NO.15-35462

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASSIE CORDELL TRUEBLOOD, next friend of Ara Badayos, an incapacitated person; et al.,

Plaintiffs - Appellees,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Defendants - Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 2:14-cv-01178-MJP
The Honorable Marsha J. Pechman
United States District Court Judge

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

I. INTRODUCTION

Plaintiffs' brief confirms the extraordinary nature of their claim and of the district court's ruling. They assert that substantive due process imposes a seven-day deadline for completing competency evaluations of jailed criminal defendants. Until the district court here, no court had ever so held, and virtually every state and the federal government allow far longer. Plaintiffs never dispute these points, instead arguing that they are irrelevant. But Plaintiffs must show that anything beyond seven days "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). A rule that no court or state has ever before adopted hardly meets this standard.

The Court should reject Plaintiffs' claim for another reason as well. "[I]f a constitutional claim is covered by a specific constitutional provision . . . , the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998) (internal quotation marks omitted). Plaintiffs' "claim is simply that a specific period of incarceration . . . is overly lengthy." Resp. at 49. But the Sixth Amendment "is designed to

minimize the possibility of lengthy incarceration prior to trial." *United States v. MacDonald*, 456 U.S. 1, 8 (1982). Thus, Plaintiffs' claim should be analyzed under the Sixth Amendment (as the State argued below), not substantive due process. And Plaintiffs never even try to meet the Sixth Amendment standard.

II. FACTS

Plaintiffs' brief omits or misstates key facts, requiring a response.

A. Not All Evaluations Occur in State Hospitals or Jails—Many Occur in the Community

Plaintiffs claim that competency evaluations "occur in two places: a state psychiatric hospital or a jail." Resp. at 7. In reality, at least a quarter of criminal defendants are evaluated in the community, after release on bail. *See, e.g.*, ER 245; SER 209 (showing that in the 4th quarter of 2013, Eastern State Hospital evaluated 44 defendants in the community, compared to 81 in jail); SER 227-28 (similar figures for 1st quarter of 2014).

Presumably, Plaintiffs ignore this fact because it highlights a point they hope the Court will overlook. When defendants wait in jail for a competency evaluation, the reason they are jailed is not the need for an evaluation—those are routinely done in the community. Rather, the true cause of their detention is that they were denied bail or are unable to post bail.

B. Few Competency Determinations Are "Obvious," and Collateral Documents Are Often Critical

Central to Plaintiffs' brief is the notion "that in the large majority of cases, it's very obvious" whether defendants are competent, making evaluation a straightforward process with no need of collateral documents. Resp. at 19, 35-36. But the district court made no finding to that effect, and with very good reason: both the Supreme Court and competency experts disagree.

The Supreme Court has repeatedly recognized that "the question [of competence] is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *Cooper v. Oklahoma*, 517 U.S. 348, 365 (1996) (noting "that the inexactness and uncertainty that characterize competency proceedings may make it difficult to determine whether a defendant is incompetent"). And the State's experts find that only about ten percent of competency evaluations are truly obvious. SSER 4. Indeed, if the determination is usually obvious, why are roughly seventy-five percent of those referred for competency evaluations nationwide ultimately deemed competent? ER 161, 296, 345.

The difficulty of assessing competency is one reason independent experts like the National Judicial College say that "[i]t is a best practice for the [evaluator] to consider third-party information," such as "educational, military,

and employment records" and "interviews and consultations with third parties, including defense counsel, relatives, and jail personnel." ER 275. And the State's evaluators do often find it necessary to consider such collateral documents, which can take significant time to collect. *E.g.*, SSER 12 (collateral documents "are essential for . . . 95 percent of the felony cases" and 25 to 30 percent of misdemeanor cases); ER 186, 278 (noting the importance of collateral records from family or the community).

C. No Credible Evidence Demonstrates That Only Seven Percent of Delays Are Caused by Factors Beyond the State's Control

Another inaccurate claim central to Plaintiffs' brief is that only seven percent of delays for in-jail evaluations are caused by factors outside the State's control. Pl. Br. at 1-2, 11 n.7, 34. But the district court made no such finding, and the evidence would not have supported such a finding.

The seven percent figure cited by Plaintiffs refers to a measure used in a quarterly report to the Washington legislature. SER 231. But the report: (1) explicitly says that it fails to capture many external causes of delay, SER 230; (2) considers only delays that occurred *after* the State received all of the documents necessary to complete an evaluation, *id.*; (3) never states which external delays *are* included, *id.* at 230-31; and (4) combines delays in completing in-jail evaluations with delays in completing evaluations in the

community, *id.*, which make up the vast bulk of the total delays, *compare* SER 227 (showing Western State Hospital average completion time for in-jail evaluations of 17.8 days), *with* SER 228 (showing Western State Hospital average completion time for evaluations in the community of 88.7 days). The report thus provides no basis for determining what percentage of delays for in-jail evaluations are caused by factors outside the State's control.

Meanwhile, the record is replete with evidence showing that factors beyond the State's control routinely contribute significantly to delay. For example, many witnesses and reports attested that coordinating with defense counsel virtually always causes some delay, and often significant delays. ER 129-30, 186, 188-90, 201-02, 295-98. Other reports and witnesses attested to delays caused by scheduling interpreters, ER 199-200, gathering collateral documents, SSER 11-13; ER 91-93, 127, 132-35, 186, 278, and scheduling space in jails, ER 186, 202, 207-08. *See generally* SER 175-77; ER 249, 295-96; SER 601.

In short, the district court did not find that only seven percent of delays are outside the State's control, and there is no basis for such a conclusion.

