



The Florida Legislature

OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY



10-S02

RESEARCH MEMORANDUM

Better Coordination Between Florida and the Federal Government Could Expedite Removal of Undocumented Aliens in Mental Health Institutions

February 1, 2010

Summary

As requested, OPPAGA examined three questions related to undocumented aliens receiving mental treatment services in state mental health treatment facilities.¹

- How many undocumented aliens are served in Florida's mental health treatment facilities and what are their characteristics?
- How much does it cost to serve undocumented aliens in Florida's mental health treatment facilities?
- What are options for reducing the state's cost of serving undocumented aliens in mental health treatment facilities?

As of November 24, 2009, there were 86 undocumented aliens in Florida's mental health treatment facilities. Two-thirds of this population was committed through their involvement with the criminal justice system. Most of these persons are from Central America and the Caribbean Region. Florida currently spends over \$9 million dollars annually to treat undocumented aliens in mental health treatment facilities, most of which comes from general revenue. The state's options for reducing these costs include improving coordination with the U.S. Department of Homeland Security's Immigration and Customs Enforcement to remove these persons, honoring Immigration and Customs Enforcement detainers for Sexually Violent Predator clients, and assisting undocumented aliens who wish to return to their country of origin.²

¹ For purposes of this report, the term 'undocumented alien' refers to a person who enters the United States without legal permission or who fails to leave when his or her permission to remain in the United States expires.

² Federal law uses the term 'removal' to refer to an immigration legal proceeding formerly known as 'deportation'. An immigration judge issues a removal order to deport an undocumented alien from the United States.

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Program Purpose, Organization, and Responsibilities

The Department of Children and Families (DCF) provides mental health treatment within institutions for mentally ill persons involved in the criminal justice system and those with severe and persistent mental illness who cannot be served in the community.³ A judge may commit to a state mental health treatment facility an individual who has been evaluated as having a mental illness and who poses a threat to themselves, other individuals, or public safety.

Judges may order two types of commitment—forensic or civil. Forensic commitments include defendants who are incompetent to proceed to trial and those who are determined not guilty of a charged crime by reason of insanity. Civil commitments include mentally ill individuals committed under the Baker Act as well as sexually violent predators committed under the Involuntary Civil Commitment of Sexually Violent Predators Act.

Forensic Commitment. Florida law provides that persons must be mentally competent before they stand trial for their offenses. If a defendant is unable to understand the charges and penalties he/she is facing, unable to understand the legal process and disclose to counsel facts pertinent to the proceedings, or maintain appropriate courtroom behavior, the judge may find that the individual is incompetent to proceed.⁴ A defendant's competency must be restored before the criminal proceeding may resume. If the court further determines that the defendant is a danger to himself or others, it may involuntarily commit the defendant to a secure forensic facility to receive competency restoration training. Not guilty by reason of insanity applies to defendants who are competent to proceed with their legal defense, but have been adjudicated as not guilty because they were judged to have met the legal definition of insanity at the time they committed an offense.⁵ If the determination is made that further residential treatment is needed, the individual is sent to a state mental health treatment facility until they no longer meet the statutory requirements for involuntary commitment.⁶

Civil Commitment. The Baker Act (Florida Mental Health Act) provides short-term treatment to individuals with serious mental disorders and then returns them to the community. An individual committed under the Baker Act must be mentally ill and meet statutory criteria for involuntary inpatient placement including: 1) being incapable of surviving alone or with the help of others and likely to suffer from neglect without treatment; or 2) likely to inflict serious bodily harm on themselves or others in the near future. Additionally, all available less restrictive treatment alternatives, such as community outpatient treatment, must be judged as inappropriate to improve the individual's condition.⁷

Florida law also provides for civil commitment of certain sex offenders who meet the statutory criteria of a sexually violent predator. The Involuntary Civil Commitment of Sexually Violent Predators Act (Jimmy Ryce Act), addresses the treatment needs of persons who have been convicted of a sexually violent offense and have a mental abnormality or personality disorder that makes them likely to engage in future acts of sexual violence if not confined in a secure

³ Section 394.455(18), *F.S.*, defines mental illness as "an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person's ability to meet the ordinary demands of living, regardless of etiology."

⁴ Sections 916.12 and 916.3012, *F.S.*

⁵ Rule 3.217, *Florida Rules of Criminal Procedure*.

