

# MODERNIZATION INITIATIVES AND ALTERNATIVE CRIMINAL JUSTICE PATHWAYS IN MICHIGAN

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# BACKGROUND



## Michigan Mental Health Commission 2004 key findings:

1. Mental Health Code an inpatient model in an outpatient world.
2. The system waits for crisis to act which results in delay in treatment.
3. Delay is harmful.

# POTENTIAL HARMS IN DELAYING TREATMENT



- ▶ 1. Permanent incapacity
- ▶ 2. Incarceration
- ▶ 3. Poverty, homelessness, isolation and poor health
- ▶ 4. Loss of resiliency
- ▶ 5. Increased risk of dementia, drug abuse and suicide

With early intervention, much of this risk can be reduced.

# THE HIGH RISK OF INCARCERATION

Prior to the pandemic  
51% of the inmates in  
the Wayne County Jail had a case  
history with the Detroit-Wayne County  
Community Mental Health Authority



# THE HIGH RISK OF INCARCERATION

- ▶ **2,000,000** persons with mental illness will spend time in our nation's jails and prisons this year.
- ▶ **380,000** persons with mental illness reside in our nation's jails and prisons.
- ▶ **25-40%** of persons with serious mental illness have spent time in jail or prison.<sup>5</sup>

# THE CRIMINAL JUSTICE CAPACITY LIMITED AND TOO LATE



Michigan's 203 problem solving courts served 7,089 people last year but rejected 3,828.

Tens of thousands of persons with serious mental illness could be better served by outpatient treatment that promotes recovery and reduces hospitalizations and emergency room visits.

# THE GREATEST OPPORTUNITY FOR DIVERSION IS THE CIVIL SYSTEM



The Michigan Department of Health and Human Services reports that for at least the last 3 years, the number one reason for Emergency Room visits was psychiatric care.

165,712 visits in 2020, over 200,000 in 2018 and 2019.

# DIGGING DEEPER



In 2020, 18,000 petitions for mental health treatment filed in Michigan.

8 These persons were screened, had 2 certs, hospitalized and petition filed for hearing in 7 days.

10,500, or 58% of these petitions were dismissed, withdrawn or deferred before the hearing date.

What happened to these persons?



# DIGGING DEEPER



Wayne County's CMH serves 38,000 adults with serious mental illness

9 Over the last 5 years 16,000 petitions for 9,000 persons.

600 persons, less than 1% of the persons petitioned accounted for 36% of all petitions filed.

No one on AOT?

# DIGGING DEEPER



In Wayne County:

59% of the petitions did not make it to court.

What happened to them?

Did they engage in treatment?

# DIGGING DEEPER



Just 57 individuals had at least 10 petitions filed with the probate court in the last 5 years.

The hospitalization cost in the last fiscal year for these individuals was nearly \$5,000,000.

One person cost \$600,000 and made 45 visits to the ER.

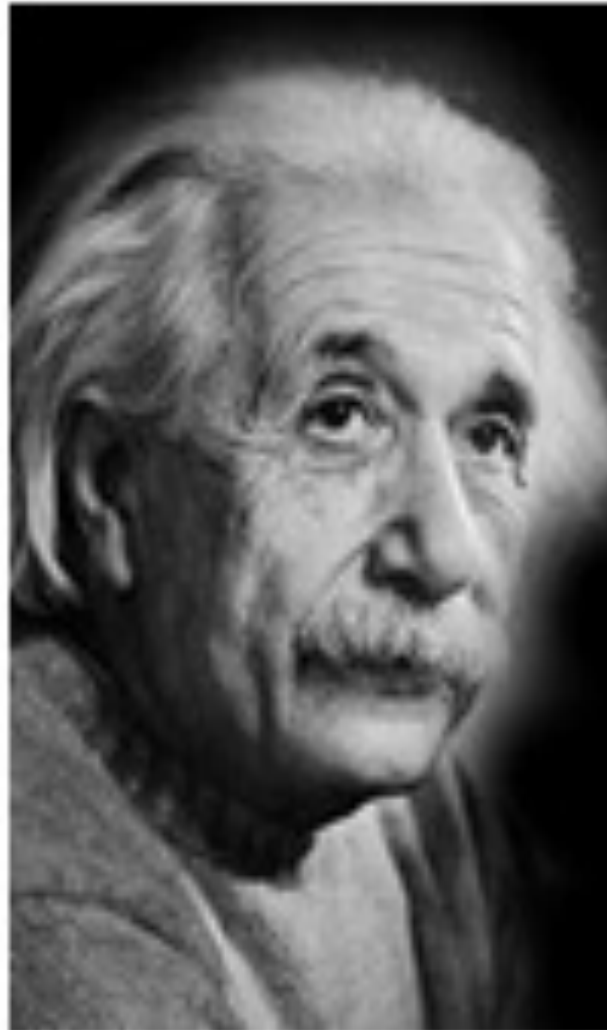
# THE REVOLVING DOOR



Repeated, short hospital stays, without effective follow up, accomplishes nothing, except to create a revolving door.

