Caution: The worksheets must be filed with your tax return. Keep a copy for your records.

Worksheet 1 - For Form 8582, Lines 1a, 1b, and 1c (See instructions.)

Name of activity	Current year		Prior years	Overall gain or loss	
	(a) Net income (line 1a)	(b) Net loss (line 1b)	(c) Unallowed loss (line 1c)	(d) Gain	(e) Loss
	SEE ATTACHED STATEMENT FOR WORKSHEET 1				
Total. Enter on Form 8582, lines 1a, 1b, and 1c ▶	6,727.	-1,796.			

Worksheet 2 - For Form 8582, Lines 2a and 2b (See instructions.)

Name of activity	(a) Current year deductions (line 2a)	(b) Prior year unallowed deductions (line 2b)	(c) Overall loss
Total. Enter on Form 8582, lines 2a and 2b ▶			

Worksheet 3 - For Form 8582, Lines 3a, 3b, and 3c (See instructions.)

Name of activity	Current year		Prior years	Overall gain or loss	
	(a) Net income (line 3a)	(b) Net loss (line 3b)	(c) Unallowed loss (line 3c)	(d) Gain	(e) Loss
Total. Enter on Form 8582, lines 3a, 3b, and 3c ▶					

Worksheet 4 - Use this worksheet if an amount is shown on Form 8582, line 10 or 14 (See instructions.)

Name of activity	Form or schedule and line number to be reported on (see instructions)	(a) Loss	(b) Ratio	(c) Special allowance	(d) Subtract column (c) from column (a)
Total ▶					

Worksheet 5 - Allocation of Unallowed Losses (See instructions.)

Name of activity	Form or schedule and line number to be reported on (see instructions)	(a) Loss	(b) Ratio	(c) Unallowed loss
Total ▶				

Form **8283**
(Rev. December 2014)
Department of the Treasury
Internal Revenue Service

Noncash Charitable Contributions

▶ Attach to your tax return if you claimed a total deduction of over $500 for all contributed property.
▶ Information about Form 8283 and its separate instructions is at *www.irs.gov/form8283.*

OMB. No. 1545-0908
Attachment Sequence No. **155**

Name(s) shown on your income tax return

CARLESS J. & [redacted] BOATWRIGHT

Identifying number [redacted]

Note. Figure the amount of your contribution deduction before completing this form. See your tax return instructions.

Section A. Donated Property of $5,000 or Less and Publicly Traded Securities - List in this section **only** items (or groups of similar items) for which you claimed a deduction of $5,000 or less. Also list publicly traded securities even if the deduction is more than $5,000 (see instructions).

Part I **Information on Donated Property** - If you need more space, attach a statement.

1	(a) Name and address of the donee organization	(b) If donated property is a vehicle, check the box. Also enter the vehicle identification number (unless Form 1098-C is attached)	(c) Description of donated property (For a vehicle, enter the year, make, model, and mileage. For securities, enter the company name and the number of shares.)
A	GOODWILL INDUSTRIES OF N FL 4527 L, JACKSONVILLE, FL 32205	☐	
B	LEE CONLEE HOUSE, INC. PO BOX 2558, PALATKA, FL 32178	☐	
C		☐	
D		☐	
E		☐	

Note. If the amount you claimed as a deduction for an item is $500 or less, you do not have to complete columns (e), (f), and (g).

	(d) Date of the contribution	(e) Date acquired by donor (mo., yr.)	(f) How acquired by donor	(g) Donor's cost or adjusted basis	(h) Fair market value (see instructions)	(i) Method used to determine the fair market value
A			PURCHASE		650.	THRIFT SHOP VALUE
B			PURCHASE		100.	THRIFT SHOP VALUE
C						
D						
E						

Part II **Partial Interests and Restricted Use Property** - Complete lines 2a through 2e if you gave less than an entire interest in a property listed in Part I. Complete lines 3a through 3c if conditions were placed on a contribution listed in Part I; also attach the required statement (see instructions).

2 a Enter the letter from Part I that identifies the property for which you gave less than an entire interest ▶ _____
If Part II applies to more than one property, attach a separate statement.

b Total amount claimed as a deduction for the property listed in Part I: (1) For this tax year ▶ _____
(2) For any prior tax years ▶ _____

c Name and address of each organization to which any such contribution was made in a prior year (complete only if different from the donee organization above):
Name of charitable organization (donee)

Address (number, street, and room or suite no.)

City or town, state, and ZIP code

d For tangible property, enter the place where the property is located or kept ▶ _____

e Name of any person, other than the donee organization, having actual possession of the property ▶ _____

		Yes	No
3 a	Is there a restriction, either temporary or permanent, on the donee's right to use or dispose of the donated property?		
b	Did you give to anyone (other than the donee organization or another organization participating with the donee organization in cooperative fundraising) the right to the income from the donated property or to the possession of the property, including the right to vote donated securities, to acquire the property by purchase or otherwise, or to designate the person having such income, possession, or right to acquire?		
c	Is there a restriction limiting the donated property for a particular use?		

Form **8867**

Department of the Treasury
Internal Revenue Service

Paid Preparer's Due Diligence Checklist

Earned Income Credit (EIC), American Opportunity Tax Credit (AOTC), Child Tax Credit (CTC), and Additional Child Tax Credit (ACTC)

▶ **To be completed by preparer and filed with Form 1040, 1040A, 1040EZ, 1040NR, 1040SS, or 1040PR.**

▶ **Go to www.irs.gov/Form8867 for instructions and the latest information.**

OMB No. 1545-1629

2017

Attachment Sequence No. **70**

Taxpayer name(s) shown on return
CARLESS J. & [redacted] BOATWRIGHT

Taxpayer identification number [redacted]

Enter preparer's name and PTIN

JOHN D. ROWE, CPA P00099553

Part I **Due Diligence Requirements**

Please check the appropriate box for the credit(s) claimed on this return and complete the related Parts I-IV for the credit(s) claimed (check all that apply).	EIC ☐	CTC/ACTC ☒	AOTC ☐
1 Did you complete the return based on information for tax year 2017 provided by the taxpayer or reasonably obtained by you?		☒ Yes ☐ No	
2 Did you complete the applicable EIC and/or CTC/ACTC worksheets found in the Form 1040, 1040A, 1040EZ, 1040SS, 1040PR, or 1040NR Instructions, and/or the AOTC worksheet found in the Form 8863 Instructions, or your own worksheet(s) that provides the same information, and all related forms and schedules for each credit claimed?		☒ Yes ☐ No	
3 Did you satisfy the knowledge requirement? To meet the knowledge requirement, you must do both of the following: • Interview the taxpayer, ask questions, and document the taxpayer's responses to determine that the taxpayer is eligible to claim the credit(s) • Review information to determine that the taxpayer is eligible to claim the credit(s) and for what amount		☒ Yes ☐ No	
4 Did any information provided by the taxpayer, a third party, or reasonably known to you, in connection with preparing the return, appear to be incorrect, incomplete, or inconsistent? (If "Yes," answer questions 4a and 4b. If "No," go to question 5.)		☐ Yes ☒ No	
a Did you make reasonable inquiries to determine the correct, complete, and consistent information?		☐ Yes ☐ No	
b Did you document your inquiries? (Documentation should include the questions you asked, whom you asked, when you asked, the information that was provided, and the impact the information had on your preparation of the return.)		☐ Yes ☐ No	
5 Did you satisfy the record retention requirement? To meet the record retention requirement, you must keep a copy of your documentation referenced in 4b, a copy of this Form 8867, a copy of applicable worksheets, a record of how, when, and from whom the information used to prepare Form 8867 and worksheet(s) was obtained, and a copy of any document(s) provided by the taxpayer that you relied on to determine eligibility or to compute the amount for the credit(s) List those documents, if any, that you relied on.		☒ Yes ☐ No	
6 Did you ask the taxpayer whether he/she could provide documentation to substantiate eligibility for and the amount of the credit(s) claimed on the return if his/her return is selected for audit?		☒ Yes ☐ No	
7 Did you ask the taxpayer if any of these credits were disallowed or reduced in a previous year? (If credits were disallowed or reduced, go to question 7a; if not, go to question 8.)		☒ Yes ☐ No	
a Did you complete the required recertification Form 8862?		☐ Yes ☐ No ☐ N/A	
8 If the taxpayer is reporting self-employment income, did you ask questions to prepare a complete and correct Form 1040, Schedule C?		☐ Yes ☐ No ☒ N/A	

LHA **For Paperwork Reduction Act Notice, see separate instructions.**

Form **8867** (2017)

720501 12-12-17

Part II **Due Diligence Questions for Returns Claiming EIC** (If the return does not claim EIC, go to Part III.)

	EIC	CTC/ACTC	AOTC
9a Have you determined that this taxpayer is, in fact, eligible to claim the EIC for the number of children for whom the EIC is claimed, or to claim EIC if the taxpayer has no qualifying child? (Skip 9b and 9c if the taxpayer is claiming EIC and does not have a qualifying child.)	☐ Yes ☐ No		
b Did you explain to the taxpayer that he/she may not claim the EIC if the taxpayer has not lived with the child for over half the year, even if the taxpayer has supported the child?	☐ Yes ☐ No		
c Did you explain to the taxpayer the rules about claiming the EIC when a child is the qualifying child of more than one person (tie-breaker rules)?	☐ Yes ☐ No ☐ N/A		

Part III **Due Diligence Questions for Returns Claiming CTC and/or ACTC** (If the return does not claim CTC or ACTC, go to Part IV.)

10a Did all children for whom the taxpayer is claiming the CTC/ACTC reside with the taxpayer? (If "Yes," go to question 10c; if "No," go to question 10b.)		☒ Yes ☐ No	
b Did you ask if there is an active Form 8332, Release/Revocation of Claim to Exemption for Child by Custodial Parent, or a similar statement in place and, if applicable, did you attach it to the return?		☐ Yes ☐ No ☐ N/A	
c Have you determined that the taxpayer has not released the claim to another person?		☒ Yes ☐ No ☐ N/A	

Part IV **Due Diligence Questions for Returns Claiming AOTC** (If the return does not claim AOTC, go to Part V.)

11 Did the taxpayer provide substantiation such as a Form 1098-T and/or receipts for the qualified tuition and related expenses for the claimed AOTC?			☐ Yes ☐ No

Part V **Credit Eligibility Certification**

▶ **You have complied with all due diligence requirements with respect to the credits claimed on the return of the taxpayer identified above if you:**

A. Interview the taxpayer, ask adequate questions, document the taxpayer's responses on the return or in your notes, review adequate information to determine if the taxpayer is eligible to claim the credit(s) and in what amount(s);

B. Complete this Form 8867 truthfully and accurately and complete the actions described in this checklist for all credits claimed;

C. Submit Form 8867 in the manner required; **and**

D. Keep all five of the following records for 3 years from the latest of the dates specified in the Form 8867 instructions under *Document Retention.*

1. A copy of Form 8867,
2. The applicable worksheet(s) or your own worksheet(s) for any credits claimed,
3. Copies of any taxpayer documents you may have relied upon to determine eligibility for and the amount of the credit(s),
4. A record of how, when, and from whom the information used to prepare this form and worksheet(s) was obtained, and
5. A record of any additional questions you may have asked to determine eligibility for and amount of the credits, and the taxpayer's answers.

▶ **If you have not complied with all due diligence requirements for all credits claimed, you may have to pay a $510 penalty for each credit for which you have failed to comply.**

12 Do you certify that all of the answers on this Form 8867 are, to the best of your knowledge, true, correct, and complete?	☒ Yes	☐ No

Form **4562**

Department of the Treasury
Internal Revenue Service (99)

Depreciation and Amortization
(Including Information on Listed Property)

▶ Attach to your tax return. SCHEDULE E- 1

▶ Go to www.irs.gov/Form4562 for instructions and the latest information.

OMB No. 1545-0172

2017

Attachment Sequence No. **179**

Name(s) shown on return

Business or activity to which this form relates

RENTAL PROPERTY - [redacted]

Identifying number

CARLESS J. & [redacted] BOATWRIGHT

Part I Election To Expense Certain Property Under Section 179 **Note:** If you have any listed property, complete Part V before you complete Part I.

1	Maximum amount (see instructions)	1	
2	Total cost of section 179 property placed in service (see instructions)	2	
3	Threshold cost of section 179 property before reduction in limitation	3	
4	Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter -0-	4	
5	Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter -0-. If married filing separately, see instructions	5	

6 (a) Description of property	(b) Cost (business use only)	(c) Elected cost

7	Listed property. Enter the amount from line 29	7	
8	Total elected cost of section 179 property. Add amounts in column (c), lines 6 and 7	8	
9	Tentative deduction. Enter the **smaller** of line 5 or line 8	9	
10	Carryover of disallowed deduction from line 13 of your 2016 Form 4562	10	
11	Business income limitation. Enter the smaller of business income (not less than zero) or line 5	11	
12	Section 179 expense deduction. Add lines 9 and 10, but don't enter more than line 11	12	
13	Carryover of disallowed deduction to 2018. Add lines 9 and 10, less line 12 ▶	13	

Note: Don't use Part II or Part III below for listed property. Instead, use Part V.

Part II Special Depreciation Allowance and Other Depreciation (Don't include listed property.)

14	Special depreciation allowance for qualified property (other than listed property) placed in service during the tax year	14	
15	Property subject to section 168(f)(1) election	15	
16	Other depreciation (including ACRS)	16	

Part III MACRS Depreciation (Don't include listed property.) (See instructions.)

Section A

17	MACRS deductions for assets placed in service in tax years beginning before 2017	17	2,863.
18	If you are electing to group any assets placed in service during the tax year into one or more general asset accounts, check here ▶ ☐		

Section B - Assets Placed in Service During 2017 Tax Year Using the General Depreciation System

	(a) Classification of property	(b) Month and year placed in service	(c) Basis for depreciation (business/investment use only - see instructions)	(d) Recovery period	(e) Convention	(f) Method	(g) Depreciation deduction
19a	3-year property						
b	5-year property						
c	7-year property						
d	10-year property						
e	15-year property						
f	20-year property						
g	25-year property			25 yrs.		S/L	
h	Residential rental property	2/17	6,906.	27.5 yrs.	MM	S/L	220.
		/		27.5 yrs.	MM	S/L	
i	Nonresidential real property	/		39 yrs.	MM	S/L	
		/			MM	S/L	

Section C - Assets Placed in Service During 2017 Tax Year Using the Alternative Depreciation System

20a	Class life					S/L	
b	12-year			12 yrs.		S/L	
c	40-year	/		40 yrs.	MM	S/L	

Part IV Summary (See instructions.)

21	Listed property. Enter amount from line 28	21	
22	**Total.** Add amounts from line 12, lines 14 through 17, lines 19 and 20 in column (g), and line 21. Enter here and on the appropriate lines of your return. Partnerships and S corporations - see instr.	22	3,083.
23	For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs	23	

Part V **Listed Property** (Include automobiles, certain other vehicles, certain aircraft, certain computers, and property used for entertainment, recreation, or amusement.)

Note: For any vehicle for which you are using the standard mileage rate or deducting lease expense, complete **only** 24a, 24b, columns (a) through (c) of Section A, all of Section B, and Section C if applicable.

Section A - Depreciation and Other Information (Caution: See the instructions for limits for passenger automobiles.)

24a Do you have evidence to support the business/investment use claimed? ☐ Yes ☐ No **24b** If "Yes," is the evidence written? ☐ Yes ☐ No

(a) Type of property (list vehicles first)	(b) Date placed in service	(c) Business/ investment use percentage	(d) Cost or other basis	(e) Basis for depreciation (business/investment use only)	(f) Recovery period	(g) Method/ Convention	(h) Depreciation deduction	(i) Elected section 179 cost
25 Special depreciation allowance for qualified listed property placed in service during the tax year and used more than 50% in a qualified business use						**25**		
26 Property used more than 50% in a qualified business use:								
		%						
		%						
		%						
27 Property used 50% or less in a qualified business use:								
		%				S/L -		
		%				S/L -		
		%				S/L -		
28 Add amounts in column (h), lines 25 through 27. Enter here and on line 21, page 1						**28**		
29 Add amounts in column (i), line 26. Enter here and on line 7, page 1						**29**		

Section B - Information on Use of Vehicles

Complete this section for vehicles used by a sole proprietor, partner, or other "more than 5% owner," or related person. If you provided vehicles to your employees, first answer the questions in Section C to see if you meet an exception to completing this section for those vehicles.

	(a) Vehicle		(b) Vehicle		(c) Vehicle		(d) Vehicle		(e) Vehicle		(f) Vehicle	
30 Total business/investment miles driven during the year (**don't** include commuting miles)												
31 Total commuting miles driven during the year												
32 Total other personal (noncommuting) miles driven												
33 Total miles driven during the year. Add lines 30 through 32												
	Yes	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**
34 Was the vehicle available for personal use during off-duty hours?												
35 Was the vehicle used primarily by a more than 5% owner or related person?												
36 Is another vehicle available for personal use?												

Section C - Questions for Employers Who Provide Vehicles for Use by Their Employees

Answer these questions to determine if you meet an exception to completing Section B for vehicles used by employees who **aren't** more than 5% owners or related persons.

	Yes	**No**
37 Do you maintain a written policy statement that prohibits all personal use of vehicles, including commuting, by your employees?		
38 Do you maintain a written policy statement that prohibits personal use of vehicles, except commuting, by your employees? See the instructions for vehicles used by corporate officers, directors, or 1% or more owners		
39 Do you treat all use of vehicles by employees as personal use?		
40 Do you provide more than five vehicles to your employees, obtain information from your employees about the use of the vehicles, and retain the information received?		
41 Do you meet the requirements concerning qualified automobile demonstration use?		

Note: If your answer to 37, 38, 39, 40, or 41 is "Yes," don't complete Section B for the covered vehicles.

Part VI **Amortization**

(a) Description of costs	(b) Date amortization begins	(c) Amortizable amount	(d) Code section	(e) Amortization period or percentage	(f) Amortization for this year
42 Amortization of costs that begins during your 2017 tax year:					
43 Amortization of costs that began before your 2017 tax year				**43**	
44 **Total.** Add amounts in column (f). See the instructions for where to report				**44**	

Form **4562**

Department of the Treasury
Internal Revenue Service (99)

Depreciation and Amortization
(Including Information on Listed Property)

▶ Attach to your tax return. SCHEDULE E- 3

▶ Go to www.irs.gov/Form4562 for instructions and the latest information.

OMB No. 1545-0172

2017

Attachment Sequence No. **179**

Name(s) shown on return

Business or activity to which this form relates

RESIDENTIAL RENTAL - [redacted]

Identifying number

CARLESS J. & [redacted] BOATWRIGHT

Part I Election To Expense Certain Property Under Section 179 **Note:** If you have any listed property, complete Part V before you complete Part I.

1	Maximum amount (see instructions)	1
2	Total cost of section 179 property placed in service (see instructions)	2
3	Threshold cost of section 179 property before reduction in limitation	3
4	Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter -0-	4
5	Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter -0-. If married filing separately, see instructions	5

6	(a) Description of property	(b) Cost (business use only)	(c) Elected cost

7	Listed property. Enter the amount from line 29	7	
8	Total elected cost of section 179 property. Add amounts in column (c), lines 6 and 7	8	
9	Tentative deduction. Enter the **smaller** of line 5 or line 8	9	
10	Carryover of disallowed deduction from line 13 of your 2016 Form 4562	10	
11	Business income limitation. Enter the smaller of business income (not less than zero) or line 5	11	
12	Section 179 expense deduction. Add lines 9 and 10, but don't enter more than line 11	12	
13	Carryover of disallowed deduction to 2018. Add lines 9 and 10, less line 12 ▶	13	

Note: Don't use Part II or Part III below for listed property. Instead, use Part V.

Part II Special Depreciation Allowance and Other Depreciation (Don't include listed property.)

14	Special depreciation allowance for qualified property (other than listed property) placed in service during the tax year	14	
15	Property subject to section 168(f)(1) election	15	
16	Other depreciation (including ACRS)	16	

Part III MACRS Depreciation (Don't include listed property.) (See instructions.)

Section A

17	MACRS deductions for assets placed in service in tax years beginning before 2017	17	
18	If you are electing to group any assets placed in service during the tax year into one or more general asset accounts, check here ▶ ☐		

Section B - Assets Placed in Service During 2017 Tax Year Using the General Depreciation System

	(a) Classification of property	(b) Month and year placed in service	(c) Basis for depreciation (business/investment use only - see instructions)	(d) Recovery period	(e) Convention	(f) Method	(g) Depreciation deduction
19a	3-year property						
b	5-year property						
c	7-year property						
d	10-year property						
e	15-year property						
f	20-year property						
g	25-year property			25 yrs.		S/L	
h	Residential rental property	/		27.5 yrs.	MM	S/L	
		/	STATEMENT 5	27.5 yrs.	MM	S/L	1,286.
i	Nonresidential real property	/		39 yrs.	MM	S/L	
		/			MM	S/L	

Section C - Assets Placed in Service During 2017 Tax Year Using the Alternative Depreciation System

20a	Class life					S/L	
b	12-year			12 yrs.		S/L	
c	40-year	/		40 yrs.	MM	S/L	

Part IV Summary (See instructions.)

21	Listed property. Enter amount from line 28	21	
22	**Total.** Add amounts from line 12, lines 14 through 17, lines 19 and 20 in column (g), and line 21. Enter here and on the appropriate lines of your return. Partnerships and S corporations - see instr.	22	1,286.
23	For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs	23	

Part V **Listed Property** (Include automobiles, certain other vehicles, certain aircraft, certain computers, and property used for entertainment, recreation, or amusement.)

Note: For any vehicle for which you are using the standard mileage rate or deducting lease expense, complete **only** 24a, 24b, columns (a) through (c) of Section A, all of Section B, and Section C if applicable.

Section A - Depreciation and Other Information (Caution: See the instructions for limits for passenger automobiles.)

24a Do you have evidence to support the business/investment use claimed? ☐ Yes ☐ No **24b** If "Yes," is the evidence written? ☐ Yes ☐ No

(a) Type of property (list vehicles first)	(b) Date placed in service	(c) Business/ investment use percentage	(d) Cost or other basis	(e) Basis for depreciation (business/investment use only)	(f) Recovery period	(g) Method/ Convention	(h) Depreciation deduction	(i) Elected section 179 cost
25 Special depreciation allowance for qualified listed property placed in service during the tax year and used more than 50% in a qualified business use						**25**		
26 Property used more than 50% in a qualified business use:								
		%						
		%						
		%						
27 Property used 50% or less in a qualified business use:								
		%				S/L -		
		%				S/L -		
		%				S/L -		
28 Add amounts in column (h), lines 25 through 27. Enter here and on line 21, page 1						**28**		
29 Add amounts in column (i), line 26. Enter here and on line 7, page 1							**29**	

Section B - Information on Use of Vehicles

Complete this section for vehicles used by a sole proprietor, partner, or other "more than 5% owner," or related person. If you provided vehicles to your employees, first answer the questions in Section C to see if you meet an exception to completing this section for those vehicles.

	(a) Vehicle		(b) Vehicle		(c) Vehicle		(d) Vehicle		(e) Vehicle		(f) Vehicle	
30 Total business/investment miles driven during the year (**don't** include commuting miles)												
31 Total commuting miles driven during the year												
32 Total other personal (noncommuting) miles driven												
33 Total miles driven during the year. Add lines 30 through 32												
	Yes	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**
34 Was the vehicle available for personal use during off-duty hours?												
35 Was the vehicle used primarily by a more than 5% owner or related person?												
36 Is another vehicle available for personal use?												

Section C - Questions for Employers Who Provide Vehicles for Use by Their Employees

Answer these questions to determine if you meet an exception to completing Section B for vehicles used by employees who **aren't** more than 5% owners or related persons.

	Yes	**No**
37 Do you maintain a written policy statement that prohibits all personal use of vehicles, including commuting, by your employees?		
38 Do you maintain a written policy statement that prohibits personal use of vehicles, except commuting, by your employees? See the instructions for vehicles used by corporate officers, directors, or 1% or more owners		
39 Do you treat all use of vehicles by employees as personal use?		
40 Do you provide more than five vehicles to your employees, obtain information from your employees about the use of the vehicles, and retain the information received?		
41 Do you meet the requirements concerning qualified automobile demonstration use?		

Note: If your answer to 37, 38, 39, 40, or 41 is "Yes," don't complete Section B for the covered vehicles.

Part VI **Amortization**

(a) Description of costs	(b) Date amortization begins	(c) Amortizable amount	(d) Code section	(e) Amortization period or percentage	(f) Amortization for this year
42 Amortization of costs that begins during your 2017 tax year:					
43 Amortization of costs that began before your 2017 tax year				**43**	
44 **Total.** Add amounts in column (f). See the instructions for where to report				**44**	

CARLESS J. & [redacted] BOATWRIGHT [redacted]

SCHEDULE A — MORTGAGE INTEREST AND POINTS REPORTED ON FORM 1098 — STATEMENT 1

DESCRIPTION	AMOUNT
WELLS FARGO BANK N A, PO BOX 14411, DES MOINES, IA 50306-3411	8,681.
TOTAL TO SCHEDULE A, LINE 10	8,681.

SCHEDULE A — REAL ESTATE TAXES — STATEMENT 2

DESCRIPTION	AMOUNT
[redacted]	238.
WELLS FARGO BANK N A	1,615.
TOTAL TO SCHEDULE A, LINE 6	1,853.

FORM 8582 — ACTIVE RENTAL OF REAL ESTATE - WORKSHEET 1 — STATEMENT 3

NAME OF ACTIVITY	CURRENT YEAR NET INCOME	CURRENT YEAR NET LOSS	PRIOR YEAR UNALLOWED LOSS	OVERALL GAIN OR LOSS GAIN	OVERALL GAIN OR LOSS LOSS
RENTAL PROPERTY - [redacted]	0.	-1,796.			-1,796.
RESIDENTIAL RENTAL - [redacted]	3,909.	0.		3,909.	
RESIDENTIAL RENTAL - [redacted]	2,818.	0.		2,818.	
TOTALS	6,727.	-1,796.		6,727.	-1,796.

STATEMENT(S) 1, 2, 3

FORM 8582 SUMMARY OF PASSIVE ACTIVITIES STATEMENT 4

R R E A	NAME	FORM OR SCHEDULE	GAIN/LOSS	PRIOR YEAR C/O	NET GAIN/LOSS	UNALLOWED LOSS	ALLOWED LOSS
X	RENTAL PROPERTY - [redacted]	SCH E	-1,796.		-1,796.		1,796.
X	RESIDENTIAL RENTAL - [redacted]	SCH E	3,909.		3,909.		
X	RESIDENTIAL RENTAL - [redacted]	SCH E	2,818.		2,818.		
	TOTALS		4,931.		4,931.		1,796.

PRIOR YEAR CARRYOVERS ALLOWED DUE TO CURRENT YEAR NET ACTIVITY INCOME

TOTAL 1,796.

CARLESS J. & [redacted] BOATWRIGHT [redacted]

FORM 4562 PART III - RESIDENTIAL RENTAL PROPERTY STATEMENT 5

(A) DESCRIPTION OF PROPERTY	(B) MO/YR	(C) BASIS	(G) DEDUCTION
HOUSE	1/17	15,528.	541.
ROOF	2/17	3,868.	123.
RENOVATION	3/17	21,592.	622.
TOTAL TO FORM 4562, PART III, LINE 19H		40,988.	1,286.

WRITING SAMPLES

Georgetown Law
American Criminal Law Review

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SOLVING THE PROBLEM OF CRIMINALIZING THE MENTALLY ILL: THE MIAMI MODEL

C. Joseph Boatwright II*

INTRODUCTION

It does not seem plausible that a Harvard educated psychiatrist and the former head of psychiatry at Jackson Memorial hospital in Miami-Dade County would be homeless and continually cycling through the criminal justice system. However, this was exactly the situation that faced Judge Steven Leifman, a county court judge in Miami-Dade County, Florida in 2000.[1] Early in his career, Judge Leifman met with parents who asked if he could help their son who was scheduled to appear before Judge Leifman in court that day.[2] They explained that their son was a Harvard educated psychiatrist and the former head of psychiatry at Jackson Memorial hospital in Miami-Dade County.[3] Further, they explained that he was suffering from late onset schizophrenia, was homeless, and had been arrested numerous times on minor offenses.[4] As a result, he had been in and out of the county jail system for years.[5] Although Judge Leifman had not previously dealt with a similar situation, he assured the parents that he would help their son.[6]

The accused man had been arrested on a second degree misdemeanor for stealing a shopping cart.[7] As Judge Leifman began to speak to him,

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[1] Ines Novacic, CBS News, *Treatment or Lockup? Criminal Justice System Grapples With Mentally ILL* (July 21, 2015 , 5:36 AM), http://www.cbsnews.com/news/treatment-or-lockup-criminal-justice-system-grapples-with-mentally-ill/. *See* Judge Steven Leifman, Keynote Speaker, 2013 meeting of the International Association of Forensic Mental Health Services in Masstricht, Netherlands, https://www.youtube.com/watch?v=ky8byo3PTyA.

