



# The Florida Senate

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Committee on Children, Families, and Elder Affairs

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## **FORENSIC HOSPITAL DIVERSION PILOT PROGRAM**

### **Issue Description**

Roughly 125,000 people with serious mental illnesses are arrested and booked into Florida jails annually. The cost to local governments to house these individuals is estimated to be over \$500 million. Another \$600 million annually is spent housing people with mental illnesses in state prisons and forensic treatment facilities. Based on historic growth rates, it has been projected that the number of state prison beds serving inmates with mental illnesses will more than double from 17,000 to over 35,000 beds over the next ten years, with capital and operating costs of more than \$3.6 billion for new beds alone.

In 2006, the demand for state hospital beds in Florida to provide services to persons found incompetent to proceed to trial (ITP) and not guilty by reason of insanity (NGI) outpaced the supply of beds in state treatment facilities. The state was forced to allocate \$16 million in emergency funding and \$48 million in recurring annual funding to create 300 additional forensic treatment beds to timely serve these individuals. Florida currently spends more than \$210 million annually – one third of all adult mental health dollars and two thirds of all state mental health hospital dollars – on 1,700 beds, serving roughly 3,000 individuals under forensic commitment.

Provision of mental health services to mentally ill defendants is a collaborative effort among the Department of Children and Family Services (DCF), the Department of Corrections (DOC), and the courts. In recent years, those entities have worked to provide and expand services for mentally ill defendants outside of the existing systems. However, lack of funding and legislative authority have made implementation of alternative systems difficult. The intention of these efforts is to keep mentally ill offenders out of forensic facilities and in less expensive, more effective forms of community control.

It has been suggested that this model be tested by implementing a limited number of pilot programs to divert selected individuals from state hospitals to locked community-based residential treatment facilities that will provide assistance in accessing community-based treatment and support services following discharge.

### **Background**

#### **Forensic Mental Health**

On any given day in Florida, there are approximately 17,000 prison inmates, 15,000 local jail detainees, and 40,000 individuals under correctional supervision in the community who experience serious mental illnesses. Annually, as many as 125,000 adults with mental illnesses or substance use disorders requiring immediate treatment are arrested and booked into Florida jails. Of the 150,000 children and adolescents who are referred to Florida's Department of Juvenile Justice (DJJ) every year, over 70 percent have at least one mental health disorder.<sup>1</sup>

Over the past nine years, the population of inmates with mental illnesses or substance use disorders in Florida prisons increased from 8,000 to nearly 17,000 individuals. In the next nine years, this number is projected to reach more than 35,000 individuals, with an average annual increase of 1,700 individuals. A population this size is enough to fill more than 20 correctional institutions, or the equivalent of one new prison added every year.<sup>2</sup>

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<sup>1</sup> DCF, *Staff Analysis and Economic Impact, Senate Bill Number 2018* (Mar. 2, 2009).

<sup>2</sup> *Id.*

Forensic mental health services cost the state a quarter-billion dollars a year and are now the fastest growing segment of Florida's public mental health system. Over the past nine years, forensic commitments have increased from 863 to 1,549 admissions annually. At this rate, commitments are projected to reach nearly 2,800 by 2016.<sup>3</sup>

People with serious mental illnesses or substance use disorders who come in contact with the criminal justice system are typically poor, uninsured, homeless, members of minority groups, and experiencing co-occurring mental health and substance use disorders.<sup>4</sup> The majority of these individuals are charged with minor misdemeanor and low-level felony offenses that are a direct result of untreated psychiatric conditions.<sup>5</sup>

Due in large part to inadequate community-based treatment capacity and infrastructure, individuals with mental illnesses or substance use disorders who become involved in the justice system are at increased risk of subsequent recidivism to the justice system. According to a 2006 report by the Bureau of Justice Statistics, "a quarter of both state and jail inmates who have a mental health problem have been incarcerated three or more times previously."<sup>6</sup> As many as half of individuals with mental illnesses and/or substance use disorders who recidivate to the justice system are charged, not with committing new offenses, but for violating conditions of probation or parole, such as failing to report to treatment or to maintain stable housing or employment.<sup>7</sup>

Consequences of the current system include:

- Substantial and disproportionate cost shifts from less expensive, front-end services provided in the community to much more expensive, back-end services provided in the juvenile justice, criminal justice, and forensic mental health settings;
- Compromised public safety;
- Increased arrest, incarceration, and criminalization of people with mental illnesses;
- Increased police injuries; and
- Increased rates of chronic homelessness.<sup>8</sup>

#### *Incompetent to Proceed to Trial/Not Guilty by Reason of Insanity*

Part II of ch. 916, F.S., relates to forensic services for persons who are mentally ill and describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed due to mental illness or who have been adjudicated not guilty by reason of insanity. Persons committed under ch. 916, F.S., remain under the jurisdiction of the committing court but are committed to the custody of the Florida Department of Children and Family Services (DCF).

Chapter 916, F.S., authorizes the court to appoint experts to evaluate a criminal defendant's mental condition, including competency, insanity, and the need for involuntary hospitalization or placement. Pursuant to this chapter, an individual is incompetent to proceed if he or she "does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him."<sup>9</sup>

In considering the issue of competence to proceed, the statute requires that the examining expert must report to the court regarding the defendant's capacity to appreciate the charges or allegations against him, appreciate the range and nature of possible penalties, understand the adversarial nature of the legal process, consult with counsel

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<sup>3</sup> *Id.*

<sup>4</sup> Often, individuals with mental health problems have difficulty accessing resources in the community for a variety of reasons, including: lack of knowledge regarding available services; lack of funds; stigma of criminal records; or a lack of capacity to access services. *State and County Collaboration: Mental Health and the Criminal Justice System*, National Association of Counties, available at <http://www.ojp.usdoj.gov/newsroom/testimony/2009/statecountycollabo.pdf> [hereinafter *State and County Collaboration*] (last visited October 1, 2010).

