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# ***A GUIDE TO MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM***

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***A SYSTEMS GUIDE FOR FAMILIES AND CONSUMERS***

**National Alliance on Mental Illness  
Department of Policy and Legal Affairs**

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## ***FOREWORD***

Tragically, jails and prisons are emerging as the "psychiatric hospitals" of the 1990s. A sample of 1400 NAMI families surveyed in 1991 revealed that 40 percent of family members with severe mental illness had been arrested one or more times. Other national studies reveal that approximately 8 percent of all jail and prison inmates suffer from severe mental illnesses such as schizophrenia or bipolar disorders. These statistics are a direct reflection of the failure of public mental health systems to provide appropriate care and treatment to individuals with severe mental illnesses.

These horrifying statistics point directly to the need of NAMI families and consumers to develop greater familiarity with the workings of their local criminal justice systems. Key personnel in these systems, such as police officers, prosecutors, public defenders and jail employees may have limited knowledge about severe mental illness and the needs of those who suffer from these illnesses. Moreover, the procedures, terminology and practices which characterize the criminal justice system are likely to be bewildering for consumers and family members alike.

This guide is intended to serve as an aid for those people thrust into interaction with local criminal justice systems. Since criminal procedures are complicated and often differ from state to state, readers are urged to consult the laws and procedures of their states and localities.

Obviously, this guide is not a substitute for a lawyer. However, the information contained here will hopefully be useful for consumers, family members and advocates in developing a basic understanding of criminal procedures and terminology. Additionally, the guide includes helpful hints to enable families and others to impact at the various stages of criminal processes.

NAMI would particularly like to thank Robert J. Kaplan, Esq. for his work in drafting this guide and to the NAMI Forensic Network and the National Coalition for the Mentally Ill in the Criminal Justice System, for their important assistance. Comments and questions about this publication should be directed to:

**NAMI Office of Legal Affairs  
2107 Wilson Blvd, Suite 300  
Arlington, VA. 22201**

I sincerely hope that this guide proves to be a useful tool for NAMI members and others seeking to improve the treatment for persons with severe mental illness in criminal justice systems.

***Ron Honberg – Director of Legal Affairs, NAMI***

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## ***INTRODUCTION***

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This *Guide to Mental Illness and the Criminal Justice System* is intended to be useful when persons with mental illness – or their families – are confronted with the criminal justice system. These will invariably be challenging and emotionally charged moments. We hope the guide will assist by raising issues that should be considered in a criminal case involving mental illness and will offer comfort by detailing the likely progress of a criminal case.

Unavoidably, the guide contains more detail than many readers will need and, simultaneously, insufficient detail for others. In the spirit of both simplicity and inclusiveness, the guide attempts to broadly address all the major issues that will confront a person with mental illness – and that person's family – if he or she becomes involved with the criminal justice system. Readers who find the guide excessively technical or detailed should concentrate on the summaries at the beginning of each section; they provide an overview of each section's important points. Readers who require more detail or specific information about the laws of a particular state can use the guide as a road map to identify issues that need exploration or clarification.

The unfortunate reality is that many persons with mental illness come into contact with the criminal justice system. Interaction with the criminal justice system can be difficult even for people without mental illness; therefore, the pressure and intimidation of criminal process is often overwhelming for persons with mental illness and for their families.

Although four of the five most common offenses for which persons with mental illness are charged are not violent crimes, persons with mental illness are over-represented in jails and prisons. Among the general population in the United States, only 2.8 percent of adults have a serious mental illness. However, among the population in U.S. jails, 7.2 percent have a serious mental illness<sup>1</sup>; and among state prison populations in the U.S., between 6 percent and 8 percent have a mental illness<sup>2</sup>. Furthermore, these statistics do not begin to account for the persons with mental illness who come into contact with the criminal justice system, but do not end up in jail or prison.

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1 **Criminalizing the Seriously Mentally Ill: The Abuse of Jails as Mental Hospitals**, Torrey, et. al., Public Citizen's Health Research Group and the National Alliance for the Mentally Ill, p. 14 (1992).

2 **Mental Illness in America's Prisons**, National Coalition for the Mentally Ill in the Criminal Justice System, p. 10 (1993).

There are three distinct scenarios most often encountered by persons with mental illness and their families. The first scenario is that of the mentally ill family member arrested or incarcerated on **misdemeanor** criminal charges having nothing to do with his or her family. The second scenario occurs when a mentally ill family member is arrested or incarcerated on **felony** criminal charges having nothing to do with his or her family. In both of these cases, the objective of the family is to get the mentally ill family member released from custody, acquitted at trial, and access to appropriate treatment. The third common scenario occurs when a family is forced to call the police to intervene because of threatening or destructive actions of a mentally ill family member. In that case, the likely objective of the family is to protect its members while attempting to get the mentally ill family member appropriate treatment. These scenarios will be addressed somewhat independently in this guide because they involve dramatically different considerations.

## *A WORD ON CRIMINAL LAW*

### *Summary:*

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- Criminal law varies substantially by state.**
- Criminal cases are dramatically affected by legal procedure.**

More so than in other areas of the law, in criminal law the outcome of a case is dependent on the facts of the case and on legal procedure rather than on actual substantive law. For the person unfamiliar with the criminal justice system, it is the procedure that governs the steps in a criminal case that will most directly affect that person from the time of arrest to the end of his or her case. Therefore it is essential that this guide cover criminal procedure as well as a few substantive areas of criminal law. Be aware, however, that criminal law is almost uniformly a matter of state law, and it can vary considerably from state to state. Consequently, generalizations reflected in the guide may not accurately represent criminal procedure – and even substantive criminal law – as it exists in any particular state. Furthermore, cases in the federal judicial system are governed by federal criminal procedure, which – although similar to criminal law as it is practiced in the states – has its own set of rules. Therefore, *it is essential to have a good criminal lawyer to direct you through any encounter with the criminal justice system.*



## ***FINDING A LAWYER***

### ***Summary:***

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- A person charged with certain crimes has an automatic right to a lawyer.**
- If you cannot afford a private lawyer you can still locate a lawyer paid by the state or volunteer legal services through:**
  - ♦.Public defender services**
  - ♦.Court appointed attorneys**
  - ♦.Local criminal defense lawyer associations**
  - ♦.Local bar associations.**

Competent criminal lawyers are almost always available, even if your budget is limited. The first place to seek a lawyer if you can't afford to pay a full fee for a private lawyer is through public defender services. The United States Constitution guarantees legal representation to every defendant in a felony criminal case. Therefore, if a defendant to a felony charge cannot afford a lawyer, the state must provide him or her with one. Public-defender organizations are state or local agencies that function as public law firms paid by the state to represent criminal defendants who cannot afford to hire private lawyers for their defense. However, a person charged with a misdemeanor crime, especially one that does not carry a jail sentence, may not be entitled to a state-provided attorney. Also, a defendant in a criminal case can waive the right to be represented by a state-provided lawyer and defend him- or herself.

The other consideration with representation by a public defender is that public-defender attorneys often face tremendous case loads and are not capable of giving personal attention to every case. This certainly does not mean that public defenders are not good lawyers or do not care about their clients. Rather, **the trick is to get the attention and compassion of your public defender. Family members of persons with mental illness can sometimes overcome the public defender's time constraints by being insistent, but remaining *polite and concerned*.** Cases involving mental illness can be appealing to public defenders because they stand out from the usual cases that he or she handles, and they have a particularly compelling human interest.

Nonetheless, in every geographical area, free legal representation is available to just about anyone who can't afford his or her own attorney. In areas that do not provide a

public-defender service, the state will appoint and pay for a private attorney for any criminal defendant who meets the qualifications for a state-provided legal defense.