III. ARGUMENT

A. Standard of Review

Plaintiffs repeatedly seek to portray this appeal as challenging primarily the district court's factual findings. Not so. The central issues on appeal are purely legal. First, does the Sixth Amendment, rather than due process, provide the controlling standard? *See, e.g.*, *Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1991) (holding that determination of whether substantive due process or the Fourth Amendment applies is a question of law). Second, if due process governs, do jailed criminal defendants have a fundamental right to evaluation within seven days? *See, e.g.*, *Hatton v. Wicks*, 744 F.2d 501, 503 (5th Cir. 1984) (whether a substantive due process right exists "obviously is a question of law"); *United States v. Ridgway*, 300 F.3d 1153, 1155 (9th Cir. 2002). Only if the Court declares such a right does it need to reach factual questions about the scope of the injunction.

B. The Sixth Amendment Applies Here and Imposes No Seven-Day Limit

The Sixth Amendment provides the controlling standard because it explicitly protects against lengthy pretrial incarceration. Plaintiffs essentially admit that they cannot show a Sixth Amendment violation, never arguing to the

contrary. Instead, they argue that this issue is waived and that the Sixth Amendment is irrelevant. Both arguments fail.

1. The State raised the Sixth Amendment test below

Knowing they cannot prevail under the Sixth Amendment, Plaintiffs ask this Court to ignore it, alleging that the State has waived its application. But the relevance of the Sixth Amendment is not a new issue on appeal. The State raised this issue in its response to Plaintiffs' motion for summary judgment, SER 721, and spent five pages on it in its trial brief. SER 673-74, 679-81. There, the State argued that for defendants not yet deemed incompetent—the only defendants at issue on appeal—the Sixth Amendment provided a more appropriate guide than substantive due process. SER 673-74, 679-81. As to this group, the State urged, "instead of articulating a wholly new substantive due process right to evaluation of competency in a specific number of days, it is more logical to resort to the analysis and protections provided by the right to speedy trial." SER 679-80.

In asserting waiver, Plaintiffs claim it is dispositive that the pretrial order does not mention the Sixth Amendment. Resp. at 56. That is incorrect on two fronts.

First, this Court has repeatedly held that "[t]here is no bright-line rule to determine whether a matter has been properly raised." *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989). Instead, the central question is whether the argument was presented sufficiently so that the trial court could have ruled on it. *Id.*; *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) (same). For example, in *Fegert* this Court held that an issue was sufficiently raised by counsel mentioning it at oral argument in the trial court, even though the trial court never actually addressed it. *Id.*; *see also, e.g.*, *United Transp. Union v. BNSF Ry. Co.*, 710 F.3d 915, 927-28 (9th Cir. 2013) (citing *Fegert* and considering issue the district court never addressed).

Here, the State argued at length that the Sixth Amendment provided a more appropriate test for resolving the rights of defendants not yet deemed incompetent. SER 673-74, 679-81. The issue was presented "sufficiently for the trial court to rule on it." *Fegert*, 887 F.2d at 957.

Second, this case is easily distinguishable from those Plaintiffs cite that focus on the pretrial order. In those appeals, parties challenged facts they had stipulated to in a pretrial order, *Jauregui v. City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988), raised affirmative defenses omitted from the pretrial order, *Pierce Cty. Hotel Emps. & Rest. Emps. Health Trust v. Elks Lodge,*

B.P.O.E. No. 1450, 827 F.2d 1324, 1329 (9th Cir. 1987); *Operating Eng'rs Pension Trust v. Cecil Backhoe Serv., Inc.*, 795 F.2d 1501, 1506 (9th Cir. 1986), or relied on factual allegations never raised in the pretrial order, *S. California Retail Clerks Union & Food Emp'rs Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984). This case could not be more different. The State seeks not to raise new facts or defenses, but simply application of the proper constitutional test, a test it advocated below.

Finally, even if the State had failed to raise this argument below, which it did not, this Court should consider it. The question whether the Sixth or Fourteenth Amendment applies is "'purely one of law and . . . does not depend on the factual record.'" *Russell v. Gregoire*, 124 F.3d 1079, 1083 n.4 (9th Cir. 1997) (quoting *A–1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996)).

2. Specific constitutional provisions control

Plaintiffs do not dispute the clear rule "'that if a constitutional claim is covered by a specific constitutional provision . . . , the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'" *Lewis*, 523 U.S. at 843 (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)). This rule derives from the federal

courts' "'reluctan[ce] to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.'" *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). The rule has particular force in the criminal law realm, where "'beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" *Medina*, 505 U.S. at 443 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). This rule requires applying the Sixth Amendment here.

3. Because the length of confinement is the sole issue, the Sixth Amendment is the controlling, specific provision

This case is about time alone, not the fact of Plaintiffs' confinement or the conditions of their confinement. In Plaintiffs' own words: "The claim is simply that a specific period of incarceration . . . is overly lengthy." Resp. at 49. *See also* ER 62 ("Plaintiffs do not challenge the fact of their detention, but rather the length of their detention.").

Given the nature of Plaintiffs' claim, the specific provision that governs is the Sixth Amendment, which "is designed to minimize the possibility of lengthy incarceration prior to trial." *MacDonald*, 456 U.S. at 8; *United States v. Ewell*, 383 U.S. 116, 120 (1966) (holding that the Sixth Amendment

"prevent[s] undue and oppressive incarceration prior to trial"). Seeking to avoid this clear result, Plaintiffs offer four arguments. Each fails.

a. Plaintiffs cannot avoid the Sixth Amendment by challenging only part of the time they are held

Plaintiffs first argue that the Court should apply due process, rather than the Sixth Amendment, because they challenge only a portion of the time spent awaiting trial—namely, the time spent waiting for competency evaluation. Resp. at 48-50. That argument falls flat.

