

JAIL DIVERSION PROGRAMS FOR THOSE WITH MENTAL ILLNESS: AN EMPHASIS ON PRE-BOOKING DIVERSION AND OTHER EARLY DIVERSION MODELS





MEMORANDUM

DATE: January 2009

TO: Mental Health and Criminal Justice System Leaders

FROM: Rusty Selix, Executive Director

RE: Jail Diversion Programs

This report is a detailed paper studying various criminal justice diversion programs that is a culmination of work done by Rachel Scherer a recent law school graduate, who is now an attorney, who collected this research information over the past year. The paper is an excellent one and was originally conceived of as documenting recommendations on pre-booking criminal justice diversion and contrasting that with mental health courts while providing recommendations on both.

However, after reading the report what it really does more than anything is document that there are at least 10 stages of involvement of the criminal justice system for which there can be diversion through coordinated efforts between law criminal justice and mental health officials.

What emerges is that police departments, sheriffs, district attorneys, judges, and County mental health officials should be working together to match the full continuum of strategies to each situation.

The ten strategies can be summarized as follows:

1. Proactive efforts by outreach teams to homeless and other places for those at high risk of criminal justice system contact to provide services before a crime has been committed.

A corollary to this type of proactive pre-crime commitment was brought to my attention after this paper was prepared by a San Bernardino City police officer named Marci Atkins who indicated that she is now teaching classes to mental health consumers about how to respond to the police that is the flip side of CIT training for police officers. In other words while it is important to train police officers in terms of how respond to a situation involving someone with a mental illness it is equally important to train those who have severe mental illnesses and may again be in situations where they are confronted by law enforcement and to help them better understand law enforcement and how they can respond in a more constructive way that serves them better.

2. Police officers direct diversion at the commission of a crime that is considered minor or for which the officer does not file charges and directly transfers the individual to mental health services.

3. Same as number 2 except officer threatens the filing of charges and individual only cooperates after threat is made.
4. Police response (often accompanied by mental health officials) through CIT programs responding to 911 calls or other situations and making the referral to treatment instead of taking the person into court and also an alternative to taking a person to the hospital for a 51/50.
5. Taking the individual into custody and filing charges and transferring the individual to a mental health treatment program with legal action initiated but not court action.
6. After the filing of charges a diversion at the time of arraignment or the initial pleading of the case but before there has been a trial.
7. After trial mental health court determination in lieu of entering a conviction.
8. The more common form of the mental health court which is an alternative sentencing approach after there has been a conviction.
9. Not guilty by reason of Insanity Plea bargain
10. Incompetent to Stand Trial (debatable as to whether this is really diversion versus delay but when initiated it does result in treatment instead of incarceration and could lead to one of the other forms of diversion)

The continuum would seem to be based upon the severity of mental health symptoms the magnitude of the crime and the individual's willingness to enter treatment without threats of punishment.

Critical to all of these programs is the availability of mental health services that has to be known to the law enforcement officials involved so that they can confidently make a referral knowing there are slots available.

Additional copies are available online at www.mhac.org. We recommend that this be distributed broadly to mental health and law enforcement community leaders and encourages meetings of representatives of all the organizations affected by this to promote a broader range of criminal justice diversion strategies than the two that are widely understood, the CIT training for response to crisis situations and the mental health court after conviction.

The document also should be viewed still as a continuing document subject to adding additional material and editing. We post this on our website with an expectation that it will be updated over time reflecting additional information learned and corrections from those who know more about this than we do.

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* Rachel Scherer, Mental Health Association in California, September 2008.

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I. INTRODUCTION

Jail diversion programs that target mentally ill offenders have been sprouting up all around the country for roughly the last twenty years.¹ This report focuses primarily on analyzing pre-booking diversion programs and some early intervention post-booking diversion programs because they identify and begin the diversion process at early stages in the criminal process. Thus, contact with the criminal system as a result of a mental illness is substantially reduced, and in some cases almost entirely prevented. In order to understand why pre-booking diversion and other early intervention post-booking programs are such an important component in the criminal process to place our time and energy on expanding, it is important to first understand the generalized and objective differences between pre-booking and post-booking jail diversion programs.

II. BACKGROUND

A. *The First Step: Understanding the Booking and/or Arrest Process*

One of the most important steps toward understanding the differences between pre-booking and post-booking jail diversion programs is to identify and understand the booking and/or arrest process itself. In doing so, the specific rationales for selecting and creating a mental health diversion program at any of several points along the continuum of the booking and/or arrest process emerge. Some basic definitions will help.

1. *Booking*

Black's Law Dictionary defines "booking" as the process that occurs when a police officer records "the name of a person arrested in a sequential list of police arrests, with details of the person's identity (usually including a photograph and a fingerprint), particulars about the alleged offense, and the name of the arresting officer."² Booking typically takes place at the police department. In order to be booked, an individual needs to *first be arrested* for a particular offense.

2. *Arrest*

Black's Law Dictionary defines an arrest as the "taking or keeping of a person in custody by legal authority, especially in response to a criminal charge . . ."³ Generally (for purposes of this report), a person is under arrest for a particular crime when an officer escorts him or her in a police car to the station for booking.

Arrest is often the most damaging moment for a person with a mental illness. First, in many cases, it is confrontational, accusatory, and humiliating, as the individual is being criminalized for a behavior they often can't control. Second, once an arrest is made, booking as well as the more formal court processes begin, which further criminalizes the illness.

¹ CMHS NAT'L GAINS CTR. & CMHS GAINS TAPA CTR. FOR JAIL DIVERSION, PRACTICAL ADVICE ON JAIL DIVERSION: TEN YEARS OF LEARNINGS ON JAIL DIVERSION FROM THE CMHS NATIONAL GAINS CENTER 7 (2007). "Seven percent of U.S. Counties have one or more jail diversion programs." Henry J. Steadman, *What Can We Say About the Outcomes of Jail Diversion Programs*, Power Point, NASMHPD's Forensic Division Annual Meeting, Sept. 12, 2005.

² BLACK'S LAW DICTIONARY (Brian A. Garner, ed., 2004).

³ *Id.*

However, the unwritten rule about an arrest is that an officer has some discretion as to whether to make an arrest in the first place (depending on the crime).⁴ This is true regardless of whether a formal diversion program is in place. For example, for minor offenses, an officer might give a verbal warning, never initiating the arrest or booking process at all.⁵

3. *The Citation*

Some lower level crimes, such as those governed by municipal codes, do not require the costly and timely process of arrest and booking at all. Instead, issuing a citation regarding the charged crime is appropriate.

Black's Law Dictionary defines "citation" as a "police-issued order to appear before a judge on a given date to defend against a stated charge"⁶ Thus, a citation may be a substitute for what could otherwise be an arrest resulting in booking.

Initially, it appears that someone who is issued a citation for a charged crime is never arrested or booked. But in practice, this is hardly ever the case, particularly for homeless individuals suffering from mental illness.⁷ This is because these individuals often "fail to appear" in court pursuant to the date on the citation.⁸

If an individual fails to appear at court pursuant to a citation for a minor infraction, a bench warrant will be issued for that individual's arrest. Then, the criminal cycle of arrest and booking begins due to a simple "failure to appear" charge resulting from the missed court date. Thus, failing to appear in court pursuant to a citation for a minor municipal crime, such as loitering or panhandling, could ultimately end in arrest and booking upon future contact with a police officer.

4. *Summary*

In summary, there are two key ways in which an individual might be arrested and booked for a crime. First, as is most common, arrest and booking takes place for higher level offenses and crimes, including some misdemeanors and all felonies in which the officer is required under law to make the arrest. However, for some misdemeanors and municipal crimes, the arrest and booking process might never be initiated due to the officer's discretion not to make the arrest. In the alternative, if a citation alone is issued for a municipal crime—and the individual appears in court regarding the charge—a bench warrant will not be issued and the arrest and booking process will be avoided. The second way in which arrest and booking typically takes place is for minor municipal crimes and/or infractions when an individual fails to appear for a court date on the original minor offense or citation.

B. The Second Step: Understanding the Criminal Process an Individual Faces Post-Booking

⁴ *E.g.*, Interview with Officer Marci Atkins, Homeless Advocate Officer, San Bernardino Police Department, San Bernardino, CA, Aug. 8, 2008.

⁵ *Id.*

⁶ BLACK'S LAW DICTIONARY (Brian A. Garner, ed., 2004).

⁷ Interview with Officer Marci Atkins, Homeless Advocate Officer, San Bernardino Police Department, San Bernardino, CA, Aug. 8, 2008.

⁸ *See e.g.*, Superior Court of California—County of Shasta, Criminal Division, www.shastacourts.com/menu/php?page=criminal (last visited Sept. 19, 2008). In addition to failing to appear, such individuals may also have difficulty paying fines associated with minor citations due to lack of finances causing a bench warrant to be issued.

In order to appreciate any future contacts with the criminal system that might be avoided under a pre-booking or other early diversion program, it is important to identify some basic stages of the post-booking criminal process. There are six major points of contact with the criminal system after booking has been completed: 1) arraignment, 2) the pre-trial hearing, 3) the preliminary hearing, 4) trial, 5) sentencing, and 6) possible jail or prison time if convicted.⁹ At each of the stages of trial, the defendant may be represented by counsel. The issue then turns to whether the time, cost, punishment, and resources used by the criminal system at each of these stages are a useful investment for our society to make when the root cause of the behavior has been determined to be a mental illness.

1. Arraignment—The Court Process Begins

For most crimes, the first step after booking is arraignment, usually occurring within one or two days of booking. Black's Law Dictionary defines arraignment as "the initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and enter the plea."¹⁰ At arraignment, the defendant, or counsel on behalf of the defendant, usually pleads not guilty. If the defendant pleads guilty he or she can be convicted without a trial at this early stage.

A pre-booking diversion program avoids this stage of the criminal process altogether, thereby avoiding any time waiting in jail for the arraignment. Instead, this time will be spent linking the offender to key community mental health services and supports.

On the other hand, a virtue of some post-booking diversion programs is that they might begin the diversion process at this early stage in the criminal process. Thus, while the diversion is technically post-booking or post-arraignment, it still avoids the other stages of criminalization of mental illness, including the following: pre-trial hearing, preliminary hearing, trial, sentencing, and possible jail or prison time. The inherent disadvantage, however, is that the defendant is still criminalized for his or her mental illness and potential wasteful tax dollars are spent to pay judges, bailiffs, and police officers involved in the criminal process through arraignment.

2. Pre-Trial Hearing

After arraignment, a pre-trial hearing may take place during which time information is exchanged between the prosecution and the defense. During this time, the prosecutor may offer a plea agreement to the defendant and the defense attorney may file motions, such as that to suppress evidence.¹¹

While a plea agreement sounds diversionary to some degree, it can often be as damaging as a conviction on the original charge. For example, if a mentally ill individual is charged with a felony, he or she might agree to plead guilty to a lesser charge or related misdemeanor. But a conviction for a misdemeanor can still be highly damaging to the individual when he or she attempts to obtain employment later down the road. Additionally, focusing on the plea

⁹ See Los Angeles Superior Court-Criminal, General Information, *available at* www.lasuperiorcourt.org/Criminal/main.htm (last visited Sept. 8, 2008).

