



# Improving Responses to People with Mental Illnesses at the Pretrial Stage

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## Essential Elements

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This project was supported by a grant from the Public Welfare Foundation.

Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the Public Welfare Foundation, members of The Council of State Governments, or the project's advisory group.

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This report is informed by, and builds on, three previous Essential Elements publications for court, law enforcement, and probation professionals about special responses to people with mental illnesses who are involved with the criminal justice system, available at [csgjusticecenter.org](http://csgjusticecenter.org).

The Council of State Governments Justice Center, New York 10007

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Cover and interior design by Carrie Cook.

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# Acknowledgments

**T**his publication was made possible through the support of the Public Welfare Foundation. In particular, The Council of State Governments Justice Center thanks Seema Gajwani and Mary E. McClymont for their strategic vision and support in this area, and Sarah Joy Albrecht for her assistance guiding the report to completion.

Thanks also go to the members of this publication's advisory group, listed below, whose input greatly informed the development of the document.

- John Clark, Senior Manager, Technical Assistance, Pretrial Justice Institute
- Hon. John Creuzot, Judge (ret.), Dallas County; The Creuzot Law Firm
- Thomas Donovan, State's Attorney, Chittenden County (VT)
- Glenda Flowers, Supervisory Pretrial Services Officer, Pretrial Services Agency for the District of Columbia
- Dr. Krista Gehring, Assistant Professor, University of Houston-Downtown
- Dr. Alexander M. Holsinger, Principal Graduate Advisor, Professor of Criminal Justice & Criminology, University of Missouri-Kansas City
- Dr. Geraldine Nagy, Director (ret.), Travis County Community Supervision and Corrections Department (TX)
- Dr. Merrill Rotter, Senior Forensic Advisor, New York State Office of Mental Health
- Hon. Chad Schmucker, President, National Judicial College
- Elizabeth Simoni, Executive Director, Maine Pretrial Services, Inc.; Northeast Director, National Association of Pretrial Services Agencies
- Dr. Henry Steadman, President, Policy Research Associates
- Laurie Stolen, Director, Alternative Sentencing Department, Larimer County (CO) Criminal Justice Services
- Thomas Ullmann, Public Defender, Office of the Public Defender (CT)
- Dr. Marie VanNostrand, Justice Project Manager, Luminosity, Inc.

The authors also thank numerous pretrial practitioners and policymakers from around the country for information about their programs, as well as the members of the National Pretrial Justice Reform Working Group for their comments on an early draft. Federal grantees participated in an early discussion of the elements during the Intensive Training Summit for Second Chance Act Co-Occurring Disorders Grantees and Justice and Mental Health Collaboration Grantees. The authors also thank the National Association of Pretrial Services Agencies for its early support for this project, including the opportunity to release the elements at their national conference in August 2015.

Special thanks go to David A. D'Amora, Emily M. Harris, Risë Haneberg, and Karen Watts at The Council of State Governments Justice Center for their significant contributions throughout the development and drafting process, and to Michael D. Thompson and Suzanne Brown-McBride for their support of this project. The authors are grateful to Emily Buckler, Ashleigh Fryer, and Anna Montoya for their help producing this publication.

# Introduction

**P**olicymakers and criminal justice and behavioral health professionals know that a significant number of people with mental illnesses enter and move through local criminal justice systems every day: nationwide, approximately two million adults with serious mental illnesses are admitted into jails each year,<sup>1</sup> about three-quarters of whom have co-occurring substance use disorders.<sup>2</sup> While the law of the land has made pretrial detention “the carefully limited exception”<sup>3</sup> for only those cases where no conditions of release can assure that an individual will return to court and will not pose a risk to public safety, in many communities, people with mental illnesses are detained longer while awaiting trial and at higher rates than those who do not have mental illnesses. Time in jail for people with mental illnesses means not only deprivation of liberty, but also separation from established treatment and other supports they may have been receiving in the community. Further, new research has revealed a number of ways pretrial detention can actually increase future criminal justice involvement, particularly for people at low- or moderate-risk of pretrial failure,<sup>4</sup> underscoring the cost of the status quo for public safety, public health, and taxpayers.

Communities around the country are looking for ways to improve this situation. Some are building on existing diversion programs that provide an opportunity for community-based treatment instead of traditional prosecution; others are looking at this issue as a part of broader, “front-end” policy reform through the incorporation of legal and evidence-based practices for pretrial release decisions. This is not an easy task. Pretrial release decisions must be made quickly and often around-the-clock. In many communities, judicial officers must make these decisions with little information beyond what is available in an arrest report, knowing that there are limited pretrial supervision resources and limited treatment services available in the community. Diversion decisions are often on a similarly fast timeline.

The laws, processes, and politics vary from jurisdiction to jurisdiction, as do the available community-based treatments and supports. Fortunately, however, there have been significant advances in pretrial research and practice in the last several years that any community can apply and implement locally. These foundational principles for pretrial policy and “essential elements” for responding to people with mental illnesses and co-occurring substance use disorders at the pretrial stage are the basis for this report.

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<sup>1</sup> Henry J. Steadman et al., “Revalidating the Brief Jail Mental Health Screen to Increase Accuracy for Women.” *Psychiatric Services* 58, no. 12 (2007): 1,598–1,601.

<sup>2</sup> Karen M. Abram and Linda A. Teplin, “Co-Occurring Disorders Among Mentally Ill Jail Detainees,” *American Psychologist* 46, no. 10 (1991): 1,036–1,045.

<sup>3</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>4</sup> Laura and John Arnold Foundation, “Research Summary: Pretrial Criminal Justice Research” (New York, NY: Laura and John Arnold Foundation, 2013).

## Key Terminology

**Mental Illnesses:** Mental illnesses are characterized by symptoms that meet criteria for specific diagnoses, the duration of these symptoms, and the associated disability (the degree to which the person’s ability to perform activities of daily life is impaired).<sup>5</sup>

The focus of this report is on people with Serious Mental Illnesses (SMI), who are defined by the Substance Abuse and Mental Health Services Administration as persons age 18 and over, who currently or at any time during the past year have had a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet diagnostic criteria, resulting in a functional impairment that substantially interferes with or limits one or more major life activities.<sup>6</sup> Each state is required to develop a definition of SMI, or serious and persistent mental illness (SPMI) as a requirement of federal block grant funding. Meeting SMI criteria has significant implications for access to public mental health services.

As discussed below, there are aspects of the pretrial stage that make it difficult to determine whether an individual meets SMI criteria. These essential elements are applicable without a precise diagnostic categorization.

Among people with an SMI who are involved with the criminal justice system, almost three-quarters have co-occurring substance use disorders (COD) of some degree.<sup>7</sup> The types of substances used and the degree of disorder significantly impact approaches to treatment and outcomes.

Throughout this document “behavioral health needs” refers to mental illnesses and/or co-occurring substance use disorders, unless otherwise noted.

**Pretrial Risk:** Unless otherwise noted, throughout this document “risk” will refer to risk of pretrial failure, or the probability that an individual will fail to appear in court (FTA) or will commit new criminal activity (NCA) while on pretrial release.

**Pretrial Stage:** Taken literally, “pretrial” can refer to any involvement with the criminal justice system ranging from first encounters with law enforcement, to arrest and booking into jail, and through the adjudication of a case. This stage includes initial release/detention decisions and

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<sup>5</sup> For a discussion of the continuum of mental illness impairment and needs, see Fred Osher et al., *Adults with Behavioral Health Needs under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery* (New York, NY: The Council of State Governments Justice Center, 2012), 13–16.

<sup>6</sup> Substance Abuse and Mental Health Services Administration, “Contracting for Managed Substance Abuse and Mental Health Services: A Guide for Public Purchasers,” Technical Assistance Publication Series No. 22 (Rockville, MD: Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, 1998).

<sup>7</sup> Abram and Teplin, “Co-Occurring Disorders Among Mentally Ill Jail Detainees.”

conditions of release pending trial for all arrestees. It also includes the use of diversion, which occurs when “the prosecuting attorney and the defense [ . . . ] agree that a prosecution be suspended for a specified period of time, after which time it will be dismissed if the offender has met specified conditions during the suspension period.”<sup>8</sup>

Improving encounters between people with mental illnesses and law enforcement is a goal nationwide and an important step to effectively reduce the overrepresentation of people with mental illnesses in jail. While it is not within the scope of this report, another report in this series, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Specialized Law Enforcement-Based Program*,<sup>9</sup> provides guidance on “pre-booking diversions.” Similarly, while many mental health courts work with criminal defendants (as opposed to those who have pleaded or been found guilty), readers interested in details about problem-solving court approaches should consult *The Essential Elements of a Mental Health Court*.<sup>10</sup>

## Adverse Effects of Jail for People with Mental Illnesses

Pretrial detention should only be used for public safety purposes. While some may see jail as a relatively safe environment where people with mental illnesses can receive food, shelter, and needed medical care, pretrial detention for these individuals actually comes at a significant cost, both in spending for local corrections and in the disruption of human lives. Counties and sometimes states pay for supervision and treatment of these detainees, some of whom may be difficult to supervise or cause disturbances within the jail. Jails are not intended for, and are rarely designed to facilitate, treatment. Detention may cause people who have been receiving treatment in the community to miss appointments with treatment providers, experience disruption in medication, be separated from family or other positive supports, and possibly lose their housing or employment.<sup>11</sup>

<sup>8</sup> American Bar Association, Criminal Justice Standards, Standard 14-4.1 “Diversion and other alternative resolutions.”