To begin with, Plaintiffs have cited no case in support of this argument, and the State is aware of none. Moreover, their position would lead to the absurd result that plaintiffs could always invoke substantive due process, even when another constitutional provision "provides an explicit textual source of constitutional protection." *Graham v. Connor*, 490 U.S. 386, 395 (1989). To do so, a plaintiff would simply need to do what Plaintiffs attempt here: challenge only a discrete part of government conduct where a challenge to the whole would plainly be governed by a specific provision. For example, although a criminal defendant's right to counsel is protected by the Sixth Amendment, if he were temporarily denied counsel could he bring a substantive due process claim challenging only that portion of time? Of course not; all such claims are analyzed under the Sixth Amendment. *See, e.g.*, *Perry v. Leeke*, 488 U.S. 272

(1989) (finding no Sixth Amendment violation where defendant was barred from consulting counsel during 15-minute recess); *Geders v. United States*, 425 U.S. 80 (1976) (finding Sixth Amendment violation where defendant was barred from consulting counsel overnight).

Indeed, even where a defendant challenges delay in a portion of the time before his trial, the Supreme Court applies the Sixth Amendment, not generic due process principles. In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), Klopfer's first trial ended in a mistrial. The State then took a "nolle prosequi," meaning the indictment was still pending but would not be pursued at that time. Klopfer then moved to dismiss the indictment, claiming the delay was unconstitutional. The Supreme Court agreed, holding that the delay violated Klopfer's "right to a speedy trial . . . guaranteed to him by the Sixth Amendment." *Id.* at 221. Notably, Justice Harlan, concurring, would have reached the same result based on due process, but the other eight Justices instead relied on the Sixth Amendment. *Id.* at 226-27 (Harlan, J., concurring).

In short, the Sixth Amendment "is designed to minimize the possibility of lengthy incarceration prior to trial." *MacDonald*, 456 U.S. at 8. Plaintiffs' claim "is simply that a specific period of [pretrial] incarceration . . . is overly lengthy." Resp. at 49. The Sixth Amendment governs their claim, and

"[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection." *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc), *overruled on other grounds by Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007).

b. None of the cases Plaintiffs cite justify ignoring the Sixth Amendment

Plaintiffs' second argument for ignoring the Sixth Amendment is that courts sometimes apply due process principles to claims of mentally incompetent defendants awaiting trial. But Plaintiffs ignore two crucial points: (1) those cases all involved challenges that went beyond simply the length of confinement; and (2) none of them addressed whether applying the Sixth Amendment would be appropriate.

As to the first point, the cases Plaintiffs cite are inapposite because the claims there, unlike here, went far beyond "simply that a specific period of [pretrial] incarceration . . . is overly lengthy." Resp. at 49. For example, in *Jackson v. Indiana*, 406 U.S. 715 (1972), Jackson was found incompetent and held for three years without any showing that it was possible to restore his competency. He effectively received a life sentence without trial. Jackson's claim was not "simply that a specific period of [pretrial] incarceration . . .

[was] overly lengthy," Resp. at 49, but rather that he could not be held at all unless the state showed "a substantial probability that he [would] attain [competence] in the foreseeable future." *Jackson*, 406 U.S. at 738. The Court agreed. *Id. Jackson* thus did not involve how long a defendant would wait in jail before trial, but rather whether he could be held without any hope of trial.

Plaintiffs next cite *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003). There, the plaintiffs had all been found incompetent and ordered transferred to a state hospital for treatment. Thus, entirely separate from their right to a speedy trial, they all had a right to be transferred to the less restrictive state hospital and to receive restorative treatment, rights that "accrue[d] at the moment" they were "declared unfit." *Id.* at 1122 n.13. Here, by contrast, no Plaintiff at issue on appeal has yet been "declared unfit" and therefore none yet has a right to treatment or transfer. Indeed, most never will because most will be found competent. ER 12, 161, 203. Instead, their only current claim is "that a specific period of [pretrial] incarceration . . . is overly lengthy." Resp. at 49. Unlike the claim in *Mink*, this claim fits squarely within the Sixth Amendment.

Plaintiffs also cite two district court decisions, but both involved defendants who were deemed incompetent and thus had a right to transfer and treatment independent of the Sixth Amendment. *See Advocacy Ctr. for Elderly*

& Disabled v. Louisiana Dep't of Health & Hosp., 731 F. Supp. 2d 603, 605 (E.D. La. 2010) (claim brought on behalf of "criminal defendants in Louisiana courts who are found incompetent to stand trial"); *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 935 (E.D. Ark. 2002) (noting that class included defendants ordered to receive treatment). Both also appear to have involved challenges to the conditions of confinement, which also are outside the Sixth Amendment. *Advocacy Ctr.*, 731 F. Supp. 2d at 607 ("plaintiffs allege the Detainees are receiving inadequate mental-health treatment in the parish jails"); *Terry*, 232 F. Supp. 2d at 943 (citing "[t]he lack of inpatient mental health treatment" in jail as a factor in finding a constitutional violation).

Setting aside these substantial differences from this case, none of these cases considered the question here: whether the Sixth Amendment provides the framework for analyzing a claim that "a specific period of [pretrial] incarceration . . . is overly lengthy." Resp. at 49. "Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting); *see also, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("[A]ssumptions . . . are not binding in future cases that directly raise the questions.").

c. It is irrelevant that some delay for completing competency evaluations is acceptable

Next, Plaintiffs argue that the Sixth Amendment provides them no protection because the time to complete an evaluation will always be treated as necessary and satisfy the Sixth Amendment. Resp. at 52-53. This is incorrect.

It is true that the federal Speedy Trial Act and its analogues in many states, including Washington, exclude competency proceedings from the computation of time before trial. *E.g.*, 18 U.S.C. § 3161(h)(1)(A); Wash. R. Crim. P. 3.3(e)(1). It is also true that delays caused by competency evaluations are often treated as justified under the Sixth Amendment. But this does not mean that delays caused by evaluations are categorically barred from challenge under the Sixth Amendment. Indeed, the State's opening brief cited many federal cases analyzing whether delays caused by competency evaluations, among other factors, caused a Sixth Amendment violation. Op. Br. at 34 (citing *United States v. McGhee*, 532 F.3d 733 (8th Cir. 2008)); *United States v. DeGarmo*, 450 F.3d 360 (8th Cir. 2006); *United States v. Vasquez*, 918 F.2d 329, 333 (2d Cir. 1990)). Thus, criminal defendants can and do employ the Sixth Amendment to challenge delays caused by competency evaluations.

d. This Court has refused to apply substantive due process in addition to a textually explicit right

In a last-ditch effort to preserve their due process claim, Plaintiffs contend that regardless of whether the Sixth Amendment applies, the Court must also consider their due process argument. Resp. at 55. This Court has explicitly rejected Plaintiffs' view.

