

# Criminal Legal

## **How do I help when my loved one faces arrest, incarceration, and court?**

Criminal legal involvement is a common outcome for someone with a severe mental illness (SMI) that is untreated or under-treated. When a person with a brain-based disease that impacts thinking and behavior loses touch with reality and is unable to understand or follow laws, they may get arrested before medical help is forthcoming.

When a person with SMI is arrested, they may become part of the “forensic system” if they don’t understand their charges or the case against them. Their attorney is the person most likely to petition the court for a psychological evaluation if there is a question about a defendant’s fitness for trial. Terminology can vary, but the defendant may be found “unable,” “unfit for trial,” or “incompetent to proceed.” If so, their criminal case is paused until competency is restored.

The term “forensic” also refers to services for someone whose criminal case ends with a finding of not guilty by reason of insanity (NGRI). States have their own terminology and laws related to that possibility and where a person might be placed for long-term care and/or sentencing. Four states (Idaho, Kansas, Montana, and Utah) don’t allow for an [insanity defense](#).

Many states have shifted resources away from the civil commitment system to expand forensic services. Advocates might argue that this criminalizes illness by pushing resources “downstream.” TAC provides an extensive report: [Prevention Over Punishment: Finding the Right Balance of Civil and Forensic State Psychiatric Hospital Beds](#).

While TAC’s advocacy efforts support timely treatment to prevent criminalization of psychiatric illness, the current reality is that many people have been swept into the criminal legal system, and more will continue to suffer that fate until we change our societal response back to a medical and treatment approach. Until that time, figuring out how to navigate the complex criminal legal systems remains an unfortunate necessity.

**Please note:** Counties and states vary tremendously in the way they apply and implement laws and regulations. This resource provides general principles that are broadly similar across jurisdictions and can help you to ask the right questions and know where to seek information and answers.

## What's the difference between a criminal court and a civil court?

A person who has been arrested for an alleged crime is involved in a criminal court process. Involuntary commitment (whether inpatient or outpatient) is managed through the civil courts. Most of the time, civil court options are unavailable while a person with SMI faces criminal charges. Advocates nationally are suggesting [new pathways](#) to divert people into care through civil instead of criminal courts. In some states, a person found “not restorable” or “unfit to proceed,” despite repeated attempts at competency restoration, might have their case transferred into a civil court to consider commitment. In Washington State, for example, that process is called “[civil conversion](#).” Some courts are starting to consider ways to shift some individuals out of a criminal process and into assisted outpatient treatment (AOT). TAC’s AOT Implementation Team provides a [guidance handbook](#) about that innovative possibility.

TAC provides a [video](#) with more information about civil versus criminal courts.

## Can my loved one get arrested if no one pressed charges?

A person may be arrested for doing something that police identify as a crime. Officers must read someone their rights and explain why they are being taken into custody. The arrested person has the right to legal counsel and is usually assigned a public defender if unable to hire a private attorney, although that entitlement is not absolute and varies from state to state.

The defense attorney represents the person accused of a crime. The prosecutor represents the “state” and is responsible for protecting public safety and holding people accountable for criminal actions. Prosecutors can pursue a case without the victim’s participation. In other words, charges can be filed by the prosecutor regardless of whether the victim of the crime chooses to “press charges.” This may feel confusing to families who call 911 seeking help but not anticipating that their loved one might get arrested for causing property damage or slightly injuring someone in the household, for example. To adjudicate means to make a formal judgment or decision about a problem or disputed matter. While a criminal case is being “adjudicated,” it means that hearings are on the calendar, attorneys are considering their strategy, and decisions are being considered about whether the case is likely to go to trial or be resolved another way. The arrested person generally remains in jail while the case is being adjudicated unless bail is posted, charges are dropped, or a mental health diversion option is available. Adjudication is paused if the competency of the defendant is raised: See below for more information about competency evaluation and restoration.

If a person facing charges fails to appear for a scheduled hearing, a “bench warrant” might be issued, which means the defendant could be arrested in the community if law enforcement encounters them and scans their record for any reason.

