

Forensic Briefs

Episode 36 Sharon Kelley - Misdemeanors and the Competency Crisis

In this episode, Sharon Kelley, J.D., Ph.D., returns to Forensic Briefs to examine the competency crisis overwhelming forensic systems nationwide. Drawing on recent research, she explains why misdemeanor defendants are disproportionately ill, why incompetence findings are rising, and how states vary in statutory approaches to evaluation, restoration, and dismissal. The conversation highlights systemic strain, unintended consequences of policy changes, and the human impact on defendants, evaluators, and communities navigating limited mental health resources.

This podcast is presented solely for educational and entertainment purposes. The content presented is not designed to be advice specific to any one person or situation. This podcast is not intended as a substitute for the advice of a qualified mental health professional or lawyer.

Dr. Millkey So, Michelle, who are we going to be talking to today?

Dr. Guyton Alex, today we welcome back Dr. Sharon Kelley. She is one of those JD/PhD folks, and she is a clinical forensic psychologist at the University of Virginia's Institute of Law, Psychiatry and Public Policy. Her primary clinical and research interests involve forensic mental health assessment, legal competencies of individuals in the criminal legal system, and police interactions with persons with mental illness.

Dr. Guyton She has published and presented on a range of topics in these areas, and is the coauthor of 35 publications. Prior to working at ILPPP, she worked in psychiatric hospitals, juvenile justice facilities, jails, outpatient clinics, and primary care centers. Well, Sharon Kelley, welcome back to Forensic Briefs. We so enjoy talking with you and Lizzy Foster about feedback in forensic mental health assessments that we are excited that you came back.

Dr. Guyton But we're going to talk about something totally different, today, talking about competency crisis and misdemeanor defendants. And, you know, you're one of these people when you're one of these JD/PhD, really extra smart, extra well-trained people. And I always love perspectives because you appreciate the legal perspective.

Dr. Guyton So much faster, than the rest of us, do, which I love. Either there's a question of incompetency or they've been found incompetent. So can you talk to us a little bit about how you first even got into this, into the subject?

Dr. Kelley Sure. Well, thanks for having me back. It's a pleasure to speak with you both. And, yeah, thanks for asking to talk about this paper, because we do think it's really important, especially in the moment we're in right now in terms of the competence crisis, just like you said. Michelle. So I'll start by acknowledging my coauthors, of course, but of maybe particular importance here, because they've been doing work in this area for much longer than I have.

Dr. Kelley So, my coauthors here are Brett Gardner and Daniel Murray. We all work together at the Institute of Law, Psychiatry and Public Policy at University of Virginia. And for years now, Brett and Dan and others have been doing research, looking at our state system of court ordered evaluations, looking at, we have a state oversight system, that operates such that every time you do a court ordered competence or sanity evaluation, you redact that report and send it in to our state Department of Behavioral Health.

Dr. Kelley And that's mostly a quality, you know, that originated as a quality assurance kind of program. So other evaluators review your work, you get feedback if you're kind of not meeting kind of basic competencies in those areas. But of course, it also creates a wonderful database to do research with in terms of looking at the reports and evaluations and conclusions and kind of all of those good things.

Dr. Kelley So, they had been doing work looking at these evaluations, answering the questions that you might want to ask about evaluator practices and things like that. And in a previous study, they found that defendants who were facing only misdemeanor charges, the defendants we're talking about were more often opined incompetent to stand trial than defendants facing felony charges. And that seemed to be because the defendants, facing only misdemeanor charges, were just more ill.

Dr. Kelley The presence of psychotic symptoms in those defendants was just much, much higher. And that seemed to be playing a really important role, of course, in evaluators opinions. There was also evidence from other work they did that those misdemeanor-only defendants, more often needed inpatient restoration. And in Virginia, we actually have a fairly robust outpatient restoration system. So, there are options for folks to get jail based or community based services, but misdemeanor-only defendants,

because they're more often psychotic, they're more often being referred for inpatient restoration.

