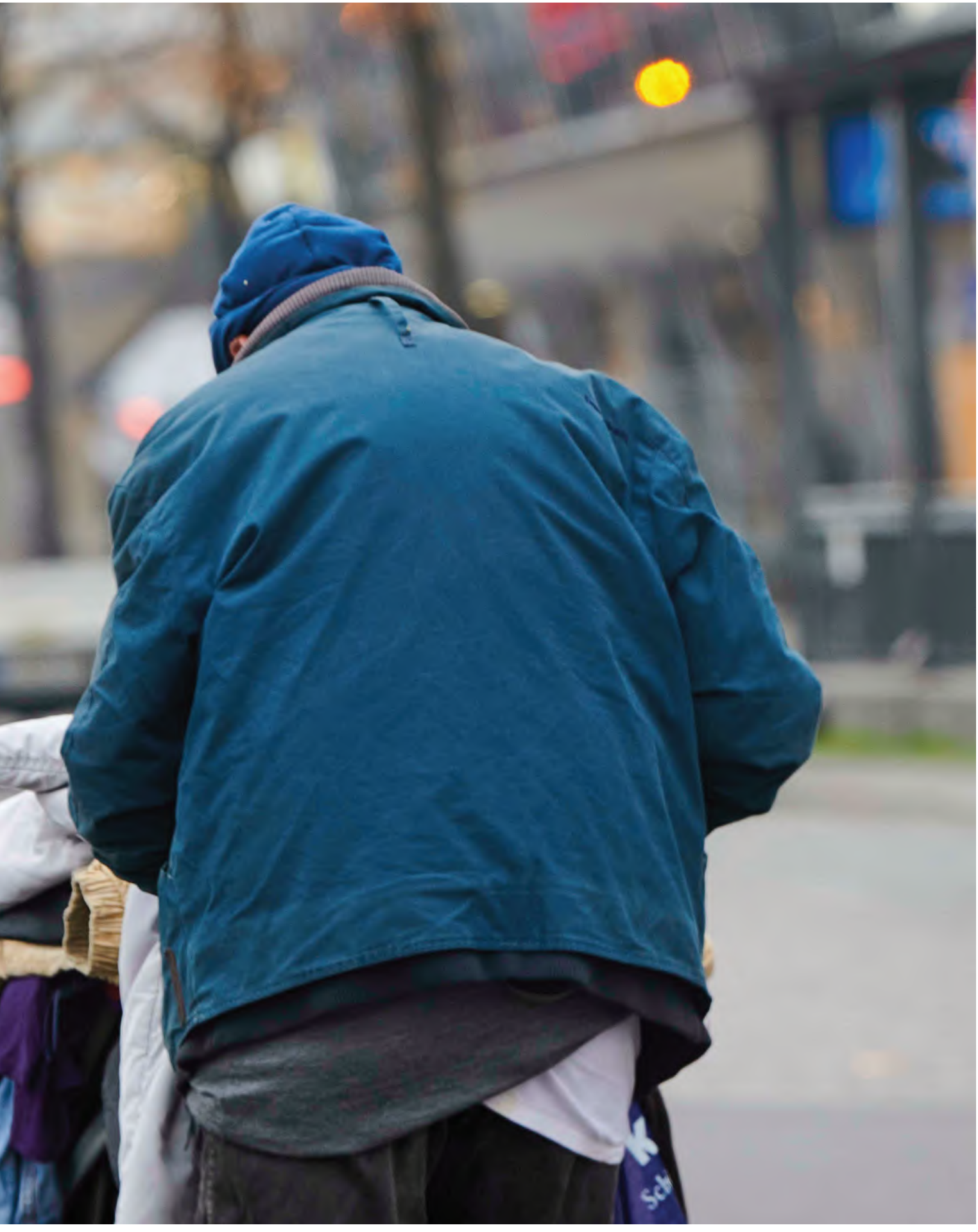
STANDING TALL: A NEW STAGE FOR INCOMPETENCY CASES

A growing number of people with serious mental illness are getting entangled in the legal system, often for minor crimes. Psychologists are figuring out how to get them essential mental health care instead.

BY TORI DEANGELIS

There has been a significant increase in "incompetent to stand trial" cases over the past few years. Recent federal funding may help bolster services to address the causes and treatment for this population.