In *Armendariz*, 75 F.3d 1311, this Court held that although a plaintiff normally may bring claims "under multiple constitutional theories" if he alleges conduct "implicat[ing] more than a single right," he may not do so if one of the two theories is "substantive due process." *Id.* at 1326; *see also, e.g.*, *Ramirez v. Butte-Silver Bow Cty.*, 298 F.3d 1022, 1029 (9th Cir. 2002), *aff'd sub nom. Groh v. Ramirez*, 540 U.S. 551 (2004) (holding that although "certain wrongs affect more than a single right," "the Supreme Court has held that plaintiffs cannot 'double up' constitutional claims . . . : Where a claim can be analyzed under 'an explicit textual source' of rights in the Constitution, a court may not also assess the claim under another, 'more generalized,' source") (quoting *Graham*, 490 U.S. at 394-95).

The cases Plaintiffs cite are not to the contrary. Resp. at 55. In *Soldal v. Cook County*, 506 U.S. 56 (1992), when plaintiffs brought claims under both the Fourth and Fourteenth Amendments, the Court applied "the Fourth

Amendment's specific protection for 'houses, papers, and effects' rather than the general protection of property in the Due Process Clause." *Id.* at 70-71. Meanwhile, in *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000), the Court allowed a substantive due process claim to proceed because it protected against conduct not regulated by other provisions and the plaintiff's other claims were not yet ripe. *Id.* at 585. Thus, the Court did not allow a substantive due process claim where another claim covered the same conduct.

In short, where one constitutional provision provides explicit protection against government conduct, this Court has consistently applied that provision rather than substantive due process. *See, e.g.*, *Kirkpatrick v. County of Washoe*, 792 F.3d 1184, 1189 (9th Cir. 2015); *Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 908 (9th Cir. 2003).[1] The Court should do the same here.

4. The Sixth Amendment imposes no seven-day deadline

Plaintiffs essentially concede that if the Sixth Amendment applies, their case fails. They never even argue to the contrary, and with good reason: they

[1] Plaintiffs also contend that applying the Sixth Amendment would place defense counsel in a bind by forcing them to demand a speedy trial for potentially incompetent defendants. Resp. at 55 n.25. The argument makes little sense. Counsel could simply assert that the delay in completing an evaluation was interfering with their client's right to a speedy trial, which would be sufficient to trigger their speedy trial claim.

are unable to satisfy the threshold requirement of "presumptively prejudicial" delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Neither Washington's statutory fourteen-day limit, nor 2014's average wait time of twenty-two days is presumptively prejudicial. Courts have consistently upheld far greater periods of time. *E.g.*, *McGhee*, 532 F.3d at 740 (finding that nearly five months between order for competency evaluation and filing of evaluation did not violate Sixth Amendment); *DeGarmo*, 450 F.3d at 365 (holding seventy-six-day delay for competency evaluation not prejudicial and therefore not a Sixth Amendment violation); *Vasquez*, 918 F.2d at 333, 337-38 (finding no Sixth Amendment violation despite ten-month delay between motion for psychiatric exam and completion of competency report).

In sum, Plaintiffs' claim is properly analyzed under the Sixth Amendment, and under that amendment it fails.

C. Even if Substantive Due Process Were the Standard, It Imposes No Seven-Day Deadline

In arguing that substantive due process requires evaluation of jailed defendants within seven days, Plaintiffs, like the district court, ignore basic principles of substantive due process analysis. Under controlling principles and any formulation of the controlling test, Plaintiffs' claim fails.

1. Substantive due process principles

Substantive due process analysis is narrowly limited in at least two respects. First, it protects only those "fundamental rights and liberties . . . 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *see also, e.g.*, *Lewis*, 523 U.S. at 846 (government conduct violates due process if it "'shocks the conscience' and violates the 'decencies of civilized conduct'") (quoting *Rochin v. California*, 342 U.S. 165, 172-73 (1952)). And second, "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins*, 503 U.S. at 125). Plaintiffs' arguments fly in the face of both principles.

As to the first point, Plaintiffs say that in assessing whether a claimed right is "deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21, "[t]he practices of other [states] have no bearing." Resp. at 38. The Supreme Court disagrees.

"'The fact that a practice is followed by a large number of states is not conclusive . . . , but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Schall v. Martin*, 467 U.S. 253, 268 (1984) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (internal citations omitted)). In *Schall*, for example, New York law allowed pretrial detention of juveniles based on the risk that they might commit other crimes. *Id.* at 255. The Court of Appeals deemed this interest insubstantial because the "vast majority" of the juveniles detained had their cases dismissed before trial or were released after trial. *Id.* at 262. The Supreme Court reversed, holding that the "substantiality and legitimacy of the state interests" were "confirmed by the widespread use and judicial acceptance of preventive detention for juveniles" in other states. *Id.* at 266. "In light of the uniform legislative judgment" of the states, the Court found that due process was satisfied. *Id.* at 267.

Similarly here, virtually every state and the federal government allow far more than seven days for completing evaluations. ER 139, 170-71; 18 U.S.C. § 4247(b). This "uniform legislative judgment" strongly suggests that a right to have evaluations completed in seven days is not "so rooted in the traditions and

conscience of our people as to be ranked fundamental." *Schall*, 467 U.S. at 268 (internal quotation marks omitted).

Turning to the second basic principle, Plaintiffs, like the district court, failed to offer "a careful description of the asserted right." *Flores*, 507 U.S. at 302. Plaintiffs claim the rights at issue are "freedom from incarceration" and "receipt of court ordered competency services." Resp. at 25. Neither description withstands scrutiny.

