The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.B.; *et. al.*,

Plaintiffs,

v.

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

Defendants.

No. 14-cv-01178-MJP

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

NOTED FOR: OCTOBER 8, 2014

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I. INTRODUCTION

Defendants concede that Plaintiffs and putative Class members wait *many weeks and months* for competency evaluation and restoration services. Dkt. No. 65 at 2. Meanwhile, suitable beds at the hospitals sit vacant. Jail officials, next friends and expert testimony all confirm the significant and irreparable harm experienced by these individuals because of the prolonged delays. Still, Defendants argue against any intervention by this Court. Defendants do little more than assert their inability to comply with any court order granting emergency relief for lack of money. As the Ninth Circuit noted in *Oregon Advocacy Center v. Mink*, "lack of funds, staff, or facilities" cannot justify Defendants' violation of Plaintiffs' and putative Class members' substantive due process rights by failing to timely provide competency evaluation and restoration services. 322 F.3d 1101, 1121 (2003) (citation and internal quotation marks omitted).

Despite their own characterization of the problem as complex, Defendants easily identify key areas for reform: "space, staffing, and systemic changes." Dkt. No. 65 at 3. The emergency relief Plaintiffs request from the Court is properly focused on concrete, immediate actions that Defendants can take to address space and staffing issues, and no other considerations prevent this Court from granting the relief requested.

II. ARGUMENT

A. The Injunctive Relief Requested Can Be Implemented and Will Have an Effect on the Harms Alleged.

Defendants' response describes things they would like to do, but have not. Defendants speculate that the legislature may give them money, and by this time next year, they may be hiring staff and open a single new unit to *start* dealing with the lack of adequate resources. Decl. of David Lord ("Lord Decl.") ¶5. Plaintiffs' requested remedies, on the other hand, are all things Defendants could start doing now to completely eliminate the waitlist for in-jail evaluations and reduce the wait for hospital-based services.

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1. The Requested Remedy to Use Forensic Beds for Only Forensic Patients Is a Proper Form of Relief.

Plaintiffs requested the Court order that:

> Defendants are enjoined to immediately staff and use all existing space with hardened security at the hospitals for forensic services.

Contrary to Defendants' assertions, not all hardened units are currently being used to serve forensic patients. Defendants carefully qualify their statement by claiming, "Both hospitals fully utilize all *currently funded* space within hardened security for forensic services." Dkt. No. 65 at 7 (emphasis added). However, after the Nisqually earthquake, forensic services were relocated from their old location in a building which became structurally compromised and no longer exists. Decl. of Emily Cooper ("Cooper Decl.") ¶5. While the current Center for Forensic Services was being built, all forensic patients were housed on the S units which had added security, including a yard area with a similar tall fence surrounding it to prevent escape. *Id.* Further, until 2012, the forensic "community unit" was housed on a civil unit. Declaration of Todd Carlisle ("Carlisle Decl.") ¶ 6. WSH moved these patients to E1, a unit that is both hardened and in the forensic services building. Carlisle Decl. ¶¶ 6 and 7. At present, S4 is completely empty, and if staffed, could be used to reduce delays. *See* Cooper Decl. ¶8.

Additionally, E2 at WSH is hardened and is currently used to serve people who were at one time sent to the hospital for forensic services, but have since had their commitments converted to civil commitments when it was determined they could not be restored and criminal charges were dismissed. Carlisle Decl. ¶ 7. At the August TRO hearing, Defendants admitted that these people take up space that could be used to serve Plaintiffs' need for inpatient evaluation and restoration. TRO Hr'g Tr. 21-22, Aug. 7, 2014. These individuals are civil patients and can and should be served on standard civil units, instead of taking up hardened forensic beds.

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At ESH, there are three hardened forensic units with a 31 bed capacity each; however, ESH has routinely artificially lowered that capacity to as low as 25 due to the shortage of psychiatrists. Cooper Decl. ¶ 6. While Defendants state that ESH no longer keeps civil patients on the forensic unit, this practice has occurred in the very recent past. Cooper Decl. ¶ 7.