Dr. Kelley That takes longer. It's far more expensive. So, in terms of state policymakers and things like that, looking at just kind of fiscal outputs and system costs, these defendants are just costing more to our system. And so they brought this idea, because I'm the law person and I actually really like reading statutes and, and, and things like that. They said, well, maybe we should be looking at state statutes, basically, to see this just written into the law anywhere any states are treating this group of defendants differently, just to see kind of where we're starting with, in terms of making recommendations about system level reform.

Dr. Guyton So I want to highlight, you highlighted your, the coauthors. The title of this paper is called *How U.S. Jurisdictions Address Competence Evaluation and Restoration for Defendants Facing Only Misdemeanor or Low Level Charges*, and this is published in 2024. In Psychology, Public Policy and Law, which is just the most perfect journal for this paper. And I am so glad that somebody enjoys reading statute this.

Dr. Guyton I, I can't say it's it's my favorite activity.

Dr. Kelley Yeah. There's not a club for it that I found so far, at least. I'm sure, I'm sure, I'm sure that has.

Dr. Guyton Well, maybe you should start it. And so, I guess maybe before we dive into what you found in these statutes, I think many of us who work in this arena are quite familiar with the competency crisis. But for those listeners who may be somewhat less so, practice in different areas. Could you maybe describe that? You know, I mean, it has a lot of layers, but, you know, just give us an overview of it.

Dr. Kelley Sure. Yeah. So many layers to this problem. Just like you said. I think the briefest way to think about it is that the system is getting, meaning our competence system, is getting more referrals and increasing number of referrals for competence evaluation. Right. And so one kind of point is like, what are the reasons for the increased number of referrals?

Dr. Kelley Increasingly people are also being opined incompetent. The rates of incompetence seem to be rising. So, questions about why is that occurring. And then our number of state hospital beds across the country, has declined really precipitously since really kind of the deinstitutionalization movement, in the 50s and 60s. And so the

combination of these kind of facts of life, more referrals, more incompetent defendants, fewer state hospital beds, which is where a lot of defendants go to get restoration services has created a huge problem for the system in terms of defendants waiting just, you know, in some cases, ridiculously long time to get the services that they need.

Dr. Kelley So people wait in jails. And there have been, of course, individual, you know, really tragic stories of some people committing suicide or becoming just very, very, very ill while they're waiting for these evaluations to happen and to receive the restoration services that they need to move forward with their charges.

Dr. Millkey So, Sharon, I understand the hospital beds decreasing, but why is the rest of this happening? Why are more people being referred? Why are more people being found unfit? Is it are people having are people more symptomatic? Is the bar moving in terms of what's fitness? I don't know the answer. I have hypotheses, but they're just guesses.

Dr. Kelley Yeah. And I don't you know, I think that's because there is no one answer. And these are hard questions. And I don't know that there is that, that we know fully the reasons for all of these things. So I'll point to some areas where we do have kind of firmer data. So one area is just homelessness and unsheltered populations.

Dr. Kelley And then the proportion of serious mental illness among that population and so we have a group of people who don't have shelter, who don't often, often don't have services and are really visible and often in terms of police response and community response, right, that they're the ones who get attention, who come into contact with the police and depending on the locality that you're in, police often just don't have a lot of resources or training to deal with those folks particularly well.

Dr. Kelley So they end up being arrested and put in the system. So, as, as kind of homelessness and all of the problems associated with that has become more prominent, that helps, I think, explain some portion of the problem. The change in proportion of defendants being found incompetent seems really thornier. I think there are less clear answers here. Maybe relevant factor here is that we know from surveying defendants, and when I say body, I am I guess I'm talking in the kind of academic royal we were like the community of forensic evaluators.

Dr. Kelley We know from surveys, with defense attorneys, that defense attorneys are often kind of disincentivized to refer their clients for competence

evaluations for low level offenses, for misdemeanor offenses, because they'll think, "well, the person is kind of marginally competent, perhaps, and the amount of time they might spend waiting for the evaluation and or getting restored is longer than the jail sentence they might serve."

Dr. Kelley You know, maybe this person is looking at community supervision. So I'm not going to raise the competence issue. We're just going to kind of muscle through and proceed with the case. So we know or could suspect that we're therefore getting kind of a biased sample of evaluatees for lower level charges. So we're getting the people who are really, really ill because those are the only people kind of passing the defense attorney bar, to even get into the evaluation system.