<sup>9</sup> Matt Schwarzfeld, Melissa Reuland, and Martha Plotkin, *Improving Responses to People with Mental Illnesses: The Essential Elements of Specialized Probation Initiatives* (New York, NY: The Council of State Governments Justice Center, 2008).

<sup>10</sup> Michael Thompson, Fred Osher, and Denise Tomasini-Joshi, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court* (New York, NY: The Council of State Governments Justice Center, 2008).

<sup>11</sup> Research to date has also shown that detention before diversion does not improve diversion outcomes. Allison G. Robertson et al., “Mental Health and Reoffending Outcomes of Jail Diversion Participants With a Brief Incarceration After Arraignment,” *Psychiatric Services* 65, no. 9 (2014): 1,113–1,119.

Further, new research has revealed a number of ways that pretrial detention may increase future criminal justice involvement. Pretrial detention has been linked to a higher likelihood of conviction, regardless of charge.<sup>12</sup> People detained pretrial are more likely to receive a sentence to jail or prison and to receive a longer jail or prison sentence than those released pretrial, regardless of the charge, seriousness of their offense, and criminal history.<sup>13</sup> There is also emerging research suggesting that even short periods of pretrial detention increases the likelihood of failing to appear or engaging in new criminal activity while on pretrial release, and, more strikingly, that some pretrial detention increases the likelihood of recidivism in the future.<sup>14</sup>

## About the Problem

About 5 percent of the general population has an SMI, as compared to about 17 percent of people entering jails. This overrepresentation of people with behavioral health needs likely becomes even more concentrated within a jail's average daily population because in many communities, people with behavioral health needs are less likely to make bail or take longer to make bail.<sup>15</sup> Considering that more than 60 percent of the jail populations in the U.S. are pretrial detainees,<sup>16</sup> a significant portion of jail populations are pretrial detainees with behavioral health needs.

Many communities are addressing this issue by paying close attention to who is arrested and booked into jail. They have identified strategies to effectively divert individuals with mental illnesses who do not pose a public safety risk to needed community-based services, often through partnerships between law enforcement and community-based treatment providers.

For many who are arrested and booked into jail, the current approach to pretrial detention is not the best use of public resources to protect public safety or ensure appearance in court. The Laura

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<sup>12</sup> Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables* (Washington, DC: Bureau of Justice Statistics: State Court Processing Statistics, 2013), 22.

<sup>13</sup> For recent research on this conclusion in the federal system, as well as a summary of existing research in the states, see James C. Oleson et al., "The Sentencing Consequences of Federal Pretrial Supervision," *Crime and Delinquency* (2014): 1–21.

<sup>14</sup> This research is based on a study of more than 150,000 defendants from Kentucky and is controlled for demographics, criminal history, and current charge information. The findings held for those who were measured to be at a "low risk" of pretrial failure based on Kentucky's pretrial risk assessment tool. Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (New York, NY: Laura and John Arnold Foundation, 2013).

<sup>15</sup> See Vera Institute of Justice, *Los Angeles County Jail Overcrowding Reduction Project* (New York, NY: Vera Institute of Justice 2011); The Council of State Governments Justice Center, *Improving Outcome for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems* (New York, NY: The Council of State Governments Justice Center, 2012); Jeffrey Draine et al., "The Impact of Mental Illness Status on the Length of Jail Detention and the Legal Mechanism of Jail Release," *Psychiatric Services* 61, no. 5 (2010) (Analyzing admissions to the Philadelphia jail system in 2003 and finding "mental illness status was not found to be a significant predictor of longer detentions").

<sup>16</sup> Todd D. Minton and Zhen Zeng, *Jail Inmates at Midyear, 2014* (Washington, DC: Bureau of Justice Statistics, 2015), 4.

and John Arnold Foundation (LJAF) reports that less than 10 percent of jurisdictions use data-driven risk assessments to inform pretrial release decisions.<sup>17</sup> Further, in two large jurisdictions that LJAF examined in detail, nearly half of the highest-risk defendants were released pending trial, while low-risk, nonviolent defendants were frequently detained.<sup>18</sup>

***“The link between serious mental illness and risk of engaging in criminal behavior is relatively weak and applies to a relatively small number of people. The same is true for the link between serious mental illness and risk of violence. For those people with mental illnesses, judges (and others) should look at the same factors used to appraise risk for all other defendants. Judges should look at the individuals’ history of behaviors they are trying to predict and risk factors, other than just the presence of a mental illness, that are associated with threats to public safety.”***

— EXPERT ADVISORY GROUP ON REDUCING RECIDIVISM AND PROMOTING RECOVERY:  
UNDERSTANDING RISKS AND DANGEROUSNESS IN DEFENDANTS WITH MENTAL ILLNESSES

## Behavioral Health at the Pretrial Stage

Many communities have found ways to make effective connections to treatment part of pretrial release or diversion programs.<sup>19</sup> In a 2009 survey of about 300 pretrial services programs, three-quarters of the 171 respondents indicated they provide information on “physical/mental status” to the courts, and 44 percent of respondents indicated they have special supervision procedures for people with mental illnesses.<sup>20</sup> Many communities around the country have formal and informal “mental health caseloads” for pretrial services officers. Clinicians are available in many courthouses to conduct brief on-site assessments of behavioral health needs to inform decisions about diversion and referrals to community-based providers.

<sup>17</sup> Laura and John Arnold Foundation, “Developing a National Model for Pretrial Risk Assessment,” (2013), 1–2, [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf).

<sup>18</sup> *Ibid.*

<sup>19</sup> For an early review, see John Clark, *Non-Specialty First Appearance Court Models For Diverting Persons with Mental Illness: Alternatives to Mental Health Courts* (Delmar, NY: Technical Assistance and Policy Analysis Center for Jail Diversion, 2004).

<sup>20</sup> Pretrial Justice Institute, *2009 Survey of Pretrial Services Programs* (Washington, DC: Pretrial Justice Institute, 2009) 44, 48.

Public defender offices nationwide have started to employ social workers to assist with screening and case management for defendants with behavioral health and social service needs. Social workers assigned to defense teams help facilitate the processes of identifying behavioral health and other needs, providing the defense attorney with key information to incorporate into pretrial release and diversion requests. Social workers within public defender offices can also help to identify community-based treatment and support services and create linkages as needed. The co-location of legal aid attorneys with experts in income supports and entitlements can similarly facilitate benefits enrollment and housing access.<sup>21</sup>

Prosecutors are developing and leading diversion programs that hold individuals accountable for their actions and protect public safety while limiting incarceration costs. Municipal and general jurisdiction judges are increasingly receiving training not just on fitness to stand trial<sup>22</sup> or establishing specialty courts, but also on recognizing behavioral health needs from the bench and responding appropriately.

At the state level, according to the National Conference of State Legislatures, in 2015, 43 states provide pretrial diversion options by statute, of which 17 have specified the availability of diversion for people with mental illnesses, often in the form of a problem-solving court.<sup>23</sup>

There is a growing research base that informs work in this area. Studies have identified factors shown to be statistically predictive for pretrial success or failure. There is also an increased awareness of the large number of people detained simply because they do not have the financial resources to make bail. These findings have prompted policymakers to reconsider the information that informs pretrial decisions and the options available for community-based pretrial supervision. At the same time, as many states expand Medicaid eligibility, significant funding may now exist to pay for needed behavioral health treatment in the community.

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**21** See, for example, Texas Task Force on Indigent Defense, "Representing the Mentally Ill Offender: Evaluation of Advocacy Alternatives for Criminal Defendants with Mental Illness," (Austin, TX: Office of Court Administration, 2010), <https://ppri.tamu.edu/representing-the-mentally-ill-offender/>.

**22** This report does not address the significant issue of improving policies and practices around evaluating and restoring competency. The National Judicial College provides best practices and a database of state legislation online at: <http://www.mentalcompetency.org/>.

**23** National Conference of State Legislatures, "Pretrial Diversion," <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx>.

## Essential Elements

**W**ith the support of the Public Welfare Foundation, The Council of State Governments Justice Center has worked with national experts, researchers, policymakers, and practitioners to identify effective approaches by local criminal justice systems' to defendants with mental illnesses and, often, co-occurring substance use disorders at the pretrial stage. This report incorporates the best available research and experience from those in multiple disciplines to articulate seven essential elements that should be included in efforts to improve outcomes for individuals from arrest through case disposition. Beyond planning and implementation of specialized programs, these elements lay the foundation for systemic responses at the pretrial stage. While the application of these elements in different jurisdictions will require many different types of policies or programs, adherence to these elements provides the foundation for a system's success in improving public safety, public health, and public expenditures, as well as protection of individual rights.

