

Determining a Criminal Defendant's Competency to Proceed With an Extradition Hearing

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When a criminal defendant flees from one state (often referred to as the requesting state) to another (often referred to as the asylum state), the requesting state can demand that the asylum state return the defendant through a process called extradition. Only a handful of states have considered a fugitive's right to be competent to proceed with an extradition hearing. Those states fall into three categories. Some states apply the same standard as in criminal trial competency cases. Others apply a more limited competency standard. Two have found that a fugitive has no right to be competent to proceed in an extradition hearing. The particular legal test adopted affects the nature and scope of the competency evaluation conducted by the psychiatrist or psychologist in the extradition hearing. In addition, we are not aware of any state that has considered what happens to the fugitive if he is ultimately found not competent to proceed. Legislation, either state by state or through amendments to the Uniform Criminal Extradition Act, can provide the legal and psychiatric communities with guidance in assessing competency initially and in taking appropriate steps if the fugitive is ultimately found not competent.

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Extradition is the process by which a state can secure the return of a criminal defendant who has fled to another state; “fled” is used in both constitutional¹ and statutory^{2–5} provisions authorizing interstate extradition. (Extradition can also occur between countries, pursuant to whatever terms the specific extradition treaty contains. (See, e.g., Extradition Treaty between United States and Italy.⁶) Extradition between cities or counties within a single state does not require special proceedings; law enforcement is authorized to execute an in-state arrest warrant as part of its general arrest powers. (See, e.g., Washington Peace Officers Powers Act.⁷) For purposes of this article, all ref-

erences are to extradition between two states.) The state in which the criminal charges are pending and from which the defendant has fled is referred to as the requesting state or the demanding state. The state to which the defendant has fled, and from which extradition is sought, is referred to as the asylum state. The person who is the subject of, and is challenging, the extradition hearing is referred to as the petitioner. If the petitioner was in the demanding state at the time the alleged crime was committed, the petitioner is referred to as a fugitive. For example, if a person is charged with murder in Washington, was in Washington at the time of the alleged murder, and is in Oregon at the time extradition is sought, Washington would be the requesting or demanding state, Oregon would be the asylum state, and the petitioner would be the alleged fugitive.

If the alleged fugitive is showing the effects of an acute and severe mental illness at the time of the extradition hearing, the asylum state must resolve the question of his mental competency before determining the merits of the extradition. Once competency is at issue, a psychiatrist or psychologist may be asked to perform a forensic mental health examination of the

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defendant. The competency process, however, creates both legal and mental health questions. Unfortunately, there is no uniform formula, either legal or psychiatric, by which competency is determined in this context.

We begin by discussing the legal procedures for extradition hearings. Next, we identify the possible legal approaches and competency tests applied by state courts. We conclude by analyzing the practical effect that the legal competency test used has on the psychiatric evaluation and the opinions ultimately reached by the evaluating forensic mental health expert witness.

Legal Process for Extradition Hearings

Interstate extradition is required under the United States Constitution upon demand by the executive of the requesting state,¹ and federal statutory law has implemented the provision.² The constitutional and federal statutory provisions contain broad requirements; the states have enacted their own legislation setting forth the procedural requirements that must be fulfilled to carry out an extradition. Most states have done so by adopting the Uniform Criminal Extradition Act (UCEA), which was drafted by the Interstate Commission on Crime and the National Conference of Commissioners on Uniform State Laws in 1926.⁸ If the requesting state complies with the requirements of the asylum state's version of the UCEA and if the asylum state seeks to deliver the fugitive to the requesting state, it must first provide the due process required by the UCEA. For example, a person arrested pursuant to an extradition warrant has the right to challenge the extradition and the right to assistance of legal counsel. (See, e.g., *In re Personal Restraint of Jian Liu*,³ the Kansas UCEA,⁴ and the Washington UCEA.⁵) This article speaks to those cases in which the asylum state wishes to turn the fugitive over to the requesting state.