Plaintiffs' proposed remedy to use all forensic units for only forensic patients would provide immediate relief tailored specifically to alleviate Plaintiffs' irreparable harm. Freeing up this hardened unit would allow for these beds to serve people in jails waiting for evaluation and restoration services at WSH and ESH.

2. The Requested Remedy to Move Civil Patients and the Highest Level NGRI Patients to Civil Units Is a Proper Form of Relief.

Plaintiffs requested the Court order that:

> Defendants are enjoined to immediately transfer any civil patients on the forensic units and those patients found Not Guilty by Reason of Insanity who have a conditional release, partial conditional release, or have attained the highest level from the forensic units to standard, non-hardened, 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.

As described above, there is an entire unit of civil patients occupying a hardened unit at WSH. Additionally, from time to time, individual civil patients occupy other beds on the forensic unit. Cooper Decl. ¶7. Also, forensic patients who had been found Not Guilty by Reason of Insanity (NGRI) are housed within the forensic services building, no matter how stable their clinical condition. Cooper Decl. ¶9. As with the patients who have been converted from forensic to civil commitment described above, here too, Defendants admitted to the Court at the August TRO hearing that serving NGRI patients limits bed space for Plaintiffs and putative Class members. TRO Hr'g Tr. 21.

The NGRI patients are assigned levels based upon their behavior and responsiveness to treatment. Carlisle Decl. ¶5. Those with the highest levels are those doing the best behaviorally and clinically. *Id.* NGRI patients with the highest levels have not always been housed on the

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hardened units. In the past, NGRI patients at WSH with the highest levels were served on the "community unit" which was located on a civil unit, not in the hardened Center for Forensic Services. Carlisle Decl. ¶ 6. Defendants fail to mention this fact, instead claiming that this request "places patients and staff at grave, physical risk." Dkt. No. 65 at 14. In fact, former WSH medical director Dr. Marylouise Jones has publicly stated that:

> What the public may not realize, is that many of the individuals who are not guilty by reason of insanity, and who have remained hospitalized for many years, these individuals have stabilized. They're bright, they're articulate, they're compassionate. These are individuals that, again, present no more risk to the community.

Disability Rights Washington, *The Megaphone Effect: Reclaiming Recovery*, YOUTUBE at 7:35-7:52 (May 29, 2013), http://youtu.be/ahsprUekAI0. Because Defendants admitted the burden NGRI patients place on bed space at the August TRO hearing before this Court, the relatively recent historic practices at WSH, and Dr. Jones's admission that the highest level NGRI patients are quite stable and not dangerous, Plaintiffs have requested a simple, reasonable change back to the prior practice of serving these individuals on a non-hardened unit to free up additional space for inpatient evaluation and restoration services needed by Plaintiffs. While Defendants claim this would violate patient rights because they cannot make individualized clinical determinations, Plaintiffs foresaw this concern and asked that the injunction provide a process by which Defendants could explain why the move was not appropriate for an individual.

Plaintiffs' requested relief that some additional forensic space be created by moving the most stable, long-term NGRI patients to the civil unit on which they used to reside is appropriate and would provide immediate relief tailored specifically to alleviate Plaintiffs' irreparable harm. Defendants' protests against this relief ring hollow and contradict their own previous position.

3. The Requested Remedy of Immediately Contracting Directly with Private Evaluators Is a Proper Form of Relief.

Plaintiffs requested the Court order that:

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> Defendants are enjoined to immediately contract directly with all private evaluators identified by either defense counsel or prosecutors in each county, at each evaluator's regular rate, to conduct competency evaluations in addition to existing evaluators and those evaluators who can be pulled from outpatient evaluations to staff the additional inpatient units ordered above.