[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

the accused man had a psychotic episode in the courtroom.[8] This caused Judge Leifman to order a mental competency examination for him.[9] After the examination, it was determined that he was "incompetent to proceed" in court due to his mental illness and should be involuntarily committed to a facility where he could receive mental health treatment and be restored to competency.[10] However, Florida law, like the laws of many other states and jurisdictions, did not allow for the involuntary commitment of defendants in misdemeanor cases.[11] As a result, he was released from jail without receiving mental health treatment, only to repeat the cycle of being arrested again and going through the same process without any treatment.[12]

Judge Leifman's experience is not uncommon for those in the criminal justice system. It is generally and most commonly described as the "criminalization of mental illness." The criminalization of mental illness is the process of directing those with mental illnesses, who usually commit minor offenses, through the criminal justice system and then treating their mental illnesses in our jails and prisons.[13] The criminalization of mental illness has become a significant problem in the United States. According to current statistics from the National Sheriff's Association, Treatment Advocacy Center, and the Department of Justice, there are nearly ten times as many people with mental illnesses in jails and prisons in the United States as there are in all state psychiatric hospitals combined.[14] Nearly 20 percent of all jail detainees experience a severe mental illness (SMI).[15] There are nearly 1.5 million individuals with severe mental illnesses that are arrested annually.[16] On any given day there are 360,000 people with severe mental illnesses in jails and prisons throughout the country and over 760,000 people with severe mental illnesses are on community control or probation.[17] People with mental illnesses are on probation or parole two to four times that of the

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[8] Id.
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Risdon N. Slate, Jacqueline K. Buffington-Vollum and W. Wesley Johnson, *The Criminalization of Mental Illness*, Carolina Academic Press at pg. 43 (2d ed. 2013).
[14] The statistics mentioned most likely include all individuals whether they have committed minor or major offenses. E. Fuller Torrey, et. al. *The Treatment of Persons With Mental Illness In Prisons and Jails: A State Survey*, National Sheriff's Association (April 8, 2014), http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.
[15] Id.
[16] Telephone interview with Judge Steven Leifman, County Court Judge for Miami-Dade County, Fl (October 19, 2017).
[17] Id.

general population on community control or probation.[18] People with mental illnesses remain incarcerated four to eight times longer than people without mental illnesses for the exact same charge and at seven times the cost.[19]

When Judge Leifman initially confronted this problem, South Florida had the highest percentage of individuals suffering from mental illnesses in the nation in its population.[20] In Miami-Dade County, nine percent of the total population suffered from mental illnesses, which is two to three times the national average.[21] At this same time, in the Dade County Jail there were up to 1200 inmates suffering from mental illnesses that occupied three floors of the jail.[22] In contrast, in 1985 there were only 450 inmates suffering from mental illnesses in the county jail. [23] Of the 100,000 bookings in the county jail, 20,000 were for individuals suffering from mental illnesses.[24] Therefore, the Dade County jail served as the largest psychiatric institution in Florida.[25]

During this same time period, Miami-Dade County spent millions of dollars yearly on its mental health crisis. Miami-Dade County spent over one million dollars a year on psychotropic medications.[26] In addition, they spent $18 per day to house inmates at its jail.[27] The cost for housing inmates suffering from a mental illness was $125 per day.[28] The total

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[18] Jillian Peterson, American Psychological Association, *Mental Illness Not Usually Linked To Crime, Research Finds* (April 21, 2014) http://www.apa.org/news/press/releases/2014/04/mental-illness-crime.aspx.

[19] Miami-Dade County, Office of the Mayor, *Mental Health Task Force Final Report* at pg. 16 (February 14, 2007).

[20] *Final Report of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn (Spring Term 2004).

[21] John K. Iglehart, *Decriminalizing Mental Illness-The Miami Model*, New England Journal of Medicine, N Engl J Med 2016; 374:1701-1703 (May 5, 2016) http://www.nejm.org/doi/full/10.1056/NEJMp1602959#t=article.

[22] *Final Report Of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn (Spring Term 2004).

[23] *Mentally Ill Criminals in Dade County, Florida: A Report On The Problem And How To Deal With It, Citizens' Crime Commission Report Program* at pg. 17, 41 and 51 (March, 1985). http://passthrough.fw-notify.net/download/563748/http://dcjhistory.com/uploads/1985_Mentally_Ill_Criminals_in_Dade_Cty.pdf

[24] *Final Report of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn (Spring Term 2004).

[25] Id. *See* also *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).

[26] *Final Report of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn (Spring Term 2004).

[27] Id.

[28] Id.

cost to house those suffering from mental illnesses was $250,000 a day and $90 million annually.[29]

Judge Leifman recognized the significance of the criminalization of mental illness first hand due to his experiences as a judge in the criminal justice system. He considered it a crisis situation.[30] This led him to help develop, with other community leaders, the 11th Judicial Circuit Criminal Mental Health Project (CMHP) in 2000. Now, more than 15 years later, the CMHP is referred to as the Miami Model.[31] The CMHP or Miami Model is a mental health diversion program that consists of a number of distinct parts that have helped eliminate the criminalization of mental illness in Miami-Dade County.[32] The success of the CMHP has been nationally recognized through the numerous awards it has received and the CMHP has become a national model of excellence in dealing with mental illness in the criminal justice system.[33]

This article, which is divided into seven parts, seeks to examine the success of the Miami Model or the CMHP. Part I describes the history of deinstitutionalization, which has contributed to the criminalization of mental illness. Part II describes the concept and problems associated with the criminalization of mental illness. Part III discusses the problems Miami-Dade County faces in its mental health crisis, the institution of the CMHP, and documents the success of the CMHP. Part IV describes the experiences of other jurisdictions throughout the United States that have implemented programs patterned after or adopted keys parts of the CMHP. Part V describes the weaknesses of programs like the CMHP including the need for more legislation and funding to assist courts and communities in combating the criminalization of mental illness. Part VI discusses the success of judicial and community intervention in dealing with mental health issues in the criminal justice system. Finally, this article concludes, finding that the CMHP has been successful and is a model to follow for other jurisdictions in their struggles against the criminalization of mental illness.

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[29] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).

[30] Ines Novacic, CBS News, *Treatment or Lockup? Criminal Justice System Grapples With Mentally ILL* (July 21, 2015 , 5:36 AM), http://www.cbsnews.com/news/treatment-or-lockup-criminal-justice-system-grapples-with-mentally-ill/. *See* Judge Steven Leifman, Keynote Speaker, 2013 meeting of the International Association of Forensic Mental Health Services in Maastricht, Netherlands, https://www.youtube.com/watch?v=ky8byo3PTyA.

[31] John K. Iglehart, *Decriminalizing Mental Illness-The Miami Model*, New England Journal of Medicine, N Engl. J Med 2016; 374:1701-1703 (May 5, 2016) http://www.nejm.org/doi/full/10.1056/NEJMp1602959#t=article.

[32] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).

[33] Id.

I. DEINSTITUTIONALIZATION: A HISTORICAL PERSPECTIVE

The criminalization of mental illness is not a recent concept. In the early years of our country, jails and prisons were commonly used to house people suffering from mental illnesses because there were no psychiatric hospitals in existence at that time.[34] It is estimated that 20 percent of the jail population during this time period included those suffering from severe mental illnesses.[35] In the early 1800s, Reverend Louis Dwight, a Yale graduate and Congregationalist minister, while delivering bibles to local jails in Massachusetts, noticed how poorly people suffering from mental illnesses were being treated in these jails.[36] As a result, he lobbied the State of Massachusetts for better treatment of the mentally ill.[37] This led to the creation of the first publicly funded psychiatric hospital, which was opened in Massachusetts in 1833.[38]

The most notable activist in this area was Dorothy Dix. She also lobbied for better treatment of people suffering from mental illnesses that were being housed in jails.[39] Her advocacy led to the creation of numerous publicly funded psychiatric hospitals.[40] In fact, by 1880, there were more than seventy-five publicly funded hospitals in the United States.[41]

Efforts by activists such as Dwight and Dix led the United States government in 1880 to perform a census of people suffering from mental illnesses.[42] The census located roughly 90,000 individuals suffering from mental illnesses in the United States.[43] There were 58,609 prisoners in local jails and prisons but only 397 of those were classified as having severe mental illnesses.[44] Thus, persons with severe mental illnesses

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[34] *Mental Health: Transforming Florida's Mental Health System* at pg. 9 (Nov. 2007), http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf

[35] *More Mentally Ill Persons are in Jails and Prisons Than Hospitals: A Survey of the States* (May 2010), http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf

[36] Frontline, *Deinstitutionalization: A Psychiatric Titanic* (May, 2005), http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html

[37] Id.

[38] Id. See also *A Brief History of Mental Illness and the U.S. Mental Health Care System*, Unite for Site, http://www.uniteforsight.org/mental-health/module2

[39] Frontline, *Deinstitutionalization: A Psychiatric Titanic* (May, 2005), http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html

[40] Id. See also *A Brief History of Mental Illness and the U.S. Mental Health Care System,* Unite for Site, http://www.uniteforsight.org/mental-health/module2

[41] Id.

[42] Id.

[43] Id.

[44] Id.

made up only 0.7 percent of the prison and jail populations at that time.[45]

By 1950 there were nearly 350 publicly funded psychiatric hospitals across the United States.[46] In addition, there were nearly 560,000 mentally ill patients in the nation's psychiatric hospitals.[47] As the numbers of patients in psychiatric hospitals began to rise, the level of care began to decline.[48] Further, the cost to run the institutions was increasingly rising and these hospitals were becoming inefficient to operate.[49]

In 1955, the drug Thorazine began to be used to control the symptoms of psychosis associated with mental illness. The mental health community proposed that mental health patients could receive better treatment in their local communities with the use of Thorazin.[50] It was believed that with proper medication and humane treatment, those suffering from mental illnesses would be treated more humanely and effectively in their own community.[51] Thus, the policy of the deinstitutionalization of people with mental illnesses began.

Deinstitutionalization is the name given to the policy of moving severely mentally ill individuals out of state hospitals and back into their communities where they were to receive community based treatment.[52] The result of this would ultimately lead to the closing of all or part of the state-run institutions.[53] This idea was accepted by the federal government which led to the enactment of the Community Mental Health Centers Act in 1963.[54]

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[45] Id.

[46] *Mental Health: Transforming Florida's Mental Health System* at pg. 16 (Nov. 2007), http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf

[47] *A Brief History of Mental Illness and the U.S. Mental Health Care System*, Unite for Site, http://www.uniteforsight.org/mental-health/module2

[48] Id.

[49] Id.

[50] *Frontline, Deinstitutionalization: A Psychiatric Titanic* (May, 2005), http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html, *See Also Mental Health: Transforming Florida's Mental Health System* at pg. 16 (Nov. 2007), http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf

[51] Id.

[52] Frontline, *Deinstitutionalization: A Psychiatric Titanic* (May, 2005), http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html

[53] Id., *See Also Mental Health: Transforming Florida's Mental Health System* at pg. 16 (Nov. 2007), http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf

[54] *Transforming Florida's Mental Health System* at pg. 17 (Nov. 2007), http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf. *See also,* Community Mental Health Centers

The Community Mental Health Centers Act was intended to create a network of community-based mental health providers that would replace failing and costly state hospitals and integrate people with mental illnesses back into their home communities with comprehensive treatment and services.[55] In what would be his last public bill signing, President Kennedy signed a $3 billion authorization to support this movement from institutional to community-based treatment.[56] However, President Kennedy was assassinated, and with the distraction of the Vietnam War, none of the $ 3 billion was ever appropriated.[57]

After the passage of the act, a number of federal tort and class action lawsuits were filed against the states.[58] As the courts ruled against the state-run facilities, the judgments led to the closing of the institutions or the release of patients with mental illnesses.[59] These closings contributed to the deinstitutionalization of people with mental illnesses because there was no organized or adequate network of community mental health centers to receive the released patients.[60]

One of the landmark cases that contributed to deinstitutionalization was *Wyatt v. Stickney*.[61] In *Wyatt*, a challenge was made to the conditions and treatment provided to the patients at Bryce Hospital in Alabama.[62] The challenges were prompted when funding for mental health services was decreased state wide and about 100 employees' employment was terminated at the hospital.[63] Bryce Hospital serviced primarily patients who were involuntarily committed due to their mental illness.[64]

The court held that individuals involuntarily committed through the civil commitment process had a constitutional right to adequate and effective treatment that would allow them the opportunity to be cured or improve their mental condition.[65] In its reasoning, the court stated:

Construction Act, Mental Retardation Facilities and Construction Act, Public Law 88-164 (1963).

[55] Id.

[56] Id. It is thought that President Kennedy had a personal motivation behind signing this bill because his sister, Rosemary Kennedy, while suffering from a severe mental illness received a botched lobotomy that left her permanently mentally and physically incapacitated. *See Kennedy's Message on Mental Illness: 50 Years Later*, Cure Alliance for Mental Illness, http://curealliance.org/kennedys-message-on-mental-illness-50-years-later. (February 2013).

[57] Id.

[58] Id.

[59] Id.

[60] Id.

[61] Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

[62] Id.

[63] Id. at 783.

[64] Id.

[65] Id.

> "The patients at Bryce Hospital, for the most part, were involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions such as Bryce."[66]

As a result, the court held that even though the failure to provide adequate treatment was due to a lack of operating funds resulting in a lack of staff and facilities, this could not be used to justify not providing suitable and adequate care to people with mental illnesses.[67] According to the court, this failure to provide the adequate and suitable care was a violation of the individual's due process rights.[68]

The court gave the defendants six months to establish treatment plans and implement a compliant treatment program.[69] In doing so, the court outlined three fundamental conditions for adequate and effective treatment programs in public mental institutions. These three fundamental conditions were: (1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment, and (3) individualized treatment plans.[70] As a result, if the state could not meet these standards, then the patients were to be released.[71]

These factors of compliance became known as the "Wyatt Standards."[72] Relying on these standards, similar litigation began in numerous other states. Many states were unable to meet these

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[66] Id.
[67] Id.
[68] Id.
[69] Wyatt v. Stickney, 334 F. Supp. 134, 1343 (M.D. Ala. 1971).
[70] Id.
[71] Id.
[72] *See* https://mentalillnesspolicy.org/legal/wyatt-stickney-right-treatment.html

requirements.[73] As a result, patients with mental illnesses were rapidly released from hospitals all over the country.[74]

Several other court cases further outlined the legal requirements for admission to or retention in a hospital setting and contributed to deinstitutionalization.[75] For example, the District of Columbia Court of Appeals in 1966 required hospitals to discharge patients to an environment less restrictive than a hospital if at all possible, and the burden was placed on the government to find the least restrictive means.[76] Also, in 1975, the United States Supreme Court held that a finding of "mental illness" alone cannot justify a state confining a person against his will and holding him indefinitely in simple custodial confinement[77] The Court held further that a state cannot constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends solely because he suffers from a mental illness.[78] Finally, in 1999, the Court held that a mental illness could be defined as disability, and thus, could be covered under the Americans with Disabilities Act.[79] Thereafter, all governmental agencies, not just state hospitals, would be required to make "reasonable accommodations" to move people with mental illnesses into community-based treatment to end unnecessary institutionalization. [80] However, many states and communities lacked adequate community-based treatment and this led to further deinstitutionalization.

As deinstitutionalization began, the number of patients in state mental hospitals began to decline. From 1955 until 1994, the number of patients in state hospitals fell from approximately 560,000 to 72,000 patients, which was a decrease of over 90 percent.[81] Further, in 2009, with the onset of the Great Recession, states spent less money on mental health facilities by cutting spending by nearly $4.35 billion.[82] This led to an even greater decrease in facilities for those suffering from mental illnesses. [83] As a result, in 2010, there were only 43,000 beds in

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[73] Id.
[74] Id.
[75] *See* Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, AMA Journal of Ethics Vol. 15 Number 10 (October 2013), http://journalofethics.ama-assn.org/2013/10/mhst1-1310.html
[76] Id., Lake v. Cameron, 364 F. 2d 657 (D.C. Cir. 1966).
[77] O'Connor v. Donaldson, 422 U.S. 563 (1975).
[78] Id.
[79] Olmsted v. L.C., 527 U.S. 581 (1999).
[80] Id.
[81] Id.
[82] *Timeline: Deinstitutionalization and Its Consequences*, Deanna Pan (April 2013), http://www.motherjones.com/politics/2013/04/timeline-mental-health-america.
[83] Id.

psychiatric facilities available for use in the United States.[84] This was 14 beds for every 100,000 people.[85] This was the same ratio that existed in 1850 before the work of activists Dix and Dwight.[86]

Deinstitutionalization was meant to help those suffering from mental illnesses. Individuals suffering from severe mental illnesses were supposed to be freed from the confines of state mental hospitals and receive treatment back in their communities through a community-based health system. However, because of the lack of funding for community-based health systems, the vast majority of these individuals were left with no way of being ensured that they would receive proper medication or treatment. Further, there are now very few psychiatric hospitals left in the country and even less beds in the remaining hospitals for those who suffer from mental illnesses. This has led many to call deinstitutionalization the major cause of the mental health crisis in the United States.[87]

II. The Concept of the Criminalization of Mental Illness

Deinstitutionalization contributed significantly to the criminalization of mental illness. As people with mental illnesses left the psychiatric hospitals, they were turned out into the communities at large. However, since there was inadequate funding for the community based programs, those with mental illnesses suffered from a lack of adequate treatment. As a result, many ended up in local jails and state prisons. This is likely the reason why, over the next four decades as the patients in the state psychiatric hospitals decreased by 90 percent, the prison population grew by 400 percent.[88]

The term criminalization of mental illness was coined by Dr. Marc F. Abramson as he noticed the large rise of those suffering from mental illnesses in the prison population after the start of deinstitutionalization.[89] Criminalization of mental illness is used to describe people with mental illnesses who are arrested and prosecuted, with or without jail detention, for minor offenses rather than being placed in the mental health system.[90]

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[84] Id.
[85] Id.
[86] Id.
[87] *Frontline, Deinstitutionalization: A Psychiatric Titanic* (May, 2005), http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html
[88] *Final Report of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn at pg. 5 (Spring Term 2004).
[89] Risdon N. Slate, Jacqueline K. Buffington-Vollum and W. Wesley Johnson, *The Criminalization Of Mental Illness*, Carolina Academic Press at pg. 43 (2d ed. 2013).
[90] Id., *See also* H. Richard Lamb and Linda E. Weinberger, *Persons With Severe Mental Illness in Jails and Prison: A Review*, Psychiatry Online (April 1998). http://dx.doi.org/10.1176/ps.49.4.483

Some scholars in the area include in this term individuals who commit serious offenses, but the overwhelming majority of experts in this area apply the term to minor offenses only.[91] The difference between minor offenses and serious offenses is important.[92] Those who commit serious offenses are normally directed to the criminal justice system and housed in forensic state institutions. Alternatively, those who commit minor offenses will be directed to a civil facility if there is adequate space available.[93] Due to the closing of the psychiatric hospitals and the lack of community-based programs, those who have committed minor offenses are released, only to be re-arrested for the same or similar offenses.[94] As a result, they continually cycle in and out of state and local jail facilities.[95]

According to recent Department of Justice, Bureau of Justice Statistics, there are nearly 1.2 million people with some type of reported mental illness incarcerated in jails and prisons throughout the United States.[96] Of these, people with mental illnesses are on probation or parole two to four times more often than the general probation or parole population.[97] On any given day there are 360,000 people with severe mental illnesses in jails and prisons throughout the country and over 760,000 people with severe mental illnesses are on community control or probation.[98] There are also roughly 35,000 individuals with severe mental illnesses in state psychiatric hospitals.[99] Most of these individuals are in the hospitals in response to court orders in criminal cases.[100] In fourty-four of the fifty states and the District of Columbia, a single prison or county jail in that state holds more people with severe mental

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[91] Id.
[92] Id.
[93] Id.
[94] Id.
[95] Id.
[96] Jillian Peterson, *American Psychological Association, Mental Illness Not Usually Linked To Crime, Research Finds* (April 21, 2014) http://www.apa.org/news/press/releases/2014/04/mental-illness-crime.aspx. *See also* Dorris J. James and Lauren E. Glaze, *Bureau of Justice Special Report: Mental Health Problems of Prison and Jail Inmates* (September 2006) https://www.bjs.gov/content/pub/pdf/mhppji.pdf. As explained earlier the term criminalization of mental illness is traditionally applied to those who commit minor offenses. The 1.2 million individuals documented by the Department of Justice most likely include all individuals whether they have committed minor or major offenses.
[97] Id.
[98] Telephone interview with Judge Steven Leifman, County Court Judge for Miami-Dade County, Fl, (October 19, 2017). *See* also *The Treatment of Persons With Mental Illness In Prisons and Jails: A State Survey, National Sheriff's Association* at pg. 6 (April 8, 2014),http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.
[99] Id.
[100] Id.

illnesses than the largest remaining psychiatric hospital in that state.[101] Thus, the number of those with severe mental illnesses in prisons and jails is nearly ten times the number remaining in state hospitals.[102]

The United States ranks number one in the world in the number of people suffering from mental illnesses.[103] The United States also ranks number one with the largest number of untreated cases of mental illnesses.[104] Further, nearly half the inmates with mental illnesses in state or federal custody in the United States are incarcerated for committing a nonviolent crime.[105] According to recent statistics by the United States Department of Justice, nearly twenty percent of all jail detainees experience severe mental illnesses and are incarcerated four to eight times longer than people without mental illnesses for the exact same charge.[106]

According to the Department of Justice, $15 billion is spent annually on housing those with mental illnesses in prisons and jails throughout the country.[107] It costs seven times more on average to house those with mental illnesses than those without.[108] State prisons spend $5 billion annually to house non-violent inmates with mental illnesses.[109]

Although this is a national problem, each state has its own unique challenges. For example, in Texas it costs $22,000 a year to house an inmate without mental illness, but those with mental illnesses cost the state $30,000 to $50,000 a year.[110] In some areas of Florida, it costs the state $80 per day to house inmates but those with mental illnesses costs the state $130 a day.[111] In Cook County, Illinois, it costs $143 a day to house an inmate but costs twice that amount if the individual has severe mental illnesses.[112] In Arkansas, the cost to process an individual through the court system and keep them incarcerated is $6,300 per year but the

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[101] Id. at pg. 7
[102] Id.
[103] *Final Report Of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn at pg. 5 (Spring Term 2004).
[104] Id.
[105] Id.
[106] *Miami-Dade County, Office of the Mayor, Mental Health Task Force Final Report* at pg. 16 (February 14, 2007).
[107] *Consequences of Criminalization of Mental Illness* (Jan. 2017). https://mentalillnesspolicy.org/consequences/criminalization.html.
[108] Id.
[109] Dustin Demoss, *Economic Impact of Our Current Mental Health System*, Huffington Post (June, 2016), http://www.huffingtonpost.com/dustin-demoss/economic-impact-of-our-cu_b_7537298.html
[110] Id.
[111] Id.
[112] Deborah L. Shelton, *How Sending the Mentally Ill to Jail is a Cost to Us All*, Take Part (May 2015), http://www.takepart.com/article/2015/05/18/when-sickness-crime.

cost for an individual with mental illness is $30,000 a year.[113] These are just a few of the examples of the nationwide consequences of the criminalization of mental illness.

In regards to the state of Florida, Judge Steve Leifman, who is the chair of the Florida Supreme Court Task Force on Substance Abuse and Mental Issues, recently presented a study before the Subcommittee on the Oversight and Investigations of the Energy and Commerce Committee of the United States House of Representatives Concerning People with Mental Illnesses Involved in the Criminal Justice System.[114] According to his study, the prison population in Florida has increased by 56 percent since 1996.[115] By contrast, the number of inmates receiving mental health treatment has increased by 160 percent.[116] The total cost to house people with mental illnesses in Florida's prisons and forensic treatment facilities is $625 million annually and an additional $400 million is spent housing people with mental illnesses in local jails.[117] State expenditures are expected to increase as much as $1 billion annually over the next decade.[118]

These costs to house those suffering from mental illnesses are higher because of the costs associated with special care that is needed for these inmates. This includes special medical treatment, costs for special medication i.e. psychotropic drugs, and additional supervision costs. For example, the Los Angeles County Jail spends $10 million per year on psychiatric medications.[119] In the Oklahoma prison system, the amount of psychiatric drugs prescribed increased 50 percent over a recent five year period.[120] In Portland, Oregon, the local county jail spends half of

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[113] *Report: Incarcerating the Mentally Ill 20 Times More Costly Than Treatment*, Arkansas News (June 18, 2015), http://www.arkansasnews.com/news/arkansas/report-incarcerating-mentally-ill-people-20-times-more-costly-treatment.

[114] *Hearing Before The Subcomm. On Oversights and Investigations of The Committee of Energy and Commerce House of Representatives Concerning People with Mental Illnesses Involved in the Criminal Justice System*, 113th Congress 2nd Session 74-77 (March 26, 2014) (statement of Judge Steve Leifman Chair, Supreme Court of Florida Task Force on Substance Abuse and Mental Health Issues in the Courts).

[115] Id., *See also STATEMENT OF JUDGE STEVE LEIFMAN Chair, Supreme Court of Florida Task Force on Substance Abuse and Mental Health Issues in the Courts before the Subcommittee on Oversight and Investigations*
of the Energy and Commerce Committee of the UNITED STATES HOUSE OF REPRESENTATIVES
concerning People with Mental Illnesses Involved in the Criminal Justice System, Mental Illness Policy.org https://mentalillnesspolicy.org/wp-content/uploads/judgeleifmanpsychhospitaltestimony.pdf

[116] Id.

[117] Id.

[118] Id.

[119] *Consequences of Criminalization of Mental Illness* (Jan. 2017) https://mentalillnesspolicy.org/consequences/criminalization.html.

[120] Id.

its medication budget on psychiatric drugs for those suffering from mental illness.[121]

In addition, inmates with mental illnesses spend, on average, a longer amount of time in jail. This increased jail stay results in higher costs for inmates suffering from mental illnesses compared to those without mental illnesses. For example, in Florida, inmates in the Orange County Jail stay for a period of 26 days, but inmates suffering from mental illnesses are there for an average of 51 days.[122] Further, in New York, inmates in Riker's Island stay for an average of 42 days, but those with mental illnesses stay for an average of 215 days.[123] In Denver, Colorado, inmates suffering from mental illnesses stay in jail five and one- half (5 ½) times longer than other inmates.[124]

Furthermore, the costs associated with lawsuits from injuries sustained relating to inmates suffering from mental illnesses while in jail facilities are not usually included in the costs of housing them.[125] However, these costs can be substantial. For example, in a recent six-year period, the state of Washington spent over $1.2 million in judgments from lawsuits involving the care of inmates with mental illnesses.[126] Monetary amounts are not available in most instances due to confidential settlements, but one only has to read the numerous accounts of negligence to know how costly these lawsuits can be to the states and local jurisdictions.[127]

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[121] Matt Davis, *The Criminalization of Mental Illness: Why Are Oregon's Jail's the Biggest Providers of Mental Health Services?* The Portland Mercury (Jan. 14, 2010), http://www.portlandmercury.com/portland/the-criminalization-of-mental-illness/Content?oid=2090110.

[122] Stephanie Mencimer, *There Are 10 Times More Mentally Ill People Behind Bars Than In State Hospitals*, Mother Jones (April 8, 2014), http://www.motherjones.com/mojo/2014/04/record-numbers-mentally-ill-prisons-and-jails.

[123] Id.

[124] Sidney M. Wolfe, *Criminalizing the Seriously Mentally Ill: Two Decades Later*, Public Citizen Vol. 27 No. 7 (July 2011).

[125] Stephanie Mencimer, *There Are 10 Times More Mentally Ill People Behind Bars Than In State Hospitals*, Mother Jones (April 8, 2014), http://www.motherjones.com/mojo/2014/04/record-numbers-mentally-ill-prisons-and-jails.

[126] Chad Kinsella, *Corrections Health Care Costs* at pg. 3, The Council of State Governments (January 2004). https://www.prisonpolicy.org/scans/csg/Corrections+Health+Care+Costs+1-21-04.pdf

[127] Stephanie Mencimer, *There Are 10 Times More Mentally Ill People Behind Bars Than In State Hospitals*, Mother Jones (April 8, 2014), http://www.motherjones.com/mojo/2014/04/record-numbers-mentally-ill-prisons-and-jails. For example, a schizophrenic man housed in a Texas state prison gouged out his eye and ate it. Another man in a Florida prison cut open his abdomen and repeatedly vomited into the open wound.

