The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.B.; *et al.* **Plaintiffs,** **vs.** **Washington State Department of Social and Health Services; *et al.*,** **Defendants.**	**No. 14-cv-01178-MJP** **PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** **NOTED FOR: OCTOBER 6, 2014** **ORAL ARGUMENT REQUESTED**

"No one sees these individuals or hears their cries for help. It is very hard to get people's attention or sympathy because these individuals are no longer considered mental health patients deserving treatment but rather, inmates deserving punishment, even though they have not been convicted of any crime. Yet, these individuals are arrested because of behaviors directly stemming from then mental health conditions. The process is inhumane and should stop."

Judy Snow,
Pierce County Jail Mental Health Manager
(Snow Decl. ¶ 17)

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I. INTRODUCTION

Plaintiff Disability Rights Washington, along with individual named Plaintiffs, respectfully moves the Court for an order: (1) declaring prolonged detention of people with mental conditions in need of competency evaluation and restoration services unconstitutional; (2) enjoining Defendants to contract with private evaluators to immediately bring evaluation waitlist times down to no more than seven days; (3) enjoining Defendants to immediately staff and use all existing space with hardened security at the hospitals for forensic services; (4) requiring immediate transfer any civil patients on the forensic units and those patients not guilty by reason of insanity with conditional or partial conditional releases and those who have attained the highest level from the forensic units to civil units, unless an individual showing is made to this court that a particular patient's needs cannot be met or they cannot safely be housed in any civil unit. Plaintiffs request this order because the current prolonged delays of weeks and months to provide evaluation and restoration services constitute unlawful action in violation of the Due Process Clause of the Fourteenth Amendment.

II. BACKGROUND

A. Plaintiffs and Class Members Suffer Serious Harms as a Result of Defendants' Failure to Timely Provide Competency Evaluation and Restoration Services.

1. State Law Places Responsibility for Competency Evaluations and Restoration Services on Defendants.

A fundamental tenet of the American criminal justice system is that an individual may be prosecuted only if she is competent to have an understanding of the charges against her and to assist her attorney in her own defense. *Dusky v. United States*, 362 U.S. 402 (1960). *See also* Wash. Rev. Code § 10.77.050 (prohibiting an incompetent person from being "tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues"). To that end, Washington state law charges Defendants with overseeing competency evaluation and

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restoration services for adult individuals charged with crimes under state law. Wash. Rev. Code §§ 10.77 *et. seq.* (2014). Whenever there is reason to doubt that an adult individual with mental health disabilities is competent to stand trial, the court orders an evaluation to determine competency. *Id.* § 10.77.060. Whenever an individual with mental disabilities is found to be incompetent to stand trial, the criminal proceedings are stayed while Defendants attempt to restore an individual to competency. *Id.* §§ 10.77.084, -.086, -0.88. In recognition of the important liberty interests and constitutional rights implicated by the timeliness of competency evaluations and restoration services, state law sets a target deadline of seven days for Defendants to complete competency evaluations and restoration services for individuals detained in jails. *Id.* §§ 10.77.068.

2. Defendants Have Consistently Failed to Timely Evaluate and Restore Adult Individuals in Jails to Competency.

Delays in the provision of evaluation and restoration services are a notorious and long-standing problem that Defendants have long been aware of. Decl. of Daron Morris ("Morris Decl."), Ex. A; Decl. of Gordon Karlsson ("Karlsson Decl.") ¶ 4; Decl. of Kari Reardon ("Reardon Decl.") ¶¶ 4-5. By Defendant Department of Social and Human Services's ("DSHS") own admission, Defendants have failed to timely evaluate and restore the competency of individuals in jails and have in fact maintained a waitlist for evaluation and restoration services for the last fifteen years. Decl. of Emily Cooper ("Cooper Decl."), Ex. A-C, J at 37. For years, stakeholders, including state court judges, criminal defense attorneys, law enforcement officers, jail staff, mental health providers, and disability and civil rights advocates such as Plaintiff Disability Rights Washington, have attempted to work with Defendants to reduce waitlists and the length of delays for competency evaluation and restoration services through policy and legislative means. Morris Decl. ¶ 8, Ex. B. The legislature responded by enacting Senate Bill

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6492 in 2012. At the time Senate Bill 6492 was under consideration, the average wait time for admission to Defendant WSH or Defendant ESH for court-ordered competency evaluation was forty-one days. Final Bill Report, S.S.B. 6492, 61st Leg., Reg. Sess. (Wash. 2012). Senate Bill 6492 created a seven-day target deadline for completing competency evaluation and restoration services for individuals detained in jails. *See* Wash. Rev. Code § 10.77.068.