<sup>5</sup> DCF, *Staff Analysis and Economic Impact, Senate Bill Number 2018* (Mar. 2, 2009).

<sup>6</sup> *State and County Collaboration*, *supra* note 4.

<sup>7</sup> DCF, *Staff Analysis and Economic Impact, Senate Bill Number 2018* (Mar. 2, 2009).

<sup>8</sup> *Id.*

<sup>9</sup> FLA. STAT. § 916.12(1) (2010).

regarding the facts pertinent to the case, behave appropriately in court, and testify relevantly. The report to the court must also include any other information deemed relevant. If the expert finds the defendant incompetent to proceed, she must also report on recommended treatment that will allow the defendant to regain competence. The expert's report to the court must also address the defendant's mental illness, recommended treatments and alternatives and their availability in the community, the likelihood of the defendant's attaining competence under the treatment recommended, an assessment of the probable duration of the treatment, and the probability that the defendant will attain competence to proceed in the foreseeable future.<sup>10</sup>

Chapter 916, F.S., also provides the criteria for defendants who are adjudicated incompetent to proceed to be involuntarily committed for treatment. The court must find by clear and convincing evidence that the defendant is mentally ill and because of the mental illness:

- The defendant is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being; and
- There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and
- All available, less restrictive treatment alternatives, including treatment in community residential facilities or community inpatient or outpatient settings, which would offer an opportunity for improvement of the defendant's condition have been judged to be inappropriate; and
- There is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future.<sup>11</sup>

This part also provides that a defendant who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily committed if he or she is mentally ill and, because of the mental illness, is manifestly dangerous to himself or herself or others.<sup>12</sup>

#### *Department of Children and Family Services Mental Health Services*

Under the authority of Chapter 916, Florida Statutes, DCF provides mental health assessment, evaluation, and treatment of individuals committed to DCF following adjudication as incompetent to proceed during a criminal proceeding or not guilty by reason of insanity. The individuals committed for involuntary treatment are charged with a felony offense and are mandated to be admitted to a treatment facility within 15 days of the department's receipt of a complete commitment packet from the courts.<sup>13</sup> The state civil<sup>14</sup> and forensic<sup>15</sup> treatment facilities provide the following services:<sup>16</sup>

<sup>10</sup> A defendant may not automatically be deemed incompetent to proceed simply because his or her satisfactory mental functioning is dependent upon psychotropic medication. *See* FLA. STAT. § 916.12(5) (2010).

<sup>11</sup> FLA. STAT. § 916.13 (2010).

<sup>12</sup> FLA. STAT. § 916.15 (2010).

<sup>13</sup> In a criminal case involving a client who has been adjudicated incompetent to proceed or not guilty by reason of insanity, a jail may be used as an emergency facility for up to 15 days following the date the department or agency receives a completed copy of the court commitment order. FLA. STAT. § 916.107(1)(a) (2010).

<sup>14</sup> A "civil facility" is a mental health facility established within DCF or by contract with DCF to serve individuals committed pursuant to chapter 394, F.S., and those defendants pursuant to chapter 916, F.S., who do not require the security provided in a forensic facility; or an intermediate care facility for the developmentally disabled, a foster care facility, a group home facility, or a supported living setting, as defined in s. 393.063, F.S., designated by the agency to serve those defendants who do not require the security provided in a forensic facility. FLA. STAT. § 916.106(4) (2010).

<sup>15</sup> A "forensic facility" is a separate and secure facility established within DCF or agency to serve forensic clients. A separate and secure facility means a security-grade building for the purpose of separately housing persons who have mental illness from persons with retardation or autism and separately housing persons who have been involuntarily committed pursuant to chapter 916, F.S., from nonforensic residents. FLA. STAT. § 916.106(10) (2010).

<sup>16</sup> *State Mental Health Treatment Facilities*, Florida Department of Children and Family Services, available at <http://www.dcf.state.fl.us/facilities/> (last visited October 1, 2010).

- Basic Support Services includes provision of the basic requirements for survival such as shelter, food, clothing, and a sense of personal safety.
- Healthcare Services intended to identify and treat physical and mental illness and promote good health. The priorities of health care services are: a) routine physical and mental health assessment, evidence-based treatment, and health education; b) rapid response to acute illness or injury; c) ongoing management of chronic health conditions; and d) provision of pharmacotherapy with clinical pharmacology oversight.
- Recovery Services consists of psychiatric evaluation, diagnosis, holistic recovery planning with the individual and interdisciplinary team, stabilization of the symptoms of mental illness through psychotherapeutic medication and recovery therapies, restoration of optimum level of functioning, and transition to community placement with the appropriate support services in place.
- Continuity of Care Services includes internal case management services and community linkages designed to ensure that essential services are being provided consistent with the individual's recovery plan. The state mental health treatment facilities work in partnership with the community providers and circuits to facilitate continuous services and supports for people transitioning from the facility back into the community.
- Competency Restoration Training and Evaluation Services (in forensic facilities) involves group or individual processes. The focus of training is on helping individuals to understand the judicial process, the role of the court, the nature of their charges, the possible penalties, and their personal legal rights. Competency evaluations are completed, as needed, and competency evaluation reports are prepared for the courts indicating the individual's progress, as required.

Persons committed to the custody of DCF are usually treated at one of the three forensic mental health treatment facilities — Florida State Hospital in Chattahoochee, North Florida Evaluation and Treatment Center in Gainesville, or South Florida Evaluation and Treatment Center in Miami. These three facilities contain 1,700 forensic and forensic step-down beds and serve approximately 3,000 people each year. The cost to fund these beds is more than \$210 million annually, equating to one third of all adult mental health dollars and two thirds of all state mental health hospital dollars.