This is essentially the equivalent of a public defender service, except that you get a private attorney paid by the state rather than a public defender.

In densely populated areas, there is usually an available listing of attorneys who will take cases for needy clients on a pro bono basis. (A pro bono case is a case that a lawyer takes without charging a fee.) Many lawyers – including highly regarded ones – take a few pro bono cases each year. Some lawyers will also take cases on a reduced-fee basis if the defendant's story is compelling enough. State and local bar associations are often good sources for lists of pro bono attorneys. The National Association of Criminal Defense Lawyers as well as local associations of criminal defense lawyers publish lists of member attorneys, some of whom take pro bono and reduced-fee cases.

## ***CONSTITUTIONAL RIGHTS***

### ***Summary:***

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- The United States Constitution guarantees minimum rights for every person in the United States. These rights are listed below as they relate to criminal cases.**

Every person accused of a crime has certain "constitutional" rights guaranteed by the United States Constitution. These are minimum rights that must be honored in every criminal court in every state. Through their own constitutions, statutes, and case law, states may establish other rights for persons accused of a crime, but these rights must be in addition to, or greater than, the rights guaranteed by the United States Constitution. The rights guaranteed by the United States Constitution are as follows:

### ***1. Fourth Amendment right against unreasonable searches and seizures***

This right prohibits the police from searching your person or your home or seizing your property or person (an arrest) unreasonably. In most cases a search or seizure needs a warrant to be reasonable, but in a few other cases reasonableness may not require a warrant.

### ***2. Fourth Amendment exclusionary rule***

This rule prohibits the prosecution from placing into evidence at a criminal trial

any evidence that was obtained as a product of an unreasonable search or seizure.

### ***3. Fifth Amendment right against self-incrimination***

This is the well-known right to remain silent. This rule prohibits the police from forcing anyone to give evidence against him- or herself for use in the criminal prosecution of that person. This protection is the source of the Miranda warnings that police give to suspects before questioning. The Miranda warnings are explained in greater detail in the "Interrogation" section of this guide.

### ***4. Fifth Amendment protection against double jeopardy***

This means that a person cannot be tried twice for the same crime. Note, though, that double jeopardy generally only applies where there has been a guilty plea, conviction, or an acquittal. In a case where the jury could not reach a verdict (a hung jury), there is no double jeopardy, and the defendant can be re-tried before a new jury.

### ***5. Sixth Amendment right to a speedy trial***

Every defendant in a criminal case has a constitutional right to have the charges against him or her decided quickly so that he or she can move on with his or her life. If the trial is not held speedily enough, the remedy is to dismiss the charges with prejudice, which means that the defendant can never again be charged with that crime. Whether or not a trial was speedy enough will be decided by the court based on factors such as the length of the delay, the reason for the delay, and the prejudice to the defendant.

### ***6. Sixth Amendment right to a public trial***

Every defendant in a criminal case has the right to have his or her trial held in public, and the public has the right to view every criminal trial. The only exception to this right occurs when the judge determines that a public trial will prevent the defendant from having a fair trial.

### ***7. Sixth Amendment right to a jury trial***

Generally, anyone charged with a felony or a misdemeanor with a maximum possible punishment of six months or more will be entitled to a jury trial. However, the defendant in a criminal case is allowed to waive this right and have a trial before a judge. In some states, though, the prosecution may also have to agree to waive the jury trial.

**8. *Sixth Amendment right to confront witnesses***

This protection guarantees every criminal defendant that no witness can be offered against him or her at trial unless the defense has the opportunity to cross-examine that witness.

**9. *The Sixth Amendment right to compulsory process for obtaining witnesses***

A defendant in a criminal case has a constitutional right to call witnesses for his or her defense and to compel them to appear.

**10. *The Sixth Amendment right to assistance of counsel***

No person charged with a felony can be tried unless that person has had the opportunity to be represented by a lawyer. This means that if the defendant has been charged with a felony and the defendant cannot afford a lawyer, the state must provide the defendant with a lawyer paid by the state. The defendant can still waive his right to a lawyer and represent himself. The right to counsel does not arise, however, until the defendant has been formally charged with a crime.

**11. *The Eighth Amendment right against cruel and unusual punishment***

The prohibition against cruel and unusual punishment is designed to prevent punishments that are disproportionate to the crime committed. For example, a twenty-year prison sentence for disturbing the peace is disproportionate to the crime and violates the eighth amendment.

**12. *The Eighth Amendment right of prisoners to treatment***

The Eighth Amendment right of prisoners to treatment guarantees that prisoners in every jail and prison in the United States will receive appropriate treatment for any "serious medical need." This right will be discussed more explicitly in the "Right to Treatment" section of this guide.

***MISDEMEANOR VERSUS FELONY***

***Summary:***

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- Misdeemeanors are crimes that are punishable by incarceration of one year or less.**
- Felonies are crimes that are punishable by incarceration of more than one year.**

**• Misdemeanors and felonies are governed by slightly different procedures.**

Criminal violations come in two varieties, misdemeanors and felonies. There is no universal rule among the states to determine what constitutes a misdemeanor and what constitutes a felony. Nonetheless, a generalization can be made that crimes that are punishable by incarceration of one year or less are misdemeanors, and crimes that are punishable by incarceration of more than one year are felonies.

Beyond the maximum possible period of incarceration, whether or not a crime is a felony or a misdemeanor is significant with respect to criminal procedure and constitutional rights. Therefore, this guide will note distinctions between misdemeanors and felonies through each step in the process of a criminal case.

## ***SCENARIO ONE***

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This section will explore the likely path traveled by a mentally ill adult offender through the criminal justice system. It will start with a fictional account of an often encountered situation and follow the case as it progresses. The procedure that will govern this case depends on whether or not the defendant is charged with a misdemeanor or a felony. Therefore, examples will be given of misdemeanor and felony crimes and distinctions between misdemeanors and felonies will be noted in each section.

### **BACKGROUND**

Jeff Jones (JJ) is a 30-year-old male who was diagnosed with paranoid schizophrenia ten years ago at age 20. JJ has little insight into his illness and frequently stops taking his medication. Shortly after he goes off his medication, JJ usually becomes very ill and customarily needs to be hospitalized. Consequently, JJ is frequently in and out of state psychiatric hospitals, and – as a result – has not been successful in maintaining steady employment. JJ's principal delusion is that the telephone company is broadcasting messages into his head.

JJ has been arrested 11 times in the past ten years, but never for a charge more serious than disturbing the peace. On each of these occasions, the charges were dropped and

JJ was released.

JJ's parents are in their early sixties, and both still work full time. Together Mr. and Mrs. Jones make a comfortable living, but most of their savings have been drained by JJ's needs over the course of the past decade. Though JJ's parents love him very much, they have three other children who also have needs. The Jones are fatigued from the constant attention JJ requires.

### **• Misdemeanor Crime**

One day, JJ sees a telephone repairman emerge from the back of a telephone company van. JJ believes that the telephone repairman has just broadcast a satanic message into his head from that van, instructing him to commit suicide. JJ approaches the repairman and begins to shout and make threatening gestures. JJ then spits on the telephone repairman, who retreats into the van and calls the police. When the police arrive, JJ is circling the van and shouting unintelligibly.

### **• Felony Crime**

JJ is struck with a sudden belief that if he kills the telephone repairman, the suicidal messages will cease. JJ picks up a loose piece of concrete from the street and smashes the repairman over the head repeatedly until bystanders intervene and subdue him. The telephone repairman is seriously injured and may not completely recover. The police are called by a bystander.