The mechanism by which an alleged fugitive challenges extradition to the requesting state is by way of a petition for a writ of *habeas corpus*.^{3-7,9} The points raised in an extradition hearing are far more limited than those in a criminal case. In *Michigan v. Doran*,⁹ the U.S. Supreme Court noted that there are only four questions that a court must consider in a *habeas corpus* challenge to an extradition proceeding:

Are the documents that comprise the extradition request in order on their face?

Has the petitioner been charged with a crime in the demanding state?

Is the petitioner the person identified as the fugitive in the extradition request?

Is the petitioner in fact a fugitive?

Whether the petitioner is competent to stand trial in the requesting state on the merits of the case, or whether he was sane or insane at the time of the alleged offense, logically should be determined by the requesting state, not the asylum state. (See, e.g., *Kostic v. Smedley*,¹⁰ in which the court denied a petitioner's request that the asylum state consider a potential insanity defense to the underlying charges pending in the requesting state.) The extradition process was not intended to allow review in the asylum state of matters that can be litigated fully in the requesting state.⁹ In other words, a petitioner's competency (or lack of competency) to proceed with an extradition hearing is independent of any defense that could be raised on the merits in the requesting state.

Legal Competency for Extradition Purposes

Of the 12 states that have considered whether a petitioner has the right to be competent for an extradition hearing, 10 have found that there is a right to be competent, and 2 have found that competency is irrelevant in extradition proceedings.³ The 10 states recognizing a right to competency are: Alaska,¹⁰ Colorado,¹¹ Georgia,¹² Kansas,¹³ Louisiana,¹⁴ Massachusetts,¹⁵ New York,^{16,17} Texas,¹⁸ Washington,³ and West Virginia.¹⁹ They rely on the federal right to counsel and the UCEA statutory right to counsel. That right would be meaningless if the alleged fugitive could not communicate rationally with counsel.

Florida, in *State ex rel. Buster v. Purdy*,²⁰ and Kentucky, in *Kellems v. Buchignani*,²¹ are the two states that consider competency irrelevant to extradition hearings. The opinions in those cases contain very little analysis. Indeed, the entire opinion in *Kellems v. Buchignani* reads as follows:

After a careful review of the records and the briefs, this court is of the opinion that the question of the mental competence of a fugitive in extradition proceedings is not relevant [Ref. 21, p 789; citations omitted.].

Several jurisdictions have not yet addressed competency to participate in extradition proceedings.

Of the four questions identified by the U.S. Supreme Court in *Michigan v. Doran*,⁹ only challenges to the third and fourth ones truly require the subject's participation: whether the petitioner is the person named in the extradition request and whether the petitioner is a fugitive (i.e., fled the requesting state). For example, if the asylum state presents fingerprint evidence to prove the petitioner's identity, the petitioner must be able to work with counsel to determine whether to challenge that evidence, perhaps by challenging the fingerprint witness or some other means. Or the petitioner may wish to waive the question of identity and instead work with counsel on establishing that the petitioner did not flee from the requesting state, but rather left because he received death threats from drug dealers. The other questions can be determined without the petitioner's factual knowledge (e.g., *Ex Parte Potter*.¹⁸). Although extradition proceedings are technically civil, they involve a potential loss of liberty, and courts have held that they are therefore subject to constitutional due process protections.^{3,22} Those due process protections include a constitutional and perhaps also a statutory right to counsel during the extradition hearings.^{3-5,23}

The right to counsel would be meaningless if the petitioner lacked the capacity necessary to participate meaningfully in the process. In other words, the petitioner must be competent to be afforded the due process right to counsel.