Even where a person is detained against his will, he cannot simply invoke the broad interest in "freedom from incarceration" if his claim is too attenuated from that interest. *See Flores*, 507 U.S. at 302; *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) ("The *Flores* Court rejected the proposed fundamental right of 'freedom from physical restraint' because it was not an accurate depiction of the true issue in the case."). Here, Plaintiffs' interest is not really in "freedom from incarceration" in at least three respects. First, most defendants are found competent and then remain in jail pending trial, so the evaluation does not end their incarceration. Second, the evaluation order is not the cause of Plaintiffs' incarceration, because if they were able to post bail, the evaluation would be conducted in the community; indeed, if a defendant posts bail after evaluation is ordered, the evaluation occurs in the community.

SSER 18; ER 187, 235. Finally, even defendants found incompetent are not released, but instead are transferred to a state mental hospital and then, in most instances, returned to jail after competency is restored. SSER 9, 23-24; ER 218, 239. The interest in "freedom from incarceration" is thus at most tangential to this case.

Plaintiffs' second claimed right—to "receipt of court ordered competency services"—is not one this Court has ever recognized. In *Mink*, this Court identified a liberty interest "in restorative treatment," but the Court made clear that "[t]he interest of an incapacitated criminal defendant in obtaining timely treatment accrues *at the moment that defendant is declared unfit*." *Mink*, 322 F.3d at 1123 n.13 (emphasis added). Here, the demand is for evaluation, not treatment, and none of the defendants at issue on appeal has been declared unfit.

Ultimately, then, Plaintiffs' real claim is that they have a liberty interest in receiving an evaluation within seven days. Neither this Court nor the Supreme Court has ever recognized such an interest.

With these principles in mind, we turn to applying the due process test. Broadly speaking: "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty of

the individual and the demands of an organized society." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (internal quotation marks omitted). In the specific circumstances where a defendant challenges his pretrial detention, the question is whether the detention is regulatory rather than punitive. *E.g.*, *Bell v.Wolfish*, 441 U.S. 520, 537 (1979). Under either the broad or narrow formulation of the test, Plaintiffs' claim fails.

2. Taking more than seven days to complete a competency evaluation is not punishment

Plaintiffs' claim is "that a specific period of incarceration—from the day they are court ordered to undergo a competency evaluation to the day the State completes the evaluation—violates their right to due process if it is overly lengthy." Resp. at 49. In evaluating this claim, the central question is whether detention beyond seven days "amount[s] to punishment of the detainee." *Bell*, 441 U.S. at 535; *e.g.*, *United States v. Salerno*, 481 U.S. 739, 747 (1987). It does not.

No one contends that the State's purpose in holding defendants awaiting evaluation is to punish them. Therefore, as Plaintiffs admit, the question is whether "the nature and duration of [detention] bear some reasonable relationship to the purpose for which the individual is [detained]." Resp. at 27 (quoting *Jackson*, 406 U.S. at 738). Here, that standard is plainly satisfied.

Washington law now requires the competency evaluations of jailed defendants to be completed within fourteen days, with a seven-day extension possible for clinical reasons. On average, in 2014 it took the State twenty-two days to complete in-jail evaluations. These time periods "bear some reasonable relationship" to the State's goal of completing accurate competency evaluations. The State's opening brief explained at length the many factors that cause evaluations to take longer than seven days, from gathering medical records to allowing intoxicants to clear to scheduling with defense counsel. That time periods beyond fourteen or even twenty-two days are reasonable is evidenced by the fact that both federal law and the laws of virtually every other state allow longer periods for evaluation. ER 139, 170-71; 18 U.S.C. § 4247(b). *See, e.g.*, *Schall*, 467 U.S. at 266 (holding that the "substantiality and legitimacy of the state interests" were "confirmed by the widespread use" of similar practices in other states).

Looking beyond simply time, although Plaintiffs have not challenged their conditions of confinement, they argue that "class members are not receiving the mental health care they need" and "each day in jail increases their illness and risk of harm." Resp. at 27. These blanket statements grossly mischaracterize the record. Because most defendants who are evaluated are

found competent, there is no basis to assume that they all need mental health care. Even as to defendants found incompetent, roughly half are held in King or Pierce County, SER 166-67, county jails that Plaintiffs held up as model providers of mental health care. *See, e.g.*, ER 300 (Plaintiffs' expert opining that King County provides a "relatively rich and sophisticated mental health delivery system" in its jail); ER 319-25 (Plaintiffs' witness testifying about the range of mental health services provided in Pierce County Jail).

In short, there was no basis for the district court's categorical holding that once the seventh day passes, "the nature and duration of" Plaintiffs' detention loses any "reasonable relation to the purpose for which the individual is [detained]." *Jackson*, 406 U.S. at 738; *see, e.g.*, *United States v. Briggs*, 697 F.3d 98, 101 (2d Cir. 2012) (noting that federal courts "have consistently held that due process places no bright-line limit on the length of pretrial detention").

3. The balancing of interests test does not require completing evaluations within seven days

The broader balancing of interests test applied in *Mink* confirms that there is no basis for a seven-day evaluation deadline.

In *Mink*, the defendants were all found incompetent and ordered transferred to a state hospital for treatment. Thus, they all had liberty interests in transfer to the less restrictive state hospital and in restorative treatment.

Against these interests, the Court balanced "the legitimate interests of the state," finding that Oregon offered none whatsoever. *Mink*, 322 F.3d at 1121.

This case differs dramatically. Plaintiffs here have no interest in restorative treatment because none of them have been declared incompetent. *Id.* at 1123 n.13 ("The interest of an incapacitated criminal defendant in obtaining timely treatment accrues *at the moment that defendant is declared unfit*.") (emphasis added). Likewise, most Plaintiffs here have no liberty interest in transfer to a state hospital, because most will be found competent and remain in jail.