¹⁰ BLACK'S LAW DICTIONARY (Brian A. Garner, ed., 2004). The defendant need not be present in court for arraignment of a misdemeanor crime if represented by counsel. Nonetheless communications regarding each of these proceedings will be communicated to the defendant.

¹¹ See e.g., Superior Court of California—County of Shasta, Criminal Division, www.shastacourts.com/menu/php?page=criminal (last visited Sept. 19, 2008).

agreement as a way to avoid a harsher penalty does nothing to ensure linkage to lasting mental health treatment.

A pre-booking diversion program and some early intervention post-booking programs avoid this criminally-based negotiations process altogether and instead link the individual directly to treatment. Additionally, such programs circumvent the tax dollars being spent to pay judges, prosecutors, defense attorneys, police officers, and bailiffs during this time, instead directing such costs to community treatment.

3. Preliminary Hearing

After the pre-trial hearing, for felony charges only, the next step is the preliminary hearing.¹² The alternative to a preliminary hearing is for the District Attorney to seek an indictment from a grand jury, but this is far less common.¹³

Black's Law Dictionary defines a preliminary hearing (also known as a probable cause hearing) as "a criminal hearing (usually conducted by a magistrate) to determine whether there is sufficient evidence to prosecute an accused person."¹⁴ "If sufficient evidence exists, the case will be set for trial"¹⁵

While the preliminary hearing itself may not be terribly damaging to the defendant, the costs in time and labor associated with paying the judge, court staff, prosecutor, and public defender are factors to consider. Again, the question should be asked as to whether it is worth the time and cost of all these judicial parties to be involved in the matter if the root cause of the behavior is a mental illness that could have been identified and addressed at an earlier stage. While a preliminary hearing often occurs within a couple days of booking, it may also be the case that the mentally ill individual waits in jail during those few days, which can be damaging to the individual's condition, even if he or she is receiving some type of mental health treatment through the jail.

4. Trial

Generally, trial takes place within one or two months of arraignment. This can be a critical and lengthy period of time for persons with mental illness. Under California law, trial usually takes place within sixty days of arraignment for charges involving felonies.¹⁶ For misdemeanors, trial usually takes place within thirty to forty-five days, depending upon whether the individual has been held in jail during that time.¹⁷

It is important to note the length of time being spent between the time charges are filed and the trial, because often during this time, if there is no diversionary program in place, very little or nothing is done to address the mental illness that led to the criminal behavior. If the individual waits in jail this entire time, although likely receiving some type of mental health care in the jail under California law, jails are not first and foremost mental health facilities and are not

¹² See Los Angeles Superior Court-Criminal, General Information, *available at* www.lasuperiorcourt.org/Criminal/main.htm (last visited Sept. 8, 2008).

¹³ See BLACK'S LAW DICTIONARY (Brian A. Garner, ed., 2004). "If a grand jury decides that evidence is strong enough to hold a suspect for trial, it returns a bill of indictment charging the suspect with a specific crime." *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Los Angeles Superior Court-Criminal, General Information, *available at* www.lasuperiorcourt.org/Criminal/main.htm (last visited Sept. 8, 2008).

¹⁷ *Id.*

designed to be a therapeutic or rehabilitative environment. Thus, while care may be obtained, it is not necessarily the most beneficial toward long-term recovery or reducing recidivism. Likewise, if the individual is released to the community while awaiting trial, he or she may not be receiving mental health care and could wind up with another similar charge during that time. A pre-booking or other early diversion program avoids the time and money spent dragging a criminal case out when at an early stage it can be determined that a mental illness was the root cause of the criminal behavior.

5. *Sentencing Hearing*

If the jury or fact-finder finds the defendant guilty at trial, a sentencing hearing will take place to determine the defendant's punishment. This may be a stage at which a post-conviction mental health court intervenes, however, many mental health courts will intervene earlier at any point post guilty plea. In a post-plea mental health court, the defendant might plead guilty as early as arraignment and be diverted to treatment, or alternatively, plead guilty as late as trial and still be diverted. Some courts, discussed further throughout the report, will even intervene pre-guilty plea.¹⁸

6. *Jail or Prison Time*

One of the most damaging aspects of the criminal system to mentally ill offenders can be a sentence to jail or prison. For misdemeanor crimes, the defendant can be sentenced to jail time for up to one year. For felony crimes, the defendant can be sentenced to prison for over one year. While mental health treatment will be provided in jail or prison under California law, persons with mental illness often deteriorate due to the general harsh conditions of incarceration. Additionally, they are less likely to follow rules compared to other prisoners and therefore may suffer harsher consequences. Further, they are susceptible to being both physically and mentally victimized by other prisoners.

7. *Summary*

In summary, as illustrated through the six key steps of the criminal process above, it is possible that a defendant could wait in jail from the time of booking and arrest all the way through trial and sentencing. In most cases, this might take between one and two months.

However, for many low level offenses it is often not practical or cost-efficient to have such individuals wait in jail for such a lengthy period of time. Due to overcrowding of the jails, defendants may be "site released" shortly after booking and/or arraignment.¹⁹ Upon being site-released (generally, with no treatment plan in place), such individuals (and/or counsel) are expected to appear for future court/hearing dates, including the preliminary hearing and trial. While site release ensures the person with mental illness does not wait in jail or prison, it does not end the criminal process by which he or she is subjected. Further, with no treatment program in place, the individual is more likely to reoffend while on release in the community, further exacerbating the problem.²⁰

A pre-booking diversion or other early diversion program eliminates incarceration as a source of punishment, as well contact with the criminal system at many or all of the stages of the

¹⁸ *See infra* Section V.B.2.

¹⁹ *E.g.*, Interview with Officer Marci Atkins, Homeless Advocate Officer, San Bernardino Police Dep't, San Bernardino, CA, Aug. 8, 2008.

²⁰ Additionally, irrespective of site-release, if a judge sets bail for either a felony or misdemeanor charge, the defendant may also be released by posting bond. But again, with no treatment in place, the individual is more likely to re-offend.

criminal process identified above. Early diversion programs focus on linkages to treatment to address the root problem of the criminal behavior instead of perpetuating punishment for that behavior through the generalized criminal system.

C. The Third Step: Identifying the Two Main Types of Criminal Diversion Programs, Pre- versus Post-Booking Diversion

There are several terms often used interchangeably to describe criminal diversion programs. The most common terms are pre-booking and post-booking. But within each of these two major overarching categories there are multiple if not hundreds of different variations upon which a pre-booking or post-booking program might function. Therefore, the terms alone fail to denote a specific type of program, but rather a point or moment in the criminal process in which some type of diversion is being accomplished. The National GAINS Center²¹ and the Bazelon Center for Mental Health Law²² use the terms “pre-booking” and “post-booking” to describe and evaluate a variety of mental health diversion programs around the country. This report will also use these terms to make an important policy distinction among many types of jail diversion programs. But other organizations, such as the Criminal Justice Mental Health Consensus Project, eliminate use of the terms pre-booking and post-booking altogether opting simply to refer to all such programs as “jail diversion.”²³

1. Pre-Booking Diversion

As mentioned in detail in Section I of this report, a diversion program that is pre-booking in nature seeks to divert the individual from booking and arrest altogether. The focus is on early diversion to treatment in order to address the root cause of the criminal behavior, eliminating virtually all subsequent contacts with the criminal system. Thus, at a minimum, a pre-booking program diverts the individual from the following stages of the ordinary criminal process discussed in Section II: arrest, booking at the station, arraignment, the pre-trial hearing, the preliminary hearing, trial, sentencing, and possible jail or prison time.

The GAINS Center describes two main types of pre-booking diversion programs. The Mental Health Association in California (“MHAC”) has identified a third type of pre-booking diversion that will be discussed last.

²¹ “The National GAINS Center in the Justice System is committed to the goal of transforming the nation’s fragmented mental health system and developing a recovery-oriented, consumer-driven system of care as described in the report of the President’s New Freedom Commission. The GAINS Center is uniquely poised to help states forge collaborations among the mental health, substance abuse, and criminal justice systems.” The GAINS Center, <http://gainscenter.samhsa.gov/html/about/default.asp> (last visited Aug. 19, 2008).

²² The Bazelon Ctr. for Mental Health Law, Fact Sheet #6, Pre-Booking Diversion, *available at* www.bazelon.org/issues/criminalization/factsheets/criminal6.htm; The Bazelon Ctr. for Mental Health Law, Fact Sheet #7 Post-Booking Diversion, *available at* www.bazelon.org/issues/criminalization/factsheets/criminal7.htm (last visited Sept. 8, 2008).

²³ “Some visitors to this website will be more familiar with terms associated with jail diversion (for example, “pre-booking” and “post-booking”). Though these terms aren’t used here, you can find content on these types of diversion programs throughout the site.” Council of State Governments, Criminal Justice Mental Health Consensus Project, *Jail Diversion*, *available at* <http://consensusproject.org/issue-areas/jail-diversion/> (last visited Sept. 18, 2008).

The first type of pre-booking diversion is the Crisis Intervention Training (“CIT”) police officer model.²⁴ In this model, a police officer is the first responder to a 911 call directed to him or her because of specialized training in handling crisis mental health situations. The officer as first responder assesses the mental health situation and determines whether to link the individual to services or alternatively to make an arrest. Through CIT training “officers [are] encouraged to consider, when appropriate, linkage and referral for care to the mental health system as a preferable alternative to arrest.”²⁵

The second type of CIT is the co-responder model, which includes an officer “co-responding” with the assistance of a clinician or social worker to help assess the mental health needs of the client and determine what linkages and services might be appropriate.²⁶ These are often called crisis intervention *teams*, and the acronym CIT is also used to identify them.

As stated by the GAINS Center,

Most pre-booking programs are characterized by specialized training for police officers and a 24-hour crisis drop-off center with a no-refusal policy for persons brought in by the police. The most recognized program model is the Crisis Intervention Team (CIT) developed in Memphis, TN. Other models of pre-booking diversion involve collaboration between police and specially-trained mental health service providers who co-respond to calls involving a potential mental health crisis.²⁷

The third type of pre-booking diversion that MHAC has identified need not involve a crisis or emergency situation. Further, it need not involve a police officer responding to a 911 call. However, a police officer may be a key ingredient in the program as it involves a duty to patrol and may include proactive outreach seeking out persons who may be in need of services. Through such programs,²⁸ officers might do regular patrol of downtowns and other neighborhoods, where there are commonly people who are homeless. Alternatively they may proactively do outreach to homeless camps, and abandoned areas for persons who might be in need of mental health services. Such officers will then provide appropriate linkages to services needed. Often the persons targeted through this type of diversion program may be in need of multiple services, only one of which is mental health treatment. Usually, when the officer identifies these types of individuals, the individual has been involved in minor crimes related to their homelessness, such as trespassing, disorderly conduct, petty theft, public intoxication, loitering, or panhandling.

The proactive outreach is often before commission of a crime. A social worker or an outreach team (with or without a police officer) may patrol the same areas to enroll people in

²⁴ The GAINS Center for Mental Health Services, www.gainscenter.samhsa.gov/html/tapa/jail%20diversion/types.asp (last visited Aug. 19, 2008).

²⁵ Jennifer L.S. Teller, et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 PSYCH. SERVS. 232, 233 (2006).