As an alternative to commitment, the circuit court may also order conditional release of a defendant who has been found incompetent to proceed or not guilty by reason of insanity. Conditional release must be based on an approved plan for providing appropriate outpatient care. The circuit court may also order conditional release in lieu of an involuntary commitment to a facility. If outpatient treatment is appropriate, a written plan for outpatient treatment, including recommendations from qualified professionals, must be filed with the circuit court.<sup>17</sup>

#### *Prisoner's Constitutional Right to Adequate Health Care*

Prison inmates have a constitutional right to adequate health care, including mental health treatment. "Deliberate indifference to serious medical needs" by a prison system has been found to be a violation of the Eighth Amendment prohibition against cruel and unusual punishment.<sup>18</sup> "The growth of local correctional populations has strained the limited capacity of jails to respond to the health needs of inmates."<sup>19</sup> "This situation is particularly challenging in the case of inmates with serious mental illnesses, who require specialized treatment and services."<sup>20</sup>

#### *Department of Corrections Mental Health Services*

The delivery of mental health services for inmates begins at the reception centers and continues throughout incarceration according to the individual's needs. Inmates move between five levels of mental health care depending on their needs. The five levels of care include:

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<sup>17</sup> FLA. STAT. § 916.17 (2010).

<sup>18</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976); *Annual Report 2008-2009*, State of Florida Correctional Medical Authority, Dec. 2009, available at <http://www.doh.state.fl.us/cma/reports/AnnualReportCMA08-09.pdf> (last visited October 1, 2010).

<sup>19</sup> Henry Steadman, *Prevalence of Serious Mental Illness Among Jail Inmates*, American Psychiatric Association, available at <http://psychservices.psychiatryonline.org/cgi/content/full/60/6/761> (last visited October 1, 2010).

<sup>20</sup> *Id.*

- Outpatient Care involves regular monitoring, evaluation, group counseling, individual counseling and psychotropic medications, when clinically indicated. Inmates reside in the general prison community, and report to the institutional health clinic to receive medications or other mental health services.
- Infirmery Mental Health Care is the first and least restrictive of four levels of inpatient mental health care, and consists of brief admission (1-14 days) to the institutional infirmery for inmates residing in the general prison community. Infirmery Mental Health Care is indicated whenever mental health staff determines that an inmate who is residing in the general prison community presents with mental health problems or conditions that cannot be safely or effectively managed on an outpatient basis. Admission to Infirmery Mental Health Care is often precipitated by mental health crisis involving assessed risk of serious self-injurious behavior. If the crisis is not resolved within 14 days, the inmate is typically transferred to the next level of inpatient care, which is Crisis Stabilization Unit.
- Crisis Stabilization Unit involves admission to a locked, highly structured, specially designed mental health unit that is separate from the general prison community. Inmates in a Crisis Stabilization Unit are classified very severe mental impairment. If the inmate's condition stabilizes to the point that he/she can be safely discharged, he/she will be transferred to outpatient care or to a lower level of inpatient care, which is a Transitional Care Unit.
- Transitional Care Unit is appropriate for inmates who require more intensive service than what can be provided in Outpatient Care or Infirmery Mental Health Care, but whose condition is not so acute as to require care in a Crisis Stabilization Unit. Inmates in a Transitional Care Unit are classified as having severe or chronic impairment and they typically remain in the unit for extended periods (six months or longer). Some inmates remain in the unit for years because their level of functioning does not reach the threshold required for discharge to outpatient care. If the inmate who is assigned to a Crisis Stabilization Unit requires a higher level of care, he/she is referred for admission to Acute Inpatient Mental Health Care at a Corrections Mental Health Facility, the highest, most intensive level of mental health care available to inmates.
- Acute inpatient mental health care is provided at a Corrections Mental Health Facility, which is a locked, secure, and highly structured setting away from the general prison community. Admission to a Corrections Mental Health Facility requires judicial commitment, which lasts for six months. Staff may request additional commitments in six-month increments indefinitely, commensurate with the inmate's ongoing needs assessment.<sup>21</sup>

### *The Forensic Bed Shortage*

In late 2006, the number of persons waiting for forensic treatment reached unprecedented levels, and the department was unable to comply with the law mandating admission to a treatment facility within 15 days.<sup>22</sup> The forensic waiting list reached a peak of 343 individuals on October 2, 2006, with 277 of those persons awaiting admission in excess of 15 days.<sup>23</sup> The average number of days to wait for admission to a forensic facility by January 2007 was 72 days.<sup>24</sup>

To address the immediate problem, the Legislative Budget Commission took action in January 2007 and re-allocated funds. The department opened additional forensic beds with the funding and enhanced use of community forensic services. On July 1, 2007, there were no offenders exceeding the statutorily-required 15-day period after court referral, and no offenders were awaiting transport from local jails to a forensic facility. The department reduced the average number of days an individual must wait in jail prior to admission to a state mental health facility from 4.2 days in July 2007 to 3.3 days in August 2007.

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<sup>21</sup> Email from Tommy Maggitas, Department of Corrections, (March 9, 2009, 5:07 PM EST)(on file with the committee).

<sup>22</sup> See FLA. STAT. § 916.107(1)(a) (2010).

<sup>23</sup> Additionally, there were several instances in which mentally ill inmates died while awaiting transfer to a psychiatric hospital. Abby Goodnough, *Officials Clash Over Mentally Ill in Florida Jails*, N.Y. TIMES, Nov. 15, 2006, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9E04E5DA173EF936A25752C1A9609C8B63> (last visited October 1, 2010).

<sup>24</sup> *Forensic Mental Health Update*, Department of Children and Families, Nov. 15, 2007. This situation also resulted in the Secretary of DCF, Ludy Hadi, being held in criminal contempt of court for DCF's failure to comply with the 15 day requirement. Goodnough, *supra* note 21.