On the other side of the balance, unlike Oregon's lack of legitimate interests in *Mink*, Washington has several legitimate interests in sometimes taking more than seven days to finish competency evaluations. Most importantly, the State (like the defendant) has a compelling interest in *accurate* competency evaluations, because erroneously deeming a defendant either competent or incompetent has disastrous consequences for both the State and the defendant. Op. Br. at 45-46. In addition, the State has an overriding interest in protecting a defendant's right to counsel and against self-incrimination by scheduling an evaluation defense counsel can attend. *See, e.g.*, *United States v.*

Garrett, 179 F.3d 1143, 1147 (9th Cir. 1999); *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).

Achieving these interests often requires more than seven days. As the State's opening brief explains, a number of factors can cause evaluations to take longer than seven days, from the need to gather medical records to the need to arrange for an interpreter to the need to coordinate with defense counsel. Op. Br. at 12-20.

Plaintiffs offer several responses. None is persuasive.

First, they claim "that in the large majority of cases, it's very obvious" whether someone is competent. Resp. at 19. But the trial court made no such finding and the Supreme Court has repeatedly rejected that view. *See, e.g.*, *Cooper*, 517 U.S. at 365 (noting "that the inexactness and uncertainty that characterize competency proceedings may make it difficult to determine" competency); *Drope*, 420 U.S. at 180 (noting that "the question [of competence] is often a difficult one in which a wide range of manifestations and subtle nuances are implicated").

Second, they assert that each cause of delay is a factor in only a small percentage of cases. For example, they note that interpreters are needed in only 10-15% of cases, Resp. at 35, their expert claimed that additional documents

are needed only in "around 10% of cases," SER 367, they argue that "[m]alingering is an issue in a very small minority of cases," Resp. at 37, and they claim defense counsel availability is not a substantial cause of delay, Resp. at 33. But even if their low-end estimates were all accurate, these issues would still cumulatively be a factor in a substantial share of cases. And their estimates are not all accurate. *See, e.g.*, SSER 12 (collateral documents "are essential for . . . 95 percent of the felony cases"); ER 129-30, 186, 188-90, 201-02, 295-98.

Third, they adopt the district court's view that if the State made certain changes, such as requiring evaluators "'to conduct evaluations in the evenings, on weekends, or on holidays,'" evaluations could occur more quickly. Resp. at 34 (quoting ER 17 n.1). But the question is not whether the State could make changes, it is whether failure to complete evaluations within seven days "'shocks the conscience' and violates the 'decencies of civilized conduct.'" *Lewis*, 523 U.S. at 846 (quoting *Rochin*, 342 U.S. at 172-73). It does not.

Finally, Plaintiffs' central claim is that there is "no legitimate interest in" taking longer than seven days to complete a competency evaluation. Resp. at 31. But if that is true, why does the federal government allow up to 45 days? 18 U.S.C. § 4247(b). Why does virtually every other state allow far longer than

seven days? ER 170-71, 174-79. Why does the National Judicial College explicitly discourage rushing an evaluation and say that "best practice" is to allow 15 days for misdemeanor charges and 21-30 days for felony charges? ER 272. In substantive due process analysis, this "uniform legislative judgment" carries enormous weight, confirming the "substantiality and legitimacy of the state interests." *Schall*, 467 U.S. at 266.

In short, *Mink* supports the State on appeal. Plaintiffs' liberty interests here are far weaker, and the State's legitimate interests are far stronger. Balancing the interests does not justify a rule that would invalidate virtually every competency evaluation system in the country.

4. The "good-cause" exception cannot save the district court's extreme rule

Aware that the district court declared a fundamental right never before recognized by any court or state, Plaintiffs seek to save this extreme rule by repeatedly invoking the one exception the district court allowed: the State may seek a delay for "clinical good cause." ER 27. This paltry exception falls far short of saving the district court's extreme rule, for two reasons.

First, it imposes enormous burdens on the State without constitutional justification. If routine causes of delay beyond the State's control occur—such as the need for an interpreter, trouble obtaining necessary collateral documents,

or the lingering effects of drugs in a defendant's system—the State must file a motion for extension before the seventh day. And if the court fails to rule by the seventh day, the State must move the defendant to a mental hospital. ER 27. This is a tremendous burden on the State because Washington's state hospitals "operate at full capacity" and "all the beds are full." ER 224. In addition to increasing expenses, overcrowding the hospitals with criminal defendants creates security problems and diverts resources from the care of disabled patients the courts have found require hospitalization. ER 157-59, 224.

Second, it ignores one entirely valid reason for delay—unavailability of defense counsel. For example, if the evaluator has sufficient information to perform the evaluation on day seven, but defense counsel is unavailable, the defendant must be sent to the mental hospital. The evidence demonstrates that coordinating with defense counsel often requires scheduling an evaluation more than seven days after the evaluation is ordered. ER 129-130, 186, 188-90, 201-02, 295-98. And coordinating with defense counsel is not simply a nicety, it is constitutionally required. Yet the "good-cause" exception makes no provision for protecting the defendant's right to counsel.

D. The Injunction Is An Abuse of Discretion

For many of the same reasons that the "good-cause" exception is insufficient, the injunction is an abuse of discretion. It will require transferring many criminal defendants to state mental institutions even though at least half of those referred for evaluation are deemed competent. And it requires transfer even when defense counsel is the cause of delay or a state court has not yet ruled on an extension motion.

These needless transfers will cause real harm. They will harm existing patients at the state hospitals, who will suffer overcrowding and diversion of resources. They will harm taxpayers, by forcing needless hospitalization of competent defendants. And they will harm defendants, who will in many cases be transferred hundreds of miles from friends, family, and counsel without good reason.

Plaintiffs contend that these problems can be addressed later through a motion under Rule 60(b)(5). Resp. at 46-47. That is backwards. A federal court should not issue an injunction in the first place except to prevent a violation of federal law. *See, e.g., Katie A., ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1155 (9th Cir. 2007) (holding that it is "an abuse of discretion" for a district court to enter an injunction that "requires any more of state officers

than demanded by federal constitutional or statutory law"). The constitution imposes no seven-day deadline, so the court should not force the State to try to comply before seeking relief.