²⁶ The GAINS Center for Mental Health Services, www.gainscenter.samhsa.gov/html/tapa/jail%20diversion/types.asp (last visited Aug. 19, 2008).

²⁷ The GAINS Center for Mental Health Services, www.gainscenter.samhsa.gov/html/tapa/jail%20diversion/types.asp (last visited Aug. 19, 2008).

²⁸ One prominent such program is discussed in detail in Section IV.B (describing the program Officer Marci Atkins and the San Bernardino City police department created).

community mental health programs as was the model in AB 34 (1999) and AB 2034 (2000). Pre booking diversion only to the situations when an arrest could have otherwise been made.

2. Post-Booking Diversion

As described in Section I, post-booking diversion can occur at any stage in the criminal process after arrest and booking. This is the most prevalent type of diversion program in the U.S., and it includes two further subtypes, jail-based and court-based diversion programs.²⁹

Court-based diversion programs are most prevalent and are often known as mental health courts. In such a court the criminal charge or conviction leads to treatment rather than to a jail or prison sentence. In many mental health courts the charges are dropped or the conviction is reversed upon successful completion of the program.³⁰ Although mental health courts are the most prevalent type of post-booking diversion program, often occurring on a post-conviction or post guilty plea basis, post-booking court diversion may take place at earlier stages in the criminal process, as briefly mentioned in Section II.B. Such an early intervention model mental health court might intervene at arraignment or before a guilty plea is given, which could be at a number of stages in the trial process. Early diversion mental health courts may be ideal diversion models when used to target felony or elevated misdemeanor offenses that are directly result of or caused by mental illness. This is because the severity of the charged crime makes it unlikely that such individuals will be diverted on a pre-arrest or pre-booking basis.

Jail based diversion, the other type of post-booking diversion, is somewhat similar content-wise to court based diversion, except that it avoids the use of a formal court altogether.³¹ Jail based diversion might occur after booking but at jail after a consultation with a clinician upon intake. If the clinician determines that the individual is suffering from a mental illness that directly led to the criminal behavior, he or she might recommend that law enforcement and the district attorney defer charges upon the condition that the individual obtain treatment in the community. If treatment is completed, then charges will be dropped.³²

3. Summary

The GAINS Center has identified five major points at which a post-booking diversion program typically operates, which include relevant key stages in the two jail based and court based options: 1) “at or immediately after booking into jail, before the formal filing of charges”; 2) “release from pretrial detention [in jail], with the condition of participation in treatment”; 3) “prior to disposition [of the case at trial], for example, upon the prosecutor’s offer or deferred prosecution”; 4) “at disposition or sentencing; this may include deferred sentencing or release on

²⁹ CMHS NAT’L GAINS CTR. & CMHS GAINS TAPA CTR. FOR JAIL DIVERSION, PRACTICAL ADVICE ON JAIL DIVERSION: TEN YEARS OF LEARNINGS ON JAIL DIVERSION FROM THE CMHS NATIONAL GAINS CENTER 12-13 (2007), *available at* http://gainscenter.samhsa.gov/pdfs/jail_diversion/PracticalAdviceOnJailDiversion.pdf (last visited Aug. 27, 2008).

³⁰ For more information about CA mental health courts, see *infra* Section V.

³¹ *E.g.*, CMHS NAT’L GAINS CTR. & CMHS GAINS TAPA CTR. FOR JAIL DIVERSION, PRACTICAL ADVICE ON JAIL DIVERSION: TEN YEARS OF LEARNINGS ON JAIL DIVERSION FROM THE CMHS NATIONAL GAINS CENTER 13 (2007), *available at* http://gainscenter.samhsa.gov/pdfs/jail_diversion/PracticalAdviceOnJailDiversion.pdf (last visited Aug. 27, 2008).

³² See Patricia A. Griffin, *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 PSYCHIATRIC SERVS. 1285, 1286 (2002).

probation with conditions which include participation in treatment”; and 5) “when at risk of, or following, a violation of probation related to a prior conviction.”³³ Because there are so many points at which an individual might be diverted post-booking, one can begin to see the myriad of post-booking programs that exist and could potentially be created.

One final minor point regarding the linguistics at work in jail diversion programs needs to be made. The word “pre” alone or with some other term does not mean it is a *pre-booking* diversion program. Some programs are *pre-trial*, *pre-conviction*, or *pre-sentencing*, and it is important to note that these are all *post-booking* diversion programs. This is part of the flaw with the pre- and post-booking terminology. The key is to focus on the term “booking” or any other point of entry into the criminal system and see whether diversion is aimed before or after that point.

III. WHY PRE-BOOKING DIVERSION OR OTHER EARLY DIVERSION PROGRAMS ARE A KEY AREA TO FOCUS CALIFORNIA RESOURCES, TIME, AND ENERGY

“The vast majority of *detainees and inmates in U.S. jails and prisons* with co-occurring mental health and substance abuse disorders are nonviolent, low-level offenders who repeatedly cycle through the criminal justice system”³⁴ Further, nearly half of the mentally ill persons *incarcerated in state prisons* nationwide are there because they committed a non-violent crime.³⁵ Even more, “Half of all *arrests* of people with mental illnesses are for nonviolent crimes such as trespass or disorderly conduct.”³⁶

While pre-booking diversion or other early diversion programs may not be appropriate for some persons who are criminally minded that just so happen to have a mental illness unrelated to the criminal behavior, diversion programs are a critical step toward addressing why so many persons with mental illness are incarcerated for non-violent crimes. Pre-booking diversion is most appropriate for those who commit very minor, non-violent offenses as a result of a mental illness. Early intervention post-booking diversion alternatives, on the other hand, may be appropriate for higher level offenses, including felonies, when the mental illness has caused the criminal behavior. In either case, incarcerating such a high number of persons with mental illness for non-violent and/or minor crimes does little to reduce recidivism. Additionally, it clogs the courts, jails, and prisons with problems that should be dealt with in the mental health system rather than the criminal system.

A. *Types of Crimes Typically Associated with Pre-Booking Diversion*

³³ The GAINS Center for Mental Health Services, www.gainscenter.samhsa.gov/html/tapa/jail%20diversion/types.asp (last visited Aug. 19, 2008).

³⁴ SAMHSA, *Jail Diversion: Knowledge Development and Application Program* (emphasis added).

³⁵ COUNCIL OF STATE GOVERNMENTS, THE CONSENSUS PROJECT, THE ADVOCACY HANDBOOK: A GUIDE FOR IMPLEMENTING RECOMMENDATIONS OF THE CRIMINAL JUSTICE/MENTAL HEALTH PROJECT, *available at* http://consensusproject.org/advocacy/step1_1/ (emphasis added).

³⁶ THE BAZELON CTR., *THE ROLE OF MENTAL HEALTH COURTS IN SYSTEM REFORM*, *available at* http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts/#_ftn1 (last visited Aug. 27, 2008) (emphasis added).

One of the first distinctions that tends to arise between a pre-booking and post-booking diversion program is the type of offense for which pre-booking diversion is most appropriate. Typically, offenses diverted through a pre-booking program are low level misdemeanors and infractions for which a citation might be appropriate.³⁷ Currently, these tend to be offenses for which a police officer has general discretion with regard to whether to make an arrest. These types of offenses such as trespassing, loitering, disorderly conduct, public intoxication, petty theft, and nuisance; are sometimes referred to as “survival” or crimes.³⁸ Because nearly half of all arrests of persons with mental illness are for non-violent crimes, pre-booking diversion programs are ideal for two key reasons: 1) to address the underlying illness as soon as possible and 2) to divert the individual from entering (or re-entering) the criminal system.

B. Post-Booking Diversion Programs that Emphasize Diversion at Early Stages

Both jail-based and early intervention court-based diversion programs are important to develop and bolster for the general two reasons identified above with respect to pre-booking diversion programs. One key practical difference with respect to the need for both pre-booking and early intervention post-booking diversion programs is that higher level offenses are not likely to be diverted through the pre-booking stage. Thus, when higher level offenses related to a mental illness are at issue, early diversion post-booking diversion programs are critical aspects of jail diversion that should be bolstered.

A mental health court is a practical model to divert charges associated with higher level offenses, particularly felonies or cases where the individual is more resistant to treatment. Whether intervening at sentencing or at an earlier stage in the criminal process, the judge and a mental health court team—including prosecutors, public defenders, clinicians, and probation officers—work with the individual to obtain treatment for a set period of time in exchange for avoiding incarceration. Often treatment through a mental health court is conditioned on a guilty plea or conviction for the crime charged. In some cases, the conviction is dropped if treatment is completed successfully.³⁹ Less frequently, treatment programs through a mental health court may be obtained on a pre-plea basis.⁴⁰ When treatment in a pre-plea court is successfully completed, charges are then dropped.

Many argue that dragging a mentally ill individual through the criminal process of a mental health court in order to ultimately enter a treatment program is coercive and not likely to last in the long-run as treatment seldom results in recovery without the active willing participation and engagement of the client. However, there appear to be many stories of success with such courts. Since mental health courts are still new and developing, more data needs to accumulate before specific questions regarding long-term recidivism patterns can be answered.⁴¹

³⁷ See *infra* Section IV for a detailed discussion of why this tends to be the case.

³⁸ *E.g.*, Interview with Officer Marci Atkins, Homeless Advocate Officer, San Bernardino Police Dep’t, San Bernardino, CA, Aug. 8, 2008.

³⁹ The Orange County W.I.T. court operates this way. Interview with Honorable Judge Wendy S. Lindley, Orange County Superior Courts, Orange County, California, Nov. 26, 2007.

⁴⁰ See *infra* Section V.B.2 discussing San Francisco’s Pre-Plea Mental Health Court.

⁴¹ The National Council on State Governments cautions that “Understanding the mental health court concept means recognizing that not only are multiple options available for improving the courts’ response to defendants with mental illness, but that there are numerous ways to design and implement a mental health court.

Short-term data on these courts suggest that they are having a great impact in reducing recidivism and enhancing recovery.⁴²

. . . .
Program planners should . . . *be aware of the limited evidence base for mental health courts*. While these programs show great promise, their long-term viability depends on empirically documented results. *More research is needed* to better understand mental health court processes, to identify the specific categories of defendants who benefit the most from a mental health court, and to isolate the components of the mental health court model most responsible for its effectiveness.

BUREAU OF JUSTICE ASSISTANCE, COUNCIL ON STATE GOVERNMENTS, A GUIDE TO MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION v (2005) (emphasis added).

⁴² Outcome data from the San Francisco Behavioral Health Court (“BHC,” a mental health court) revealed the following: “By 18 months after graduation, the estimated risk of being charged with any new offense was about 40% lower for BHC graduates than that of similar detainees who did not participate in the program. The risk of BHC graduates being charged with a new violent crime was about 54% lower than that of other comparable detainees.” SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, OFFICE OF COLLABORATIVE JUSTICE PROGRAMS, SAN FRANCISCO BEHAVIORAL HEALTH COURT (2008) *available at* http://www.sfgov.org/site/uploadedfiles/courts/BHCFactSheet_Final.pdf. The study was principally aimed at determining whether the recidivism rate was being reduced for felony as opposed to misdemeanor offenders. In the authors’/researchers’ words, it was concluded that “it appears possible to expand the mental health court model beyond its original clientele of persons charged with nonviolent misdemeanors in a way that public safety is enhanced rather than compromised” Dale E. McNeil & Renee L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1402 (2007).