As a supervising unit psychologist at Oregon State Hospital, Jessica Murakami-Brundage, PhD, finds her work with people with serious mental illness both rewarding and meaningful. "I see people at some of their lowest points," she said, "and to see people get better and recover is an amazing privilege."

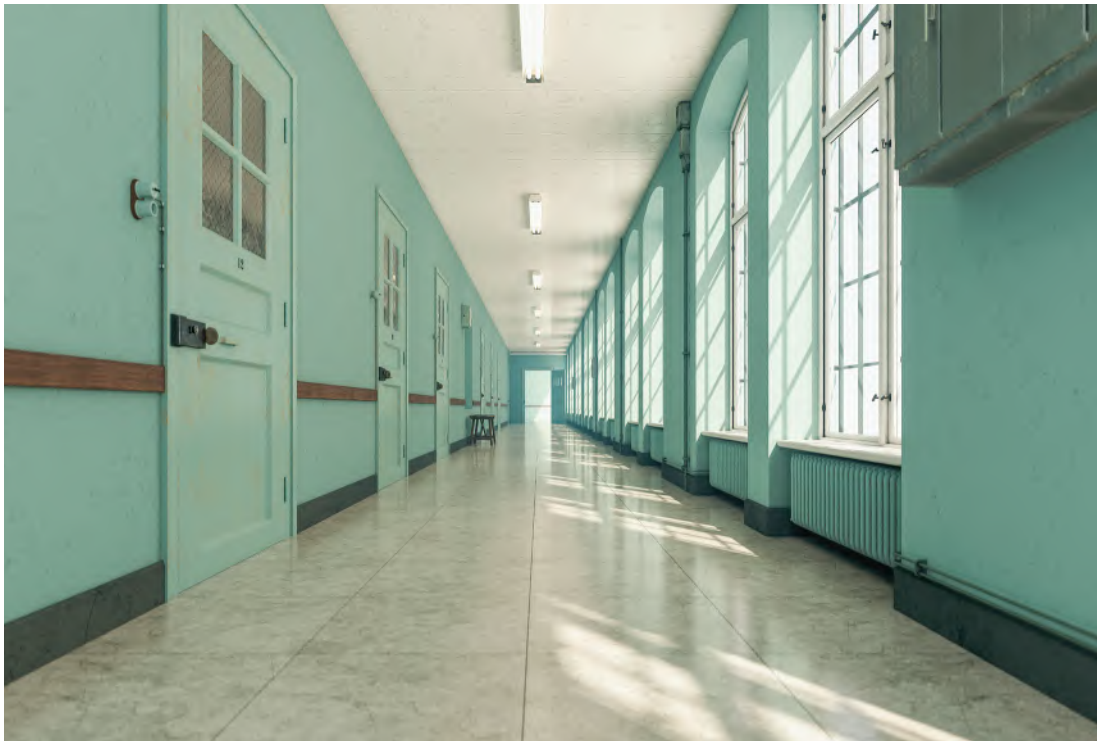
Over the past several years, however, she's been alarmed by the increasing number of patients who are committed for "competency restoration"—gaining or regaining the ability to defend themselves in court against criminal charges.

"My main job is to help them be able to aid and assist their attorney—to learn their plea options and follow court rules," Murakami-Brundage said. She added that it's frustrating for her because she'd much rather focus on helping them recover from serious mental illness. "Most of my patients would benefit much more from receiving stable housing and psychosocial services," she said, "than from learning what a judge does."

An example is her patient Jason (not his real name), a middle-aged man with schizophrenia who was arrested for threatening someone in a store. "I know that the pressure I was under was why I lashed out the way that I did," he said. He was arrested but found incompetent to stand trial (IST) due to symptoms of psychosis and sent to Oregon State Hospital.

When Jason discovered that the main reason he was there was to receive psychiatric medication and to learn "legal skills," he said he was disappointed that he wouldn't be receiving the kind of care that would help him improve long-term, in particular substance abuse treatment. While he appreciated the stability of the hospital ("There is no begging here, no borrowing, no stealing," he said), he was worried he'd be released back to homelessness.

"I'm afraid that with one more mistake, that's going to be the end of it," as he put it.



The rise in those deemed incompetent to stand trial is at least partially due to the fact that there are not enough community treatment options.