These attempts at legislative reform have failed to remedy the waitlists and delays in competency evaluation and restoration services for individuals in jails. The independent Joint Legislative Audit and Review Committee ("JLARC") issued two separate reports on December 2, 2012 and April 23, 2014, finding that Defendant WSH and Defendant ESH were failing to meet the statutory guidelines passed by the legislature regarding providing timely competency evaluation and restoration services. Decl. of Judy Snow ("Snow Decl."), Exs. M-N. According to JLARC: "DSHS is not consistently meeting the performance targets for competency services, as intended by statute. DSHS is also not consistently meeting its assumed evaluator staffing and productivity levels." Snow Decl., Ex. N at 2. Further, "DSHS has not completed basic planning and analysis necessary to identify the best approach to meet the targets." *Id.* From November 1, 2012 to April 30, 2013, only 14% of individuals in need of evaluation, and 30% of individuals in need of restoration services, were admitted to Defendant WSH within seven days. Snow Decl., Ex. N at 7. Defendant ESH provides evaluations within seven days 11% of the time and restoration services 35% of the time. *Id.* During that period, individuals waited in jail on average waited twenty-nine days for evaluation and fifteen days for restoration services at Defendant WSH, and fifty days for evaluation and seventeen days for restoration services at Defendant ESH. *Id.*

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A year and a half later, there has been no improvement in the waitlists and delays. In fact, the waitlists and delays are longer. According to the most recent waitlists provided by Defendants, there are 256 people waiting in city and county jails for more than seven days for competency evaluation or restoration services from Defendants. Cooper Decl., Ex. C. Ninety of those individuals have already been determined to be incompetent, but are still waiting in jails for restoration services. Cooper Decl., Ex. C. According to testimony provided by Defendants, the current minimum wait for felony restoration treatment is sixty days. Cooper Decl, Ex. J at 12-13; Decl. of Mary Kay High ("High Decl.") ¶¶ 3-4. Indeed, waits for felony restoration services have been as long as seventy-three days. Morris Decl., Ex. B.

3. Defendants' Failure to Reduce Waitlists and Delays in Competency Evaluations and Restoration Services Cause Prolonged Detentions in Jails Which Harm Plaintiffs and Class Members.

Defendants' failure to timely evaluate and restore individuals in jails to competency causes the individually named Plaintiffs and Plaintiff DRW's affected constituents continue to languish in jails across the state for weeks and months to the detriment of their overall mental condition in numerous ways. It is well-documented that jails are not therapeutic environments appropriate for individuals with mental conditions. Snow Decl. ¶ 12; Decl. of Dr. Terry Kupers ("Kupers Decl."), Ex. A, at 4-9 (detailing limits of mental health treatment available in jails). Indeed, Defendants themselves are well-aware of the harms to individuals with mental disabilities in jails. As noted in Defendants' own consultants' recent report:

> Delays in treatment for individuals with severe mental illnesses entail both short-term and long-term consequences. They continue to suffer from their symptoms in jails that cannot provide a therapeutic environment, and that often lack resources to identify and offer even initial treatment. This can cause delays in treatment, but also exacerbation of symptoms for the defendant.

Cooper Decl., Ex. K at 16.

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a. *Plaintiffs and Class Members Do Not Receive Adequate Mental Health Treatment in Jails.*

Individuals with mental disabilities decompensate rapidly in jails while awaiting evaluation or restoration services because jails cannot provide adequate mental health treatment. Kupers Decl., Ex. A at 14; Morris Decl. ¶ 21; Decl. of Melissa Parker ("Parker Decl.") ¶¶ 12-13; Decl. of Marilyn Roberts ("Roberts Decl.") ¶ 12. Jails across the state acknowledge their inability to treat the mental health needs of individuals waiting for evaluation and restoration services. Snow Decl. ¶ 9; Karlsson Decl. ¶ 9 (prolonged detention "significantly taxes" mental health resources at King County Correctional Facility); Decl. of Kristina Ray ("Ray Decl.") ¶ 6 (Spokane County Jail mental health module always full and has a waitlist).

Prolonged detention in jails without adequate treatment exacerbates individuals' mental conditions, which manifests in deeply concerning behavior and self-harm. Plaintiff A.B. "declined to take any medications, to wash herself, or to otherwise protect her most basic survival needs." Decl. of Cassie Cordell Trueblood ("Trueblood Decl.") ¶ 5. Plaintiff Q.M. "became less coherent and less communicative" and indicated his intent to "urinate in his cell in order to avoid having contact with the jail guards." Decl. of Kathryn McCormick ("McCormick Decl.") ¶¶ 20-21. Defense attorney Kari Reardon testifies that clients have "swallow[ed] objects or engag[ed] in other harm to self." Reardon Decl. ¶ 12. After weeks of waiting in jail, one client "swallowed a razor provided to him by jail staff." *Id.* ¶ 13. Indeed, the Pierce County Jail Mental Health Manager Judy Snow testifies that "[i]t is not uncommon for individuals to smear feces or be unable to toilet properly due to decompensating." Snow Decl. ¶ 14.

b. *Jail Conditions and Solitary Confinement Exacerbate Harm to Individuals with Mental Health Disabilities.*

Jails are punitive by nature, and the conditions of confinement in correctional settings often exacerbate the harm suffered by individuals awaiting competency evaluation and

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restoration services. Kupers Decl., Ex. A at 4-9. It is not uncommon for jails resort to the use of force, restraints, and involuntary medication. Snow Decl. ¶ 14 ("I've even seen an individual be put in a restraint chair so that jail staff could clean the cell of feces and urine."); Decl. of Michael Stanfill ("Stanfill Decl.") ¶ 6; Roberts Decl. ¶ 15, Ex. C (photographs of bruises on Plaintiff K.R.'s wrists due to the use of restraints). Individuals with mental disabilities are frequently placed in solitary confinement where their liberty, freedom of movement, and social interaction are extremely limited. Trueblood Decl. ¶ 6; McCormick Decl. ¶ 22; Ray Decl. ¶¶ 7-8; Reardon Decl. ¶¶ 9-10; High Decl. ¶ 5; Cooper Decl., Exs. D-G.