In comparison, outcome data from a study of the Santa Barbara Mental Health Treatment Court concluded that participants in the mental health court had fewer days in jail (though not significantly reduced recidivism rates) than traditional court. MERITH COSDEN, JEFFREY ELLENS, JEFFREY SCHNELL, & YASMEEN YAMINI-DIOUF, UNIV. CAL. SANTA BARBARA GERVITZ GRAD. SCHOOL OF EDUC., EVALUATION OF THE SANTA BARBARA COUNTY MENTAL HEALTH TREATMENT COURT WITH INTENSIVE CASE MANAGEMENT ix (2004). Somewhat alarmingly, however, the study found that the two populations—those in mental health court versus those with treatment as usual in the criminal system—had comparable outcome rates in most instances. *Id.* at 22. Those receiving “treatment as usual” pursuant to a regular criminal court, however, were uniquely connected to services, including a case manager with referrals to relevant county treatment programs. *Id.* at 15 tbl.3. The study cautioned that mental health courts need to be particularly sensitive to the period after participants graduate from the courts, when linkages to specialized treatment may abruptly end. “A concern among some of the graduates was that the supports, including their close contacts with their case managers, ended after 18-months. This led some clients to slip back into old problems and habits of treatment non-compliance.” *Id.* at 73. The study concluded by stating the following:

Overall, the utility of mental health treatment courts will depend on the collaboration of the criminal justice and mental health systems, and on the range and quality of services available to qualifying criminal offenders.

C. Effective Programs Need to Have Available Capacity In Mental Health Programs

While pre-booking diversion or other early intervention diversion programs may sound great in theory, one key element to an effective program is that there be a guaranteed slot in county mental health programs to divert persons in need of treatment into.⁴³ To illustrate the problem, a police officer may wish to divert someone with a mental illness into a treatment program, but upon arriving with the individual at a local facility, may be told that there is no room available in the program as capacity is full. Further, even if there are some guaranteed slots, the program may develop a waiting list, only being able to support so many individuals due to limited funding.⁴⁴ In order to create effective pre-booking diversion or other early diversion models, California counties need to set aside or reserve slots in their programs so that persons in need of treatment are not turned away once the program is started. California counties can seek to create this change by expanding their county mental health plans with funding from the Mental Health Services Act.⁴⁵ Funding issues will be further discussed in Section VI.B.

IV. MODEL PRE-BOOKING DIVERSION PROGRAMS

Crisis intervention training (“CIT”) has become a critical method by which pre-booking diversion programs are created. More often, CIT is the backbone of any pre-booking diversion program. Thus, pre-booking outreach diversion programs always involve a police officer, and may or may not include another “co-responder,” such as a mental health provider.

As previously mentioned, the primary reason that police officers receive CIT training is to improve response to a 911 call. The call might be from a commercial establishment complaining that a homeless person is continually loitering near the premises, the call might be from a family member concerned about a loved one with a mental illness who may be in crisis (which could involve a threat to another family member that could be charged as a crime.) When the call is received, the 911 operator dispatches the call to officers with CIT training. Thus, due

Many of the criminal offenders seen in these programs needed long-term, perhaps life-long, mental health care. Work is needed to develop and implement programs that can provide treatment options for this population.

Id.

⁴³ For example, the Orange County “Whatever It Takes” mental health court has 100 reserved slots for its program. Interview with Honorable Judge Wendy S. Lindley, Orange County Superior Courts, Orange County, California, Nov. 26, 2007. *See also* County of Orange, Mental Health Services Act, Community Services & Supports Three-Year Plan, Approved as of April 1, 2006, at 293.

⁴⁴ E-mail Attachment from Bruce Gurganus, Marin County Mental Health Director, Sept. 3, 2008. The program currently has 75 participants, but “[c]urrently there are twenty individuals on the waiting list [for the STAR program] who would qualify for the program if there were enough staff and resources available.” *Id.*

⁴⁵ *See also* Appendix 3, County of Orange, Mental Health Services Act, Community Services & Supports Three-Year Plan, Approved as of April 1, 2006, at 287-309.

to the nature of the 911 call, it is a police officer (rather than someone from the public mental health sector) who is the “first responder” to a mental health offense or crisis situation.⁴⁶

One caveat, as mentioned earlier, is that CIT training may be used in such a way that ultimately the program is not responding solely to 911 call crisis situations. Instead, through the program and the training skills learned from CIT, officers proactively reach out to persons in need of mental health treatment and divert them to it.

A. *Review of Key Elements in Pre-Booking Diversion Programs at a National Level*

A review of 14 prominent pre-booking diversion programs⁴⁷ reveals the following elements or options that may be present in a pre-booking diversion program:

- A well defined target population
 - Often, best accomplished through collaboration among all key parties: law enforcement, jail personnel, judges, prosecutors, public defenders, and other stakeholders.⁴⁸ Additionally, strategic planning and gradual isolation of a problem area or group is important.⁴⁹
 - For example, one pre-booking diversion program has targeted persons who are homeless and mentally ill.⁵⁰ Other programs might target persons who have committed misdemeanors or non-violent offenses.⁵¹ Even more, a program might simply target women with children if that is a group that is in need of special attention in the community.⁵²
- 40 hour CIT training for patrol officers⁵³
 - Patrol officers are often carefully screened and selected for the program based on their willingness to be there
 - Officers enter the program on a voluntary basis
 - Officers may receive incentive pay for their work
 - Some new police recruits are now *required* to attend CIT post-academy training

⁴⁶ Interview with Officer Marci Atkins, Homeless Advocate Officer, San Bernardino Police Department, San Bernardino, CA, Aug. 8, 2008.

⁴⁷ E-mail Attachment from Latrease Moore, Project Assistant, Criminal Justice Division, Policy Research Associates, *GAINS Ctr., Pre-Booking Jail Diversion Programs 2003*. The fourteen programs identified by the Policy Research Associates are 1) Akron, Ohio, 2) Albuquerque, N.M., 3) Athens, GA, 4) Athens, OH, 5) Hillsborough, County FL, 6) Houston, TX, 7) Kansas City, MO, 8) Miami Dade County, 9) Long Beach, CA, 10) Phoenix AZ, 11) Tucson, AZ, 12) Memphis, TN, 13) San Diego, CA, and 14) Kings County, WA. *Id.*

⁴⁸ For further information about getting started in creating a pre-booking diversion program, see CMHS NAT’L GAINS CTR. & CMHS GAINS TAPA CTR. FOR JAIL DIVERSION, *PRACTICAL ADVICE ON JAIL DIVERSION: TEN YEARS OF LEARNINGS ON JAIL DIVERSION FROM THE CMHS NATIONAL GAINS CENTER 23-30 (2007)* [hereinafter *PRACTICAL ADVICE ON JAIL DIVERSION*], *available at* http://gainscenter.samhsa.gov/pdfs/jail_diversion/PracticalAdviceOnJailDiversion.pdf (last visited Aug. 27, 2008).

⁴⁹ *Id.*

⁵⁰ San Bernardino Homeless Advocate Officer Model.

⁵¹ *PRACTICAL ADVICE ON JAIL DIVERSION*, *supra* note 49, at 29.

⁵² *Id.* at 31.

⁵³ *Id.*

- 40 hour training may be divided so that it is not all “classroom” time: ex. 20 hours in the classroom, 8 hours taking field trips to mental health facilities or other service centers, and 12 hours role-playing⁵⁴
- CIT Refresher courses
 - 6 minute training models to the entire department on a regular basis⁵⁵
 - Two-day annual trainings⁵⁶
- CIT training for 911 operators who receive, interpret, and dispatch the calls
 - One program requires a 2 hour CIT training course for operators⁵⁷
- Officers in CIT programs are usually in uniform when dispatched on a CIT call
- Officer Employee Shifts and/or Coverage of mental health calls
 - Some programs have CIT officers who respond to mental health calls, but are not always able to do so quickly if other emergency calls associated with their general patrol duties are ahead on the dispatch list
 - Other programs designate certain on-call hours for CIT officers; thus there is always an available officer to immediately respond to a mental health call. One program, for example, has CIT shifts that rotate every 2 hours, 7 days a week⁵⁸
- Who is the first responder? (Single Officer v. Co-Responder Models)
 - Some first responders include a single CIT police officer
 - Others include the CIT police officer with another mental health provider, such as a social worker or clinician⁵⁹
 - Other programs incorporate a fuller team, often called a mobile crisis team, with a peer advocate, (such as a former homeless person with a mental illness now in recovery through treatment) licensed clinician or social worker, crisis counselor, registered nurse, and police officer.⁶⁰ In some cases, the police officer returns to duties after the team takes over.
- Linkage to Lasting Treatment in the Community
 - Partnership with mental or behavioral health services is critical
 - Community based services often include mental health outpatient services, substance abuse outpatient services, housing, medical assistance, benefits assistance, and employment assistance
 - Some officers have agreements with facilities that if they bring an individual to the center, that individual will be accepted even if near full capacity
- Linkage to Voluntary or Involuntary Treatment?
 - Typically treatment linkages are made on a voluntary basis⁶¹

⁵⁴ *Id.* (describing the program in Tucson, Arizona).

⁵⁵ *Id.* (describing the program in Tucson, Arizona).

⁵⁶ Jennifer L. S. Teller, et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 PSYCH. SERVS. 232, 233 (2006).

⁵⁷ *Id.* (describing the program in Houston, Texas).

⁵⁸ *Id.* (describing the program in Memphis, Tennessee).

⁵⁹ *Id.* (describing the Long Beach, CA MET program)

⁶⁰ *Id.* (describing the Hillsborough, County, Florida program).

⁶¹ See Jennifer L. S. Teller, et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 PSYCH. SERVS. 232, 235 (2006).

- But some CIT programs focus on emergency situations during which a 72 involuntary hour hold is actually part of the goal of the program⁶²
 - A recent 2006 study showed that 95.2% of the linkages to treatment by CIT trained officers were voluntary; prior to the CIT program, however, 89.4% of the linkages were allegedly voluntary⁶³
 - Follow Up Post-Crisis Call
 - One program has designed a Special Investigation Unit to follow up with CIT cases⁶⁴
 - Special detectives may be designated to investigate CIT calls and issues⁶⁵
- B. Variations of the Pre-Booking Diversion Model in California*

1. San Bernardino City's Homeless Advocate Officer Program⁶⁶

In 2005, the City of San Bernardino decided to create a program that would directly address the root problem of the homeless mentally ill in their city. Homeless persons with mental illness were identified as the target population for the program because such persons typically wind up in the police and criminal system for minor offenses such as trespass, loitering, panhandling, or failure to appear in court pursuant to a citation. The City decided that continuing to re-arrest and re-book these individuals was not cost-effective, and it was also not solving the problem of getting such individuals off the streets and out of the cycle of criminal survival behaviors. While the program might not have been thought of as a “pre-booking diversion” program when it was created—as it was more specifically created to address a problem of the homeless mentally ill who continued to re-offend on the same charges—this is exactly what it is.

a. Brief Description and Advantages of Having a Full Time Specialized Officer

Through the program, a single officer—the Homeless Advocate Officer—takes on several roles. Officer Marci Atkins is the founding and current Homeless Advocate Officer of the San Bernardino City program.⁶⁷

⁶² Some aspects of the Los Angeles SMART and San Diego PERT programs work this way.

