

Listening to the Field: Observations and Recommendations to Reduce Jail Populations During a Pandemic

A Pandemic Resource for Courts

Developed in collaboration with the National Judicial Task Force to Examine State Courts' Response to Mental Illness

January 25, 2021 | Version #1.0



This brief describes lessons learned by four communities as they respond to the pandemic and its effects on people with significant behavioral health needs in the criminal justice system, particularly in jail. What emerges from listening sessions conducted with these sites are unanticipated problems, useful data, and innovative practices that inform strategies that all criminal justice systems should embrace during and after the pandemic.

Recent media is replete with accounts of people with serious behavioral health needs being incarcerated for long periods of time in local jails because of a heightened lack of community resources, and because of COVID-19 restrictions in jails and inpatient treatment facilities. As the availability of treatment beds and community slots constricts, arrestees become stuck in jails, where behavioral health needs are often untreated and frequently exacerbated.

In order to better understand the problem and to identify successful responses, four listening sessions were arranged with interdisciplinary teams from communities around the country. The local teams consisted of behavioral health treatment providers, case managers, law enforcement, jail personnel, prosecution and defense counsel, and court representatives, including judges. The National Center for State Courts is extremely grateful to these participants and to the Council of State Governments and the Stepping Up Initiative for their assistance in identifying these innovative jurisdictions.

Crisis Care Resources and Initial Law Enforcement Contact

Observations

- **Crisis care resources.** Many front-end interventions known to reduce the use of jail were curtailed, especially early in the pandemic. Co-responder and mobile crisis response teams were wary of engaging in in-person contacts, and there were quarantine protocols in many community treatment settings, so opportunities for early diversion from the criminal justice system were diminished, and people with mental illness who would otherwise have been diverted were now taken to jail. This dynamic has repeated, though perhaps less dramatically, as infection waves repeated.

Community treatment sites imposed in-person contact restrictions, and, in some cases closed their doors either preemptively or as positive tests emerged among staff and clients. Treatment groups have been suspended or dramatically limited, as have prevention and outreach efforts.

- **Crisis Intervention Teams (CIT).** All four sites reported that CIT trainings for their law enforcement personnel were restricted or delayed, and in some cases, cancelled until only recently. Concerns about COVID transmission in an in-person training setting, which is the traditional format for CIT training, was the most common reason, though overall law enforcement personnel shortages were also a concern.
- **Law enforcement citation, arrest, and booking practices.** Most law enforcement entities reprioritized their enforcement activities to focus more on serious offenses. Many jails imposed quarantine periods, and jail processing overall slowed, making any booking a likely longer term of incarceration than it otherwise would be. Some law enforcement agencies explicitly directed officers to cite rather than arrest, when possible. One jurisdiction reported a more than 50% increase in citations in lieu of arrest. Yet some jurisdictions reported that as community resources were curtailed, diversion efforts were also lessened, resulting in increased bookings for people with behavioral health needs.

Recommendations

Successful strategies:

- Diversion to crisis care and community treatment options should be re-emphasized, and to the extent remote treatment or other supports, including peer support can be implemented, they should be considered.
- Resume CIT and other law enforcement engagements and reinforce the tenets of the trainings. If in-person trainings are not yet feasible, use remote instruction technologies for those parts of the trainings that can be done remotely.
- Diversion from arrest and jail are more effective and important now than ever. Jurisdictions reported that citations in lieu of arrest, promises to appear rather than warrants, a reminder to law enforcement about the importance of diversion, and more reliance on book and release processes were effective in reducing some of the volume of people with behavioral health needs in jail.