This is a stunning waste of scarce resources that produces nothing of value, but does produce the risk of tragedy.

# SAGE ADVICE



**"Insanity is doing the same thing over & over again & expecting different results."**

*Albert Einstein*

# NOW WHAT?



Michigan has opened the door for early intervention.

Court-ordered Outpatient treatment is now a viable alternative to hospitalization.

But, progress in implementation is slow



# CREATED NEW DEFINITION OF PERSON REQUIRING TREATMENT TO PERMIT EARLIER INTERVENTION

Greater focus on capacity and risk of harm

No need to show prior failures

One process to secure mental health treatment

A remedy of up to 180 days of court-ordered outpatient treatment available for all cases.





# SECTION 401(A) RISK OF SERIOUS HARM

(a) An individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.

# NEW STANDARD INTERPRETED

Dangerousness or threat of immediate harm not required.

Court of Appeals held an act from years earlier can be the act that substantially supports the expectation that the individual can reasonably expected in the near future to seriously injure someone.

*In re Tchakarova*, 328 App 172, 936 NW2d 863 (2019)



# NEW STANDARD INTERPRETED

Another panel of the Court of Appeals held that an “act” from two years ago could be the act that would support a finding the person needed treatment citing the doctor’s statement that past history is more predictive of future behavior than current statements.



In re Nicholas Heidarisaifa, March 11, 2021 (No. 353582)

## **SECTION 401(C) LACK OF UNDERSTANDING OF NEED FOR TREATMENT, REFUSING TREATMENT, CREATING RISK OF PHYSICAL OR MENTAL HARM**

**(c) An individual who has mental illness, whose judgment is so impaired by that mental illness, and whose lack of understanding of the need for treatment has caused him or her to demonstrate an unwillingness to voluntarily participate in or adhere to treatment that is necessary, on the basis of competent clinical opinion, to prevent a relapse or harmful deterioration of his or her condition, and presents a substantial risk of significant physical or mental harm to the individual or others.**



# NEW STANDARD INTERPRETED

In Spaulding the doctor testified that the respondent was not at risk of harm at the hearing, but was at risk of harm due to lack of insight and history of decompensation.



# THE QUESTIONS TO BE ANSWERED IN ORDERING TREATMENT

Does the individual have a mental illness?

Is the person's judgement impaired?

Does the impairment in judgement cause a lack of understanding of the need for treatment?

Is the person unwilling to engage in voluntary treatment

Is that treatment necessary to prevent a relapse or harmful deterioration of the person's condition?

Will this present a substantial risk of significant physical or mental harm to the person or others?

# FIRST RESPONDER CATCH PHRASE

**Old Standard:**

**“Immediate risk of harm to self or others.”**

**New Standard:**

**“Substantial risk of harm due to impaired judgment.”**





# THE PROBLEM WITH IMPLEMENTATION

Although the statute requires coordination between hospitals, ERs and community treatment providers, the hospitals have not caught up with the changes.



# TRAINING!



Everyone needs to recognize the new standard for intervention.

26 The standard relates to ordering treatment, not hospitalization.

The severity of the illness and the immediacy of the risk of harm dictates whether hospitalization or AOT is more appropriate.

# MICHIGAN'S MENTAL HEALTH CODE IS NOW AN OUT-PATIENT MODEL IN AN OUT-PATIENT WORLD

If the court finds that the individual is a person in need of treatment, the court can order Assisted Outpatient Treatment.

No special provision to order AOT. A history of hospitalization or incarceration not required.

The court can enter an order for combined for up to 180 days of AOT and 60 days of hospitalization during the time of the order.

There are no review hearings. In the event of noncompliance a hearing or status conference can be held.

# TWO PATHWAYS TO CARE



The Mental Health Code now provides two pathways to obtain court ordered AOT.