As a result of deinstitutionalization, jails have become the new mental hospitals.[128] Not only do jails house people with mental illnesses that are accused of committing crimes, they also house those not accused of committing crimes. In a 1992 study, it was found that 29 percent of jails nationwide housed those suffering from mental illnesses that were not accused of committing crimes.[129] These individuals not accused of crimes are housed while they await mental health evaluations pursuant to civil commitment proceedings.[130] Jails have to house these individuals because they have become the only receiving facilities for civil commitments in these areas.[131] These numbers are not decreasing. In fact, Public Health Research Group reviewed these statistics over a 20-year period and found that the numbers increased for this period.[132]

A major problem caused by deinstitutionalization is that prisons and especially local jails are ill equipped to deal with inmates suffering from mental illnesses.[133] Jails and prisons are not prepared to provide adequate psychiatric and medical treatment for people suffering from mental illnesses.[134] Jail staffs are often not adequately trained in handling those suffering from mental illnesses.[135] In addition, inmates suffering from mental illnesses are more likely to physically attack correctional staff and other inmates and also are subject to victimization by other inmates in disproportionate numbers.[136] Finally, deterioration of their psychiatric condition occurs when they are denied adequate treatment, which often leads to a disproportionate number of suicides.[137]

The criminalization of mental illness is a major problem in this country. As jails and prisons have become the main holding facilities for those suffering from mental illnesses, the results for society include significant financial costs to the taxpayers and inadequate care and

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[128] E. Fuller Torrey, et. al. The Treatment of Persons With Mental Illness In Prisons and Jails: A State Survey, National Sheriff's Association at pg. 6 (April 8, 2014), http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

[129] Azza AbuDagga, et. al., *Individuals With Serious Mental Illnesses in County Jails: A Survey of Jail Staff's Perspectives*, Public Citizens' Health Research Group and Treatment Advocacy Center (Jul 14, 2016). http://www.citizen.org/documents/2330.pdf

[130] Id.

[131] Id. The individuals are those being held for involuntary examinations based on civil commitment statutes in the differing states.

[132] Id.

[133] E. Fuller Torrey, et. al. *The Treatment of Persons With Mental Illness In Prisons and Jails: A State Survey*, National Sheriff's Association at pg. 7 (April 8, 2014), http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

[134] Id.

[135] Id.

[136] Id.

[137] Id.

treatment for people suffering from mental illnesses. There was and is a great need for a solution to this problem.

III. A Solution to the Criminalization of Mental Illness: The Miami Model

A. Miami-Dade County's Problem

In the early 2000s, south Florida had the highest number of people in its population suffering from mental illnesses in the country.[138] In Miami-Dade County, nine percent of the population suffered from mental illnesses which is two to three times the national average.[139] However, Florida ranked 49th in the nation in funding for mental illness.[140] Miami-Dade County had the largest percentage of mental illness in an urban area in the country.[141] In the Dade County Jail, there were up to 1200 inmates suffering from mental illnesses and they took up three floors of the jail.[142] Contrast this with 1985 when there were only eighty inmates suffering from severe mental illnesses in the county jail.[143] Of the 100,000 bookings in the county jail, 20,000 were for individuals suffering from mental illnesses.[144] Thus, the Dade County jail served as the largest psychiatric institution in Florida.[145]

During this time period, Miami-Dade County spent over $1 million a year on psychotropic medications.[146] Miami-Dade County spent $18 per day to house inmates without mental illnesses at its jail.[147] However, the cost for housing inmates with mental illnesses was $125 a day.[148] The total cost to house those with mental illnesses was $250,000 a day and $90 million annually.[149] People suffering from mental illnesses were

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[138] Id.
[139] John K. Iglehart, *Decriminalizing Mental Illness-The Miami Model, New England Journal of Medicine*, N Engl. J Med 2016; 374:1701-1703 (May 5, 2016) http://www.nejm.org/doi/full/10.1056/NEJMp1602959#t=article.
[140] Id.
[141] Id.
[142] *Final Report Of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn at pg. 6 (Spring Term 2004).
[143] *Final Report Of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn at pg. 6 (Spring Term 2004).
[144] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).
[145] Id.
[146] *Final Report Of The Miami-Dade Grand Jury*, Katherine Rundle and Don L. Horn (Spring Term 2004).
[147] Id.
[148] Id.
[149] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).

incarcerated eight times longer than those without and at seven times the cost.[150]

B. The Solution: The Creation of the CMHP

These were the issues facing County Judge Steve Leifman. He saw the problem of the criminalization of mental illness first hand. This led him to help develop the Eleventh Judicial Circuit Criminal Mental Health Project (CMHP) in 2000. Fifteen years later, it is called the Miami model.[151] The Miami model contains a number of distinct parts that have helped to substantially eliminate the criminalization of mental illness in Miami-Dade County.

Certain core elements are necessary to ensure that any mental health diversion project is successful.[152] These core elements are included in the CMHP and make up the essential system of care that is necessary for any program to be successful and provide the proper treatment.[153] According to Tim Coffey, the Eleventh Judicial Circuit's project coordinator, "it's not about following or using the exact model of the Eleventh Judicial Circuit. The success of the program has been due to implementation or following of certain core elements which any community can follow."[154]

These core elements are described by the National Leadership Forum on Behavioral Health/Criminal Justice to include "forensic intensive case management, supportive housing, peer support, accessible and appropriated medication, integrated dual diagnosis treatment, supported employment, assertive community treatment/forensic assertive community treatment, and cognitive-behavioral interventions targeted to risk factors.[155] In addition, Coffey stated that "Judge Leifman identified the following other elements that would be essential to a successful program and they include: proper diagnosis and treatment for both mental illnesses and co-occurring substance use disorders; trauma related services; meaningful day activities (e.g., clubhouses, drop-in centers) that can provide opportunities for development of social and employment skills; coordinated criminal justice responses (e.g., problem

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[150] *Miami-Dade County, Office of the Mayor, Mental Health Task Force Final Report* at pg. 16 (February 14, 2007).

[151] John K. Iglehart, *Decriminalizing Mental Illness-The Miami Model, New England Journal of Medicine*, N Engl J Med 2016; 374:1701-1703 (May 5, 2016) http://www.nejm.org/doi/full/10.1056/NEJMp1602959#t=article.

[152] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (November 23, 2016).

[153] Id.

[154] Id.

[155] *Ending an American Tragedy: Addressing the Needs of Justice-Involved People with Mental Illnesses and Co-Occurring Disorders*, National Leadership Forum on Behavioral Health/Criminal Justice Services (September, 2009).

solving courts, diversion programs, and Crisis Intervention Training); and use of advances in information technology to reduce system fragmentation and enhance care coordination." [156]

The Eleventh Judicial Circuit Criminal Mental Health Project (CMHP) was established with the primary goal of diverting individuals with serious mental illnesses (SMI) or co-occurring serious mental illnesses and substance use disorders out of the criminal justice system and into comprehensive community-based treatment and support services.[157] The object was to establish a solution to the problem of the criminalization of mental illness by providing the essential services to those in need and bridging a gap between the community partners and stakeholders who had an interest in eliminating or reducing the problem of criminalization of mental illness.[158] The short-term goals were to reduce the number of individuals with SMI in county jails and provide sufficient help with housing, treatment, and other essential medical services so that those re-entering the community would not reoffend and would have the proper treatment for a successful mental health recovery.[159] The program's long term goals included: "reduced demand for costly acute care services in jails, prisons, forensic mental health treatment facilities, emergency rooms, and other crisis settings; decreased crime and improved public safety; improved public health; decreased injuries to law enforcement officers and people with mental illnesses; and decreased rates of chronic homelessness." [160] Most important, the CMHP's main goal was "to close the revolving door which results in the devastation of families and the community, the breakdown of the criminal justice system, and wasteful government spending."[161]

The CHMP has been in operation for seventeen years. It functions to divert nonviolent misdemeanant defendants suffering from SMI or those with SMI who commit less serious felonies, or those with co-occurring SMI and substance use disorders, from the criminal justice system into community-based treatment and support services.[162] The program has two main components. First, there is a pre-booking process that relies heavily on crisis intervention training (CIT) with law enforcement officers.[163] Second, there is a post-booking diversion program that seeks

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[156] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (December 13, 2016).
[157] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).
[158] Id.
[159] Id.
[160] Id.
[161] Id.
[162] Id.
[163] Id.

to divert those arrested and awaiting adjudication out of the criminal justice system.[164] Both components seek to divert the individuals out of the criminal justice system and place them in community-based treatment and support programs.[165]

The success of the CMHP depends on the participation and cooperation of community stakeholders.[166] Without the support of the community stakeholders, the CMHP would have no chance of success.[167] The community stakeholders for the CHMP include: "the State Attorney's Office, the Public Defender's Office, the Miami-Dade County Department of Corrections and Rehabilitation, the Florida Department of Children and Families, the Social Security Administration, public and private community mental health providers, Jackson Memorial Hospital-Public Health Trust, law enforcement agencies, family members, and mental health consumers."[168] These community leaders have a vested interest in making sure each of the following programs is successful in order to help alleviate the societal problems associated with the criminalization of mental illness.

1) Pre-Booking Diversion

CIT is the key component of the pre-booking diversion. CIT was modeled after training developed in Memphis, Tennessee in the 1980s and is currently known as the Memphis Model.[169] The basis of CIT is to equip and train law enforcement officers to appropriately deal with those suffering from mental illnesses.[170] Law enforcement officers on a regular basis are the first responders to deal with those suffering from mental illnesses. Thus, proper training is essential.

CIT requires that officers receive "40 hours of specialized training in psychiatric diagnoses, suicide intervention, substance abuse issues, behavioral de-escalation techniques, the role of the family in the care of a person with a mental illness, mental health and substance abuse laws, and local resources for those in crisis."[171] "The training is designed to educate and prepare officers to recognize the signs and symptoms of mental illnesses, and to respond more effectively and appropriately to individuals in crisis."[172] CIT officers are trained and have expertise in de-escalating crises involving people suffering from mental illnesses and provide an understanding and compassion in dealing with those with

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[164] Id.
[165] Id.
[166] Id.
[167] Id.
[168] Id.
[169] Id.
[170] Id.
[171] Id.
[172] Id.

SMI in difficult situations.[173] As a result, officers dealing with those suffering from SMI can often divert them to proper mental health services rather than taking them to jail.[174]

This training is important because it can divert individuals with SMI out of the criminal justice system and into programs that are designed to address their needs.[175] For example, an individual with SMI may habitually trespass at a convenience store. An officer with CIT can ascertain that the individual's conduct is based on his SMI and divert him to a proper mental health facility. In this way, the officer can provide services that may help alleviate the problem rather than to arrest the individual and continue the cycle of the individual being repeatedly incarcerated because of the mental illness.

The CMHP has been very successful in its CIT. Through the history of the program the CMHP has provided training free of charge to over 4,600 law enforcement officers and to all thirty-six local municipalities in Miami-Dade County, as well as Miami-Dade Public Schools and the Department of Corrections and Rehabilitation.[176] Over the past seven years, these officers from the Miami-Dade Police Department and City of Miami Police Department who have received CIT have responded to nearly 71,000 mental health crisis calls resulting in over 14,000 diversions to crisis units and just over 100 arrests.[177] Statistically, this is one arrest per every 519 calls for service dealing with people with mental illnesses, one diversion for every five calls, and one transport for treatment for every 1.8 calls.[178] As a result of CIT, the average daily population in the county jail system has dropped from 7,800 to 4,800 inmates and the county has closed one entire jail facility.[179] This has produced a savings to the taxpayers of $12 million per year.[180] There has also been a reduction in fatal shootings and injuries of people with mental illnesses by police officers.[181] From 1999 through 2005, there were nineteen persons with mental illnesses that died as the result of incidents with law enforcement officers in Miami-Dade County.[182] Since 2005, this figure has dropped significantly.[183] The following statistics indicate the success of the CIT program.

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[173] Id.
[174] Id.
[175] Id.
[176] Id. *See also* Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (October 25, 2017).
[177] Id.
[178] Id.
[179] Id.
[180] Id.
[181] Id.
[182] Id.
[183] Id.

Table 1: City of Miami and Miami-Dade Police Departments Annual CIT Calls[184]

MDPD + MPD	2010	2011	2012	2013	2014	2015	2016	Total*	
CIT Calls	7,779	9,399	10,404	10,626	11,042	10,579	11,799	71,628	
Individuals Arrested	4	45	27	9	24	10	19	138	(0.2%)
Individuals Diverted from Jail	1,940	3,563	2,118	1,215	1,871	1,633	1,694	14,034	(19.6%)
Individuals Transported to Crisis**	3,307	4,642	5,527	3,946	5,155	7,417	8,303	38,297	(53.5%)
Use Of Force	29	75	72	59	79	69	58	441	(0.6%)
Officer Injuries	-	-	-	11	21	26	12	70	(0.1%)
Consumer Injuries	-	-	-	127	262	211	203	803	(1.1%)

* Average of 1 arrest per 519 calls, 1 jail diversion per 5 calls, and 1 transport to treatment per 1.8 calls.

2) Post Booking Jail Diversion Program

The CMHP was created to divert non-violent misdemeanor offenders with SMI and co-occurring substance abuse disorders out of the criminal justice system and into community-based treatment and service programs.[185] In 2008, the program was expanded to address certain non-violent felony offenses in the diversion program.[186] On average 500 individuals annually are diverted out of the criminal justice system.[187] However, that number has increased as the program has developed over the years. For example, in 2015, there were 831 referrals.[188] Over the past 10 years, roughly 4,000 individuals have been diverted out of county jails and into community-based programs and services for treating mental illnesses.[189] The misdemeanor and felony jail diversion programs are the main parts of the Post Booking Jail Diversion program.

a. Misdemeanor Jail Diversion Program

The misdemeanor diversion program has 300 referrals annually.[190] The post booking diversion program requires that defendants who are booked into the jail are screened for signs and symptoms of mental

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[184] *Miami-Dade County 11th Judicial Circuit Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes*; *See also* Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (October 25, 2017).

[185] Id.

[186] Id.

[187] Id.

[188] *Miami-Dade County 11th Judicial Circuit Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes* (June 8, 2016).

[189] Id.

[190] Id. That number has been growing each year as the program has grown. *See* Miami-Dade County 11th Judicial Circuit Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes (June 8, 2016).

illnesses by correctional officers. [191] Defendants charged with misdemeanors and who satisfy the program admission criteria are transferred from the jail to a community-based crisis stabilization unit within 24 to 48 hours of booking.[192] Once the defendant is stabilized, the criminal charges may be dismissed or modified according to the type of further treatment that is needed.[193] If further treatment is needed, then defendants who agree to further services are assisted by matching them with a comprehensive array of community-based treatment, support, and housing services that are essential for successful community re-entry and recovery outcomes.[194] Program participants are monitored by the CMHP for up to one year following community re-entry to ensure that they are continuing with their treatment and are in contact with necessary supports and services.[195]

Seventy to eighty percent of the defendants in the misdemeanor diversion program are homeless at the time of arrest.[196] In addition, they tend to be those who suffer from the most severe forms of mental illnesses and also have co-occurring substance abuse issues. [197] The program has been very successful as the recidivism rates among program participants have decreased from about 75 percent to 20 percent annually.[198]

b. Felony Jail Diversion Program

There are roughly 200 defendants that are referred to the felony diversion program each year. [199] The defendants in the felony jail diversion program are referred to the CMHP through a number of community sources including the Public Defender's Office, the State Attorney's Office, private attorneys, judges, corrections health services, and family members. [200] The defendants must meet mental health diagnostic criteria to qualify to enter the program.[201] They must also meet the legal criteria of entering the program with a third degree felony and cannot have more than three prior felony convictions.[202] In addition, they must be eligible to apply for entitlement benefits such as

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[191] Id.
[192] Id.
[193] Id.
[194] Id.
[195] Id.
[196] Id.
[197] Id.
[198] Id.
[199] Id.
[200] Id.
[201] Id.
[202] Id.

Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), and Medicaid.[203]

Once the person is accepted into the felony jail diversion program, the assistant state attorney prosecuting the case will inform the court of the plea offer to the defendant and any subsequent plea conditions that will be offered contingent upon successful program completion.[204] Similar to the misdemeanor program, legal charges may be dismissed or modified based on treatment engagement.[205] All defendants are assisted in accessing community based services and supports, and their progress is monitored and reported back to the court by CMHP staff.[206]

Of those participating in the felony diversion program, 65 percent complete the program.[207] While those who completed and did not complete the program both demonstrated improvements in criminal justice outcomes, those who completed did much better.[208] Recidivism rates were 25 percent for completers and 73 percent for non-completers within one year of finishing or leaving the program. Within two years of leaving the program, recidivism rates were 35 percent for completers and 79 percent for non-completers.[209] Non-completers of the program returned twice as often to jail than those who completed the program.[210] Those who completed the program demonstrated an 82 percent reduction in jail bookings and a 90 percent reduction in jail days within one year.[211] For every 100 completers of the program there was over $750,000 dollars in cost avoidance to the jail in the year following admission.[212] Since 2008, the felony jail program alone is estimated to have saved the county over 15,000 days of housing costs in the county jail which is more than 35 years of costly jail time.[213] Overall, participants in the program demonstrated continued reductions in criminal justice involvement during the two years following discharge from the program.[214]

3) Forensic Hospital Diversion Program

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[203] Id.
[204] Id.
[205] Id.
[206] Id.
[207] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (October 25, 2017).
[208] Id.
[209] Id.
[210] Id.
[211] Id.
[212] Id.
[213] *Miami-Dade County 11th Judicial Circuit Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes* (June 8, 2016).
[214] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (October 25, 2017).

In 2009, the CMHP implemented a pilot project funded by the State of Florida to develop the Miami-Dade Forensic Alternative Center (MD-FAC). The MD-FAC is a ten bed receiving facility which was implemented to "demonstrate the feasibility of establishing a program to divert individuals with mental illnesses committed to the Florida Department of Children and Families from placement in state forensic hospitals to placement in community-based treatment and forensic services."[215] Individuals participating in the program are those that have been charged with 2nd and 3rd degree felonies, but who do not have significant histories of violent felony offenses.[216] In addition, they must not be likely to face incarceration if convicted of their alleged offenses.[217] Finally, they must have been adjudicated incompetent to proceed to trial or not guilty by reason of insanity.[218] Individuals meeting these requirements qualify for the community-based treatment program.[219]

"The community-based treatment provider for the pilot project is responsible for providing a full array of residential treatment and community re-entry services including crisis stabilization, competency restoration, development of community living skills, assistance with community re-entry, and community monitoring to ensure ongoing treatment following discharge."[220] In addition, the treatment provider will help individuals in accessing "entitlement benefits and other means of economic self-sufficiency to ensure ongoing and timely access to services and supports after re-entering the community."[221] Unlike individuals admitted to state hospitals, individuals served by MD-FAC are not returned to jail upon restoration of competency.[222] This is an advantage because, unlike state facilities, the program is able to keep individuals whose competency has been restored in the program rather than in jail while awaiting trial.[223] As a result, this decreases the burdens on the jail and eliminates the possibility that a person may decompensate while in jail and or lose his ability to maintain normal psychological functioning and be declared incompetent to proceed again.[224]

To date, the project has demonstrated

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[215] Id. *See The Forensic Mental Health System*, Florida Senate Interim Report 2012-108 at pg.3 (September, 2011).
[216] Id.
[217] Id.
[218] Id.
[219] Id.
[220] Id.
[221] Id.
[222] Id.
[223] *The Forensic Mental Health System*, Florida Senate Interim Report 2012-108 at pg.3 (September, 2011).
[224] Id. *See The Forensic Mental Health System*, Florida Senate Interim Report 2012-108 at pg.3 (September, 2011)

> a more cost effective delivery of forensic mental health services, reduced burdens on the county jail system in terms of housing and transporting defendants with forensic mental health needs, and has provided a more effective community re-entry and monitoring of individuals who, historically, have been at high risk for recidivism to the justice system and other acute care settings.[225]
>
> Individuals admitted to the MD-FAC program are identified as ready for discharge from forensic commitment an average of 52 days (35%) sooner than individuals who complete competency restoration services in forensic treatment facilities, and spend an average of 31 fewer days (18%) under forensic commitment. The average cost to provide services in the MD-FAC program is roughly 32 percent less expensive than services provided in state forensic treatment facilities.[226]

4) *Access to Entitlement Benefits*

> Community leaders in the criminal justice and behavioral health communities consistently identify lack of access to public entitlement benefits such as Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), and Medicaid as among the most significant and persistent barriers to successful community re-integration and recovery for individuals who experience serious mental illnesses and co-occurring substance use disorders.[227]

The majority of individuals involved in the CMHP programs do not receive any entitlement benefits at the time they enter a CMHP program.[228] As a result, many of the participants do not have sufficient funds to obtain adequate housing, treatment, or support services in the community.[229]

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[225] Id.
[226] Id.
[227] Id.
[228] Id.
[229] Id.

In order to address this barrier and maximize limited resources, the CMHP developed an innovative plan to improve the ability to transition individuals from the criminal justice system to the community. [230] Funding is essential to the success of the program. Therefore, "all participants in the program who are eligible to apply for Social Security benefits are provided with assistance utilizing a best practice model referred to as SOAR (SSI/SSDI, Outreach, Access and Recovery)."[231] SOAR is an approach that was developed as a federal technical assistance initiative to expedite access to social security entitlement benefits for individuals with mental illnesses who are homeless.[232] The result of obtaining SSI and/or SSDI for the program participants is essential in that it provides a "steady income and health care coverage which enables individuals to access basic needs including housing, food, medical care, and psychiatric treatment."[233] This reduces recidivism in the criminal justice system, prevents homelessness, and is an essential element in the process of recovery for the CMHP participants.[234]

The CMHP has developed a good working relationship with the Social Security Administration, which helps expedite and ensure approvals for entitlement benefits in the shortest time possible.[235] The process begins when all CMHP participants are initially screened for eligibility for federal entitlement benefits, with CMHP staff initiating applications as early as possible utilizing the SOAR model.[236] Program data demonstrates that 90 percent of the individuals are approved on the initial application. [237] By contrast, the national average across all disability groups for approval on initial application is 37 percent.[238] In addition, the average time of approval for CMHP participants is 30 days.[239] This quick turnaround time is remarkable when compared to the ordinary approval process, which typically takes between nine to twelve months.[240]

Based on the success of the CMHP, Miami-Dade County was awarded a 3-year, $750,000 grant from the State of Florida in 2010.[241] The grant was for the purpose of implementing and expanding applications for access to entitlement benefit services to include

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[230] Id.
[231] Id.
[232] Id.
[233] Id.
[234] Id.
[235] Id.
[236] Id.
[237] Id.
[238] Id.
[239] Id.
[240] Id.
[241] Id.

individuals with SMI re-entering the community after completing jail sentences. [242] This would be done by implementing a specialized entitlement benefits unit utilizing the SOAR model to expedite access to Social Security and Medicaid benefits for individuals served by the CMHP programs.[243]

5) Recovery Peer Specialists

Recovery Peer Specialists are another essential element of the CMHP. Recovery Peer Specialists are individuals who suffered from mental illnesses and have recovered or are in recovery and that work as members of the jail diversion team.[244] Based on their life experiences, they are able to better relate in some instances and provide invaluable help to those they are serving. The primary function of Recovery Peer Specialists is to assist jail diversion program participants with community re-entry and engagement in continuing treatment and services. [245] This is accomplished by working with participants, caregivers, family members, and other sources of support to minimize barriers to treatment engagement and to model and facilitate the development of adaptive coping skills and behaviors.[246] Recovery Peer Specialists also serve as consultants and faculty to the CMHP's CIT training program.[247]

6) Bristol-Myer Squibb Foundation Project

The South Florida Behavioral Health Network, with coordination from CMHP, which is contracted by the Florida Department of Children and Families to manage the substance abuse and mental health system of care in Miami-Dade and Monroe counties, was awarded a three year, $1.2 million grant from the Bristol-Myers Squibb Foundation.[248] The purpose of the grant is to "develop and implement a first of-its-kind coordinated system of care targeting the needs of individuals with serious mental illnesses who are at highest risk for involvement in the criminal justice system and other institutional settings."[249] The project coordinates and works with CMHP's Misdemeanor and Felony Jail

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[242] Id.
[243] Id.
[244] Id. *See also* The Florida Certification Board, Available Certifications, http://flcertificationboard.org/certifications/certified-recovery-peer-specialist-adult-family-or-veteran. In Florida, one can receive a certificate of training as a Recovery Peer Specialist from the State of Florida.
[245] Id.
[246] Id.
[247] Id.
[248] Id.
[249] South Florida Behavioral Network, Research and Grants, http://sfbhn.org/T4%20research%20page.htm

Diversion programs.[250] "A primary goal of the project is to ensure timely and efficient access to a comprehensive array of services based on enhanced, individualized assessment of clinical and criminogenic needs and risk factors."[251] The services are to be delivered by a coordinated network of community-based treatment providers and justice system stakeholders involved in cross-systems and cross-disciplinary treatment planning, service coordination, and information sharing.[252] Although in its infancy, the project will be evaluated by comparisons of behavioral health and criminal justice outcomes among individuals enrolled in the new program versus individuals participating in traditional community-based services.[253]

7) Mental Health Diversion Facility

Another important aspect of the CMHP is its development of a dedicated mental health diversion facility. Since 2006, the courts have been working with stakeholders from Miami-Dade County on a capital improvement project to develop a first of its kind mental health diversion and treatment facility. Currently, the county has begun building a dedicated mental health diversion facility, which will cost taxpayers over $42 million.[254] The facility will service individuals who are diverted from the county jail system into a "seamless continuum of comprehensive community-based treatment programs that leverage local, state, and federal resources."[255] The project's main goal is to build on the successful work of the CMHP with the goal of creating an effective and cost efficient alternative treatment setting to which individuals awaiting trial may be diverted.[256]

The diversion facility will be housed in a former state forensic hospital which is in the process of being renovated to include programs operated by community based treatment and social services providers.[257] The services offered at the facility will include "crisis stabilization, short-term residential treatment, day treatment and day activities programs, intensive case management, outpatient behavioral health and primary care treatment services, and vocational rehabilitation/supportive

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[250] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).
[251] Id.
[252] Id.
[253] Id.
[254] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (October 25, 2017). *See* Also David Ovalle, *In Miami-Dade, hope, help for offenders with mental illness*, Miami Herald (September 29, 2014) http://www.miamiherald.com/news/local/community/miami-dade/article2319144.html
[255] Id.
[256] Id.
[257] Id.

employment services."[258] The facility will also include space for the courts and for social service agencies such as housing providers, legal services, and immigration services so that the comprehensive needs of individuals can be served.[259]

The goal for the mental health diversion facility and expansion of the CMHP's diversion programs is to, "create a centralized, coordinated, and seamless continuum of care for individuals who are diverted from the criminal justice system either pre-booking or post-booking."[260] In providing a comprehensive array of services and supports in one facility, it is likely that individuals who are currently recycling through the criminal justice system will be more likely to engage treatment and recovery services.[261] The new facility will also allow individuals who spend extended amounts of time in the county jail to move more quickly and seamlessly into residential treatment programs and supervised outpatient services.[262]

It is estimated that the new diversion facility will save $8.2 million each year.[263] In addition, it is estimated that there will be a reduction in almost 1,200 jail bookings each year.[264] Further, this will save the county an estimated reduction in annual jail days by over 34,000, which is equivalent to over ninety beds every year.[265]

8) *Typical or Troubled?* Program

Recently, the CMHP partnered with the American Psychiatric Foundation (APF) and Miami-Dade County Public Schools (MDCPS) to implement the *Typical or Troubled?* School Mental Health Education Program for all public junior high and high schools in the Miami-Dade County school system.[266] "The program will train over 500 teachers, school psychologists, social workers and guidance counselors on early identification of potential mental health problems, will educate and engage parents, and will ultimately link students with mental health services when needed."[267] The program helps school personnel distinguish between typical teenage behavior and evidence of mental

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[258] Id.
[259] Id.
[260] Id.
[261] Id.
[262] Id.
[263] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (October 25, 2017). *See also Mental Health Diversion Facility, Service and Fiscal Impact Estimates*(June 9, 2016).
[264] Id.
[265] Id.
[266] Id. *American Psychiatric Association Foundation, Typical or Troubled? Program,* http://www.americanpsychiatricfoundation.org/what-we-do/public-education/typical-or-troubled
[267] Id.

health warning signs that would warrant intervention.[268] The goal will be to take a proactive approach to confront the issue of mental health in the school system through partnerships and targeted training that seek to identify and provide effective treatment of mental health problems before those problems manifest through increased truancy, substance abuse, criminal activity, violence, or tragedy.[269]

C. CMHP A Model of Success

The success of the CMHP has been immense in the fight against the criminalization of mental illness. The CHMP has demonstrated substantial gains in its effort to combat the criminalization of mental illnesses.[270] This is accomplished because the CMHP offers the promise of hope and recovery for individuals with SMI who have often been misunderstood and discriminated against through a wide variety of services and programs that are absent from most communities.[271] Once a person is engaged in the proper treatment and community support services, the individual has the opportunity to achieve successful recovery and community integration, as well as reduce his recidivism to jail.[272]

The success of the CMHP has been nationally recognized and is a national model of excellence in dealing with mental illness in the criminal justice system. [273] The CMHP has received numerous recognitions and awards including the 2010 Prudential Davis Productivity Award for implementation of SOAR, 2010 Eli Lilly Reintegration Award for Advocacy, the 2008 Center for Mental Health Services/National GAINS Center Impact Award, the 2007 National Association of Counties Achievement Award, the 2006 United States Department of Housing & Urban Development's HMIS National Visionary Award, the 2006 Prudential Financial Davis Productivity Award, and the 2003 National Association of Counties Distinguished Service Award.[274] In addition, for Judge Leifman's incredible work in this area, he was honored in 2015 by the United States Supreme Court when he received the National Center for State Courts' William H. Rehnquist Award for Judicial Excellence.[275]

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[268] Id.
[269] Id.
[270] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).
[271] Id.
[272] Id.
[273] Id.
[274] Id.
[275] *Miami Judge Steve Leifman Wins William H. Rehquist Award*, National Center For State Courts News Release,

The CMHP provides an effective and cost-efficient solution to a community problem.[276] As previously noted, over CMHP's fifteen-year history, "program results demonstrate that individualized transition planning to access necessary community based treatment and services upon release from jail will ensure successful community re-entry and recovery for individuals with mental illnesses, and possible co-occurring substance use disorders that are involved in the criminal justice system."[277] This truly innovative program has seen incredible results.