Dr. Kelley So that's likely at least a factor in this phenomenon. Maybe defense attorneys broadly are getting savvier about what competence is, you know, over the years. And so they're their kind of radar for who's incompetent and who's not incompetent. Is it somewhat more sensitive than it was decades earlier? But certainly with the misdemeanor only defendants, it seems to be the case that you have to be pretty ill to get referred.

Dr. Kelley And so for that reason, we're just getting, you know, kind of a group of people with more severe symptoms to evaluate.

Dr. Guyton Yeah, I remember reading about that in your paper and feeling a little disheartened, sad, insert negative feeling here, thinking about how criminal defense attorneys are reluctant to raise competency when they have a concern because they are worried about what will happen to their client, you know, in this system. You know, is it better to allow an incompetent defendant to plead to something than it is to have them be found incompetent?

Dr. Guyton Wait for services for months, and I appreciate that's a really complex and hard decision. For attorneys. But I'm also reminded of sort of the duty of, of court personnel that when there's a bona fide issue or a question about competency, it's supposed to be raised. Right. And so it really seems like it's putting in a squeeze on criminal defense attorneys who are trying to look out for their best interests of their clients.

Dr. Guyton But there's a lot of interests at stake. And so what do you what do you weigh more heavily?

Dr. Kelley I think it highlights the hard position defense attorneys have to find themselves in in this system. And also, to your first point about how disheartening this is for the defendant, the individual, competence comes from a due process protection, right. Like we are talking about a constitutional what should be a constitutional safeguard and what should be the right

Dr. Kelley every person has to understand the charges they're facing to understand a bit about this very complex criminal legal system that we have, because we know that most people are pleading guilty and taking plea bargains. You know that those rates are above 90% in basically every jurisdiction that has researched the issue. So we know that we're sending people into a system where they're going to admit that they did something and face consequences for it, and to know that some defense attorneys who are looking out for their clients' best interests, or should be, are saying, well, I'd rather have them move through the system impaired than have them have to wait maybe months or years to be

Dr. Kelley somewhat healthier and go through the system a little bit more functional.

Dr. Millkey Well, it's just such a Hobson's choice, you know, how do you, as a defense attorney, weigh your client's liberty interests against their due process interests? I remember talking to somebody, and at the time I was talking to him, he was a judge but was a defense attorney previously, and he talked to me about, you know, look, I knew, I could raise I knew he wasn't fit. If I raised fitness:

Dr. Millkey He has a deal on the table, which is a get out of jail free, in essence, bench probation. So. And I knew if he went to the hospital with as sick as he was, he would be there for months. if not, you know, for the maximum penalty. So I just I told him to say yes when I stepped on his foot, you know.

Dr. Millkey But, you know, it's just impossible. It's an impossible position.

Dr. Kelley Right. It's a it's a terribly unfair position for the legal actors to find themselves in for defendants, kind of unwittingly, often find themselves. And, I think just. Yeah, highlights the tension we have in not having a robust public mental health system. You know, that kind of goes to the heart of the deinstitutionalization crisis. And likely why we see so many folks who are unsheltered and really ill, that aren't getting routed into our, our criminal system.

- Dr. Kelley** That whole phenomena of criminalization of the mentally ill, you know.
- Dr. Guyton** And I also think it's an interesting conversation to have. And, you know, I've had this with people, you know, sort of more legal and policy makers is that, you know, a lot of times in the criminal legal system, there's a lot of concern about the level of the crime and what the person is accused of. And, you know, is this a felony or a person crime of some kind.
- Dr. Guyton** And, and that that should dictate whether a person receives a higher level of care. But what you know, what you're seeing in the research and I think what Alex and I see day to day in our practice is that people charged with the smallest of offenses often, you know, are some of the most ill individuals, and chronically ill individuals, who require a higher level of care.
- Dr. Guyton** But then that may not be available to them because states are trying to address this, you know, and trying to put some cost savings measures into place by saying, "well, if you know, if you don't have a serious offense or something like that, then you can't go to the state hospital," when clinically, you know, because because I'm not about a lawyer or a JD, right?
- Dr. Guyton** And I'm like, well, clinically, what I think this person needs is a very high level of services because they are acutely ill. Right. And so I feel sometimes there's this, this butting of heads of the clinical versus legal here of clinically, what does this person need versus legally, what is a state or jurisdiction willing to provide.
- Dr. Guyton** And and I you know, I wonder if that's at play at some of these states that are grappling with what to do with these misdemeanor-only, people.
- Dr. Kelley** Right. And that tension between, I suppose you kind of wanting sometimes or being compelled sometimes to use the restoration services for the clinical services, that's the level of care, right? We want somebody to receive an inpatient level of care. But really what they're receiving there is restoration services. Not not like, it's clinical care in one sense and not clinical care in another.
- Dr. Kelley** And I think just really highlights the fact that there aren't great other options for this person to get that treatment right. That's just kind of the revolving door that they find themselves in.
- Dr. Guyton** Absolutely. Okay. And so now we are in a situation where the data suggests that there are more defendants being referred and that more of

