



Fact Sheet

Mental Health Courts

October 2006

**Prepared by the Disabilities Law Project and
the Bazelon Center for Mental Health Law**

The last several years have seen a dramatic increase in the number of specialty courts designed to divert individuals with mental illness from criminal court to court-supervised mental health treatment services. These “mental health courts” began to gain popularity in 1997 with the development of a highly publicized mental health court in Broward County, Florida.¹ While there were four mental health courts in the country in 1997, by January 2004 there were about 70, and by June 2005 there were approximately 125.² The explosion of mental health courts has been fueled in part by the growing popularity of specialty courts generally and by the availability of federal funding for mental health courts pursuant to a law known as “America’s Law Enforcement and Mental Health Project,” Pub. L. No. 106-515 (2000).³ See 42 U.S.C. § 3796ii.

This Fact Sheet sets forth some of the basic issues presented by mental health courts, including arguments for and against mental health courts, alternatives to mental health courts, and recommendations for minimum protections that should be in place in mental health courts.

I. What are Mental Health Courts and How do they Work?

The term “mental health courts” generally refers to specialized courts that divert criminal defendants with mental illness into judicially supervised community-based treatment. Surveys of mental health courts done by the Council of State Governments

Produced with a grant from the Training Advocacy Support Center (TASC).

¹ Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 *Psychology, Public Policy, and Law* 507, 507 (2005); Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 *Psychiatric Services* 457, 457 (2001).

² Council of State Governments, *Mental Health Courts: A National Snapshot 1* (2005), http://www.ojp.usdoj.gov/BJA/pdf/MHC_National_Snapshot.pdf.

³ John Clark, Technical Assistance and Policy Analysis Center for Jail Diversion, *Non Specialty First Appearance Court Models for Diverting Persons with Mental Illness: Alternatives to Mental Health Courts 2* (Feb. 2004), http://gainscenter.samhsa.gov/pdfs/jail_diversion/pre_trial_nocover.pdf.

Criminal Justice/Mental Health Consensus Project have defined mental health courts as adult criminal courts that have a separate docket dedicated to persons with mental illnesses, divert criminal defendants from jail into treatment programs, monitor the defendants during treatment, and have the ability to impose criminal sanctions for failure to comply.⁴ The Bureau of Justice Assistance (BJA) of the U.S. Department of Justice⁵ uses the term mental health courts to refer “to a specialized docket for defendants with mental illnesses that provides: the opportunity to participate in court-supervised treatment; a court team composed of a judge, court personnel, and treatment providers, which defines terms of participation; continued status assessments with individualized sanctions and incentives; and resolution of case upon successful completion of mandated treatment plan.”⁶

Most mental health courts have certain characteristics in common. Following a screening and assessment to determine eligibility, individuals choose whether they want to participate. If they do participate, they are assigned to a treatment team, typically comprised of mental health court staff, community mental health providers, and/or probation or parole officers. There are set terms and conditions for community-based supervision, with regular status conferences and sanctions for violation.⁷

There is a great deal of variation, however, in how mental health courts operate. Differences include who is eligible to participate, whether a guilty plea is required before a person is allowed to participate, what types of sanctions are imposed for failure to comply with treatment, and the length of court supervision.

A. Who is Eligible?

Many older mental health courts allow only non-violent offenders charged with misdemeanors to participate. More recently, courts have allowed participation by individuals charged with felonies. The Council of State Governments’ 2005 survey of mental health courts found that 34 percent of mental health courts accept individuals charged with misdemeanors only, 56 percent accept individuals charged with felonies and misdemeanors, and 10 percent only accept individuals charged with felonies.⁸

B. Pre- or post-adjudication

Some courts use a pre-adjudication model, in which charges are suspended or held in abeyance while the individual participates in the mental health court program. If the defendant fails the program, charges may be reinstated. If the defendant

⁴ Council of State Governments Criminal Justice/Mental Health Consensus Project, Survey of Mental Health Courts (Sept. 2003), <http://www.mentalhealthcourtsurvey.com>.

⁵ BJA is the administrator of the Mental Health Courts Grant Program created by the “America’s Law Enforcement and Mental Health Project” law.