## What if I'm the victim?

Your county or court may offer access to a victim advocate who can help you understand the court process and express your wishes and position to the prosecutor. The victim advocate may also keep you aware of court hearings and release conditions. Sometimes the court will automatically impose a

“no contact order” when someone has been assaulted. That might mean that your loved one cannot have contact with you or cannot come within a certain distance of your home. If you don’t want those restrictions imposed on your loved one, you can express your wishes through the victim advocate.

## **What if I don’t think my loved one is being represented?**

An emerging complication is a nationwide [shortage of public defense attorneys](#). The Constitution guarantees the right to an attorney for anybody charged with a crime, so questions are emerging about the legal implications of long waits to get a public defender.

If there isn’t a privately hired attorney, families can research what agency manages public defense for the court overseeing their loved one’s case. If the incarcerated person with SMI is waiting for weeks or even months with no action on their case, the family can ask to speak with a supervisor at the defense agency.

Figuring out who has been assigned to defend your loved one can be difficult. There may be an online case information search on the website of the court. A state “bar” is the organization that regulates attorneys. Your state bar may have an online directory for finding contact information about the attorney if you know their name. If the directory does not have direct contact information, it may at least list the organization that the attorney works for, and you might contact that organization. See the section titled “Working with attorneys” below for topics you might raise with the defense attorney and/or the prosecutor.

## **How can I plan ahead to try to avoid criminal legal involvement?**

Families should always call 911 if there is a threat of violence or harm but may want to weigh all options before calling if there is no threat of harm. When calling 911, ask for response from officers with crisis intervention training (CIT). Not all departments have CIT-trained officers, but they might have a program where crisis responders ride along with law enforcement. An alternative is to call 988 for mental health crisis support. TAC provides a resource with more information about [emergency planning](#).

### **When things are calm, families might research these questions:**

- Are police in my area required to take someone to jail if there is evidence of domestic violence?
- Do police in my area commonly take someone in a mental health crisis to a hospital or alternative treatment facility or to jail?
- Do police in my area have a crisis-informed team to respond to crisis-related calls?
- Is there a mobile crisis response team that I can contact instead of police if my loved one with SMI experiences a mental health emergency? One place for information about specialized response teams in some areas is called [The Right Response](#).

## **How do I find out if my loved one is in jail or prison?**

Jails are operated by local agencies, usually the county. Prisons are operated by the state. Usually someone is taken to jail after being arrested and not sent to prison unless they are found guilty of a

crime and sentenced.

If you weren't present when your loved one was arrested or if your loved one has dropped out of site and you suspect they've been arrested, you may need to locate them. If you know what state they are in, you may be able to look them up on a website called [VINE](#).

Most jails and state prisons have websites with a tab for looking up the names of inmates. If searching by name is unsuccessful, there may be a "mugshot lookup" page that provides an identification number. That number might provide another way to find information through the inmate search tab. Sometimes this information is not available immediately after arrest.

If you cannot find information online, call the facility. While speaking with staff, ask about visiting protocols and rules related to mail or video teleconferencing. Ask if there is a nurse, social worker, psychiatrist, health services clinical liaison, medical director, or a chaplain you can speak with and/or fax information to.

If your loved one might be held in a federal prison, the [Bureau of Prisons provides a tool to search for an inmate](#).

## **What information can I share?**

Preparing a [mental health history](#) to share through fax might impact the care that your loved one receives while they are incarcerated. If your loved one has completed a [psychiatric advance directive](#), it can also be shared. If someone has [power of attorney, guardianship, or conservatorship](#), that paperwork can be included and may increase the likelihood of communication with providers during the incarceration.

Who provides mental health care in the facility can vary. County jails usually have a mental health agency contracted to provide services to inmates, while state prisons generally employ medical staff directly. The service provider is who needs to receive any information family members wish to share about their loved one's illness and symptoms, medications that work/don't work, and if there is a likely risk for suicide.

## **How can I help while they are incarcerated?**

Jails and prisons are required to provide adequate mental health care services for inmates who need them. This right is included in the U.S. Constitution under Eighth Amendment protections against cruel and unusual punishment. The Journal of the American Academy of Psychiatry and the Law provides an [article](#) describing cases in which Eighth Amendment violations have been found when facilities failed to provide mental health treatment and/or inappropriately used solitary confinement for mentally ill prisoners.