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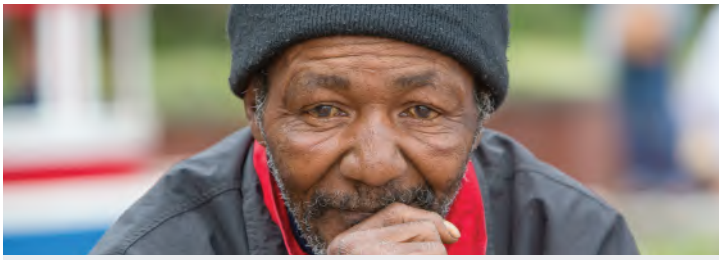

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The IST designation was originally intended to protect those with serious mental illness from unfair imprisonment.

UNDERSTANDING ALLEGATIONS

WHAT DOES IT MEAN TO BE 'INCOMPETENT TO STAND TRIAL'?

According to the APA Dictionary of Psychology, in order to be competent to stand trial, a person must be able "to understand and appreciate the criminal proceedings against him or her, to consult with an attorney with a reasonable degree of understanding, and to make and express choices among available options." At any time during the proceedings, the judge, prosecutor, or most commonly, the defense attorney, may raise concerns about a defendant's competence, at which point the judge will usually order a competency evaluation. Being incompetent to stand trial, or IST, differs from the "not guilty for reason of insanity" defense: IST means that a defendant lacks the capacity to understand the allegations, while the insanity defense refers to the defendant's mental state at the time of the crime.

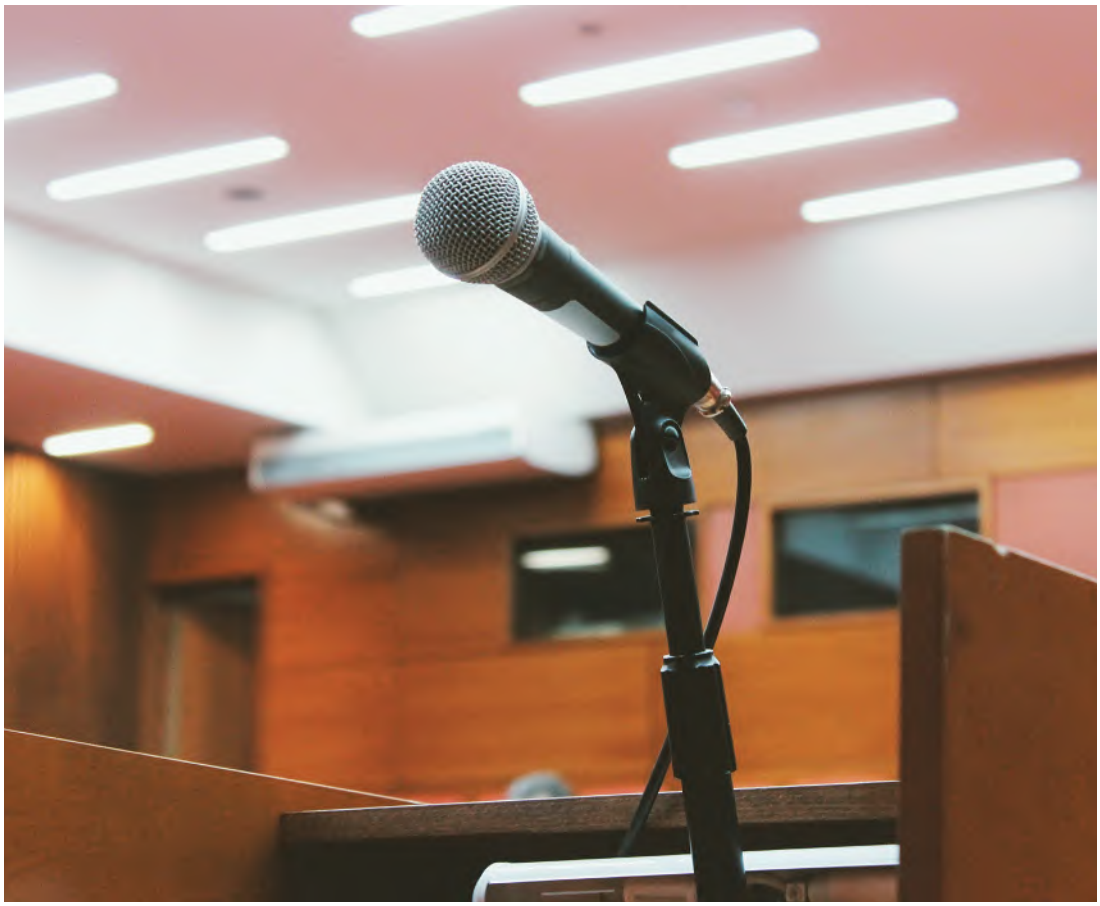
Jason's situation is not unique to Oregon: It is happening all over the country, thanks to systemic factors that have significantly increased the number of people with serious mental illness who are found incompetent to stand trial. A typical scenario is that a person is arrested for a crime, often a minor one such as loitering or trespassing. Then they enter the court system, and if the judge or an attorney suspects the person might be IST, they can request an evaluation, and the judge usually orders one. The person then waits for that evaluation, usually in jail, and sometimes for a long period of time. If they are found unfit once they are evaluated, they are sent to a state hospital, back to jail, or in some cases to community treatment to be "restored." That can take weeks, months, even years. When their cases are resolved one way or another, these individuals are often released to the streets, unable to get the care that they need and sometimes starting the whole cycle over again.