IV. CONCLUSION

The State respectfully asks this Court to reverse the district court's creation of a new substantive due process right and its injunction.

RESPECTFULLY SUBMITTED this 27th day of October 2015.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c) the Appellees state that *Cassie Cordell Trueblood, next friend of Ara Badayos, an incapacitated person, et al. v. Washington State Department of Social and Health Services, et al.*, No. 15-35601 (9th Cir.) is a related case. *Trueblood v. Washington State DSHS* is a separate appeal of the attorneys' fees and costs awarded in the same district court case. *See* Docket 162. It involves the same parties, but a different issue.

CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 6,979 words.

October 27, 2015.

s/ Noah G. Purcell
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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2015, I electronically filed the foregoing reply brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Noah G. Purcell
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NO.15-35462

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASSIE CORDELL TRUEBLOOD, next friend of Ara Badayos, an incapacitated person; et al.,

Plaintiffs - Appellees,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Defendants - Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 2:14-cv-01178-MJP
The Honorable Marsha J. Pechman
United States District Court Judge

STATE'S SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME I OF I – Pages 1 to 25

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TABLE OF CONTENTS

VOLUME I OF I – PAGES 1 TO 25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CASSIE CORDELL TRUEBLOOD, et al.,	)	
	)	
Plaintiffs,	)	Case No. C14-1178-MJP
	)	
v.	)	March 24, 2015
	)	
WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,	)	BENCH TRIAL, Vol. 6 of 7
	)	
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

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EXAMINATION INDEX

EXHIBIT INDEX

cleaning up, their symptoms are managed, and they understand all three prongs of the *Dusky* criteria; whereas, the week before, they weren't.

Q So, Doctor, would you say it's possible to walk into an interview and to immediately know whether a person is competent or incompetent?

A It's possible.

Q How often does that happen?

A Like I said, I like it when it happens, but it doesn't happen often. Like I said, maybe one out of ten. And those are cases where it's clear that there's -- the cases that come to mind are those cases in which there's been a severe traumatic brain injury. There's a clear case of dementia due to Alzheimer's or some other medical problem. And those are really clear.

And there are some that are very clear that are psychotic, and genuinely psychotic, but most require additional consideration.

Q Okay.

A And I still go through all of the steps that I would in a regular competency eval. I'm not going to cut any corners. But the evaluation is a lot simpler.

Q Okay. When it's simpler, does that lend itself to being completed more quickly?

A Sure. Yeah.

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 24th day of March 2015.

/S/ Nancy L. Bauer

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CASSIE CORDELL TRUEBLOOD, et al., Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al., Defendants.	Case No. C14-1178-MJP March 23, 2015 BENCH TRIAL, Vol. 5 of 7

VERBATIM REPORT OF PROCEEDINGS
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EXAMINATION INDEX

EXHIBIT INDEX

do in-jail evaluations as part of their work?

A I am working toward -- the people that I'm hiring now, we've changed their job description so that they don't have a dedicated worksite so that I can move resources to where they're most needed. When we get spikes in referrals at the inpatient unit, I utilize the C18 evaluators to come over and do inpatient evaluations, either initial evaluations or evaluations at the end of competency restorations.

And I also -- we have developed -- I've pulled an evaluator from our PR workforce. The people who are seen in the community or in attorney's offices, I've pulled an evaluator from there to work in-jail cases because they're a higher priority for us. But then periodically we do a large event where people from the community are invited to come to the hospital and participate in competency evaluations at the hospital.

So the people who are primarily cited as jail-based evaluators do conduct two other types of evaluations, both for people who are released into the community. That's a pretty small percentage of their caseload. But as the -- as the wait list has become more and more problematic, I've also used the jail-based evaluators to do more hospital cases in an effort to oversample the restoration cases to make sure that there's nobody who could be returned to jail earlier.

Q Okay. Moving back, when you said "wait lists." Which

Q I'm putting up what has been marked as Defendants' Demonstrative Exhibit A.

Dr. Fredrickson, could you go ahead and identify yourself on this chart?

A Yes. Do you want me to point or...?

Q Go ahead and describe for us --

A Right. I am on the bottom part under Eastern State Hospital, Dr. Timm Fredrickson. I'm the director of the forensic services unit.

Q And how long have you worked at Eastern State Hospital?

A I've worked at Eastern State Hospital for 20 years. Eighteen of those have been as a forensic evaluator, and I've been the clinical director of the forensic services unit since November of 2014.

Q What degrees do you hold?

A I have a bachelor's degree from the University of Montana, a master's degree in psychology from Eastern Washington University, and a doctorate in psychology from Georgia State University. I received my license to practice psychology in the state of Washington in 1988.

THE COURT: Before you go further here, I can't get the realtime to function.

(Brief interruption.)

THE COURT: I'm sorry. The IT department often thinks that my courtroom is the Bermuda Triangle of

A Yakima and the Tri-Cities.
Q And what are the current travel times for Tri-Cities?
A Tri-Cities is only about two and a half hours one way. I don't know why they want it there, because the Yakima people could do the Tri-Cities. That's less than 60. But it's up to -- you know, wherever DSHS wants them. The Yakima people could do Kittitas very easily. But -- but because Tri-Cities and Yakima are the second and third most frequent places to go, that's probably why they want somebody out-stationed.
Q So we were talking a little while ago about documents and the documents that the hospital gets on its own.

Can you tell us how collateral documents are different from the initial referral that the hospital gets after a court order?
A Okay. According to the -- the initial documents that we get are the court order, the police reports. We generate the NCIC. Medical records, as requested, they get as much information as they can collect on a particular individual from different places, because of -- DSHS lists if they have any mental health history. And we get that particular information, and that comes in piecemeal as the people send them to us.