At the same time, the Supreme Court of Florida appointed Judge Steven Leifman as Special Advisor on Criminal Justice and Mental Health. Judge Leifman coordinated several workgroups on behalf of the court including Criminal Justice. The efforts of the Supreme Court and the appointed workgroups culminated in a report/plan titled “Transforming Florida’s Mental Health System.” The report included recommendations for a mental health system to prevent individuals (with mental illness) from entering the justice system and assisting persons already involved with the justice system to get the treatment they need.<sup>25</sup>

### Delivery Across Systems

Individuals admitted to state forensic treatment facilities for competency restoration receive services primarily focused on resolving legal issues, but not necessarily targeting long-term wellness and recovery from mental illnesses. Once competency is restored, individuals are discharged from state treatment facilities and generally returned to jails, where they are rebooked and incarcerated while waiting for their cases to be resolved. A sizable number of individuals experience a worsening of symptoms while waiting in jail, and some are readmitted to state facilities for additional treatment and competency restoration services.

The majority of individuals who enter the forensic treatment system do not go on to prison,<sup>26</sup> but return to court, and either have their charges dismissed for lack of prosecution or the defendant takes a plea such as conviction with credit for time served or probation.<sup>27</sup> Most are then released to the community, often with few or no community supports and services in place.<sup>28</sup> Many are subsequently rearrested and return to the justice and forensic mental health systems, either as the result of committing a new offense or failing to comply with the terms of probation or community control.<sup>29</sup>

Provision of mental health services to mentally ill defendants is a collaborative effort among the Department of Children and Family Services (DCF), the Department of Corrections (DOC), and the courts. In recent years, those entities have worked to provide and expand services for mentally ill defendants outside of the existing systems.

### Diversion

“Diversion is the process of diverting individuals with severe mental illness and/or co-occurring substance abuse disorders away from the justice system and into the community mental health system, where they are more appropriately served.”<sup>30</sup> The typical diversion program operates in one of the following stages of criminal justice involvement: initial interaction with police; arraignment; court; or jail. The individual is then linked to community-based services, where they receive outpatient residential services, housing, health, entitlements, or employment.<sup>31</sup> By providing more appropriate community-based services, diversion programs prevent individuals with mental illness and substance abuse disorders from becoming unnecessarily involved in the criminal justice system.<sup>32</sup> There are numerous benefits to the community, criminal justice system and the diverted individual, including:

- Enhancing public safety by making jail space available for violent offenders.
- Providing judges and prosecutors with an alternative to incarceration.
- Reducing the social costs of providing inappropriate mental health services or no services at all.

<sup>25</sup> Bills to implement recommendations in the report were considered during the 2008, 2009, and 2010 sessions. See HB 7085 (2009); CS/CS/CS/SB 1150 (2008); CS/SB 2018 (2009); CS/SB 1180 (2009); SB 1140 (2010); and HB 1189 (2010).

<sup>26</sup> H. Richard, Lamb, *Community Treatment of Severely Mentally Ill Offenders Under the Jurisdiction of the Criminal Justice System: A Review*, American Psychiatric Association, available at <http://psychservices.psychiatryonline.org/cgi/content/full/50/7/907> (last visited October 12, 2010).

<sup>27</sup> Interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Aug. 20, 2010).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Mental Health: Transforming Florida’s Mental Health System*, Supreme Court of the State of Florida, available at [http://www.floridasupremecourt.org/pub\\_info/documents/11-14-2007\\_Mental\\_Health\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/documents/11-14-2007_Mental_Health_Report.pdf) [hereinafter *Mental Health*] (last visited October 1, 2010).

<sup>31</sup> *Jail Diversion*, The Center for Mental Health Services National GAINS Center, available at [http://www.gainscenter.samhsa.gov/html/jail\\_diversion/what\\_is\\_jd.asp](http://www.gainscenter.samhsa.gov/html/jail_diversion/what_is_jd.asp) (last visited October 1, 2010).

<sup>32</sup> *Id.*

- Providing an effective linkage to community-based services, enabling people with mental illness to live successfully in their communities, thus reducing the risk of homelessness, run-ins with the criminal justice system, and institutionalization.<sup>33</sup>

This system of diversion is becoming an important component of national, state and local mental healthcare.<sup>34</sup>

#### *Miami-Dade Forensic Alternative Center*

In Florida, this approach is being tested in the Miami-Dade Forensic Alternative Center (MD-FAC), a pilot program implemented in August 2009 by DCF, the Eleventh Judicial Circuit of Florida,<sup>35</sup> and the Bayview Center for Mental Health (Bayview). The pilot program was established to demonstrate the feasibility of diverting individuals with mental illness adjudicated incompetent to proceed to trial from state hospital placement to placement in community-based treatment and competency restoration services.<sup>36</sup>

“Admission to MD-FAC is limited to individuals who otherwise would be committed to DCF and admitted to state forensic hospitals.”<sup>37</sup> In order to be eligible for MD-FAC, an individual must be charged with a less serious offense, such as a second or third degree felony. A team, composed of the judge, mental health staff from DCF, Bayview, and the state attorney’s office, assesses the individual further and reach a consensus on whether the individual should be admitted to the program.<sup>38</sup> Screening includes a review of the individual’s criminal history for indications of risk of violence or public safety concerns, a review of the appropriateness of treatment in an alternative community-based setting, and the likelihood that the individual would face incarceration if convicted of the alleged offense.<sup>39</sup>

To date, all of the individuals committed to MD-FAC have been committed to DCF under s. 916.13, F.S., as incompetent to proceed to trial.<sup>40</sup> The current contract between DCF and Bayview allows for the admission of individuals committed to DCF under s. 916.15, F.S., not guilty by reason of insanity, but the court anticipates that this type of admission will rarely occur.<sup>41</sup>

Following admission, individuals are initially placed in a locked inpatient setting where they receive crisis stabilization, short-term residential treatment, and competency restoration services.<sup>42</sup> Upon stabilization, participants are transferred to a locked, short-term residential treatment facility. When participants are ready to step-down to a less restrictive placement in the community, they are provided assistance with re-entry and ongoing service engagement.<sup>43</sup> “Once competency is restored or the participant no longer meets the criteria for continued commitment, the program prepares a treatment summary and recommendations for community

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<sup>33</sup> *Jail Diversion for People with Mental Illness: Developing Supportive Community Coalitions*; TAPA Center for Jail Diversion, a branch of the National GAINS Center, Oct. 2003, available at [http://www.gainscenter.samhsa.gov/pdfs/jail\\_diversion/NMHA.pdf](http://www.gainscenter.samhsa.gov/pdfs/jail_diversion/NMHA.pdf) (last visited October 1, 2010).