The elements are consistent with, and spring from, the core principles for pretrial policy and practice (see Box, "Pretrial Justice"). They are derived from a growing research base and from innovative programs and approaches from around the country. The elements begin with collaboration, which is at the heart of balancing the legal, clinical, and criminal justice considerations in responding effectively at the pretrial stage. The communities that undertake this important work will vary widely in the availability of community-based resources, both in the range of treatment and supports, as well as in capacity. Similarly, legal structures and processes will vary from jurisdiction to jurisdiction and between municipal courts and those hearing felony cases. However, clear communications between justice and health systems are fundamental in achieving shared public safety and public health goals.

Because few communities universally screen arrestees for behavioral health needs, assess the probability of their success on pretrial release, or evaluate pretrial release and diversion options for this population, there is a need for more research in this area. The elements in this report suggest questions for future researchers in this fast-moving, important field.

## Pretrial Justice: Core Principles

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Effective responses for people with mental illnesses at the pretrial stage build on many of the same principles as effective responses for any defendants. The following set of principles about pretrial practices is foundational to the essential elements.

- The practices should be fair and evidence based. Optimally, decisions about custody or release should not be determined by factors such as an individual's gender, race, ethnicity, or financial resources.
- The practices should address two key goals: (1) protecting against the risk that the individual will fail to appear for scheduled court dates; and (2) protecting against risks to the safety of the community or to specific persons.
- Unnecessary pretrial detention should be minimized. Detention is detrimental to the individual who is detained, costly to the jurisdiction, and can be counter-productive in terms of its impact on future criminal behavior.
- To make sound decisions about release or detention, judicial officers need to have (1) reliable information about the potential risks posed by release of the individual; and (2) confidence that resources are available in the community to address or minimize the risks of nonappearance or danger to the community if the decision is made to release the individual.

*From Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement* by William F. Dressel & Barry Mahoney, National Judicial College (May 2013)

# 1. Collaboration

**Criminal justice and behavioral health leaders, managers, and line staff actively work together to develop, operate, maintain, monitor, and improve responses to people with mental illnesses in the pretrial period.**

The impetus for a pretrial mental health initiative is often manifold, ranging from a need to reduce jail overcrowding, or a recommendation from a task force focused on people with mental illnesses in the justice system, to a change in state pretrial policy or a tragic occurrence in the community. Regardless of its origins, a successful pretrial mental health initiative will draw on expertise and resources from criminal justice and behavioral health systems. Overlapping legal structures, jurisdictions, multiple funding sources, and physical facilities will likely require coordinated involvement from municipal, county, and state officials. At all levels, leadership, management, and line staff must make important and unique contributions to ensure success.

## Who Is Involved

While the exact configuration will vary from place to place, a group of decision makers (e.g., a “Mental Health Pretrial Task Force”) should draw on stakeholders across different systems to plan, administer, and sustain the initiative.<sup>24</sup> Jail administrators, elected prosecutors and chief public defenders, judges, court administrators, treatment providers and behavioral health administrators, and pretrial services agency directors are most likely to be the core members of this leadership group. County commissioners and criminal justice experts should be involved from the beginning to ensure that the initiative is integrated in larger legal frameworks, systems planning, data collection, and funding. Criminal justice coordinators may also be well suited to bridge justice and health systems and may be able to assist in the identification of potential partners within government and the community, as well as researchers and technical assistance resources. Some communities may have existing criminal justice advisory boards or coordinating councils already well positioned to provide oversight to this initiative, however ad hoc members should be added to ensure that all necessary parties for the pretrial process for defendants with serious mental illnesses are included.

There should be a healthy interaction between the leadership group and designees in each agency charged with specific activities related to planning, implementing, and operating the initiative. Goals

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<sup>24</sup> For a general discussion of criminal justice and behavioral health collaboration, see The Council of State Governments Justice Center, *Criminal Justice/Mental Health Consensus Project Report* (New York, NY: The Council of State Governments Justice Center, 2002). For a discussion of collaborative local justice system planning, see M. Elaine Borakove et al., *From Silo to System: What Makes a Criminal Justice System Operate Like a System?* (Arlington, VA: The Justice Management Institute, 2015).

and principles established by leadership should be operationalized by staff familiar with the legal and evidence-based principles and current system processes. Staff members who are experienced, knowledgeable, creative, and well respected by their colleagues should be designated to this team. This “work team” should submit plans, challenges, questions, and regular reports to the leadership group for review.

The planning, administration, and sustainability of the initiative will benefit from input by additional stakeholders, such as local law enforcement, crime victim advocates, people with serious mental illnesses who have been involved with the criminal justice system and their families, and additional social service providers that are assisting with access to housing, medical benefits, and employment. State administering agencies (SAAs) may have access to funding or expertise that can also help inform the effort, and other state agencies may be able to provide expertise or funding for specific aspects of the initiative. Researchers and technical assistance providers play an important role as well by sharing information about legal and evidence-based approaches from around the country and assisting with the development of appropriate outcome measures and the collection and analysis of data to track performance.

## The Planning Process

There is no substitute for a thoughtful, inclusive planning process. A pretrial services director or a judge may be tempted to use his or her own authority to create an initiative without involving other stakeholders. When buy-in has not been secured by other stakeholders, interrelations among the many critical departments and agencies can suffer. Those who are unaware of or are skeptical about the new initiative may not make referrals or may challenge recommended participation. The time spent gaining support at the beginning from key stakeholders and addressing their legitimate concerns is critical to the success of the initiative.

The planning committee should be convened to review research on germane legal issues, existing policies and regulations, and models of evidence-based pretrial practice in order to set realistic goals and foundation principles for the initiative. A common pitfall in the design of a pretrial mental health initiative is to set unrealistic goals for reductions in the jail population or recidivism rates. Time spent researching legal and evidence-based pretrial and behavioral health practices is critical, as is review of available local data. By dedicating some of their own limited time to understanding the research and defining the goals and objectives of the effort, these leaders send important messages to their staff and to the public about the principles that will be followed in policy development and

implementation. They also model the cross-system cooperation that will be necessary to make the initiative work.

Responsibility and accountability should be clearly designated. In some communities, a pretrial services agency may be the natural “owner” of the initiative with a director who is committed to its success and a designated staff member who coordinates with other partners. In other communities, this role may fall to the courts, local community corrections/probation, or a nonprofit, community-based organization. Prosecutors are often the leaders in developing and operating diversion programs. Criminal justice coordinators may also be natural project leads, given their role in bridging different systems, identifying innovative programming, and project development, however it will be important for the initiative, once launched, to have an operational home in an existing agency.

Planning should include a survey of community-based treatment and support services, including different types and quantities of treatment. Housing may be a particularly important factor for some people’s success in the community, both in managing their illnesses and in staying crime-free. Working with housing departments, homeless services agencies and nonprofits, and community-based organizations can help identify the range of housing options available to those with behavioral health disorders who are justice system involved.<sup>25</sup> By developing an inventory of available services and supports, those engaged in the planning process will be able to develop processes to maximize these available resources through thoughtful referrals and be able to identify priorities for fundraising or future capacity development.

By the end of the planning process, there should be a plan in place for implementation and, potentially, a formalization of the relationships between the agencies. This may include memorandums of understanding that capture the responsibilities of different agencies and allow for the exchange of information, a joint funding request or budget proposal, and a draft policies and procedures document. As new policies or programs are developed and implemented, outreach to media can play an important role in helping communities understand the changes and their public safety and public health goals. There should also be a plan in place for training, communications, future oversight meetings, and data collection based on identified performance measures.

## Operation, Maintenance, Monitoring, and Improvement

At each level, stakeholders should know the names of their counterparts, how best to contact them, and the factors that influence how they do their jobs. For leaders, this may be election cycles, funding

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<sup>25</sup> The research on best practices and outcomes in this area is very limited. For a discussion of different housing approaches and balancing service needs with appropriate levels of criminal justice supervision for this population, see Caterina Gouvis, Roman Elizabeth Cincotta McBride, and Jenny W. L. Osborne, *Principles and Practice in Housing for Persons with Mental Illness Who Have Had Contact with the Justice System*, (Washington, DC: Urban Institute, 2006), especially the discussion on pages 23–25 of principles for effective programming.

structures, and relationships with state or municipal governments. For managers, it may be different performance measures or interagency agreements. Line staff benefit from understanding all of these dimensions, as well as the hierarchy of their partners' organizations and basics about their partners' schedules and activities (e.g., times they are likely available to meet, easiest ways to communicate during the day, etc.).

Regular meetings at the leadership, management, and line staff levels should bring together stakeholders to discuss current operations and progress towards the initiative's goals. The time spent together to jointly discuss an issue of mutual interest—whether it is the progress of an individual defendant on pretrial release or the status of overall initiative sustainability—can be the most efficient way to develop a viable approach and can also be the catalyst for innovations and improvements.

Sustainability should be regularly included in discussions. For most initiatives, multiple stakeholders will need to contribute data in order to handle cases appropriately and develop accurate analyses about the effectiveness of the program. Different stakeholders also bring expertise about different types of funding and how it may be used for various initiative components. Initiative champions, the community, and the media should be regularly engaged to spread understanding and support for the initiative.

