supervised outpatient treatment process
 - Court must find probable cause to believe that the defendant is charged with an eligible offense and has a mental illness, and that his charged conduct is associated with the mental illness
- Diversion would occur post-charge but prior to adjudication of the criminal case
 - If CA and competent defendant agree, court shall find the criteria has been met and order treatment
 - If court has substantial doubts about defendant's competency, treatment may be ordered if criteria has been met
 - Cannot be ordered over the objection of the CA or a competent defendant
- Defendant would be entitled to separate counsel for the criminal proceeding and civil proceeding



Expedited Diversion to Court-Ordered Treatment

Civil Commitment Standard:

(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 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 or 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 (Va. Code § 37.2-817)

EDCOT Standard:

(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.



Expedited Diversion to Court-Ordered Treatment

- Duration of treatment shall not exceed 180 days unless extenuating circumstances exist, in which case duration shall not exceed one year or the maximum sentence that would be available for the charge, whichever is shorter
- Civil counsel is 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
- If ordered, treatment is monitored by CSB and reports are made to the court every two weeks. Status hearings are required to be held 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 reevaluation



Barriers to Implementation of EDCOT

Legal

- Due Process Concerns
- Ethical Concerns for Attorneys
- Lack of Authority for Enforcement
- Lack of Incentives to Comply with EDCOT Order
- Workload Impacts
- Collateral Consequences for Findings Made in the EDCOT Diversion Eligibility Hearings



Barriers to Implementation of EDCOT

Services

- Workforce:
 - Existing shortage of mental health professionals
 - Recommended required credentials for evaluators: qualified mental health provider, licensed mental health provider, or a licensed or license-eligible individual trained to be a prescreener
 - Note: if the recommended credentials are required, the local CSB may be unable to perform EDCOT evaluations and subsequent treatment
 - Insufficient community supports and programming across the Commonwealth for effective implementation
 - Some localities may have the necessary community supports and programming where the workforce may only need to be increased by one individual, whereas other localities do not have the necessary community supports and programs and would need to attract an entirely new workforce.



Barriers to Implementation of EDCOT

Services

- Funding Needs:
 - Cell phones, housing, and transportation services
 - Specialized person-centered case management and treatment services
 - Staffing to serve as treatment providers, diversion case managers, peer services, DBHDS staff to train localities, and DBHDS staff to serve as an EDCOT statewide coordinator (estimated cost for one additional CSB staff in each office to be in excess of \$2 million, less benefits)



Recommendations

- Early diversion is preferable and avoids the barriers to implementation of EDCOT
 - Consider funding and support of programs that divert individuals prior to being charged with a criminal offense
- Some stakeholders expressed support for:
 - An amendment to Va. Code § 19.2-169.2 to provide discretion to the court to order restoration services if an individual is found incompetent to stand trial
 - Further study by BHC of an assisted outpatient treatment program designed to serve individuals charged with a low level/nonviolent offense who are incompetent to stand trial but don't meet the current civil commitment standard