⁶ Section 916.15, *F.S.*

⁷ Section 394.467, *F.S.*

facility for long-term control, care, and treatment.⁸ The Department of Children and Families evaluates selected sex offenders, most of whom are serving sentences in state prison for sex crimes. Those offenders found to meet the criteria of a sexually violent predator are transferred from the Department of Corrections after completion of their sentence and are detained at the Florida Civil Commitment Center. During a civil commitment proceeding, a judge or jury determines whether or not the offender meets the criteria of a sexually violent offender. Persons committed to the state under the Involuntary Civil Commitment of Sexually Violent Predators Act are detained until the court determines that they are no longer a threat to public safety. It is not uncommon for individuals to remain in detention status for many years; some undocumented aliens have been at the civil commitment center for at least nine years.

Patients at the state mental health treatment facilities, both civil and forensic, receive a variety of treatment, rehabilitation and enrichment services to address their individual therapeutic needs, including psychiatric treatment, health care services, psychiatric rehabilitation, vocational and education services, addiction services, and rehabilitation therapy.

Questions and Answers

How many undocumented aliens are served in Florida's mental health treatment facilities and what are their characteristics?

As of November 24, 2009, a total of 86 undocumented aliens resided in state mental health treatment facilities, 69 of whom resided in state mental health treatment facilities and 17 in the Florida Civil Commitment Center. The ratio of undocumented aliens as a percentage of total capacity has remained fairly constant over the last five years. A large segment of this population was committed through their involvement with the criminal justice system. Most of these persons are from Central America and the Caribbean Region, and about half have families in Florida.

While the number of undocumented aliens in state mental health treatment facilities does not appear to be growing, the department does not have a standardized process for identifying and verifying undocumented alien status. According to DCF staff, the number of undocumented aliens varies between 60 and 90 at any given time. Department figures show that between April 2005 and September 2009, the number ranged from a high of 87 or 3% of total state mental health treatment beds to a low of 62 or 2% of total beds.⁹ However, the department does not have a standard process for identifying and verifying undocumented alien status. In some cases, facility staff ask an individual if he/she is a citizen of another country. In other cases, facility staff involve the individual's family and case manager or they contact federal immigration officials to help determine the individual's citizenship status. Without a standardized process, the department cannot be sure that it has sufficiently identified all undocumented aliens for possible removal. Department staff stated that they will be exploring a more standardized process for verification across facilities.

As illustrated in Exhibit 1, based on DCF's assessment, two-thirds of undocumented aliens in state mental health facilities have committed or stand accused of committing a crime. All individuals forensically committed as incompetent to proceed or not guilty by reason of insanity

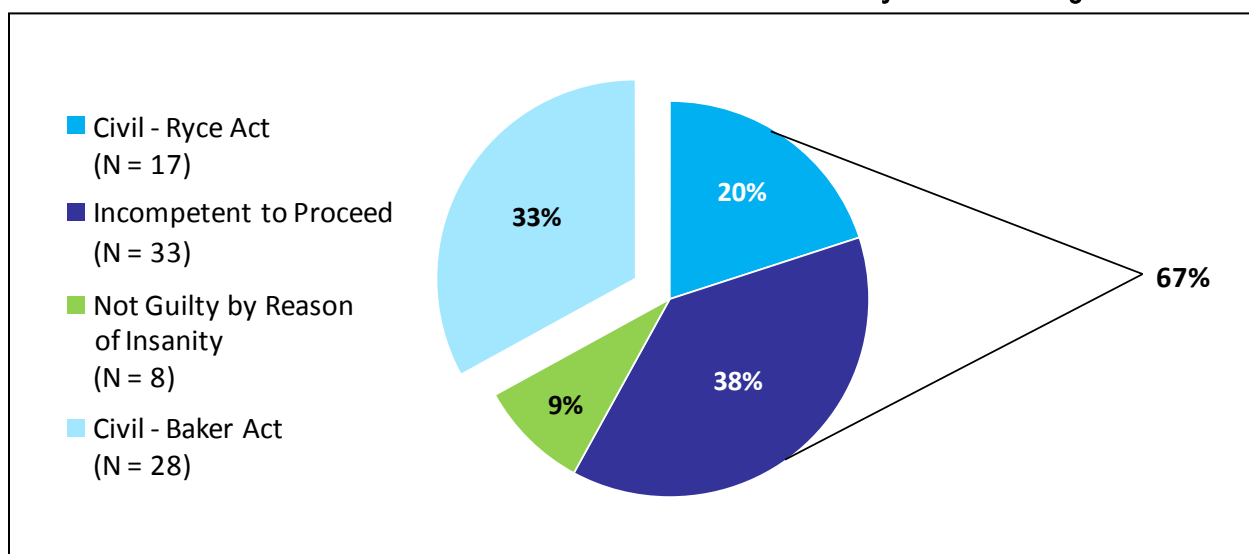
⁸ Section 394.912, F.S.