Individuals with mental disabilities are frequently placed in solitary confinement for multiple reasons, and in all cases, solitary confinement, as an even more restrictive correctional setting, can accelerate decompensation. Kupers Decl., Ex. A at 9-13. Solitary confinement, or 22 to 23 hour per day lock-down, "is not therapeutic," Ray Decl. ¶ 7, and "disproportionately impacts inmates with mental illness as the isolation only continues to exacerbate their mental illness." Snow Decl. ¶ 9. *See also* Kupers Decl., Ex. A at 7-11. Many individuals may end up in solitary confinement because their mental states make them less able to follow jail rules. Kupers Decl., Ex. A at 11; Cooper Decl., Exs. D-F. Others may be placed in solitary confinement for suicide watch. Cooper Decl., Ex. G; Reardon Decl. ¶ 11; Kupers Decl., Ex. A, at 10-11. Individuals with mental disabilities may also end up in solitary confinement if they are parties to acts of violence in a jail. Individuals with mental disabilities are often both victims and perpetrators of violence due to their decompensated mental states. Kupers Decl., Ex. A at 10. Plaintiff K.R. was assaulted by another inmate while he was on the phone with his mother. Roberts Decl. ¶ 14. Defense attorney Reardon testifies that a vulnerable client was "attacked by

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another inmate, knocked unconscious, and sustained a traumatic brain injury after shards of his own skull pierced his brain." Reardon Decl. ¶ 14.

c. *The Harms Suffered by Plaintiffs and Class Members Are Irreparable.*

Defendants are well-aware of the long-lasting harms suffered by Plaintiffs and Class members due to their prolonged detention in jails. Cooper Decl., Ex. K at 16. Plaintiffs and Class members suffer these harms multiple times over, as individuals with mental disabilities spend more time in jail than those without such disabilities. Karlsson Decl. ¶¶ 6-7; Stanfill Decl. ¶ 9. The longer an individual with mental disabilities is detained in jail, the more difficult it is to restore and maintain that individual's competency. Kupers Decl., Ex. A at 14-15; Snow Decl. ¶ 12. Once Defendants WSH and ESH finally admit Plaintiffs and Class members for competency restoration services after they have languished in jail for months, Defendants "struggle because these individuals then require longer stays once they are admitted, straining the resources of the hospital." Cooper Decl., Ex. K at 16. *See also* Snow Decl. ¶ 12; Kupers Decl., Ex. A at 12.

Plaintiff putative Class members are innocent until proven guilty. Nonetheless, many class members suffer serious irreparable harm far in excess of any criminal punishment that could be levied if convicted due to Defendants' failure to provide timely competency evaluation and restoration services. For example, Amanda Cook, a twenty-five-year-old mother, committed suicide while she was waiting in Spokane County Jail for competency evaluation services from Defendant ESH. Parker Decl. ¶ 3, Ex. B. Plaintiff Q.M. has languished in jail for five months, largely in isolation, though his sentencing range if convicted is one to three months. Decl. of Ben Goldsmith ("Goldsmith Decl.") ¶ 7. Others may lose their home, their belongings, or their eligibility for community based services while they wait in jail without a conviction. Cooper Decl., Ex. L.

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4. Defendants' Repeated and Continued Failure to Provide Timely Evaluation and Restoration Services is Well-Documented.

JLARC issued a recommendation that Defendants "should hire an independent, external consultant" to develop both a service delivery approach to "meet the statutory targets" and "a staffing model to implement the new approach." Snow Decl., Ex. N at 19. On June 30, 2014, the consultants hired by Defendant DSHS concluded there are systemic problems with Washington's forensic mental health system, including:

> [A] lack of infrastructure specific to forensic services, a lack of systemic training and oversight for forensic clinicians, and a lack of community-based alternatives to lengthy inpatient hospitalization for incompetent defendants and [not guilty by reason of insanity] acquittees.

Cooper Decl., Ex. K at 2. According to Defendants' own experts, "DSHS currently has an insufficient number of evaluators to conduct all the evaluations required." Cooper Decl., Ex. K at 10. The report went on to conclude that Washington's forensic mental health system is inadequately funded, resulting in its inability to fulfill its obligations under state law *See* Cooper Decl., Ex. K at 11. With pressure from the legislature, Defendants have hired consultants and reached out to stakeholders, but have failed to propose or implement a plan for fixing a fifteen-year-old problem. Cooper Decl., Exs. J-K; Morris Decl. ¶ 22; Snow Decl. ¶ 17.

B. Defendants Have Made Clear That They Will Not Take Any Action to Reduce Waitlists and Delays in Competency Evaluations and Restoration Services for Plaintiffs and Class Members.