The 10 states that require extradition competence fall into two general categories when it comes to assessing a petitioner's competency in an extradition hearing. The first includes the states (Alaska,¹⁰ Colorado,¹¹ Massachusetts,¹⁵ New York,^{16,17} and West Virginia¹⁸) that apply the standard of competency to stand trial used in criminal cases, which includes an inquiry into all four elements of extradition. The competency test for criminal trials, as set out by the U.S. Supreme Court in *Dusky v. United States*, is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of understanding—and whether he has a rational as well as a factual understanding of the proceedings against him (*Dusky v. United States*, Ref. 24, p 402). In contrast, the states in the second category (Georgia,¹² Kansas,¹³ Louisiana,¹⁴ Texas,¹⁸ and Washington³) apply a middle-of-the-road standard that is different from the *Dusky* test. The only inquiry in those states is whether the petitioner is able to consult with

his attorney as to identity and whether he or she is a fugitive.

If the first two elements in an extradition hearing can be determined without the petitioner's actual involvement, then one might ask whether there is any meaningful difference between the two tests for competency to proceed on an extradition hearing. The meaningful difference is that the *Dusky* standard contains another requirement in addition to those in the more limited test: the petitioner must possess the capacity to understand the proceedings. That capacity is irrelevant to whether the petitioner can rationally assist counsel in challenging the third and fourth requirements in an extradition hearing.

Clinical Considerations

The previous section describes the legal considerations involved in the context of competency to be extradited. In this section, we discuss how those legal considerations comport with the clinical aspects related to competency evaluations. Although state law varies regarding competency in extradition proceedings, the sequence of events once competency is raised in a criminal proceeding is fairly consistent. When a criminal defendant's competency is questioned, the court requests a forensic evaluation of the defendant be conducted by a qualified psychiatrist or psychologist. This section reviews the clinical role of the evaluator and suggests that the competency evaluation in an extradition context focus specifically on whether the person has sufficient thought processes to participate adequately in the extradition proceeding, a narrow set of skills likely to be applicable to only a small class of mentally ill individuals. This clinical assessment is consistent with those jurisdictions that have outlined the middle-of-the-road approach to competency in extradition.

Clinical Role

Forensic evaluators, typically qualified psychiatrists and psychologists, play a key role in assisting the court with regard to a defendant's competence. Although most literature focuses on trial competency, the forensic evaluator's role in any context generally involves more than presenting an opinion on the ultimate issue of competency. The AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial, recognizes that "an expert should describe the strengths and weaknesses of the defendant, regardless of whether the jurisdiction

allows or requires opinion on the ultimate issue” (Ref. 25, p S28). Although no specific attention has been afforded to capacity to participate in extradition proceedings, it is reasonable to presume that such evaluations would include some of the same material assessed in the evaluations of competency in other situations.

The role of the psychiatrist or psychologist in evaluating the capacity of individuals facing extradition to understand the proceedings in court is relatively new. As discussed above, courts have only recently begun to consider the question of competency and have determined, in many cases, that individuals should be competent for extradition proceedings. Further, as discussed previously, where courts have determined that competency is necessary for such adjudication, the legal thresholds are variable and not well defined for the specific realm of extradition. (Compare those states that apply the *Dusky* standard^{10,11,14,15–17,19} with those applying a more middle-of-the-road approach.^{3,12–14,18,22}) Forensic evaluation guidelines concerning capacity to participate in extradition proceedings have not been established as they have in other contexts, including trial and execution. Nevertheless, as with other capacity evaluations, a forensic evaluator can assist the court by assessing the defendant’s level of understanding and cooperation, in light of the particular adjudicative proceeding.