Recent federal funding may aid those who are interested in improving this frustrating situation. In May 2021, the Substance Abuse and Mental Health Services Administration (SAMHSA) distributed $3 billion in American Rescue Plan (ARP) funding for its mental health and substance use block grant programs, after providing supplemental funding of nearly $2.5 billion for these programs in March 2021—the most ever given to these programs. In December 2021, the ARP granted the Centers for Medicare & Medicaid Services new authority to promote access to Medicaid services for people with mental health and substance use disorder crises, including funding for states that provide qualifying mobile crisis intervention services.

"We're at a really good moment where instead of cutting mental health services, we're putting more money into them," thanks in part to increased awareness of mental health issues during the pandemic, said Debra A. Pinals, MD, a clinical professor of psychiatry at the University of Michigan Medical School; director of its Program in Psychiatry, Law, and Ethics; and a leading mental health and forensics expert. "There are lots of things happening that can potentially create pathways toward better and more robust community-based services"—services that would move people deemed IST either out of the forensic system entirely or at least partially into community care as appropriate, she said.

WHY THE UPTICK?

While it's unclear exactly the extent to which IST cases have risen in the past number of years, it appears to be a significant increase. In 2017, Katherine



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To competently participate in a trial, a person must understand what they are accused of, be able to communicate with their attorney, and comprehend their options in the legal process.

Warburton, DO, medical director at the California Department of State Hospitals, and colleagues surveyed 50 of 51 U.S. jurisdictions. They found that 82% of jurisdictions reported an increase in referrals for competency evaluation, while 78% reported an increase in referrals for competency restoration (*CNS Spectrums*, Vol. 25, No. 2, 2020).

Meanwhile, clinical psychologist Lauren Kois, PhD, an assistant professor at the University of Alabama who studies IST, has been working to discern the actual number of people who are getting competency evaluations nationwide. In a study that is not yet published, her team found that court records were extremely inconsistent and often unavailable, with just 22 state judiciaries able to provide data on the number of defendants evaluated each year. Kois estimates that there are probably between 120,000 and 200,000 of these evaluations annually. This is 2 to 3 times the number that is most often cited—60,000—which was the number of evaluations reported in the book *Adjudicative Competence* (Springer, 2002) by University of South Florida psychologist and forensics expert Norman Poythress, PhD, and colleagues.

Why are these cases rising so dramatically? Many agree that an underlying reason is insufficient community treatment options for people at risk of offending—the result of both short- and long-term budget cuts, starting with deinstitutionalization in the 1950s.

"Correctional systems have essentially taken over as the primary providers of mental health services" for those with serious mental illness, said Philip Candilis, MD, a professor of psychiatry and behavioral sciences at The George Washington University School of Medicine and Health Sciences and medical director at Saint Elizabeths Hospital in Washington, D.C. "And that's simply not how the field [of mental health] sees itself." Related

to this, judges and lawyers have taken to using the "incompetence" label as a way to get people with serious mental illness and forensic involvement into treatment because of their belief—and to some extent the reality—that placing these individuals in psychiatric hospitals is the only way to get them mental health care, even though that "care" often focuses mainly on restoration, Candilis and others noted.

Another factor highlighted by many experts is that it has become increasingly difficult to civilly commit people, that is, to place people who are not criminally charged but who are deemed dangerous to themselves or others and who have a treatable mental illness in state hospitals, often involuntarily. Years ago, fewer restrictions on civil commitment sometimes led to unfair institutionalization for those with serious mental illness or developmental disabilities. The 1960 ruling in *Dusky v. United States*—that defendants must be sufficiently informed about the legal process to receive a fair trial—subsequently allowed individuals with these conditions to undergo competency restoration instead. But one unintended consequence was putting more people with serious mental illness in contact with the criminal justice system.