<sup>34</sup> *Id.*

<sup>35</sup> MD-FAC is part of Eleventh Judicial Circuit Criminal Mental Health Project (CMHP). This CMHP runs four diversion programs (Pre-Arrest Diversion, Post-Arrest Misdemeanor Diversion, Post-Arrest Felony Diversion, and Forensic Hospital Diversion). Interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Aug. 20, 2010). This report will discuss the Forensic Hospital Diversion Pilot Program. The Eleventh Judicial Circuit includes Miami-Dade County, which has one of the nation’s largest percentages of mentally ill residents. Goodnough, *supra* note 21.

<sup>36</sup> Miami-Dade Forensic Alternative Center, *Pilot Program Status Report*, August 2010 (on file with the Children, Families, and Elder Affairs Committee).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; Interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Aug. 30, 2010).

<sup>39</sup> *Id.*

<sup>40</sup> Miami-Dade Forensic Alternative Center, *Pilot Program Status Report*, August 2010 (on file with the Children, Families, and Elder Affairs Committee).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

placement.”<sup>44</sup> “The committing court then holds a hearing to review the recommendations and appropriateness of the recommended community placement.”<sup>45</sup> “Upon authorization of step down from inpatient services into community placement by the court, MD-FAC staff provides assistance with re-entry and continues to monitor individuals to ensure efficient and ongoing linkage to necessary treatment and support services.”<sup>46</sup> Some of the re-entry services include assistance in assessing entitlement benefits and other means to build economic self-sufficiency, developing effective community supports, and providing living skills.<sup>47</sup> Thus, the pilot program follows a model of comprehensive care, which contributes to more effective community re-entry and recovery outcomes.<sup>48</sup>

As of September 2010, 44 individuals have been referred to the MD-FAC program.<sup>49</sup> Of the 44 individuals referred, 30 were determined by the team to meet the criteria for admission.<sup>50</sup> Twenty-four individuals have been admitted to the pilot program and diverted from admission to state forensic facilities.<sup>51</sup> Two individuals were re-evaluated and found competent to proceed to trial without being admitted to the program.<sup>52</sup> One individual is pending admission to the program, but will most likely be admitted to a state hospital as the program is currently above capacity.<sup>53</sup>

To serve these 24 people, MD-FAC operates 10 beds, with an average bed per day cost of \$274.00 for a total cost of \$1,000,100.<sup>54</sup> MD-FAC reports that increasing the bed capacity will decrease the average bed per day cost at MD-FAC to less than \$230, with the possibility of further decreasing costs in the future.<sup>55</sup>

As a result of the MD-FAC program:

- The average number of days to restore competency has been reduced, as compared to forensic treatment facilities.<sup>56</sup>

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Referral rates range from 1 to 7 individuals per month (average of 3.4 referrals per month). *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Additionally, three individuals who met criteria for admission to the program were subsequently admitted to a state hospital because of lack of bed availability at MD-FAC, i.e., the program was at or above capacity. On average, the program has diverted 2.2 individuals per month from admission to state forensic facilities. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Out of the 14 individuals who were found by the assessment team not to meet the criteria for admission: 6 individuals did not meet legal criteria; 3 individuals did not meet criteria for commitment; 2 individuals did not meet clinical/diagnostic criteria; 2 individuals required medical treatment beyond what the program could provide; and 1 individual refused to participate in screening. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Staffing standards at MD-FAC allow for additional bed capacity without substantially increasing program staff or fixed costs. As a result, operations will become more efficient as program capacity is increased. *Id.*

<sup>56</sup>

<b>Comparison of competency restoration services provided in forensic treatment facilities and MD-FAC (average number of days year to date, FY2009-10):</b>	<b>Forensic facilities</b>	<b>MD-FAC</b>	<b>Difference*</b>
Average days to restore competency (admission date to date court notified as competent)	138.9	99.3	39.6 days (-29%)
Average length of stay for individuals restored to competency (this includes the time it takes for counties to pick up individuals)	157.8	139.6	18.2 days (-12%)

“The diminishing advantage of MD-FAC over forensic facilities in terms of average number of days to restore competency (39.6 day reduction) and overall average length of stay for individuals restored to competency (18.2 day reduction) relates to the fact that individuals enrolled in MD-FAC are not rebooked into the jail following restoration of competency. Instead, they remain at the treatment program where they are re-evaluated by court appointed experts while the treatment team develops a comprehensive transition plan for eventual step-down into a less restrictive community placement. When court hearings are held to determine competency and/or authorize step-down into community placements, individuals are brought directly to



- The burden on local jails has been reduced, as individuals served by MD-FAC are not returned to jail upon restoration of competency.<sup>57</sup>
- Because individuals are not returned to jail, it prevents the individual's symptoms from worsening while incarcerated, possibly requiring readmission to state treatment facilities.<sup>58</sup>
- Individuals access treatment more quickly and efficiently because of the ongoing assistance, support, and monitoring following discharge from inpatient treatment and community re-entry.
- Individuals in the program receive additional services not provided in the state treatment facilities, such as intensive services targeting competency restoration, as well as community-living and re-entry skills.
- It is standard practice at MD-FAC to provide assistance to all individuals in accessing federal entitlement benefits that pay for treatment and housing upon discharge.