The Standard for Competency to Stand Trial as a Basis for Other Competency Evaluations

Competency to stand trial, also known as fitness to proceed, is the classic and most commonly performed evaluation in the criminal process. The modern standard for competency to stand trial was established in *Dusky v. United States*.²⁴ Although the exact wording varies by state, every state applies a variant of the *Dusky* standard to define competency to stand trial. As noted above, in *Dusky* the Court held that the test for competency to stand trial in a criminal case is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of understanding—and whether he has a rational as well as a factual understanding of the proceedings against him” (Ref. 24, p 402). In a subsequent case, *Drope v. Missouri*, the Court added that the defendant must also be able to “assist in preparing his own defense” (Ref. 26, p 171). In 1993, the Court in *Godinez v. Moran*²⁷ ruled that there is no

difference in the competency standard at any point in a trial. The majority ruled that the standard to determine competency articulated in *Dusky* is constitutionally sufficient for determining competency to make guilty pleas, waive counsel, represent oneself, and make other trial-related decisions. (But see *Indiana v. Edwards*,²⁸ in which the Court held that a defendant can be competent to stand trial but not competent to represent himself.)

In the aftermath of *Dusky*, forensic evaluators are largely left to determine and apply what is meant by the terms used in *Dusky*, such as “sufficient present ability” and “rational as well as factual understanding” (Ref. 24, p 406). However, legal scholars and forensic evaluators have developed some assessment tools and operational definitions to flesh out the Court’s standards. These efforts have largely resulted in lists intended to focus on the defendant’s functional capacities as related to competency to stand trial. By way of illustration, the Harvard Laboratory’s Competency Assessment Inventory included “understanding of court procedure,” “capacity to disclose pertinent facts,” and “appraisal of available legal defenses.”²⁹ These tools aid the forensic evaluator by listing elements that competence to stand trial might require.

We argue that these tools have limited applicability to an assessment for competency to participate in an extradition proceeding. The complexities involved in an extradition proceeding, by reason of the concrete nature of the questions, are far more limited than those of almost any criminal trial. If a *Dusky* standard is applied to competency to participate in an extradition evaluation, we argue that forensic evaluators use the latitude inherent in the original test to make implicit opinions about the defendant’s capacities and what the specific criminal procedure will require of the defendant. Despite the Supreme Court’s ruling in *Godinez* that there is one standard for adjudicative competence, defendants participating in an extradition proceeding do not need a broader understanding of criminal processes nor do they need considerable abilities to communicate with their attorneys because of the summary nature of the hearing and the asylum court’s narrow role. It is understandable that courts would favor one standard for competency because of the complexities that arise if defendants are able to participate in some parts of the judicial process and not others. However, given the nature of competency, i.e., that it relates to pres-

ent abilities and context, we argue that, at least in the realm of extradition proceedings, a more nuanced approach is favored from clinical and policy perspectives.

Nuanced Approach to Competency

We suggest that a more nuanced approach to competency be applied in the setting of extradition proceedings. Such an approach has bases in clinical practice, and it also has some basis in law. As further discussed below, from a clinical and policy perspective, our suggested nuanced analysis for competence in this context is more in line with the jurisdictions that limit the inquiry to the points raised in *Michigan v. Doran*, or the middle-of-the-road jurisdictions (Ref. 9, p 289). A flexible approach to competency has bases in both law and clinical practice. With regard to the law, the Supreme Court, in its recent decision in *Indiana v. Edwards*,²⁸ has opened the door to an individualized approach to the concept of competency, taking into account the context in which the question of competency arises. At issue in *Edwards* was whether a criminal defendant could be competent to stand trial and yet not competent to represent himself in court. The Court answered that question in the affirmative.

In *Edwards*, the Court recognized that symptoms of mental illness can vary in degree, can change over time, and may affect a defendant's functioning differently in different settings, thereby cautioning against a single competency standard. To this end, the Court in *Edwards* affirmed that a single competency standard might not be appropriate. (See Ref. 30 p 703, supporting a nuanced standard for competency in light of *Edwards*. See also *Panetti v. Quarterman*,³¹ for the ruling that competency to be executed involves still different abilities.)

The understanding that competency standards should be bound to context is further apparent when looking at requirements in other realms of the law. For example, different standards are applied when assessing whether an individual is competent to make medical decisions, to execute a will, to consent to human research, and the like. Accordingly, it is clear that no single standard or test applies across all legal situations.