Plaintiffs and Class members now seek relief from this Court to vindicate their due process rights under the United States Constitution, as Defendants have made clear that they will not take any action to remedy the waitlists and delays. Defense attorneys have tried to bring contempt motions seeking to compel Defendants to take action, with little success. Morris Decl. at ¶ 6; Decl. of Andrea Crumper ("Crumpler Decl."), Exs. D, F; Trueblood Decl., Ex. B; Reardon

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Decl. ¶ 8. For example, Defendants successfully argued that the state court lacked jurisdiction to determine constitutional liberty questions. Crumpler Decl., Exs. D, F. Even where state courts have found Defendants in contempt, Defendants refuse to comply with these court orders. Cooper Decl., Exs. H, J at 53 (Attorney General's Office stating in contempt proceedings that Defendants will not comply with any state court order for Defendants to immediately transport a pre-trial detainee for competency restoration services). Because neither legislative action nor state courts have appropriately addressed the issue, Plaintiffs bring this action in federal court.

C. Plaintiffs Have Vigorously Sought to Eliminate the Harm They Suffer and Have Timely Brought This Motion.

This case was originally brought by the Snohomish County Public Defenders Association ("SCPDA"). When the case was filed, an immediate Temporary Restraining Order ("TRO") was also sought. The Court denied that TRO. Almost immediately thereafter, Plaintiffs' counsel met with SCPDA to discuss amending the complaint and substituting counsel with more experience in this area of practice. Decl. of David Carlson in Support of TRO ("Carlson Decl.") at ¶¶ 4-5. Since then Plaintiffs' counsel has engaged in intensive fact development across the state, conducted extensive legal research, substituted counsel, and filed a Second Amended Complaint adding numerous Plaintiffs. *Id.* ¶¶ 7-8. In addition, Plaintiffs' counsel has explored in good faith the possibility of alternative dispute resolution with Defense counsel. *Id.* ¶ 9. As soon as it became evident that there was no way immediate resolve their continued irreparable harm without an Order from this Court, Plaintiffs decided to prepare and file this motion and immediately informed Defense counsel of that decision. *Id.* ¶¶ 10-12.

III. ARGUMENT

A. Defendants' Failure to Provide Evaluation and Restoration Treatment in a Timely Manner Resulting in Irreparable Harm to the Class Supports the Granting of a Temporary Restraining Order and Preliminary Injunction.

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1. Legal Standard for a Temporary Restraining Order and Preliminary Injunction.

When asked to grant a preliminary injunction where the public interest is at stake, a court must consider whether: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is likely to suffer irreparable harm in the absence of the preliminary relief; (3) the balance of equities tips in his or her favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). The standard "is substantially identical for the injunction and the TRO," *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001), except for the additional requirement that the applicant show immediate relief is necessary to obtain a TRO. *See Hunt v. Nat'l Broad. Co., Inc.*, 872 F.2d 289, 292 (9th Cir. 1989); Fed. R. Civ. P. 65(b)(1)(A). Each of these requirements is met here.

2. Plaintiffs Are Likely to Succeed on the Merits of Their Due Process Claim.

It is well-established in the Ninth Circuit that pre-trial detainees in need of evaluation or restoration of competency have substantive due process rights under the Fourteenth Amendment, or liberty interests in freedom from incarceration and in restorative services. *See Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003). To determine whether the due process rights of incarcerated individuals with mental disabilities facing criminal charges have been violated, a court must balance the incarcerated individuals' "liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." *Id*.

While the federal constitution does not set forth arbitrary time limits by when an incarcerated individual needing evaluation or restoration should receive such services, the Ninth Circuit in *Mink* has found that refusal to provide these incarcerated individuals services in a "timely manner" violates due process. 322 F.3d at 1122 (finding due process violation and upholding injunction against Oregon State Hospital imposing seven-day time limit to admit

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incapacitated criminal defendants). In reaching its decision in *Mink*, the Ninth Circuit noted that state health agencies do not have a legitimate state interest in keeping pre-trial detainees with mental health disabilities "locked up in county jails for *weeks and months*." *Id.* at 1121 (emphasis added).[1] Indeed, delaying evaluation and treatment "undermines the state's fundamental interest in bringing the accused to trial." *Id*. (citing *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (bringing "accused to trial is fundamental to…ordered liberty and prerequisite to social justice and peace."))