Protections for inmates are also part of the Americans with Disabilities Act (ADA), which prohibits discrimination against individuals with disabilities, including mental illnesses, and provides a [form](#) for reporting potential violations in various settings.

### **When communicating with providers responsible for mental health treatment in jail:**

- Communicate your concerns both by phone and in writing. Use fax whenever possible for maximum accountability. Be sure to share your phone number and email address for follow through.
- Share [mental health history](#). Jail staff need to know about medications that work or don't work, contact information for the current prescriber, and triggers that might set off the inmate's behavior.
- Provide as much diagnostic information as possible, including if there is a family history of SMI or if there are reasons to suspect a diagnosis even if a professional hasn't been available to provide one.
- Explain your relationship to the inmate and that you want to ensure that their Eighth Amendment rights are upheld while they are detained.
- Briefly explain the importance of treatment to prevent psychiatric deterioration, including [brain damage from untreated psychosis](#).
- Incarceration is a [risk factor](#) for traumatic brain injury (TBI), with symptoms that may appear right away or could take many years to manifest. If a TBI might be worsening or causing symptoms, clinicians need this information to adjust their treatment approach. TAC provides [more information about TBI](#) with resources for military service members and veterans.
- Describe other specific risks for harm if symptoms remain untreated. Include any suicide risks, risks for malnourishment or dehydration (common when a person with paranoid delusions has a fear of poisoning), and risks for solitary confinement if symptom-related behaviors lead to punitive measures. Use historical information and knowledge of past symptoms and behaviors to back your concerns with facts.
- If you believe your loved one may be suicidal, ask about the jail's protocol for checking on inmates who are at risk.
- Ask if your loved one has been offered the opportunity to fill out a form (maybe called a "pink slip," "kite," or "tank order") to notify staff that they have a need for treatment.
- If your loved one is unaware of their illness, explain that they experience a neurological symptom called [anosognosia](#), which makes them incapable of seeing that they are sick. Describe how this worsens the risk for harm because your loved one is unable to advocate in their own best interests.
- Ask what protocol the jail uses to medicate against an inmate's objection if there is a significant safety risk.
- If a [medication](#) that works for your loved one is not on the jail's "formulary," which limits available medications as a cost-saving measure, ask for a form to apply for an exception. Request a description of that process and any denials in writing.
- Thank staff for caring for your loved one while they are fragile and unwell.

While your loved one is incarcerated, you may be able to contact their treatment provider in the community to let them know what's happened. The community provider may be able to communicate with a jail liaison if one is available.

## What information can I expect from a jail or prison?

Treatment staff at jails often work for contracting agencies bound by [HIPAA](#), so a release of information (ROI) with that agency may be required for substantial information sharing. However, federal laws do not prohibit provider agencies from communicating with families.

The U.S. Department of Health and Human Services (HHS) provides a 13-page question-and-answer handout with specific information about [permitted disclosures related to mental health](#). Information from that guidance might enable basic information sharing, especially if there are safety concerns. Also, if you are a primary care partner and the provider knows that they can ask your loved one if it's okay to talk to you. If your loved one doesn't object, HIPAA allows for routine communications between providers and care partners without a formal ROI.

Prisons are more likely to have their own medical staff: In that case, the ROI and any information sharing would be directly with prison mental health care employees. If your loved one contacts you and it's appropriate, remind them that they can request an ROI so you can speak with their providers and advocate in their best interests.

If you have [guardianship](#) or another contract that assigns you as a personal representative, be sure to share that paperwork and explain what authority that contract affords you. Another option might be to contact the chaplain, who is not bound by HIPAA.

Having an ROI might mean that you will know if your loved one is transferred somewhere else or released. Keep in mind that county jails may release someone on a moment's notice, without any discharge planning or outreach to the family. If you have communication with the facility, be sure to make clear that you want to be notified if your loved one is moved or released. A program called [Vine](#) also can help you track a case or a person's custody status.

## What is competency restoration?

Competency is the ability of a criminal defendant to stand trial, as gauged by their mental ability to understand the proceedings and to assist defense lawyers. Competency to stand trial statutes can vary somewhat between jurisdictions, but there are common elements often found in such statutes.