In the clinical realm, psychological theory and research likewise convey that capacity is context specific and that it is possible to have capacity for some purposes and lack capacity for others. In *Edwards*,

the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law (AAPL) filed an *amicus* brief supporting a different standard of competence for self-representation than to stand trial with the assistance of counsel, arguing that there is "professional recognition that competency is not a unitary, all-or-nothing concept, but that individuals may have some competencies but not others."³²

A useful way to think of that point is to consider whether the individual has the capacity to play whatever role is necessary in the context of the particular proceeding. This focuses the evaluator and court on recognizing the different tasks that the defendant assumes throughout the criminal process. Different judicial proceedings may require the defendant to display a different fund of knowledge, attention, understanding, judgment, or level of communication, among other abilities.

By way of illustration, a defendant with mental illness may have the requisite psycholegal abilities for some types of proceedings, but not for others. Because legal proceedings require different abilities from a defendant, a person with psychosis may be found to have the capacity to be executed, even if the symptoms would preclude a finding of capacity to stand trial. An individual with auditory hallucinations, for example, may be unable to have a rational conversation with defense counsel or attend to the court proceedings, but that same individual may be able to appreciate the basis for an execution. A forensic evaluator is charged with assessing the individual's functional abilities with respect to a particular set of abilities needed in the context of a specific legal proceeding.

Applying a Flexible (and Narrow) Approach to Evaluating Capacity to Participate in Extradition Proceedings

In applying a functional approach to evaluating capacity, an assessment of capacity to participate in extradition proceedings should consider the specific goals of the extradition proceeding. In this light, the forensic evaluator need not assess or duplicate the inquiry for capacity to stand trial. Rather, the evaluation should focus on the material characteristics and abilities that the defendant needs to participate adequately in an extradition hearing. In contrast to capacity to stand trial, an individual participating in a hearing for extradition does not need the same ad-

vanced conceptual or cognitive abilities to assist his counsel. Similarly, the defendant need not demonstrate the same command of oral communication capabilities, as the defendant will not be faced with the prolonged interaction with his attorney in formulating a defense or publicly speaking (testifying), as he might in a trial. Further, the duration of attention and concentration required by the defendant in a hearing is considerably less than is usually needed in a criminal trial.

From a clinical perspective, then, which specific factors contribute to the context and must be assessed in evaluating the mental capacity necessary for extradition proceedings? The legal parameters for extradition should frame the clinical inquiry. As noted above, the four questions at play in extradition include whether the extradition documents on their face are in order, whether the petitioner has been charged with a crime in the demanding state, whether he is the person named in the extradition request, and whether he is a fugitive.⁹ Of these, only the final two can be contested by the accused (see, e.g., *Ex Parte Potter*, Ref. 18, p 296) and relate to capacity. When a defendant in an extradition proceeding raises the question of his competence, the “court need only determine whether the petitioner is sufficiently competent to assist counsel at ascertaining his identity and whereabouts at the time of the crime” (Ref. 12, p 910; see also Ref. 18, p 296, citing *Oliver v. Barrett*). This middle-of-the-road legal approach, which is applied by several jurisdictions, comports best with a functional clinical inquiry in this context.

In assessing a defendant for these narrow functional abilities, the forensic evaluator may use several techniques, including a background review, a clinical interview, and a mental status examination, to elicit whether the defendant is able to assist in confirming identity and whereabouts. Through the interview and mental status examination, the defendant will be asked questions related to orientation (including self and time) and memory, which directly bear on the two prongs of the extradition inquiry. The interview will also elicit whether the defendant can maintain minimal concentration and communicate with his attorney with respect to these parameters. Individuals with extreme psychotic symptoms or dissociative, amnesic, or cognitive dysfunctions could fail to meet this competence prong. With regard to the defendant’s ability to assist with the second prong, fu-

gitive status, memory, and temporal relationships should be assessed. Looking at these prongs and the functional requirements needed to participate in an extradition proceeding, it seems apparent that the jurisdictions that have recognized a right to competency in this setting have essentially created a very narrow right for a small class of severely mentally ill individuals.