*The following is the likely course of events and choices that will face JJ and his family as JJ's case progresses through the criminal courts.*

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### **POLICE INVOLVEMENT**

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The police will have several options when they arrive on the scene. First, in the case of the misdemeanor crime in which there was no physical injury, the police can warn JJ that he is disturbing the peace and not take further action. Whether or not the police let JJ go with a warning at this point will likely be decided by how well JJ is known to the police for incidents of this type and how threatening he seems to be toward the telephone repairman.

The second option of the police is to take JJ into custody and deliver him to mental health authorities for examination and possible civil commitment. In this instance, there is no actual arrest made, although JJ is effectively taken into custody. This

option will probably result in JJ being confined to a psychiatric facility – a local hospital or community mental health center – for 24 to 72 hours. After that confinement, JJ may well be released back into the community with no further legal obligation to receive treatment. The police will not exercise this option in the case of the felony crime described above.

The third option of the police is to issue JJ a citation to appear in court at a later date, but not make an actual arrest. This is a less likely option because, if the police were not going to remove JJ from the scene, they would probably let him go with a warning (though he may still be cited for disorderly conduct and released). Furthermore, in the felony case, the police will not let JJ go with a warning or a citation.

The last option for the police is to arrest JJ and transport him to the police station. In the misdemeanor case, JJ will likely be arrested because of the disturbing nature of his actions and to remove the threat to the telephone repairman. The police probably have adequate probable cause to arrest JJ as he was still engaged in threatening conduct and disturbing the peace when they arrived on the scene. In the case of the felony crime, JJ will almost certainly be arrested.

For the purposes of illustration, we will assume that JJ is arrested by the police.

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## ARREST

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### *Summary:*

- An arrest does not occur until the police take a person into custody for the purpose of charging that person with a crime.**
- Before a police officer can make a lawful arrest, he or she must believe that a crime was committed by the person to be arrested.**

An arrest occurs when a police officer takes a person *into custody* for the *purpose of charging that person with a crime*. A person who is picked up by the police for questioning is not under arrest unless the police take that person into custody – meaning that he or she is not free to leave – for the purpose of charging that person

with a crime. This is important in the context of mental illness because an arrest does not occur every time a person with mental illness is picked up or taken into custody by the police.

An arrest is only lawful when it is supported by "probable cause." This means that before a police officer can make an arrest he or she *must believe that 1) a crime has been committed* and *2) the person to be arrested committed that crime*. An arrest made when both of these requirements have not been met is unlawful. An unlawful arrest could result in dismissal of charges in an unusual case, although it is very unlikely to do so.

In the felony scenario, the bystanders who intervened will have informed the police of what has occurred and that JJ did it. This in itself is probably enough information to give the police probable cause to arrest JJ. JJ will then be arrested and taken to the police station house.

Frequent mention is made on television and in the media of an arrest warrant. An arrest warrant is merely a determination made by a magistrate judge that the police have probable cause to make an arrest before the arrest is actually made. A warrant is not required to make an arrest, and it will only be obtained prior to an arrest to avoid a later challenge to the arrest based on probable cause. As a practical matter, however, most arrests are made without a warrant. One notable exception is that a warrant is required to arrest a person in his or her home in a non-emergency.

It is worthwhile to note that in the case of a misdemeanor, an officer has probable cause to make an arrest only if the officer actually sees the crime being committed. It is also common practice in a misdemeanor case for a police officer to issue a citation to appear in court at a later date, rather than make an arrest.

As part of an arrest, the police will search JJ's person.

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## BOOKING

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### *Summary:*

- **Booking is the process of finger-printing and photographing a person who has been arrested.**
- **Family members should try not to discuss the arrestee's mental illness with the authorities without first speaking with a lawyer.**



**Booking** is another term that anyone who has watched television is familiar with. Booking is really nothing more than an administrative procedure to make a record of the arrest. This is the point where JJ will be finger-printed and photographed at the station house. He will then be placed into a holding cell at the police station where he was booked, and he may be allowed the well-known "one phone call" at this time.

JJ, or someone at the police station, will probably call JJ's parents to inform them that he has been arrested and booked. Mr. and Mrs. Jones should go to the police station as soon as possible.

In some instances, it may be important for the police to be notified quickly that they have a person with mental illness in custody. However, families should be cautioned that the disclosure that a person has a mental illness can make the police view the situation more seriously. Therefore, whenever possible, before family members make disclosures to the authorities concerning the psychiatric history of a mentally ill family member, they should discuss it with their attorney.

One concern with disclosing the family member's mental illness is that it may make the police view the situation more seriously than if the police think the family member was simply drunk or on drugs at the time of the incident.

If the family (or the person with mental illness) does not have its own attorney and may not get one until one is appointed by the court, the family will have to use their own judgment concerning what to disclose to the police. The family should bear in mind, however, that the police may not have the same view about mental illness that the family does and may in fact know very little about mental illness.

In the misdemeanor case, if JJ's parents feel confident that JJ will be released to their custody because he has a mental illness, then the Joneses should bring a recent psychiatric report with them to the police station. It should indicate JJ's need for immediate treatment and other pertinent information.

***In the felony case, the Joneses should absolutely **consult with an attorney** before they disclose JJ's psychiatric history to the police, particularly his beliefs concerning the telephone company.***

If it is determined strategically acceptable to disclose information about JJ's mental illness to the police, the Jones should attempt to convince the station chief to transfer JJ to a suitable mental health facility as soon as possible so that he can receive treatment as his case is processed. The procedure for a temporary transfer to a forensic facility varies dramatically by state and locality and may not be available in every area. Furthermore, **this type of transfer may require judicial involvement.** If it does, JJ will likely not be transferred anywhere until he has had at least his first

appearance.

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## INTERROGATION

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### *Summary:*

- Family members should try to prevent the police from questioning the mentally ill family member without a lawyer present.**
- Any person who is questioned by the police and is not free to end the questioning and leave the place where he or she is being questioned must be given a Miranda warning.**
- The police must immediately stop questioning anyone who asks for a lawyer.**

The police may or may not interrogate JJ about the specifics of the crime for which he was arrested, but it is safe to assume that they will. It is equally likely that the police will ask JJ questions relating to his psychiatric condition. In a rare case, the police may have JJ examined by a police psychiatrist, though initial screening may also be by a police official with no formal training.

The police can bring a person in for questioning without arresting him or her. Although the person is not under arrest, he or she may not be immediately free to break off the questioning and leave. If the person being questioned is not free to leave, he or she has certain automatic rights.

Before the police can question someone who is not free to leave – including a person who is under arrest – the police must read that person his/her Miranda rights: that he/she has the right to remain silent; that anything he/she says can be used against him/her in the court of law; that he/she has the right to speak with an attorney; that if he/she cannot afford an attorney, one will be provided for him/her.

Questions about whether or not the defendant has been properly notified of his rights most often arise when the defendant has given the police a confession during an interrogation without a lawyer present to represent him or her. The constitutional rule requires that, as soon as the person being questioned asks for his lawyer, the

police must cease questioning that person entirely.

The defendant can waive his or her right to have his or her attorney present as long as the waiver is "knowing and intelligent." The reason this is important with respect to those with mental illness is that *a confession given during a police interrogation is valid, even if the person questioned has a mental illness that prevented the confession from being of that person's free will. Therefore, it is critical to get an attorney for a criminal suspect or defendant with mental illness as soon as possible.* Without an attorney present, the police may extract a confession from the defendant without the defendant realizing what is happening. Even though evidence of the mental illness might be introduced at a later trial to discredit such a confession, it still may not fully remove the impact of that confession.

If JJ is given a psychiatric exam by a police psychiatrist but not warned of his Miranda rights before the exam, the statements made to the police psychiatrist by JJ cannot be used against him in a later trial. Likewise, any statements that the police extract from JJ before giving him his Miranda rights are also not admissible against him at a later trial.