⁶ Bureau of Justice Assistance, Mental Health Courts Program, <http://www.ojp.usdoj.gov/BJA/grant/MentalHealthCtFS.pdf>.

⁷ Mental Health Courts: a National Snapshot, *supra* note 2.

⁸ *Id.*

successfully completes the program, charges are reduced or dismissed. Most courts use a post-adjudication model, however, whereby the participant must accept a guilty plea in order to participate and will have a record of conviction even if he/she successfully completes the program.

The Council of State Governments' 2005 survey found that 67 percent of mental health courts require participant to enter a guilty plea.⁹ Fifteen of the 37 mental health courts funded by BJA require guilty pleas of all court participants, four courts defer the prosecution pending the completion of the treatment plan, and the 18 other courts rely on a combination of these two approaches depending on the level of the offense charged.¹⁰

A Bazelon Center survey of mental health courts found that more than one-third of the courts surveyed allow for dismissal of the charges or expungement after successful completion of treatment. Dismissal of charges is typically not automatic, and an individual must request expungement of the record. One out of four of the courts surveyed report that the individual will have a record of conviction even if the course of court supervision is successfully completed.¹¹

C. Sanctions

Mental health courts use a variety of sanctions for non-compliance with a treatment plan, such as adjustments in treatment plan, more frequent court appearances, and increased judicial persuasion. Many mental health courts, however, use jail time or other punitive measures. The Bazelon Center study of mental health courts found that more than half of mental health courts reported using jail time as a sanction, and one out of three reported that the individual may be dropped from the program for non-compliance -- actions that may be particularly unhelpful if the issue is one of normal relapse and the ups and downs of recovery from mental illness.¹²

D. Length of supervision

Some mental health courts provide court-supervised treatment for a set period of time, while others individualize the time period. Some do not specify any limits on the time frame. Few mental health courts explicitly limit the length of supervision to the maximum the defendant could have received in traditional criminal court for

⁹ *Id.*

¹⁰ BJA Mental Health Courts Program, www.ojp.usdoj.gov/BJA/grant/MentalHealthCtFS.pdf.

¹¹ Tammy Seltzer, *Mental Health Courts: A Misguided Attempt*, 11 *Psychology, Public Policy & Law* 570, 576-77 (2006).

¹² See <http://consensusproject.org/topics/news/mhcsurvey>. Thirteen of the 24 courts reporting on sanctions use incarceration; eight courts reported termination or reinstatement of criminal charges for non-compliance. Some courts have opted to use termination or reinstatement of charges rather than incarceration. *Id.*

incarceration or probation.¹³ In some cases, the duration of court supervision significantly exceeds the maximum length of incarceration or probation that the person could have received in criminal proceedings. In any event, individuals charged with minor offenses tend to spend significantly more time under judicial supervision in a mental health court than they would have with a guilty plea in criminal proceedings.¹⁴

II. Why Have Mental Health Courts Become Increasingly Popular?

Mental health courts were developed in order to respond to the problem of increasing numbers of individuals with mental illnesses incarcerated in jails and prisons because of the failures of public mental health systems to provide them with needed services. As state hospital beds have closed without adequate development of community mental health systems, many individuals with mental illnesses have either been trans-institutionalized in nursing homes or board and care homes, or have found themselves in jails and prisons. A Department of Justice study released in September 2006 found that more than half of all prison and jail inmates have mental health problems.¹⁵

Often the basis for the arrest of individuals with mental illnesses is a “nuisance” crime, such as trespass or disorderly conduct. Adults with mental illnesses are arrested twice as often as adults without a mental illness for the same behavior.¹⁶ Reasons for the frequency of arrest of individuals with mental illnesses include police beliefs that: (1) they are doing the person a favor because the person will receive food and shelter in jail; (2) an arrest is the only way to get the person off the street and out of trouble; (3) processing an arrest is faster than trying to link the person with mental health and/or substance abuse services; or (4) the criminal justice system may afford access to treatment that would otherwise be unavailable.¹⁷

The popularity of mental health courts also reflects a number of other factors, including the success of drug courts, concerns about jail overcrowding, and the availability of federal funding for mental health courts.

¹³ West Virginia’s Mental Health Court is one of the rare courts that specifies that the treatment program under the court’s supervision can only be as long as the “sentence or probation for the offense charged.” *Id.*

¹⁴ Seltzer, *supra* note 11, at 578-79.