The CMHP is estimated to have saved the county millions of dollars since its inception.[278] Its diversion programs alone save the taxpayers nearly $6 million a year.[279] In addition, the population in the local jails has dropped from 7,800 to 4,800, which allowed for the closing of one of the county jails and has saved the taxpayers $12 million per year.[280] The savings alone would seem to most to be a success, but the real success is that recidivism rates of those treated and participating in the program dropped from 75 percent to 20 percent annually.[281] This decline shows that the fight against the criminalization of mental illness is working as individuals suffering from SMI are not being repeatedly recycled through the criminal justice system. In addition, they are receiving the necessary treatments and services to help them lead a productive life.

The Chief Justice of the Florida Supreme Court, Jorge Labarga, summed up the work of Judge Leifman and the CMHP when he said, "Judge Leifman epitomizes judicial excellence: Troubled by people with mental illnesses cycling through his Miami courtroom, Judge Leifman decided to take action. His unwavering commitment and compassion in the years since that moment have brought astounding results, changing and saving lives, and bringing families back together. He has made our courts more just and our society more humane."[282]

IV. DO THE PRINCIPLES OR PARTS OF THE CMHP WORK IN OTHER JURISDICTIONS?

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http://www.floridasupremecourt.org/pub_info/documents/pressreleases/2015/08-12-2015_Leifman-Wins-Rehnquist-Award.pdf.

[276] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).

[277] Id.

[278] Id.

[279] *Miami-Dade County 11th Judicial Circuit Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes* (June 8, 2016).

[280] *11th Judicial Circuit of Florida, Criminal Mental Health Project Program Summary* (2015).

[281] Id.

[282] *Miami Judge Steve Leifman Wins William H. Rehnquist Award*, National Center For State Courts News Release, http://www.floridasupremecourt.org/pub_info/documents/pressreleases/2015/08-12-2015_Leifman-Wins-Rehnquist-Award.pdf.

The CMHP has been shown to be an innovative program that helps solve the problem of the criminalization of mental illness. It is clear that the problem of the criminalization of mental illness occurs across the nation. If the problem is so widespread, the question is whether other areas or jurisdictions have adopted the CMHP's program or similar components of the program. Further, if these areas or jurisdictions have adopted the programs or components of the program, then are these areas or jurisdictions seeing similar successes.

In making this determination, research was conducted on eighteen different jurisdictions suffering from the effects of the criminalization of mental illness that are utilizing diversionary programs similar to the CMHP.[283] Fifteen of these jurisdictions made site visits to Miami, Florida to view the CMHP.[284] One jurisdiction worked closely with Judge Leifman and his staff in developing their programs but did not make a site visit.[285] Interviews were done with representatives of seventeen of the eighteen jurisdictions.[286]

A. Site Visits

Fifteen of the eighteen jurisdictions researched made site visits to the CMHP and viewed the CMHP's programs. One jurisdiction did not make a site visit but has worked closely with the Judge Leifman and the staff of the CMHP in developing its programs. Seventy-five percent of the jurisdictions making visits or working directly with Judge Leifiman and his staff adopted parts of the CMHP. None of those jurisdictions adopted the entire CMHP program and all cited lack of financial resources as the major reason. Twenty-five percent of the jurisdictions did not adopt parts of the program after their visit because they already had similar programs in place. Only one of the sixteen jurisdictions did not adopt any parts of the CMHP because they cited the fact that their studies on the subject area showed that their program worked better, although they had some similar components in place. All those that

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[283] The jurisdictions researched were as follows: Duval County, Fl; Shelby County, TN; Broward County, Fl; Pinellas County, Fl; 19th Judicial Circuit, Fl; Franklin County, OH; Cook County, Ill.; Orange County, Fl; 20th Judicial Circuit, Fl; Bexar County, TX; Hillsborough County, Fl; Alachua County, Fl; Harris County, TX; Cuyahoga County, OH; Palm Beach County, Fl; King County, WA; Douglas County, KS; Los Angeles County, CA;

[284] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (May 25, 2017).

[285] 19th Judicial Circuit of Florida; King County, Washington; and Douglas County Kansas did not make site visits.

[286] Only King County, Washington was not interviewed. They did not visit the CMHP. Information on their program was gathered by web based sources.

visited the CMHP stated that the visit was valuable and that they gained valuable ideas that could be helpful in the future for solving the problem of the criminalization of mental illness in their jurisdictions.

B. Main Components

All of the eighteen researched jurisdictions utilize CIT. However, only 66 percent of those had a triage or crisis stabilization center similar to that of the CMHP. This crisis stabilization center is an important component because it gives CIT officers a place away from the county or local jail to which individuals suffering from SMI can be diverted. A representative of one of the jurisdictions stated, "It is frustrating when CIT has been completed but there is no facility to divert individuals to other than the county jail."[287]

In regard to mental health diversion, 66 percent of the jurisdictions had a pre-trial diversion program for those suffering from SMI. Eight-three percent of the jurisdictions had a mental health court system in place. Sixty-six percent of the jurisdictions used their pre-trial diversion program as their main diversionary component for people with mental illnesses. Twenty-six percent of those operating a mental health court used this court as their main diversionary program for those suffering from SMI.

In regards to the CMHP's other components, only 38 percent were utilizing SOAR. Only one jurisdiction had adopted a school program to target those in schools suffering from SMI. No jurisdiction had developed a dedicated mental health diversion facility.

All of the jurisdictions interviewed cited two major problems in limiting the success of their programs. All of the jurisdictions stated that financial resources are the biggest barrier in limiting their success. For example, many interviewed cited the fact that the CMHP was spending $42 million on a dedicated mental health diversion facility which they would never be able to do in their jurisdiction. Further, all of the jurisdictions cited the need for changes in legislation or new legislation to provide helps and tools in the fight against the criminalization of mental illness.

From the visits, all of the representatives of the jurisdictions stated that they gained valuable ideas on how to implement or make their diversion programs better. Further, they stated that it helped bring community leaders together. For the majority of these jurisdictions, their programs had not been in place long enough to gain valuable statistics as to whether the ideas they implemented had been successful. However, the perception by these representatives was that they had a made strides

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[287]Telephone interview with Kelly Steele, Problem Solving Court Manager, 9th Judicial Circuit, Fl (July 18, 2017).

in right direction and that their programs were going to be successful.

C. Examples and Models

It is clear from the interviews and web-based resources that areas and jurisdictions that suffer from the criminalization of mental illness have attempted to solve their problem by adopting parts of the CMHP's programs or by adopting similar components. Some have been very successful. Others have just started to implement programs so that there are no concrete numbers with which to measure success. Most have financial restrictions but are using creative methods to craft successful programs. Below are models from other areas and jurisdictions and their successes.

1) Duval County, Florida

In 2015, community leaders realized they had a mental health crisis. [288] Community leaders that were part of the Jacksonville Community Council Inc (JCCI). JCCI commissioned a study on the mental health crisis in Duval County. As part of that study, community leaders visited the CMHP.[289] As a result of the study and the visit, several programs were put in place.

In 2016, First Schools Plus, a mental health service program in Duval County schools, began to put licensed mental health professionals in selected schools. [290] In 2016, there were nearly 1000 referrals and 61 percent of those students received services.[291] This program has been seen as an immense success based on the number of individuals receiving services.

In 2017, a mental health central receiving system was opened to divert people suffering from mental illnesses from the local jail to receive mental health services. [292] All officers receive CIT training through the Jacksonville Sheriff's Office.[293] These officers now have a way to divert individuals suffering from SMI rather than taking them to

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[288] Florida Times Union, Editorial Page, *Florida's mental health crisis deserves to be a high priority* (February 19, 2015), http://jacksonville.com/opinion/editorials/2015-02-18/story/floridas-mental-health-crisis-deserves-be-high-priority.

[289] Telephone interview with Judge Karen Cole, Circuit Judge 4th Judicial Circuit, (July 17, 2017).

[290] Florida Times Union, Editorial Page, *JCCI Mental Health Study has produced lasting impact* (December 23, 2016). http://jacksonville.com/opinion/2016-12-23/jcci-mental-health-study-has-produced-lasting-impact

[291] Id.

[292] Jessica Palombo, *Duval Needs $1.5 Million To Open Mental Health Care 'Central Receiving System* (November 23, 2016). http://news.wjct.org/post/duval-needs-15-million-open-mental-health-care-central-receiving-system

[293] Id.

the county jail. This is important because the Duval County Jail is the largest mental health provider in the county.[294]

Duval County also uses some similar components of the CMHP. The county operates a mental health court.[295] In addition, Duval County, through some of its non-profit hospitals, provides training to 10,000 individuals in the community for recognizing signs of severe mental illness and to help connect high risk individuals to services faster.[296] This is a way of trying to keep people suffering from mental illnesses from entering the court system by recognizing their mental health issues and stabilizing them before they would enter the court system.[297]

Judge Karen Cole has been an instrumental figure in helping solve the mental health crisis in Duval County. She along with community leaders made a site visit to the CMHP. Judge Cole stated that the visit was a huge success.[298] It brought community leaders together and helped with the development of a number of programs.[299] The county's program is still in its inception and pieces are being borrowed from the CMHP.[300] However, the county does not have the same type of funding as Miami-Dade County. There are no statistics as to the success of the programs as it is in its inception, but it is perceived in the coming years that the statistics will justify the program's funding.[301]

2) Pinellas County, Florida

Pinellas County visited the CMHP in December 2013.[302] Pinellas County operates a unique mental health jail diversion program.[303] The program was started in 2004.[304] The program has diverted nearly 6000 individuals suffering from mental illnesses out of the criminal justice system.[305] There has been a 90 percent reduction in recidivism among those that have completed the program.[306] The jail diversion program

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[294] Id.
[295] Interview Judge Karen Cole, Circuit Judge 4th Judicial Circuit, July 17, 2017.
[296] Ryan Benk, *10k to Receive Mental Health Training In Jacksonville*, WJCT.com, (January 26, 2017). http://news.wjct.org/post/10k-receive-mental-health-training-jacksonville
[297] Id.
[298] Telephone interview with Judge Karen Cole, Circuit Judge 4th Judicial Circuit, (July 17, 2017).
[299] Id.
[300] Id.
[301] Id.
[302] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (May 25, 2017).
[303] Telephone interview with Bob Dillinger, Public Defender, Sixth Judicial Circuit (July 18, 2017). *See also*, http://www.wearethehope.org/jail_diversion.htm
[304] Id.
[305] Id.
[306] Id.

diverts individuals out of the criminal justice system into community-based treatment.[307] The program lasts ninety days.[308] The program acts in the place of a mental health court.[309]

The ninety-day program provides services which include face-to-face assessments, transportation, transitional housing, psychiatric evaluations, treatment plans, prescription medication therapy, intensive case management, court liaison and finding additional community resources.[310] The program provides access to community-based health and substance-abuse treatment services.[311] Clients receive treatment services, case management, housing, and medications.[312]

Pinellas County has CIT training but lacks a triage or central receiving facility and adequate housing for placement of individuals once they have completed the program.[313] This is due to a lack of funding.[314]However, it is estimated that the jail diversion program saves the taxpayers millions of dollars each year.[315] For example in 2004, it was estimated the program saved the taxpayers over $5 million.[316]

Pinellas County has not adopted all of the CMHP programs because of a lack of funding.[317] However, it has become creative by instituting the Safe Harbor homeless facility and a chronic inebriation program that helps with those suffering from mental illness and co-occurring substance abuse issues.[318] Although the county does not have the same financial resources as Miami-Dade County, it has become creative and successful with the programs it has initiated.

3) 19th Judicial Circuit, St. Lucie and Indian River County, Florida

The 19th Judicial Circuit which includes St. Lucie and Indian River counties deals with the problem of the criminalization of mental illness.[319] Although no representative has visited the CMHP from the 19th Circuit, Circuit Court Judge Cynthia Cox has worked closely with Judge Leifman on issues dealing with mental illnesses in the criminal justice system.[320] She has been the administrative judge for the mental

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[307] Id.
[308] Id.
[309] Id.
[310] http://www.wearethehope.org/jail_diversion.htm
[311] Id.
[312] Id.
[313] Id.
[314] Id.
[315] Id.
[316] Id.
[317] Id.
[318] Id.
[319] Telephone interview with Judge Cynthia Cox, Circuit Judge 19th Judicial Circuit, Florida (July 26,2017).
[320] Id.

health courts in the 19th Circuit and has been instrumental in their success.[321] The 19th Circuit does have CIT training but does not have a central receiving system because of lack of funding.[322] As a result, mental health diversion and services are provided through the mental health courts.[323]

The mental health courts were started in the early 2000's.[324] Currently, there are roughly 500 participants in the mental health courts in St. Lucie and Indian River counties.[325] The mental health courts have adopted many of the principles of the CMHP.[326] Inside the mental health courts, there is a misdemeanor and felony diversion program.[327] The mental health courts also offer services and programs similar to those in the CMHP to those found not guilty by reason of insanity and with competency issues.[328] In addition, there is a traditional track through which participants are placed on probation.[329] Finally, the courts also utilize the SOAR program to help the participants receive the government benefits they need for housing and treatment.[330]

Lack of funding is a major reason for not adopting all of the CMHP.[331] However, the program in place has been very successful and saves the circuit an average of $3 million a year in jail costs.[332] According to Judge Cox, this is due to the creative use of funds and building programs within the mental health court system.[333]

4) Franklin County, Ohio

Franklin County, Ohio, has problems with the criminalization of mental illness.[334] The county currently houses 2,300 inmates in its county jail with 45 percent suffering from some type of mental illness.[335] Representatives from the county visited the CMHP in October 2015.[336] Based on the visit, the county developed a number of programs to help

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[321] Id.
[322] Id.
[323] Id.
[324] Id.
[325] Id.
[326] Id.
[327] Id.
[328] Id.
[329] Id.
[330] Id.
[331] Id.
[332] Id.
[333] Id.
[334] Telephone interview with Michael Daniels, Justice Policy Coordinator for Franklin County, Ohio (July 26, 2017).
[335] Id.
[336] Id.

with their mental health crisis.[337] First, the county instituted CIT training for law enforcement officers and developed a mental health crisis center where law enforcement officers could divert individuals with SMI to provide mental health and co-occurring substance abuse services.[338] In addition, a program was developed to place individuals with SMI, who have been deemed frequent users of the system, in social service programs to obtain the needed services.[339] In 2016, a misdemeanor and felony diversion program was started for individuals involved in the criminal justice system who suffered SMI.[340] Finally, a mental health court was instituted. Funding mental health diversion programs is an issue. However, the county has tried to be creative in using the key components of the CMHP that are financially feasible in order to reduce the criminalization of mental illness in the county.

5) Cook County, Illinois

Cook County, Illinois, has adopted some components of the CMHP. In particular, it uses a combination of supportive housing, which includes community mental health treatment services and rent subsidies.[341] In addition, Cook County utilizes Assistive Community Treatment (ACT) teams composed of mental health specialists who help coordinate treatment, housing, and employment.[342] Finally, Cook County utilizes CIT training and has adopted a Mental Health Court for felony offenders.[343]

In fact, Cook County has a successful mental health diversion program which operates through its Mental Health Court.[344] Unlike the CMHP, the diversion program only focuses on felony offenders.[345] According to Judge Lawrence Fox, Director of Problem Solving Courts in Cook County, the county's studies show that misdemeanor diversion does not work as well as focusing on felony offenders.[346] According to

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[337] Id.
[338] Id.
[339] Id.
[340] Id.
[341] Michael Ollove, *New Efforts Aim To Keep The Mentally Ill Out Of Jail*, The Huffington Post (May 19, 2015). http://www.huffingtonpost.com/2015/05/19/mentally-ill-jail_n_7316246.html.
[342] Id.
[343] A Note From Sheriff Thomas J.Dart, *A Mental Health Template For American Jails*, http://www.cookcountysheriff.org/MentalHealthTemplate.html. *See* also, *Eliminating Barriers To The Treatment of Mental Illness*, Treatment Advocacy Center, Illinois, http://www.treatmentadvocacycenter.org/browse-by-state/illinois.
[344] Telephone interview with Judge Lawrence Fox, the Director of Problem Solving Courts in Cook County, Illinois (July 31, 2017).
[345] Id.
[346] Id.

Fox, the idea is to target high risk offenders and the model has been a success.[347]

In using these components and strategies Cook County has experienced success in combating the criminalization of mental illness. There has been an 86 percent reduction in arrests of those with mental illnesses.[348] Further, there has been an 86 percent reduction in jail time for those suffering from mental illnesses.[349] Finally, there has been a 76 percent reduction in hospitalizations for those participating in the programs.[350]

6) King County, Washington

King County, Washington utilizes several components of the CMHP in its mental health diversion programs. King County utilizes supportive housing and Assertive Community Treatment (ACT) which has provided for intensive community based mental health treatments.[351] This is done through jail diversion programs that utilize CIT training and a crisis solutions center.[352] These programs have led to a 45 percent reduction in jail booking for those participating in the programs.[353]

One of the unique features of King County program is the development of a crisis solutions center, which has three linked programs.[354] First, there is a crisis diversion facility for adults in crisis who need stabilization and referral to appropriate community based services. [355] Second, there are crisis diversion interim services for individuals who need intensive case management to identify and engage in available housing and support options upon returning to their home community.[356] Finally, there is a Mobile Crisis Team that responds with police and other first responders in the community to provide crisis stabilization and linkage to appropriate services and supports in moments of crisis.[357]

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[347] Id.
[348] Michael Ollove, *New Efforts Aim To Keep The Mentally Ill Out Of Jail*, The Huffington Post (May 19, 2015). http://www.huffingtonpost.com/2015/05/19/mentally-ill-jail_n_7316246.html.
[349] Id.
[350] Id.
[351] Id.
[352] King County, Washington Government Web Page, Crisis Diversion Programs, http://www.kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/diversion-reentry-services/crisis-diversion-programs.aspx
[353] Id.
[354] Id.
[355] Id.
[356] Id.
[357] Id.

King County also utilizes a mental health court program.[358] This program provides a diversionary court for those whose crimes are linked to a mental illness.[359] The diversionary court is open to individuals with both misdemeanor and felony charges.[360]

King County's diversion program was evaluated by researchers at Seattle University who concluded that the program was successful. [361] The evaluation results suggest that the program is relieving an otherwise substantial and unnecessary burden on law enforcement officers.[362] This is done by diverting individuals with SMI out of the criminal justice system to mental health professionals who can triage cases and divert the individuals to more appropriate treatment.[363]

7) Bexar County, Texas

Bexar County, Texas utilizes a complex jail diversion program in its fight against the criminalization of mental illness that incorporates a number of the components of the CMHP.[364] First, the county utilizes a pre-arrest diversion program which includes CIT training and the use of a crisis center to provide needed mental health and substance abuse services.[365] In addition, there is a pre-trial diversion program offering pre-trial mental health services and a court diversion program.[366] Finally, the county has adopted a collaboration model involving different agencies and different members of the community to cooperate in facilitating proper services.[367]

The program has seen immense success. On average, the program diverts 4,000 individuals annually from incarceration to treatment and

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[358] King County, Washington Government Web Page, King County District Court Regional Mental Health Court, http://www.kingcounty.gov/courts/district-court/regional-mental-health-court.aspx.

[359] Id.

[360] Id.

[361] Helfgott, J. B., Hickman, M. J., & Labossiere, A. (2012). *A Descriptive Evaluation of the Seattle Police Department's Crisis Intervention Team/Mental Health Partnership pilot project.* Seattle, WA: Seattle University. *See also* http://www.modelsforchange.net/publications/765/Washington_State_Mental_Health_Diversion_Guidebook.pdf.

[362] Id.

[363] Id.

[364] *Blueprint for Success: The Bexar County Model, How To Set Up A Jail Diversion Program In Your Community,* http://passthrough.fw-notify.net/download/318528/http://www.fairfaxcounty.gov/policecommission/subcommittees/materials/jail-diversion-toolkit.pdf

[365] Id. at pgs. 11-21.

[366] Id.

[367] Id.

has diverted 20,000 individuals since the program's inception.[368] In addition, the county saves $5 million for jail costs and $4 million annually for inappropriate admissions to the emergency room.[369] Finally, before the program, physical force was required at least fifty times each year in taking the mentally ill into custody.[370] Since the inception of the program, only three incidents of physical force have been used in dealing with the mentally ill.[371] The program has had immense success as there is only a 4% recidivism rate for those completing programs and 70-80% of the participants complete the program.[372] Based on its success, Bexar County has become a national model for success in the area of fighting criminalization of mental illness.[373]

Even with its immense success, representatives from Bexar County visited the CMHP.[374] The reason for the visit was to see how the CMHP's diversion programs worked within the court system.[375] Bexar County's programs focus on the law enforcement side and in particular its CIT and pre-arrest diversion.[376] They viewed the CMHP to help develop their court programs.[377] The reason for this, according to Gilbert Gonzalez, Director of the Mental Health Department for Bexar County, is that the CMHP approach is different in that Bexar County's programs focus on law enforcement diversion where Judge Leifman brings "great experience in fighting the criminalization of mental illness through the court system."[378] Gonzalez said the greatest challenge for Bexar County's programs, other than that of funding, is that of "educating those within the court system of the value and need for mental health diversion."[379]

8) Douglas County, Kansas

Douglas County, Kansas faces the problem of the criminalization of mental illness. The county has adopted a number of components similar

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[368] Id. *See Also* Susan Parmerleau, *Jail Diversion Program A Huge Success*, My San Antonio (January 22, 2016), http://www.mysanantonio.com/opinion/commentary/article/

[369] Id.

[370] Id.

[371] Id.

[372] Telephone interview with Gilbert Gonzalez, Director of Mental Health Department for Bexar County, TX, (August 22, 2017).

[373] Susan Parmerleau, *Jail Diversion Program A Huge Success*, My San Antonio (January 22, 2016), http://www.mysanantonio.com/opinion/commentary/article/

[374] Telephone interview with Gilbert Gonzalez, Director of Mental Health Department for Bexar County, TX, (August 22, 2017).

[375] Id.

[376] Id.

[377] Id.

[378] Id.

[379] Id.

to those of the CMHP in its fight against the criminalization of mental illness. Douglas County has provided CIT training to law enforcement officers throughout the county.[380] The county and municipal courts in Lawrence, Kansas have developed a mental health diversion program that includes both pre-booking and post-booking diversion programs for misdemeanors.[381] As part of the post-booking diversion program, the county has created mental health courts.[382] Finally, the county has a goal in the near future of creating a mental health crisis stabilization and treatment center.[383]

Douglas County's program is in its infancy and there are no statistics available concerning the success of the program at this time.[384] However, the county is unique in that it has hired a special consultant from the academic community, Margaret E. Severson, to help with the creation of its program.[385] Ms. Severson is a professor at the University of Kansas and has studied mental illness in the court systems for many years.[386] Based on her studies, she recommended the current components for Douglas County's program.[387] According to Professor Severson, she is "optimistic that the Douglas County program is a successful approach to combating the criminalization of mental illness and that in the future the statistics will provide proof of this successful approach." [388]

9) Los Angeles County, California

In 2015, Los Angeles County, California instituted a mental health diversion program to help reduce the number of individuals suffering from SMI who are housed in the county jail.[389] Los Angeles County currently has over 16,000 inmates housed in its jail system, which ranks as one of the largest in the United States.[390] Roughly 4,000 of those inmates suffer from SMI.[391]

The mental health diversion program, which is called the Office of Re-Entry and Diversion, is headed by retired Superior Court Judge Peter

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[380] Rick Cagan, *Mental Illness and Jails*, Justice Matters In Kansas, http://www.justicemattersinkansas.org/mental_illness_jails

[381] Id.

[382] Id.

[383] Id.

[384] Telephone interview with Professor Margaret E. Severson, University of Kansas (February 17, 2017).

[385] Id.

[386] Id.

[387] Id.

[388] Id.

[389] Telephone interview with the Honorable Peter Espinoza, Director of Los Angeles County Office of Diversion and Re-entry (February 17, 2017).

[390] Id.

[391] Id.

Espinoza.[392] In addition to the fact that key roles are played by judges in both the CMHP and the Office of Re-Entry and Diversion, the Los Angeles County program shares a number of other characteristics with those of the CMHP. First, the Los Angeles County program has a pre-booking diversion program which includes CIT training for law enforcement and four urgent care centers to provide mental health services to those diverted.[393] In addition, the program has a post booking diversion program which consists of a misdemeanor diversion program that aims to place those diverted in community based treatment.[394] Finally, the program consists of a pre-trial felony diversion program which currently provides 1,000 beds for those experiencing mental health and co-occurring substance abuse issues.[395]

According to Judge Espinoza, the program has been in place for a year, and "we are starting to see some success."[396] Currently, there are no concrete statistics available for the pre-booking diversion program due to the number of agencies involved and the age of the program.[397] However, currently 291 inmates have been diverted from the county jail to community-based treatment through the misdemeanor diversion program and 80 percent of the individuals have successfully completed or continue to receive services.[398] In addition, 127 individuals have been diverted through the felony diversion for case management services and 209 have been placed in the community re-entry program.[399]

Judge Espinoza is very optimistic that the program will be successful.[400] According to Espinzoa, "we are already seeing positive results even though the program is just in its inception."[401] "However, the success of the program will ultimately be based on the development of resources to provide resources to those suffering from severe mental illness within the county."[402]

10) Lee County, Florida

Lee County, Florida suffers from the effects of the criminalization of mental illness like many other areas.[403] Lee County has implemented

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[392] Id.
[393] Id.
[394] Id.
[395] Id.
[396] Id.
[397] Id.
[398] Id.
[399] Id.
[400] Id.
[401] Id.
[402] Id.
[403] Telephone interview with Belinda Smith, Administrative Services Coordinator for Specialty Courts for Lee County, Fl (August 22, 2017).

some of the major components of the CMHP.[404] There has been CIT training in the county since 2005.[405] 80 percent of Ft. Meyers police officers, 40 percent of Cape Coral police officers, 25 percent of the deputies at the Lee County Sheriff's Office, and five percent of the county's correctional officers have been trained.[406] Similar to the CMHP, the county uses the CIT training to divert individuals to a triage center which was started in 2008.[407]

The main component of mental health diversion is managed through the mental health courts in Lee County.[408] The court handles both misdemeanor and felony cases.[409] The court diverts about 70 percent of the participants while 30 percent enter pleas and are placed on probation or community control.[410] Seventy-two percent of the participants graduate from the program and, of those graduates, only six percent reoffend within a year of graduation.[411] Those in the program tend to be those with higher risks of reoffending and have greater mental health needs.[412] Lower level offenders are diverted through the triage center.[413] The county utilizes the SOAR program.[414] Thus, Lee County has been successful in its use and implementation of the mental health diversion programs.