Recommended resources:

- [NCSC Pandemic Resource, The Crisis Care Continuum: Resources for Judges During and After the COVID-19 Pandemic.](#)

Crisis Care Resources and Initial Law Enforcement Contact

Observations	Recommendations
<p>Jail booking and bail processes also changed. Fourteen-day quarantine periods after booking are now common, which both lengthens jail stays and increases anxiety and the acuity of other behavioral health symptoms.</p> <p>On the other hand, some jurisdictions lowered or eliminated monetary bail requirements and others implemented book and release protocols with agreements to appear in court at a specified time.</p>	<ul style="list-style-type: none"> ▪ SAMHSA, Crisis Services: Meeting Needs, Saving Lives ▪ National Association of State Mental Health Program Directors, Using Technology to Improve the Delivery of Behavioral Health Crisis Services in the U.S.

Jails and Behavioral Health

Observations	Recommendations
<ul style="list-style-type: none"> ▪ Behavioral health screening and assessment. Remarkably, each of our listening session jurisdictions employs universal mental health screening at booking. Some have used telehealth technologies to administer the screen in an effort to reduce direct contact. In some instances, the identified behavioral health needs are used as additional impetus to release the arrestee sooner and to coordinate that release with community treatment resources. ▪ In-jail behavioral health treatment. An obvious result of minimizing in-person contacts in jails is that treatment groups were eliminated or greatly reduced in size. Often this is the only in-custody treatment modality, so for many, treatment stopped. Some jurisdictions moved to one-on-one cell-side treatment, but obviously the capacity of treatment providers is greatly reduced when sessions are one-on-one. Other impacts of moving to cell-side treatment is that confidentiality is compromised, and practitioners report that effectiveness of the interventions was diminished. ▪ Composition of jail populations. As the reach and effectiveness of jail-based behavioral health treatment are reduced, the number of people in jail who need treatment is staying the same or increasing. While jail censuses decreased dramatically across the country, 	<p>Successful strategies:</p> <ul style="list-style-type: none"> ▪ All sites use some form of universal screening in jail. Identifying people with behavioral health needs early is essential to being able to respond appropriately to those needs, and to divert them to treatment. Telehealth screening options allowed several jurisdictions to continue to screen without interruption. ▪ To the extent that in-jail treatment is appropriate, telehealth options can be a safe and effective mode of service delivery. ▪ The data generated by behavioral health screens and other sources should be collected, disseminated appropriately, and used to make decisions about

Jails and Behavioral Health

Observations

the percentage of remaining inmates who required treatment increased significantly. Consensus among listening session participants was consistent with data from a number of studies, that overall, during the pandemic people without behavioral health needs are more able to avoid incarceration than people with those needs. Further, the acuity of those needs is greater now than pre-pandemic. One jurisdiction reported that pre-pandemic, 12% of the jail's population assessed as having a serious mental illness, in late summer that same number was 22%.

These data reinforce another best practice recommendation, that jails employ universal behavioral health screening. Without that screening, this increased prevalence of mental illness among the jail population and the resulting treatment needs would not be readily identified.

This change in jail population composition has implications for jail staffing as well, as inmates with behavioral health needs require a higher intensity of staffing.

Reasons for the disproportionate impact on incarceration for people with mental illness are generally tied to resource scarcity. In a number of jurisdictions, the pandemic has reduced availability of community-based treatment, and even when resources exist, quarantine and testing requirements often mean that access to those resources is delayed. The same restrictions also often apply to inpatient assessment and treatment resources and to competency evaluation beds. The result is that while getting into jail is as easy as ever for people with mental illness, the common avenues to leave are frequently unavailable or delayed. As COVID infection waves peak again, these restrictions and delays reoccur as well.

Recommendations

diversion opportunities, treatment needs, and jail resource needs.

Recommended resources:

- NCSC Pandemic Resource [Providing Court-Connected Behavioral Health Services During the Pandemic: Remote Technology Solutions](#).
- SAMHSA, [Screening and Assessment of Co-Occurring Disorders in the Justice System](#).
- Council of State Governments Justice Center, [Set, Measure, Achieve: Stepping Up Guidance to Reach Prevalence Reduction Targets](#).