¹⁵ U.S. Department of Justice, *Bureau of Justice Statistics Special Report: Mental Health Problems of Prison and Jail Inmates* (Sept. 2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>. The report found that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of local jail inmates have mental health problems.

¹⁶ Linda Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, Nat’l Inst. of Justice J., July 2000, at 12.

¹⁷ Tammy Seltzer, *supra* note 11, at 573.

III. What are the Arguments for and Against Mental Health Courts?

Some have argued that mental health courts should be used because they will reduce the involvement of people with mental illnesses in the criminal justice system and will help people obtain needed mental health services. See, e.g., comments of Bruce Winick in Stefan & Winick, *supra* note 1, at 510-11 (mental health courts may not be the best alternative, but they are a pragmatic solution given the realities of our mental health service delivery system and are a far better approach than processing through the criminal justice system individuals whose primary problem is untreated mental illness); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 Am. J. Crim. L. 255, 322 (2001) (mental health courts would facilitate “the treatment and rehabilitation of mentally ill offenders for their return to society as constructive members of their respective communities”); Marie L. Leahy, Comment, *Booking Procedure for the Mentally Ill or Handicap Suspect: Justice Undone*, 29 New Eng. J. on Crim. & Civ. Confinement 293, 325-26 (2003) (“With more frequent use and development of mental health courts, those suspects who suffer from mental disabilities will be directed to treatment facilities instead of thrown into jail cells which may very well only compound their unfortunate situation.”). Very little research is available, however, on the effectiveness of mental health courts or on the effects of different community variables on the success of these courts.¹⁸

Many advocates are extremely troubled by the ways in which mental health courts have made matters worse for individuals with mental illnesses. For example, many have noted that the existence of these courts may create a perverse incentive for police to arrest individuals with mental illnesses for minor offenses, such as disorderly conduct, because they believe that this will result in the individual receiving needed mental health services.¹⁹ Arrests, as well as the guilty pleas required for participation in some mental health courts, affect individuals’ future prospects for employment, housing, and other benefits. Thus, mental health courts may actually create obstacles that make it more difficult for individuals to achieve stability and re-integrate themselves into the community successfully.

¹⁸ *Mental Health Courts Program*, *supra* note 6, at 1 (noting the lack of research on effectiveness, though some research points to the relative success of some mental health courts, such as the Broward County mental health court, in which defendants were twice as likely to receive mental health services and no more likely to commit a new crime).

¹⁹ Seltzer, *supra* note 11, at 581 (noting the inherent risk that any court-based diversion program, if not accompanied by a host of procedural safeguards and an effective pre-booking diversion program, may lead law enforcement officers to arrest individuals with mental illness based on the expectation that this will lead to the provision of services). See also comments of Bruce Winick in Stefan & Winick, *supra* note 1, at 518 (noting the risk that mental health courts, if seen as an effective means of facilitating the treatment of people with untreated mental illness, may prompt the police to begin arresting people with mental illness for offenses for which they would not previously have been arrested, though no evidence shows that mental health courts have been used in this way).

Additionally, some have questioned whether mental health courts have actually created more mental health services for an underserved population or have instead simply moved a group of people to the head of the line for these services.²⁰ Creating a system where individuals who have been arrested and processed through mental health courts receive priority for scarce mental health services limits the availability of services to other individuals with mental illness who have not reached the point of being arrested. In such a system, arrest becomes the primary path to obtaining needed mental health services, and individuals must deteriorate dramatically before receiving services.

Moreover, mental health courts do not always provide the services that individuals need. While they introduce an element of coercion, some impose treatment plans that may include little beyond medication and do nothing to address the issues that caused the person's criminal conduct or address the person's need for additional treatment, housing, and vocational services.²¹

Most significantly, mental health courts fail to address the root of the problems that cause increasing numbers of individuals with mental illness to be routed into the criminal justice system. These courts intervene very late in the process; individuals are denied needed services long before they reach the point of being arrested. While the creation of mental health courts is presented as a solution to the problem, that view diverts attention from the need to address the underlying failures of public mental health systems.²²

IV. Are There Other Alternatives Besides Mental Health Courts?

Even some proponents of mental health courts acknowledge that better alternatives exist, but view mental health courts as more likely to be implemented than other solutions. As Bruce Winick has noted:

A humane society would make mental health treatment more widely available to all who want or need it and would provide better social services designed to help those in need to obtain treatment. Frequently, all this would require is needed referrals and help with transportation to appointments.²³

²⁰ Steadman, *supra* note 1, at 458.