D. Conclusion

Jurisdictions and areas across the country suffer from the criminalization of mental illness. Some of these jurisdictions have been proactive by developing programs to combat the criminalization of mental illness. At least 15 different jurisdictions have visited the CMHP to gain ideas and most have implemented programs based on some of those ideas. Reports from the previously identified jurisdictions indicate that these implemented programs have been a success. They also provide examples of how different areas have been creative due to financial limitations in combating the criminalization of mental illness. They also provide a good frame work of ideas for other jurisdictions trying to implement similar programs. In all, the research described in this thesis indicates that the CMHP has had a positive influence on other

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[404] Id.
[405] Id.
[406] Id.
[407] Id.
[408] Id.
[409] Id.
[410] Id.
[411] Id.
[412] Id.
[413] Id.
[414] Id.

jurisdictions and that other jurisdictions are finding success in implementing parts of the CMHP or utilizing similar components to those of the CMHP.

V. THE NEED FOR IMPROVEMENT

Programs like the CMHP have been tremendously successful. However, programs like these also have weaknesses. First, programs like the CMHP do not address every issue that the communities and court systems face in regards to the criminalization of mental illness. This is often the case because there is a lack of legislation to adequately address mental health issues in the court system and the community. Further, in order for programs like the CMHP to operate effectively, they must be adequately funded. Many communities do not have the resources to effectively run programs like the CMHP and thus, they are not as successful. The lack of funding and effective legislation are two of the major issues cited by all jurisdictions dealing with the issue of the criminalization of mental illness.

A. The Need for More Legislation

1) Legislative Help for Court Systems

The CMHP and other similar programs have been extremely successful. But even with their success, the CMHP and other similar programs do not adequately address every issue and cannot solve every problem relating to the criminalization of mental illness. A major weakness is the lack of legislation to help court systems and communities battle this problem.

One of the major problems facing courts is the lack of legal remedies to help alleviate the problems associated with the criminalization of mental illness. In most cases, it is the lower courts that deal with the problems of criminalization of mental illness. The reason for this is that these courts are usually the courts that are assigned or have jurisdiction over misdemeanor type cases. The problem arises because most states will not allow a county court judge presiding over misdemeanor cases to order an involuntary forensic commitment. As a result, the defendant is normally released from custody as soon as he is found incompetent to proceed only to be repeatedly recycled through the court system after each arrest.

In Florida, for example, the Florida Supreme Court has held that a judge cannot order a defendant charged with a misdemeanor in a criminal case to be involuntarily committed to a forensic mental health facility.[415] In *Onwu v. State*, a county court judge presiding over a

[415] Onwu v. State, 692 So. 2d 881 (Fla. 1997).

misdemeanor case ordered a mental evaluation of the defendant to determine his competency to proceed in the criminal case.[416] After receiving the competency evaluations, the defendant was found to be incompetent to proceed.[417] As a result, the judge moved to initiate proceedings in order to involuntarily commit the defendant to a state forensic mental health facility.[418] The defendant challenged the judge's authority claiming that under Chapter 916 of the Florida Statutes, only a circuit court judge has the authority to involuntarily commit the defendant to a state forensic mental health facility.[419]

The Florida Supreme Court held that the county court judge did not have the authority to commit the defendant to a state forensic mental health facility.[420] The Court relied on the statutory language which provides that only a circuit court judge can make the necessary findings to order a forensic commitment.[421] As a result, the Court reasoned that a judge did not have the authority to order an involuntary forensic commitment in a misdemeanor case.[422]

Most states follow the same approach as provided for in Florida law and do not allow forensic commitment in misdemeanor cases.[423] As argued in Onwu, the main reason for this is that there is usually a shortage of bed space in state forensic facilities and a forensic commitment of misdemeanants would only exacerbate the situation.[424] Due to the lack of bed space, the states are concerned with the fiscal impact of flooding the forensic hospitals with misdemeanants.[425] However, as the court noted in *Onwu*, it only takes the legislature to amend the statute or draft new legislation that would allow misdemeanants to be committed to forensic hospitals.[426]

The Florida legislature has recently passed legislation that will help county courts combat the criminalization of mental illness. The amended portions fall under the civil mental health laws commonly called Baker Act proceedings. In particular, the legislature recently amended statutory provisions that allow a criminal county court judge to make an ex-parte order requiring an involuntary examination if the judge believes the

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[416] Id.
[417] Id. At 882.
[418] Id.
[419] Id.
[420] Id. at 883.
[421] Id. at 883.
[422] Id.
[423] *See* SYMPOSIUM:THE CRIMINAL DEFENSE LAWYER'S FIDUCIARY DUTY TO CLIENTS WITH MENTAL DISABILITY, 68 Fordham L. Rev. 1581 (April, 2000) at 1624.
[424] Onwu, 692 So. 2d 881, 882.
[425] Telephone interview with Tim Coffey (March 31, 2017).
[426] Onwu, 692 So. 2d 881, 883.

person is suffering from mental illness.[427] Further, under Fla. Stat. 394.4655, a criminal county court judge can now order and require the individual to involuntary outpatient treatment services.[428] However, the statutes still will not allow the criminal county court judge to order and require involuntary inpatient placement.[429]

These amended provisions do not address the problem discussed in the *Onwu* decision. However, they do provide a tool for criminal county court judges when facing mental health issues in their courts. In particular, in the event that a defendant is found incompetent to proceed, rather than just releasing the defendant, the county court judge could enter an order under Fla. Stat. 394.4655 requiring an involuntary mental health examination and if appropriate could order outpatient treatment. Although not perfect, this provides a significant tool for a criminal county court judge that did not previously exist. Further, these types of legislation can be a model for other jurisdictions to follow.

2) Legislation for Communities at Large

The National Alliance for Mental Illness (NAMI) recently "warned the U.S. Senate Judiciary Committee that the criminalization of people living with mental illnesses has reached crisis proportions and called for support of federal, state, and local reforms to overcome failings in both the mental health care and criminal justice systems."[430] NAMI has urged for more legislation to help in the fight against the criminalization of mental illness.[431] In particular, NAMI supports bills like the Mental Health and Safe Communities Act introduced by Senator John Cornyn of Texas and similar bills that would help in combating the criminalization of the mentally ill.[432]

Bills like the Mental Health and Safe Communities Act are essential in solving the problem of criminalizing the mentally ill. [433] If passed, the Mental Health and Safe Communities Act will provide more funding for mental health care especially in the area of the criminal justice system.[434]

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[427] Fla. Stat. 394.463(2)(a)(1) (2017).
[428] Fla. Stat. 394.4655 (2017).
[429] Fla. Stat. 394.467 ; Fla. Stat. 394.455(10) (2017).
[430] *NAMI Warns Senate about Criminalization of Mental Illness; Supports Cornyn Bill*, National Alliance for Mental Illness press release (Feb. 2016), https://www.nami.org/Press-Media/Press-Releases/2016/NAMI-Warns-Senate-about-Criminalization-of-Mental
[431] Id.
[432] Id. In February, 2016 NAMI Senior Policy Advisor Ronald S. Honberg presented NAMI's support of the Mental Health and Safe Communities Act, introduced by Senator John Cornyn of Texas, before the Senate Judiciary Committee.
[433] *Mental Health and Safe Communities Act of 2015*, S.2002 114th Congress (2015).
[434] Id. *See also* Sarah Trumble, *Mental Health and Safe Communities Act: The Good, the Bad, and the Fixable*, Third Way (October 30, 2015).

It will provide for the collection of data concerning the role of mental illness in homicides.[435] Also, it will provide funding for training of law enforcement officers in active shooter scenarios especially when dealing with those that have mental illnesses.[436] Finally, it will provide stronger background checks and qualification for gun ownership in order to keep those with severe mental illnesses from owning guns.[437]

These are just examples of current legislation that will help both the court systems and communities combat the criminalization of mental illness. It is clear that this type of legislation will help fill in gaps that cannot otherwise be handled by programs such as the CMHP. It is also evident that these types of legislative helps will be very successful in alleviating the problems associated with the criminalization of mental illness.

B. Lack of Funding

The CMHP is an incredible program. However, many communities cannot establish such a program or even parts of the program because of a lack of resources. The monetary limitations keep most communities from experiencing the type of success that has been experienced by Miami-Dade County.

The CMHP initially started its program with a $50,000 grant and later secured a $300,000 federal grant to help build its program.[438] However, the CMHP now spends nearly $1.2 million each year on its program.[439] In addition, Miami-Dade County is in the process of building a dedicated mental health diversion facility which will cost taxpayers over $40 million.[440]

Funds such as those spent by Miami-Dade County are not always available to other counties. Many counties resort to grants and other government aids in order to institute mental health programs that work with the criminal justice system. Many communities do not even have a dedicated facility or funds for treatment programs in order to divert

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http://www.thirdway.org/memo/mental-health-and-safe-communities-act-the-good-the-bad-and-the-fixable

[435] Id.

[436] Id.

[437] Id.

[438] Telephone interview with Tim Coffey, Coordinator Eleventh Judicial Circuit Mental Health Project (April 28, 2017).

[439] Miami-Dade County, 11th Judicial Circuit, *Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes* (June 8, 2016).

[440] David Ovalle, *In Miami-Dade, hope, help for offenders with mental illness*, Miami Herald (September 29, 2014). http://www.miamiherald.com/news/local/community/miami-dade/article2319144.html

individuals with SMI out of the criminal justice system. Thus, funding is a major issue for smaller communities.

Larger communities are not immune to the problem of limited funding. Los Angeles County has based the success of its program on the development of resources.[441] Bexar County, which promotes one of the best mental illness diversion programs in the country, faces funding issues. Officials in Bexar County noted that with budget cuts the lack of resources makes it hard to service individuals with SMI in the criminal justice system.[442] Thus, funding of mental health diversion programs is an issue for counties both large and small.

However, some jurisdictions are learning how to cope with less funding. For example, in Florida's Seventh Judicial Circuit, SMA Behavioral, which is the mental health provider for the circuit, has begun to develop pilot programs using grant money.[443] Currently, they are using grant money to create crisis treatment units in the circuit's smaller counties to service individuals with episodes of severe mental illness.[444] In addition, they have started a FACT program with non-recurring state funds to identify, target and service individuals in the circuit with a history of severe mental illness.[445] It is the hope of SMA to continue to build programs and services with grant money in order to fund necessary programs. Other jurisdictions could follow these examples to help build programs to service those with severe mental illness.

VI. JUDICIAL INTERVENTION AND COMMUNITY SUPPORT

The criminalization of mental illness is a real problem in our country. It is important that communities and their stakeholders come together to solve this problem. Judges seem to be the catalysts in raising community awareness of this issue and helping coordinate efforts in counties, states, and throughout the country. The majority of programs researched and cited above include participation by a representative of the judiciary as a key component of the program's success. It seems that the judiciary has a unique way of bringing attention to the problem of the criminalization of mental illness. As one judge stated, "When I was a public defender trying to address this problem, I called a meeting of all the key

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[441] *See Supra* note 303.

[442] Matt Clarke, *Bexar County, Texas Fails to Properly Evaluate Mentally Ill Jail Prisoners*, Prison Legal News (April 2011) https://www.prisonlegalnews.org/news/2011/apr/15/bexar-county-texas-fails-to-properly-evaluate-mentally-ill-jail-prisoners

[443] Telephone interview with Ivan Cosimi, CEO SMA Behavioral Healthcare (April 26, 2017).

[444] Id.

[445] Id.

stakeholders, and no one came. When I became a judge I called the same meeting. Everyone was five minutes early."[446]

Two programs or organizations which have been developed through coordinated efforts of judges have helped to bring attention to and help solve the problem of the criminalization of mental illness. The first of these is the Judges Criminal Justice/Mental Health Leadership Initiative. The second is the Stepping Up Initiative. Both programs have been instrumental in educating and helping solve the problem of the criminalization of mental illness.

A. Judges Criminal Justice and Mental Health Leadership Initiative

The Judges Leadership Initiative (JLI) was founded to help harness the leadership skills of the judiciary in order to help combat the criminalization of mental illness.[447] The organization is funded by the United States Department of Justice and United States Department of Health and Human Services.[448] The goal of the JLI is to support and enhance the efforts of judges who have already taken leadership roles in their communities fighting against the criminalization of mental illness.[449] In addition, the goal is to promote leadership among more judges that will improve the response to people with mental illnesses that are in the criminal justice system.[450] This is done by providing activities and resources to judges who wish to participate. Thus far, the JLI has provided help in addressing 400 to 500 issues that deal with mental health in the criminal justice system.[451]

The JLI, led by one its co-founders and chairpersons, Steven Leifman, has recently partnered with Psychiatric Leadership Group to form the Judges and Psychiatrist's Leadership Initiative (JPLI).[452] The goal of the JPLI is to stimulate, support, and enhance efforts by judges and psychiatrists to improve judicial, community, and systemic responses to people with behavioral health needs who are involved in the justice system.[453] This is done by creating a community of judges and psychiatrists through web-based and in-person training.[454] In addition,

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[446] *Judges Criminal Justice/Mental Health Leadership Initiative*, https://www.bja.gov/publications/jli.pdf

[447] Id.

[448] Id.

[449] Id.

[450] Id.

[451] Telephone interview with Judge Steven Leifman, Co-Chairman of the JLI, (October 19, 2017).

[452] *Judges' and Psychiatrists' Leadership Initiative*, https://csgjusticecenter.org/courts/judges-leadership-initiative/

[453] Id.

[454] Id.

the JPLI seeks to increase the reach of trainings in order to build the non-clinical skills of court professionals which will help improve individual and public safety outcomes.[455] For example, the JPLI recently provided training to effectively identify and manage individuals with mental illnesses within the Illinois court system.[456] Finally, the JLPI's goal is to develop educational resources to increase judges' and psychiatrists' understanding of the latest research and best practices for people with mental illnesses involved in the justice system.[457]

B. Stepping up Initiative

In 2015, the National Association of Counties, the Council of State Governments Justice Center, and the American Psychiatric Association Foundation launched the Stepping Up Initiative.[458] The goal of the Stepping Up Initiative is to advance counties' efforts in reducing the number of adults with mental illnesses and co-occurring substance abuse disorders in jails.[459] As part of this, elected officials of counties are being called upon to pass a resolution and "work with other leaders (e.g., the sheriff, judges, district attorney, treatment providers, and state and local policymakers), people with mental illnesses and their advocates, and other stakeholders to reduce the number of people with mental illnesses in jails."[460]

As part of this resolution, the counties' stakeholders are asked to take the following six actions. First, convene or draw on a diverse team of leaders and decision makers from multiple agencies committed to safely reducing the number of people with mental illnesses in jails. Second, collect and review prevalence numbers and assess individuals' needs to better identify adults entering jails with mental illnesses and their recidivism risk and use that baseline information to guide decision making at the system, program, and case levels. Third, examine treatment and service capacity to determine which programs and services are available in the county for people with mental illnesses and co-occurring substance use disorders and identify state and local policy and funding barriers to minimizing contact with the justice system and

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[455] Id.

[456] *Judges and Psychiatrists Partner to Deliver Training in Illinois on Individuals with Mental Illnesses in the Courts*, Justice Center, Council of State Governments (June 29, 2011). https://csgjusticecenter.org/cp/posts/judges-and-psychiatrists-partner-to-deliver-training-in-illinois-on-individuals-with-mental-illnesses-in-the-courts/

[457] *Judges' and Psychiatrists' Leadership Initiative*, https://csgjusticecenter.org/courts/judges-leadership-initiative/

[458] *The Stepping Up Intitiative*,http://www.naco.org/resources/programs-and-services/stepping-initiative

[459] Id.

[460] Id.

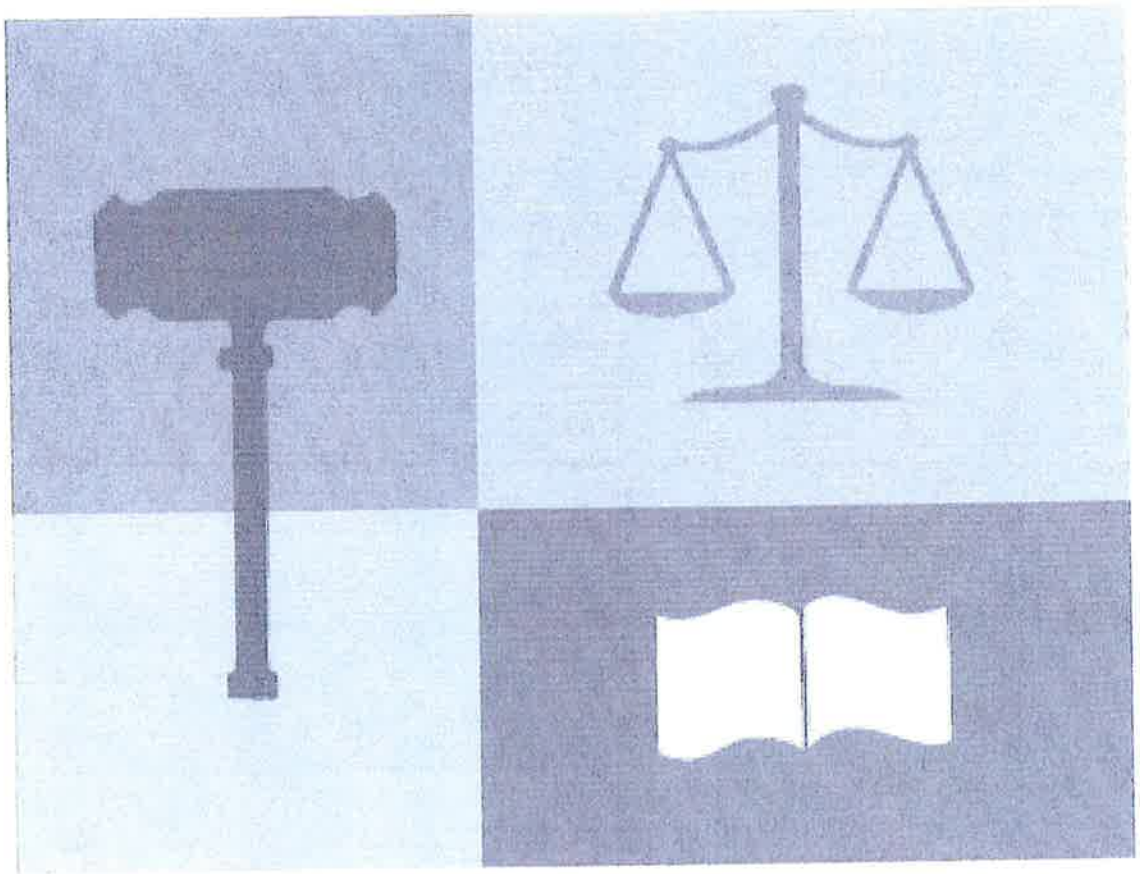
providing treatment and supports in the community. Fourth, develop a plan with measurable outcomes that draws on the jail assessment and prevalence data and the examination of available treatment and service capacity while considering identified barriers. Fifth, implement research-based approaches that advance the plan. Finally, create a process to track progress using data and information systems and to report on successes.

The Initiative has been very successful in that over 360 counties nationwide have adopted the resolution. A summit was held in 2016 to help refine strategies to implement the six-step plan. Further, the initiative is providing resources to counties in order to help them reduce their jail populations of those with mental illnesses and co-occurring substance abuse orders.

CONCLUSION

The CMHP has enjoyed tremendous success in its fight against the criminalization of mental illness. This is evident not only from the numerous statistics showing its success but also from the lives it has touched and the placement of individuals on the successful road to recovery. The CMHP has been nationally recognized and it is a model that has been followed by other jurisdictions and communities. These communities and jurisdictions have experienced similar successes as that of the CMHP. The CMHP and other similar programs have provided a catalyst for other judges and community leaders to form national programs to combat the criminalization of mental illness like the Judges Leadership Initiative and the Stepping Up Initiative.

The only weakness is that the CMHP does not address every issue that encompasses the criminalization of mental illness. As a result, legislation is needed to address the problems of the criminalization of mental illness in the court systems and in communities. In addition, many communities lack the funding to experience the success of the CHMP. It is important for these jurisdictions to have proper funding or become creative in their use of funds. However, in light of these weaknesses, the CMHP is still the gold standard in providing an effective solution to the problem of criminalizing the mentally ill.



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LETTER FROM THE EDITOR

Dear Readers,

For those in the northern hemisphere, this is a time of steamy, hot days and longing for the cooler time of autumn. But work does not stop even in the heat, so we bring to you our latest issue of IJCSL filled with interesting articles to read (at the beach?)

The first article visits a question that is pressing not only in the United States, but also in many other countries where CSOs are restricted in the amount of advocacy activities they can pursue if they wish to achieve the highest level of tax benefits. The author, **C. Joseph Boatwright**, a Jacksonville, FL attorney, discusses **the "political activity prohibition" in Internal Revenue Code § 501 (c)(3), with particular reference to religious organizations**.

This topic is one that has received a great deal of attention in both the popular and the academic press because of the Internal Revenue Service (IRS) initiative to restrict election-related activities at churches and other religious institutions throughout the United States (among other organizations). Readers of the Newsletter will recall discussions of the controversy involving All Saints Episcopal Church in Pasadena, CA as well as other aspects of the IRS initiative. Mr. Boatwright's careful and considered analysis of the situation gives a great deal of historical background for the "political activity prohibition" and makes a well-reasoned argument as to why it should be repealed, at least with respect to religious organizations.

The Special Section this quarter includes three items of interest with regard to **anti-terrorism legislation**. At a time when serious concerns have been raised about potential and actual infringement of civil liberties as a result of legislation and other government activities related to pursuing terror suspects, the Special Section is quite significant in bringing together three different approaches to the issue, specifically as it affects charities and other not-for-profit organizations. Concerns have been raised in developing countries, where anti-terrorism legislation is frequently used to target CSOs that are not in favor with the government. In addition, as this Special Section demonstrates, the issues are pertinent in developed countries once thought to be bastions of civil liberties.

The first of the items in the Special Section, an excerpt from the new (July 2008) **Charity Commission for England and Wales "Counter-terrorism Strategy"** describes how an independent agency within government seeks to thread its way between effective oversight and enforcement and respect for the sector it oversees. For example, the Commission stresses that it seeks "a balance between support and guidance, prevention and compliance intervention." Whether its efforts to do so will be successful remains to be seen.

The second item is a paper by **Terrance S. Carter**, a lawyer practicing in Toronto, Canada, which addresses concerns about the way in which the legislation adopted to address the potential for terrorism in Canada has had an adverse impact on charities working there and internationally. Presented in April at the University of Iowa Provost's Forum on International Affairs 2008:

Counter-Terrorism and Civil Society, Mr. Carter's article is entitled **"The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for Balance."**

The article discusses the fairly onerous requirements of recent legislation aimed at combatting terrorism in Canada and their disparate impact on charities. Many clearly seek to ignore or avoid the application of the laws, while others will be subject to extreme paperwork burdens involved with compliance. In seeking the balance he proposes, Mr. Carter urges regulators to try to fit the oversight regime to the circumstances, arguing that most charities are not going to be potential targets of terrorist's activities.

Rounding out the Special Section is a publication co-authored by **Kay Guinane of OMB Watch and Vanessa Dick of Grantmakers Without Borders.** It details that ways in which anti-terrorism legislation in the United States has adversely affected "charities, foundations, and the people they serve." This article, entitled **"Collateral Damage,"** has received significant attention since its original publication on the OMB Watch website, and we are very pleased to present it to an international audience.

Guinane and Dick's article details the flawed assumptions on which the U. S. anti-terrorism measures aimed at charities are based, the barriers they create for international philanthropy and programs, the failure to grant adequate due process rights and the damaging effect that has had on charities, etc. They also discuss other implications of the legislation and other rules, including the curtailment of free speech. This article is truly an indictment of the manner in which the government has pursued its anti-terrorist agenda in ways that harm civil liberties.

All in all both the stand-alone article and the Special Section offer much food for thought. Any reader comments and letters in response would be welcome. In the meantime, happy reading!

Karla W. Simon, Editor-in-Chief

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IJCSL EDITORIAL POLICY

July, 2008

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ARTICLES

SHOULD THE 501(C)(3) POLITICAL ACTIVITY PROHIBITION BE REVOKED?

BY C. JOSEPH BOATWRIGHT*

I. INTRODUCTION

Churches and other tax exempt organizations that meet the qualifications of §501(c)(3) are exempt from federal income taxes.[1] However, the churches and organizations are only tax exempt if they do not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[2] This language is known as the "Political Activity Prohibition."[3] Any church or organization violating this part of §501(c)(3) can lose its tax exempt status or be subject to penalties.[4]

In 2000, the U.S. Court of Appeals for the District of Columbia upheld the constitutionality of the "Political Activity Prohibition" and allowed the Internal Revenue Service (IRS) to strip a church in Binghamton, New York, of its tax exempt status for being involved in political activity that violated the prohibition in §501(c)(3).[5] In light of the decision, Walter Jones, a Congressman from North Carolina, and representatives from the American Center for Law and Justice worked together to propose an amendment to §501(c)(3) which would allow churches the freedom to be involved in political activities including but not limited to speech "on behalf of or opposition to a political candidate."[6] The concern was that churches would not be able to engage in political speech from the pulpits of churches without losing their tax exempt

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[1] 26 U.S.C. §501(c)(3) (2006).

[2] Id.

[3] DARRYLL K. JONES ET. AL., TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS 471 (1ST. ED. 2003).

[4] *See* Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

[5] Id. The church ran newspaper ads that opposed a political candidate for office which violated the political activity prohibition.

[6] American Center for Law and Justice, Permissible and Impermissible Political Activity by Houses of Worship, http://www.aclj.org/news/Read.aspx?ID=86

status. As a result in 2002, Walter Jones sponsored HR-235 which was entitled the "Houses of Worship Free Speech Restoration Act" in an attempt to amend §501(c)(3).[7] The bill was voted down by the House of Representatives in 2003.[8] Congressman Jones has tried on numerous occasions since 2003 to amend §501(c)(3) by sponsoring different versions of bills that would do away with the "Political Activity Prohibition," but as of yet none of the versions have passed.[9] In 2007, Congressman Jones sponsored H.R. 2275 which will seek to strike the entire portion of the "political activity prohibition" language and as of January, 2008 the bill has been referred to House Committee on Ways and Means.[10]

This article will discuss whether the "political activity prohibition" should be revoked. In discussing whether the "political activity prohibition" should be revoked, this article will first discuss the history behind the political activity prohibition. Next, the article will discuss the different tax exempt theories which allow the charitable deduction. Third, the article will discuss the tax consequences of violating the "political activity prohibition." Fourth, the article will discuss exactly what type of political activity would be allowed if the "political activity prohibition" were revoked. Then, this article will discuss the tax effect and consequences of revoking the "political activity prohibition." Then, the article will discuss free speech and establishment clause issues that relate to the "political activity prohibition." Next, the article will discuss the dilemma that the IRS faces by holding to strict enforcement of the prohibition against political activity. The IRS faces a dilemma in that strict enforcement of the prohibition would require costly monitoring of every church in the country. Further, if the IRS selectively enforces such a provision, targets could claim that the government is favoring different religions over others. Conversely, if the IRS sits idle, there will be rampant abuse of the prohibition. Last, the article will conclude that a revocation of the political activity prohibition should not be allowed, but Congress should amend the prohibition to allow an insubstantial amount of political conduct which would in turn allow the IRS to properly enforce the provision.

A. II. HISTORY OF THE POLITICAL ACTIVITY PROHIBITION

Most proponents of bills such as H.R. 2275 believe that the "Political Activity Prohibition" as it stands in its current form was never meant to apply to churches.[11] Some individuals take the position that the "Political Activity Prohibition" came about during the Senate administration of Lyndon Johnson. During Johnson's administration, two non-profit organizations were causing Johnson political problems by actively supporting those candidates that opposed Johnson, and as

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[7] Id.

[8] Id.

[9] Id. Jones has proposed different versions of the a bill to amend §501(C)(3) between 2002-2007 but none have passed as to date.

[10] H.R. 2275, 110th Cong. (2007). The Bill is entitled "To restore the Free Speech and First Amendment rights of churches and exempt organizations by repealing the 1954 Johnson Amendment."

[11] *See* Jennifer M. Smith, *Article: Morse Code, Da Vinci Code, Tax Code and...Churches: An Historical and Constitutional Analysis of Why Section 501(C)(3) Does Not Apply to Churches,* 23 J.L. & Politics 41 (Winter 2007).

a result, he sought to have their non-profit status revoked.[12] Regardless of Senator Johnson's motivations, there are those that argue that the tax exempt status of an organization under §501(c)(3) is based on the charitable nature of the organization.[13] Thus, if an organization is involved in politics then it is not by its nature charitable. A brief look at the history of the charitable deduction will tend to show that the political activity prohibition has its roots in common law and that even prior to 1954, Congress sought to place limits on political activity and charitable status of entities.