those defendants are being found incompetent, which I've been glad to see the research literature reflect this because we've seen this in our practice over time. And then, you know, of course, I begin to question, am I becoming biased?

Dr. Guyton You know, but then I think about some of the folks that we evaluate in some of our rapid programs, and these are individuals who can't even do an evaluation because they are so acutely ill. Right? We're meeting with them at their cell side or can only tolerate a short amount of time of, of interview before terminating because they just can't, you know, they just can't make it.

Dr. Guyton And so it's, I guess, affirming to me to see that this is a trend that we see more nationally for people just being more ill and thus more likely to be found unfit. Right.

Dr. Kelley Yeah. I think you're a that's such a brilliant point, because we should all be, right, in terms of bias concerns and things like that. Right? We all want to be monitoring our kind of own rates, right, of competence and incompetence and sanity and insanity to make sure that we're kind of roughly aligned with what other evaluators are doing in our field.

Dr. Kelley And right, we also, I think many of us anecdotally started to get the feeling of these higher incompetence rates. And what does that say about me as an evaluator? Has my my bar shifted in some problematic or biased way. And so we need research like this to be able to tell us if, if, if we're kind of on par, if what we're doing is, is truly kind of evaluating the person in front of us as opposed to, you know, having some kind of like skewed radar and drifting over time from what we're supposed to be doing.

Dr. Millkey Quite a few years ago here in Oregon, I worked at the state hospital. I say the state hospital because at that time we had one and, we used to have a lot more than that. And, we were looking we looked at to sort of internally, what is our rate of finding people fit versus not fit.

Dr. Millkey And, it turned out it turned out to be a coin flip, you know, it was like 50/50. And the people who'd been around for a while, like, well, like, I can't be right. What's happening here. That's not right. But what, like Sharon. I mean, you've been looking at this. Is it still a coin flip? I mean, what are the rates of people finding folks not fit now?

Dr. Kelley Sure. So I, you know, I think the number that we used to hear, you know, a couple of or based on research that was a couple of decades old, really more than that was about 30%ish, you know, 30%.

Dr. Millkey And that's what we were expecting. That's what we were expecting to say. Yeah.

Dr. Kelley And so now it's depending on the state and the particular, you know, research that you're looking at because not all states have looked at this. The rates seem to be more like 40 to 60% findings of incompetence, depending on where you are. So, I think the coin flip, kind of framework is roughly where we're at at the moment.

Dr. Kelley Again, kind of maybe depending on jurisdiction. And this, you know, some evaluators are seeing just very different samples of evaluatees and other evaluators. But I think the coin flip framework is, is about right.

Dr. Guyton And I think relevant to that is your discussion about folks with misdemeanor only charges. So like, for example, in our rapid program. We see people, they're referred. And when an evaluation is done within two weeks, in most of the counties where we do that, it's reserved for only people with misdemeanors who are in jail.

Dr. Guyton Right. So it's a very specific population of people, you know, because the court says while people with felonies are probably going to be waiting in jail for a while anyway, so they can wait for, you know, a court ordered evaluation through the hospital. But I think that has that tells me, based in the context of the research that you're, citing, that we may have and sometimes do have a higher rate than that because we are getting misdemeanor only people who most typically, not always of course, but most typically have serious and persistent mental health issues, have concurrent substance use issues, are facing a number of other significant barriers like housing instability,

Dr. Guyton food insecurity, you know, trauma. And, and, you know, just these various other things that don't make anybody better, and more mentally stable. And so I think, you know, we may even see higher rates, than, than sort of the more national level, you know, and, and even some of our colleagues at the hospital who, you know, are seeing people for competency evaluations once they've been in the hospital.