²¹ Seltzer, *supra* note 11, at 583.

²² *Id.* at 571-72 (mental health courts signal an acceptance of the rates at which individuals with serious mental illnesses are entering the criminal justice system and their "very presence makes it more difficult to generate political will to address the root of the problem").

²³ Stefan & Winick, *supra* note 1, at 510.

Alternative models that link people with mental illnesses with services to address the behaviors that result in criminal charges include:

- Community treatment programs such as assertive community treatment, which includes intensive outreach efforts and services to individuals with mental illnesses in their communities.²⁴ The Village Integrated Service Agency in southern California is one example of a community mental health agency that has been recognized for the success of its comprehensive approach -- including a variety of recover-oriented mental health services, employment assistance, and supported housing -- in diverting individuals from the criminal justice system.²⁵
- Police diversion efforts. In some communities, police are provided special training to familiarize them with the needs of individuals with mental illnesses, including crisis intervention, and encouraged to bring individuals presenting mental health problems to community mental health centers rather than arresting them.²⁶
- Other diversion or alternative sentencing programs that link individuals with mental health services without using a coercive court-based model. For example, the Nathaniel Project in Brooklyn, N.Y., run by the Center for Alternative Sentencing and Employment Services, operates a program providing a dispositional alternative for criminal defendants with mental illnesses who are charged with serious offenses. The Project provides two years of intensive case management and community supervision instead of incarceration. The Project targets individuals who have been indicted for a felony, most of whom are homeless and have a co-occurring substance abuse disorder. Individuals are provided with a comprehensive treatment plan created by clinical coordinators who are master's degree-level mental health professionals with expertise navigating the criminal justice system. The program begins working with participants prior to release and helps create a smooth transition to the community. Participants are closely monitored and provided with supervised housing and treatment in the community. They attend periodic court dates to monitor progress. Charges are dismissed upon successful completion of the program.²⁷

V. To the Extent Mental Health Courts Do Exist, What Minimum Protections Should they Have?

By discussing minimum protections that mental health courts should have in place, we do not mean to suggest that these courts reflect an appropriate mechanism to deal with individuals with mental illnesses in the criminal justice system as long as they

²⁴ See, e.g., *id.*

²⁵ See <http://www.village-isa.org>.

²⁶ See, e.g., *id.*; Seltzer, *supra* note 11, at 584.

²⁷ Seltzer, *supra* note 11, at 585.

incorporate protections. Rather, we describe these protections to suggest avenues for advocacy where mental health courts are in operation. Advocates should carefully consider whether urging minimum protections in mental health courts will detract from efforts to promote better alternatives.

The following are some critical protections that should be in place where mental health courts are operating:

- **Participation must be voluntary.** Many people have raised concerns about whether participation in mental health courts is typically truly voluntary.²⁸ Defense counsel must make sure that a defendant with mental illness has a meaningful understanding of the potential consequences of participating in a mental health court versus proceeding in criminal court. Because treatment is viewed as a more positive result than punishment, there may be a tendency for counsel to push for diversion to a mental health court, regardless of the coercive aspects of mental health courts and regardless of the strength of the person's case in criminal court.
- **A person must be permitted to withdraw.** It is critical that individuals be allowed to withdraw from the jurisdiction of a mental health court upon request and choose instead to return to criminal court. For the reasons discussed above, individuals may be pushed to choose mental health courts without a full understanding of the complexities of this choice. If the right to withdraw is to be meaningful, prosecutors must be prohibited from using information obtained through the individual's participation in the mental health court program.
- **A guilty plea must not be required as a condition of participation.** As discussed above, requiring an individual to plead guilty before he or she may participate in a mental health court program is highly problematic. The guilty plea may put the individual in a worse position in the future with respect to job prospects, housing, and eligibility for treatment than if the individual were acquitted in criminal court. Individuals should not have to agree to conditions that will jeopardize their ability to maintain stable employment and housing in order to receive court-supervised mental health services.
- **Courts should focus on more serious crimes.** One of the troubling aspects of mental health courts is that they tend to focus on the least serious crimes. Mental health courts should target individuals who are not eligible for other types of diversion. Individuals who come into the criminal justice system for misdemeanors and "nuisance" crimes can be diverted, before arrest or even after arrest, into diversion programs other than mental health courts.²⁹