⁶³ Jennifer L. S. Teller, et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 PSYCH. SERVS. 232, 235 (2006).

⁶⁴ *Id.* (describing the program in Albuquerque, New Mexico).

⁶⁵ *Id.* (describing the program in Albuquerque, New Mexico, where there are “four full time detectives supervised by a sergeant to review CIT reports and identify people at high risk for contact with law enforcement . . .”).

⁶⁶ Nearly all the information obtained to write this section of the report is derivative of conversations with Officer Marci Atkins of the San Bernardino City Police Department in August 2008. Citation to her for each idea or sentence has been omitted in lieu of providing a citation to her here. MHAC is grateful for the time she took in explaining all the details of her program so that we could report them to you here.

⁶⁷ Initially, counties and agencies might think that creating such a program with a single officer is not worth it because it is only one position—and how much impact could one police officer make? But Officer Atkins and the Homeless Advocate Officer Program have made a significant impact in the lives of countless homeless persons suffering from mental.

First, the Homeless Advocate Officer is designated to address 911 calls related solely and specifically to homelessness issues. Second, even absent a 911 call about an issue related to homelessness, the designated Homeless Advocate Officer is expected to patrol the City to look for people who might be homeless and in need of linkages to services. About 90% of the time, appropriate services include linkages to mental health services.⁶⁸ Additionally, the Homeless Advocate Officer is not required to take any general patrol officer 911 calls that are not related to homelessness or mental health. This is critical because many CIT officers who juggle both types of calls and corresponding duties may wind up putting mental health/homelessness calls on the backburner because they are non-emergency calls.

For example, calls about loitering or panhandling are typically non-emergency calls dealt with after higher emergency calls by the typical patrol officer. But these calls may also often involve an underlying mental health issue. Under the Homeless Advocate Officer model, the Homeless Advocate Officer will be dispatched immediately to the “non-emergency” call because this is the specialized goal of the program. Without the Homeless Advocate Officer position, however, a general patrol officer might wait several hours before arriving to the “non-emergency” panhandling or loitering call because he or she must first address “emergency” calls. By this time, the individual who was panhandling or loitering may have left the scene. One strength in having a single officer or multiple officers on call to address issues related to a target population—such as crimes related to homelessness—is that there is almost always an immediate response to the call.

Further, the Homeless Advocate Officer is effectively on-call for all homeless issues during a full-time shift each week (unlike many other CIT programs in which all officers remain on duty for general patrol issues or may rotate CIT responses). Having one or more full time officers devoted to the program ensures that an officer will be a first responder at or near the moment of the crisis situation and that this officer has the specialized knowledge to provide proper linkages to services if needed.

Another advantage to having one or two officers specialize in the program, effectively taking it on full-time, is that sometimes general patrol officers are reluctant to spend too much time on non-emergency calls for fear that persons in their department might view them as lazy or wasting time on unimportant “non-police” matters. Having one or more officers who are devoted to the program ensures that adequate time is spent in assessing each person and offering linkages to potential mental health treatment or other services.

Officer Atkins has previously participated in CIT training through her police department, as have other officers in her department. But as a single officer dedicated solely to the program, another advantage is that Officer Atkins has built a strong reputation in the homeless community as being the officer who is present to help and not necessarily to make an arrest.⁶⁹ Additionally, Officer Atkins has also developed relationships with the key service centers and organizations in the city, and is able to link individuals to services based on their individual needs. Many police departments overlook the importance of educating officers about specific mental health services available in the community; this knowledge is critical in order to implement an effective pre-booking diversion program.

⁶⁸ Statement by Officer Atkins.

⁶⁹ Officer Atkins described once meeting a homeless woman who, after Atkins introduced herself, started crying because she had heard about Atkins through word of mouth on the street and knew she finally had a chance to get help.

b. Emphasis on Voluntary Treatment

Arguably, what may be most important to the success of the San Bernardino program is Officer Marci Atkins' positive and non-paternalistic attitude about mental health treatment. If homeless individuals are willing to and desirous of getting out of homelessness, Officer Atkins is there to help them find a way to make this a reality. Officer Atkins does not spend her time trying to help persons who are resistant to treatment because she knows and believes that the process is already so hard for those who are willing to accept it voluntarily. Additionally, her time is limited, and she wants to assist those who are desirous of help and change because there is more likely to be a long lasting impact for such individuals.

c. Avoiding Arrest: The Pre-Booking Diversion Process of Linking Homeless Mentally Ill Persons to Voluntary Treatment

1) Introductions

The process by which Officer Atkins meets with a homeless and/or mentally ill individual is as follows. Upon dispatch to a 911 homelessness/mental health call or arrival at an area where she believes an individual is in need of her assistance, Officer Atkins' first step is to approach the individual in a non-threatening and conversational manner. Although Officer Atkins is in uniform, her first job is to introduce herself by name, identify her role as the Homeless Advocate Officer, and then explain that her role is to help and not necessarily to arrest.

2) The Questionnaire

Officer Atkins then tries to get to know the individual and learn about his or her individual needs, goals, and desires. She has developed a Homeless Assessment Questionnaire for this purpose (see Appendix 3 for a copy). Some of the questions include the following: How long have you been homeless? What event caused you to become homeless? Do you have a job/income? What are your skills? Do you have a Driver's License? What hurdles have you run up against while being homeless? Are you under the care of a Doctor? Have you ever been diagnosed with a mental illness? Are you a Veteran? Are you on parole/probation? Asking these questions allows her to form a bond with the individual and learn about how to connect him or her to the services he or she needs.

3) Education about Crime and Services Available

After completing the Questionnaire, Officer Atkins then takes the time to educate the individual about the likely crimes an officer might arrest him or her for if he or she chooses to remain homeless.⁷⁰ Additionally, this presents an opportunity for Officer Atkins to educate the individual about available treatment or services choices.

As a result, most of the time Officer Atkins finds herself in conversations with homeless persons about whether or not they are ready for change in their lives: Do they want a job? If so, what kind? Do they want housing? Do they have any other goals in their life? Are they resistant to access mental health services because they dislike medications? Does failing to access mental health treatment interfere with one or more life goals they have? Officer Atkins makes sure they know change will not be easy, but if they are ready for the challenge, she is willing to help them get there. If individuals are receptive to the idea of voluntarily accessing

⁷⁰ This is yet another effective and preventive aspect of pre-booking diversion: education about the types of crimes likely to lead to arrest.

treatment, she will connect them to mental health services in addition to other supportive services.

4) Transportation and Linkage to Community Services

Officer Atkins then transports such individuals (in her police car) to the intake office at the Mentally Ill Homeless Program. At this facility, individuals in need of services meet with a clinician at intake to determine whether a mental illness is present. Then, if a mental illness is present, the individual will meet with a case manager to determine their needs for services.⁷¹ (For this particular program services will only be provided if a mental illness is present.) Furthermore, through linkage with the Mentally Ill Homeless Program, individuals might also be eligible for the Homeless Court Program, which operates right next door. Through Homeless Court, persons who have outstanding warrants issued for their arrest may have them expunged from their record provided they are participating in a mental health program.⁷²

d. Outline: Core aspects of the San Bernardino Pre-Booking Diversion Program

Listed below are some of the core aspects of the pre-booking diversion program Officer Atkins and the City of San Bernardino's Police Department have developed:

- *A Policy Not To Arrest but to Develop Relationships with the Homeless Mentally Ill that may overtime lead to effective services linkages*
 - Homeless Advocate Officer must have good communication skills
 - Patience and focus on small steps toward help accessing services
 - Sometimes Officer Atkins merely hands out her business card; weeks or months later receives a call that the individual needs help
- *Education about the Law and How Not to Get Arrested if such Individuals Wish to Remain Homeless*
 - Education about prevalent crimes such as loitering, panhandling, trespass, etc.
 - If such persons know the elements of the crimes, they are less likely to commit them and therefore less likely to be arrested
 - Officer Atkins also goes to outpatient clinics to educate persons with mental illness about why police officers might seem harsh or demanding sometimes
 - She calls this "reverse CIT training" because in regular CIT training the officers are taught to step into the shoes of someone with a mental illness, and in the reverse CIT training, she encourages persons with mental illness to step into the shoes of police officers to better understand why they act the way they do
- *Once a Relationship is Established, Officer Atkins Makes Sure that Persons Enter the Program on a Voluntary Basis*
 - Open and honest discussion about the individual's choice to remain homeless and untreated and the consequences versus obtaining housing and/or treatment
- *How Clients Are Linked to Services*
 - Most often through the County of San Bernardino Behavioral Health Mentally Ill Homeless Program

⁷¹ As a side note, Office Atkins has never been turned away from a county facility that provides services, possibly because of the strong relationships she has built with them.

⁷² County of San Bernardino, Homeless Court Program Pamphlet. See *infra* Section V.B.1 for a discussion about the difference between a mental health court and a homeless court.

- Criteria for admission: must be between the ages of 18-64, have a mental disorder, be currently homeless, have ability to take medication without assistance, and is otherwise without funds
 - Services Available: “temporary housing and food, assistance in securing permanent housing, assistance with transportation to and from needed services, referrals for health care [including mental health], referrals for job search and placement, assistance in SSI & Medi-Cal Applications, and referrals for V.A. Services.”
 - 90 days duration to provide linkage to other programs that may provide longer lasting services
 - Outstanding warrants may be cleared through linkage with and participation in the Homeless Court Program (post-booking diversion)⁷³
 - “Clients with warrants and failures to appear for anything but felonies can have these issues resolved . . . even if charges go back many years.”⁷⁴
 - “Clients may have been arrested or received citations for misdemeanors or infractions such as open containers, petty theft, loitering, public intoxication, urinating in public and other legal problems of this nature including traffic violations. . . . Clients accepted into homeless court must also be participating in a mental health and/or substance abuse program.”⁷⁵
 - Bi-Monthly court sessions
- *Officer Atkins still follows up after linkages are made*
 - Whether by phone call or dropping by their new residence to see how they are doing,⁷⁶ Officer Atkins maintains a relationship with persons she has helped, making sure that such persons still know they can contact her for help
 - Many persons have complaints about board and care facilities. These facilities are sometimes fraudulent, and so Officer Atkins can also provide education to persons in this situation about their tenant rights.

⁷³ See *infra* Section V.B.1 for a discussion about the difference between a mental health court and a homeless court.

⁷⁴ Homeless Court Program Pamphlet, County of San Bernardino.

⁷⁵ *Id.*

⁷⁶ During the ride-along in which I accompanied Officer Atkins for a day to learn about the program, we visited the apartment residence of a formerly homeless couple who Atkins had gone to great lengths over a long period of time to help connect to services and housing. Officer Atkins was working on helping them get a fridge to store food, but had also managed to get them a bed and a chair for their apartment. We also drove the woman to and from Goodwill that day, and Atkins gave her vouchers to buy clothing and other items that they needed for the apartment (such as bed sheets). This couple was at first very resistant to her offers for help. Officer Atkins initially met them while responding to a 911 call that they were loitering near a business. Officer Atkins gave them her card, but eventually met them when she was patrolling the city and discovered the camp where they were living. Upon this later encounter, the couple seemed ready to make a change. Among many other aspects of linking the couple to services, Atkins also managed to find a temporary shelter for their beloved dog while they stayed at a temporary room and board before finally moving into their own apartment.

