

DIVERSION *NOT* INCARCERATION

Recommendations to Reduce Incarceration
of Black, Indigenous and People of Color
with Mental Health Challenges



People with mental health challenges are better served in the community than jail.

People with mental health challenges are better served in the community than jail.¹ Nevertheless, New York continues to incarcerate thousands of people with mental health challenges. With appropriate preventions and interventions, New York can reduce the number of people incarcerated who have mental health conditions, particularly Black, Indigenous and people of color (BIPOC) and other marginalized communities, who are disproportionately impacted by the criminal legal system.

During the first year of the COVID-19 pandemic, New York City's (NYC) overall jail population dropped dramatically, in response to targeted efforts to release people from jail to decrease the spread of COVID-19, reaching a record low of less than 4,000 (64% decrease since 2014).^{2,3} Despite these record-level reductions in the jail population, people with mental health conditions still remain disproportionately incarcerated. In fact, since 2020, there has been a 20% increase of people with serious mental health concerns in city jails.^{4,5}

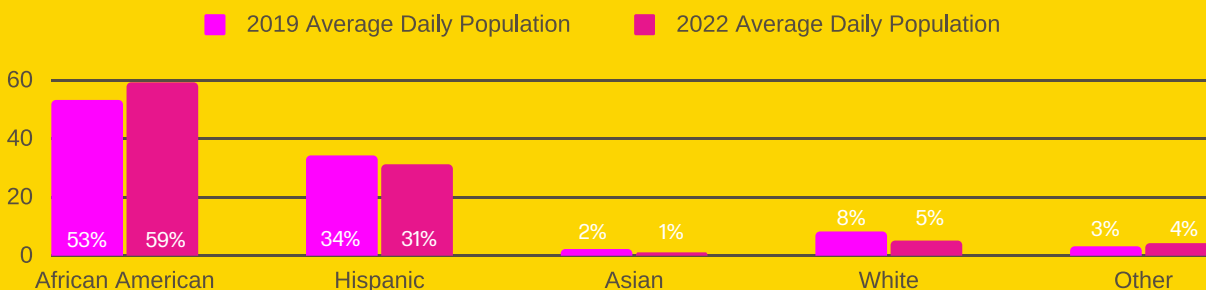
City jails are *not* designed to provide quality health care. Yet, today, almost 3,000 (51%) people are relegated to receive their *mental health treatment in city jails.* ^{6,7}

About a third of those receiving mental health treatment in NYC jails are diagnosed with a “serious mental illness” (SMI). ⁷ A 2015 study found that **people who most frequently cycled through city jails were diagnosed with a SMI and nearly all (99%) had an alcohol or substance use disorder.** ⁸ In 2022, 19 people died while incarcerated in NYC jails, and suicide was the leading cause of death followed by suspected overdose. Most of the people who died of suicide had a known serious mental health concern, and two died while in one of Rikers specialized mental health units. ¹⁰ Moreover, the conditions at Rikers have only gotten more violent. Even with oversight from a federal monitor, NYC Department of Correction’s rate of use of force incidents with serious injury has drastically increased over the last few years, with a record spike at the end of 2022. ¹¹

BIPOC and other marginalized communities continue to be disproportionately incarcerated. More than half (58.8%) of the people incarcerated in city jails are Black. ¹² Moreover, while the total jail population decreased, the proportion of Black people incarcerated increased. ¹³ From the first quarter of 2019 to the last quarter of 2022, the proportion of Black people increased by 10.5% compared to a 9.4% decrease for the Latinx, and 31.6% decrease for the white jail population. ¹⁴ Additionally, the number of people identifying as Transgender, Intersex or Non-binary incarcerated in NYC jails almost tripled between 2019 and 2022. ¹⁵ **Black and Latinx communities disproportionately experience chronically insufficient health care and often worsening health outcomes after incarceration.** ^{16,17} High rates of incarceration only further exacerbate harm and decrease access to care for people struggling with mental health conditions, and perpetuate cycles of instability, disrupt social networks, and increase overall poor health outcomes. ¹⁸

RACIAL BREAKDOWN OF NYC JAIL POPULATION

While the proportion of white, Latinx, and Asian people incarcerated decreased, between 2019 and 2022, the proportion of Black people incarcerated increased.