As opposed to the misdemeanor scenario, the police in this felony case will probably question JJ about the crime to extract a confession from him. The police may also question JJ about his psychiatric history in an attempt to build evidence against a later insanity defense to the crime.

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## DECISION TO FILE CHARGES

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### *Summary:*

- The decision to file charges is often made by the police and the prosecutor's office together.**

After the arrestee has been booked, the police will make a decision about whether or not to file charges. Generally, this amounts to review of the arresting officer's report by a superior or by a member of the prosecutor's office. In many jurisdictions, both the police and the prosecutor's office will review the decision to file charges and what the charge will be.

An assessment will be made of the evidence collected, the importance of prosecuting

the case, and the **arrestee's prior criminal record**. The decision will be made before the arrestee makes his first appearance.

In this case, charges will be filed if the prosecution believes that it is in the best interest of JJ to proceed with the criminal case or if a criminal conviction will protect the public. Important considerations for the prosecutor will include the probability that JJ will become dangerous if allowed to remain free without treatment, the frequency with which JJ gets into trouble of this nature, and the quality of psychiatric care JJ will receive through the criminal justice system. As a cautionary note, family members should not presume benevolence by the prosecutor because some prosecutors are more interested in appearing tough on crime than assisting persons with mental illness.

After careful consideration and consultation with their attorney, JJ's parents may want to consider contacting the prosecutor directly to inform him or her of the nature of JJ's illness and its effect on his behavior. By making the prosecutor aware of the success of drug therapy in the treatment of serious mental illness, JJ's parents may effectively encourage the prosecutor to accept a **jail diversion alternative**. As in all cases, however, **JJ's parents should not contact the prosecutor without first discussing this strategy with their attorney.**

In the felony case, JJ will likely be charged with some form of aggravated assault. It is unlikely that he will be released at this point because of the seriousness of the crime.

In some cases, a felony charge may be reduced to a lesser felony charge or even to a misdemeanor charge. This is the point in the past when JJ was arrested, that he was released and the charges dropped. In the felony case, JJ will likely be charged with some form of aggravated assault, a felony. It is unlikely that he will be released at this point, as in the past, because of the seriousness of the crime.

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## **JAIL DIVERSION**

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### *Summary:*

- **Jail diversion** is a procedure in which a person with mental illness who has been charged with a crime **agrees to participate in voluntary treatment in exchange for the prosecutor's dropping the charges.**

Jail diversion is a program that provides an alternative disposition to criminal charges. It is used instead of pressing charges and going through all or part of the criminal process. Jail diversion can be an important opportunity for mentally ill persons who have contact with the criminal justice system; however, this program is not as widespread or as accessible as many people would like it to be.

Jail diversion most often occurs at one of two points during the process of a criminal case. The first point at which it can occur is when the police pick up a mentally ill person for a criminal violation, but transfer that person directly to the mental health system without ever making an arrest. The second point at which jail diversion usually occurs is after a person has been charged, **but before his or her case has gone to trial.**

Jail diversion must be distinguished from probation and a suspended sentence. Although they have different names, probation and a suspended sentence really refer to the same thing. For probation or a suspended sentence, a conviction is entered onto the defendant's criminal record, either by guilty plea or by verdict at trial. In a suspended sentence, the judge sets a sentence that includes jail time, but allows the defendant to avoid going to jail during the term of the sentence as long as the defendant stays out of trouble or meets some other requirement set by the court. The period of time in which the defendant must stay out of trouble is known as probation. If the defendant violates the terms of the agreement, he or she may be incarcerated for the full period of the underlying sentence, even though he or she has served a considerable portion of the sentence on probation.

Jail diversion allows the person who was arrested to avoid the remaining criminal process, including a criminal conviction. ***This is particularly important for persons with mental illness because it enables them to avoid a history of criminal convictions for violations that were really only an expression of their illness.*** Most importantly, of course, jail diversion enables persons with mental illness to receive treatment in an appropriate setting instead of spending time in jail.

Under the terms of a jail diversion, the prosecution will generally drop the charges against the arrestee on the condition that the arrestee perform some other activity. In the case of an offender with mental illness, the prosecution will likely drop the charges on the condition that the mentally ill offender **undergoes voluntary treatment.** If the mentally ill person fails to follow through with the voluntary treatment, the prosecutor's office can have the person re-arrested and re-file the charges.

In practice, jail diversion is most appealing to the prosecutor's office in the case of a non-violent misdemeanor or minor felony. **As the crime becomes more serious, the prosecution is probably going to be less willing to accept a jail diversion.** It is important to remember that prosecutor offices are under the same kinds of case loads

that public defender offices are, and therefore the prosecution may be eager to get rid of a case involving a non-serious, non-violent offense. Jail diversion can be a good deal for both sides in some cases.

In the misdemeanor scenario, JJ's case is an excellent candidate for jail diversion because he is a non-violent offender who clearly needs psychiatric treatment. Jail diversion will benefit JJ by assuring that he receives treatment, and it will benefit the public by guaranteeing that JJ will not be interacting with the public in an unmedicated, untreated state.

In a pro-active vein, families of persons with mental illness should familiarize themselves with jail diversion programs in their communities, before the need for that information arises. Furthermore, prosecutors and some defense lawyers may not be familiar with jail diversion, even though the program is in common use in their community. Therefore, the family of a person with mental illness should be prepared to present both the prosecutor and their defense lawyer with information concerning jail diversion in their community, including the names and phone numbers of the jail diversion program administrators.

In certain instances, the family of the person with mental illness may need to contact the jail diversion administrators directly in an attempt to initiate a jail diversion.

As a practical matter, jail diversion is reserved for non-violent misdemeanors and minor felonies. JJ will not qualify for jail diversion in the felony scenario because he has committed a felony that is both serious and violent.

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## FILING OF CHARGES

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### *Summary:*

- When charges are filed, the person charged officially becomes a defendant in a criminal case.**

The next step is to formally charge the arrestee. The usual procedure is for the prosecutor's office to file a complaint with the magistrate's court detailing the charges against the defendant. The filing of this document officially makes the arrestee a defendant in a criminal case. The magistrate will then review the charges to determine if there is sufficient legal basis to proceed.

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## FIRST APPEARANCE

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### *Summary:*

- **At the first appearance the magistrate judge will appoint an attorney if the defendant is entitled to one and cannot afford one, and he will set bail or a time for a bail hearing.**

The first appearance may be referred to as an "arraignment" in a few areas, but must be distinguished from an "arraignment on an indictment," which is the procedure commonly known as an *arraignment*. The first appearance can be very traumatic and confusing for individuals with mental illness, because it is their first formal appearance in Court.

A person who has been arrested must be presented before a magistrate without "unnecessary delay." Unnecessary delay can be anywhere from a few hours on a week day to two or more days on the weekend. The length of time between the arrest and the first appearance depends on how well the criminal court in a particular locality is staffed and the day and time of week.

At the first appearance, the magistrate makes certain that the police have arrested the right person. The magistrate will also inform JJ of his rights under the law, which usually includes a warning to the defendant to remain quiet until he or she has spoken with a lawyer. The first appearance is also usually the point at which an attorney is appointed for the defendant, if he/she cannot afford one. It is important to note that not all defendants to a misdemeanor charge are entitled to a court appointed attorney. In the misdemeanor case, JJ will be entitled to a state-provided attorney only if a conviction on the misdemeanor charge is likely to result in incarceration.

If JJ's case is in a city, a public defender may be present to represent JJ through the first appearance. The magistrate will also set bail at the first appearance. In the misdemeanor case, the magistrate may release JJ on his own recognizance or to the custody of his parents.