The Ninth Circuit also made clear that "lack of funds, staff or facilities" is not a legitimate state interest that would justify a state health agency violating the substantive due process rights of pre-trial detainees and failing to provide necessary services. *Mink*, 322 F.3d at 1121. In fact, evidence in this lawsuit proves that delaying services and requiring prolonged incarceration actually costs taxpayers and the State more money than simply providing the services to Class members. The mental health director for King County Jail, the largest jail in the state, testifies that providing mental health services in jail is "much more expensive" than providing the same services in a non-penal setting. Stanfill Decl. ¶ 10 (remarking further that when one adds in the ancillary costs of police, court, and probation, the cost for keeping these individuals in a jail as opposed to community-based programs is "astronomical."); *see also* Karlsson Decl. ¶ 9 (King County jail official noting that "the increasing length of stay of the acutely mentally ill in our facility significantly taxes the resources available to us."); Ray Decl. ¶ 7 (noting Spokane County Jail is overcrowded and women with mental illness are housed in solitary because there is no other place for them). By shifting the burden of housing and treating individuals with mental

[1] *Weiss v. Thompson*, 120 Wn. App. 402 (2004) (holding that 15 day delay in transporting incapacitated defendant to WSH did not violate substantive due process but remarking that ongoing, systemic problems with delayed transportation akin to *Mink* not present in record)

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disabilities from state hospitals to jails – from facilities trained and equipped to provide therapeutic services to facilities designed for punishment state fiscal interests are not being met. The Washington State Supreme Court recently rejected a similar inappropriate shifting of civil patient services from state hospitals to local emergency rooms. *Det. of D.W. v. Dep't of Soc. & Health Servs.*, 332 P.3d 423 (Wash. 2014). If community hospitals do not provide legally sufficient mental health services, surely jails do not either.

Akin to the circumstances in *Mink*, Washington state law places responsibility for ensuring constitutional compliance and timely treatment of pre-trial detainees in need of competency evaluation or restoration services solely with Defendants WSH and ESH operated by Defendant DSHS. *See* Wash. Rev. Code §§ 10.77 *et. seq*. Given the fundamental liberty interests at stake for Class members, state law sets forth a target deadline of seven days for all evaluations and admissions for restoration services to take place. Wash. Rev. Code § 10.77.068.

It is undisputed that Defendants *for years* have routinely failed to provide evaluation and restoration of competency in a timely manner. Morris Decl., Ex. A; Karlsson Decl. ¶ 4; Reardon Decl. ¶¶ 4-5; Cooper Decl., Ex. C. On September 9, 2014, Defendants testified that they have maintained a waitlist for competency restoration and evaluation treatment for *fifteen years*, and the list has increased dramatically over the last year. Cooper Decl., Ex. J at 37. The cost of these delays are being borne by pretrial detainees decompensating in jail while waiting for these services, the defense attorneys representing them, and the mental health professionals and correctional officers in jail doing their best to try to keep these individuals safe. Parker Decl. ¶ 3 ("Amanda committed suicide on December 6, 2013, while waiting in Spokane County Jail for competency evaluation from Eastern State Hospital ("ESH")); Reardon Decl. ¶ 4; Morris Decl. ¶ 21; Snow Decl. ¶ 17; Stanfill Decl. ¶ 10; Karlsson Decl. ¶ 4.

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A majority of putative Class members have been waiting in jail for services far longer than the seven days identified in state statute, and in fact, have been waiting for *many weeks and months* in violation of the Fourteenth Amendment. *See* Cooper Decl., Ex. C (waitlists for Defendant WSH and Defendant ESH). Just last week, a medical provider from Defendant WSH testified in a state court proceeding that the minimum wait time for an incompetent individual charged with a felony to receive restoration services was *sixty days*. Cooper Decl., Ex. J at 12-13. A report issued by the Washington State Joint Legislative Audit and Review Committee in April 2014 also confirms that Defendant WSH and Defendant ESH fail to timely provide evaluations or restoration services. Snow Decl. ¶ 16, Exs. M-N. Even forensic consultants hired by Defendants acknowledge this as well in their June 2014 report. Cooper Decl., Ex. K.

The named Plaintiffs and other putative Class members have experienced prolonged delays in receiving competency evaluations or restoration services. *See* McCormick Decl. ¶¶ 18, 24 (Plaintiff Q.M. faced delays over three months for competency restoration services and is still waiting in King County Jail for restoration services); Crumpler Decl. ¶¶ 5, 7 (Plaintiff D.D. has severe mental illness and has been waiting almost two months for a competency evaluation in Spokane County Jail); Roberts Decl. ¶ 13 (Plaintiff K.R. waited over three months in Thurston County Jail for a competency evaluation and restoration services until being released on personal recognizance and is still waiting for restoration services); Trueblood Decl. ¶¶ 8, 11 (Plaintiff A.B. waited over forty-five days to be transported to Defendant WSH for restoration services). Melissa Parker painfully shares that her sister Amanda Cook committed suicide in Spokane County Jail while waiting weeks for a competency evaluation from Defendant ESH. *See generally* Parker Decl.

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Jail officials from around the state confirm what putative Class members are experiencing. Jail administrators from some of the largest jails in the State report extensive delays in pre-trial detainees receiving court-ordered competency evaluations and restoration services. Pierce County Jail officials note that the waitlist to receive evaluations and treatment "began to increase dramatically in 2012" and that "[i]ndividuals are languishing in jail for an indefinite time." Snow Decl. ¶¶ 8, 17. King County Jail reports that while the "wait time for [WSH] evaluations or restoration was significant" in past years, "the wait time has doubled" in 2014. Karlsson Decl. ¶ 4. Spokane County Jail officials observed that "the number of inmates with mental illness waiting for competency evaluation and restoration from [ESH] have significantly increased in the past four years." Ray Decl. ¶ 10. Indeed, the Mental Health Manager for Spokane County Jail noted that it's "not uncommon for individuals to spend more time waiting in jail for a competency evaluation than had they been convicted and served their sentence." *Id*. ¶ 16. This same official gave an example of a female charged with two misdemeanors who is currently been waiting *over 5 months* for a competency evaluation. *Id*.