Defendants have intentionally set reimbursement rates for private evaluators low. They admit that the purpose of this is to discourage qualified psychologists from conducting these evaluations as private contractors. *See* Roberts Decl. [Dkt. No. 61] ¶ 8c (stating that paying private sector more may entice state evaluators to move to private sector). Ironically, this is exactly the opposite of what the state legislature intended when it directed Defendants to reimburse private evaluators:

> in an amount that will encourage in-depth evaluation reports. Subject to the availability of amounts appropriated for this specific purpose, the department shall reimburse the county in an amount determined by the department to be fair and reasonable with the county paying any excess costs. The amount of reimbursement established by the department must at least meet the equivalent amount for evaluations conducted by the department.

Wash. Rev. Code § 10.77.073(4). With this in mind, Plaintiffs proposed Defendants do just this, pay evaluators what evaluations actually cost in the private market because that is clearly a reasonable rate set by the market to complete "in-depth evaluation reports."

If Defendants were serious about their commitment to providing timely competency evaluation and restoration services, they would incentivize counties to utilize the alternate competency evaluation process outlined in Wash. Rev. Code § 10.77.073 by reimbursing counties at a reasonable market rate of $1,500 per case. Morris Decl. [Dkt. No. 45] ¶ 17. It is unsurprising that the majority of counties do not utilize the alternate process, as Defendant DSHS limits reimbursement for such evaluations to $800 *per case*. *Id.* ¶ 17, Ex. H. As King County defense attorney Daron Morris testifies, this reimbursement rate is unreasonable because prevailing market rates for an evaluator is $200 to $300 per hour, and an evaluator needs more than three to four hours to evaluate an individual suspected to be incompetent to stand trial. Morris Decl. ¶ 17.

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Defendants protest that there are very few qualified evaluators to conduct these evaluations. This has to do with how many private evaluators could be marshaled, not whether they should be marshaled at all, and is not a reason to not even try. More importantly, one of the arguments WSH has made over the years is that it cannot retain staff because other providers attract them with greater pay, benefits, or other work related considerations. Carlisle Decl. ¶ 8; *see also* Roberts Decl. [Dkt. No. 61] ¶ 5 ("Private, federal, and state agencies viciously compete to recruit form this limited pool [of forensically trained psychiatrists and psychologists].")

By contracting for private evaluations, Defendants can tap into that market that is currently working elsewhere but not willing to work for the amount the state is willing to pay its employees. Thus, people who previously worked for Defendants and left for "greener pastures" could be enticed to use their training on a limited basis to assist with this dire situation without leaving their more appealing day jobs. As previously discussed, the fact that this may cost Defendants more money is no legitimate impediment to the relief requested.

B. Plaintiffs Have Satisfied the Requirements for a Temporary Restraining Order.

As the record shows, the harms to Plaintiffs that flow from Defendants' refusal to act immediately are many, and a temporary restraining order enjoining Defendants to take practicable steps to address space and staffing issues will remedy those harms.

1. Defendants' Own Evidence Proves Plaintiffs' Likelihood of Success on a Due Process Claim.[1]

Defendants mischaracterize Plaintiffs' claim as one requiring an interpretation of state law, namely, Wash. Rev. Code § 10.77.068, which establishes a target deadline of seven days for the completion of competency evaluation and restoration services for individuals detained in jail.[2] In fact, the Ninth Circuit in *Mink* evaluated the issue as one of Constitutional law, and "con-

[1] At this time, Plaintiffs do not seek relief from the court under the Americans with Disabilities Act, 42 U.S.C. § 12132 *et. seq. See* Dkt. No. 41.

[2] Defendants mistakenly assert that Plaintiffs rely on Wash. Rev. Code § 10.77.220 as a source for a seven-day deadline. Dkt. No. 65 at 18. Plaintiffs do not. *See* Dkt. No. 41.

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clude[d] that [Defendant state hospital] violates the *substantive due process* rights of incapacitated criminal defendants when it refuses to admit them in a timely manner." 322 F.3d at 1121-22 (emphasis added).

Whether or not seven days is a mandatory deadline required by the U.S. Constitution is irrelevant, as the proper analysis for determining whether the substantive due process rights of Plaintiffs and putative Class members have been violated is "determined by balancing their liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." *Id. See also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1126 (W.D. Wash. 2013) (finding violation of Sixth Amendment right to counsel without finding failure to adhere to specific numerical standards for constitutional adequacy of counsel because public defense system caseloads so exceeded any reasonable standard proposed).