At the outset and regularly throughout program implementation, treatment providers and pretrial services officers should discuss how they each see their own roles and the roles of others in supporting success.

Regular discussions among stakeholders, feedback from defendants, and ongoing training and performance measurement can all be the bases for ongoing quality improvement and innovation.

## 2. Training

**Criminal justice and behavioral health stakeholders are familiar with legal and evidence-based practices for pretrial release, supervision, and diversion, basic concepts in both pretrial justice and behavioral health, and specific skills relevant to their professions.**

Training is at the heart of effective pretrial responses; from leadership understanding and endorsement of legal and evidence-based practices in system design, to management decision-making, to line staff interacting productively with defendants on release. Too often a systems change falls short of its intended benefits because stakeholders at all levels have not prioritized investing in the knowledge necessary for success. Ongoing training with quality assurance should be part of all stakeholders' experience and should be considered in performance evaluation. Leaders should support excellence through recognition and promotion of managers and line staff who excel, and also seek financial support for the development and delivery of training.

### Foundational Training

There is a core body of knowledge about the law and research findings that all members of the leadership group should have as a prerequisite to setting goals and parameters for their own community. Leaders should receive training and background materials on the federal constitutional rights of criminal defendants and any state constitutional or statutory provisions that address considerations for pretrial release, preventive detention, and diversion options. This training should include explanation and discussion of the timing and context for different steps of a criminal case. Leaders should also be familiar with policies that require law enforcement to arrest, rather than issue a citation, for certain charges, and how this impacts the flow of people with mental illnesses into pretrial detention.

A practice is "evidence based" when there is a body of research showing that if the practice is implemented with fidelity, desired outcomes are likely to be achieved. Researchers and technical assistance providers can identify practices that have a research base and demonstrate positive public safety outcomes in the areas of pretrial release, pretrial supervision, and diversion. Research on pretrial decision-making and supervision and diversion programming is accelerating, and planners should anticipate attending professional conferences, signing up for newsletters, or

using other strategies to stay abreast of developments in this field.<sup>26</sup> With regards to behavioral health populations involved with the criminal justice system, there is a subset of research testing interventions that help those with mental illnesses and co-occurring substance use disorders progress towards recovery and reduce their criminal justice system involvement.<sup>27</sup> Of particular importance in this area is training on the nuanced relationships between mental illness, substance use disorders, and different types of criminal activity. Basic understanding of state legal considerations in information sharing between justice and health stakeholders should also be reviewed, as there are often misconceptions. Those involved with planning, in particular, should be familiar with who benefits from different types of interventions, under what circumstances, with what expected outcomes, and with what resources, to set realistic goals and objectives, and to develop training to achieve these programmatic outcomes. Local consumer and family groups can provide new perspectives on the pretrial phase and ideas about ways to achieve shared goals.

Cross-training is an effective way to share information and build understanding and partnership between criminal justice and behavioral health stakeholders. Cross-training that familiarizes criminal justice and behavioral health stakeholders with each other's systems, structures, missions, and values is essential for everyone involved, from leaders to managers and line staff. Cross-training should be ongoing and can be both formal and informal. Its goals are to build common understanding that enhances trust, improving the ability to work together productively and to constructively identify new opportunities.

## Role-Specific Training

Leaders should seek out innovative training strategies that involve coaching, practicing, and providing feedback for relevant skills. Frontline criminal justice stakeholders (i.e., judges, prosecutors, defense attorneys, and pretrial services officers) should be able to recognize signs of behavioral health disorders in order to make a referral to a clinician, and should have a basic understanding of symptoms of these illnesses that are likely to impact pretrial success. They should be taught the different avenues for connecting defendants with those who are able to determine behavioral health needs and facilitate connections to needed care.

Judicial officers need to be trained on how to read and interpret pretrial risk assessments and any information they receive about behavioral health needs. Attorneys need to know what information

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<sup>26</sup> For an introduction to the concept of "Legal and Evidence-Based Practices" for pretrial, see Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Washington, DC: National Institute of Corrections and Crime and Justice Institute, 2007).

<sup>27</sup> Alex M. Blandford and Fred C. Osher, *A Checklist for Implementing Evidence-Based Practices and Programs for Justice-Involved Adults with Behavioral Health Disorders* (Delmar, NY: SAMHSA's GAINS Center for Behavioral Health and Justice Transformation, 2012).

the other side will have access to, factors the judicial officer will be considering, and how to move for different release options. Continuing legal education should provide judges, prosecutors, and defense attorneys with the range of release options—including diversion programs—available in their jurisdictions. It should also include information about the impact of detention on access to benefits, treatment, and other community-based supports. Officers supervising defendants with mental illnesses should receive substantial and ongoing training on mental health issues, co-occurring substance use disorders, and effective supervision strategies for this population.

Community-based treatment and service providers should receive training on pretrial processes and how to promote both recovery and adherence to release conditions. Training should introduce behavioral health staff to the steps of a criminal case for different types of offenses, the roles and responsibilities of various court staff, and the rights of criminal defendants. On-site exposure to the pace of pretrial hearings can sensitize the clinician to time limitations that constrict the exchange of information. Clinicians will also want to be familiar with the range of conditions likely to be placed on pretrial defendants or on participants in a diversion program. They should be taught to inquire about future court dates to support the defendants' appearances at required hearings. Clinicians should receive training on factors associated with pretrial failure—both failure to appear and new criminal activity. This training should include interventions that mitigate the likelihood of future criminal activity. Providers should also receive training on how, when, and what to communicate to supervising agents to promote adherence to conditions of release.

Line staff from both justice and behavioral health should have training on how to work with families, who can be essential sources of information and support for defendants with behavioral health issues. Training is also an opportunity to involve other system actors who may not be directly involved with the initiative but whose actions can support the initiative's goals, such as law enforcement or faith-based organizations.

## 3. Release and Diversion Options

**Judicial officers and other stakeholders use a range of mechanisms for quick and appropriate pretrial release and diversion.**

State and local policies establish a number of potential opportunities for pretrial release or diversion.<sup>28</sup> An initial decision about whether to release an individual and, if so, under what conditions, is often made within hours of arrest and there are often options to reconsider at arraignment or a subsequent appearance. Pretrial release may be with or without a posted bond, and with or without conditions. Diversion may be available through law enforcement interactions before an individual is booked, or after booking when the prosecutor's office either decides to delay filing charges or to suspend prosecuting the case. Each of these opportunities may be appropriate for different types of defendants. There should also be opportunities for those who could not be released earlier because of insufficient information or community-based placements.

It is also worth noting that an experienced prosecutor's decision not to file charges may be another appropriate avenue to community-based care. By ensuring that only meritorious cases proceed, prosecutors ensure that people with behavioral health needs are not pulled into the criminal justice system inappropriately. Referrals to voluntary treatment may be a more appropriate way to make connections for some cases, particularly those with low risk for subsequent criminal activity.

### Financial Bail for Defendants with Serious Mental Illnesses

Setting a dollar amount to secure bail is a widespread practice in most jurisdictions. However, planners should carefully consider the potential unintended consequences of this practice. Individuals with behavioral health needs may be unable to meet financial conditions because they do not have steady income, have limited income, or may not have friends/relatives able or willing to assist with posting bail.<sup>29</sup> This could result in pretrial detention unrelated to these individuals' true risk of pretrial failure. Analyses of detention data can help planners determine whether current bail-setting practices are unnecessarily causing the detention of those who could be safely released.

**28** The National Conference of State Legislatures (NCSL) has developed a database of state statutes on pretrial release and diversion and tracks pending legislation in this area. <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release.aspx> (August 27, 2015).

**29** See, for example, The Council of State Governments Justice Center, "Improving Outcome for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems," (New York, NY: The Council of State Governments Justice Center, 2012), 6.

As part of the planning process, stakeholders should review relevant federal and state law, as well as local court rules and processes, in order to delineate the various possibilities for pretrial release and diversion before adjudication. By the end of the planning process, a list of release options at different stages of a criminal case should exist that includes how released individuals are connected to community-based treatment and supports, as well as what information is needed to allow for appropriate referrals and how that information can be efficiently gathered.

While certain stages of the case may be most heavily used for pretrial release or diversion, opportunities for release and diversion exist at nearly every stage of case processing. Understanding and using a range of mechanisms for release and diversion can help stakeholders balance liberty, public safety, and public health goals.