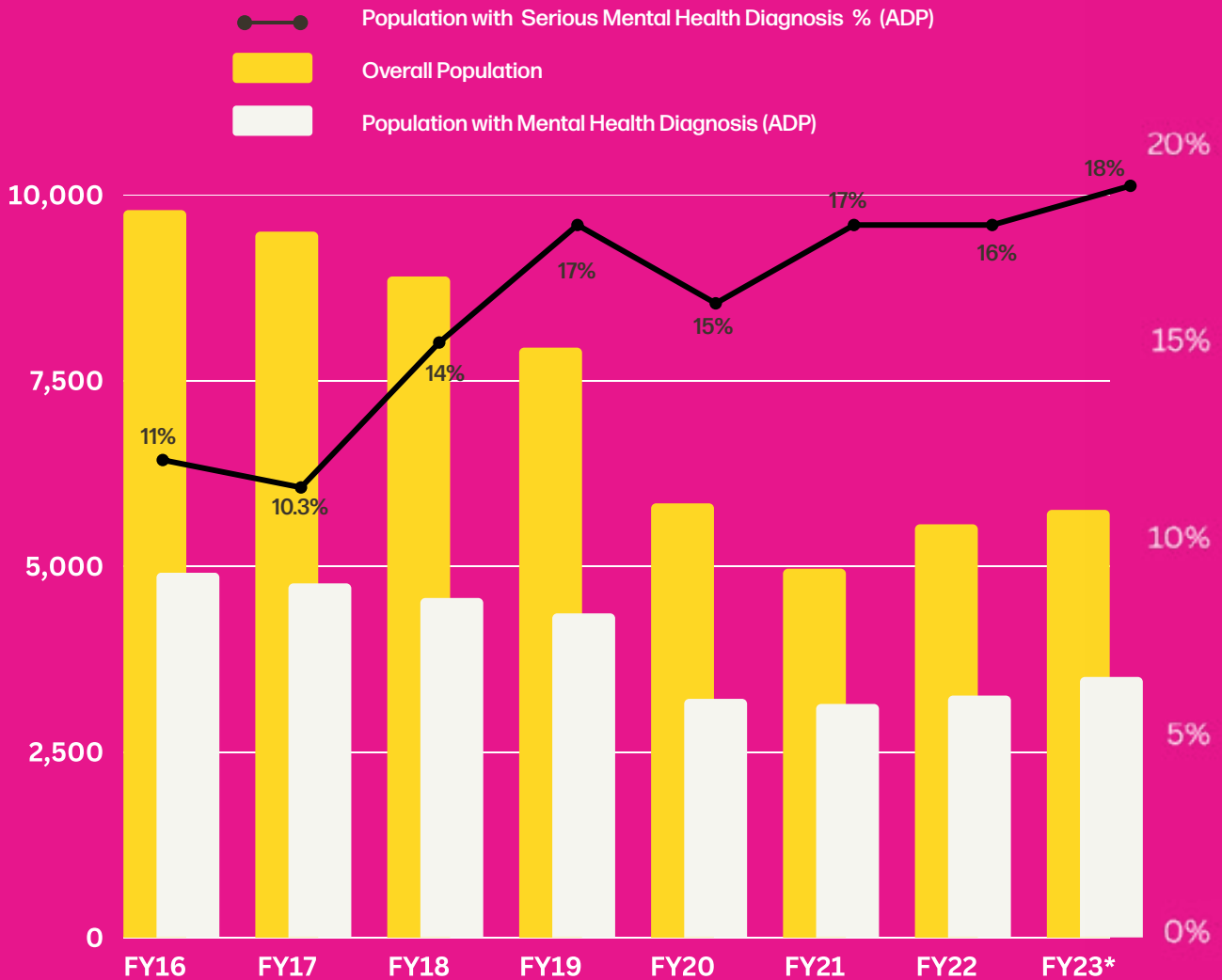


Source: NYC Department of Correction, Population Demographics Reports, FY19 Q3 and FY23 Q2.