"[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Defendants have articulated no legitimate state interest in the prolonged detention of Plaintiffs and putative Class members. Defendants' own waitlists for evaluation and restoration services at WSH and ESH show that in the last six months, *58% to 86%* of the WSH waitlist has been composed of people waiting in jail longer than twenty days for evaluation or restoration services. Cooper Decl. [Dkt. No. 57], Exs. A-C. For ESH, in the last six months, *81% to 93%* of the waitlist has been composed of people waiting in jail longer than twenty days for evaluation or restoration services. *Id.*

Defendants seek to avoid responsibility for Plaintiffs' unlawful detention, claiming that it is due to the pending criminal charges. To the contrary, after an evaluation or restoration is ordered, the criminal charges are stayed. Plaintiffs thereafter are simply being warehoused in jails because Defendants do not timely provide evaluation and restoration services as required by law. Whether the U.S. Constitution requires Defendants to provide Plaintiffs and putative Class members with evaluation and restoration services within seven days is a question the Court need not

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answer now, as Plaintiffs have established that the current waitlists and delays far exceed the bounds of constitutional acceptability.

2. Plaintiffs Suffer Irreparable Harm.

Defendants misplace blame for Plaintiffs' harms on counties and local jails. Dkt. No. 65 at 10-11. Even more disturbing, Defendants propose that individuals detained in jails awaiting competency evaluation and restoration services should receive court-ordered involuntary administration of medication rather than Defendants take concrete, immediate, and necessary steps to address their waitlists and delays. *Id.* at 11. As Pierce County Jail Mental Health Manager Judy Snow testifies, "To force medication in a jail setting is not only burdensome, it is also tragic when it is clear that the individual needs to be in a therapeutic environment." Snow Decl. [Dkt. No. 42] ¶ 15. Ms. Snow continues, "Even with medications, individuals in this environment continue to decompensate because a jail setting is isolated with minimal interaction with others." *Id.* Involuntary administration of medication does not address the fact that Plaintiffs and putative Class members are suffering from decompensation and exacerbation of their mental health conditions *because* Defendants routinely fail to timely provide evaluation and restoration services.

Testimony from Plaintiffs' expert Dr. Terry Kupers and jail officials across the state refutes the notion that jails are capable of providing the services that Defendants are statutorily required to provide. "Mental health treatment in jail, on average, is relatively skimpy and is targeted for the subpopulation of inmates who require psychotropic medications or become suicidal during their tenure at the jail." Kupers Decl. [Dkt. No. 50], Ex. A at 5. Jails are not therapeutic settings. Snow Decl. ¶ 12 (noting that "An individual is more likely to decompensate and regress in [jail]."). Even Spokane County Jail, which *is* a licensed mental health provider, contends that jails cannot provide competency restoration services because *jails are correctional settings and not therapeutic treatment settings*. Ray Decl. [Dkt. No. 56] ¶ 10. As the Ninth Circuit recognized without hesitation in *Mink,* the harm at issue here is caused by Defendants' delays, not the county jails.

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

Ultimately, the gravamen of all the objections lodged by Defendants is that fixing this longstanding problem will cost money. However, 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 & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (internal quotation marks omitted).

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

Defendants mischaracterize Plaintiffs' request as contrary to the public interest by failing to recognize that the populations served by Defendants in their civil and forensic units are in fact one and the same. As Plaintiffs' witnesses note, Plaintiffs and putative Class members are frequently low-level offenders who are charged with misdemeanors for behaviors that are the direct result of symptoms associated with mental health conditions. Stanfill Decl. [Dkt. No. 53], ¶ 7; Morris Decl. ¶ 21; Snow Decl. ¶ 17. It is well-documented that Plaintiffs and putative Class members suffer serious mental, physical, and emotional harm due to their prolonged detention, often in solitary confinement, in jails without adequate mental health treatment. Cooper Decl. [Dkt. No. 57], Ex. K at 16; Kupers Decl., Ex. A at 12.