Pretrial Practices

Observations

- **Pretrial assessments.** The varying assessment mechanisms were impacted in different ways. Those jurisdictions that used remote pretrial assessment protocols or assessments that did not require interviews were impacted less than those that depended on in-person encounters. While having assessors embedded in the jails is usually an effective strategy, during the pandemic, these personnel are often among the first to be excluded from the confines of local jails. In those jurisdictions, pretrial releases are often delayed for everyone, but these delays affect people with behavioral health needs disproportionately in that they often are not as able to post monetary bail, nor are they as likely to be able to produce evidence of stable housing. There were also reports of screening and assessment information being less likely to be communicated by jail staff to pretrial agencies, which also had the effect of delaying pretrial release.

Another common report is that particularly early in the pandemic, courts were slow to ramp up court hearings capacity, either virtual or in-person, so there were longer than usual delays in court reviews and orders. Some of this court hearing capacity issue persists even now.

- **Pretrial supervision.** Both because of delays in pretrial decision-making and because of delays in court case disposition processes, the number of people in a pretrial status has increased dramatically. In addition, the length of time defendants are spending on pretrial status, whether supervised or not, is much longer during the pandemic. Once again, people with mental illnesses are impacted disproportionately.

Listening session sites reported two significant impacts of this prolonged pretrial status. First, longer stints on supervision combined with fewer community supports have resulted in more violations of pretrial conditions and, therefore, more revocations and returns to jail. A common scenario includes a person with co-occurring disorders testing positive for substance use.

Recommendations

Successful strategies:

- Pretrial risk assessment processes should continue, either using a tool that does not require an interview, or by using remote technologies to interview arrestees.
- Pretrial supervision was also more successful when accomplished remotely, and these remote technologies allowed supervision staff to increase their capacity, as pretrial caseloads often grew during the pandemic. Successful jurisdictions also modified their responses to non-serious violations, only using jail as a sanction for egregious conduct.

Recommended resources:

- Council of State Governments Justice Center, [Improving Responses to People with Mental Illnesses at the Pretrial Stage: Essential Elements](#).
- Advancing Pretrial Policy and Research, [Advancing Pretrial Justice](#).

Pretrial Practices

Observations

The second impact, conversely, is that in some jurisdictions, pretrial supervision has moved to a virtual platform. These supervision staff reported an improved ability to check on defendants and greater capacity to supervise a larger caseload. Being able to visit with a supervisee remotely allowed for more frequent contact in a less threatening setting and, therefore, fewer failures to report or comply.

Recommendations

Prosecution and Defense

Observations

- Prosecution.** While some sites reported little discernable change in the use of prosecutorial discretion, others noted significantly more and “better” plea offers, fewer requests for warrants, and less resistance to outright charge dismissals. In some cases, prosecutors were motivated to avoid trials, especially jury trials, because of the logistical difficulties in conducting them, and because of concerns about the effectiveness of a prosecution in a virtual setting. They also reported they worry about long delays before a trial can be held and are concerned that defendants may not be able to be found as timelines are stretched, so better to have a plea to something now than chance a failure to appear in the future.

One difference specific to the experience of people with behavioral health needs is that some participants noted more prosecutorial reluctance to agree to diversions to treatment. In part this was due to a lack of confidence in the availability of treatment resources, but some of the reticence also seems attributable to the worries about keeping track of defendants over longer periods of time, as described above.

- Defense.** Defense counsel practices were more significantly affected than those of prosecutors, largely because of the restricted access to their clients, both in jail and in the community. While most jurisdictions quickly moved to virtual consultations, defense counsel reported that the remote nature of the contact made them less able to pick up on cues that

Recommendations

Successful strategies:

- Diversion to treatment and the careful exercise of prosecutorial discretion reduced backlogs of cases and helped to engage defendants with treatment and reduce their jail commitments.
- Dedicating one prosecutor or a small team of prosecutors to behavioral health related cases increases specialization, familiarity with resources, and opportunities for appropriate diversions to treatment.