- *General Distinction between patrol officer's responses and homeless advocate officer's options/responses*
 - General Patrol Officer
 - Give a warning
 - Issue citation or arrest
 - Run name of individual in system and look for a warrant for their arrest, if there is one arrest will be made
 - Homeless Advocate Officer
 - All the above options plus . . .
 - Spending more time with the person to learn the root of the problem and try to think of a way to address it
 - Provide linkages to services
- *Officer Atkins' ideas to improve programs like hers in the future*
 - 24 hour services center linkage needed (currently does not exist in San Bernardino)
 - From the beginning find someone to help with data collection
 - Find a way to keep track of clients, whether by photo or other identifying info, so that other officers might be able to easily learn whether or not the client has a mental health problem

2. *San Diego's Psychiatric Emergency Response Team ("PERT")*

The mission of the PERT program, which has been in existence for twelve years, is to prevent unnecessary hospitalizations and to reduce the incarceration of persons with mental illness.⁷⁷ The most critical aspect of the PERT program that makes it different from San Bernardino is that a full time clinician accompanies the designated police officer on-call for mental health issues 40 hours a week. Thus, when a PERT team arrives to a crisis situation, there is one uniformed officer and one plain clothed clinician to help the person in crisis, as well as any affected family members. The program is available from 6 AM until 3 AM, staffed most heavily from 2 PM until midnight, as this is the time when most calls are received.

The PERT program's co-responder model does not necessarily include the police officer who may be the first responder to the 911 call.⁷⁸ If the patrol officer at the crisis situation believes there is a psychiatric emergency, he or she will contact the PERT team, which will rapidly arrive to provide assistance to individuals with mental illness in crisis. The program is designed so that the police officer on general patrol duty returns to work as soon as possible.

In the alternative, the 911 operator might dispatch the PERT team directly to a crisis in which the operator believes a mental health emergency is at issue. Upon dispatch by the 911 operator or the police officer who is the first responder, "[t]he PERT team will do an evaluation and assessment, and if appropriate [provide] a referral to a community-based resource or treatment facility."⁷⁹

⁷⁷ Information in this Section came from a phone conversation with Jim Fix, the Director of the PERT program, September 2008.

⁷⁸ San Diego County Sheriff's Department, Psychiatric Emergency Response Team (PERT), www.sdsheriff.net/vista/services_pert.html (last visited Sept. 2, 2008).

⁷⁹ *Id.*

Additionally, the PERT team has gained such a positive reputation in San Diego, particularly with NAMI members, and as a result, members of the community might dial 911 and specifically ask for a PERT team to be dispatched to their residence if a family member with a mental illness is in crisis.

The target population the PERT team addresses is persons who have a mental illness and are in a crisis situation. The crisis may involve a danger-to-self-or-others emergency situation, requiring an involuntary 72 hour commitment hold. But it is estimated that roughly 80% of the time, the crisis at issue involves assisting the person in obtaining voluntary mental health services through linkages to services with the county department of behavioral health.⁸⁰ Further, in many cases, it is often the case that no criminal offense has been committed. Thus, the program is diversionary in that members of the community are accessing PERT arguably even earlier than when a crime has taken place. Yet, the essence of the program is that a 911 call is made in order to dispatch the team.

The PERT team currently works with 21 different law enforcement offices and was recently expanded geographically and by increasing hours of availability via Mental Health Services Act funding.

3. *Los Angeles Law Enforcement Teams*

Los Angeles County has several CIT based emergency response teams, including the following: 1) Los Angeles Police Department's Systemwide Mental Assessment Response Team ("SMART"); 2) Long Beach Police Department's Mental Evaluation Team ("MET"); 3) Pasadena Police Department Homeless Outreach Psychiatric Evaluations (Project HOPE); 4) Los Angeles County Metropolitan Transit Authority Crisis Response Unit (MTA-CRU); and 5) Los Angeles County Sheriff's Department Mental Evaluation Team ("MET").⁸¹

Like San Diego's PERT program, each of these teams consists of a trained deputy sheriff or police officer and a mental health clinician.⁸² These teams may either be called in by a patrol officer on duty at the scene of a crisis or by a 911 operator. Typically, upon arrival at the scene, the original patrol officer is relieved of further duties and can return to normal patrol. The L.A. programs are very similar in function to San Diego's PERT program. Like PERT, dispatch of a SMART team or other law enforcement co-responder team usually occurs in a crisis or emergency situation and arrests are avoided if possible. SMART officers are encouraged to provide linkage to treatment and avoid making an arrest.⁸³

L.A. County does have Homeless Outreach Teams ("HOT"), which are similar to Officer Atkins' Homeless Advocate Officer position.⁸⁴ The main difference, however, is that the HOT team is comprised of Department of Mental Health Staff and not an officer. But much of the diversionary and educational model is the same: "HOT serves to increase the likelihood of

⁸⁰ Phone Interview with Jim Fix, Director, PERT program, Sept. 2008.

⁸¹ County of Los Angeles, Network of Care for Behavioral Health, <http://losangeles.networkofcare.org/mh/emergency.cfm> (last visited Sept. 3, 2008).

⁸² *Id.*

⁸³ "The objective [of SMART] is to provide intervention, referral, or placement for a mentally ill person, allowing field officers to quickly return to other field duties." *SMART Helps the Mentally Ill*, Los Angeles Police Beat, Office of the Chief of Police, Feb. 2000, at 1.

⁸⁴ County of Los Angeles, Network of Care for Behavioral Health, <http://losangeles.networkofcare.org/mh/emergency.cfm> (last visited Sept. 3, 2008).

effective outcomes for the homeless mentally ill in situations when he or she encounters law enforcement personnel.”⁸⁵

Additionally, similar to San Bernardino, L.A. has a Homeless Court Program in which persons with a mental illness who are in treatment may have the opportunity to have outstanding warrants related to homelessness cleared from their record.⁸⁶ To be eligible for the Court, the offense must have been committed within L.A. County; the individual must either be homeless or at risk of becoming homeless; the individual must have completed 90 days of satisfactory participation in a rehabilitation program; the individual may not have any citations or arrests in the last six months, have any open felony warrants, or be in violation of probation or parole.⁸⁷ Homeless Courts, however, are a post-booking diversion program discussed later in this report.⁸⁸

C. National and International Examples

1. CIT in Akron, Ohio

“In 2000, the Akron Police Department became the first in Ohio to start a CIT program.”⁸⁹ This program, like other “Crisis Intervention Team programs across the country help[s] direct persons with mental illness into treatment instead of inappropriate incarceration.”⁹⁰ The backbone of the program is the 40 hours of free CIT training for police officers that is put together by the “mental health community, providers, consumers, and family members.”⁹¹ One of the goals of the Akron program, like many other CIT programs, is to provide CIT training to 25% of its patrol officers to ensure that at least one CIT officer is on duty 24 hours a day, seven days a week.⁹² In this pre-booking diversion program, the officers remain on their regular patrol duties and incorporate CIT calls into their daily routine.⁹³

2. Australia’s Mental Health First Aid

“Mental Health First Aid is a 12-hour training course designed to give *members of the public* key skills to help someone who is developing a mental health problem or experiencing a mental health crisis.”⁹⁴ The concept of the program is to provide general mental health crisis training tools similar to that of general CPR knowledge, which members of the public are often

⁸⁵ *Id.*

⁸⁶ Public Counsel, The Los Angeles Homeless Court Handout. For information about the homeless court, see www.publiccounsel.org “Homelessness Prevention Law Project.”

⁸⁷ Public Counsel Handout obtained at Transformation Through Advocacy Conference in Los Angeles, Spring 2008.

⁸⁸ For more information about Homeless Courts see Section V.B.

⁸⁹ Ohio Criminal Justice Coordinating Center of Excellence, Crisis Intervention Team, <http://www.neoucom.edu/CJCCOE/cit.html> (last visited Sept. 2, 2008).

⁹⁰ *Id.*

⁹¹ E-mail Attachment from Latrease Moore, Project Assistant, Criminal Justice Division, Policy Research Associates, *GAINS Ctr., Pre-Booking Jail Diversion Programs 2003*

⁹² Ohio Criminal Justice Coordinating Center of Excellence, Overview of CIT, <http://www.neoucom.edu/CJCCOE/support/citoverview.pdf> (last visited Sept. 2, 2008).

⁹³ *Id.*

⁹⁴ Nat’l Council for Community Behavioral Healthcare, Press & Public, Mental Health First Aid, available at http://www.thenationalcouncil.org/cs/pressroom/mental_health_first_aid (last visited Sept. 8, 2008) (emphasis added).

aware of for physical health emergencies.⁹⁵ “The evidence behind the program demonstrates that it makes people feel more comfortable managing a crisis situation and builds mental health literacy — helping the public identify, understand and respond to signs of mental illness.”⁹⁶ “Although the training is generally geared to average citizens and does not typically offer the level of expertise needed by police departments . . . [some police departments, such as one in Rhode Island] . . . use Mental Health First Aid as a supplement to other training police receive.”⁹⁷ The National Council for Community Behavioral Healthcare has introduced Mental Health First Aid to the U.S. and offers trainings on the program throughout the country.⁹⁸ Mental Health First Aid might be thought of as a pre-booking diversion program to the extent that it is used to train officers and members of the public to divert persons with mental illness who are in crisis.

V. EARLY DIVERSION POST-BOOKING PROGRAMS

A. Jail Diversion Program in San Rafael, Marin County

San Rafael does not currently have a pre-booking diversion program, but it operates a post-booking diversion program called the Support and Treatment After Release (“STAR”), also known as the Mentally Ill Offender Crime Reduction Program, that aims to assist persons with severe mental illness get treatment shortly after they have been booked and are taken to jail.⁹⁹ Diversion takes place at jail, after booking, but often before or shortly after arraignment. The program currently has 75 offenders and is funded through the Mentally Ill Offender Crime Reduction Act as well as the Mental Health Services Act.¹⁰⁰ The County also has a mental health court, but it operates on a post-conviction basis in which a guilty plea is required in order for the treatment program to be initiated.¹⁰¹

1. Santa Barbara Plans to Replicate the San Rafael Model

Santa Barbara is in the process of building a pre-booking or other early diversion program.¹⁰² Currently, homeless outreach advocates meet once a month with members of the police department to discuss problem areas and ways they might divert minor offenders in the

⁹⁵ *Tragic Events Involving Police in R.I. Spur Mental Health Training Initiatives*, MENTAL HEALTH WEEKLY, July 28, 2008, at 7.

⁹⁶ Nat’l Council for Community Behavioral Healthcare, Press & Public, Mental Health First Aid, available at http://www.thenationalcouncil.org/cs/pressroom/mental_health_first_aid (last visited Sept. 8, 2008) (emphasis added).

⁹⁷ *Tragic Events Involving Police in R.I. Spur Mental Health Training Initiatives*, MENTAL HEALTH WEEKLY, July 28, 2008, at 1, 7.