28 The first is the traditional method of filing petitions for mental health treatment from the hospital.

The second is AOT only, bypassing the hospital.

# NEW PATHWAY



If only seeking outpatient treatment, the petition can be filed with the court without a certification by a physician.

If the person refuses to be examined, Court can order an examination and the police can be ordered to transport the individual for an evaluation.

# NEW PATHWAY



30 It can be readily used by community providers to help persons who are refusing treatment get back on track without a complex, expensive effort or waiting for crisis.

# NEW PATHWAY



The challenge with AOT only petitions is the need for a psychiatrist.

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Community providers with access to psychiatrists can secure treatment for their clients without waiting for a crisis.

# IF FOUND TO REQUIRE TREATMENT:

- ▶ Order the individual to receive AOT for up to 180 days through a community mental health services provider or other entity designated by MDHHS.
- ▶ If ordering AOT only:
  - Must consider preferences and experiences
  - If conflicts with advance directive, an independent psychiatrist must review





# SPECIFIC AOT ORDERS



- ▶ Case management services
- ▶ Medication
- ▶ Blood/urinalysis tests to determine compliance with or effectiveness of prescribed medications
- ▶ Individual/group therapy
- ▶ Educational/vocational training
- ▶ Supervised living
- ▶ Assertive community treatment team services
- ▶ Alcohol/substance use disorder treatment, or both
- ▶ Alcohol/substance use disorder testing, or both
  - Subject to review every 6 months
- ▶ Any other services prescribed

# SPECIFIC AOT ORDERS



- ▶ A psychiatrist is required to supervise the preparation and implementation of the AOT plan
- ▶ The AOT plan must be completed within 30 after entry of the court's order for AOT
- ▶ The AOT plan must be forwarded to the court within 3 days after completion of the plan and maintained in the court file.

# MEDIATION



Now may be possible

Before filing for AOT only

After filing for AOT only, but before hearing which is not for 28 days.

Hearing can be adjourned since not in custody.

Earlier intervention, while individual's cognition not as impaired

# HOSPITAL ISSUES

Hospitals still apply the danger to self standard.

Hospitals fail to follow deferment process, notice and release.

Hospitals discharge from hospital on petitions for combined orders.

Hospitals discharge person on combined orders without consulting with the outpatient treatment program.

# USING AOT TO DIVERT MISDEMEANANTS FROM THE FORENSIC SYSTEM



- ▶ The use of the forensic system for misdemeanants is ineffective at preventing recidivism and delays assessment and treatment for persons charged with serious crimes.

# USING AOT TO DIVERT MISDEMEANANTS FROM THE FORENSIC SYSTEM



- ▶ Led by the State Court Administrative Office a coalition that included the prosecutors association, community mental health, NAMI, Disability Rights Michigan and others have proposed legislation to use AOT to divert misdemeanants from the criminal justice system.

# USING AOT TO DIVERT MISDEMEANANTS FROM THE FORENSIC SYSTEM



- ▶ First, a defendant would be evaluated by a qualified mental health professional to determine if the individual met the criteria for AOT.
- ▶ If so, the court would enter an order for AOT for 180 days if there was no objection by the defendant or the prosecutor
- ▶ Further proceedings would be through the civil justice system

# USING AOT TO DIVERT MISDEMEANANTS FROM THE FORENSIC SYSTEM



- ▶ The criminal charges would be automatically dismissed after 90 or 180 days depending on the seriousness of the charge and the need to maintain bond conditions.
- ▶ The AOT could not be terminated without a hearing



# USING AOT TO DIVERT MISDEMEANANTS FROM THE FORENSIC SYSTEM



- ▶ Legislation to implement this concept is currently being drafted by the Legislative Services Bureau
- ▶ Implementation should lead to treatment aimed at recovery, not competency to stand trial, which should lead to reduced recidivism

# WHERE TO START?

- ▶ Convene the stakeholders
- ▶ Identify the familiar faces
- ▶ A relatively small number consume huge resources and time
- ▶ Focusing on these individuals presents the greatest opportunity to improve lives and relieve pressure on our ERs and law enforcement
- ▶ Successful intervention will free up resources for more people



# WHERE CAN THIS TAKE US?

- ▶ We can stop the endless cycling of individuals through the ERs and jails by working together and using the tools we now have to improve people's lives. We can intervene before it is too late. We now have a clear path to use assisted outpatient treatment.



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