Recommended resources:

- Fair and Just Prosecution, [Improving Justice System Responses to Individuals with Mental Illness.](#)

Prosecution and Defense

Observations

would indicate the presence of behavioral health needs, and judges reported the same issue. This potentially led to fewer requests for further evaluation, and diminished referrals for behavioral health diversion programs.

Recommendations

Court Processes

Observations

- **Judicial Practices.** Most court systems quickly moved to video arraignments as courthouses closed to in-person appearances, but the migration of remote technologies to other hearing types was more disparate. Some jurisdictions still have not held any jury trials, for example, virtual or in-person, while others transitioned to virtual hearings of all sorts within months, if not weeks. The reported effect on people with behavioral health needs is mixed. Some observed that failures to appear are down overall, and that for some it is easier and less threatening or stressful, to appear virtually. Others posited that accessing virtual technologies is more often a hurdle for people with behavioral health disorders.
- **Problem-Solving Courts.** Drug courts, veterans courts, mental health courts, and the like were impacted by the pandemic very differently from jurisdiction to jurisdiction. Some of these programs have still not resumed operation at all, while others hardly missed a session. Some found ways to continue drug testing, supervision, and treatment remotely, and reported excellent results, good compliance with program requirements, and fewer missed contacts, while others have lost track of most participants and continue operating inconsistently and with few services available.
- **The difference in responses seems to have depended on two factors:** the enthusiasm of the judge and the team to find ways to persevere; and the availability of useable

Recommendations

Successful strategies:

- Some observed that remote video appearances seemed to be less threatening and anxiety inducing for some defendants with behavioral health needs. More data regarding which defendants, diagnoses, or conditions can benefit from interacting remotely could be useful.
- Judicial acknowledgement and understanding of the particularly harmful effects of incarceration for people with mental illness lessened their reliance on jail as a sanction or disposition.
- Problem-solving courts that found ways to continue to operate, often remotely, saw positive effects of that ongoing engagement. Virtual supervision strategies seemed to work well, and in some cases increased supervision capacity, frequency of contacts, and effectiveness.
- Programs that increased their attention on civil alternatives, such as AOT, were better able to find appropriate diversion opportunities.

Court Processes

Observations

remote technologies. When both were present, the programs continued. Even in those programs, however, the number of participants often dropped. As arrests dwindled, and as some prosecutors leaned more toward misdemeanor options when they were viable, there was less “leverage” and reduced incentive for defendants to agree to participate in lengthy and demanding problem-solving court programs.

- **Two of the sites noted** that a side effect of the pandemic seems to be an increased interest in Assisted Outpatient Treatment programs, either as an adjunct to existing problem-solving courts or as an alternative. This new interest in diversion to the civil courts and to outpatient treatment may be a result of the more evident incompatibility of the behavioral health needs of some defendants with jails and the criminal justice system, or it may be a natural movement toward where resources are available, but in either case it was characterized as a welcomed development.
- **Finally, one jurisdiction with a homeless court** described that court’s census as “exploding.” The combination of long-term homelessness, pandemic-related homelessness, and behavioral health disorders converged to create acute needs, and a problem-solving court approach to those needs has proved very popular.

Recommendations

- Courts that focused on acute pandemic related needs, such as homelessness, dramatically increased their census.
- Recommended resources:
- NCSC Pandemic Resource, Supporting Vulnerable Populations: Civil Interventions and Diversion for Those with Mental Illness.
- Council of State Governments Justice Center, Practical Considerations Related to Release and Sentencing for Defendants Who Have Behavioral Health Needs: A Judicial Guide.
- National Association of Drug Court Professionals, COVID-19 Resources.