### Related Issue

As described above, Chapter 916, F.S., allows the circuit court to order forensic commitment proceedings for a defendant adjudicated incompetent to proceed to trial. The Florida Supreme Court, in *Onwu v. State*, ruled that only the circuit court, and not the county court, has the authority to order forensic commitment of persons found incompetent to proceed to trial (ITP) through Chapter 916, F.S.<sup>59</sup> The Court noted that the county court may still commit misdemeanor defendants found ITP through the Baker Act.<sup>60</sup>

However, county court judges are without recourse when a misdemeanor defendant found ITP does not meet the criteria for Baker Act involuntary hospitalization, but may still pose a danger to himself or others in the future, and thus requires treatment. In this instance, the county court judge can conditionally release the defendant into the community, but has no authority to order any mental health treatment services. If the defendant receives mental health services while on conditional release, competency may be restored so that a plea can be entered within the year. It is reported that many misdemeanor defendant cases are dismissed by the end of the year because competency has not been restored. In other cases, by the end of the year, the individual has either disappeared or has been rearrested.<sup>61</sup>

## Findings and/or Conclusions

### Creation of a Jail Diversion Program

“There are six key features that have emerged as essential for creating a successful jail diversion program. These elements are crucial in linking the criminal justice and community treatment systems:

1. Interagency Collaboration. Service integration at the community level, including involvement of social services, housing, mental health, health, local corrections (institutional and community), criminal justice and substance abuse agencies.
2. Active Involvement. Regular meetings for service coordination and information sharing and the establishment of written Memoranda of Understanding (MOUs).

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court by MD-FAC staff. This not only reduces burdens on the county jail, but eliminates the possibility that individuals will decompensate while incarcerated and require subsequent readmission to state treatment facilities. It also ensures that individuals remain linked to the service provider through the community re-entry and re-integration process.” *Id.*

<sup>57</sup> MD-FAC program staff provides ongoing assistance, support and monitoring following discharge from inpatient treatment and community re-entry. Additionally, individuals are less likely to return to state hospitals, emergency rooms, and other crisis settings. *Id.*

<sup>58</sup> Of the 44 individuals referred to MD-FAC to date, 10 (23%) had one or more previous admissions a state forensic hospital for competency restoration and subsequent readmission to the Miami-Dade County Jail. *Id.*

<sup>59</sup> This is true even if even if the county court judge is appointed to act as circuit judge for purposes of determining competency. *Onwu v. State*, 692 So.2d 881 (Fla. 1997).

<sup>60</sup> Ch. 394, Part 1, F.S. *Id.*

<sup>61</sup> Telephone interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Sep. 28, 2010).

3. “Boundary Spanner.” Boundary spanners are staff who bridge the mental health, criminal justice, and substance abuse systems and manage cross-system staff interactions.
4. Leadership. There needs to be a strong leader to network and coordinate.
5. Early Identification. Individuals should be screened, at the earliest point possible, for mental health treatment needs and to determine whether they meet the criteria for diversion.
6. Cross-Trained Case Managers. Case managers should have adequate knowledge and experience with mental health and criminal justice systems.<sup>62</sup>

### Services to Participants

Once the jail diversion program is established, research has shown that there are eight essential elements that will keep participants from reoffending.<sup>63</sup>

1. Forensic Intensive Case Management. This system provides services to mentally ill criminal defendants when and where they are needed.<sup>64</sup>
2. Supportive Housing. Supportive housing is “permanent, affordable housing linked to a broad range of supportive services, including treatment for mental and substance abuse disorders.”<sup>65</sup> Many mentally ill individuals have a difficult time securing public housing assistance because of their previous involvement with the criminal justice system. The MD-FAC program, for example, establishes housing for a mentally ill criminal defendant before that individual is released, as part of a comprehensive care plan. On a daily basis, it is less costly to provide public housing assistance than for an individual that a space in on a jail or prison.<sup>66</sup> Researchers note that the need for supervision and the provision of social services should be considered with regard to housing.<sup>67</sup>
3. Peer Support. These “services can expand the continuum of services available to people with mental and substance abuse disorders and may help them engage in treatment.”<sup>68</sup> Studies note that “[f]orensic peer specialists bring real-world experience with multiple service systems and an ability to relate one-on-one to people struggling to reclaim their lives.”<sup>69</sup> MD-FAC has several individuals that serve as peer specialists.<sup>70</sup>
4. Accessible and Appropriate Medication. When mentally ill individuals become involved in the criminal justice system, any treatment that they had been receiving prior to involvement often gets disrupted. For example, often mentally ill individuals are not getting the medication they need in jail.<sup>71</sup> Additionally, one of the criticisms of the current system has been that once the individual is released from jail, the individual does not receive follow-up services when he or she returns to the community.<sup>72</sup> It is imperative

<sup>62</sup> *Jail Diversion*, The Center for Mental Health Services National GAINS Center, available at [http://www.gainscenter.samhsa.gov/html/jail\\_diversion/what\\_is\\_jd.asp](http://www.gainscenter.samhsa.gov/html/jail_diversion/what_is_jd.asp) (last visited October 1, 2010).

<sup>63</sup> The Essential System of Care has been implemented in several cities, including San Antonio, Texas and Lincoln, Nebraska. *Ending an American Tragedy: Addressing the Needs of Justice-Involved People with Mental Illness and Co-Occurring Disorders*, National Leadership Forum on Behavioral Health/Criminal Justice Services, Sep. 2009, available at <http://www.gainscenter.samhsa.gov/html/nlf/pdfs/AmericanTragedy.pdf> [hereinafter *Ending an American Tragedy*] (last visited October 1, 2010).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Miami-Dade Forensic Alternative Center, *Pilot Program Status Report*, August 2010 (on file with the Children, Families, and Elder Affairs Committee).

<sup>71</sup> *Ending an American Tragedy*, *supra* note 60.