Those are the basic -- that's the basic information that our evaluators want before they do the evaluation, because that gives us a history of what's going on with that

particular individual when they do the interview. The interview consists of talking to them, doing mental status exams, psychological testing, if required or necessary. For example, if the person has an intellectual disability, we have certain types of procedures and assessments that we can use to assess how well they're picking up the information. Those are all specific. So there are a number of those types of assessment tools that we use when we see them.

We also, if necessary, if medical records missed some areas, like I said -- the example I gave about the motor vehicle accident and stuff, then we ask permission to get those. We can get those without having them sign a release of information, but we ask them politely anyway. And then when we get back, we ask for that information, also.

Q Are these collateral documents necessary in every evaluation case?

A I would say not every evaluation case, but for the majority -- I would say they are essential for, I would say, 95 percent of the felony cases.

For the misdemeanor cases, I would say that, from my experience, if we have the data before I go from there, that's all I really need. So having the extra data 25, 30 percent of the time.

Q Why do you say that information is more important to have in a felony case?

A Well, in a felony case, it's more -- I mean, in a felony case, there's more at stake for the individual. So I want -- and when I do them, I want to make sure that I give the best, most accurate evaluation that I can, and I want to evaluate all aspects of it.

Say, for example, a person says they can't read or write, then I would ask for school records to see if that is indeed the case. There are a number of things that are dictated by a particular individual evaluation. If none of that seems important or whatever, then we don't get it. If somebody comes in and the defense attorney wants a quick evaluation, we see them within, let's say, three weeks, and all of a sudden the attorney who is there with me is saying he's not like this, this wasn't what he was like when he came in, usually in those types of situations the assessment can be done very quickly. If he asked if this was something other than a mental disease or defect, proceed, write a quick letter, and it's over. But, again, it's based on the individual.

With felonies, I would say -- how do I say -- I make sure that no stone is untouched before I make my evaluation.

Q Have you observed the difference in how often a felony case is contested, the competency determination is contested versus how often a misdemeanor case is contested?

A It's like night and day. Like I said, when I was doing

C E R T I F I C A T E

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I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 23rd day of March 2015.

/S/ Nancy L. Bauer

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CASSIE CORDELL TRUEBLOOD, et al., Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al., Defendants.	Case No. C14-1178-MJP March 19, 2015 BENCH TRIAL, Vol. 4 of 7

VERBATIM REPORT OF PROCEEDINGS
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UNITED STATES DISTRICT JUDGE

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EXAMINATION INDEX

EXHIBIT INDEX

Q (By Ms. Leaders) Yes. You were talking about the not-eligible-for-admissions.

A So four of the seven are what are called admin PRs, and it says, "medical clearance availability" for the first two, and then, "attorney/interpreter scheduling conflict," and then, "medical record collateral information."

So somebody is requesting information that isn't being provided yet. On the last one, the attorney -- apparently there's some conflict with their schedule, so they're on the list.

And then, "client released from custody and can't be located." So they're pretty self-explanatory.

So they get put on a holding pattern until we're told that the order is no longer being pursued.

Q Okay. And so when they're in this category, how long can someone stay on the wait list?

A A long time. I mean, I've seen -- the longest I've seen was around 300 days.

Q Okay. And does that necessarily mean someone is waiting in jail when they are on the wait list that long?

A I can't say with 100 percent certainty where they are, but most of them are not. Most of the really long wait times are personal recognizance, at least for Western State. The jail-based ones are typically resolved.

MS. LEADERS: Your Honor, I believe this is an agreed

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Dated this 20th day of March 2015.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CASSIE CORDELL TRUEBLOOD, et al., Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al., Defendants.	Case No. C14-1178-MJP March 16, 2015 BENCH TRIAL, Vol. 1 of 7

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EXAMINATION INDEX

EXHIBIT INDEX

MR. CARNEY: I'm sorry. I'm not sure which one you're going to use. I know that that is one that we had questions about.

Why don't you continue, and then we'll take it up after opening is concluded. Okay?

MS. COATS: Okay.

THE COURT: Well, first I think you need to turn your camera on so I can see it.

MS. COATS: Your Honor, can you see it now?

THE COURT: Now I can see it, but I've been handed a hard copy, which is easier for me to read.

Go ahead.

MS. COATS: Thank you, Your Honor. If anybody thinks that a defendant, a criminal defendant, may be incompetent to stand trial, the court can either ask the Secretary of DSHS to designate an evaluator, or appoint an evaluator him or herself.

Most evaluations are conducted within the jails, the exception being those charged with Class A felonies, those whom the appointed evaluator believes that an inpatient evaluation would be more accurate, and those who the court believes needs an inpatient evaluation for health, safety, or similar reasons.

If the person is found competent to stand trial, then, of course, that person will proceed through to the criminal

proceedings and be returned back to jail if they were inpatient for the evaluation.

If the person is found incompetent to stand trial, the person is referred for restoration treatment, unless that person has been charged with a non-serious misdemeanor. The people who are referred for restoration go to restoration for differing periods of time, depending on the particular charges, and, of course, restoration is longer for those who are charged with felonies.

It should be noted that any time during restoration, if a defendant is found to be competent, then that person is returned to jail at that time for the court to then make a determination.

If the court determines after the initial restoration period -- and this is for felonies -- that the person remains incompetent, then there are up to two additional periods of time that the defendant can be at the state hospital for restoration treatment. And then after that, if the defendant is still incompetent, generally the charges are dismissed and the person is referred for civil commitment. And that would be the remaining misdemeanors and the felonies. And then, of course, if the person is restored to competency, then they go on to criminal proceedings.

The class in this case consists of those criminal defendants who are waiting in jail for competency services,

C E R T I F I C A T E

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Dated this 6th day of April 2015.

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Nancy L. Bauer, CCR, RPR
Official Court Reporter

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2015, I electronically filed the foregoing State's Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Noah G. Purcell
NOAH G. PURCELL, WSBA #43492