It is important to note again that not everyone is entitled to a court-appointed attorney. In the felony case, JJ will automatically be entitled to a state-provided attorney because he is charged with a felony.

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## BAIL

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*Summary:*

- **Bail is collateral that the court holds to guarantee that a person who is charged with a crime will appear for the trial.**
- **It is critical to have a lawyer present at the bail hearing.**
- **Bail is usually available through a bail bondsman.**

Simply put, **bail** is the mechanism through which a person charged with a crime is allowed to remain free while their case is pending.

If the magistrate at the preliminary hearing believes that the defendant is a flight risk – that the defendant may flee rather than face the charges against him or her – the magistrate can order the defendant to be held in jail until the end of his or her trial or until he or she pleads guilty. This is known as **pre-trial detention**, and usually the only purpose of pre-trial detention is to guarantee that the defendant will show up for trial. With respect to certain violent crimes, though, pre-trial detention may also serve the purpose of protecting the community.

The purpose of bail is to provide a substitute for pre-trial detention. In most cases, a person who has had a first appearance is entitled to be released from custody and to remain free until the conclusion of his or her trial or until he or she pleads guilty – upon the posting of proper bail. Bail is thus a compromise to allow a person to remain free pending trial, but to still guarantee that the person will show up for trial. In a few cases, however, bail will not be available, especially if the person was charged with certain violent crimes or if it is determined that no amount of bail will eliminate the risk of flight.

It is especially important to have a lawyer at the bail hearing. The prosecution will argue for considerable bail in a case involving violent crime, and **it is essential to have an effective advocate who can explain to the court the extenuating circumstance involved with mental illness and attempt to use the mental illness to justify a lower bail.** Of course, the decision whether or not to raise the issue of mental illness at the bail hearing should be made by the defendant's attorney, who will have insight into the judge's sensitivity to issues relating to mental illness.

In the felony case, the magistrate will determine whether or not JJ is a flight risk. The fact that JJ **does not have a steady job** and even the fact that he has a mental illness may work against him. Mr. and Mrs. Jones **can make a plea to the court to release JJ to their custody.**

As a practical matter, the seriousness of the crime is likely to influence the magistrate



to set a significant bail amount. Mr. and Mrs. Jones can then either put up property as collateral or get the bail through a bail bondsman.

In the misdemeanor case, bail might not be much of an issue. There is less risk of flight in misdemeanor cases because there is a much less severe penalty at stake for the defendant than in a felony case. This risk factor has lowers standards for bail in misdemeanors so that bail will be either release on the defendant's own recognizance (the defendant promises to show up for the trial) or a small amount of money. Therefore, JJ will probably be released on his own recognizance, or possibly to his parent's custody.

## COMPETENCY TO STAND TRIAL

### *Summary:*

- No person can be tried or sentenced for a crime if – because of a mental disease or defect – he cannot understand the nature of the proceedings against him or assist his lawyer in preparing his defense.
- A criminal defendant found not competent to stand trial is usually subject to civil commitment for an indefinite period.

The due process clause of the Constitution provides that no defendant can be tried or sentenced if – because of a mental disease or defect he cannot understand the nature of the proceedings against him or cannot assist his lawyer in preparing his defense. The defendant is entitled to have the question of his competence to stand trial itself tried before a jury. The judge at a criminal trial has a constitutional obligation to raise the issue of the defendant's competence to stand trial when the defendant exhibits behavior in the courtroom that tends to indicate that he is not competent.

Significantly, the issue of competence to stand trial focuses on the mental state of the defendant at the time of trial, not his mental state at the time of the acts leading to the criminal charge. This should be distinguished from the insanity defense (*discussed on page 23*) where the issue is the defendant's mental state at the time of the acts leading to the criminal charge.

A defendant who is found incompetent to stand trial will be committed to a mental health treatment facility until he has regained competence. He/she may be held in this status only for a reasonable period so it can be decided if the defendant will regain competence at some point in the foreseeable future. If the defendant does not regain competence during that period, he/she may be released and the charges may be

dropped. Conversely, he/she may be **civilly committed**. The purpose of treatment in the case of a person held pending competence to stand trial is **exclusively to treat that person until he or she reaches the point of competence so that the trial can proceed.**

Competency to stand trial may be a less important issue in misdemeanor cases than in felonies. This is true because, in a misdemeanor case, if the defendant is so ill that he or she cannot stand trial, he or she will likely have been placed into the mental health system at an earlier stage in the proceedings, whether through jail diversion or another mechanism.

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## PRELIMINARY HEARING

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### *Summary:*

- At the preliminary hearing in a felony case, the magistrate judge will determine whether or not there is enough evidence to continue the prosecution.**
- In a misdemeanor case there is no preliminary hearing, and the actual trial will occur at this point instead.**
- A preliminary hearing is usually not available in states that use the grand jury system.**

The next step in the process of a felony case is the preliminary hearing. In states where a grand jury indictment is routinely the next step, a preliminary hearing will probably not be available. In misdemeanor cases, the trial itself will take place at this point rather than the preliminary hearing.

The purpose of the preliminary hearing is for the magistrate to determine if there are sufficient grounds to support the charge. The standard used is whether or not there is probable cause to believe that the charges have merit. The magistrate can also reduce the charge if it is determined that the evidence offered can only support a lesser charge. If there is found to be probable cause, the case is bound over for trial. If probable cause to support the charges is not found, the case is dismissed.

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## GRAND JURY

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***Summary:***

- A grand jury is a group of citizens that decides whether or not there is enough evidence for a case to continue to trial.**
- A grand jury is used in those states that do not have a preliminary hearing.**

A grand jury is typically used in those states that do not provide for a preliminary hearing.

A grand jury is a group of private citizens who are assembled for a specific term to review all cases that the prosecution intends to bring. Like the magistrate in the preliminary hearing, the grand jury reviews the evidence of the prosecution to determine whether there is probable cause to support the charge.

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## **PLEA BARGAINING**

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***Summary:***

- Most criminal cases are disposed of through a plea bargain.**

Spirited plea bargaining can take place at any point in a criminal case, even before charges have been filed. This involves negotiations between the prosecution and defense to reach a disposition of the case agreeable to both sides. Most criminal cases that are brought are disposed of through a plea bargain rather than through a trial.

Whether or not a plea bargain can be arranged depends on the attitudes of the defendant and the prosecution. In a highly publicized case, the prosecution may be less willing to bargain than in a case that has had little attention in the press. For the mentally ill offender, a plea bargain can achieve the goals of avoiding incarceration and assuring treatment. A plea bargain may include specific elements, such as recommended sentence and place of confinement.

## FILING OF INDICTMENT AND ARRAIGNMENT ON THE INDICTMENT

### *Summary:*

- **The arraignment on the indictment is the point at which the defendant makes his plea of not guilty, guilty, or nolo contendere.**

If the prosecution's charges survive either the preliminary hearing or the grand jury, the next step is to file an indictment. The indictment is very much like the complaint that was originally filed against the defendant, but it may include modifications to the original charges.

The arraignment on the indictment is the point at which the defendant is informed of the charges against him and makes a plea of not guilty, nolo contendere (no contest), or guilty. If the defendant pleads not guilty, a trial date will be set.

A nolo contendere plea means that the defendant will not contest the charges brought against him, but he or she does not admit guilt. In the criminal context, this has the same effect as a guilty plea, and the case will be set for sentencing. The most likely reason that the defendant would plead nolo contendere rather than guilty is that there is also a **civil suit pending**. In JJ's case, if the telephone repairman was going to sue him in civil court for damages, a guilty plea would be admissible to prove JJ's liability. However, a plea of nolo contendere would keep open the issue of JJ's liability for the civil trial.

Like the nolo contendere plea, a guilty plea will cause the case to be set for sentencing.