Defense counsel plays a critical role in ensuring that people with behavioral health needs are considered for different options for pretrial release and diversion. Early appointment of well-trained counsel can facilitate the identification of behavioral health needs and appropriate use of pretrial release and diversion options. Defense counsel, especially those who employ social workers as part of the defense team, are often the first ones to identify a behavioral health need through early conversations with the defendant. They are also in a unique position of trust to receive information about the existence of a behavioral health need from pretrial services or others gathering information immediately after arrest. Well-trained counsel can advise their clients, and often their families, about different types of pretrial release, the conditions associated with them, and consequences of non-compliance. They can help their clients weigh the value of disclosing mental illness to the court and to prosecution. They can play an essential role in increasing the transparency of the criminal justice process for defendants, which is essential for these individuals in understanding what is happening and making informed decisions in their own cases.<sup>30</sup> Defense counsel can also play an important role in moving a case effectively through the pretrial stage by requesting needed mental health information, requesting bail reconsideration, or deciding to share behavioral health needs with the court and prosecutors in order to demonstrate eligibility for a diversion program. The presence of an advocate actively identifying options and working with the defendant to navigate the process can help prevent what is too often the case: defendants detained pretrial for lengthy periods because no one knows what to do to advance the case while addressing the behavioral health needs.

Judicial officers, prosecutors, and court staff can play a critical role in identifying when a behavioral health need is present and facilitating appropriate release and referral to community-based care.

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**30** There is a growing research base for the positive impact of this sort of procedural justice, including among those with mental illnesses. See, for example, Heathcote W. Wales, Virginia Aldige Hiday, and Bradley Ray, "Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism," *International Journal of Law & Psychiatry* 33, (2010), 265–271.

In courts of limited jurisdiction (e.g., municipal courts), where defense counsel is often not available, magistrates or other judicial officers are likely to be the first line for identifying a potential mental health need. This may be determined from their own observations, or through information provided by family members or clinicians. With this knowledge, they can appropriately guide the case, even though these are often very busy courts with cases moving quickly.

## **Behavioral Health, Risk of Violence, and Preventive Detention**

The connection between mental illness and violence is complex. Although often a real concern for decision makers, violence while on pretrial release is a relatively rare event.<sup>31</sup> The mere presence of a mental illness does not help predict violence, so decision makers should not “put a thumb on the scale” of pretrial risk assessment when mental illness is suspected or identified. To do so would be to detain or limit the freedom of many people without necessarily improving public safety. At the same time, where there is a real risk of violence that cannot be managed, many states follow the federal system and have provisions for “preventive detention.”

Research does suggest that some people under the influence of drugs and other substances are more likely to be violent, whether or not they have a mental illness. And individuals with serious mental illnesses who are actively psychotic may be at increased risk.<sup>32</sup> However, for all individuals, regardless of behavioral health needs, past violent behavior is the best predictor of future violent behavior. Some jurisdictions are developing processes or using empirically developed tools to try to gauge risk of violence for any defendant and handle these cases appropriately.

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<sup>31</sup> See, for example, Qudsia Siddiqi, *Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset* (New York, NY: Criminal Justice Agency, 2009).

<sup>32</sup> R.A. Friedman, “Violence and Mental Illness—How Strong is the Link?” *The New England Journal of Medicine* 355, no. 20 (2006), 2064–2066.

## 4. Informed Decision Making

**Judicial officers receive information that is shown to be relevant to defendants' probability of success on release to inform their decisions about release and to set the least restrictive conditions to ensure appearance in court and protect the public. Diversion is made available based on similar factors, and defendants make informed decisions to participate.**

A number of decisions made by judicial officers and prosecutors in the first hours and days after arrest have a significant impact on the trajectory of a defendant's case. These decisions determine whether people will be released on their own recognizance or must post some sort of financial bond, whether they must adhere to certain conditions while on release, and whether they will be offered the opportunity to participate in a community-based diversion program.<sup>33</sup>

The much-quoted language in *U.S. v. Salerno* (1987) highlights the U.S. Supreme Court's view that "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."<sup>34</sup> Conditions on that liberty should only be imposed after an individualized determination of pretrial risk, and should be the minimum necessary to ensure appearance in court and protect the public.<sup>35</sup>

A growing body of research is studying what information judicial officers and prosecutors should have at their disposal to ground their decisions. A careful consideration of the goals of each of these decisions should guide what information needs to be collected, how it should be packaged, who should receive it, and, most importantly, how it should be used to inform decision-making. For most jurisdictions, the primary goals for pretrial release will be ensuring appearance in court and protecting public safety. These goals are to be achieved while minimizing pretrial detention for all, and, for people with behavioral health needs, making connections to needed behavioral health care. For diversion, the goals will be to make needed connections to community-based care without jeopardizing public safety, to protect and restore victims, and to use public resources efficiently.<sup>36</sup>

Planners must develop processes that strike the balance between gathering needed information and minimizing the length of pretrial detention. As discussed above, even short periods of detention can increase future criminal justice involvement and, for people with behavioral health needs, create disruptions in care, aggravate symptoms, and potentially jeopardize necessary supports, such as

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**33** For more on pretrial release and diversion, generally, the National Association of Pretrial Services Agencies (NAPSA) and the American Bar Association have developed standards that are available online.

**34** *United States v. Salerno*, 481 U.S. 739, 755 (1987).

**35** *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

**36** See, for example, NAPSA Diversion Standard 1.2.

housing. At the same time, processes must include steps to assess each individual's likelihood of success in the community, including determining how to release an individual without jeopardizing public safety, particularly when there is a victim involved. Processes should also be in place to regularly review those who are in pretrial detention to determine whether the detention is still appropriate and, if not, to reconsider the bail set and diversion options as quickly as possible.

## Release Decisions

Judicial officers need information to make quick decisions about who poses a significant risk of failing to appear at scheduled court appearances (FTA) or new criminal activity (NCA) while on pretrial release. Research has identified a handful of factors that can be combined to “accurately sort defendants into categories showing their likelihood of having a successful pretrial release.”<sup>37</sup> Using a pretrial risk assessment instrument to collect and provide this information to judges is gaining widespread support, including from the Conference of Chief Justices, Conference of State Court Administrators, the American Bar Association, the National Sheriffs' Association, the American Jail Association, and the National Association of Pretrial Services Agencies.<sup>38</sup> Different factors may be determined to be the most predictive in different jurisdictions based on appropriate analyses; however, factors related to criminal history (e.g., prior failures to appear, prior convictions, and incarcerations for certain charge types) have been found to be the most predictive in the largest studies currently available.<sup>39</sup>

The law, research, and practice are still coming together regarding whether or how much to consider a defendant's mental health status in making a release decision or setting conditions of release.<sup>40</sup> Some states include “mental health” as a condition that may, or even must, be considered by the judicial officer in making a release decision and setting conditions of release. The largest recent studies have shown that including a question about “mental health status”<sup>41</sup> did not make a pretrial

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**37** Pretrial Justice Institute, “Issue Brief: Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants,” (2015), 2, [http://www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20\(May%202015\).pdf](http://www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20(May%202015).pdf) (August 3, 2015).

**38** Support for pretrial risk assessment is one of the recommendations of the National Symposium on Pretrial Justice convened by former U.S. Attorney General Eric Holder in 2011 and the National Pretrial Justice Working Group.

**39** Kristin Bechtel, Christopher T. Lowenkamp, and Alex Holsinger, “Identifying the Predictors of Pretrial Failure: A Meta-Analysis,” *Federal Probation* 75, no. 2 (2011); Marie VanNostrand and Christopher Lowenkamp, “Assessing Pretrial Risk without a Defendant Interview,” (2013), [http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF\\_Report\\_no-interview\\_FNL.pdf](http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_no-interview_FNL.pdf). Care should be taken so that these pretrial risk instruments do not, in their development or implementation, have the unintended effect of having disproportionately classifying certain racial, gender or class groups as high risk.

**40** For example, Texas has special statutory provisions for early identification of mental illness and release on personal recognizance with outpatient treatment for defendants with potential mental health needs. Texas Code of Criminal Procedure Art. 16.22, Art. 17.032. Many states also require or allow consideration of “mental condition” in bail determination. See, for example, Florida §903.046, Illinois 725 ILCS 5/110-5; Indiana §35-33-8-4; Montana §46-9-301; New York Crim. Proc. Law §510.30; South Dakota §23A-43-4; Washington Superior Court Criminal Rule 3.2. The National Conference on State Legislatures (NCSL) has developed a rich database of laws related to pretrial release and diversion, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy.aspx>. Research on mental health in bail consideration was obtained through an interview with Amber Widgery, Esq., Policy Associate at NCSL.

**41** “Mental health status” or similar language is rarely defined in statutory language or in pretrial research, making comparisons of research and specific implementation guidance difficult.

risk instrument more accurate, although some local jurisdictions working with researchers have found their own definitions of “mental illness” to be helpful inclusions in tools for risk of failure to appear. Further complicating matters are the high rates of substance use disorders co-occurring with mental illnesses, particularly in criminal justice populations. Current or historic substance use has been found to be predictive in several pretrial risk tools.<sup>42</sup> A number of reasons may be behind these findings;<sup>43</sup> regardless, assuming that all those with mental illnesses are more “risky” for pretrial failure would be incorrect, and “mental health status” should only be included as a factor in a pretrial risk instrument with extreme caution.