Public defenders from across the state confirm the delays as well. High Decl. ¶¶ 3-4 (Pierce County public defender reporting transport delays to WSH for incarcerated individuals waiting at Pierce County Jail for restoration services of 60 days); Morris Decl. ¶¶ 11-12, 18 (King County public defender observing delays of weeks to months for court-ordered competency evaluation or restoration services; "particularly heart-breaking to watch people with low-level offenses be held in jail in excess of a year when their maximum sentences, if they were convicted, would be lower than the time spent waiting for admission to WSH."); Reardon Decl. ¶¶ 4-6, 14 (Spokane County public defender reporting delays of six to eight weeks for competency evaluations and weeks for restoration services from ESH).

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These prolonged delays also violate the procedural due process rights of the Class. As the Ninth Circuit noted in *Mink,* delaying an individual's ability to return to competency prolongs her criminal case and in turn, makes it difficult for her attorney to conduct factual investigations, identify witnesses, or engage in plea negotiations. 322 F.3d at 1119, n. 10. Here, public defense supervisors report that the delays in services and treatment have "caused break-downs in attorney-client relationships." Morris Decl. ¶ 6.

Given the well-documented lengthy delays far exceeding seven days, coupled with Defendants' own statements, *see supra* Section II.A.4 and II.B, and reports confirming the delays, Plaintiffs are highly likely to succeed on the merits of their due process claim. The issues presented in this case are similar to those of the *Mink* case, which compels the same result on the merits here.

3. Plaintiffs Will Suffer Irreparable Harm If Not Granted Relief.

Courts have held that the threat of irreparable harm typically exists when a possible violation of fundamental rights is at stake. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (holding that violation of a constitutional right "for even minimal periods of time [] unquestionably constitutes irreparable injury"). *See also Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (finding invasion of a constitutionally protected interest constitutes an irreparable injury). Following this analysis courts have found that "unnecessary deprivation of liberty clearly constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988).[2]

[2] Finally, in determining whether to grant preliminary relief in a class action, it is proper to analyze the irreparable harm that will be suffered by absent class members as well as by the class representatives. *Elkins v. Dreyfus*, No. C10–1366 MJP, 2010 WL 3947499, *9 (W.D. Wash. Oct. 6, 2010).

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State-imposed imprisonment is a "massive curtailment of individual liberty" such that its wrongful imposition should be deemed to rise to rise to the level of irreparable harm. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). And while such curtailment might be legally justified under certain circumstances, here Plaintiffs have proven the substantial likelihood that in this instance such a restriction on individual liberty is not justified.

The facts and professional opinion show that "the human cost is so much greater than the fiscal cost of treating them in a therapeutic environment." Snow Decl. ¶ 11, *see also* Cooper Decl., Ex. L; Stanfill Decl. ¶ 10; Section II.A.3 (detailing irreparable harm). Dr. Terry Kupers describes that "When an average individual who is placed in isolated confinement develops massive free-floating anxiety, hyper-responsiveness, paranoid ideas, confusion, perceptual distortions, motor excitement and so forth, and becomes frightened he will not be able to control his aggressive fantasies, just imagine how difficult it would be for someone who is prone to paranoid psychosis or suicidal despair to remain balanced." Kupers Decl., Ex. A at 13-14.

Individual examples include Ms. Cook's suicide at Spokane County Jail after learning that her evaluation was once again delayed. Parker Decl. ¶¶15-18. At the same jail, Plaintiff D.D. spent over two months in either solitary confinement or on suicide watch after making numerous statements about wanting to die. Crumpler Decl. ¶ 6. Plaintiff A.B. waited over seven weeks after she was ordered to Defendant WSH for restoration services and spent forty-three of those days in solitary confinement. Trueblood Decl. ¶ 6. Plaintiff K.R. spent four months in jail without medication, and the vast majority of that time was spent in solitary confinement after being assaulted by his cellmate. Roberts Decl., ¶¶ 15-16. During this time he lost a significant amount of weight and lost touch with reality. *Id.* at ¶13. Plaintiff Q.M. spent the majority of his five and a half month incarceration in solitary confinement, which increased his despair and

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exacerbated his mental condition. McCormick Decl. ¶29. While in solitary he lost significant weight and urinated in his cell to avoid interacting with guards. *Id*. at ¶¶ 23, 27.

This type of treatment can lead to permanent damage. "The tendency to suffer psychiatric breakdown and become suicidal is made even worse by sleep deprivation, which is a frequent occurrence among prisoners in isolated confinement . . . the social isolation and idleness, as well as the near absolute lack of control over most aspects of daily life, very often lead to serious psychiatric symptoms and breakdown." Kupers Decl., Ex. A at 12-13. Dr. Kupers goes on to explain that "[t]he longer the individual remains at the jail, the worse the outcome and prognosis of his psychiatric disorder, and the less likelihood his competence will be restored (or, in a certain proportion of cases, the longer it will take for competence to be restored.)" Kupers Decl., Ex. A at 15-16; *see also* Snow Decl. ¶12.