A. Pre-1954 History

Tax exempt status for churches and other charitable organizations under §501(C)(3) has its roots in the common law of "Charitable Trusts."[14] A charitable trust is a trust that either provides for relief of poverty, advances education, advances religion, or includes trusts for other purposes that are beneficial to the community.[15] In order for the trust to obtain tax relief, the trust must be charitable and must provide a public benefit.[16] A trust that serves political purposes is not charitable and does not provide a public benefit.[17] As a result, a trust that serves political purposes does not qualify as a "charitable trust" under the common law.

The Courts and the IRS have recognized that charitable exemptions are based on the common law of concept of charity as found in the law of charitable trusts.[18] One of the requirements of the common law concept of a charity is that the charity must provide a public benefit.[19] In analyzing the roots of the common law charity, a political purpose was held not to be a public benefit because courts were unable to tell whether the political activity would or would not benefit the public.[20]

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[12] *House Committee on Ways and Means*, May 14, 2002 (Statement of the Hon. Walter B. Jones, a Representative in Congress from the State of North Carolina).

[13] Karla W. Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 Tax L. Rev. 477 (1981).

[14] Id.; *See also* Green v. Connally, 330 F. Supp. 1150 (D.C. Cir. 1971)(holding that § 501(C)(3) has its roots in charitable trust law.)

[15] Abraham Drassinhower, *The Doctrine of Political Purposes in the Law of Charities: A Conceptual Analysis* 289 (2007) (citing to Lord Macnaghten's oft-cited definition in Commissioners for Special Purpose of Income Tax v. Pemsel, [1891] A.C. 531, 583.

[16] Id.

[17] Bowman and Others v. Secular Society, [1916-1917] 1 ALL ER at 18. (stating that a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure change is a charitable gift.)

[18] Bob Jones Univ. v. United States, 461 U.S. 574, 579 (1983).

[19] Id.

[20] Drassinhower , *supra* note 15.

It was based on this idea of charitable trust law that an exemption provision to similar to 501(C)(3) was enacted by Congress in the Revenue Act of 1894. [21] In 1913, the first formal exemption for charitable organizations was enacted under the Revenue Act of 1913.[22] Debates prior to the passage of the Act indicated that the charitable exemption would be only for be for those organizations that were not organized for profit and were charitable.[23] The Supreme Court interpreted the exemption provision in the 1913 Act and noted that the exemption for the charitable organizations was based on the public benefit they provide.[24]

It was not until 1920 that language prohibiting political activity began to surface in Regulations promulgated under the Revenue Act of 1918.[25] Under Regulation 45 Article 517(1), an "association formed to disseminate controversial or partisan propaganda" was not considered to be charitable under the Act.[26] In 1927, the United States Board of Tax Appeals, applying the above regulation, held that a contribution to an organization which had as one of its purposes to support candidates for public office that advocated the organization's positions was not charitable.[27] As a result, since the organization was not charitable, any deductions based on contributions to the organization were disallowed.[28]

In the Revenue Act of 1934, Congress denied charitable status to organizations which devoted a substantial part of their activities to "carrying on propaganda, or otherwise attempting to influence legislation." This addition was known as the "lobbying restriction." Although this provision is different from the "politician activity prohibition" of the 1954 and 1987 act, it showed a move by Congress to address the issues of political activity by charities prior to the 1954 Johnson amendment.[29]

In summary, the "political activity prohibition" was recognized prior to the 1954 Revenue Act. Courts have recognized that even though there was no political activity prohibition in the code, the prohibition was rooted in the common law on which 501(c)(3) was conceptually based.[30] The law of charitable exemptions and deduction under 501(c)(3) has its root in the

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[21] Simon, *supra* note 13; unrelated portions of the act were declared unconstitutional in Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601 (1895).

[22] *House Committee on Ways and Means*, April 20, 2005 (Statement of Bruce Hopkins, Attorney, Polsinelli Shalton Welte Suelthaus, P.C., Kansas City, Missouri)(stating that this was the first formal constitutional exception.)

[23] Simon, *Supra* note 13.

[24] Trinidad v. Sagrada Orden, 263 U.S. 578 (1924).

[25] *Treas. Reg* 45 Art 517(1).

[26] Id.

[27] Fales v. Commissioner, 9 B.T.A. 828 (1927).

[28] Id.

[29] I.R.C. §103(6) (1934 Revenue Act).

[30] Greene, 330 F. Supp. 1150.

common law of "Charitable Trusts" which prohibited charitable status to trusts which engaged in political activity. The progression of history up until 1954 shows that there has always been some type of political activity prohibition even thought it was not codified formally until 1954. The reason for this is that up until 1954 an organization that was involved in political activities was not deemed charitable and did not benefit the public.

B. 1954 Amendment and Beyond

The first official language prohibiting political activity was added to the Code by Congress in 1954.[31] In pertinent part the added language read as follows: "and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."[32] The amendment was added as part of a floor amendment by Senator Lyndon B. Johnson.[33] In the brief discussion on the Senate Floor, Johnson sought to extend the §501(c)(3) provisions to deny tax exemption not only to those who influenced legislation but also to those who intervened "in any political campaign on behalf of any candidate for any public office."[34] Subsequently, the added language was adopted in full.[35]

Many argue that Johnson only proposed the additional language because he was upset with two non-church groups operating as non-profit organizations. These two tax exempt groups supported his opponent in running for the Senate in Texas.[36] This was Johnson's attempt to strengthen his position in his run for re-election by terminating the groups' exempt status.[37] The two groups were anti-communist groups that opposed Johnson, and they were in no way affiliated with any church or religious organization.[38] It is based on this fact that many argue that the "political activity prohibition" was never meant to apply to churches.[39]

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[31] 68A Stat. 163 (1954).

[32] Id.

[33] 100 CONG. REC. 9604 (1954).

[34] Id.

[35] 68A Stat. 163 (1954).

[36] *House Committee on Ways and Means*, May 14, 2002 (Statement of Colby M. May, Director, American Center for Law and Justice, Alexandria); See also Patrick L. O'Daniel, *ARTICLE: More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. Rev. 733 (2001).

[37] Id.

[38] Id.

[39] Smith, *Supra* note 11.

In 1987, Congress amended 501(c)(3) to prohibit political activity "in opposition to any candidate."[40] The rationale for adding this additional language was to prevent public funds from supporting political activity and to promote neutrality.[41] 501(c)(3) has not been amended since this time. However, the IRS issued proposed regulations in regards to the 1987 amendment in 1994.[42]

III. What Type of Political Activity is Allowed

A. In General

In 1967, the U.S. Court of Appeals for the Eight Circuit held that "activity which is not religious, charitable, scientific, literary or educational will not result in loss of deductibility or of exemption if that activity is only incidental and less than substantial."[43] Cases such as this allow a small amount of incidental non-charitable activity before an exempt status will be revoked. However, rulings such as this do not apply to the "no political activity" prohibition because such prohibition is absolute.[44] Thus, the question becomes what type of activity is prohibited if such prohibition is absolute.

The Internal Revenue Code does specify what constitutes political activities.[45] However, the Regulations provide that certain activities "constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate."[46] These activities include but are not limited to "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such candidate."[47] A candidate for public office is defined as an individual who offers himself, or is proposed by others, as a candidate for an elective office, whether such office be national, state, or local."[48] From the language of the regulation and the code, political activities are not banned in total; it is only when there is an

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[40] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; see also H.R. Rep. No. 100-391, at 1621, 1625 (1987), reprinted in 1987 U.S.C.C.A.N. 2313-1, 2313-1201, 2313-1205.

[41] Id.

[42] DARRYLL K. JONES ET. AL, *Supra* note 3.

[43] St. Louis Union Trust Co. v. U.S, 374 F.2d 427 (8th Cir. 1967)(factually this case dealt with the exempt status of trust whose donations supported a local bar association which was not involved in political activites).

[44] United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981)(the Seventh Circuit stated: "It should be noted that exemption is lost . . . by participation in any political campaign on behalf of any candidate for public office. It need not from a substantial part of the organization's activities." This unlike the lobbying restrictions found in 501(c)(3) which allows an insubstantial amount of lobbying.)

[45] Id.

[46] 26 U.S.C. § 501(C)(3).

[47] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

[48] Id.

activity that shows bias for or against a candidate that the organization violates the "political activity prohibition" of 501(c)(3).[49] Thus, an organization must remain neutral.[50]

The IRS has taken the position that such political activities must be strictly neutral in nature to receive tax exempt status.[51] For example, in Association of the Bar of New York City, the New York City Bar Association produced a publication that was released to the general public which ranked judicial nominees for New York at the federal, state and local level.[52] The publication rated the candidates as not approved, approved, or approved as highly qualified.[53] The court held that these activities favored one judicial nominee over another.[54] Thus, the activity was considered impermissible under 501(c)(3).[55]

An illustration of this lack of neutrality was present in the 10th Circuit Court of Appeals case of Christian Echoes Nat'l Ministry v. United States.[56] In Christian Echoes, a religious organization that used the radio and publications to influence its followers published many statements and made numerous broadcasts that attacked candidates it thought were too liberal.[57] The organization went so far as to urge its listeners not to vote for John F. Kennedy but instead to elect individuals such as Strom Thurmond.[58] The court viewed this as impermissible political activity and upheld the government's revocation of their tax exempt status.[59]

The IRS has issued a number of Revenue Rulings that describe types of political activities that are permissible. For example, a non-profit radio station that provided equal airtime and access to all legally qualified candidates for public office was not viewed as offering support "on or behalf of a political candidate."[60] Also, the IRS has provided that an organization that is exempt under 501(c)(3) may distribute to the public a compilation of voter records of all

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[49] *See* The Association of the Bar of the City of New York v. Comm., 858 F. 2d 876 (2nd Cir. 1988) (holding that a New York Bar Association publication which rates candidates based on non-objective data should be denied exempt status because this activity violates the political activity prohibition.)

[50] Id.

[51] Id. *See also* Fuliani v. League of Women's Voter Educ. Fund, 882 F. 2d 621 (2nd Cir. 1989) (holding that political activities must be strictly non-partisan in nature).

[52] Id. at 877.

[53] Id.

[54] Id. at 880.

[55] Id. at 881.

[56] Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (10th Cir. 1972).

[57] Id. at 856.

[58] Id.

[59] Id. The organizations tax exempt status was also revoked for participating in substantial lobbying activities which also violated 501(c)(3).

[60] Rev. Rul 74-574, 1974-2 C.B. 160 (1974).

members of Congress on major legislative issues as long the publication does not contain an editorial opinion and its content or structure do not imply approval or disapproval of any member or their voting records.[61] Further, an organization exempt under 501(c)(3) may send a questionnaire to candidates for public office and may publish the comments and distribute them to the public as long as such questions proposed are non-biased in nature.[62] Further, tax exempt status will not be denied when an organization exempt under 501(c)(3) holds a public forum in which all candidates in a particular election are invited to speak on non-biased election topics.[63] The foregoing discussion is not meant to be exhaustive but is only an illustration of certain political activities that are permissible. The proper conclusion to this matter is that the Service approaches these issues on a case-by-case basis under a highly factual inquiry and looks to see if the organization is supporting a candidate or remaining neutral.[64]

B. Code Words and Other Language

The IRS has taken the position that certain "coded language" violates the "political activity prohibition."[65] The IRS has explained that certain words can have the connotation of supporting or opposing a political candidate without actually naming the political candidates.[66] According to the IRS,

> the concern is that an §501(c)(3) organization may support or oppose a particular candidate in a political campaign without specifically naming the candidate by using code words to substitute for the candidate's name in its messages, such as 'conservative,' 'liberal,' 'pro-life,' 'pro-choice,' 'anti-choice,' 'Republican,' 'Democrat,' etc., coupled with a discussion of the candidacy or the election.[67] When this occurs, it is quite evident what is happening -- an intervention is taking place.[68]

The issue really has become one of intent. According to the IRS, in order to violate the political campaign prohibition, an advocacy communication "should contain some relatively clear

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[61] Rev. Rul 78-248, 1978-1 C.B. 154 (1978).

[62] Id.

[63] Rev. Rul. 86-95, 1986-2 C.B. 73 (1986).

[64] *See* Rev Rul 80-282, 1980-2 C.B. 178 (1980) (finding that all inquiries to into whether an impermissible political activity is present is a highly factual inquiry that must ultimately include that the activity in non-biased) *See* also Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (2007) (where service analyzed 21 different factual issues ranging from voter eduction booths at local fairs to churches that use their internet website to support one of their parishioners for public office).

[65] See Colby May testimony regarding TAM 9117001 *supra* note 36.

[66] TAM 9117001(1990)(For example if a tax exempt organization under 501(c)(3) makes public comments regarding support for the conservative candidate then this could be viewed as violating the political activity prohibition.)

[67] *Election Year Issues* (2002 CETIP) at 345.

[68] Id. at 345, As for intervention, the IRS is referring to an intervention in the political campaign on or behalf of a candidate.

directive that enables the recipient to know the organization's position on a specific candidate or slate of candidates."[69] This leaves the IRS to judge the intent behind the language or coded words.[70] Most opponents of the political activity prohibition have concerns that this gives the IRS too much discretion as to what constitutes impermissible activity.[71] This intent based discretionary judgment on the part of the IRS provides the basis for which most proponents of bills such as H.R. 2275 feel that the "political activity prohibition" should be revoked.[72]

IV. PENALTIES FOR VIOLATING THE POLITICAL ACTIVITY PROHIBITION

A. 4955 Excise Taxes

In 1987, Congress enacted §4955 of the Internal Revenue Code as a way to penalize § 501(c)(3) organizations which made political expenditures that violated the "political activity prohibition."[73] The provision was passed in order to provide an additional penalty in addition to that of revocation,[74] since there were some situations in which revocation would not be a sufficient penalty alone.[75] Also, the excise tax was meant as an alternative to revocation in the limited situation where the expenditure of tax exempt dollars was unintentional and where the amount of the activity was unsubstantial.[76] Thus, the passage of §4955 was meant to strengthen and provide a deterrence factor for violations of the "no political activity" rule.[77]

According to §4955(a)(1) there is an initial tax on the organization equal to 10% of each political expenditure.[78] This tax is to be paid by the organization.[79] If the expenditure as

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[69] Id. at 346.

[70] Id. at 346.

[71] May testimony, *Supra* note 36.

[72] Id.

[73] 26 U.S.C. §4955(d)(1) (2006)(The term "political expenditure" is defined in §4955(d)(1) as "any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office,").

[74] H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 1623-1624 (1987).

[75] Id. This situation would arise when the organization used all its contributions and revenue for improper purposes.

[76] Id.

[77] Id.

[78] 26 U.S.C. § 4955(a)(1).

[79] Id.

described in §4955(a)(1) is not corrected within the taxable year, then a tax equal to 100% of the amount of the expenditure is imposed on the organization.[80]

Section 4955 also provides a penalty for managers[81] who agree to make the political expenditure.[82] The tax is equal to 2½ percent of the amount of the expenditure.[83] However, the tax will not be imposed unless the manager knows that the expenditure is a political expenditure and it is willful and without good cause. [84] Any organization manager that will not agree to the correction of the political expenditure will be taxed an additional amount equal to 50% of the expenditure.[85] Under § 4955(c), if more than one manager is liable with respect to §4955(a)(2) or (b)(2), all managers are jointly and severally liable.[86] Furthermore, IRC 4955(c) provides that for "any one political expenditure," the tax under §4955(a)(2) is capped at $5,000 and the tax under (b)(2) is capped at $10,000.[87]

B. Flagrant Expenditures

The IRS may seek to have an injunction entered pursuant to §7409 of the Internal Revenue Code to enjoin the flagrant political expenditures of §501(c)(3) organizations.[88] An injunction will prohibit the organization from making further political expenditures and will provide other such relief as may be appropriate to protect the assets of the organization so to ensure that they will be used for charitable purposes.[89] In order for a court to grant an injunction, the IRS must notify the organization that it will seek an injunction if the prohibited activity does not cease, the Commissioner of the IRS has personally determined that the organization has flagrantly violated the political campaign activity prohibition, and that injunctive relief is appropriate to prevent further political expenditures.[90] If the IRS does not meet these three requirements, then the injunction will not be granted.[91]

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[80] 26 U.S.C. 4955(b)(1).

[81] 26 U.S.C §4955(f)(2) (stating that an "organization manager" is any officer, director, or trustee of the organization (or individual having similar powers or responsibilities), or any employee of the organization having power or authority with respect to the expenditure. Per Treas. Reg. 53.4955-1(b)(2)(i), in order for a manager to be subject to the tax under IRC 4955(a)(2), the manager must either be authorized to approve, or to exercise discretion in recommending approval of, the making of the expenditure by the organization, or be a member of a group (such as the organization's governing body) which is so authorized. *See also Election Year Issues* (2002 CETIP) at 358-359 for a detailed discussion of managers.

[82] 26 U.S.C. §4955(a)(2).

[83] Id.

[84] Id.

[85] 26 U.S.C. §4955(b)(2)

[86] 26 U.S.C. §4955(c)(1)

[87] 26 U.S.C.§4955(c)(2).

[88] 26 U.S.C.§7409.

[89] 26 U.S.C.§7409(a)(1).

[90] 26 U.S.C.§7409(a)(2).

Under §6852 of the Internal Revenue Code, the IRS can under certain circumstances consider the organization's tax year closed and may accelerate any taxes due under §4955.[92] This provision only applies when the organization's expenditures constitute a flagrant violation of the prohibition against making political expenditures.[93] When this flagrant violation occurs, the IRS will immediately determine the tax owed which shall be due and payable immediately.

C. Revocation

It was not until a U.S. Court of Appeals decision from the District of Columbia in 2000 that the "political activity prohibition" was sought to be amended by local religious groups. [94] The decision by the U.S. Court of Appeals on the political activity prohibition sparked much controversy because it marked the first time that a church's tax exempt status was terminated for violating the political activity prohibition.[95] This decision led Walter Jones to propose an amendment to the "political activity prohibition."[96]

Branch Ministries, Inc. operated a church in Binghamton, New York.[97] Days before the 1992 presidential election, the church took out a full page add in USA Today and the Washington Times.[98] Each advertisement bore the headline "Christians Beware," and the adds opposed Governor Clinton for his stand on abortion, homosexuality, and distribution of condoms in the public schools.[99] The ads also sought donations from the public and stated that any contributions to the church would be tax-deductible.[100] As a result, the IRS began a church tax inquiry based on the belief that church had participated in impermissible political activities under 501(c)(3).[101] After a few meetings between the parties, the IRS revoked the church's tax exempt status.[102]

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[91] Id.

[92] 26 U.S.C.§6852.

[93] 26 U.S.C.§6852(a)(1)(B).

[94] Branch Ministries v. Rossotti, 341 F.3d 166 (D.C. CIR. 2000).

[95] Id. at 144; *See* Christian Echoes, 470 F.2d 849 (where a religious organization had its tax exempt status revoked for participating in campaign activities but Christian Echoes was not a church.)

[96] Id. *See also* Congressman Walter Jones Testimony, *Supra* note 12.

[97] Id.

[98] Id. at 140.

[99] Id.

[100] Id.

[101] Id.

[102] Id.

The church filed suit in District Court alleging that the IRS had no authority to revoke their tax exempt status.[103] The District Court then granted the IRS' Motion for Summary Judgment.[104] As a result, the church appealed the case to the District of Columbia Court of Appeals.[105]

In its analysis, the Court reasoned that the IRS had the authority to revoke the tax exempt status of a church pursuant to the requirements under 501(c)(3).[106] This authority is based on the power granted to the IRS in §7611 of the Church Audit Procedures Act.[107] The Court reasoned that the IRS has the authority to grant exempt status and under the Church Audit Procedures Act it has the power to revoke the exemption.[108] Further, the Court held that the activity was of the type that was prohibited by 501(c)(3).[109] Thus, the revocation of the tax exempt status of the church was ruled to be valid. [110]

Clearly, the actions of the church indicate the type of egregious conduct that "political activity prohibition" seeks to prohibit. This court decision marked the first revocation of exempt status for a church for violating the political activity prohibition,[111] due to the blatant violation of the prohibition against campaign activities.[112] However, it seems that unless there is a *blatant* violation, the exempt status is not likely to be revoked.

D. Enforcement

Many who support the revoking of the "political activity prohibition" through a bill such as H.R. 2275 do so because of the potential for harsh penalties.[113] There is a great fear, in light of the Branch Ministries case, that churches could lose their exempt status[114] if, for example, a pastor or minister made certain statements during a church service which have both a religious

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[103] Id.

[104] Id. at 141.

[105] Id.

[106] Id. at 141(the church tried to argue that the IRS could not revoke the status of a church because only a religious organization and not a church was listed in 501(c)(3).)

[107] Id.

[108] Id.

[109] Id.

[110] Id.

[111] DARRYLL K. JONES ET. AL, *Supra* note 3.

[112] Id.

[113] *House Committee on Ways and Means*, May 14, 2002 (Statement of the Hon. Walter B. Jones, a Representative in Congress from the State of North Carolina).

[114] Id.

connotation and which at the same time comment on a political candidate.[115] However, this position is not supported by the current statistics of IRS examinations.[116]

In 2004 and 2006 the IRS published results of its investigations of potential noncompliance by §501(c)(3) organizations that were suspected of participating in political campaign activities.[117] The investigations were part of a project called the "Political Activities Compliance Initiative" implemented by the IRS. [118] The IRS compiled results for both the 2004 and 2006 elections for which no church lost its tax exempt status.[119]

In 2004, the IRS received 166 referrals alleging campaign intervention by §501(c)(3) organizations which resulted in 110 of the organizations being selected for examination.[120] Of those, only 47 churches were selected for examination.[121] According to the 2004 Political Activities Compliance Initiative Final Report, only 19 allegations were made and investigated in 2004 regarding church officials making statements endorsing a candidate and only 12 were determined to be valid.[122] Other activities by churches investigated included endorsing or opposing candidates on websites, disseminating voter guides or candidate ratings, placing signs on property in favor of or opposition of a candidate, making cash contributions to candidates and showing preferential treatment by allowing some candidates to speak and not others.[123] In regard to the 47 churches, after examination, the IRS did not propose a revocation or revoke any of the churches' tax exempt status nor penalize any of the churches.[124] The IRS did however find prohibited political activity in 42 of the churches but only issued a written advisory opinion to those churches.[125]

In 2006, the IRS selected 100 §501(c)(3) organizations for examination of which only 44 were churches.[126] Only 13 of the churches were investigated for church officials making

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[115] Id.

[116] 2004 Internal Revenue Service Political Activities Compliance Initiative Final Report Project 302; 2006 Internal Revenue Service Political Activities Compliance Initiative Executive Summary.

[117] Id.

[118] Id.

[119] Id.

[120] 2004 Internal Revenue Service Political Activities Compliance Initiative Final Report Project 302.

[121] Id.

[122] Id.

[123] Id.

[124] Id.

[125] Id.

[126] 2006 Internal Revenue Service Political Activities Compliance Initiative Final Report.

statements during the church services endorsing a candidate.[127] Again, no church had its exempt status revoked nor was there even a proposal to revoke the status.[128] In concluding their investigations, the IRS only found four churches to be in violation of the political activity prohibition.[129] Again, no penalties were levied and only written advisory opinions were issued.[130]

V. HR 2275

HR 2275 as proposed seeks to alleviate the concerns of churches across America.[131] The bill as proposed by Congressman Jones will seek to amend the current language of §501(c)(3).[132] In particular, the amendment would strike the following language from 501(c)(3): "and which does participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." As stated in the title of the bill, the amendment would do away with the political activity prohibition first added to the code in 1954.[133]

Congressman Jones' concern is that a minister would not be able to speak on political issues during a church service, which would be a hindrance to his freedom of speech.[134] According to Jones, there may be moral issues that a minister feels compelled to speak of which would also contain references to political candidates.[135] However, the minister could not speak on the issue for fear of placing his church's exempt status in jeopardy.[136] Thus, Jones seems to be proposing the Bill so that pastors and churches will be able to speak on religious and political issues in the same breath without losing the tax exempt status.[137]

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[127] Id.

[128] Id.

[129] Id.

[130] Id.

[131] H.R. 2275, 110th Cong. (2007).

[132] Id.

[133] Id. The title of the Bill says it all: "To restore the Free Speech and First Amendment Rights of churches and exempt organizations by repealing the 1954 Johnson Amendment"

[134] *House Committee on Ways and Means*, May 14, 2002 (Statement of the Hon. Walter B. Jones, a Representative in Congress from the State of North Carolina).

[135] Id. (Jones testimony before Ways and Means refers to a priest bringing a sermon on abortion felt compelled to state that George Bush was pro-life and Al Gore was pro-choice but did not because of the fear of losing his tax exempt status.)

[136] Id.

[137] Id.

The language of HR 2275 will have a much broader effect than Jones may contemplate. The Bill will do away with the "political activity prohibition" altogether. This bill would allow churches to freely participate in political campaigns.[138] Further, the language of the Bill does not mention that the amendment will only apply to churches and therefore, it would apply to all §501(c)(3) organizations. Thus, all §501(c)(3) organizations would be allowed to participate in political campaigns without penalty.[139]

VI. Tax Effect of Abolishing the "Political Activity Prohibition"

A. Subsidy

Churches have historically received tax exempt status because their charitable activities have been seen as type of government subsidy.[140] In Bob Jones University v. U.S., the Supreme Court stated that,

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.[141]

Further, in Regan v. Taxation With Representation, the Supreme Court stated that "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."[142] Thus, in essence the government is entering into a relationship with a church and is offering an exemption in return for the church performing a charitable function that would otherwise have to be provided by the government.[143]

The concern is that if HR 2275 is passed and the "political activity prohibition" is abolished, then a church would be allowed to participate in political activity with the help of the government. If this were to happen, the government would no longer be subsidizing a charitable

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[138] Wallbuilders, *Houses of Worship Free Speech Restoration Act,* http://wallBuilders.com/LIBissues Articles.asp?id=102.

[139] *House Committee on Ways and Means*, May 14, 2002 (Statement of the Hon. Walter B. Jones, a Representative in Congress from the State of North Carolina)(Jones justificiation seems to be that the IRS targets some groups and not others. According to Jones there are too many 501(c)(3) organizations for the IRS to regulate and this would in a sense level the playing field.)

[140] Bob Jones University v. U.S., 461 U.S. 574 (1983).

[141] Id. at 590 (This principle is known as the public benefit theory or the subsidation model); See Simon *Supra* note 13; *See also* David M. Anderson, *Comment: Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts To Influence Legislation*, 2006 B.Y.U. L. Rev. 115 (2006).

[142] Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983).

[143] Id.

venture but would rather be subsidizing political activity. The government would in essence be giving cash grants to churches in order to allow them to support candidates for political office. This violates the very rules of charitable trust law and the political benefit theory in that a charitable organization whose purpose is of a political nature is not a charity.[144]

In viewing the revocation of the "political activity prohibition" and the passing of a bill such as H.R. 2275 under this subsidy model, churches could now funnel large amounts of money into campaigns or use their facilities to support candidates while at the same time receiving exempt status. Not only could churches funnel large amounts of money into political campaigns but any §501(c)(3) organization could use government subsidies to fund political campaigns. This type of subsidy is what most opponents of revoking the "political activity prohibition" and bills such as HR 2275 disagree with. Most opponents of HR 2275 do not want to see the government subsidizing political campaigns. Thus, it is unlikely that a bill such as HR 2275 in its current form will pass.

B. Substantive Horizontal Equity

Substantive Horizontal Equity is a tax principle which states that similarly situated taxpayers should be taxed the same.[145] The tax fairness principle of substantive horizontal equity is violated when similarly situated taxpayers are treated differently in regards to the same economic activity.[146] Further, the violation occurs when there is no tax policy reason for the differential treatment.[147]

The revocation of the "political activity prohibition" through HR 2275 violates the principle of substantive horizontal equity. HR 2275 would allow taxpayers to fund political speech through a §501(c)(3) organization and receive a deduction while a similarly situated taxpayer who chooses to fund political speech through a non-charitable organization would receive no deduction. This situation would provide a tax benefit for one taxpayer while disallowing the benefit to another taxpayer without any policy reason. Further, such an inequity would then favor political speech through §501(c)(3) organizations versus non- §501(c)(3) organizations and would cause disparate economic treatment for the taxpayers.