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"CORRECTIONAL SYSTEMS HAVE ESSENTIALLY TAKEN OVER AS THE PRIMARY PROVIDERS OF MENTAL HEALTH SERVICES."

PHILIP CANDILIS, MD, MEDICAL DIRECTOR, SAINT ELIZABETHS HOSPITAL

The expense involved in restoring competency is much higher than for general mental health care.

Jen Snyder, PhD, a clinical psychologist at Oregon State Hospital, has been seeing that trend in her setting. She said that starting several years ago, she and colleagues started to notice that people coming into the hospital because they were found to be IST had very similar presentations to those sent there via civil commitment: Both had serious mental illnesses that needed psychiatric and psychological care much more than they needed criminal punishment.

"These were all people who were very sick—it's just that one group had charges and the other didn't," she said.

To add to the problem, people with mental illness who are experiencing homelessness have easy access to dangerous drugs and are thus arrested more often for drug-related infractions. As a result, "people are coming in more sick and more unstable than ever, and our rates of seclusion and restraints have risen because of this," Murakami-Brundage said. And because of her hospital's focus on restoration, "they're not getting the substance abuse treatment they need."

Collectively, these factors lead to a system that is not only failing to help those in need but is also exorbitantly expensive. In Kois's survey of states, she found that state hospital beds for people awaiting competency evaluations ranged from $480 per night in rural areas to $1,300 per night in urban areas, with an average of about $1,000 per night. Three months of restoration in a state hospital "could pay a psychologist for a whole year just to do mental health evaluations," Kois said. "And that would be a smart investment, because a person would also be receiving general treatment recommendations, not just those specific to competency"—not to mention freeing up funds to provide better and more cost-effective community services.

LARGE-SCALE IMPROVEMENTS

Mental health providers, researchers, judges, state and local leaders, and other stakeholders are beginning to tackle this problem from a variety of angles, some at larger systemic levels and others at more discrete entry points within the forensic and mental health systems.

In Colorado, two forensic psychologists with decades of experience in addressing and consulting on competency cases—Daniel Murrie, PhD, of the University of Virginia's Institute of Law, Psychiatry, and Public Policy, and Neil Gowensmith, PhD, of the University of Denver's Graduate School of Professional Psychology—are serving as federally appointed "special masters" to help the state overhaul its competency system.

The move occurred after 8 years of legal disputes in which Disability Law Colorado, an advocacy group, sued the state twice about lengthy wait times for hospitalization, making it clear that the system needed fixing, said Murrie. The U.S. District Court for the District of Colorado appointed the team to step in, asking them to submit a plan that highlighted deficiencies in the current state system and possible paths forward.

After a mediation process

between the advocacy group and the state, in 2019 the parties developed a consent decree that everyone in the system is bound to, which lays out rules of action and consequences if they're not followed. At its heart is a triage system that defaults more clinically stable people accused of minor offenses and deemed IST to outpatient rather than inpatient restoration. But it also ensures that people with urgent mental health needs receive more rapid triage to the hospital, requiring the most acute cases to be admitted within 7 days and less urgent cases within 30 days. The decree also mandates the use of "forensic navigators" to monitor the hospital waiting list each week and triage priorities as individuals' mental health needs shift.

When state hospitals fail to comply by not meeting the appropriate time frames, they are fined, and the resulting funds are spent on innovative diversion projects such as housing for the homeless and court dockets designed specifically for competency cases, Murrie noted.

The team's aim is to strike a balance that is efficient for those who need to be in the system but doesn't needlessly involve those who probably don't need to be, such as those charged with minor offenses like shoplifting or sleeping in public parks, Gowensmith said. "There are a lot of people—especially with lower-level charges—who are being put into the system because the community and courts have few options otherwise," he said. "So, they pull the only lever they have, which is the competency lever—but it's not the right lever for a lot of these folks."

In another effort to improve the IST situation in a number of states, Lisa Callahan, PhD, a senior research associate at Policy Research Associates, a behavioral health research and technical assistance company, has been helping to oversee a federally funded program called Learning Collaboratives, run through SAMHSA's GAINS Center for Behavioral Health and Justice Transformation. Teams of stakeholders from different states apply competitively for the program, which so far has provided support and technical assistance in 12 states, Washington, D.C., and Nashville, Tennessee.