In further support of a narrow application of the competency standard in the setting of extradition are policy considerations. Jurisdictions that have created a competency right in this setting often cite fairness and due process considerations for the defendant. You can imagine, however, that there may be resistance among such individuals and their counsel to undergoing competency evaluations at the extradition stage, should the standard be the same as trial competency. For example, should a client show signs of worsening symptoms or declining competency, a determination of competence at a preliminary stage may not be in the individual’s best interest, as it may hinder a later challenge to trial by affecting the competence-for-trial inquiry. This is not a problem if the standards for the different judicial proceedings are distinct (Ref. 33, p 297, arguing by analogy for different competency standards for postconviction proceedings).

Further, it is important to keep in mind the summary nature of the extradition proceeding. As articulated by the Supreme Court in *Doran*, the asylum state has a narrow role (Ref. 9, p 288). It is not the asylum state’s role to investigate the underlying criminal acts or use its resources. The underlying questions and defenses can be fully litigated in the requesting state; to explore more fully the legal issues in the asylum state would defeat the plain purposes of the summary and mandatory procedures of the extradition proceeding (Ref. 9, p 290).

Intersection Between Extradition Proceedings and Clinical Considerations

As noted above, extradition hearings are civil, but they involve a potential loss of liberty.³ Case law in the various states set out inconsistent legal tests for competency, but neither case law nor the UCEA specifies any procedure for determining competency in extradition hearings. Criminal competency statutes, such as Washington’s,³⁴ contain detailed procedures in criminal cases for competency evaluation, restoration treatment, and civil commitment of an

incompetent criminal defendant. Those criminal competency procedures do not translate well to civil extradition hearings, mainly because criminal competency statutes vary from state to state.

If the asylum state determines that the petitioner is not competent, what happens next? Can the asylum state require competency restoration treatment for an extradition proceeding? All 50 states and the District of Columbia have statutorily authorized at least some form of competency restoration treatment for defendants who are not competent to proceed with a criminal trial.³⁵ They do not have similar provisions for competency restoration treatment for extradition purposes.

This point is best illustrated by an example in which we will assume Defendant and Co-defendant are charged in Washington state with conspiracy to commit murder. Defendant flees to Texas, which takes the middle-of-the-road approach that competency for an extradition hearing applies only to identity and status as a fugitive.¹⁸ Co-defendant flees to Colorado, which takes the broader approach that the *Dusky* test applies to extradition hearings.¹¹ Both Defendant and Co-defendant are competent under the middle-of-the-road Texas standard and incompetent under the broader Colorado standard.

Defendant's and Co-defendant's fates depend on which state's competency laws apply. Regardless of which state conducts the competency examination and no matter which state's competency laws apply, Defendant and Co-defendant will be treated differently, even though they are similarly situated. In the criminal competency-to-stand-trial arena, they would both be subject to a variant of the *Dusky* standard for competency and would be subject to some form of competency restoration treatment.³⁵

Ramifications for the Incompetent Defendant in the Setting of Extradition

When a court determines that an individual is not competent to participate in an extradition proceeding, additional social and policy considerations are generated. What should be the disposition of the defendant found incompetent in this setting? In other instances when a criminal defendant is deemed incompetent (e.g., not competent to stand trial), he may be committed to a psychiatric hospital for competency restoration. In other words, the individual's underlying mental illness is treated in an effort to

restore competency. If competency is restored, the judicial process resumes.

The question of restorability is of concern to both the asylum state and the requesting state. These concerns become clear in light of *Jackson v. Indiana*,³⁶ where the Court suggested that an incompetent defendant should be held only for a reasonable time, to determine whether there is a substantial likelihood that competency can be restored. In the trial context, the court has the option to dismiss the individual's criminal charges if it would be unjust to resume the criminal proceedings because of the lapse of time. Alternatively, if the individual cannot attain capacity, civil commitment proceedings can be initiated if the individual is a danger to self or others. Specific requirements for civil commitment vary by state, but generally an individual must be deemed a danger to self or others. This determination is made without reference to whether the defendant committed the offense charged.