Dr. Guyton Right. And they're, you know, these, updates of, you know, how are they doing now? Are they are they ready to go now, which is different than

somebody who's just coming to jail two weeks ago and, you know, not in a treatment environment.

Dr. Kelley Absolutely. Yeah. I think we often think that go to that the hospital evaluator example really quickly of somebody who's seen kind of a more severe segment of the population. But you're right, it's kind of those screening evaluations. So as folks who are often out in the community or jail based or court clinic based who are getting people coming in fresh often, right, not not in any kind of treatment, and their rates of incompetence are just, you know, we would estimate just going to be higher, than other folks.

Dr. Millkey Yeah. I sometimes think that they should rename the disorderly conduct statute the unhoused person with severe and persistent mental illness crime.

Dr. Guyton In a public space.

Dr. Kelley Absolutely. Yes. We say the same thing in our clinic. Let's just, you know, you can kind of guess that the couple of charges this person is coming and where and, kind of what, what the, the basic parameters or contours of that story is going to be.

Dr. Millkey Yeah. Resisting arrest with no other charges, that kind of thing. Yeah.

Dr. Kelley Absolutely.

Dr. Guyton Right. Right. So all of these factors seem like a really great rationale for the study that you and your colleagues have done. You know, this sort of huge driver of the competency crisis, folks with misdemeanor only creating high demand for what is increasingly expensive psychiatric services for more nuisance or quality of life offenses. So can you tell us a little bit about the study and what you hoped to find and your general methods for going about it?

Dr. Kelley Sure. So, the study, as I might have kind of referenced at the top, basically involved reviewing laws, in this case mostly statutes of all U.S jurisdictions related to competence procedures and our basic questions were just how many of them outlined any kind of different procedures for defendants facing misdemeanor only charges? And then basically, what were those options?

- Dr. Kelley** What were we actually seeing play out in terms of different evaluation procedures or whatever it might be for that segment of defendants. So, our procedure is simple to describe, but I think just laborious in process. Right. It's it's logging on to a legal database. In my case, it was, Westlaw Edge and just reading a lot, reading a lot of statutes, you know, using keywords to get to their competence portion of their statutes.
- Dr. Kelley** We were trying to devise kind of like, you know, smart keywords to use so that a person wouldn't have to just read through all of the statutes pertaining to competence in a particular jurisdiction. And we finally concluded that was that was not going to be effective, and it was probably just more effective and efficient to just read anything a state had really pertaining to their competence procedures.
- Dr. Kelley** So we did that. We had a law student kind of do an initial review and get us started, and then I went back and just kind of read again, kind of like cover to cover, if you will, all of the competence related statutes for all 50 states. And then, the federal statutes relating to competence and just kind of categorized what we were seeing.
- Dr. Kelley** And because, the you'll see the, the kind of final categories we have are not super complex or nuanced, really, there were they were pretty kind of concrete and discrete. So, we determined this really wasn't an exercise that required multiple coders or things like that. It really was just I could, you know, bring the text of the statutes to my coauthors, and we could kind of fit them very cleanly into categories.
- Dr. Guyton** Bless you for reading all of that statute and categorizing it into an article that the rest of us can read much more easily. I appreciate that.
- Dr. Millkey** I'm so glad that you like reading statute, because this, too sounded like a pretty laborious and cumbersome process.
- Dr. Kelley** Well, I'm not, and I'm not the most efficient person. Like, like many people who are balancing clinical tasks and research tasks often court dates and things like that call louder. And so I'll credit Brett in particular with keeping us moving along on this project and managing me, and getting this work done.
- Dr. Millkey** How common was it for states to have different procedures for people charged with felonies versus charged with misdemeanors?