The program provides teams with a big-picture education on

MITIGATING CONSEQUENCES

RESTORATION VERSUS STANDARD TREATMENT

The term "restoration" can be confusing to anyone who isn't versed in this aspect of the law, as it implies a person's ability to become well. However, in the case of individuals found incompetent to stand trial (IST), it has a more specific meaning: helping them gain the tools they need to understand the proceedings against them and act accordingly (see sidebar on page 64). By contrast, standard mental health treatment for those with serious mental illness encompasses the gamut of treatment types and supports that can help these individuals gain stability internally and externally, such as medication, social supports, therapy, and maintaining a treatment routine in the community.

Forensic psychologists and IST experts Daniel Murrie, PhD, of the University of Virginia's Institute of Law, Psychiatry, and Public Policy, and Neil Gowensmith, PhD, of the University of Denver's Graduate School of Professional Psychology, have identified other basic differences between restoration and standard treatment:

RESTORATION: It's short term, involuntary, and has the singular focus of returning the person to court. It is provided by a smaller number of state-qualified providers than standard treatment, is subject to time limits imposed by the court, and most often occurs in state hospitals, though it can also take place in jails or in community programs. It is typically not confidential nor is it covered by insurance.

STANDARD MENTAL HEALTH TREATMENT: It's longer term, voluntary, has several different areas of potential focus and specialization, is confidential, and can be reimbursed by insurance. It can be provided by a wide variety of specialized providers, is often holistic in nature, has no time limits, and occurs more often in the community.

DENNY ELLIS/ALAMY

the IST phenomenon, gives technical support to help them plan and implement processes that address their system's particular needs, and fosters connections so that they can share ideas on how to improve their systems.

One participating team is the Washington, D.C., outpatient competence restoration program, which is affiliated with the city's Department of Behavioral Health and Saint Elizabeths Hospital. It is one of just 16 outpatient restoration programs in the country (Colorado's is another) and is seen as a national model because it's community based, well resourced, and innovative. It features group education on the court system, one-on-one mental health counseling and support where needed, and mock trials.

The D.C. program's involvement in the initiative enabled it to continue to improve by getting help from senior statisticians to better understand which components of its program led to faster restoration, to tweak those aspects, and to publish results accordingly, said Saint Elizabeths' Candilis. The GAINS Center Learning Collaboratives program also fostered stakeholder conversations that might not otherwise have taken place, he said.

"We get to talk to judges, forensic specialists, researchers, and policymakers at the same time," he said. "That's important because this is a community effort and a community problem, which is why the Learning Collaboratives favor a multidisciplinary approach."

People with mental illness and who are experiencing homelessness are arrested more often for drug-related infractions. Restoration programs often do not provide the substance use treatment they need.

FINE-TUNED SOLUTIONS

Other experts are tackling problems in specific areas of the criminal justice and mental health systems. Many mental health professionals are guided by a tool called the Sequential Intercept Model, often referred to as SIM, which identifies discrete points along the continuum of criminal-case processing that can serve as opportunities to divert people with serious mental illness into treatment. In a paper in *Psychiatric Services* (online first publication, 2020), Pinals and Callahan adapted the model

EDUCATION

TOWARD MORE SENSIBLE CASE DECISIONS

People found incompetent to stand trial (IST) range from those who commit minor, nonviolent offenses such as loitering or trespassing to individuals who commit serious crimes such as assault and murder. While it's difficult to put exact numbers on IST cases at either extreme, research suggests that IST cases involving minor infractions are on the rise. In a statewide sample of 1,126 Virginia defendants referred for competency evaluations, for example, defendants who faced only misdemeanor charges were much more likely than those facing felony charges to be found IST (44% versus 31.2%), according to research by University of Virginia forensic psychologist Daniel Murrie, PhD, and colleagues (*Psychology, Public Policy, and Law*, Vol. 28, No. 1, 2022).