The pretrial risk assessment instruments discussed above are based on statistical analyses of large groups of defendants. At the individual level, serious mental illness may affect the risk of FTA or NCA for a given defendant.<sup>44</sup> For those defendants whose mental illness may be directly linked to previous criminal acts, FTA, or potential violence, this information is relevant to the release decision. When a pretrial risk tool places a defendant at a risk level that would warrant release with conditions, yet information that a defendant’s mental illness has contributed to factors that put him or her at risk of pretrial failure, special conditions could be considered. It may be that their crime-related behavioral health needs could be addressed through supervision strategies and connections to treatment, if the judicial officer knows about it. For example, information that a defendant has difficulty keeping appointments because he or she lacks organizational skills or suffers delusions that may lead to new criminal activity when he or she fails to take medication can be very helpful for a judicial officer in identifying conditions of release that would mitigate that defendant’s risk.<sup>45</sup> Such specific information is difficult to collect in the short period between arrest and a bail hearing, and care should be taken in ordering mental health assessments that will delay decision making and may not produce information that is truly relevant to the decision at hand. However, if such specific information is available, it could be shared with the court by pretrial services or jail personnel through a pretrial report that goes alongside the risk assessment instrument’s score, or could be introduced by defense counsel.

In addition to the information provided by a pretrial risk assessment, processes should be in place

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**42** Pretrial risk tools for the federal system, Colorado, Florida, Ohio, and Virginia all include questions about history or current substance use. Pretrial Justice Institute, “Pretrial Risk Assessment,” 2.

**43** More research on this is needed, as few jurisdictions have data that would show whether or not all defendants have a “mental health need” that is clearly defined. Universal screening for mental health needs before the release decision is unusual, and few places that have this information have also conducted rigorous analyses for development of a pretrial risk tool or to measure pretrial release outcomes. Further complicating drawing conclusions in this area is the fact that there is great variability in how “mental health need” is identified in the studies conducted. Different tools may rely on interviewer observations, self-reported medication use, self-reported history of treatment, or responses to a questionnaire developed to screen for treatment needs, all of which would identify different groups. For example, the Colorado Pretrial Assessment Tool (2012) and the Florida Pretrial Risk Assessment Instrument (2012) both include questions about historic mental health treatment usage, however they are defined differently.

**44** Describing the relationship between different types of mental illness and specific criminal acts and risk of future criminal activity is an area of active research at this time. For a recent discussion, see Jillian Petersen et al., “How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?” *Law and Human Behavior* 38, no. 5 (2014), 439–449.

**45** The more likely scenario is that this sort of specific, individualized information will not be available for an initial release decision. If there is a pretrial services agency, it is more likely that its officers will identify these specific individual factors and incorporate them into risk management through supervision and coordination with treatment providers, as discussed below in Element 6: Community Supervision and Treatment at the pretrial stage.

to collect and consider other sources of information specific to the defendant. Family members or current care providers may have information that can help inform the judicial officer's determination of whether a defendant can be safely released to the community.

Also, even before a finding of guilt, there may be an individual who identifies as a victim of crime and has a right to be heard about concerns related to a defendant's conditions of release or diversion. Planners should establish processes that appropriately notify victims about court hearings, whether a defendant is being released, and when there are opportunities to provide input to the court about the conditions of release.<sup>46</sup>

## Conditions of Release

Conditions of release should be tailored to minimize intrusions on liberty while protecting the public and ensuring appearance in court. Increasingly, jurisdictions are providing judicial officers with recommended release decisions and conditions based on the information provided in the pretrial risk assessment. These “praxis,” or decision grids, lay out different conditions and types of supervision. The grids are structured so that people with the greatest likelihood of pretrial success have no or very few conditions placed, while those who present more risk factors have more conditions imposed.<sup>47</sup>

While many defendants with mental illnesses may benefit from community-based mental health treatment, there are likely only a small percentage of defendants who need that treatment in order to return to court and refrain from new crimes. Applying the minimum restrictions on liberty necessary to protect public safety and ensure return to court would mean that that treatment should only be a condition of release for those who truly need it in order to succeed on pretrial release. This should be the case at pretrial even though post-adjudication mandated treatment has some demonstrated effectiveness.<sup>48</sup> Judicious use of treatment as a condition of pretrial release is also necessary because most communities have very limited resources for community-based care and narrow eligibility criteria that may limit access to services. If the court-ordered condition of treatment is over-used, it is not hard to imagine a situation where a defendant remains detained

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<sup>46</sup> Pretrial Justice Center for Courts, “Addressing Victims’ Rights in Pretrial Justice Reform,” (Williamsburg, VA: National Center for State Courts, 2015), 2.

<sup>47</sup> This approach follows the “risk principle” widely used in post-adjudication supervision, which has preliminary promising results in the pretrial area. For an early example of research on how structured decision-making can be paired with a pretrial risk assessment, see Mona J.E. Danner, Marie VanNostrand, and Lisa M. Spruance, “Risk-Based Pretrial Release Recommendation and Supervision Guidelines: Exploring the Effect on Officer Recommendations, Judicial Decision Making, and Pretrial Outcome,” (2015), <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Risk-Based-Pretrial-Guidelines-August-2015.pdf>.

<sup>48</sup> For an example of findings that mandated treatment may increase the likelihood of diversion program completion, see Nahama Broner, Damon W. Mayrl, and Gerald Landsberg, “Outcomes of Mandated and Non-Mandated New York City Jail Diversion for Offenders with Alcohol, Drug, and Mental Disorders,” *Prison Journal* 85 (2005), 18–49.

because a treatment spot is not available.<sup>49</sup> While a referral for assessment and treatment, ideally to a co-located or nearby clinic, does not have the same “teeth” as a condition, it may well be the more appropriate amount of criminal justice involvement for many defendants this early in their cases.

Similar care should be taken in adding other conditions of release for people with mental illnesses. Regular reporting requirements may be particularly difficult for those with serious impairments and may not serve a true public safety need. Drug testing is a commonly imposed condition for which planning teams should develop a strategy, particularly for people with co-occurring substance use disorders. While for some defendants, drug testing may assist with a path to recovery, for others, abstinence may not be possible immediately (e.g., those physically dependent on alcohol or other drugs) and could lead to further criminal justice involvement if the defendant fails to comply. Particularly in places where a pretrial services program exists that can provide additional assessment or connection to referrals after the initial judicial opinion, courts should be circumspect in the amount of mental health information they request and the related conditions that they impose early in the case.

## Referrals to Diversion

Referrals to diversion may be made by judges, defense attorneys, and others, with prosecutors most often playing the role of “gatekeeper” to the programs and having the final decision to offer a diversion. Developing a “target population” for a diversion program is an important planning step that should be based on local goals and resources. Individuals with diverse charges, treatment needs, and criminal histories have succeeded on diversion programs.<sup>50</sup> Planners should consider available resources for community-based supervision and treatment and develop target populations for diversion accordingly.<sup>51</sup> Processes should be in place so that defendants understand what they must do to successfully complete the diversion, the potential consequences of not succeeding, and any rights that they are waiving before agreeing to participate.

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**49** Allison D. Redlich, et al., “Is Diversion Swift?: Comparing Mental Health Court and Traditional Criminal Justice Processing,” *Criminal Justice and Behavior* 39, no. 4 (2012), 420–433. A concern along these lines is raised in the post-adjudication context by the National Legal Aid & Defender Association, “Risk & Needs Assessment: What Defenders and Chief Defenders Need to Know,” (2015), 6. [http://www.nlada100years.org/sites/default/files/NLADA\\_Risk\\_Needs\\_Assessments.pdf](http://www.nlada100years.org/sites/default/files/NLADA_Risk_Needs_Assessments.pdf).

**50** Steve Ryan, Chris K. Brown, and Shinobu Watanabe-Galloway, “Towards Successful Post Booking Diversion: What Are Next Steps?” *Psychiatric Services* 61, no. 5 (2010), 469–477.

**51** Osher, et al., *Adults with Behavioral Health Needs*.

## 5. Quick Connection to Appropriate Behavioral Health and Support Services

Mental health, substance use, and other needs are identified through screening and are shared narrowly to direct defendants to appropriate treatment and services in a timely fashion.

Each contact with the criminal justice system presents an opportunity to connect people who have behavioral health needs to treatment, but the speed and unpredictable timing of release decisions can make it challenging to complete a referral and connection to assessment and care.<sup>52</sup> At the same time, careful attempts at referral and connection to care should not lead to longer detention or additional criminal justice involvement.<sup>53</sup>

The rule of thumb for sharing behavioral health information should be to share the minimum necessary for a specific purpose (See Box: Sharing Behavioral Health Information). Protections should also be in place to ensure that information collected during any pretrial interviews or assessment is used for the purposes of pretrial release decisions only and may not be used for prosecution. To the extent defense attorneys are appointed early enough in the process, they can play a productive role in determining which behavioral health information should be introduced to the court for specific decisions.

### Identifying Behavioral Health and Other Needs

Universal screening for mental health and substance use needs can be implemented at critical points, such as at booking into pretrial detention facilities and court-based centers. Short, free, publicly available questionnaires (“screens”) can be administered quickly by non-clinical personnel to identify potential mental health and substance use needs.<sup>54</sup> People who screen positive can then be referred for further assessments, diagnosis, and treatment planning by qualified professionals. Some jurisdictions have created behavioral health assessment centers in or adjacent to courts so that behavioral health needs can be identified quickly by behavioral health professionals.