<sup>72</sup> *Id.*

that people with mental illness and co-occurring substance abuse disorders get the proper medication and treatment.<sup>73</sup> Researchers note that often individuals can overcome mental illness with access to appropriate community treatment and support.<sup>74</sup>

5. Integrated Dual Diagnosis Treatment. This system “provides treatment for mental and substance use disorders simultaneously and in the same setting.”<sup>75</sup>
6. Supported Employment. These services will help person with mental illness find and secure competitive work.<sup>76</sup>
7. Assertive Community Treatment (ACT)/Forensic Assertive Community Treatment. It is a service delivery model in which treatment is provided by a team of professionals, with services determined by an individual’s needs for as long as required.<sup>77</sup> FACT Teams successfully operate in numerous areas in Florida, including St. Petersburg, Gainesville, Jacksonville, and Stuart.<sup>78</sup>
8. Cognitive Behavioral Interventions Targeted to Risk Factors for Recidivism. The strongest risk factors for recidivism are shared by all defendants, irrespective of their mental health status.<sup>79</sup> Those factors include previous criminal history; lack of education/low employment opportunities; family/marital stresses; lack of leisure/recreation activities; procriminal attitudes; antisocial patterns; and criminogenic companions.<sup>80</sup> Research has shown that offenders with mental illness have more of these risk factors for recidivism than others.<sup>81</sup> Cognitive behavioral interventions<sup>82</sup> to address these factors should be included in community treatment programs.<sup>83</sup>

### Funding the Program

Initial funding for the MD-FAC was an appropriation of \$1 million in general revenue, which was then continued by budget amendment.<sup>84</sup>

It is suggested that implementing the pilot program state-wide would result in significant cost-savings to the state. Judge Leifman reports that compared with the average cost to provide services in state forensic treatment facilities, MD-FAC (operating at a capacity of 10 beds) has resulted in a savings of nearly \$250,000 annually over services funded in state hospitals:<sup>85</sup>

<sup>73</sup> Research has found that often people with mental illness have been improperly diagnosed, and often treated in a way that exacerbates their symptoms. Making a proper diagnosis is an important component of a treatment plan. *Id.*

<sup>74</sup> This is most applicable to the less severe cases of mental illness. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Directory: Adult Mental Health Providers and Services by Region/Circuit*, Florida Department of Children and Family Services, available at [www.dcf.state.fl.us/programs/samh/publications/dir051109.doc](http://www.dcf.state.fl.us/programs/samh/publications/dir051109.doc) (last visited October 1, 2010).

<sup>79</sup> Skeem, J. (2009, March). Offenders with Mental Illness: What (really) works? Part I. Workshop provided at the biennial meeting of the Forensic Mental Health Association of California (Seaside, CA) available at [http://webfiles.uci.edu/skeem/Downloads\\_files/FMHAC\\_Seaside2009.pdf](http://webfiles.uci.edu/skeem/Downloads_files/FMHAC_Seaside2009.pdf) (last visited October 1, 2010).

<sup>80</sup> *Id.*

<sup>81</sup> Skeem, J., Nicholson, E., & Kregg, C. (2008, March). Understanding Barriers to Re-entry for Parolees with Mental Disorder. In D. Kroner (Chair), Mentally disordered offenders: A special population requiring special attention. Symposium conducted at the meeting of the American Psychology-Law Society (Jacksonville, FL) available at [http://webfiles.uci.edu/skeem/Downloads\\_files/barrierstoreentry.pptx.pdf](http://webfiles.uci.edu/skeem/Downloads_files/barrierstoreentry.pptx.pdf) (last visited October 1, 2010).

<sup>82</sup> Cognitive behavioral therapy, or cognitive therapy, focuses on present thinking, behavior, and communication rather than on past experiences and is oriented toward problem solving. <http://www.medterms.com/script/main/art.asp?articlekey=31748> (last visited October 1, 2010).

<sup>83</sup> *Ending an American Tragedy*, *supra* note 60.

<sup>84</sup> Florida House of Representatives Staff Analysis for HB 5003, Policy & Budget Council, Apr. 2, 2007 available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=36863&SessionId=54> (last visited October 1, 2010).

<sup>85</sup> Miami-Dade Forensic Alternative Center, *Pilot Program Status Report*, August 2010 (on file with the Children, Families, and Elder Affairs Committee).

**Current costs based on 10 beds funded:**

Treatment setting	Total bed/days	Average bed/day cost	Total cost
MD-FAC	10 beds x 365 days = 3,650	\$274.00	\$1,000,100
Forensic hospital	10 beds x 365 days = 3,650	\$337.00	\$1,230,050
Cost difference		-\$63.00	-\$229,950

Judge Leifman notes, however, that a substantial proportion of the bed per day costs associated with MD-FAC are reflected in minimum staffing standards required for short-term residential treatment facilities as well as fixed costs (*e.g.*, rent, utilities, property insurance).<sup>86</sup>

As noted above, it is also reported that the program would operate more efficiently and result in increased cost savings if the number of beds were increased, because staffing standards at MD-FAC allow for additional bed capacity without substantially increasing program staff or fixed costs. Based on projections developed by Bayview and DCF, increasing the program capacity by 10 additional beds would decrease the average bed per day cost at MD-FAC to less than \$230, with the possibility of further decreasing costs in the future. By contrast, MD-FAC reports that state hospitals currently operate hundreds of beds to achieve an economy of scale that contributes to the observed average bed per day rate of \$337.<sup>87</sup>

**Projected costs based on 20 beds funded:**

Treatment setting	Total bed/days	Average bed/day cost	Total cost
MD-FAC	20 beds x 365 days = 7,300	\$229.50	\$1,675,350
Forensic hospital	20 beds x 365 days = 7,300	\$337.00	\$2,460,100
Cost difference		-\$107.50	-\$784,750

Appropriations staff reports that there would likely be cost avoidance in the long run, *i.e.*, long-term cost-savings. For example, county jails would realize cost savings because they would not have to continually pay for mentally ill individuals that recidivate and are constantly involved in the criminal justice system. However, staff notes that any significant cost-savings will not result in the current fiscal year. Although services in the community may be provided more cheaply than in the mental health facility, implementation of a pilot program will not reduce the costs of operating the existing forensic facilities. While over time some facility fixed costs may be reduced, such as food costs or staff, there will not be a dollar-for-dollar reduction for implementing community-based services. In other words, the cost of the mental health facility cannot be reduced by an equivalent cost of pilot program beds.<sup>88</sup>

Additionally, there will still be a need for secure forensic treatment. Forensic hospital services and the pilot program target different groups of individuals. Forensic hospitals house more serious offenders, those committed for first-degree felonies and/or who pose a serious safety risk to the community. These individuals would not be eligible for participation in the pilot program. Therefore, appropriations staff notes that there cannot be an immediate reduction in the number of hospital forensic beds, as the pilot program is not offering an identical service.<sup>89</sup> A dollar-for-dollar reduction resulting in a cost-savings during the current fiscal year is not possible.