For example, taxpayer A and taxpayer B are both in the 33% income bracket and each wants to contribute to political speech. Taxpayer A and B both want to contribute $1,000.00 to a political campaign. A will contribute the $1,000.00 through his church which is a §501(c)(3) organization while B chooses to spend $1,000.00 in support of a candidate through a non-§501(c)(3) organization. A will be able to take a deduction for the $1,000.00 contribution while B will not. As a result, B's contribution will cost him more. Thus, this violates horizontal substantive equity as A and B are being treated differently in regards to the same economic activity without a justifiable policy reason for doing so.

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[144] *Supra* note 17.

[145] *Supreme Court Jurisprudence of Tax Fairness*, 36 Seton Hall L. Review 421 (2006).

[146] Id. See also *PIOUS POLITICS: Political Speech Funded Through I.R.C. §501(C)(3) Organizations Under Tax Fairness Principles*, Richard J. Wood, 39 Ariz. St. L.J. 209 (2007).

[147] Id.

Substantive horizontal equity is violated by the revocation of the "political activity prohibition" through HR 2275 because it will treat similarly situated taxpayers differently. One taxpayer will receive a benefit for contributing to a political organization while the other will not. In essence, one taxpayer will be allowed to purchase political speech at a lesser price solely because of the tax deduction. Thus, since there is no justifiable policy reason for allowing such disparate treatment, the revocation of the "political activity prohibition" through HR 2275 violates the principle of substantive horizontal equity.

C. Disparate Tax Treatment for Organizations

A similar substantive horizontal equity argument can be made by organizations that receive contributions for political campaign matters.[148] Political organizations are normally exempt from taxes under §527.[149] However, that does not mean they do not receive disparate treatment. The reason for this is that only the taxpayers contributing to a §501(c)(3) organization will receive a tax deduction via §170 of the Internal Revenue Code while the other taxpayers not contributing to a §501(c)(3) organization will not receive a deduction.[150]

The practical effect of the disparate treatment among the taxpayers making contributions is that the organizations will be affected. It is likely that the taxpayer who knows he will receive a deduction will make a contribution to the organization while another taxpayer may forgo making a contribution because he will not receive a deduction. Again, this would be treating similarly situated taxpayers differently as the §501(c)(3) organization will receive more income from tax deductible contributions than will the non §501(c)(3) organizations. Even if a taxpayer makes a contribution to a non §501(c)(3) organization, the §501(c)(3) organization will still likely be favored because the taxpayer contributing to the §501(c)(3) organization will be able to give a larger contribution because of the added value of a deduction under §170.[151] Thus, the §501(c)(3) organization will still receive more revenue.

D. Conclusion

The tax effect of the abolishment of the "political activity prohibition through a bill such as HR 2275 would be substantial. First, the passage would act as government subsidy of political speech using taxpayers' dollars. Also, the passage would treat similarly situated taxpayers differently by violating the principles of substantive horizontal equity. Further, it would cause disparate treatment among the organizations and taxpayers. The key issue then becomes whether there is a justification for abolishing of the "political activity prohibition" through HR 2275 in light of the tax consequences that it will cause.

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[148] *PIOUS POLITICS: Political Speech Funded Through I.R.C. §501(C)(3) Organizations Under Tax Fairness Principles*, Richard J. Wood, 39 Ariz. St. L.J. 209 (2007).

[149] 26 U.S.C. §527.

[150] 26 U.S.C. §§ 501(c)(3); 170

[151] Id.

VII. First Amendment Claims

Another question is whether the abolishment of the "political activity prohibition" through HR 2275 can be justified because of the perceived First Amendment protections it would afford.[152] A number of court cases have dealt with such First Amendment issues in light of exemptions under §501(c)(3) in regards to political activity. In all such cases, the courts have held generally that the prohibitions against political activity do not violate the First Amendment.

The prohibitions against participation in political campaigns by §501(c)(3) organizations are not in violation of the First Amendment of The United States Constitution.[153] In Christian Echoes, a ministry had its tax exempt status revoked for participating in prohibited campaign activities.[154] The ministry argued that prohibition in §501(c)(3) against participating in political campaign activities violated their First Amendment rights.[155] In particular the ministry claimed that their freedom of speech and free exercise rights had been violated.[156]

The court first addressed whether the restrictions in §501(c)(3) violated the ministry's free exercise of religion. The Court reasoned that the "free exercise clause of the First Amendment is restrained only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm."[157] In balancing the church's need for the tax exempt status versus the government's need make sure that the church and state remain separated, the Court held that the government has a compelling interest that tax dollars are not used to subsidize political partisanship.[158] In balancing the two interests, the court held that the free exercise clause was not violated because whether a church lost its exempt status did not compare with the government's compelling need to make sure that government was not subsidizing political campaign activities through churches and related religious organizations.[159]

The Court then addressed the issue of whether the ministry's free speech rights under the first amendment were violated by application of §501(c)(3).[160] The court reasoned that that a tax exemption under §501(c)(3) was a privilege, and a matter of grace rather than right.[161] In holding

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[152] May testimony, *Supra* note 36.

[153] Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849 (U.S. Ct. Appeals 10th Cir. 1972).

[154] Id. at 857.

[155] Id.

[156] Id.

[157] Id.

[158] Id.

[159] Id.

[160] Id.

[161] Id.

that the free speech rights were not violated, the court likened the ministry's claims to cases involving the Hatch Act.[162] In those cases, when certain government employees were prohibited from being involved in partisan politics, the employees claimed that their First Amendment rights were violated.[163] The courts in those cases stated that the employees could choose to work for the government under the conditions or not.[164] If they chose to work for the government, then they would have to comply with the rules of doing so.[165] The court paralleled this with §501(c)(3) organizations and stated that if an organization wanted the benefits of the exemptions then they would have to comply with the restrictions.[166] Thus, the tax exemption is not a guaranteed right but it is privilege that the ministry could forgo if they chose.[167] In concluding, the court stated, "

> The Congressional purposes evidenced by the 1934 and 1954 amendments are clearly constitutionally justified in keeping with the separation and neutrality principles particularly applicable in this case and, more succinctly, the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates.[168]

Subsequently, the United States Supreme Court faced a similar issue in 1983 and held that the prohibitions in §501(c)(3) to lobbying restrictions did not violate the First Amendment.[169] In Regan, an organization applied for tax exempt status under §501(c)(3) and the IRS denied the application for tax exempt status because the organization was involved in substantial lobbying activities.[170] The organization challenged the IRS' ruling on a number of grounds including that the government had violated its First Amendment rights.[171]

The Court in its analysis stated that deductions and exemptions for §501(c)(3) organizations are a type of government subsidy and there are certain activities in which the government chooses not to subsidize.[172] The Court stated:

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[162] Id.

[163] Id.

[164] Id.

[165] Id. (The court stated that if the organization wanted to "feed at the government troughs" then they would have to comply with the restrictions of doing so.)

[166] Id.

[167] Id.

[168] Id.

[169] Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983)(Although this case dealt with the lobbying restriction of 501(c)(3), the principles of the case were later used in Branch Ministries and are applicable to the "political activity prohibition" of 501(c)(3).

[170] Id at 541-542.

[171] Id.

[172] Id. at 544.

> Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.[173]

Further, the Court stated that the organization was not being denied an exemption for its non-lobbying activity.[174] The Court went on to state that the Court had never held that Congress must grant the tax exemption in this area of law just because an organization wanted to exercise a constitutional right. [175] It is clear that the Court was holding firmly to the proposition that the government did not have to subsidize lobbying activity in light of a constitutional claim.[176] The Court ended its analysis that §501(c)(3) did not violate the first amendment by stating,

> although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation. Although the organization does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.[177]

In 2002 the U.S. Court of Appeals for the District of Columbia discussed the constitutionality of §501(c)(3) in regards to First Amendment rights in the Branch Ministries case.[178] In particular, the church claimed that its Free Exercise rights had been violated and that they could no longer freely worship.[179] Further, the church claimed that the loss of the exemption threatened their existence and violated the First Amendment.[180]

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[173] Id.

[174] Id. The concurrence by Justice Blackmun had a different view. The concurring justices stated that 501(c)(3) would be unconstitutional in regards to substantial lobbying activities if it were not for the fact that the organization could create a 501(c)(4) organization for all its lobbying activities.

[175] Id.

[176] Id. at 549. (The Court in Citing to Buckley v. Valeo, 424 U.S. 1 (1976) by stated "We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.

[177] Id.

[178] Branch Ministries v. Rossotti, 211 F. 3d 137 (D.C. Cir. U.S. Ct. App. ,2000) (For a discussion of the facts of the case see above analysis in this article on section on revocation.)

[179] Id. at 142.

[180] Id.

The court in its analysis stated that for the church to sustain its claim it must show that its free exercise rights had been substantially burdened.[181] The court reasoned that the church's position was that the withdrawal of a conditional privilege (a tax exemption) for the failure to meet the condition itself (being involved in prohibited political activities) constituted a substantial burden on their right to freely exercise their religion.[182] This would be true "only if the receipt of the privilege (in this case the tax exemption) is conditioned upon conduct proscribed by a religious faith, or … denied … because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[183] However, this was not the case, as the court pointed out that the church did not state that a withdrawal from politics would violate its beliefs.[184] Rather, the sole effect of the "loss of the tax exemption was to decrease the amount of money available to the Church for its religious practices."[185] The Supreme Court has declared, however, that such a burden "is not constitutionally significant."[186] Thus, the court held that the church's Free Exercise rights were not violated because the government was not substantially burdening the right of the church to freely worship.[187]

The Court also held that the prohibition against involvement in political campaign activities did not violate the church's freedom of speech under the First Amendment.[188] The reason for this is that the language in §501(c)(3) is viewpoint neutral.[189] The political activity prohibition applies to all §501(c)(3) organizations equally; "they prohibit intervention in favor of all candidates for public office by all tax-exempt organizations, regardless of candidate, party, or viewpoint."[190] Thus, the court denied any free speech claims on behalf of the church.

According to the Court, the "political activity prohibition" in §501(c)(3) does not violate the constitutional rights of §501(c)(3) organizations. Any rights that are violated are minor compared to the compelling governmental interest in not subsidizing political activities through churches or related organizations. Organizations are not prohibited from worshiping as they wish by participating in political campaign activities. If they choose to participate, they will merely not be

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[181] Id. (In so stating the test to be applied the court stated that the "Government shall not substantially burden a person's exercise of religion in the absence of a compelling government interest that is furthered by the least restrictive means.")

[182] Id.

[183] Id.

[184] Id.

[185] Id.

[186] Id.

[187] Id. (The court also held that the church had alternate means by which to participate in politics by establishing a 501(c)(4) organization for that purpose.)

[188] Id. at 144.

[189] Id.

[190] Id.

afforded a tax exemption but they will not be prohibited from participation in the political activity.

VII. Is There a Need for the Revocation of the "Political Activity Prohibition?"

A. Administrative Costs and Abuses

In a 2001 study by the Hartford Institute for Religion Research, it was estimated that there were between three to four hundred thousand churches in America as of 2000.[191] During the 1999-2000 election cycle the Federal Election Commission reported that 4 billion dollars were spent on election campaigns.[192] This number increased to 10 billion dollars during the 2003-2004 election cycle.[193] In light of the large amount of expenditures and the ever-present complaints about §501(C)(3) organizations being part of the contributors, the IRS initiated a Political Activities Compliance Initiative (PACI). As part of the initiative the IRS investigated political activity by non-profit organizations.[194]

The IRS released its PACI report for 2004 in which it received 166 referrals and investigated 110 non-profit organizations.[195] Only 47 of the 110 entities were comprised of churches.[196] In 2006, 237 referrals were made and 100 of those were investigated. Only 44 of the 100 investigations were conducted on churches.[197] These numbers are staggering in light of the large number of churches in America compared to the number of alleged abuses that arise during elections.

This large number of abuses is what causes the most friction about passing an amendment to §501(c)(3) to revoke to "political activity prohibition" such as is contained in HR 2275. Many opponents of the revocation of the "political activity prohibition" as found in HR 2275 state that such a Bill would lead to rampant abuse in political campaign activity which would be contrary to the spirit of the Bipartisan Campaign Reform Act of 2002.[198] The proponents of the Bill take the

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[191] *A Report of Religion in the US Today*, Carl S. Dudley, Hartford Institute for Religious Research March 2001. See also www.ChurchSolutionsMag.com/Articles/191cover, *Church Solutions 2001 Year in Review* (where ABC News estimated 300 to 400 thousand churches in America.)

[192] 2006 Internal Revenue Service Political Activities Compliance Initiative Final Report.

[193] Id.

[194] Id.

[195] Id.

[196] Id.

[197] Id.

[198] USCJ:Houses of Worship Free Speech Restoration Act Talking Points www.uscj.org/Houses_of_Worship_Fr6794.html. *See House Committee on Ways and Means*, May 14, 2002 (Statement of American Jewish Congress).

contrary position that the Bill is needed because of the rampant abuses that go unchecked by the IRS and because the IRS uses selective prosecution in enforcing the "political activity prohibition".[199] Thus, the proponents feel that "political activity prohibition" is not fairly administered.

The abuses noted by both those who support and those who oppose the revocation of the "political activity prohibition" are numerous. For example, during the 2000 election cycle the following are a few instances of campaign activity in churches as noted by Patrick L. O'Daniel in his 2001 article entitled *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches* [200] during the 2000 election cycle:

- Addressing the congregation at a Pittsburgh church, Al Gore criticized George Bush for saying he would appoint "strict constructionists" to the Supreme Court. Gore said that this term took him back to an era of "strictly constructionist meaning" in which, "some people were considered three-fifths of a human being."[201]
- Pastor Charles Betts, Sr. at the Morningstar Missionary Baptist Church in Queens, New York, introduced the First Lady, Hillary Rodham Clinton, who was running for the Senate, by saying, "I would like to introduce to you the next senator." He then stated, "I speak the word and the word is truth. After she goes to the Senate, she is going to come back to our communities and say 'Thank you.'" Another pastor at a Bronx church substituted her opponent's name, Representative Rick Lazio, for Satan in a service hymn during a visit by the First Lady. [202]
- Preaching at the Genoa Baptist Church in Ohio, the Reverend Jerry Falwell told the worshipers, "You vote for the Bush of your choice." He also warned that if Al Gore was elected, "Our country is going to pay a dear price." "We simply have to beat Gore," Falwell said. [203]
- At the Morris Brown AME Church, Al Gore told parishioners, "I have to appeal to you because you have the votes." He also stated, "I'm asking not only for your votes, but your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday." [204]
- The Reverend Billy Graham gave what was described as a "near endorsement" to George Bush: "I don't endorse candidates. But I've come as close to it, I guess, now as any time in my life because I think it's extremely important. I've already voted. I'll let you guess who I voted for."[205]

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[199] May testimony, *Supra* note 36.

[200] Patrick L. O'Daniel , *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*;, 42 B.C. L. Rev. 733 (July 2001).

[201] Id.

[202] Id.

[203] Id.

[204] Id.

[205] Id.

- In Flint, Michigan, Al Gore attended the evening service at New Jerusalem Full Baptist Church where the speaker, Kenneth Edmonds, urged congregants to kneel at bedtime and pray: "The Lord is my shepherd, I shall not vote for George Bush."
- In Milwaukee, Wisconsin, the Reverend Joseph Noonan of Our Lady of the Rosary Roman Catholic Church inveighed against candidates who were not pro-life and instructed, "I'm not telling you who to vote for. I'm telling you who you may not vote for." [206]
- At Detroit's New Bethel Baptist Church, the Reverend Robert Smith, Jr. preached that, "if Bush is elected, then we're going to war."[207]
- During Sabbath services at University Synagogue in West Los Angeles, Rabbi Allen Freehling spoke of Noah's drunkenness and remarked that the same "obscene behavior can be said of a certain Republican presidential candidate."[208]
- In Detroit, Al Gore told a Sunday congregation, "I need you to lift me up so I can fight for you." He was introduced by the church's pastor, Bishop Charles H. Ellis III, who offered a prayer for Mr. Gore's success and told his congregation that the choice "seems to be a no-brainer to me--if it ain't broke, don't fix it."[209]
- The Christian Coalition implemented plans to distribute 70 million copies of its voter guide at churches on the Sunday before the election. Critics have claimed that the guides are "partisan campaign fliers" because of their presentation of the candidates' positions on various issues.[210]
- Victory Baptist Church and Second Baptist Church were the only two stops that the Democratic Vice-Presidential candidate, Senator Joe Lieberman, made in Las Vegas during a campaign stop. At both churches he urged the congregations to vote for the Gore-Lieberman ticket.[211]
- President Bill Clinton spoke from the pulpit in a Harlem church to a group of African-American religious leaders and urged them that if they want to "keep the economy going" then "you have to vote for Hillary and Al Gore and Joe Lieberman."[212]
- In Chicago, about 20 ministers boycotted the Chicago Sun-Times for its endorsement of George Bush for President. The ministers said they will now rely on their pulpits and other newspapers to keep their communities informed about the elections.[213]

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[206] Id.

[207] Id.

[208] Id.

[209] Id.

[210] Id.

[211] Id.

[212] Id.

[213] Id.

- In Miami, 23 ministers met in the Jordan Grove Baptist Church to coordinate efforts to get out the vote for Al Gore. They agreed to do radio ads, to coordinate vans to get people to the polls, and pledged to preach from the pulpit about voting. John Sales of First Baptist of Brownsville explained: "You don't have to need someone to tell you to vote. We've got to watch out for what's in the Bushes." [214]
- David Horton of Greater New Bethel Baptist complained that "there should have been more of an effort by the Gore campaign to make itself visible in the black churches." Sales agreed, noting that although Gore had spoken in African-American churches elsewhere, the Gore campaign had turned to Clinton to energize African-American leaders and go to black churches.[215]
- In Arkansas, Kathy Robinson, a Democratic activist, complained about a county clerk refusing to open the clerk's office for early voting on Sunday, explaining, "I had 17 Afro-American churches lined up to be bussed to the courthouse to vote on Sunday." She then added, "Now I am going to have to retract that. We are trying to get Gore elected."
- Explaining why Al Gore attended so many churches, his campaign manager, Donna Brazile explained, "More African-Americans gather in church than any place else."
- "The churches are key," remarked David Bositis, senior political analyst at the Joint Center for Political and Economic Studies, an African-American think tank. "It's an organizational nexus. You've got people who come there every week."

Thus, the 2000 election campaign was rampant with political activity violations.

The 2004 election cycle included a number of abuses of political campaign activity. Some examples are as follows although they are not meant to be exhaustive:

- All Saints Episcopal Church in Pasadena, California had a guest speaker who brought a message entitled "If Jesus Debated Senator Kerry and President Bush" in which the speaker criticized Bush throughout but never made a negative comment about Kerry[216]
- Numerous Pastors urged their congregations to vote for John Kerry regardless of what the IRS might say.[217]
- In a church in Ft. Lauderdale, Florida, the pastor encouraged his congregation to vote for Senator Kerry while Kerry was present in the congregation.[218]
- In the first two weeks of June, 2004 election Bush staffers sought out 1600 churches in Pennsylvania to find out if they supported Bush[219]

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[214] Id.

[215] Id.

[216] Allan J. Samansky , *TAX CONSEQUENCES WHEN CHURCHES PARTICIPATE IN POLITICAL CAMPAIGNS*, , 5 Geo. J.L. & Pub. Pol'y 145 (Winter 2007).

[217] Id.

[218] Id.

- President Bush also visited the Pope and reportedly complained to Cardinal Angelo Sodano, the Vatican Secretary of State, that "not all American bishops are with me."[220]
- At Allen Temple AME church, the minister, Donald H. Jordan stated, "I'm not worried about the law; I'm asking you to support him," after Senator Edwards had spoken. [221]
- At the Mt. Airy Church, Pastor Ernest C. Morris followed Sen. Kennedy to the pulpit and declared, "I can't tell you who to vote for, but I can tell you what my mamma told me last week: 'Stay out of the Bushes.'" [222]
- Jerry Falwell publicly supported Bush from his pulpit.[223]
- In July 2004, the Republican National Committee asked Roman Catholics who supported Bush to provide copies of their parish directories to the campaign.[224]
- In May, 2004, Bishop Michael Sheridan of the Colorado Springs diocese referred to the upcoming election in November and stated that Catholics who vote for candidates who stand for "abortion, illicit stem cell research or euthanasia" will "jeopardize their salvation."[225]

Thus, there were also numerous abuses during the 2004 election.

In light of the sampling of abuses mentioned above, it is remarkable that the IRS has investigated less than 150 churches total during the 2004 and 2006 elections.[226] This is remarkable especially in light of the fact that there are three hundred to four hundred thousand churches in this country. The administrative costs to keep up with these violations would be immense. Although no official report or position has been issued by the IRS, the IRS alluded to the great undertaking that would face the Service in order to investigate all violations.[227]

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[219] Alan Cooperman, *Churchgoers Get Direction from Bush Campaign*, Wash. Post, July 1, 2004, at A6.

[220] Don Lattin, *Politics and the Church: Bush Woos Faithful with a Religious Fervor*, S.F. Chron., June 21, 2004, at A1.

[221] *See* Edward E. Plowman, *Pulpit Politics*, World Mag., Nov. 6, 2004.

[222] Id.

[223] Chris Kemmitt, *RFRA Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, www.law.harvard.edu/students/orgs/jol/vol43_1/kemmitt.pdf

[224] Id.

[225] See Samansky, *Supra* note 214.

[226] Id.

[227] 2004 Internal Revenue Service Political Activities Compliance Initiative Final Report Project 302 and 2006 Internal Revenue Service Political Activities Compliance Initiative Final Report(stating reasons that IRS does not want to investigate churches including the sensitiveness of the area and the huge undertaking to investigate all violation.)

This problem will only continue to compound itself as religious leaders seek to influence national elections.[228] A CNN Special, "God's Warriors," that aired on December 23, 2007, documented numerous religious leaders who were involved in politics and supported candidates from the pulpit.[229] Further, the special documented the fervor in churches to be involved in political campaigns.[230] In fact, one traveling evangelist stated in an interview that his whole ministry was traveling from church to church encouraging congregations to vote for conservative candidates.[231] The documentary concluded that there is an enormous move in churches to become involved in politics.[232]

It is clear in the 2008 presidential election that churches will only become more involved in politics. The IRS will either have to use more money to investigate and enforce the "political activity prohibition" or it will have to enforce only going after the most egregious cases. It is this lack of enforcement by the IRS that leads many to argue that there should either by more funds and time dedicated to enforcing the "political activity prohibition" or a lessening to an abolition of the political activities doctrine to make treatment of churches more equitable.

B. Does the 501(c)(3) Revocation of Exempt Status Really Have Teeth?

Claims by many supporters of bills such as HR 2275 state that the revocation of the exempt status for a church is akin to the death penalty.[233] Many churches claim the threat of revocation would threaten their existence.[234] The reason for this is that donors would no longer contribute money knowing that they would not receive a tax deduction, which would lead to the church losing operating revenue. [235] The court in Branch Ministries stated that these concerns were overstated.[236] Because of the unique treatment of churches under the Internal Revenue Code, the effect of the revocation is more symbolic than substantial.[237]

There are many reasons that the Court took the position that the effect of the revocation would likely have little to no impact.[238] First, after a church has its exempt status revoked, it may

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[228] *God's Warriors* (CNN television broadcast December 23, 2007).

[229] Id. (Of the notables were John Hagee who encouraged his congregation to vote for candidates who supported the Nation of Israel.)

[230] Id.

[231] Id.

[232] Id.

[233] May testimony, *Supra* note 36.

[234] Branch Ministries v. Rossotti, 211 F. 3d 137, 142.

[235] Id.

[236] Id.

[237] Id.

[238] Id.

still hold itself out as a 501(c)(3) organization as long it does not participate in future political campaigns.[239] According to the position of the IRS taken at oral argument, all that would have been lost is the "advance assurance of deductibility by the donor in the event the donor is audited."[240] Thus, the contributions will remain tax deductible as long as the taxpayer can show that the church is no longer involved in political campaign activities.[241]

Another concern by churches is that the revocation will make them liable for the payment of taxes.[242] However, according to Branch Ministries, the revocation does not necessarily make the church liable for the payment of taxes.[243] The IRS made it clear in its oral arguments that just because a church loses its tax exemption does not mean that church will be liable for the payment of taxes on all contributions.[244] Any donations that are bona fide, i.e. not linked to campaign activities, will be deductible. The rationalization by the court was that these donations were in essence gifts which are not included in the income of the recipient.[245] Further, the church can still reapply for a prospective determination of its tax exempt status and thus, regain advance assurance of the deductibility of contributions and its tax exempt status.[246] However, this ruling would be based on the church's assurance that they would no longer be involved in campaign activities.[247]

C. 501(c)(4) Alternative

Many proponents of revoking the "political activity prohibition" through a bill such as HR 2275 state that without such bill, churches will have no alternate way of speaking about political issues involving candidates in church.[248] This issue has been addressed by the Supreme Court[249] and in Branch Ministries.[250] In discussing the issue, the court in Branch Ministries relying on Regan provided that a church could separately incorporate a 501(c)(4) organization to operate its

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[239] Id.

[240] Id.

[241] Id. at 143.

[242] Id.

[243] Id.

[244] Id.

[245] Id.

[246] Id.

[247] Id.

[248] May testimony, *Supra* note 36.

[249] Regan , 461 U.S. 540.

[250] Branch Ministries v. Rossotti, 211 F. 3d 137, 143.

political activities.[251] Such organizations are exempt from tax but contributions are not tax deductible to the §501(c)(4).[252]

Unlike the Regan case which dealt with lobbying, §501(c)(4) organizations are prohibited from being involved in campaign activities like the §501(c)(3) organization.[253] However, unlike the §501(c)(3) organization, the §501(c)(4) organizations can set up a Political Activity Committee (PAC) that would be free to participate in political campaigns.[254] In setting up the PAC, the church must separately incorporate the §501(c)(4) organization and then set up the PAC as an arm of the §501(c)(4).[255] In all, the church must be careful to keep separate records and must be able to show that tax free contributions are not used for political activities.[256] Although this may seem like an extensive process and overly burdensome on the church, it will allow churches to participate in political campaigns with losing their tax exempt status.[257] The rationale is that churches are allowed to participate in political activities, but they are going to have to pay for those activities just as anyone else would engaging in similar activities.[258] If the church wants to participate in political activities and still remain tax exempt, then it must do so under the plan laid out by the courts.

VIII. PROPOSAL

The "political activity prohibition" is proper because to allow a charity to be involved in political campaigns violates the very spirit of a charity. The government grants favorable status to a charity as a way of subsidizing the charity for work the government would otherwise have to perform. A passage of bill such as HR 2275 would give a blanket license for any §501(c)(3) organization to receive a government subsidy for participating in political campaign activity.

However, the law as it stands is very controversial in that it makes the IRS in some instances a type of "political speech police."[259] This is very concerning to those who argue that the IRS is selectively enforcing the current prohibition of political activities under 501(c)(3).[260] This fact is

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[251] Id.

[252] Id.

[253] Id.

[254] Id.

[255] Id.

[256] Id.

[257] Id.

[258] Regan , 461 U.S. 540.

[259] May testimony, *Supra* note 36.

[260] Id.

even more concerning in that it seems that the IRS cannot proceed against as many organizations as it would like because of the high administrative costs involved.

The result is that the IRS has "hamstrung" itself. It has made a firm stance that there is to be no political activity on the behalf of a 501(c)(3) organization but it does not have to the resources to enforce every single violation. It would be much more feasible for the IRS to be able to enforce only egregious violations of the "political activity prohibition". However, this is not possible under the language of §501(c)(3) and the current policy of the IRS.

A possible solution would be propose a "no substantial activities test" in relation to the "political activity prohibition." The "no substantial activities test" is already present in 501(c)(3).[261] The language of the Code reads "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."[262] It is this provision that allows 501(c)(3) organizations to participate in the lobbying process as long as the lobbying is not substantial.[263]

Courts have generally considered that if no more than 5% of the time and effort of the organization is devoted to lobbying then the lobbying is not substantial.[264] There are those that argue that the percentage test has been replaced by a facts and circumstances test balancing the organizations activities in relation to its objectives and circumstances in the context of the totality of the organization.[265] Even if the percentage test has become obsolete, it still is a good measure as to when lobbying activities have become substantial.

The same substantiality test could be used in relation to the "political activity prohibition." This same test would allow churches in particular to be able to discuss religious issues involving candidates from the pulpit or during a church service without losing their exemption. As long as the churches were not using a substantial part of their resources for political campaign activities i.e. 5% then the church would not be in violation. Any church or organization that abuses this privilege like the church in Branch Ministries could have their exemption revoked.

This would seem to address the IRS' concerns as stated in the PACI Executive Summary in 2006.[266] There the IRS admitted that the "political activity prohibition" raises issues freedom of speech and religious expression.[267] Also, the IRS admitted that there was no bright line test and

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[261] 26 U.S.C. §501(c)(3).

[262] Id.