- Dr. Kelley** Well, great question, great question. So over half. Right. So our N is 29. 29 jurisdictions do something different for defendants facing misdemeanor only charges. I guess I will I should maybe take a step back and say going into this, our framework was misdemeanor only defendants. Of course, the statutes don't always kind of categorize people as cleanly or in the same way.
- Dr. Kelley** So we ended up including state statutes that make other kinds of distinctions. So they'll sometimes say non person offenses or person versus person offenses. Sometimes there will be some more severe misdemeanors that get kind of lumped into the felony category. And then defendants with a lot of other misdemeanors get treated separately. So I'll I'll keep referring to kind of defendants with misdemeanor only charges.
- Dr. Kelley** But the statutes are a little bit messier than that. And we've in the table tried to make clear what distinction the state is actually making. But 29 states overall do something different. But of course, there's a lot to talk about in terms of what they're actually doing different and whether we think, as psychologists and as clinicians, that's kind of that's helpful to the competence system.
- Dr. Kelley** And the competence crisis that we're in.
- Dr. Millkey** I was kind of surprised that it was 29 states, to be honest, because, I mean, for for us, for forensic evaluators, we live and breathe fitness. But, you know, I think that for most people, it's just it's sort of like an arcane topic. Were you surprised by this or?
- Dr. Kelley** I was at first, but I think as we walk through it, your surprise will be lessened, perhaps. And I think, you know, the easiest way to understand this finding of over half states doing something different is the Jackson decision saying that we can't hold, defendants as incompetent for more than a reasonable period of time to, you know, determine whether they can become competent.
- Dr. Kelley** And so this issue of what to do and when, when a different systems make the call about somebody being unrestorable. So our kind of maybe modal finding is that the most common kind of statutory framework for dealing with these folks differently is the dismissal category. Right. Like when when are states going to dismiss charges basically in response to the Jackson case.

- Dr. Kelley** And so of course, right. There needs to be some system or there should be some, some legal system for dealing with folks who are receiving services and not getting better. And so most of the statutory frameworks are really dealing with the Jackson issue.
- Dr. Guyton** Okay. And so what kinds of changes did you see in these, in these statutes compared to other types of, of offense patterns and competency?
- Dr. Kelley** So I'll start, this this follows the flow of the paper I guess. So I'll start at kind of like the front end of the evaluation process. And then we'll end with, dismissals at the very end. So, nine states have different we called them evaluation procedures, broadly. And this could look like a couple of different things.
- Dr. Kelley** So a couple of states, not a large number, but just a few will assign multiple evaluators to the same case or defendant. And of those states a few of them say if this person is facing misdemeanor only charges, we're only going to use one evaluator, right? We don't need to put so many resources on it. And in one scenario, the qualifications you need to evaluate somebody with misdemeanor only charges are somewhat reduced.
- Dr. Kelley** Some states had a slightly faster timeline for the evaluations to be completed, so instead of 20 days or 30 days, they might be a ten day turnaround or something like that. Some limit the use of hospitalization for that initial evaluation. And then two states have these, kind of de facto limits, meaning that only kind of higher level courts can order competence evaluation.
- Dr. Kelley** So only the courts with jurisdiction over felony charges. So, in Virginia, for example, those would be our circuit courts. Only circuit courts can order competence evaluations. So, this is that was a bad example because Virginia doesn't do this. In Virginia, district courts can order these. But Alabama was one of the examples. So only Alabama circuit courts can order these evaluations for competence to stand trial.
- Dr. Kelley** And so because of that kind of the de facto output of that is that if you're a defendant facing only misdemeanor charges, the judge just doesn't have the authority to order the evaluation.
- Dr. Guyton** Can I just say, "what?!" I read that and I was like, so in Alabama, there is just no such thing as an incompetent misdemeanor only defendant?