Additionally, a range of data systems can be used either within an agency or among multiple system stakeholders to help identify those with behavioral health needs. Criminal justice actors may have their own system of flagging cases for mental health or substance use needs and can query their own databases upon a new booking. Jurisdictions may also have management information systems in place that can automatically match the arrested individual to records in existing mental health

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<sup>52</sup> Draine, et al., “The Impact of Mental Illness.”

<sup>53</sup> Redlich et al., “Is Diversion Swift?”

<sup>54</sup> For example, the Brief Jail Mental Health Screen and the Texas Christian University Drug Screen V are both publicly available screening instruments, validated with criminal justice populations.

databases and have notices of arrest sent to the provider of record. This allows community behavioral health providers to know when their clients have been booked and notify courts or corrections personnel that defendants have received behavioral health care in the community.

Identification of behavioral health needs should not come at the expense of liberty. Any screening process should be quick and conducted as close to booking as possible so that no one's pretrial release is delayed in order to conduct behavioral health screening or assessment. Allocating staff to conduct screening 24/7/365, particularly for high-volume jails, is advisable in order to make behavioral health screening truly universal.

## **Sharing Behavioral Health Information**

Information about mental health and substance use needs is generally considered private, and state and federal laws limit circumstances in which this information may be shared without an individual's permission. Often there is a well-intentioned instinct to gather and share as much information as possible about specific needs; however, stakeholders should be mindful of exactly what information is needed to inform a specific decision and share the minimum necessary. While courts can generally get access to the information they need, it is preferable to obtain an individual's written consent before collecting and sharing behavioral health information.

Two legal principles are important to keep in mind. First, federal and state privacy laws often limit who can share information about individual mental health and substance use needs based on how the information will be used. Those providing treatment services will likely be covered by the Health Insurance Portability and Accessibility Act (HIPAA) and its regulations for mental health information, and 42 Code of Federal Regulations Part 2 for substance use information. Behavioral health care providers that collect needs information in the context of providing treatment, such as a behavioral health agency's court clinic, are in the same situation as all health care providers with regard to collecting, storing, and sharing this information. Conversely, most criminal justice stakeholders will not be covered by these regulations when they collect behavioral health information; planners should check whether the jail, in particular, has declared itself a "covered entity" under HIPAA or a "federally assisted" program under 42 CFR Part 2. It is only the situation of behavioral health providers sharing information with criminal justice stakeholders that raises a potentially new relationship. In this case, both HIPAA and 42 CFR Part 2 include mechanisms for information sharing with criminal justice stakeholders, including obtaining written permission

from the defendant.<sup>55</sup> Although less well-known, HIPAA also contains provisions for information storage and security that planners should consider in developing their information collection and sharing processes.<sup>56</sup>

Second, criminal defendants have constitutional protections, and defense attorneys may be justly concerned about the impact of behavioral health information, particularly substance use, on the current case or future prosecutions. Training judges, prosecutors, and other decision makers on the nature of behavioral health needs, as discussed above, will gradually alleviate concern; knowledge about who will receive what information and for what purposes can allow stakeholders to work together productively toward the shared goal of assisting defendants toward recovery.

Two other types of screening can be critical for positioning defendants for success in the community. First, enrollment in public benefits, particularly health insurance, is essential for helping defendants access needed behavioral health treatment in the community. The pretrial stage presents an opportunity to connect defendants with public benefits that they may be eligible to receive. Many jurisdictions have developed processes to screen defendants for Medicaid eligibility and, where possible, begin the application and enrollment process.<sup>57</sup> Second, early screening for housing needs can facilitate the process of identifying and providing an appropriate housing option upon release.

## Making Quick Connections to Care and Other Supports

Planners should give careful consideration to what information is needed to make appropriate referrals of different types. Diversion programs often have specific eligibility criteria, and so processes should be designed to identify potential candidates and share only the relevant information. For diversion programs, it is worth noting that these programs are generally voluntary, so a defendant's application may also include his or her written permission to share information that he or she has a behavioral health need that meets the eligibility criteria. Particular care should be given to what behavioral health information is shared in open court and becomes part of the

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<sup>55</sup> For more on this see John Petrila and Hallie Fader-Towe, "Information-Sharing in Criminal Justice-Mental Health Collaborations," (New York, NY: The Council of State Governments Justice Center, 2010). Additional examples of mechanisms in use by different systems are available through the Vera Institute of Justice's Justice & Health Connect initiative, <http://www.jhconnect.org/> (August 27, 2015).

<sup>56</sup> Department of Health and Human Services, Office for Civil Rights, "The Security Rule," <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/> (August 27, 2015).

<sup>57</sup> The National Association of Pretrial Services Agencies, "The Patient Protection and Affordable Care Act and the Pretrial System: A 'Front Door' To Health and Safety," (Washington, DC: The National Association of Pretrial Services Agencies, 2014).

public record; often saying simply that an individual is “eligible” is sufficient without going into specific details about behavioral health needs.

A pretrial services agency may also provide referrals or connections to community-based treatment providers. Some pretrial services agencies have the capacity to do a relatively rigorous assessment for behavioral health needs that can be the basis for a very targeted referral to a community-based provider with a specific treatment approach. Other agencies make a referral after a potential behavioral health need has been identified, either as a result of a screen or even just observation, and the provider will need to do an assessment in order to develop a treatment plan or re-refer the person elsewhere. Regardless of in-house resources for assessment and development of treatment plans, all pretrial services agencies and courts should keep an up-to-date list of community-based treatment providers and other supports, their capacities, and areas of expertise. Pretrial services, courts, and jail staff should also do what they can to assure a “warm hand-off” to community-based treatment providers. This can include easy-to-follow directions, assistance with transportation, accompanying individuals to appointments, and a range of other strategies to help make the connection to care most likely to stick.

For many communities, a quick connection to community-based care is prevented by the capacity of community-based treatment providers. This may lead to wait lists and weeks elapsing before an appointment or program slot is available. During the planning phase, stakeholders can identify strategies for prioritizing available spots for those who pose the greatest public safety risk and need treatment as a condition of release, as well as establishing processes to provide the warm hand-off for appointments scheduled in the future. At the systems level, collecting data on people enrolled in benefits and average wait for treatment spots can help develop the business case for additional funding for community-based care.

## 6. Community Supervision and Treatment at the Pretrial Stage

**Criminal justice and behavioral health stakeholders work together to support defendants' adherence to conditions of release and progress toward recovery and to minimize future involvement with the criminal justice system.**

Defendants on pretrial release with significant mental health needs and risk of pretrial failure may be required to work with pretrial services officers and treatment providers in order to comply with the conditions of release or diversion. In such cases, coordination between treatment providers and supervision officers can ensure that each defendant's risks are being mitigated and their needs are addressed as well as possible. It also helps ensure that expectations for each defendant are feasible, make sense to the defendant, and are presented in a consistent manner.

### Assessment and Case Planning

Because of the unpredictable timing of pretrial release, planning for information sharing, transitions, and mechanisms to assure continuity of care are significant considerations. The planning process should identify the potential trajectories of defendants with behavioral health needs through jail and to different community-based providers to identify places where information should be shared to ensure that, for example, needed prescriptions are filled and warm hand-offs are made. For defendants without relationships with community based-providers, early contact following release is critical.

Supervision officers and treatment providers will each have strategies for assessing defendants' needs and identifying appropriate responses that should be coordinated, to the extent possible. Policies and procedures should be developed to guide the content and frequency of communication between pretrial and treatment staff.

The length and detail of assessment information should be appropriate for the goals of pretrial supervision, the conditions of release, and treatment available during pretrial release or diversion. Goals for treatment during the pretrial period should be set based on the most current assessment information and modified as needed. Goals for treatment within the pretrial period should be realistic; for some, the period of release may simply be too short for more than engaging the individual in treatment. If a jail sentence seems likely, plans should be made so that care within the facility builds on the care provided in the community, and reentry planning should begin as soon as possible.

If a behavioral health assessment is conducted separately from intake at pretrial services, a process should be in place for behavioral health staff to share appropriate information with the pretrial services officer

that includes consideration of relevant information privacy and security laws.<sup>58</sup> While sharing specific diagnoses or medications may not be necessary, information about symptoms and specific strengths and impairments may help the supervising officer support adherence to the conditions of release. For defendants with co-occurring substance use disorders, a shared understanding of the frequency of drug monitoring and the consequences of positive tests should be established at the beginning of the supervision period and updated regularly.

An assessment of supervision needs should identify specific challenges for each defendant, as well as strengths, such as supportive family members, that the supervising officer can use to facilitate success. Some people with behavioral health needs may be able to succeed with limited modifications to the type of pretrial supervision provided to those without behavioral health needs; others may have impairments or specific limitations in functioning and would benefit from specific strategies that can be used within the context of the conditions set by the court. For example, an individual with schizophrenia may have difficulty staying organized and benefit from a personal phone call reminding him to head to court that morning. With the defendant's consent, it might be helpful to have the pretrial services officer call a family member with the reminder.