⁹ System-wide there are 2,698 mental health treatment facility beds not including program slots in the Sexually Violent Predator Program.

have committed or stand accused of a felony crime, and all sexually violent predators committed under the Involuntary Civil Commitment of Sexually Violent Predators Act have been convicted of at least one sexually motivated crime and typically have multiple convictions. Of the four commitment categories, only civil commitment pursuant to the Baker Act does not involve a felony crime. Overall, 67% of the 86 undocumented aliens in state mental health treatment facilities and the Sexually Violent Predator Program have committed or stand accused of committing at least one felony crime; most commonly a violent crime and/or sex offense.

Exhibit 1

Two-thirds of Undocumented Alien Commitments Are Related to a Felony Criminal Charge



Source: OPPAGA analysis of Department of Children and Families data.

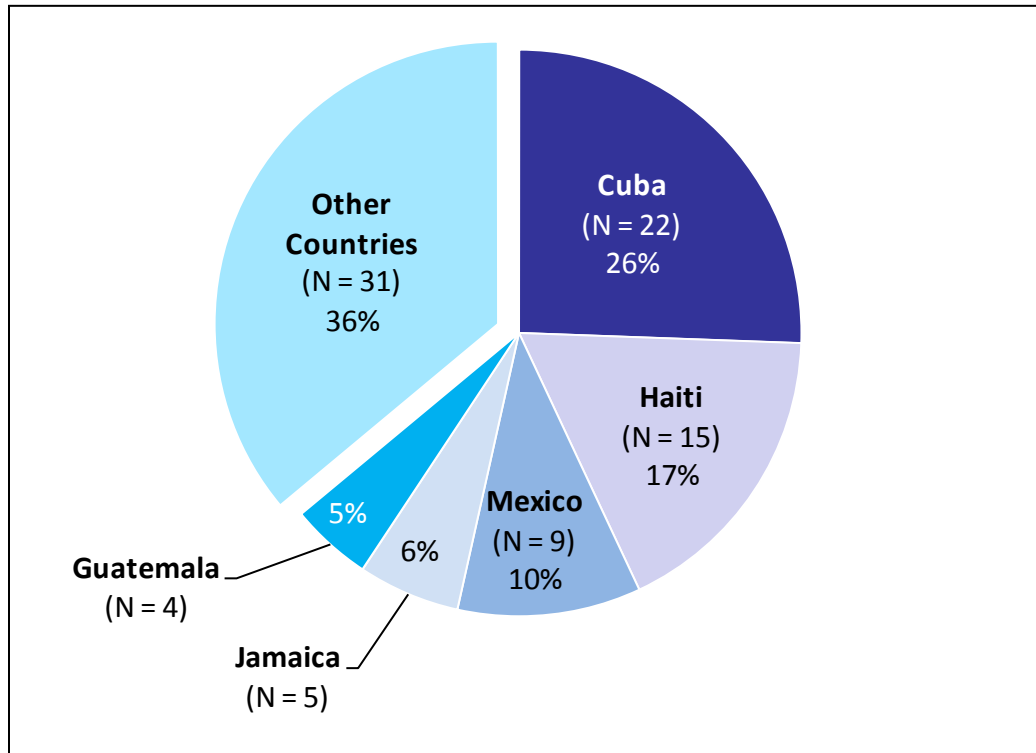
OPPAGA analyzed the criminal charges of alien forensic commitments and found that 80% of individuals incompetent to proceed or not guilty by reason of insanity had been charged with a violent crime or sex offense. These crimes include aggravated assault with a deadly weapon, first-degree murder, lewd and lascivious battery, and arson. Additionally, 15% of these aliens were charged with battery on a law enforcement officer or resisting (arrest) with violence.