Despite the vast differences in the severity of these cases, however, at this point most people deemed IST must undergo competency restoration to learn enough about the system to understand their charges and communicate with their attorneys accordingly. But there is wide variability in where people go to get restored and for how long, depending on resources, how savvy local court systems are, and other factors. In some of the more progressive examples, Florida and New York have developed systems where only IST patients with felony charges are admitted to state hospitals for competency restoration and those with minor charges are sent to community restoration programs that also include mental health services. California has gone even further by no longer admitting any IST individuals to state hospitals, including those with felony charges, instead sending them to county-based diversion programs. However, states with fewer resources sometimes use jails as places to restore competency due to long wait lists for state hospitals and a lack of community options. Still other states lack competency restoration services entirely.

Besides a lack of good community alternatives, the often inappropriate placement of IST individuals is also related to the fact that judges aren't sufficiently educated on this issue and mental health evaluators aren't included in the decision of where to send people, said Lisa Callahan, PhD, a senior research associate at Policy Research Associates, a behavioral health research and technical assistance company, who has expertise in these cases.

"Anecdotally, I hear a lot from district attorneys and judges that they would support diversion to the community if they knew where the person would be sent and who would be supervising and treating them," she said. To this end, a number of states are launching efforts to educate judges on risk and needs assessment for these individuals, including developing standardized orders that provide information to guide judges' decision-making processes.

Many advocates, including Callahan, also believe that the best long-term solution to the IST problem is to eliminate competency requirements for those with minor offenses altogether and route them into community care instead. Other wish list items include providing IST individuals with immediate connection to housing and treatment, standardizing state clinical and judicial orders and communications so that people are sent to care based on need and not on the whims of a given locale, and mandating organized data collection and analysis to provide real-time information to improve the system.

to specific points in the competency system where this could happen, from crisis services that could help avoid arrest in the first place to diversion strategies that take place at various times, starting with the moment a person appears in court. Ways to help realize these strategies include easing access to community services, training forensic evaluators on alternatives to inpatient restoration, expanding on community-based restoration efforts, and improving the conditions of confinement.

In a line of work related to the model, Kois and University of Alabama colleague Jennifer Cox, PhD, are addressing the first intervention point—avoiding arrest in the first place—through studies aimed at optimizing the use of the 988 mental health emergency line, due for national operation this summer. The call line is intended

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FURTHER READING

A survey of national trends in psychiatric patients found incompetent to stand trial: Reasons for the reinstitutionalization of people with serious mental illness in the United States
Warburton, K., et al.
CNS Spectrum, 2020

The impact of misdemeanor arrests on forensic mental health services: A state-wide review of Virginia competence to stand trial evaluations
Murrie, D. C., et al.
Psychology, Public Policy, and Law, 2022

Evaluation and restoration of competence to stand trial: Intercepting the forensic system using the Sequential Intercept Model
Pinals, D. A., & Callahan L.
Psychiatric Services, 2020

Resolution or resignation: The role of forensic mental health professionals amidst the competency services crisis
Gowensmith, W. N.
Psychology, Public Policy, and Law, 2019

to reduce arrests of people with serious mental illness and connect them to care instead. The University of Alabama's Southern Behavioral Health and Law Initiative is interviewing a variety of stakeholders—people with serious mental illness, police officers, and first responders—to determine what needs to happen to ensure that the calls are effective in helping to properly divert people. Considerations include proper training of law enforcement in mental health issues and advertising the call line in ways that will promote the number's use in communities that might be wary of such interventions, Kois said.

Kois's team is also adapting "Michael's Game"—an evidence-based cognitive behavioral intervention for people with psychotic disorders—to the competency process. The intervention uses a card game format to address delusional thinking through a stepped reasoning process. Kois's adapted version, which she calls "Stephen's Game," applies these same strategies but uses examples that address delusional or paranoid beliefs related to the legal process, for example, the belief that a person's defense attorney or judge is working against them. The aim of the intervention is to increase the therapeutic component of competency restoration, which often gets short shrift, Kois said. "It's a double whammy of getting the reality testing that many need anyway and learning about how a legal case works."

As these efforts unfold, it is important that psychologists play a central role, Gowensmith said. With their expertise in research, assessment, and practice related to competency evaluations, psychologists are well equipped to understand what people in the competency system need and to work with the system accordingly. Ways to get involved include advocacy, designing services, and grant writing, he said.

It's also important to remember that while most of the people in the competency system are dealing with serious mental health problems and legal troubles, they deserve help, Gowensmith added. "They're still our brothers and sisters," he said. "They have the same needs, the same hopes, the same dreams as anyone without a forensic commitment, and we have a responsibility to them." ■

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Specific cognitive behavioral interventions can help restore competency.