⁹⁸ Nat’l Council for Community Behavioral Healthcare, Press & Public, Mental Health First Aid, available at http://www.thenationalcouncil.org/cs/pressroom/mental_health_first_aid (last visited Sept. 8, 2008).

⁹⁹ Phone Conversation with Bruce Gurganus, Director, Division of Mental Health, Marin County, Sept. 3, 2008.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Phone conversation with Annemarie Cameron, Executive Director of the Mental Health Association of Santa Barbara, Sept. 3, 2008.

future. The program is small and collaborative, but it is being modeled after early post-booking diversionary programs in San Rafael.

B. Early Diversion Mental Health Courts

1. Mental Health Courts Defined and Distinguished from “Homeless Courts”

Post-booking diversion programs often involve court-diversion programs known as specialty courts. Mental health courts are one type of specialty court, and are in some ways distinctive from general homeless courts, even though mental health issues are often involved in homeless court.

A United States Council of State Governments Report, defines the key characteristics of a “mental health court”¹⁰⁴. A mental health court is any specialized court docket with a problem-solving focus that has a team of court staff including mental health professionals who design and implement community treatment mental health programs to divert mentally ill persons from incarceration, which often include incentives and sanctions for good and bad behaviors at regular judicial hearings, and culminate in graduation from the court program.¹⁰³

The unique aspect of a homeless court, even though to some degree it fits this definition of mental health court, is that often the individual comes to the court already having completed a term of rehabilitation or mental health treatment for a certain period of time.¹⁰⁴ This is a critical policy distinction. In a homeless court, arguably, no or very little coercion is involved in linking the individual to treatment—this is because to be eligible, the treatment has already been completed. For example, in the Los Angeles Homeless Court, one must have successfully participated in a rehabilitation program that lasted at least 90 days.¹⁰⁵ The court itself then seems to act in a non-threatening or non-coercive manner in that it only rewards those individuals who have already voluntarily completed or are enrolled in treatment. Thus, upon demonstrating commitment to treatment and toward recovery, the court steps in to clear the individual’s record for minor offenses, including fines or bench warrants often issued due to the failure to appear in court. In theory, a post-booking Homeless Court has a feel similar to a pre-booking diversion or other early intervention diversion programs because little to no coercion is involved in its structure.

¹⁰³ BUREAU OF JUSTICE ASSISTANCE, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESS: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT vii (Draft 2007).

¹⁰⁴ Orange County, however, has a model that blends both the mental health court and homeless court model—it is called the Orange County Outreach Court. COLLABORATIVE COURTS UNIT, ORANGE COUNTY SUPERIOR COURT, 2006 ANNUAL REPORT 137-40 (2006). The court focuses on resolving misdemeanor cases that often affect homeless persons and requires participation in treatment for at least one-and-a-half years. *Id.* The top ten charges that prompted entry into the court (in order from highest to lowest) are as follows: 1) violation of vehicle code for failure to provide proof of financial responsibility; 2) failure to register vehicle; 3) running a red light, stop sign, or pedestrian cross walk; 4) violation of the penal code for failure to appear on written or non-written promise to appear; 5) driving without a safety belt; 6) public intoxication; 7) drinking an alcoholic beverage in public; 8) driving without a valid license; 9) driving while driver’s license is suspended or revoked; 10) unsafe speed for prevailing conditions. *Id.*

¹⁰⁵ Public Counsel Handout obtained at Transformation Through Advocacy Conference in Los Angeles, Spring 2008.

More formal mental health courts, on the other hand, offer treatment for those who are likely not already receiving it but are suffering from a mental illness as an alternative to incarceration. These diversionary courts generally take place at any of three general adjudicatory stages: pre-plea, post-plea or post-conviction, and probation-based.¹⁰⁶ As seen from the discussion in Section II.B regarding the stages of the criminal process, one can see that a mental health court could take place at a variety of stages. In a post-plea court, an individual might plead guilty after arraignment, as part of a plea agreement in the pre-trial stage, or at some point during trial. Additionally, though less common, some mental health courts might operate post-conviction, possibly after a full adjudicatory trial. For a pre-plea court, however, the prosecution would likely delay pressing charges until successful completion of the treatment program. Specific California examples of these different types of courts will be described in detail in the next few sections.

Further, mental health courts, like homeless courts, often restrict eligibility based on the criminal charge. Many mental health courts decline to admit felonies, particularly those involving violence. The most prevalent mental health courts today deal with both misdemeanors and some non-violent felonies on a case-by-case basis. Homeless courts, however, typically deal with infractions, citations, and fines.

2. *San Francisco's Pre-Plea Mental Health Court*

San Francisco's mental health court is called "Behavioral Health Court" in order to reduce the stigma for participants associated with being labeled a "mental health court" participant. The court has been in existence since 2003.¹⁰⁷ It operates on a pre-plea basis.

Clients are not required to plead guilty to criminal charges to enter [] the program and access mental health services. [The] court operates on the premise that clients in BHC would not be in the criminal justice system if they had been adequately and appropriately treated in the community mental health system. Often, clients in [the] court have viable mental health defenses to charges, but opt for mental health treatment instead of proceeding to a jury trial. To insist that clients plead guilty to such charges just to access treatment would be fundamentally unfair and would further criminalize people with mental illness.¹⁰⁸

In order to be eligible for Behavioral Health Court, the individual must be in custody and a referral must be made by a judicial officer, prosecutor, defense attorney, or Jail Psychiatric

¹⁰⁶ "In preplea cases, prosecution is generally deferred and charges are dismissed after successful completion of treatment. . . . [I]n postplea cases [adjudication occurs], but the sentence is deferred. Probation-based cases include a conviction with probation and sometimes a suspended or deferred jail sentence." Patricia A. Griffin, *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 *PSYCHIATRIC SERVS.* 1285, 1286 (2002).

¹⁰⁷ See Dale E. McNeil & Renee L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 *AM. J. PSYCHIATRY* 1395, 1396 (2007).

¹⁰⁸ E-mail from Lisa Lightman, Director of the Office of Collaborative Justice Programs, San Francisco Superior Court, Jan. 15, 2008.

Services.¹⁰⁹ In the referral process, jail screening for an Axis I mental illness (this includes all of the major categories of mental illness such as schizophrenia, bipolar disorder, depression, and anxiety disorders such as obsessive compulsive disorder, post traumatic stress disorder, and attention deficit disorder.) is undertaken to determine whether the individual would medically qualify for the court.¹¹⁰ In order to be eligible, the defendant must have an Axis I Mental Disorder and further, be charged with a felony or misdemeanor. “Defendants charged with the following offenses are not eligible without the District Attorney’s consent: sex offenses, domestic violence offenses, homicide, weapons offenses, offenses involving great bodily injury, and other ‘serious felonies’ as defined by Penal Code 1192.7(c).”¹¹¹

Once a defendant has been accepted into the program, an individualized community-based treatment plan is devised.¹¹² Participants must remain in the treatment program for a minimum of one year, while they attend regular court sessions that meet on a regular basis (in some cases this may be on a weekly basis).¹¹³ The purpose of the court session is to inquire with the individual about his or her treatment progress and make any adjustments to the plan if necessary. In order to graduate from the court, the treatment program must be completed successfully. Upon graduation charges are resolved “in a way that takes into account the seriousness of the charges and the seriousness of the mental illness.”¹¹⁴ Thus, not all cases or charges are dismissed at the end of the program.

a. Compare to Orange County’s Post-Conviction/Post-Plea Mental Health Court

Unlike San Francisco’s Behavioral Health Court, Orange County operates one specialty mental health court, called the “Whatever It Takes” (“WIT”) Court that operates on a post guilty plea or post-conviction basis.¹¹⁵ Thus, the program operates from a different premise than the San Francisco Court, in that it requires the defendant admit to guilt and be convicted for the crime in order to take responsibility for his or her actions and to serve as further incentive to complete the treatment program.¹¹⁶ However, upon graduating from the court and having successfully completed treatment, a participant “may be given the opportunity to withdraw [the] plea and [the] case may be dismissed or reduced to a misdemeanor.”¹¹⁷ The program requires a

¹⁰⁹ SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, OFFICE OF COLLABORATIVE JUSTICE PROGRAMS, SAN FRANCISCO BEHAVIORAL HEALTH COURT (2008) *available at* http://www.sfgov.org/site/uploadedfiles/courts/BHCFactSheet_Final.pdf.

¹¹⁰ *Id.* “A mental health evaluation is conducted by Jail Aftercare Services (JAS) to determine client diagnostic suitability for BHC. If deemed appropriate, JAS staff present the case to the BHC team. The BHC legal team reviews the case to make the final decision regarding transfer into the program.” *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ E-mail from Lisa Lightman, Director of the Office of Collaborative Justice Programs, San Francisco Superior Court, Jan. 15, 2008.

¹¹⁵ Interview with Honorable Judge Wendy S. Lindley, Orange County Superior Courts, Orange County, California, Nov. 26, 2007.

¹¹⁶ *See id.*

¹¹⁷ Orange County Whatever It Takes Program, W.I.T. Court Participant Handbook 11 (2006).

minimum commitment of eighteen months of treatment.¹¹⁸ While the core individualized treatment plans are very similar to that of San Francisco, the Orange County Court diverts offenders at a later stage in the criminal process: post-plea or post-conviction.¹¹⁹

b. Santa Barbara's Mixed Pre-Plea and Post-Adjudication Mental Health Court

The Santa Barbara Mental Health Court, also known as the Mental Health Treatment Court accepts persons diagnosed with serious mental illnesses who have been charged with either a felony or misdemeanor and have at least one previous booking. However, most notably,

Offenders . . . [can] enter the program either pre-plea or post-adjudication.

Pre-plea participants could have no prior offenses that involved serious acts of violence. Post-conviction participants could have some violent activity in their past, if the . . . team members determined that they no longer posed a threat of danger to others.

...

For pre-plea offenders, graduation from the program result[s] in their charge being dropped, while post-conviction offenders ha[ve] a reduction in their terms of probation.¹²⁰

The advantage to having a mixed pre-guilty plea and post-conviction model is that diversion services are more closely tailored to the crime committed, and thus, may be more widely accepted in the community.

3. Causes For Concern With Mental Health Courts

One cause for concern in operating post-booking diversion mental health courts (not necessarily homeless courts), is that they become a mechanism by which coerced treatment is obtained. Technically, in every mental health court, the participant "voluntarily" agrees to

¹¹⁸ Interview with Honorable Judge Wendy S. Lindley, Orange County Superior Courts, Orange County, California, Nov. 26, 2007.

¹¹⁹ Nevada County also has a mental health court that operates on a post-conviction basis. The court accepts persons with both felony and misdemeanor convictions on an individualized basis, however, the court is moving toward accepting more offenders with violent felony convictions that present significant mental health problems. Interview with Nevada County Mental Health Court Team, Nevada County, California, Dec. 7, 2007. Currently, the following offenses are presumptively ineligible: 1. Any felony or misdemeanor which demonstrates that the defendant presents a substantial risk to health and safety of others; 2. Any "serious" felony under P.C. § 1192.7(c); and 3) Any crime subject to the Three Strikes sentencing law. NEVADA COUNTY MENTAL HEALTH COURT, NEVADA COUNTY MENTAL HEALTH COURT POLICIES AND PROCEDURES 16 (2003).