## During Pretrial Release or Diversion

While there is very little research to date on the effectiveness of supervision strategies for people with behavioral health needs on pretrial release, there is somewhat more extensive literature on what works for probationers with behavioral health needs. Similar strategies for post-adjudication supervision seem likely to reduce the risk of new criminal activity while on pretrial release, although it is important to note that pretrial supervision will generally involve fewer contacts over a shorter period of time. Specialized units where pretrial staff has been trained on the signs and symptoms of mental illnesses and effective communication strategies should be considered. Smaller caseloads for officers working with defendants with behavioral health needs will allow these officers to dedicate more time and attention to these defendants, which should allow for better assessment and individualization of responses.

Community-based treatment providers should target the behavioral health needs identified through assessment with high-quality, evidence-based programs and practices.<sup>59</sup> Given that almost three-quarters of defendants with serious mental illnesses have co-occurring substance use disorders, integrated dual diagnosis treatment is an important, albeit scarce, resource for many. Treatment providers and supervising officers can use specific approaches, such as motivational interviewing,

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**58** As discussed above, the federal regulations generally address information collected by behavioral health professionals, although there are some nuances that may be relevant, for example, in the context of a jail that provides behavioral health services.

**59** Blandford and Osher, *Checklist for Implementing Evidence-Based Practices and Programs*.

to increase participation and completion rates in treatment. Identifying and responding to factors associated with criminal behavior (“criminogenic needs”) is considered essential to reducing the risk of recidivism in post-adjudication treatment and supervision.<sup>60</sup>

Strategies that appreciate the variations in learning styles, cultural backgrounds, and life experiences, and “meet defendants where they are” are more likely to be successful. To the extent possible, supervision and treatment should be provided in a gender- and culturally sensitive manner. The majority of defendants will have been exposed to traumatic events and, as such, it is critical to incorporate an understanding of the impact of trauma into assessment, treatment, and supervision practices.<sup>61</sup> All clinicians and supervision staff need training about the consequences of trauma, and all interventions should reflect this awareness and be delivered in a trauma-informed manner.

Communication between behavioral health and pretrial services officers can play a critical role when it seems that a defendant or diversion participant is not succeeding. A missed appointment or failed drug test may have its origins in a change in medication or a stressful personal event. Communication from treatment providers or pretrial services can help illuminate whether a failure to appear in court is a result of disorganization or absconding; this is a critical distinction. Regular conversations between behavioral health and pretrial services officers can help reveal why an individual is not meeting conditions of release or diversion and how best to respond to achieve the primary goals of court attendance and public safety. These conversations can also generate productive problem-solving approaches so that public safety goals can be met without necessarily sending the defendant to jail or ending the diversion. Return to jail interrupts treatment and community-based supports and should be reserved as a last resort for people who truly cannot be safely managed in the community.

For people on pretrial release, plans should be made for transitions to post-adjudication care, whether or not the individual remains under supervision. For those on diversion, a transition plan should be developed that will see the individual beyond his or her supervision period. For many individuals, their arrest and subsequent evaluation may be the first time they were identified as having a mental illness. To take advantage of this “public health opportunity,” educating the individual about the effectiveness of treatment and availability of resources can make a critical difference in their ability to realize their goals and objectives, including the avoidance of subsequent criminal justice involvement. For those already in treatment, continuing treatment after supervision is essential to maximize returns on pretrial investments.

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<sup>60</sup> Osher et al., *Adults with Behavioral Health Needs*.

<sup>61</sup> K. Gehring and P. Van Voorhis, “Needs and Pretrial Failure: Additional Risk Factors for Female and Male Pretrial Defendants,” *Criminal Justice and Behavior* 41, (2014), 943–970.

## 7. Performance Measurement and Evaluation

**Data are collected and analyzed at regular intervals to identify opportunities for improvement, assess quality in the delivery of treatment and supervision, and support initiative sustainability.**

Data collection plays a critical role in program operation, management, and sustainability. Given recent emphasis on empirically developed tools and performance-based contracting, the collection and application of data has taken on a larger role in successful pretrial initiatives. Good data collection is also the foundation for research to better understand what works for whom. Planning conversations should include decisions about data collection and management, as well as regular plans for analysis.

To the extent possible, data should be collected electronically in a form that is easy to query for different types of analyses. Smaller jurisdictions are encouraged to use basic spreadsheets or databases, even if it is possible to manage many other things by paper files, while larger jurisdictions may need more sophisticated management information systems. A good management information system or database provides the ability to use search criteria, sort data for different audiences, and share summary information quickly. For jurisdictions hoping to work with researchers to develop and implement their own pretrial risk tool, a rich dataset is necessary for both development and periodic local validation. Depending on state law and the existence of appropriate memorandums of understanding or business associate agreements,<sup>62</sup> health information may need to be kept separately. If this is the case, there are strategies that can be used to match criminal justice and health datasets without including personal identifiers.<sup>63</sup> Any management information systems keeping health information should comply with HIPAA security regulations and other protections for health data.

Planners may wish to work with researchers, data managers, and IT staff to develop a plan for data collection based on the goals determined at the initiative's outset. Data will likely have numerous audiences; county managers and elected officials, funders, line staff from both criminal justice and behavioral health, and even the media may have distinct goals that would require the collection of specific data elements.

As discussed above, the process of collaboratively developing goals and performance measures is an

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**62** "Business associate agreements" extend HIPAA's privacy protections to those who work regularly with individuals and organizations covered by the statute. For further discussion and examples, see U.S. Department of Health and Human Services, "Business Associate Contracts," <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html> (September 6, 2015).

**63** Often a common unique identifier is developed and used in both justice and health datasets, which allows for the match. Alternately, the owner of the health information may match the two datasets and then take out the personally identifying information.

important one. Communities can begin with a number of lists of performance measures developed for pretrial services programs,<sup>64</sup> jail management,<sup>65</sup> or diversion.<sup>66</sup> Key system measures will likely include the behavioral health needs of people at initial appearance (e.g., percentage of people with behavioral health needs released at bail hearing/initial appearance), admissions to the jail (e.g., number or percentage of bookings with behavioral health needs), average length of pretrial detention, connections to treatment (e.g., percentage of people released who access community-based care), and success rates (e.g., percentage of people released who complete diversion program without new arrests; percentage of people released who complete the pretrial period without new arrests or missed court appearances).

Regular performance measurement and periodic evaluation assist communities in identifying strategies that are working well and others that should be adjusted. Evaluations can provide a variety of insights into how the program is working. A process evaluation may help illuminate the flow of information to judicial officers and how they use it to inform release decisions. Outcome evaluations can demonstrate that the program has achieved the goals established by the leadership group, such as increasing pretrial release without increasing pretrial failure rates.

Data collection and analyses also play an essential role in adverse event planning. Objective data about overall release strategies and empirically based risk tools can reduce finger pointing among stakeholders, as well as provide needed context and justification for decisions, for example when a single defendant commits a crime while on release.

Both quantitative and qualitative data are an important part of initiative sustainability. In addition to the performance measures and outcomes discussed above, planners should have a strategy in place for collecting the experiences of defendants who have been released pretrial or diverted. These stories add an essential human dimension to quantitative reports. These defendants may also have important feedback about what is working well and where there are opportunities for improvement. Similarly, interviews or focus groups with line staff can provide an important mechanism for improving the effort and keeping the initiative fresh.

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<sup>64</sup> For example, National Institute of Corrections, "Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field," (Washington, DC: National Institute of Corrections, 2011).

<sup>65</sup> For example, Cherise Fanno Burdeen, "Jail Population Management: Elected County Officials' Guide to Pretrial Services," (Washington, DC: National Association of Counties, 2009).

<sup>66</sup> For example, Spurgeon Kennedy and Tara Boh Klute, "Measuring for Results: Outcome and Performance Measures for Pretrial Diversion Field," (Washington, DC: National Association of Pretrial Services Agencies and National Institute of Corrections, 2015).

## Conclusion

**N**ationwide, approximately two million adults with serious mental illnesses are admitted into jails each year. In many communities, people with mental illnesses are detained while awaiting trial at higher rates and for longer periods of time than those without these needs, despite recent evidence that suggests that pretrial detention can increase future involvement in the criminal justice system.

Increasingly, local leaders have come together to develop new policies and practices, guided by a growing base of research and experience. Communities are beginning to allocate more resources for training, universal screening for behavioral health needs, research-based tools to inform release and diversion decisions, the use of evidence-based treatment and supervision approaches, and data collection and analysis. These strategies are critical not only for public safety and public health, but also to maintain the responsible use of public resources. The experiences in these communities and the contributions made by researchers in recent years inform the essential elements described herein, which can serve as a foundation for communities around the country.

As recognized throughout this publication, the pretrial stage of a criminal case presents great opportunities for improvement, in addition to the real challenge of crafting policies and processes that strike a balance between making well-informed decisions quickly while protecting individual liberties and making lasting connections to needed care. Despite substantial advances in the last several years, there are still significant unanswered questions about what works best for whom. These elements encourage data collection not only to help individual communities, but also for future researchers who are dedicated to these important questions.

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