As shown in Exhibit 2, the largest numbers of undocumented aliens in state mental health facilities are from Cuba and Haiti. In November 2009, there were aliens from 25 different countries across Europe, Asia, and Africa committed to state mental health treatment facilities and the Sexually Violent Predator Program.¹⁰ Few countries had more than one or two citizens in Florida's mental health facilities.

¹⁰ In addition to the 25 countries, two individual's countries of origin were unknown and one individual's country of origin was listed as South America.

Exhibit 2

The Majority of Undocumented Alien Commitments Come from Five Countries



Source: OPPAGA analysis of Department of Children and Families data.

Undocumented aliens in state mental health treatment facilities have a variety of mental illnesses. Those committed to mental health treatment facilities have been diagnosed with mental disorders including schizophrenia, major depression with psychotic features, paranoid schizophrenia, delusional disorder and dementia. Some also have been diagnosed with developmental or personality disorders including antisocial personality, borderline intellectual functioning, and moderate mental retardation. The majority of these individuals have medical conditions including Hepatitis B, seizure disorders and diabetes that can lead to additional medical expenses. Those committed to the Sexually Violent Predator Program typically suffer from paraphilias including pedophilia, exhibitionism and sexual sadism. Additionally, this group is likely to have a history of drug and alcohol abuse, developmental or personality disorders, and medical conditions.

How much does it cost to serve undocumented aliens in Florida's mental health treatment facilities?

Florida spends over \$9 million annually on undocumented aliens in mental health treatment facilities, most of which comes from state general revenue. Additionally, aliens have longer than average stays compared to non-aliens, resulting in higher costs.

The annualized cost to serve the 69 undocumented aliens that were in state mental health treatment facilities on November 23, 2009 is \$8.5 million, with annual costs for individual clients ranging from \$115,037 to \$130,036. Because some of these individuals are in residential

treatment for periods longer than a year, the accrued cost for these specific patients is just over \$17.2 million. In addition, the state spends nearly \$630,000 annually to treat the 17 undocumented violent sexual predators in the Florida Civil Commitment Center. The annual cost for a Sexually Violent Predator Program treatment bed is just under \$37,000. Like those residing in mental health treatment facilities, sexually violent predators often spend longer than a year in the Florida Civil Commitment Center. The accrued cost for these 17 individuals is \$2.4 million.

Most of the \$19.6 million the state has spent thus far on residential treatment for the 86 undocumented aliens housed in November 2009 comes from general revenue. Funding for state mental health treatment facilities is 75% general revenue with approximately 25% trust funded through the Federal Grants Trust Fund. Funding for the Sexually Violent Predator Program is exclusively state general revenue. The current population of aliens in all state mental health treatment facilities has cost the state \$15.3 million in general revenue and \$4.3 million in federal funding.

Undocumented aliens have longer than average stays compared to patients who are United States citizens. Undocumented aliens had typical lengths of stay that were 25 days, or 14%, longer than non-aliens resulting in an estimated additional cost of \$8,160 per alien admission. DCF staff stated that undocumented aliens may stay longer than average because it is hard to find a placement for them in the community upon release. Undocumented aliens typically are not eligible to receive Medicaid funding, which is the primary funding mechanism for community mental health housing and treatment options. Additional factors cited by facility staff include:

- language and cultural barriers that may hinder competency restoration;
- limited understanding of the U.S. judicial system, contributing to anxiety and a lack of confidence to progress with their competency restoration;
- lack of family and community support; and
- medical complications that affect doctors' ability to stabilize the patients' psychiatric conditions.

What are options for reducing the state's cost of serving undocumented aliens in mental health treatment facilities?

Florida has limited options for reducing the cost of serving undocumented aliens in mental health treatment facilities. This is due to several factors including the state's constitutional obligation to provide competency restoration services, public safety concerns, the state's lack of authority to remove undocumented aliens, federal deportation restrictions, and the state's inability to share clinical information with immigration authorities. The state's options for reducing costs include improving coordination with the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE) to remove these persons, honoring Immigration and Customs Enforcement detainers for Sexually Violent Predator clients, and assisting undocumented aliens who wish to return to their country of origin.¹¹

¹¹ U.S. Department of Homeland Security's Immigration and Customs Enforcement Office of Detention and Removal is the primary enforcement agent for the identification, apprehension and removal of illegal aliens from the U.S.