- Dr. Kelley** Yeah. I and we there were, our process, I suppose, also involved on a few occasions reaching out to people we knew in the states or we had questions about like, oh, how does this actually work? Or what does this statute actually mean? And so for the Alabama example, it was exactly that. Like how how is this actually working in practice?
- Dr. Kelley** And the feedback we got was just kind of yeah, like this is this is how the law is written. And so this is how it operates. So perplexing. Right? But again, the the statutes often raise more questions than they actually answer because at the question is about what does this actually look like on the ground. And so I don't have a great sense of what this actually looks like on the ground.
- Dr. Kelley** And so I you know, I think we should talk to some Alabama defense attorneys and judges, probably to get a better sense.
- Dr. Guyton** Yeah. Like at the next APLS, corner of the Alabama folk and be like, okay. Because either a)
- Dr. Guyton** People who have fitness concerns, who are misdemeanor only are just moving forward with their case. Or does it get dismissed or like if there's, you know, what what sense? Yeah. So yeah. Okay.
- Dr. Kelley** What about the Constitution? What about due process?
- Dr. Guyton** Oh, you and your JD wondering about the Constitution!
- Dr. Millkey** Yeah. Roll tide right over your due process rights.
- Dr. Guyton** It's a bumper sticker waiting to be made.
- Dr. Kelley** I like that, you know, it's a t shirt.
- Dr. Guyton** Okay, so there there's this reduction of number of evaluators. There's a reduction of the timeline. Something weird happening in Alabama.
- Dr. Kelley** Nobody and something weird is happening in Alabama. And we I will say, Arizona is doing the same thing. You know, where at least the way that the law is written, that's what it appears to be. So that's our front end. Those are the kind of initial evaluation procedures and settings. There are three states that have somewhat expedited court hearings, essentially.

- Dr. Kelley** Right. So instead of having, for example, a 30 day delay, the court might need to actually hold the hearing within ten days of receiving an evaluators report. Well, so three states are having expedited hearings. Seven states are limiting restoration settings. And so, Michelle, this is the point you are making earlier, making essentially usually inpatient services less available to misdemeanor only defendants.
- Dr. Kelley** We'll saying we're not going to, you know, do the expensive course of action for these folks. Some do have kind of an exit ramp, where if an evaluator specifically recommends that the person needs inpatient services then they can still receive them. So it's not, it's not always going to be kind of a firm bar on inpatient restoration services, but placing some limits around that.
- Dr. Kelley** Let me see. So the, the restoration setting is, is kind of the penultimate stop. And then we have this big category of charge dismissals, which is kind of the final step in our process. So, 21 states or 21 jurisdictions do something with dismissals that this can look really, really different depending on the state. So some do this at the at the earliest stage possible.
- Dr. Kelley** So prior to an evaluation even happening. Right. So somebody in the court has raised concerns about competence. And prior to there even being an evaluation, the judge can dismiss the charges at that point, one of the states, I believe, conditioned that on a prior finding of incompetence. So essentially it's a person's kind of known to the system.
- Dr. Kelley** Has this prior finding. Then here's the exit ramp. But this is rare, right? Only two states are saying that you can kind of exit the process at that stage. Eight states allow for dismissal. So post evaluation but pre restoration. So the evaluation has happened. They've been opined incompetent. And the court agrees with that. And so that's the point at which they can exit the system.
- Dr. Kelley** And I guess I'll briefly say that most of these dismissals are not mandatory. They're at the discretion of the judge. The states also differ about whether these are dismissals with prejudice or without prejudice. Meaning can these charges be brought back again if the person, if they're functioning kind of changes at some point in the future. So a lot of variability, even within these dismissals about whether they're mandatory or discretionary.

Dr. Kelley Discretionary, and with prejudice or without prejudice, most states allow do something with dismissals after a period of restoration, which is what the Jackson v Indiana decision is telling states to do. So maybe it's concerning, in fact, that only 12 states have this written into their statutes. I'm sure right there are there are policies on the ground.

Dr. Kelley There are regulations sometimes, right, that just weren't involved in this research. But 12 states have statutes that address post restoration dismissals. And that's kind of what we would expect. That's what you know, we're, I think, as evaluators we're pretty accustomed to, is that at some point, if somebody is not getting better, a dismissal becomes a conversation that's on the table for the legal system.

Dr. Kelley So that's the modal outcome. Frankly, that's what the majority of states who are doing something about this are doing. And that really likely is not in response to the competence crisis or anything else other than Supreme Court case from the 1970s saying that we shouldn't hold people in psychiatric hospitals indeterminately, simply because they are incompetent.

Dr. Guyton You have been listening to this episode of Forensic Briefs. If you would like to listen to the rest, go to forensicbriefs.com.

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