[263] Id.

[264] Seasongood v. Comm., 227 F.2d 907 (6th Cir. 1955); See also *World Family Corp. v. Comm.* 81 T.C. 958(1983)(holding that lobbying activities that were less than 10% but greater than 5% were insubstantial.)

[265] Haswell v. U.S., 500 F. 2d 1133 (Ct. Cl. 1974)(rejecting the percentage test in favor of a balancing test using facts and circumstances); *See* also Kentucky Bar Foundation, Inc. v. Commissioner, 78 T.C. 971 (substantiality is determined by facts and circumstances).

[266] 2006 Internal Revenue Service Political Activities Compliance Initiative Final Report.

[267] Id.

alluded to the fact that a bright line test is needed to better handle the issue.[268] Further, when the IRS finds a violation it is often de minimis and does not warrant a revocation.[269] Thus, adding a provision that would allow the IRS a bright line test and some leeway—perhaps a five percent,rule—might provide the balance that is needed to resolve the issue.

IX. CONCLUSION

The "political activity prohibition" should not be revoked as proposed in bills such as HR 2275. In proposing HR 2275, Walter Jones was attempting to give churches more freedom and liberty to speak on political issues inside churches. However, the revocation of the "political activity prohibition" as proposed in HR 2275 does more than just provide relief to churches; it allows any §501(c)(3) organization to participate in political campaign activities and thus, such a revocation should not be allowed. A pure revocation of the "political activity prohibition" would violate the concept of charities in general. An amendment to §501(c)(3) such as HR 2275 providing for a revocation of the "political activity prohibition would in essence provide a government subsidy for political campaign activities through §501(c)(3) organizations. This type of subsidy has always been forbidden under the law regarding the tax exempt status of charities. Further, the revocation would not only act as a subsidy but it would provide disparate tax treatment for individual taxpayers and other organizations not recognized under §501(c)(3).

The main concern of the proponents of the revocation is that churches face harsh penalties for violating the "political activity prohibition". The harsh penalties that seem to be present for violating the "political activity prohibition" are in reality not so harsh. Even though penalties and revocation are possible penalties it is unlikely that many organizations will ever be penalized. In fact, after recent studies for the years of 2004 and 2006, no church has lost its exempt status. Further, not one church ever had a penalty levied against for violating the "political activity prohibition" during that period.

Even though the penalties have not in practice been that harsh there is reason for concern regarding the present status of the "political activity prohibition." There seems to be rampant abuse of the privilege while the IRS is only able to investigate a small number of incidents. The IRS has voiced this concern in recognizing that it is difficult to monitor this area of law when free speech issues are at stake and the IRS does not have the manpower to fairly administer the prohibition.

It is preferable that the current rule not be so restrictive in light of the difficulty in monitoring every violation of the "political activity prohibition." One possible solution is to allow an "insubstantial" amount of political activity with §501(c)(3) organizations just as is allowed for lobbying. This would allow §501(c)(3) groups the flexibility to be speak their minds on political issues without losing their exempt status. At the same time it would protect the interests of the general public in not having tax dollars support political campaign activities through §501(C)(3) organizations.

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[268] Id.

[269] Id.

Supreme collaboration

Fun stories plus useful advice for would-be coauthors

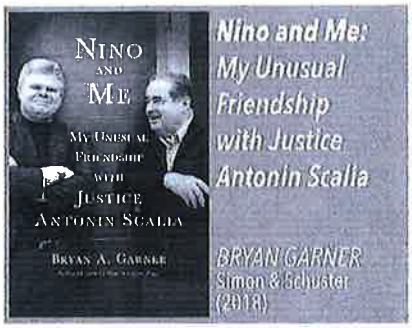
Collaborative writing can be a delicate endeavor for many judges, especially when collaborating with someone who is not a judge. Bryan Garner's newest book, *Nino and Me*, offers not just an intimate portrait of Garner's friendship with Justice Antonin Scalia but also an insightful look at the challenges of writing with someone else.

Written as a friend's tribute to Justice Scalia, *Nino and Me* focuses on the writing process behind the two books Garner and Scalia wrote together: *Reading Law: The Interpretation of Legal Texts* (West 2012), and *Making Your Case: The Art of Persuading Judges* (Thomson West, 2008). Interesting stories about their friendship abound: Garner recounts tales involving Justice Scalia performing at Garner's wedding, a trip the two took together to the Far East, and time spent together with their families. He also recalls cooking eggs for Scalia (and their disagreement as to how to properly cook eggs); getting haircuts together; and details of their exercise routines.

Garner also offers his insights into Scalia's judicial philosophies and perspectives, covering Scalia's thoughts on topics such as the difference between textualism and originalism; the role "justice" should play in judicial decisions; judicial appointments; originalism; separation of powers; and more.

But perhaps the most unexpected and useful insights of the book are Garner's thoughts on what it takes to successfully collaborate with a coauthor. Of course, most legal professionals know that Garner is a terrific writer, and *he* knows well that one of the most important parts of luring the reader is the "hook." Garner writes that he had the ideas and formats in mind for both books long before he had Scalia on board. But he knew Scalia would be the perfect hook for attracting readers. Of course, Garner acknowledges that he soon became the "sidekick," not the "superstar," emphasizing the point that sometimes one must yield to the "bigger player" in order to ensure a successful collaboration.

Garner suggests that, regardless of the imbalance in reputation between the writers, it was important that they find common ground. Both Garner and Scalia described themselves as "snoots," people who care intensely about words, usage, and grammar. Although their



political philosophies were on the opposite ends of the spectrum, both were textualists and orginalists, which provided a foundation for their writing. These commonalities were key throughout their collaborative writing process and obviously contributed greatly to their successful partnership.

Both authors considered their books to be 50-50 collaborations, so much so that it is can be difficult to know who wrote what. They pulled off this seamless presentation by establishing a thoughtful writing process, including initial talks, negotiations, and drafting of contracts through to the final editing and publishing of the books. Beginning the collaborative process by drafting an outline and a table contents, he suggests, was a key step to setting the organizational framework for the writing process.

As seamless as the end products are, Garner describes their writing process as time consuming and difficult. *Reading Law* took over three years to write, and the two authors went through at least 250 drafts before final publication. They spent countless hours writing and editing in Scalia's chambers and Garner's office, all while working "day jobs" as a U.S. Supreme Court justice and a prominent writer and lecturer.

A thoughtful writing process and many hours of work, however, did not prevent the two from arguing. One argument over word processing programs — they used different programs, and neither wanted to give up his preferred software — nearly derailed a book. They also disagreed about the use of footnotes, gender-neutral language, and contractions, among other things. Thankfully, they were able to resolve their issues, and their compromises paid off in the form of two highly regarded legal texts.

One last story seems worth sharing: Before the two launched their now famous partnership, Garner had serious doubts about asking Justice Scalia to write with him. Garner recalls his own father chastising him for thinking that he was in the same league as Scalia. Garner even tried to stop the letter he had written to Scalia to invite him to collaborate. Fortunately, the letter went through and opened the door to *Reading Law*, now widely regarded as the authority on the legal interpretation of texts. Garner's experience should insprire those who have an idea but may be afraid to take action and encourage the use of collaboration to complement one's skills with those of a co-author.

Writers interested in the collaborative writing process will find *Nino and Me* helpful, and judges will find it useful for its insights on the process and pitfalls of collaborative writing. And its light-hearted look at a unique friendship between two legal luminaries makes *Nino and Me* a fun read for anyone interested in Scalia's life on and off the bench.

— **JOE BOATWRIGHT**, *Judge, Seventh Judicial Circuit Court of Florida*

WRITING SAMPLE

IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA

CASE NO: 2014-1924 MM

DIVISION: 62

STATE OF FLORIDA,

vs.

NICHOLAS JOHNSON,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court for hearing on March 13, 2015, upon Defendant's Motion to Suppress Stop and Search. Based on the testimony and evidence presented to the Court, the Court finds as follows:

FACTS

In the early morning hours of August 2, 2014 Florida Fish Game and Wildlife Officer James Bonds (hereinafter "Officer Bonds") was travelling South on Highway 17 when he noticed a vehicle in front of him exhibiting a suspicious driving pattern. The suspicious vehicle made a u-turn and began to travel north on Highway 17. Officer Bonds made a u-turn but lost sight of the vehicle. Officer Bonds continued to search the area and ended up travelling south on Old San Mateo Road when he noticed a vehicle ahead of him which turned out to be the Defendant's vehicle. Officer Bonds admitted that he could not be sure if this was the same vehicle that he was following originally. He observed the Defendant's vehicle activate its brake lights prior to coming to the intersection of North Boundary Road and Old San Mateo Road. Officer Bonds was roughly 200 yards directly behind the defendant's vehicle when the brake lights were activated. It was dark outside and there were no street lights in the area. Officer Bonds testified that the defendant's vehicle did not stop at the stop sign.

In Court, Officer Bonds testified that his basis for believing that the Defendant did not stop at the stop sign was due to the fact that the defendant's headlights had illuminated the

canopy of trees around the intersection, and he never saw the headlights stop moving. However, at the hearing there seemed to be some confusion as the officer had originally articulated in an earlier sworn statement that it was the brake lights that had illuminated the intersection. Finally, Officer Bonds did not originally know that the Defendant's vehicle had failed to stop at the stop sign. The reason for this was the officer did not know there was a stop sign in the area. It was only after driving up to the intersection did he notice the stop sign.

Officer Bonds did not choose to make a traffic stop after the alleged infraction of failing to stop at the stop sign. Instead, the officer continued to follow the Defendant's vehicle as it made a turn onto Highway 100 and then a turn onto East End Road. As the Defendant's vehicle travelled down East End Road it swerved to the left so that it's back left tire was in the middle of the double yellow lines for about ten (10) yards. At that point, a vehicle approached the Defendant's vehicle in the opposite lane and the defendant's vehicle swerved back to the right where his right rear tire went off the roadway and it appeared that his full tire left the roadway for a brief moment. The Defendant's vehicle then corrected and went back to the center of the lane.

Officer Bonds admitted that there were no white lines on the right side of the roadway indicating where a lane would be on the road. Further, the oncoming vehicle was not affected by the swerving of the defendant's vehicle. Officer Bonds then initiated a traffic stop on the Defendant's vehicle which led to the Defendant's subsequent arrest for Driving Under the Influence.

Officer Bonds in his report stated that the basis for the stop was for failing to stop at the aforementioned stop sign and failing to maintain a single lane. At the hearing, Officer Bonds testified that this was the basis for the traffic stop. However, after some prodding by the State the officer admitted that he also believed the Defendant's driving pattern concerned him that Defendant might be impaired. It should be noted that nowhere in the officer's report was impairment listed as the basis of the stop. Further, on the State's re-direct examination, Officer Bonds was asked for the reason for the stop, and he stated that it was the totality of the circumstances. The officer only cited the Defendant for violating Florida Statute 316.074(1) – Obedience to a Required Traffic Control Device. The officer did not cite the Defendant for Failure to Maintain a Single Lane.

APPLICABLE LEGAL AUTHORITY

All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute. Davis v. State, 788 So. 2d 308, 309 (Fla. 5th DCA 2001). A traffic stop is reasonable under the Fourth Amendment where the law enforcement officer had probable cause to believe a traffic violation had occurred and the reasonableness of the stop does not depend on the subjective motivations of the officer who stopped the vehicle. Whren v. United States, 517 U.S. 806, 810 (1996) *See also*, State v. Thomas, 109 So. 3d 814 (5th DCA 2013). The validity of the traffic stop depends solely on objective criteria. Id. The objective test "asks only whether any probable cause for the stop existed," which makes the subjective motivations of the officer irrelevant. Holland v. State, 696 So. 2d 757, 759 (Fla. 1997).

Florida Statute §316.0875 (2014) defines and sets limits on no passing zones on the roadways of Florida. The relevant language Florida Statute§ 316.0875 is a follows:

> (1)The Department of Transportation and local authorities are authorized to determine those portions of any highway under their respective jurisdiction where overtaking and passing or driving to the left of the roadway would be especially hazardous and may, by appropriate signs or markings on the roadway, indicate the beginning and end of such zones, and when such signs or markings are in place and clearly visible to an ordinarily observant person, every driver of a vehicle shall obey the directions thereof.(2) Where signs or markings are in place to define a no-passing zone as set forth in subsection (1), no driver shall at any time drive on the left side of the roadway with such no-passing zone or on the left side of any pavement striping designed to mark such no-passing zone throughout its length.(3) This section does not apply when an obstruction exists making it necessary to drive to the left of the center of the highway, nor to the driver of a vehicle turning left into or from an alley, private road or driveway.

Courts have found a violation of this statute when a driver's front and back tires have crossed over the double solid lines so that the vehicle was partially into the oncoming lane of traffic regardless of whether the defendant was creating a safety hazard. *See* Lomax v. State, 148 So. 3d 119 (Fla. 1st DCA 2014).

According to Florida Statute§ 316.089(1), a vehicle shall be driven as nearly practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. Fla. Stat. §316.089(1) (2014). Courts

have found that a driver's failure to maintain a single lane as required by Florida Statute §316.089, does not by itself establish probable cause for a traffic stop unless the driver's behavior placed other vehicles in danger. *See* Hurd v. State, 958 So. 2d 600 (Fla. 4th DCA 2007). Because §316.089 prohibits leaving a lane unless it can be done safely, courts have reasoned that the failure to maintain a single lane alone cannot establish probable cause when the action is done safely. Id. Further, when a vehicle travels briefly outside of its margin for error without more is not sufficient to justify a stop for violating §316.089. Crooks v. State, 710 So. 2d 1041 (Fla. 2d DCA 1998). However, there is no requirement that the evidence show that the operator of the endangered vehicle took evasive action or was aware of the danger. Williamson v. Dep't of Highway and Safety Motor Vehicles, 933 So. 2d 665 (Fla. 1st DCA 2006).

Finally, an officer may conduct an investigatory stop on less than probable cause if the officer has a reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime. Popple v. State, 626 So. 2d 185, 186 (Fla. 1993); *See also* Tamer v. State, 463 So. 2d 1236, 1239 (Fla. 4th DCA 1985). "In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop." Popple, 626 So. 2d at 186. A founded suspicion is a belief which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge. Tamer, 463 So. 2d at 1239. Courts have held that an officer has reasonable suspicion to justify a traffic stop if they have a belief that the driver is ill, tired, or impaired, and they observe a driving pattern that is sufficient to warrant such a belief even if there is no traffic violation. *See* Yanes v. State, 877 So. 2d 25, 26 (Fla. 5th DCA 2004) (finding that an officer had reasonable suspicion to stop a vehicle where he observed a vehicle cross the fog line with one half of the width of his vehicle on three occasions over a one mile period, coupled with a belief that the driver was possibly impaired).

There seems to be a conflict or confusion among different courts of this state as to whether the officer needs to articulate a basis for the stop when he/she feels that the driver is ill, tired or impaired or if simply the facts provided in an arrest report or testimony at a hearing provide an objective basis for the stop. *See* David A. Demers, Florida DUI Handbook, §4:9 (2013-2014 Ed. West Publishing). Some courts have suggested that for an investigatory stop to be lawful when based on unusual driving which falls short of a traffic violation, then it is

important for the officer to articulate both the facts and conclusions that the officer drew from those facts. State v. Davidson, 744 So. 2d 1180 (Fla. 2nd DCA 1999). Similarly, the Florida Supreme Court upheld a circuit court's order finding a stop unlawful because the officer's report "did not indicate that impairment was the reason for the stop." *See* Dobrin v. Fla. Dep't of Highway Safety and Motor Vehicles, 874 So. 2d 1171, 1172 (Fla. 2004). However, in that same case the Florida Supreme Court made it clear that based upon the finding of facts, the important determination is whether there is an objective basis for the stop. Id. Thus, it seems that officers must articulate facts sufficient for the stop, but the stop must be judged by an objective standard not just the subjective motivations of the officers. *See* Dep't of Highway Safety and Motor Vehicles v. Jones, 935 So. 2d 532 (3rd DCA 2006).

CONCLUSION

The State argues in this case that there are three separate reasons for validating the traffic stop in question. First, the State argued that the Defendant violated Florida Statute § 316.074(1) by failing to stop at a stop sign at the intersection of North Boundary Road and Old San Mateo Road. Second, the State argued that the Defendant failed to maintain a single lane as defined by Florida Statute § 316.089 based on his driving pattern on East End Road. Finally, the State argues that the stop was valid because the officer had reasonable suspicion to believe the Defendant was impaired based on his driving pattern. The Court finds that the State did not meet their burden and therefore, the Motion to Suppress is granted.

First, Officer Bonds did not have probable cause to stop Defendant for violating Florida Statute 316.074(1). Although the Defendant was cited for failure to stop at a traffic signal, it is objectively unreasonable that Officer Bonds actually witnessed such violation occur. The probable cause affidavit states that the officers were approximately 100 yards behind Defendant's vehicle at the time this alleged failure to stop occurred. However, at the suppression hearing, Officer Bonds stated that he was over 200 yards behind Defendant's vehicle and that it was dark outside with no other lights in the area. This was distance was represented by Defendant's Exhibit 1(d).

At the hearing, Officer Bonds testified that he saw Defendant's brake lights activate as he approached the intersection. However, Officer Bonds did not even know where the stop sign was while he was watching the vehicle. It was not until he reached the intersection that he determined

that there was a stop sign in the area. Officer Bonds estimated that Defendant's vehicle moved at approximately five miles per hour through the intersection. However, Officer Bonds also admitted at the hearing that it would be impossible to perform a proper speed estimation as he was not trained in this area. Officer Bonds sole reason for believing there was a traffic violation is that he said he saw the headlights continue to move through the canopy of trees in the area of the stop sign. This reason alone is insufficient. Based on the facts before the Court, there is no reasonable objective basis for believing that the Defendant violated Florida Statute § 316.074(1) for failure to stop at a traffic signal.

Second, Officer Bonds did not have probable cause to stop the Defendant for failing to maintain a single lane as defined by Florida Statute § 316.089 based on his driving pattern on East End Road. First, the Defendant did not leave his lane of traffic when his car touched the center line and because of that, the oncoming car was never in any danger. Officer Bonds never testified that the Defendant's vehicle ever crossed over the center line, all he saw was the back left tire between the two double lines for about a distance of ten (10) yards. Officer Bonds testified that as the Defendant's vehicle travelled down East End Road it swerved to the left so that it's back left tire was in the middle of the double yellow lines for about ten (10) yards. This was only a slight margin of error for a brief period of time which would not justify a stop without the vehicle in the other lane being endangered as stated in Crooks v. State, 710 So. 2d 1041 (Fla. 2d DCA 1998) and that would not have been possible since the Defendant never fully left his lane to endanger the other vehicle.

At that point, a vehicle approached the Defendant's vehicle in the opposite lane and the Defendant's vehicle swerved back to the right where his right rear tire went off the roadway and it appeared that his full tire left the roadway for a brief moment. The Defendant's vehicle then corrected and went back to the center of the lane. The officer admitted that there were no white lines on the right side of the roadway indicating where a lane would be on the road. This conduct does not give rise to a violation of §316.089 because this was only a minor deviation, and the oncoming vehicle was not endangered.

Next, Officer Bonds never wrote any citation to the Defendant for violating Florida's no passing zones law. However, this issue was raised at the suppression hearing. Thus, to clarify any issue in this matter, the Court also finds that there was no violation of Florida Statute§ 316.0875. The reason for this is that the Defendant's vehicle never fully crossed over the center line. The basis for the Court's conclusion is supported by Lomax v. State, 148 So. 3d 119 (Fla.

1st DCA 2014).

Finally, the Court does not find that there was reasonable suspicion to justify a stop on the basis that the Defendant was ill, tired, or impaired. Officer Bonds never placed in his probable cause affidavit that he stopped the Defendant because he thought he was ill, tired or impaired. In addition, he testified that he placed everything in his report that he thought was important for this case. It was only at the suppression hearing, after some prodding by the State, did he say he was concerned about possible impairment. However, he never articulated why he was concerned about possible impairment. Further, he was asked on re-direct why he stopped the vehicle and his response was the driving pattern and all his observations together, but he never articulated how this fit with an impaired driver. Thus, Officer Bonds never clearly articulated that he stopped the vehicle because he thought the Defendant was impaired.

Also, objectively looking at the facts before the Court there was no basis for the stop in question. The only driving pattern that the Court can consider is that of the pattern on East End Road. The driving pattern of having one tire in the middle of the double yellow lines for ten (10) yards and then correcting to the right to what appeared as a tire off the roadway where there was no designated lane for only brief period of time, does not constitute reasonable suspicion to believe the Defendant was ill, tired or impaired. That driving pattern only rises to the level of mere suspicion not reasonable suspicion. In fact, from the time that Officer Bonds saw the vehicle on Old San Mateo Road until the stop was made on East End Road, Officer Bonds and the Defendant covered a distance of a couple miles. Throughout the entire time the Officer followed the Defendant, he did not violate any traffic law or exhibit any suspicious driving pattern other that the perceived running of a stop sign which has already been discussed above before they reached East End Road. Thus, objectively, the minor deviations in the lane on East End Road do not give rise to a valid traffic stop.

THEREFORE IT IS ORDERED AND ADJUDGED that the Defendant's MOTION TO SUPPRESS is hereby **GRANTED.**

DONE AND ORDERED in Palatka, Putnam County, Florida this 20th day of March, 2015.

JOE BOATWRIGHT
COUNTY COURT JUDGE

WRITING SAMPLE

IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA

CASE NO: 2016-719-CC

DIVISION: 63

KEVIN SMITH and ELIZABETH SMITH,
Husband and wife

Plaintiff

vs.

DUANE BROWN FILL DIRT,INC.,
A Florida Corporation

Defendant.

FINAL JUDGMENT

This matter came before the Court for a Non-Jury Trial on November 22, 2017 on Plaintiffs' two count Complaint for Negligent Construction and Trespass on the Case. Both parties appeared with counsel. At the Trial, the Court heard and considered the testimony of the Plaintiff, Kevin Smith, and the Defendant, the owner of Duane Brown Fill Dirt, Inc., Alvin Harris. In addition, the Court heard testimony of Frank Pliska, Ricky J. Weathington, Gary Wheeler, and Robert Baggs. The Court also admitted and received in evidence various exhibits and heard and considered argument of counsel addressed to the issues tried before the Court.

In considering the weight given to the testimony of each of the witnesses, the Court has had the opportunity to consider the demeanor of each of the witnesses while testifying; the frankness or lack of frankness of each of the witnesses; the intelligence of the witnesses; and interest that the witness might have in the outcome of the case; the means and opportunity each witness had to know the facts about which the witness testified; the ability of each witness to remember the matters about which he/she testified and the knowledge, skill, experience, training, and education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

FACTS

Plaintiffs own property located at 133 Floridian Club Road in Welaka, Fl. The Plaintiffs

access their property by a private easement called Floridian Club Road (hereinafter roadway). Sometime in November, 2015 Alvin Harris of Duane Brown Fill Dirt, Inc. (hereinafter Harris) contracted with homeowner, Cherie Willis to improve the roadway by grading, crowning, and putting millings down on the roadway. Harris only met with Cherie Willis and did not discuss the road project with any of the other homeowners. There were 15 homeowners that used the private easement but not all of those homeowners paid for the road construction. In particular, the Plaintiffs were never consulted about the road project nor did they agree to pay for any of the project. In addition, the Plaintiffs never paid for the road construction and never met with Harris or any other representative of Duane Brown Fill Dirt, Inc.

On or about December 10, 2015, Harris grated and placed cement millings on the roadway and then crowned the roadway. This caused the roadway's height to be raised substantially from the roadway's previous position. Prior to the construction, upon raining, the surface water flowed from the top of the roadway, down the hill, to the river at the end of the roadway. After the construction, the surface water no longer flowed from the top of the road towards the river but rather flowed off of the sides of the roadway into the homeowners' yards. This was caused by the Defendant crowning and raising the height of the roadway. The Defendant in improving the roadway did not take into account any drainage issues that might result from the construction. In particular, the rain water ran off the roadway into the Plaintiffs' yard. This caused the Plaintiffs' septic tank to backup into their house. As a result, the Plaintiffs' use and enjoyment of their property was diminished. In addition, the Plaintiffs' garage would flood and the yard would flood making entrance in and out of the driveway problematic.

The Plaintiff, Kevin Smith, confronted Harris about the road conditions and Harris admitted that the road was too high. Harris also admitted to another neighbor, Rick Weathington, that he had built the road too high. However, at the time of trial, Harris had not repaired the roadway to fix the surface water runoff issue. Harris in constructing the roadway, did not take into account the surface water runoff issue and did not install or prepare proper drainage. At trial, Harris admitted he had a duty to the plaintiff to make sure that the road was constructed properly to make sure that the plaintiff did not suffer damages.

At trial, Ronald Baggs was called to testify based on his expertise on road construction. He testified that the road at issue "looked good to him" but he never actually went on the roadway at issue. In addition, he never inspected the roadway in front of the Plaintiff's property. He only looked at the roadway from afar. As such, the Court discounts his testimony.

APPLICABLE LEGAL AUTHORITY

Under Florida law, to recover on a negligence claim, Plaintiff must prove that (1) defendant owed him a legal duty; (2) defendant breached that duty; (3) he suffered injury as a result of that breach; and (4) the injury caused damage. Kayfetz v. A.M. Best Roofing, 832 So. 2d 784, 786 (Fla. 3rd DCA 2002). "Trespass on the Case" is a proper remedy at law for the disturbance of an easement. Winselman v. Reynolds, 690 So. 2d 1325, 1327 (3rd DCA 1997). Where injury is indirect or a secondary consequence of the defendant's act, the proper cause of action is for "Trespass on the Case". Id. Thus, "Trespass on the Case" is an action to recover damages caused by a tort where the injury was not immediate but consequential. Id.

In actions where damages are claimed by the diversion of surface waters, "the almost universal rule, as gathered from the decisions, is that no person has the right to gather surface waters that would naturally flow in one direction by drainage, ditches, dams, or otherwise, and divert them from their natural course and cast them upon the lands of the lower owner to his injury." Westland Skating Center, Inc. v. Gus Machado Buick, 542 So. 2d 959, 961-962 (Fla. 1989). Florida has adopted the reasonable use rule to settle controversies when any party improves his land, thereby causing surface waters to damage his neighbor's property. Id. The reasonable use rule centers on whether the defendant's conduct was reasonable in causing surface waters to damage another's property, in view of all the circumstances. Id. at 963. The essence of the reasonable use rule is that the natural or original surface flow of water should remain unobstructed. Heritage 5, LLC v. Estrada,64 So. 3d. 1292, 1293 (Fla. 4th DCA 2011). When one changes the surface flow from its original state then that is unreasonable and liability attaches because the reasonable use rule is violated. Id. (finding that liability had attached because the reasonable use rule was violated when the landowner changed the original flow of the surface water from the south to the northwest causing damages to the plaintiffs' property) .

CONCLUSION

In applying the factual findings to the law, the Court finds for the Plaintiff. The Plaintiff has proven that the Defendant was liable under either a negligent construction theory and/or "Trespass on the Case." In particular, the Defendant in constructing the roadway violated the

reasonable use rule as articulated in Westland Skating Center, Inc. v. Gus Machado Buick by changing the flow of water as articulated in Heritage 5, LLC v. Estrada. The testimony showed that prior to the construction of the roadway, surface water flowed from the top of the hill down towards the homes on the river, with minimal water flow onto the Plaintiffs' property. After the construction, the surface water flow was changed to flow towards the sides of the road due to the crowning of the roadway and the increased height. This caused damages to the Plaintiffs' property. The appropriate remedy is to provide damages in order to fix the roadway and drainage issues. This would alleviate the need for any fencing as requested or a new septic tank as agreed by Plaintiff's counsel. The estimate stipulated into evidence as Plaintiff's Exhibit #4 provided an amount of $7,500 to repair the roadway. The Court enquired of the Defendant if he had an alternative amount to fix the roadway and he stated $500.00. The Court finds based on the limited evidence provided by both parties that the $7,500.00 amount is the appropriate amount of damages.

WHEREFORE, based on the foregoing, it is hereby

ORDERED AND ADJUDGED that the Plaintiffs, Kevin and Elizabeth Smith, shall have and recover from the Defendant, Duane Brown Fill Dirt, Inc., principal damages of $7,500.00 along with costs in the amount of $350.00 for a total of $7,850.00 that shall accrue interest per section 55.03 Florida Statutes, currently at 5.35%, until paid in full.

ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH

DONE AND ORDERED in Palatka, Putnam County, Florida this 14th day of December, 2017.

JOE BOATWRIGHT
COUNTY COURT JUDGE

Copies furnished to:
Timothy Keyser, Esq.
Adam Rowe, Esq.