Competence to Stand Trial

Observations

- **Referral and evaluation.** As quarantine requirements, infection outbreaks, and the resulting stall-out of both the criminal justice and mental health treatment systems became apparent, referrals for competency to stand trial evaluations diminished in most jurisdictions. Both counsel and judges could see that sending a person who potentially had a serious mental illness into that environment would likely do more harm than good. Several sites reported delays that were many months longer than usual to get an evaluation bed as state mental hospitals froze admissions and reduced capacity to address COVID concerns. The predictable result was that defendants referred for competency evaluations sat in jail for months – sometimes as much as a year – waiting just to be evaluated.

One site reported that largely because of these issues, competency referrals were made but commitments were essentially stayed, and no warrants were issued while defendants not in jail waited for an evaluation slot.

Virtual competency evaluation options emerged, and while some reported slightly less confidence in an evaluation that is not in-person, eventually this option became relied on and well received in several jurisdictions.

- **Restoration.** The same long delays exist in accessing a restoration slot, particularly an inpatient bed. In some jurisdictions this led to a renewed interest in finding and using outpatient restoration options. Some sites suggested that local, community-based outpatient restoration was becoming more and more popular with all stakeholders and predicted that its use would likely continue after the pandemic.

Recommendations

Successful strategies:

- Reserving competency evaluation referrals and restoration processes for serious cases saves evaluation and restoration resources, reduces bottlenecks at inpatient treatment facilities, reduces jail bed use, and saves defendants the deleterious effects of custodial commitments. Ideally, they were also more quickly connected to community treatment services.
- Defendants and competency systems both benefitted from focused efforts to use outpatient evaluation and restoration settings.
- Telehealth options for evaluation proved quicker, cheaper, and allowed for more access to services in rural communities.
- One jurisdiction reallocated a case manager to misdemeanants referred for competency evaluations, and instead paired those misdemeanants with behavioral health treatment options and other community supports.

Recommended resources:

- National Center for State Courts, [Competence to Stand Trial](#).
- Council of State Governments Justice Center, [Just and Well: Rethinking How States Approach Competency to Stand Trial](#).

Reentry

Observations

- **Reentry from Jail and Community Supervision.** Several sites reported that because the community treatment system has less capacity than before, and in some cases has less of a continuum of services, transition planning has been more difficult and less effective. Remote case management can be difficult, and connections to behavioral health services harder to monitor.

On the other hand, sites noted with surprise the effectiveness and efficiency of remote supervision technologies. Electronic monitoring is being more widely applied, and the broad availability of remote video technologies has been particularly helpful. As noted earlier, most jurisdictions reported fewer failures to appear or report when using these virtual appearances.

Recommendations

Successful strategies:

- Implement remote supervision technologies, which allow for a more effective and efficient use of resources, as well as fewer failures to report.

Recommended resources:

- National Association of Drug Court Professionals, [Using Mobile Technology to Enhance Outcomes in Community Corrections](#).
- American Probation and Parole Association, [Leveraging the Power of Smartphone Applications to Enhance Community Supervision](#).

Other successful strategies and positive observations:

- Some jurisdictions noted that the nature of the crisis and the reduced access to resources prompted a renewed and heightened interest in data, and in research and best practices among all team members.
- Another jurisdiction reported that the crisis required partners to communicate better and more frequently, and that stronger partnerships resulted. Another noted that the team was "closer" now, and better functioning.
- Another jurisdiction, responding to data regarding the changing composition of the jail census, increased the behavioral health and related staffing in the jail, a staffing model that they hope will continue after the pandemic abates.

Conclusion

The experience of every jurisdiction and community is different, but in-depth conversations with these four Stepping Up sites revealed several common themes and a number of successful strategies: Focus on early diversion to crisis care and treatment; look for treatment alternatives to incarceration; screen for behavioral health needs in jails; deploy telehealth resources for screening, assessment, treatment, and supervision; invest in case management resources to move people with behavioral health needs out of jail and into the community; collect and use data; and recommit to collaboration across agencies. All of these strategies are useful during a pandemic, but they are also best practices that should be institutionalized after the pandemic is over.

The recommended resources are just a start, more can be found on the National Center for State Courts [Behavioral Health Resource Hub](#).