This scenario may put the asylum state at odds with the requesting state. First, is there legal authority for the court in the asylum state to order the defendant to undergo competency restoration? In Washington, neither the competency statute³⁵ nor the Washington UCEA⁵ refers to the other, so there is no clear statutory guidance. On the other hand, a New York court found that a fugitive who is incompetent to proceed in an extradition matter may be committed for competency restoration treatment under New York's competency statute (*People v. Kent*, Ref. 17, p 509). The dissenting opinion in the Kentucky case of *Kellems v. Guchignani* stated, without providing any specifics, that "the law provides ample means by which" the subject of extradition proceedings may be committed until competent (Ref. 21, p 789).

Second, if a defendant is committed to a psychiatric facility for competency restoration, what should be the maximum length of commitment for restoration in this context? The court in *People v. Kent* directed the incompetent defendant to be committed "for a period not to exceed one year . . . , [and further ordered] re-examination of the [defendant] at intervals not to exceed ninety days" (Ref. 17, p 509). Given the limited nature of an extradition proceeding, it seems likely that most defendants in this situation would demonstrate competence or be determined unlikely to be restorable within a short period. For purposes of this discussion, we argue that a one-

year confinement should be the outer limit for such a defendant and that it is reasonable for courts to articulate shorter duration standards in this context.

Third, should an individual need restoration to participate in extradition proceedings, the asylum state provides these resources at a cost to the asylum state taxpayers. Such hospital beds are costly and scarce in most states. Wortzel *et al.* reported that defendants hospitalized for competency restoration occupy nearly 4,000 psychiatric beds in the United States, more than 10% of the nation's state-provided psychiatric beds (Ref. 37, 358). If the individual cannot be quickly restored, who will bear the cost of additional treatment? If the defendant cannot be restored, or if the asylum state does not authorize restoration treatment for extradition matters, who will bear the cost of any potential civil commitment? The asylum state may therefore be motivated to release the defendant. However, since the underlying charge is from a different state, asylum courts are not in the position to dismiss the charges. The requesting state has interest in prosecuting the defendant and should be the one to dismiss any criminal charges. Although it is likely that few individuals will be found incompetent to participate in extradition proceedings, states need statutory guidance.

Conclusion

States fall into four categories regarding the need for competency to proceed in extradition hearings: those that apply the *Dusky* test used in criminal cases; those that apply a middle-of-the-road approach directed solely to the ability for rationally assisting counsel; those that have found no right to be competent for extradition; and those that have not considered the question. The particular test adopted by a state that provides a fugitive the right to be competent can have an impact on the forensic evaluation performed by a qualified mental health professional. In any event, there is a test that can be applied in states that require competency to proceed with an extradition hearing.

The area that is not addressed by the legal system is what happens if the court finds the petitioner incompetent to proceed. Without guidance as to restoration treatment and referral of a petitioner to the civil commitment system, judges and forensic evaluators are left with two options. The first is to presume that the asylum state has authority to refer the petitioner to restoration treatment, based on the criminal stat-

utes. That option exposes the asylum state to potential liability for violating the petitioner's due process rights. The second is to presume that the asylum state has no authority to refer the petitioner to restoration treatment. That option exposes the asylum state to potential liability, based on the petitioner's post-release actions if it releases the petitioner without treatment.

The time is ripe for enacting legislation, either on a state-by-state basis or through amending the UCEA, to set out a specific set of procedures for competency to participate in extradition hearings. They should include procedures for appointing evaluators, how many evaluators are appointed, whether restoration treatment is authorized, the length and location of such treatment, and what happens if the court ultimately finds the petitioner incompetent.

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