Currently little demographic data (race, ethnicity, gender, citizenship status, LGBTIA status, etc.) are publicly available on people with a SMI diagnosis in NYC jails. However, what is well-known is that people with marginalized, intersecting identities often face significant barriers to quality mental health care—and this is especially true for those in jail.¹⁹

Despite these racial inequities being well documented, cities and states across the country, including New York, continue to revert to an overreliance on the criminal legal system to address complex social problems. Research consistently shows that incarceration has little effect on crime, especially violent crime rates.²⁰ Evidence overwhelmingly points back to supporting the growth of community diversion opportunities, particularly for BIPOC who have mental health conditions.

MENTAL HEALTH AND THE NYC JAIL POPULATION



Source: Mayor's Management Report, Sept. 2020 and Preliminary Mayor's Management Report, Jan. 2023

WHAT IS *DIVERSION*?

Frequent criminal involvement is often due to a culmination of unmet needs—such as substance use disorder, homelessness, and health conditions—which is why early diversion or removal of an individual from the criminal legal system is best to disrupt the cycle of multiple arrests and time in jail.²¹

Diversion is a strategy for moving people away from the criminal legal system and providing support to address underlying needs.²² Diversion can occur before the first point of contact with law enforcement or at any other point along the criminal legal system continuum, including court disposition to incarceration all the way through to reentry and community supervision.

For example, alternatives to incarceration (ATIs) are programs that aim to divert people who are eligible for treatment and/or social service programming away from the criminal legal system and into community-based programming. **Prosecutors and judges typically make the final decision to offer an individual an ATI.** Multiple studies confirm that ATI participants with felony charges were significantly less likely to be rearrested than similar people incarcerated in city jails.²³ **However, only two NYC-funded ATI program specifically serve people with serious mental health conditions, and some explicitly exclude people with more serious mental health treatment needs.²⁴**

The only pathway for diversion established by law is the Judicial Diversion Program, which was part of the 2009 Rockefeller Drug Law reform legislation.²⁵ **Eligibility for judicial diversion is restricted to people with substance use disorders charged with certain crimes related to substance use. Many people with mental health challenges are excluded from this process because either they don't have a substance use disorder or it is not their primary diagnosis, or the type of crime with which they are charged makes them ineligible.**

Another type of diversion is mental health courts. States across the country, seeking to reduce those incarcerated with mental health conditions, have increasingly invested in mental health courts. **Currently, there are over 300 mental health courts across the country,²⁶ including nine in New York City.²⁷** Rooted in the drug court model, mental health courts' aim to redirect individuals from incarceration by providing clinical services and linkages to support networks and community resources. **Unlike New York drug courts, which were created by statute, prosecutors played a key role in establishing mental health courts, and they determine whether a case can be transferred to the court and considered for community-based treatment.**

Despite the goals of early diversion to address core needs, far too often, eligibility is determined by the type of charges an individual faces, rather than whether their contact with the criminal legal system is due to a mental health condition and/or a substance use disorder. Given that BIPOC communities continue to be over-policed and under-resourced, **Black and Brown defendants are more likely to have high-level charges and longer criminal legal histories, which often makes them ineligible—effectively excluding those whom most need diversion.²⁸**

RECOMMENDATIONS TO *IMPROVE DIVERSION*



Evidence overwhelmingly points back to supporting the growth of community diversion opportunities, particularly for BIPOC who have mental health conditions.

