

Dealing with the Criminal Justice System

When persons with mental illness or their families are confronted with the criminal justice system, the pressure and intimidation can be overwhelming. This fact sheet offers some basic, helpful pointers. More detail can be found in the NAMI publication, *A Guide to Mental Illness and the Criminal Justice System*. This may be ordered online through the NAMI Store, or by calling the NAMI HelpLine to request a current Resource Catalog.

What should you know first about criminal law?

In criminal law, the outcome of a case depends as much on the facts of the case and the procedures followed in developing that case as it does on the actual substantive law. Individuals involved in criminal cases will be most affected by the procedural steps governing these cases from the time of arrest to the end of the case. It is, therefore, essential to have a good criminal lawyer to direct you through any encounter with the criminal justice system.

What is the difference between a misdemeanor and a felony?

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. Generally, crimes that are punishable by incarceration of one year or less are misdemeanors, and crimes punishable by incarceration of more than one year are felonies. Beyond the maximum period of incarceration, whether a crime is a felony or a misdemeanor is significant because it will have a bearing on criminal procedures and constitutional rights.

When does an arrest take place?

An arrest occurs when the police take a person into custody in order to charge that person with a crime. To make a lawful arrest, a police officer must believe that the person to be arrested committed 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 police.

What is booking?

Booking is the process of fingerprinting and photographing a person who has been arrested. 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 could 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.

What should the family do during the interrogation?

Family members should try to prevent the police from questioning a family member with mental illness 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 right to remain silent, etc.) The police must immediately stop questioning anyone who asks for a lawyer.

How do you find a lawyer?

Competent criminal lawyers are almost always available, even if your budget is limited. The first place to seek a lawyer if you cannot afford to pay a full fee for a private lawyer is through public defender services, court-appointed attorneys, local criminal defense lawyers' associations, or local bar associations.

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.

What are your constitutional rights?

- The Fourth Amendment guarantees the right against unreasonable searches and seizures. Usually a warrant is required. The exclusionary rule prevents the prosecution from placing into evidence any evidence that was obtained unreasonably.
- The Fifth Amendment guarantees the right against self-incrimination, which is the well-known right to remain silent.
- The Sixth Amendment guarantees the 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 life. The Sixth Amendment also guarantees the right to a public trial and a jury trial. The right to confront witnesses, a compulsory process for obtaining witnesses, and the right to assistance of counsel are also protected by this amendment.
- The Eighth Amendment protects people from cruel and unusual punishment. In addition, it protects the right to treatment for acute medical problems, including psychiatric problems.

Who decides to file charges?

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

What is jail diversion?

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. This treatment is generally provided in the community. In exchange for participating in treatment, the charges are either dropped or deferred, pending satisfactory compliance with treatment. Jail diversion must be distinguished from probation and a suspended sentence (which are similar), which entail a conviction being entered onto the defendant's criminal record, either by guilty plea or by a verdict.

Can a person stand trial if he or she is viewed as incompetent?

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

If a person is found competent to stand trial, can he or she invoke the insanity defense?

Yes. A determination of competency does not prevent a defendant from raising the insanity defense.