## TRIAL/HEARING

### *Summary:*

- **The defendant in a felony case has the right to trial by a jury.**

- . **A misdemeanor case may be tried in front of a judge.**
- . **A verdict by the jury must be unanimous or the case can be tried again.**

A trial is an **adversarial process** during which the prosecution and the defense get to tell their side of the events leading to the criminal charges. A trial is a very technical exercise that involves extremely detailed rules about what can be said or shown. The rules are rigidly enforced.

A trial in a criminal case is usually before a jury of six to twelve persons from the local community. In a felony case, the defendant has an absolute right to a jury trial, but this right can be waived by the defendant and the case tried before a judge. In some areas, the prosecution must also agree to waive a jury trial; otherwise, there will be a jury trial whether or not the defendant wants it.

Trial strategy varies considerably with the defense that is offered. In JJ's case, the defense may well attempt to use the insanity defense. Whether or not the defendant testifies at the trial is generally decided by the defendant's lawyer in conjunction with the wishes of the defendant. The defendant is not required to testify at the trial, and a great number of defendants do not testify. An admission made by the defendant of his or her guilt may be admissible at the trial.

In most states, a verdict at a trial must be unanimous. If a verdict is reached, double jeopardy attaches, which means that the defendant can never again be tried on those same charges. If the jury cannot reach a unanimous verdict (hung jury), the case is dismissed, but the prosecution can re-try the case before a new jury.

Trials in misdemeanor cases tend to be much less sophisticated affairs than felony trials. First of all, there is **less pre-trial maneuvering in misdemeanor cases**. In fact, a misdemeanor trial takes place procedurally at the point at which the preliminary hearing takes place in felony cases.

Misdemeanors are generally tried before a magistrate judge rather than before a jury. The right to a jury trial does not arise in most cases unless the potential period of incarceration upon a conviction exceeds **six months**. The insanity defense, which is explored later in this guide, rarely becomes an issue in a misdemeanor case. The insanity defense generally is reserved for more serious crimes. **A person who would meet the insanity defense in a misdemeanor charge likely would not have made it to trial without being referred into the mental health system.**

However, if an insanity defense was successfully used in a misdemeanor case, the period of confinement could potentially be substantially longer than the maximum period of confinement for the misdemeanor.

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## INSANITY DEFENSE

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### *Summary:*

- **The insanity defense states that, although the defendant did in fact commit the *acts* which lead to being charged, he or she is not guilty of a *crime* because he or she was insane.**
- **The insanity defense is generally used only in cases involving serious and violent felonies.**
- **In some states, a verdict of "guilty but mentally ill" is allowed, under which the defendant is found to be criminally responsible even though insane.**

The insanity defense is an **affirmative defense** to most criminal charges in the states where it is available. *Insanity* as it is used in the insanity defense is a **legal term**, and it **does not have a direct medical or psychiatric translation**. The actual insanity defense essentially means that, although the defendant did in fact commit the acts which lead to him or her being charged with a crime, he or she is not guilty of a crime because he or she was insane. This is so because in our criminal justice system, the legal determination of guilt in **almost all crimes requires the defendant to have possessed a certain mental state while committing the charged acts**.

The traditional insanity defense is a defense to a criminal charge if the defendant can show that at the time of the act he or she ***lacked the ability to know the wrongfulness of his or her actions, or the nature and quality of his or her actions, and that this lack of knowledge was caused by a defect of reason.*** A more modern approach to the insanity defense is that the defendant ***lacked sufficient capacity to appreciate the criminality of his or her acts, or to conform his or her actions to the requirements of law because of a mental disease or defect.***

Each state has adopted its own version of the insanity defense, which may involve different elements or considerations. Three states have eliminated the insanity defense altogether. In most cases, the insanity defense is used only against serious and violent felonies.

All defendants are presumed by law to be sane, and the insanity defense must be raised by the defense. In some states, once the insanity defense is raised, the prosecution must prove that the defendant was sane at the time of the criminal acts. In other states, the burden is on the defense to show that the defendant was insane at the time of the acts. Where a defendant has raised the insanity defense, the state is required to provide the defense with a psychiatrist to assess the defendant. The defendant can, of course, opt to use his own psychiatrist, but for an indigent defendant this may be cost-prohibitive. As a practical matter, however, there may be an inherent conflict for state-provided psychiatrists. While some state-provided psychiatrists may be concerned professionals who will always give their best and most balanced opinion, there may be pressure on some to render an opinion acceptable to the state to assure themselves future assignments.

If the defendant is found not guilty by reason of insanity, in almost all states he or she will be committed to a forensic facility until he or she has regained his or her sanity or is no longer dangerous, whichever occurs sooner. The commitment to the forensic facility is indefinite in most states, and the maximum length of a commitment following an insanity verdict can even exceed the maximum time of incarceration for a conviction of the crime with which the defendant was charged.

Another possible outcome of a criminal case is "guilty but mentally ill," which has been adopted in a number of states as an alternative to the traditional verdicts of guilty or not guilty. Unlike the insanity defense, defendants found guilty but mentally ill are held criminally responsible for their actions. Moreover, the same punishments can be applied to those found guilty but mentally ill as to those with a traditional guilty verdict. Since a verdict of guilty but mentally ill reflects recognition of mental illness, individuals convicted on that basis will usually have access to treatment for their mental illness during the period of their incarceration. Such treatment is likely to occur within the general prison setting instead of in a specialized forensic treatment environment. A plea of guilty but mentally ill is not necessarily better than a plea of guilty because the guilty-but-mentally-ill plea may make it harder to get parole in the future.

Legislation authorizing guilty-but-mentally-ill verdicts has been primarily motivated by political backlash against the insanity defense and fears that those people found not guilty by reason of insanity will be prematurely released into the community. Consequently, the enactment of such legislation is usually motivated by concerns about public safety rather than humane attitudes toward offenders with mental illness.

The ultimate decision whether or not to use the insanity defense is a decision that requires careful evaluation and usually must be made by an attorney. This decision frequently is based as much as on the attitude of the court and the community to

mental illness as on the facts of a particular case.

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## SENTENCING

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### *Summary:*

- The sentence is set by a judge, but the actual time of incarceration may ultimately be determined by the parole board.**
- In felony cases, the sentence is set at a special hearing. The sentence in misdemeanor cases is often set at the conclusion of the trial.**
- Families and local AMI's may be able to provide information which can be used at the sentencing hearing.**

Sentencing will follow either a guilty plea or a verdict of guilty at trial. In most states, the sentencing is done by a judge who will generally have the option of imposing probation or imprisonment. If probation is imposed, the terms and conditions of the probation will be set by the judge.

If imprisonment is imposed, the judge will set a maximum and minimum range of the sentence. The defendant will then be turned over to the parole board, which will determine the actual time when the defendant will be released on parole.

In some states, the judge's discretion to set sentences has been severely limited by statute, and the judge may be required to set a specific sentence for a particular crime. Where the judge does have discretion over the sentence, the sentence assigned will be influenced by the pre-sentence report compiled by a probation officer. At the sentencing hearing, the prosecution and the defense may also provide information that they feel is relevant to the determination of the sentence, including information from families or local AMIs.

The judge will probably set a sentence at the same hearing as the trial in a misdemeanor case. This means that there is no pre-sentence report compiled as there is in a felony case. Therefore, if the family of the mentally ill offender wants to make



a statement concerning the disposition that would best benefit their family member, it will have to be made immediately after the judge makes his ruling. The family should speak with its lawyer before a verdict is reached so that the lawyer can be prepared to ask the judge to hear from the offender's family concerning sentencing.