LIMITATIONS

The state has a constitutional obligation to provide competency restoration services. Thirty-three of the 86 undocumented aliens (38%) are individuals found incompetent to proceed. The state is constitutionally required to restore their competency prior to a criminal proceeding. As a result, Florida cannot reduce competency training and restoration costs by allowing the federal government to remove an incompetent alien unless the state wants to drop the criminal charges. In addition, immigration judges are reticent to order an alien removed unless they are satisfied that the person is competent and can understand the proceeding and its significance. While mental incompetence does not appear to preclude alien removal from a legal perspective, in practice, if an alien has had his/her competency restored, judges are more likely to issue a removal order.¹²

There are public safety concerns if the state does not provide Baker Act services to undocumented aliens. According to a Department of Children and Families legal opinion, the state is not constitutionally required to provide civil, involuntary commitment to undocumented aliens. However, the purpose of the Baker Act is to place a mentally ill person in a treatment facility because it is likely that they will hurt themselves or someone else, or pose a risk to public safety. If the state changed the Baker Act to exclude undocumented aliens from civil commitment, the state could avoid short-term costs, but such individuals could be a public safety risk and subsequently end up in the forensic mental health care system.¹³

The state of Florida lacks the authority to remove undocumented aliens. Removal of undocumented aliens is the responsibility of the U.S. Department of Homeland Security's Immigration and Customs Enforcement. Under current federal law, the state of Florida cannot remove undocumented aliens. The filing of detainers, conducting removal hearings and the issuing of removal orders are all federal functions. Therefore, in attempting to reduce costs, the department cannot independently vacate a commitment order or remove an alien without the approval of a judge.

Some undocumented aliens cannot be removed due to federal restrictions. U.S. Department of Homeland Security's Immigration and Customs Enforcement cannot remove an individual if the United States does not have diplomatic relations with his/her country of origin. For example, the United States does not have diplomatic relations with Cuba. Currently, there are 22 Cuban nationals in state mental health treatment facilities. In addition, Immigration and Customs Enforcement cannot remove an individual if his/her country of origin will not accept them. Some countries will not accept individuals who have been removed, particularly those who are mentally ill or have committed a crime. The federal government cannot hold an alien indefinitely; if after six months they are unable to remove the alien, they must release him/her into the community.

The department cannot share clinical information with Immigration and Customs Enforcement. Florida law permits the department to share a client's clinical and medical information with

¹² The Sixth Circuit of the U.S. Court of Appeals concluded that since a removal proceeding is a civil action to determine an alien's continued residence in the U.S., not a criminal proceeding, an alien subject to removal is not afforded the level of competency determination under the Due Process Clause granted a criminal defendant.

¹³ It should be noted that this discussion focuses on the institutionalization of individuals committed pursuant to the Baker Act, not to the 72-hour involuntary examination authorized by law. The state could not deny an individual evaluation services based on his/her citizenship status due to the practical limitations of quickly and positively determining an individual's citizenship.

specific entities, including the Department of Corrections, the state attorney, the patient's legal counsel and, in cases of Medicaid fraud, the Department of Legal Affairs, but does not specifically permit Immigration and Customs Enforcement to receive clinical information.¹⁴ Since an individual's civil commitment to a state mental institution is protected information in the clinical file, the state cannot share information with Immigration and Customs Enforcement that an alleged undocumented alien has been civilly committed by the state. This confidentiality issue hampers coordination between the state and federal government for purposes of initiating the removal process. To address this issue, the Legislature should amend ss. 394.4615 and 916.107(8), *Florida Statutes*, to provide for the release of clinical records to Immigration and Customs Enforcement for both civil and forensic patients.

Options for Legislative Consideration

Improve coordination with Immigration and Customs Enforcement while maintaining current policy of treating undocumented aliens in Florida facilities. Currently, the Department of Children and Families and Immigration and Customs Enforcement do not coordinate to identify undocumented aliens in mental health institutions who may be appropriate for removal. To improve coordination, the Department of Children and Families could institute a program similar to the Department of Corrections' Institutional Hearing Program. Under this program, the Department of Corrections identifies individuals suspected of being undocumented aliens and shares this information with Immigration and Customs Enforcement. The federal office then places a detainer order on the individual and the U.S. Department of Justice conducts removal hearings while these individuals are still in Department of Corrections' custody.¹⁵ If the immigration judge has issued a removal order or the hearing process is underway when the offender reaches the end of his prison sentence, Immigration and Customs Enforcement takes custody of the offender.