Here are the basics:

- A person who is "incompetent" or "unfit to stand trial" cannot be put on trial for an alleged crime.
- If defense believes a client is unable to understand the charges and the penalties associated with the charges or cannot comprehend the criminal legal process of which they are a part, then they can seek a court order for a competency evaluation.
- The prosecutor or judge also might raise the question of competency.
- A competency evaluation can be ordered by the judge.
- If a psychological evaluation shows that the defendant is not competent to stand trial, a judge may order competency restoration. In some states, a judge may dismiss a

misdeemeanor case after a defendant is found incompetent.

- The goal of competency restoration is to enable someone to demonstrate that they understand their circumstances well enough to face adjudication.
- Competency restoration is not treatment. It often means medication and time spent in a state hospital. Some states offer restoration services in the community. The state's forensic mental health agency or department is a place to seek information about those options.
- If the defendant is "restored to competency" at a state hospital, they will usually return to jail to face their charges and resume the criminal legal process. Note that time spent in competency proceedings, including restoration, is generally excluded from the allowable time for a case to proceed while protecting the individual's right to a speedy trial.
- A defendant who is "competent" may be considered for mental health court if one is available and the level of alleged crime is suitable for the program. Specialty courts are voluntary and may not accept a client who seems unwilling to accept treatment.
- How long restoration takes varies tremendously. If someone is at a state hospital for a very long time and not improving, family may want to research the state's policy about what to do when someone is "not restorable." Reaching out to the defense attorney or a supervisor at the public defender agency might get things moving if a family member is aware of the state's laws and policies and expresses concern

## Working with attorneys

If your loved one contacts you while they are incarcerated, ask if they've spoken with a lawyer. If possible, ask your loved one to sign an ROI so you can speak with their defense attorney and make sure the case is handled fairly. You can share information with their defense attorney without an ROI, but whether the information is used is up to them.

Sometimes family members discuss the case with the defense attorney and/or the prosecutor. Whether outreach to the prosecutor is a good plan may depend on their personality, career goals, and their understanding of SMI.

### Here are a few topics you might discuss with the attorneys:

- Is there a pathway for diverting your loved one into psychiatric care instead of jail?
- Is there an option to post bail and have your loved one evaluated for involuntary care and possible commitment through the civil court system?
  - If so, does the evaluation need to take place before posting bail to ensure that the evaluator has access to the individual and can transport the individual to the evaluating facility?
  - If posting bail is required prior to having your loved one evaluated, who is responsible for transportation of your loved one to the evaluating facility upon release?
  - If commitment through the civil court system is an option, is hospitalization or [assisted outpatient treatment](#) (AOT) a better choice under the circumstances?
- Is your loved one being evaluated for competency to stand trial?
  - If your loved one has been found fit for trial and is willing to voluntarily participate, is

- mental health court an option?
- What is the maximum sentence for the alleged crime if your loved one were convicted? Federal law doesn't allow someone to be incarcerated for competency longer than the maximum potential sentence, so you may want to consider whether time served exceeds that limit.
  - If so, can the attorney provide the evaluator with information you have to share, including a [mental health history](#) and medical records?
  - What are the options for competency restoration?
  - What is the deadline for competency restoration services to begin after a forensic evaluation shows someone to be incompetent to stand trial?
  - What is the anticipated wait time for a state hospital bed?
  - Is there an out-of-custody option for competency restoration in the community?
  - What happens if your loved one cannot be restored to competency?

## **What if I have an order of protection/restraining order?**

If your loved one has been threatening you or has injured you and there is an order of protection/restraining order, contact with your incarcerated loved one may be restricted.

If the order is something you filed, you may have the option to communicate with your loved one within certain boundaries. For example, the order might mean your loved one cannot come within a certain distance of your home but allows contact in public spaces, by phone, and through the mail.

If the order allows you to visit the jail or communicate by phone or mail, you will need to share a copy of the protection order with jail staff to document these allowances. TAC provides a resource about [violence and safety plans](#).

## **Additional resources**

- TAC's [Advocacy Navigator video](#) provides further guidance about advocating for treatment during an incarceration.
- The National Alliance on Mental Illness (NAMI) offers an extensive [guidebook for navigating the criminal system](#).
- [Schizophrenia & Related Disorders: A Handbook for Caregivers](#), by Nicole Drapeau Gillen, Chapter Seven: The Role of Government.