In the misdemeanor case, incarceration is not a likely outcome. It is more realistic that JJ will receive a suspended sentence with a period of probation. If probation is imposed, the terms and conditions of the probation will be set by the judge. In the case of an offender with mental illness such as JJ, the probation may be that the offender is required to receive psychiatric medical treatment. If the terms of the probation are not met, the defendant can be incarcerated for the full period of the original sentence.

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## **PRE-SENTENCE REPORT**

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### ***Summary:***

- The pre-sentence report is the report on which the judge bases much of his sentencing decision.**
- The family members should contact the probation officer preparing the pre-sentence report to provide information about mental illness and treatment requirements.**

The pre-sentence report is a report prepared by a probation officer and submitted to the sentencing judge. It gives all the details of the defendant's crime and life history that are relevant to sentencing. Factors such as criminal record, family life, and employment history will be given great weight in the pre-sentence report.

The pre-sentence report is an area in which the family of a person with mental illness should definitely be involved – with the approval of their attorney. If the attorney feels that the family member's mental illness may have a positive impact on the sentencing, the family should seek out the probation officer preparing the report and explain the nature of the mental illness and treatment needs. The existence of mental illness can influence the sentencing through the pre-sentence report, even in cases where an insanity defense was rejected by the jury.

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## APPEAL

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### *Summary:*

- An appeal is a review of a decision made by the trial judge that is challenged by one of the parties to the trial.**
- An appeal is limited to issues of judicial error.**

An *appeal* is the review of a trial court judge's decisions by a higher court. The defendant's right to appeal a conviction is automatic in most states. The only issue that is open to appeal is whether or not the judge made a legal error during the trial. A conviction will only be overturned where there was substantial legal error.

A conviction may be reversed and a new trial ordered in some cases. In other cases, errors by the trial court judge may be deemed to have been harmless, and the conviction will be upheld even though there was some error by the trial court judge.

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## PRISONERS' RIGHT TO MEDICAL TREATMENT

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### *Summary:*

- Every person in jail or prison with a "serious medical need" has a right to appropriate medical care, including persons with serious mental illness.**

All persons incarcerated in jails and prisons in the United States have a right to appropriate medical care. This right is guaranteed by the due process clause and the Eighth Amendment of the U.S. Constitution and has been determined to apply to the treatment of people with serious mental illness. However, this right arises only when a "serious medical need" for treatment exists.

Accordingly, it is very important for the families of incarcerated persons with mental illness to demonstrate that the incarcerated mentally ill family member has a "serious medical need" so that the jail or prison will be obligated to treat the mental illness.

Unfortunately, this is a greater challenge than it should be. Courts have generally relied on the judgment of treating professionals when making the determination that a prisoner has a serious medical need. There are several problems inherent in this procedure, particularly because inmate behavior is an important part of the discovery and diagnoses of mental illness. The jail or prison setting is often not conducive to accurate observations and diagnosis of persons with mental illness. This is especially true in smaller facilities, which may not have psychiatrists or other professionals on staff trained to diagnose mental illness and to make judgments about serious medical need. And some inmates with serious mental illness may not act in a disruptive manner, but may instead withdraw and "suffer silently." In the often chaotic setting of jails and prisons, the need for treatment can go undetected for years, even though an inmate does have a serious medical need. Furthermore, a constitutional violation occurs only when jail or prison officials act with "deliberate indifference" toward a known health risk to an inmate.

The right to treatment possessed by prisoners is not without serious limitations. This right only guarantees enough treatment to alleviate acute symptoms of mental illness. Therefore, this right may not extend to the treatment necessary to prevent recurrent deterioration. Also, it may not extend to rehabilitative services during incarceration, or to preparations for the inmate's transition back into the community. However, an effective argument to the prison administrators can be that ongoing treatment of severe mental illness is essential to prevent exacerbation of symptoms and to serve the best long-term interests of both the prisoner with serious mental illness and the correctional facility itself.

As a practical matter, it is critically important for family members to inform correctional officials as soon as possible about their family member's history of mental illness and his or her specific treatment requirements. In particular, jail and prison officials should be immediately informed of any suicidal behavior of the person incarcerated or any reason to believe that the person may be suicidal. At the pre-trial stage, these efforts should focus on communicating information to the sheriff or jail administrator, but only with the assent of the public defender or attorney providing legal representation. After conviction and sentencing, family members of the inmate with mental illness should communicate with the prison warden and the chief medical officer at the jail or prison. Treating psychiatrists or other mental health providers who were involved in the inmate's treatment in the community prior to incarceration can be very helpful in communicating this vital information. And, as stated earlier in this guide, it is very important to communicate information about mental illness and the need for treatment to the parole officer responsible for pre-sentencing reports as well as to the sentencing judge, but only on the advice of the defendant's attorney.

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## WRIT OF HABEAS CORPUS

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### *Summary:*

- **A writ of habeas corpus is an attack on a conviction after all appeals have been exhausted, and it is limited to issues of Constitutional violations.**

A writ of habeas corpus is an attack that can be made on a conviction even after all appeals have been exhausted. This is a procedure to review the continued detention of a prisoner and is limited to challenges to the conviction based on Constitutional grounds.

## SCENARIO TWO

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### BACKGROUND

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In this scenario, we have the same personalities as in the preceding examples, except for the following: JJ believes that his parents are trying to kill him. In particular, he believes that his mother poisons his food, but has not yet been successful in her attempts to kill him. One day JJ eats some food that his mother has made. It does not taste quite right to him. JJ believes the food has been poisoned by his mother. He beats his mother severely and then proceeds to tear apart the family home. JJ's father returns home as JJ is destroying the house.

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### POLICE INVOLVEMENT

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### *Summary:*

- **Always remain calm when dealing with the police, and above all speak clearly and slowly to avoid damaging errors in communication.**
- **Do not sign any statement unless the you are certain that you want to have your mentally ill family member arrested.**

JJ's parents are now in the unfortunate position of being victims on one hand and responsible for JJ's well-being on the other. At this point, calling in the police is probably the best alternative for JJ's parents. To avoid potential embarrassment, JJ's parents can request that police do not use sirens or flashing lights as they approach the house. This might help prevent drawing a crowd in a quiet neighborhood.

In dealing with the police, the most effective thing that JJ's parents can do is to remain calm. It is very important for them to speak slowly and clearly and to explain that there is a family member with a serious mental illness who is acting violently, but that the violence is only an expression of that person's illness. JJ's parents should be prepared to give the police a statement about what has occurred. This statement should not be signed, however, unless JJ's parents have discretion over whether or not JJ will be arrested. The police will probably need a sworn statement before they will make an arrest, so it is important for JJ's parents to determine if they want JJ arrested before they sign anything.

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## **ARREST, ALTERNATIVES AND PROCEDURE**

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### ***Summary:***

- The family should try to have the police transport the mentally ill family member to an emergency treatment facility instead of arresting him or her.**

JJ's parents may, unfortunately, need to have the police arrest JJ to protect themselves from further physical harm. Although this is clearly a drastic measure, JJ's parents and the police have some potential latitude to work together and make the best of this situation. Initially, JJ's parents can request that the police not arrest JJ, but transport him to emergency detention at a mental health facility under the state's civil commitment laws.

There are several reasons why this might not be a workable solution. First, in most states emergency evaluation is for 24 hours to 72 hours, after which the person is unconditionally released. Second, in rural areas, there may not be an appropriate facility close enough for the police to provide transportation.

The only way that emergency treatment can be extended is by obtaining a civil commitment. A civil commitment is not always accessible (even for persons who

meet the criteria for civil commitment) and treatment for persons under a commitment order is not always immediately available. Depending on the locality in which JJ's parents live, an emergency treatment may do nothing more than confine JJ for two days. After those two days, JJ would be released without even having had time to stabilize on medication.