Jails simply are not equipped to provide the same services Defendant hospitals provide. Jail is not a therapeutic environment, and an individual is more likely to decompensate in jail. Snow Decl. ¶ 12; Ray Decl. ¶ 10; Stanfill Dec. ¶¶ 6-7; Kupers Decl., Ex. A at 5. The difference in services is significant because "the neglected and traumatized individual with serious mental illness has a much more dire prognosis than the individual who enjoys a supportive environment and adequate treatment." Kupers Decl., Ex. A at 17-18. Individuals with acute psychiatric symptoms waiting in these jail for weeks and months to receive court-ordered services is especially troubling considering that dozens of these pre-trial detainees are low-level offenders spending more time in the system than they would if they were convicted. Snow Decl. ¶ 10; Ray Decl. ¶ 14; Stanfill Decl. ¶ 9; Morris Decl. ¶ 21.

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The putative Class members are clearly facing the continued and future infliction of irreparable harm, both in the violation of their constitutional rights and in the severe damage caused to them by the delays in transporting them for evaluation and restoration services.

3. The Balance of Equities Tips Sharply in Favor of Plaintiffs.

The equities here clearly favor granting a preliminary injunction. Plaintiffs are suffering from a lack of treatment that is exacerbating their mental disabilities. There is no "legitimate state interest in keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months." *Mink*, 322 F.3d at 1121.

"Lack of funds, staff or facilities cannot justify the State's failure to provide [plaintiffs] with . . . treatment necessary." *Ohlinger v. Watson*, 652 F.2d 775, 779 (9th Cir. 1980). When "faced with . . . a conflict between financial concerns and preventable human suffering," the Ninth Circuit has had "little difficulty concluding that the balance of hardships tips decidedly in favor of the latter." *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (internal quotation marks omitted). *See also Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.").

Plaintiffs face irreparable harm and violations of their constitutional rights, weighed against the possibility that it may cost Defendants money to reform their practices. The balance of hardships tips very sharply in favor of Plaintiffs.

4. A Temporary Restraining Order Will Serve the Public Interest.

"Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Not only is there a public interest in protecting the due

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process rights of those in custody who have not been convicted of a crime, but there is also a public interest in ensuring those facing criminal charges proceed to trial in a speedy manner. *See Advocacy Ctr. for the Elderly & Disabled v. La. Dep't of Health & Hosps.*, 731 F. Supp. 2d 603, 626 (2010).

As the Ninth Circuit has explained:

> It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time. It would be unfortunate, but far less harmful to society, were the government to succeed in overturning the preliminary injunction but be unable to recoup all or a portion of the funds.

Lopez, 713 F.2d at 1437. *See also* Kupers Decl., Ex. A at 17-18 (finding that people with significant mental illness who receive treatment as opposed to similarly situated individuals placed in isolation in jails are far more likely to recover and contribute to society). The issuance of the injunction requested by Plaintiffs would serve the public interest.

B. The Court Should Exercise Its Jurisdiction to Hear This Case and Grant Relief.

Younger abstention is improper here for at least three reasons. First, Plaintiffs' claim does not interfere with state court proceedings because the injunction sought is not directed at state prosecutions and will not determine the outcome of Plaintiffs' criminal cases. Second, the Court should allow Plaintiffs to seek effective, systemic relief unavailable to them in their individual state court proceedings. Third, Defendants have refused to follow state court orders, and federal court jurisdiction is necessary to protect Plaintiffs' rights.

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1. The *Younger* Doctrine Does Not Apply Here Because Plaintiffs' Claim Does Not Interfere with State Court Proceedings.

The abstention doctrine articulated in *Younger v. Harris*, 401 U.S. 37 (1971), is a narrow exception to the general principle that "federal courts are obliged to decide cases within the scope of federal jurisdiction" and applies only "where the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588, 187 L. Ed. 2d 505 (2013). *See also Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir. 2003) ("As a threshold matter, for *Younger* abstention to apply, the federal relief sought must interfere in some manner with the state litigation").

The Supreme Court has recognized that indigent defendants seeking systemic relief are not barred by *Younger* where the relief sought does not enjoin the state prosecution. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the plaintiffs sought to enjoin the practice of detaining defendants without holding probable cause hearings. The Supreme Court noted that *Younger* abstention did not apply because "the injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." 420 U.S. at 108, n.9.

Plaintiffs here are similarly situated to the *Gerstein* plaintiffs. Granting the relief that Plaintiffs seek would not interfere with state proceedings. While all Class members have pending criminal cases, these criminal proceedings are stayed pending evaluation and restoration services. Wash. Rev. Code § 10.77.084 (providing that after a criminal defendant has been found incompetent, the proceedings against the defendant are stayed); Wash. Ct. R. Crim. R. 3.3(e) (excluding all proceedings related to the competency of a defendant to stand trial when computing time for trial). Rather than interfere with state proceedings, granting Plaintiffs relief

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would promote the adjudication of the criminal charges in the state court by restoring those incompetent detainees that can be restored so that they are able to stand trial and confirming when an individual cannot be restored and charges must be dismissed.