Additionally, San Bernardino County has a post-conviction mental health court that accepts persons who have convictions for felonies. "San Bernardino has a fixed duration of three years [treatment with the court] for felony cases." Patricia A. Griffin, Henry J. Steadman & John Petril, *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 PSYCHIATRIC SERVS. 1285, 1287 (2002).

¹²⁰ MERITH COSDEN, JEFFREY ELLENS, JEFFREY SCHNELL, & YASMEEN YAMINI-DIOUF, UNIV. CAL. SANTA BARBARA GERVITZ GRAD. SCHOOL OF EDUC., EVALUATION OF THE SANTA BARBARA COUNTY MENTAL HEALTH TREATMENT COURT WITH INTENSIVE CASE MANAGEMENT 5-6 (2004).

accept treatment,¹²¹ but many argue that the choice between incarceration and treatment is too coercive to be entirely voluntary as indicated by the views of officer Atkins in San Bernardino, it is enough of a challenge for a willing individual to have successful recovery so it is more difficult for those who only willingly agree to do so in order to avoid jail.

Additionally, another cause for concern is that mental health courts will become the primary entry/diversion point to access mental health services, as opposed to other less coercive or earlier intervention models. If police officers become aware of and accustomed to this entry point into the mental health system for minor violations, the concern is that officers will no longer use pre-booking diversion tactics to begin with. One study on this issue in Akron, Ohio, where both CIT and a mental health court were available, discovered that officers were more inclined to make arrests of persons with mental illness when they knew of the existing local mental health court diversion program.¹²² The study noted the following:

The apparently higher rate of arrest by CIT-trained officers was unanticipated. Mental health systems support CIT programs in part because they view the programs as prearrest diversion programs. Police agencies, on the other hand, embrace the CIT program of enhancing officer and community safety. Through CIT training, officers may learn when referral to the mental health system is most effective and when arrest may be preferable. . . . Furthermore, it is likely that Akron arrest rates are influenced by officers' knowledge of the Mental Health Court postarrest diversion program. . . . Knowledge of the program and the fact that it may help individuals who may otherwise be resistant to treatment to live successfully in the community may result in CIT-trained officers' choosing arrest in selected cases. The interaction of prearrest diversion programs such as the CIT program and postarrest programs such as the mental health court should be the subject of future research.¹²³

Thus, it is all the more important that in areas where post-booking diversion programs are well established, including mental health courts, that pre-booking diversion programs are also strengthened.

VI. STEPS NECESSARY TO INCREASE THE NUMBER OF PRE-BOOKING DIVERSION PROGRAMS IN CALIFORNIA

A. Creation of Programs

There are many published and detailed how-to guides that lay out the critical steps involved in creating a pre-booking diversion program. Two guides we recommend are 1) the

¹²¹ *E.g.*, ORANGE COUNTY WHATEVER IT TAKES PROGRAM, W.I.T. COURT PARTICIPANT HANDBOOK 1 (2006). "The program is voluntary and is your personal choice. The Judge, the court staff and the treatment team will guide and assist you, but the final responsibility is yours." *Id.*

¹²² Jennifer L. S. Teller, et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 PSYCH. SERVS. 232, 236 (2006).

¹²³ *Id.*

Bureau of Justice Assistance’s “Improving Responses to People with Mental Illness: The Essential Elements of a Specialized Law Enforcement-Based Program;” and 2)The CMHS National GAINS Center and TAPA Center for Jail Diversion’s “Practical Advice on Jail Diversion: Ten Years of Learnings on Jail Diversion from the CMHS National GAINS Center.”

The first guide highlights the ten essential elements of a pre-booking diversion program: 1) Collaborative Planning and Implementation; 2) Program Design; 3) Specialized Training; 4) Call-Taker and Dispatcher Protocols; 5) Stabilization, Observation, and Disposition; 6) Transportation and Custodial Transfer; 7) Information Exchange and Confidentiality; 8) Treatment, Supports, and Services; 9) Organizational Support; and 10) Program Evaluation and Sustainability.¹²⁴ The guide “provide[s] practitioners and policymakers with a common framework for program design and implementation that will promote positive outcomes while being sensitive to every jurisdiction’s distinct needs and resources.”¹²⁵

The second guide is much longer and more detailed, discussing practical advice in creating and implementing jail diversion programs. The guide is broken down into the following sections: 1) Why Develop a Jail Diversion Program?; 2) What is Jail Diversion Really?; 3) Making Jail Diversion Happen in Your Community; 4) Getting Started; 5) Putting the “Action” in Your Action Plan; 6) Planning for Sustainability; and 7) Data 101.¹²⁶ Six steps identified in this guide for success in developing a diversion program are as follows: 1) interagency collaboration; 2) active involvement with stakeholders; 3) cross-system staff; 4) leadership; 5) early identification and screening; and 6) specialized case management.¹²⁷

B. Funding: Accessing and Applying for Proposition 63 or Mental Health Services Act Funds

California county mental and behavioral health departments must work with local city police departments to provide funding through MHSA to create pre-booking diversion programs. Several county diversion programs mentioned in this report have already done this. For example, San Diego’s PERT program has been expanded and improved with MHSA funds. And mental health court programs in Orange County are also using MHSA funds. The first step in accessing MHSA funding is to collaborate with the county mental health department to develop a diversion plan and eventually submit a proposal to carry out that plan.

Other potential funding sources for jail diversion projects, which several county programs mentioned in this report, have used are the federal Mentally Ill Offender Crime Reduction Act (“MIOCRA”) and grants from the Substance Abuse and Mental Health Services Administration

¹²⁴ THE COUNCIL OF STATE GOVERNMENTS, BUREAU OF JUSTICE ASSISTANCE, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESS: THE ESSENTIAL ELEMENTS OF A SPECIALIZED LAW ENFORCEMENT-BASED PROGRAM (2008).

¹²⁵ *Id.*

¹²⁶ CMHS NAT’L GAINS CTR. & CMHS GAINS TAPA CTR. FOR JAIL DIVERSION, PRACTICAL ADVICE ON JAIL DIVERSION: TEN YEARS OF LEARNINGS ON JAIL DIVERSION FROM THE CMHS NATIONAL GAINS CENTER (2007), *available at* http://gainscenter.samhsa.gov/pdfs/jail_diversion/PracticalAdviceOnJailDiversion.pdf (last visited Aug. 27, 2008).

¹²⁷ *Id.* at 14.

("SAMHSA").¹²⁸ Cities should also be willing to offer their own resources since these programs free up officers time. The pre-booking diversion Homeless Advocate Officer program in San Bernardino is currently funded through the police department and with matching funds from other sources?¹²⁹

VII. CONCLUSION

California counties should use MHSA funding to create and/or enhance early intervention jail diversion programs. Both pre-booking diversion and other early intervention post-booking diversion models should be expanded.

Pre-booking diversion programs are ideal for minor offenses and/or infractions and for small target populations that have been identified as a problem area (such as homeless persons with mental illness or single mothers who have a mental illness). As discussed in the report, pre-booking diversion often includes a CIT trained officer, but may also include a co-responder model with a licensed clinician. Both types of CIT should be expanded and implemented. This report shows that while co-responder models may be ideal in theory, specialized law officers (such as the Homeless Advocate Officer Program developed in San Bernardino) may also have a great impact and should not be overlooked if resources are limited.

However, pre-booking diversion is not always the most realistic diversion method. For greater offenses, including misdemeanors and felonies genuinely committed as a result of a mental illness, early intervention post-booking diversion programs should be bolstered. Four key moments in which post-booking diversion might still be considered early intervention are as follows: first, after an individual is taken into custody but before charges are filed; second, after charges have been filed but before arraignment; third, through a pre-guilty plea early intervention mental health court; and fourth, in post-guilty plea mental health court that emphasizes obtaining the plea at the earliest stage possible.

When both are established pre-booking and post-booking diversion programs would serve different populations. Therefore, both programs should be bolstered so that there are fewer gaps in the system.

While our jails have become a primary stop for mental health services and mental health clients, the criminal system should not continue to be a place for *perpetual* stops for persons with mental illness. Currently, persons with varying degrees and types of mental illnesses continue to cycle in and out of the criminal system, sometimes for decades, without ever receiving lasting or meaningful treatment. Early intervention programs, such as pre-booking diversion and early intervention post-booking programs are critical for counties to develop in order to proactively address this problem from reoccurring in the future. In doing so, court, jail, and prison costs will also be reduced and redirected to mental health treatment programs. Studies have demonstrated

¹²⁸ San Diego's PERT program is currently funded by about 50% through the Mental Health Services Act, the other 50% of its funding come from non-MHSA sources such as SAMHSA. Phone Interview with Jim Fix, Director, PERT program, Sept. 2008.

¹²⁹ Interview with Officer Marci Atkins, Homeless Advocate Officer, San Bernardino Police Department, San Bernardino, CA, Aug. 8, 2008.

that in the long run “[i]t is less expensive to provide mental health treatment in communities than in correctional facilities.”¹³⁰

Further, another key aspect for counties to keep in mind when developing these types of early intervention diversion programs is that ample planning and thought should go into the voluntary mental health services attached to the diversion programs so that they have a long-lasting effect and genuinely reduce recidivism. This includes being sensitive to capacity issues and ensuring that slots in treatment programs for persons to be diverted are reserved.

APPENDIX 1: Key Resources that Will Be Helpful to California Counties or Agencies Seeking to Establish a Pre-Booking or Other Early Diversion Program

1. CMHS Nat’l GAINS Ctr. & CMHS GAINS TAPA Ctr. for Jail Diversion, *Practical Advice on Jail Diversion: Ten Years of Learnings on Jail Diversion from the CMHS National GAINS Center* (2007), available at http://gainscenter.samhsa.gov/pdfs/jail_diversion/PracticalAdviceOnJailDiversion.pdf (last visited Aug. 27, 2008).
2. TAPA Ctr. of the GAINS Ctr., Melissa Reuland & Jason Cheney, *Enhancing Success of Police-Based Diversion Programs for People with Mental Illness* (2005).
3. The Council of State Governments, Bureau of Justice Assistance, *Improving Responses to People with Mental Illness: The Essential Elements of a Specialized Law Enforcement-Based Program* (2008).
4. The Council of State Governments, Bureau of Justice Assistance, *Improving Responses to People with Mental Illness: Strategies for Effective Law Enforcement Training* (draft 2008).
5. Bureau of Justice Assistance, Council of State Governments, *Improving Responses to People with Mental Illness: The Essential Elements of a Mental Health Court* (Draft 2007).
6. Bureau of Justice Assistance, Council of State Governments, *A Guide to Collecting Mental Health Court Outcome Data* (2005).

APPENDIX 2: Homeless Assessment Questionnaire, Officer Marci Atkins, San Bernardino City Police Department

On file with the Mental Health Association in California, available upon request.

APPENDIX 3: Orange County MHSA Plan Approved in 2006 to fund/create the “Whatever It Takes” mental health court

On file with the Mental Health Association in California, available upon request.

¹³⁰ Council of State Governments, Criminal Justice Mental Health Consensus Project, *The Advocacy Handbook*, available at http://consensusproject.org/advocacy/step1_2 (last visited Sept. 19, 2008).