There are several possible funding sources in addition to general revenue dollars appropriated by the legislature that should be investigated.<sup>90</sup> The funding effort should utilize reinvestment grants, wherein counties match

<sup>86</sup>Telephone interview with Judge Steven Leifman, Special Advisor to the Florida Supreme Court on Criminal Justice and Mental Health (Sep. 28, 2010).

<sup>87</sup>*Id.*

<sup>88</sup>Interview with Marta Hardy, Legislative Analyst, Health and Human Services Appropriations (Sep. 7, 2010).

<sup>89</sup>*Id.*

<sup>90</sup> While it has been suggested that Medicaid dollars may be available, both the Agency for Health Care Administration and Senate Appropriations staff suggest that it is unlikely. *Review of Forensic Hospital Diversion Pilot Program*, Agency for Health Care Administration, Aug. 6, 2010 (on file with the Children, Families, and Elder Affairs Committee); interview with Marta Hardy, Legislative Analyst, Health and Human Services Appropriations Committee.(Sep. 7, 2010);

federal contributions dollar-for-dollar.<sup>91</sup> Other possible sources include private grant money and partnerships with private universities. In such a partnership, the provider might for example work with the local university to fund internships for students doing clinical rotations in the medical school.

DCF reports that it may be able to pay for the additional pilot programs out of the money it is appropriated by the Legislature; however, the agency believes it would need statutory authority to move funds from forensic institutional beds to the community.<sup>92</sup> Appropriations staff suggests that statutory change is not required.<sup>93</sup> If DCF has sufficient funds, it can move those dollars with legislative budget authority.<sup>94</sup> DCF must identify the amount of appropriated funds that will be used for the pilot program and receive approval to do so from the Legislative Budget Commission.<sup>95</sup>

## Options and/or Recommendations

Based upon the findings in this report, the Legislature may wish to consider the following options:

### **Expand the Forensic Hospital Diversion Pilot Program to Two Other Areas in the State**

As noted above, reports from MD-FAC indicate that diversion is a promising strategy to more effectively treat mentally ill defendants. The Legislature may wish to consider expanding the forensic hospital diversion pilot program to see if its successes can be replicated in other demographic and geographic areas. DCF and representatives from OSCA suggest pilots be implemented in Hillsborough County and the Pensacola area.<sup>96</sup> These areas have the largest forensic need in the state,<sup>97</sup> and in both areas the infrastructure is already in place that will allow for efficient pilot implementation.<sup>98</sup>

### **Provide Program-Specific Training to Judges in the Pilot Areas**

The Department of Children and Families has recognized that judicial education will be an important part of implementing a pilot program.<sup>99</sup> Chief Justice Canady of the Florida Supreme Court has reconstituted the Supreme Court Mental Health and Substance Abuse Committee, which will raise awareness of the issue.

### **Authorize County Court Judges to Order Involuntary Outpatient Treatment as a Condition of Release**

As to the Related Issue, the Legislature may wish to amend Chapter 394, F.S., to provide that in a case where a defendant is found incompetent to proceed to trial on a misdemeanor, but does not meet the criteria for involuntary commitment under the Baker Act, county court judges have the authority to order involuntary outpatient mental health treatment as a condition of release.

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<sup>91</sup> The Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grant Program was established by the Legislature in 2007 for the purpose of providing funding to counties to allow them to plan, implement, or expand initiatives to address issues related to forensic mental health. There are two types of grants available: a one-year planning grant with a maximum grant award of \$100,000 and a three-year implementation or expansion grant with a maximum grant award of \$1,000,000. In order to be eligible to receive a grant, a county must have a county planning council or committee. In addition, county recipients of grant funding legislation must provide matching funds or in-kind resources. Staff Analysis for Committee Substitute for Senate Bill 2018, Committee on Children, Families, and Elder Affairs, Apr. 15, 2009, available at <http://www.flsenate.gov/data/session/2009/Senate/bills/analysis/pdf/2009s2018.cj.pdf> (last visited October 1, 2010).

<sup>92</sup> Interview with Kate Lyon and Sally Cunningham, Mental Health Program Officer, Florida Department of Children and Families (Aug. 6, 2010).

<sup>93</sup> Interview with Marta Hardy, Legislative Analyst, Health and Human Services Appropriations (Sep. 7, 2010).

<sup>94</sup> *Id.*

<sup>95</sup> However, appropriations staff reports that the limitation is that it cannot be done mid-year. *Id.*

<sup>96</sup> Interview with Kate Lyon and Sally Cunningham, Mental Health Program Officer, Florida Department of Children and Families (Aug. 6, 2010); Interview with Brenda Johnson, Office of the State Courts Administrator (Aug. 30, 2010).

<sup>97</sup> Interview with Kate Lyon and Sally Cunningham, Mental Health Program Officer, Florida Department of Children and Families (Aug. 6, 2010).

<sup>98</sup> For example, each area has implemented the reinvestment grant program, which will provide a starting point for funding and operating the programs.

<sup>99</sup> Interview with Kate Lyon and Sally Cunningham, Mental Health Program Officer, Florida Department of Children and Families (Aug. 6, 2010).