2. Plaintiffs Cannot Seek Systemic Relief in Individual Criminal Proceedings.

Even if the Court finds that the state court proceedings here implicate *Younger*, Plaintiffs are unable to obtain the same systemic relief sought here in their state court proceedings, and *Younger* does not apply where the proceedings do not offer litigants the opportunity to raise federal challenges. *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014).[3]

Here, Plaintiffs seek class-wide relief for criminal defendants with mental disabilities. They seek a systemic solution to Defendants' violations of their constitutional rights. While individual public defenders have sought to assert the rights of individual clients, none of the public defenders can seek relief on behalf of the entire class of incompetent detainees. The result of a rare successful state court challenge is to move a single defendant to the top of the waitlist, not to eliminate the unconstitutional delays for the entire Class.[4] Indeed, state court judges are often reluctant to grant relief in individual cases because it results in that defendant being moved to the top of the waitlist at the expense of other defendants. Goldsmith Decl., Ex. E at 2.

3. Defendants' Refusal to Abide By State Court Orders Renders Abstention Inappropriate.

[3] The other requirements for *Younger* abstention are that there be an ongoing state proceedings and that proceeding implicates important state interests.

[4] The primary forms of relief defense attorneys have sought are: 1) dismissal of a case; 2) release of incompetent detainees on personal recognizance; 3) immediate transport of individual clients. In addition, relief in this case will not enjoin individual criminal cases.

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Defendants have openly and repeatedly refused to comply with state court orders requiring immediate transport of particular incompetent detainees. Even if this case otherwise met the requirements of *Younger*, this extraordinary circumstance makes abstention inappropriate. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982) (stating that even where all of the requirements of *Younger* abstention are met, a "showing of bad faith, harassment, or some other extraordinary circumstance . . . would make abstention inappropriate.").

In *Younger,* the Court held that where there is "danger of irreparable loss [which] is both great and immediate," and it "plainly appears that [asserting the constitutional defense in state court] would not afford adequate protection," abstention is not appropriate. 401 U.S. at 45. Plaintiffs and Class members are suffering great and immediate harm. In addition, state courts cannot adequately protect their rights. In at least two instances, state trial trial judges have ordered Defendants to transfer specific incompetent detainees immediately, and Defendants have refused and continue to refuse to comply with these court orders. Cooper Decl., Exs. H, J at 53 (Attorney General's Office has represented to state courts that Defendants will not comply with any state court order for Defendants to immediately transport a pre-trial detainee for competency restoration services).

C. Immediate Judicial Intervention is Necessary.

Absent Court intervention to temporarily restrain Defendants from continuing to delay services to the Class, hundreds of incarcerated individuals languishing in jails waiting for evaluation and restoration services will suffer long-term damage, Snow Decl. ¶ 12; Kupers Decl., Ex A at 18, and for an extreme cased like Amanda Cook, it will mean more than continued loss of liberty but loss of life. "A stunning statistic, born out in research around the country, is that

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fully 50% of all successful jail and prison suicides . . . occur among the 3% to 7% of prisoners who are in isolated confinement (segregation). One need merely calculate the chances of a prisoner committing suicide if he or she remains in such a harsh environment for less than seven days (awaiting transfer to WSH or ESH) vs. remaining there for months." Kupers Decl., Ex A at 16.

While long-term fixes would still be necessary if the relief requested is granted, Plaintiffs urgently need immediate action by Defendants to stop the irreparable harm now. The requested relief is intended to be practicable given the service delivery system currently available to Defendants. As an example, contracting with evaluators at the average rate of $1,500 per evaluation would cost Defendants only $249,000 to complete the evaluations of the 166 people waiting in jail longer than 7 days, even if all of the evaluations were done by private contractors. *See* Morris Decl. ¶ 17; Cooper Decl., Ex. C. Additionally, the suggested bed allocations are similar to plans Defendants are already contemplating, and the movement of patients not guilty by reason of insanity to civil beds reflects standard hospital practice of a few years ago. *See* Cooper Decl., Ex. J at 49-52, ¶13.

Plaintiffs' counsel brought this motion as soon as it realized alternative methods of alleviating the current harm would not be successful. Carlson Decl. ¶¶ 9-12. Continued delay, will only compound the irreparable harm currently suffered by hundreds across the state, and the requested relief is specifically targeted at reducing that harm immediately.

D. Plaintiffs Seek a Waiver of the Bond Requirement.

Federal courts may exercise their discretion under Fed. R. Civ. P. 65(c) to waive the bond requirements in suits to enforce important federal rights of public interest. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999); *Cal. ex rel. Van de Kamp v. Tahoe Reg'l Planning*

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Agency, 766 F.2d 1319, 1325 (9th Cir. 1985) (no bond required for non-profit group). This Court should do so here.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs request that the Court issue their proposed Temporary Restraining Order and Preliminary Injunction, declaring delays in evaluation and restoration of competency unlawful and mandating the elimination of the delays.

Dated this 3rd Day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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