²⁸ See, e.g., Seltzer, *supra* note 11, at 674; Lacey R. Parker, *Mental Health Courts: Moving Beyond the Drug Court Model*, *Developments in Mental Health Law*, Jan. 2005, vol. 24 no. 1, at 12-13.

²⁹ The Brooklyn Mental Health Court handles only felonies and misdemeanors "that would likely result in a jail sentence." Seltzer, *supra* note 11, at 578.

- **The duration of supervision should not exceed the maximum jail time that a person could have received in criminal court.** Mental health courts retain jurisdiction over a person while the person receives services. These courts typically require a person to complete a period of treatment, sometimes without defining the length of treatment. Most of these courts do not explicitly limit the length of supervision to the maximum that the person could have received in traditional criminal court, and some allow supervision for a period that significantly exceeds the maximum length of incarceration or probation for the offense.³⁰ While individuals with mental illnesses may require long-term services and supports, it is inappropriate for the court to maintain continued supervision based on a person's mental illness rather than alleged criminal conduct.
- **Individuals should not be punished for non-compliance that is beyond their control.** Before sanctions are imposed for non-compliance, mental health courts should first explore whether modifications to the individual's treatment plan might address the non-compliance. For example, an individual may have legitimate reasons for refusing to comply with certain treatment regimens, such as debilitating side effects of certain medications. Alternatively, some courses of treatment simply may not work or may exacerbate the person's mental health problems. Many other factors may cause an individual to be in non-compliance, such as a lack of provider follow-up or communication, the need for other interventions, such as short-term hospitalization, or the need for graduated adjustments to a treatment plan. Individuals should not be punished for non-compliance unless it is clear that they were capable of complying but simply chose not to without justification.
- **Counsel must be appointed to represent the person.** It is essential to the fair functioning of any mental health court that participants have legal representation beginning at the earliest possible time. Having counsel at the time that a person chooses whether to participate in a mental health court is also critical to ensure that the decision to participate is truly voluntary and the individual has been informed of possible consequences.
- **Service providers should be accountable, so that a person with mental illness is not penalized for their failures.** Since mental health courts are responsible for the continuing supervision of individuals with mental illness, including imposing sanctions for non-compliance with the service plan, these courts must also have the power to ensure that service providers are delivering appropriate services to individuals who are making a genuine effort to participate in their service plan.
- **Mental health courts must ensure privacy of court records and proceedings.** The use of treatment information in a criminal proceeding raises

³⁰ *Id.*

questions of doctor-patient privilege, and disclosing medical information in open court raises serious privacy concerns. Courts should be required to keep medical information about participants out of the public record of the proceedings and should use sidebar or chamber conversations for sensitive discussions. The access of judges and prosecutors to medical information should also be limited to what is necessary in order to make decisions.³¹

Conclusion

While mental health courts may sometimes offer a better avenue for individuals with mental illness than proceeding through the criminal courts, mental health courts do not address the primary problem driving increased incarceration of individuals with mental illnesses – the failures of public mental health systems to provide needed services. Indeed, mental health courts may make the limited resources for mental health services even more problematic by simply moving individuals to the front of the line for services and ensuring that the surest way to receive services is to be arrested. Moreover, mental health courts may encourage arrests and create additional obstacles to successful community integration by requiring guilty pleas for participation. While certain procedural safeguards may be followed to limit some of the problems posed by mental health courts, these protections do not remedy many of the basic flaws of these courts. The allocation of resources to create a parallel court docket rather than providing needed mental health services before individuals reach the point of arrest poses serious concerns. Advocates should consider the relative benefits of alternatives to mental health courts that divert individuals with mental illnesses away from the criminal justice system without the need for court-supervised treatment.

³¹ These proposed protections are discussed more fully in Seltzer, *supra* note 11, at 574-81.