If the Department of Children and Families was to develop a similar program with Immigration and Customs Enforcement, undocumented aliens of any commitment status in state mental health treatment facilities could be identified and the removal process initiated early in their commitment. For example, when the Department of Children and Families admits an alleged undocumented alien, the department would alert Immigration and Customs Enforcement, who could begin conducting the citizenship verification process.¹⁶

Revise Florida statutes to honor Immigration and Customs Enforcement detainer orders that provide for removal of aliens referred to the Sexually Violent Predator Program. Currently, Florida Statutes states that sexually violent predators are not subject to an Immigration and Customs Enforcement detainer order upon release from the Department of Corrections, which defers the removal of a predator who is undocumented until after his/her release from civil detention or commitment. As of November 2009, there were 17 undocumented aliens in the Florida Civil Commitment Center for Sexually Violent Predators. According to facility staff, 16

¹⁴ Section 394.4615, *F.S.*

¹⁵ A detainer order is issued by the court or other authorizing agency to take an individual in its custody. For example, a prisoner under custody of the Department of Corrections with an ICE detainer would be released directly into ICE custody upon completion of the offender's prison sentence.

¹⁶ As previously noted, federal immigration judges are reticent to issue a removal order for an alien who is incompetent to proceed. In these cases, the department would alert the federal government when an alien has had his competency restored and he is ready to stand trial for his criminal offense. At that point, the individual also would be competent to face an immigration judge in a removal hearing. Upon final resolution of criminal charges, Immigration and Customs Enforcement could remove the alien.

of these individuals have files with Immigration and Customs Enforcement and most (14) have active detainer orders. While 9 of the 17 undocumented aliens in the Florida Civil Commitment Center are Cuban nationals and therefore cannot be removed, removal of the remaining eight would result in an annual cost savings of approximately \$300,000.

To speed the removal of these types of offenders, the Legislature could revise the law to allow undocumented aliens who meet the sexually violent predator criteria to be directly transferred to Immigration and Customs Enforcement upon release from the Florida Department of Corrections rather than sending them to the Sexually Violent Predator Program. Then, if Immigration and Customs Enforcement were unable to deport the alien, he/she would then be transferred to the Florida Department of Children and Families for civil detention and possible commitment as authorized in law. The department should develop a memorandum of understanding with the federal government to codify this process in order to reduce the likelihood that the federal government mistakenly releases into the community an alien who was not successfully deported.¹⁷ This is very important as the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high. Directly transferring aliens who are sexually violent predators to Immigration and Customs Enforcement would speed removal and free up Florida Civil Commitment Center beds for other sexually violent predators.¹⁸

Formalize efforts to assist undocumented aliens who wish to return to their country of origin. In a few cases, the department has facilitated the voluntary return of undocumented aliens to their home countries. For example, South Florida Evaluation and Treatment Center (a privatized state forensic facility in Miami), has helped aliens who have requested to return to their country of origin. The patient filled out a consent/release form allowing facility staff to make the necessary contacts. The facility contacted the appropriate embassy and the embassy then contacted Immigration and Customs Enforcement to coordinate the return.

Facility staff stated that while they have assisted undocumented aliens in the past, they have not had an appropriate candidate in a couple years. According to staff, an appropriate candidate is an alien

- who is legally competent;
- whose receiving country is willing to accept them; and
- who has ties in their country of origin including someone who can care for them.

In addition to the above criteria, only individuals civilly committed under the Baker Act or forensically committed as not guilty by reason of insanity would be appropriate candidates. Aliens forensically committed as incompetent to proceed would not be appropriate for voluntary return as they have outstanding felony charge(s) and are unlikely to be granted a removal order by a federal judge. While the department has assisted in repatriation on a limited basis, we recommend the department formalize their efforts by developing guidelines to identify appropriate candidates and develop written procedures to facilitate voluntary repatriation.

¹⁷ The Department of Children and Families does not have access to law enforcement systems that would electronically designate individuals detained to the Sexually Violent Predator Program. As a result, a process would need to be put in place to ensure that Immigration and Customs Enforcement employees are made aware of undocumented aliens who are still subject to state civil commitment pursuant to the Involuntary Civil Commitment of Sexually Violent Predators Act.

¹⁸ When considering this option, the Legislature may wish to balance potential cost savings with the ethical implications of sending a sexually violent offender back to his country of origin where he may be free to reoffend in that country.