1 *Provide Earlier, Pre-arrest Community Diversion*

Early diversion allows people to have their mental health treatment needs met and can help avoid initial and/or continual contact with law enforcement. Government officials and other leadership need to invest in local, community diversion options. Community diversion programs include responses along the criminal legal system continuum that do not involve law enforcement. The Governor's proposed expansion of outpatient services and Certified Community Behavioral Health Clinics (CCBHCs), a community-based treatment model for mental health and substance use disorder care, is an opportunity to invest in communities to reduce involvement in the criminal legal system.²⁹ Another opportunity for early diversion is implementing a community response team. These teams, staffed by health care workers, preferably peers, respond to people in crisis, deescalate the situation, and make referrals to community-based mental health supports.³⁰ In July 2022, 988, a dedicated suicide prevention and behavioral health crisis line, launched nationwide.³¹ The 988 crisis line diverts mental health calls away from law enforcement to mental health specialists, who are best equipped to address the needs of people in crisis, thereby reducing the potential for violence, especially against BIPOC communities who are at greater risk of police violence.

2 *Expand Diversion Eligibility*

The Treatment Not Jail Act (TNJ) (S.1976A/A.1263A) would expand treatment court eligibility to include people with mental health conditions and remove criminal charge restrictions, so that the court can make an individualized determination of whether treatment is in the public interest.³² Prosecutors would no longer control entry into treatment courts. However, additional safeguards are needed to ensure that judicial discretion does not perpetuate racial disparities. An individual's previous criminal record is often a bar to diversion, and given existing racial disparities, more thoughtful consideration of past convictions is required.³³ In addition, racial bias in assessments for participation in diversion must be addressed.³⁴ For example, understanding the historical legacy of racialized assessments in forensic psychiatry may be one way to minimize racial bias.³⁵

3 *Invest in ATIs*

Additional funding must be allocated for ATIs that effectively support BIPOC with serious mental health treatment needs. Assertive Community Treatment (ACT), Forensic Assertive Community Treatment (FACT), and Intensive Mobile Treatment (IMT) teams are evidence-based interventions that integrate substance use disorder services and provide other supports to people with serious mental health challenges in their communities. FACT and IMT are designed to provide the additional supports that individuals involved in the criminal legal system need. However, access to this higher level of care is limited, especially for people who are incarcerated pretrial. The Governor's proposed increase in ACT teams is an opportunity to expand the number of FACT teams and designate some FACT teams to serve as ATI programs.³⁶ Successful diversion of people with mental health concerns requires more than providing traditional mental health treatment alone.³⁷

4 *Improve and Increase Data and Coordination Across Systems*

More racial equity research related to diversion is needed. Diversion strategies should analyze racialized outcomes to identify opportunities to close racial gaps in existing services. For example, both the court and correctional health care systems should collect and report racial data to enhance diversion efforts. The Office of Court Administration should collect racial demographic and other outcome data for all cases involving diversion. Health + Hospitals Correctional Health Services should periodically report data about the SMI population, such as the number of people eligible for supportive housing and ACT, FACT, and IMT. This information could help identify racial disparities and where to redirect funding and other resources. Finally, the criminal legal system and mental health/behavioral health systems need to be able to share data about the population and collaborate to address those needs effectively.

5 *Enhance Staff Training & Include Peers in the Diversion Workforce*

Diversion staff should receive racial equity and cultural and gender-responsive training.³⁸ Racial equity training can improve the services a diversion program offers. For example, given the importance of data collection and analysis in improving diversion strategies, staff should be trained in identifying racial disparities, integrating racial equity principles, and developing equity frameworks to inform the diversion program's outcome measures. Staff training should also include supports for social determinants of health, such as housing, income, and social supports. Training in trauma-informed care is also essential for programs serving this population.³⁹ Diversion programs should also increase employment of peers. Peers have become a growing portion of the workforce, and the NYS Office of Mental Health now allows outpatient clinics to offer individual peer support services.⁴⁰

Urban Justice Center- Mental Health Project- Our mission is to disrupt and dismantle cycles of hospitalization, homelessness, and incarceration by providing direct legal and social work services and promoting systemic change through litigation, legislation, and community education.

This brief was produced through the generous support of **Trinity Church Wall Street Philanthropies.**

Special thank you to **F.Y. Eye** for generously volunteering on the brief design.

The contents reflect the authors' views and do not represent an endorsement by any supporters.

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