Alternatively, JJ's parents can agree to press charges for JJ's destructive behavior. JJ will then be handcuffed by the police and taken to the police station. JJ's case should then follow the same procedures listed previously; however, this case is somewhat different than the previous examples because JJ's parents are both his parents and the victims of his crime. This puts them in a position between the defense and the prosecution, a position that they may be able to use to make the most of the situation.

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### **BETWEEN THE DEFENSE AND THE PROSECUTION**

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In all likelihood, the prosecutor will not proceed with the case against JJ unless his parents support the prosecution and JJ and/or the public will somehow benefit. This gives JJ's parents a little leverage over the prosecutor because he or she will need their testimony to go forward with the case. Of course, if the prosecutor doesn't want to prosecute the case for policy reasons or reasons having to do with the strength of the case, the case will be dismissed and JJ will be released without treatment.

JJ's parents may be successful at this point if they suggest that the prosecutor pursue a jail diversion program, as discussed earlier. If jail diversion is not an available alternative, JJ's parents can work with the prosecutor to recommend a sentence to the judge that will get JJ into a mental health facility for treatment, at least for a short while.

It must be noted that JJ's parents should not contact the police in the belief that the result will automatically be treatment for JJ. In some states, the state may proceed with a prosecution of domestic violence against JJ, even if JJ's parents wish to have the charges dropped. In that case, the state will likely subpoena JJ's parents and force them to testify against JJ under penalty of perjury. The ultimate effect could be that JJ acquires a criminal record and is sent to jail.

## ***CONCLUSION***

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It is the unfortunate truth that any confrontation with the criminal justice system will be emotionally charged, frightening and confusing. For the person who has not been previously exposed to the system, this is doubly so. Therefore, in conclusion, we would like to offer your readers some general advice.

### ***1. Stay Calm and in Control***

Always try to keep a clear head, and stay as calm as you possibly can. This may seem impossible in the face of flashing lights, screaming people, shouting police officers and gawking neighbors. However, the more that you are able to remain calm and speak clearly, the more control you will have over the situation. No matter how angry or upset you become, never shout or scream. If you become hysterical, the police and others in the system will simply ignore you, and then you will be without any control over the situation. This is not to say that you should not be angered by the manner in which persons with mental illness are treated by the system. Rather, we are suggesting that there are better ways to channel your anger.

### ***2. Get Public Exposure for Your Situation***

The more public exposure your situation gets, the more likely it is that a miscarriage of justice will be corrected. Many people don't ever make an attempt to publicly expose abuses in the system because they don't believe that anything they do will make a difference. People feel powerless. The truth is we have seen many situations where one indignant individual, without money or powerful friends, was able to make a difference simply by getting public exposure of abuses in the system.

Letter writing is one of the most effective and most under-used tools to right the wrongs you have confronted. If you, or a family member with mental illness, is abused by the system, write letters and file complaints. Write to the police who were involved, to the superiors of those police officers, to the police commissioner, to any judge involved in the proceedings, to your local elected representatives, state representatives, to newspapers, editors, local television assignment desks, congressmen, and senators.

### **3. *Insist on Answers***

As a newcomer to the criminal justice system, as a seasoned veteran, you will be inundated with terms or information that may not make any sense to you. Police will speak to you in cryptic numbers and abbreviations with seemingly ominous overtones. Lawyers, including your own, will gloss over Latin terms and unfamiliar procedures without adequate explanation. Judges may ask you to agree to something, and are not always going to explain what your agreement means.

You must always insist on an explanation of everything that you do not understand. Many people are reluctant to ask a lot of questions for fear of appearing ignorant or stupid. However, the smartest thing you can do is to overcome that fear and insist on an explanation of anything that you don't understand. An important aspect of criminal justice is that it is often difficult for the lay person to recognize which aspects of the process are the most important. Therefore, you must get answers to every question, even if you annoy every single person that you question. In the end, you are the person who will suffer if you fail to understand what is going on. So, get explanations, insist on it.

### **4. *Get Help***

A final note – please remember this guide is not intended as a substitute for legal advice. Never, ever, try to go through the criminal justice system without a lawyer.



## **GLOSSARY**

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<b>Arraignment</b>	A hearing at which the defendant in a criminal case is officially presented with the charges against him or her. It is when he or she makes a plea of not guilty, guilty, or nolo contendere.
<b>Arrest</b>	Occurs when a police officer takes a person into custody for the purpose of charging that person with a crime. An arrest requires probable cause.
<b>Burden of Proof</b>	The cumulative amount of proof that the prosecution must put forward to prove its case. In a criminal case, the prosecution has the sole burden and must prove guilt "beyond a reasonable doubt." The defense in a criminal case has no burden of proof and wins automatically if the prosecution fails to prove guilt beyond a reasonable doubt.
<b>Court-appointed Attorney</b>	A court-appointed attorney is a private attorney appointed by the court to represent a criminal defendant who cannot afford to provide for his or her own defense. A court-appointed attorney is different than a public defender because a court-appointed attorney does not work directly for the federal, state, or local government.
<b>Double Jeopardy</b>	Refers to the fact that a person cannot be tried twice for the same crime. However, double jeopardy only attaches when there has been a conviction or an acquittal for a crime. Double jeopardy also does not protect against separate trials and convictions by the state and federal governments for the same crime.
<b>Felony</b>	Generally, a felony is any crime punishable by incarceration of more than one year.
<b>Grand Jury</b>	A group of citizens assembled for a term to review all cases that the prosecution intends to bring. The grand jury reviews the evidence of the prosecution for each case and determines which cases have enough evidence to proceed.
<b>Jail Diversion</b>	A program that allows a person charged with a crime to avoid a criminal trial and conviction in exchange for doing community service, undergoing psychiatric treatment, paying a fine, or other alternative disposition.
<b>Mens Rea</b>	The mental-intent element of a crime. Most crimes require not only that the defendant committed a specific act, but also

<b>M</b> isdemeanor	that the defendant intended to commit that act. Generally, a misdemeanor is any crime that is punishable by a jail term of one year or less.
<b>N</b> olo Contendere	An alternative plea to a guilty plea. A plea of nolo contendere is essentially a plea by the defendant that he or she neither admits nor denies guilt. The ultimate result of a plea of nolo contendere is the same as that of a guilty plea because the defendant ends up with a criminal conviction.
<b>P</b> lea Bargain	A deal arranged by the defendant's lawyer and the prosecutor under which the defendant pleads guilty to a particular crime in exchange for the prosecution agreeing not to prosecute the defendant for a more serious crime.
<b>P</b> resumption of Innocence	The legal presumption that all persons are not guilty of any crime unless and until the prosecution proves guilt beyond a reasonable doubt. Presumption of innocence is closely tied to burden of proof in a criminal case.
<b>P</b> robable Cause	The standard that police must meet to make an arrest. Probable cause is satisfied when the police officer believes that a crime has been committed and the person to be arrested committed that crime.
<b>P</b> robation/ Suspended Sentence	These essentially mean that a defendant convicted of a crime avoids going to jail for the term of the sentence for that crime on the condition that particular requirements are met – usually that the defendant stays out of trouble for the period of probation or suspended sentence.
<b>P</b> ro Bono	Work that a private attorney does without charging a fee. Many attorneys, even very good ones, will take at least one pro bono case per year.
<b>P</b> ublic Defender	A lawyer who works for a federal, state, or local agency that operates like a public law firm and provides criminal defense for persons who cannot afford to provide their own defense. Public defenders are usually appointed by a judge.

Health Care Reform for Americans with Severe Mental Illness: Report of the National Advisory Mental Health Council, National Advisory Mental Health Council, P. 19 (1993).