C. This Court Has Authority to Grant Preliminary Injunctive Relief.

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

"A federal court's obligation to hear and decide a case is virtually unflagging. Parallel state-court proceedings do not detract from that obligation." *Sprint Commc'ns, Inc. v. Jacobs*, ___ U.S. ___, 134 S. Ct. 584, 591 (2013) (citations and quotations omitted). "Circumstances fitting within the *Younger* doctrine . . . are exceptional," *id.* at 588, and notwithstanding Defendants' erroneous assertions to the contrary, those circumstances are not present in this case.

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Abstention is appropriate only where federal court jurisdiction would result in "undue interference" with state court proceedings. *Id*. As Defendants concede, a federal court abstains only if that court's exercise of jurisdiction would enjoin or have the practical effect of enjoining, ongoing state court proceedings. Dkt. No. 65 at 22. Ruling on the merits of Plaintiffs' Motion for a Temporary Restraining Order would not impact the outcome of individual Plaintiffs' criminal cases. Defendants fail to even allege that a ruling from this Court would result in undue interference with the adjudication of Plaintiffs' criminal matters. Exercising jurisdiction and granting relief here would hasten rather than impede adjudication of Plaintiffs' claims and Plaintiffs' criminal cases, accelerating the lifting of the stay due to competency concerns.

Defendants argue that because state courts are addressing evaluation and restoration delays, this Court cannot do so. This argument fails for two reasons. First, "[t]he mere potential for conflict in the results of adjudications does not, without more, warrant staying exercise of federal jurisdiction, much less abdicating it entirely." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1151 (9th Cir. 2007) (citation and quotations omitted). That state courts may also be considering individual criminal defendants' challenges does not require abstention.

Second, Defendants routinely ignore orders issued by state courts regarding transport of individual class members. Defendants cannot both ignore those orders they here describe as "appropriate and effective relief," Dkt. No. 65 at 21, and also urge this Court to abstain based on those orders.

Defendants cite to an order issued by a Snohomish County judge for immediate transport of a putative class member to WSH. Leaders Decl. [Dkt. No. 62] ¶ 6. But Defendants stated that they would not follow this order. Cooper Decl. [Dkt. No. 57] ¶ 8 (quoting email from Defendants' counsel Amber Leaders stating "WSH will not be able to transport her . . . as directed by Judge Weiss.").

Defendants also cite to proceedings involving Q.M., a named Plaintiff in this matter. Leaders Decl. ¶ 14. The trial judge ordered immediate transport of Q.M. on September 5, 2014.

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At a September 9, 2014 hearing, Defendants' counsel stated that an order for immediate transport would not be obeyed. Cooper Decl. [Dkt. No. 57, Ex. H]. As of October 6, 2014, Plaintiff Q.M remains in solitary confinement in King County Jail. Defendants' repeated and willful violation of state court orders requires that this Court exercise its jurisdiction over this matter.

2. Defendants' Request for Certification of Unspecified Issues to the Washington Supreme Court Fails to Meet the Requirements of both Washington and Federal Law for Certification and Should Be Denied.

a. *Certification is not permitted under Washington law because Plaintiffs federal constitutional claim does not rely on state law.*

Wash. Rev. Code § 2.60.020 provides that a federal court may certify a question to the Washington Supreme Court only when "it is necessary to ascertain the local law of [Washington] in order to dispose of [the] proceeding and the local law has not been clearly determined." Plaintiffs claim that Defendants are violating their Fourteenth Amendment rights by failing to provide competency evaluation and restoration services in a timely manner. Defendants have failed to identify a single question of state law that is necessary to adjudicate Plaintiffs' federal constitutional claim.

Defendants cite to four statutes, none of which requires interpretation to adjudicate Plaintiffs' constitutional claim. First, Defendants contend that Wash. Rev. Code § 10.77.068 sets performance targets, not a hard deadline, for admitting individuals for competency evaluation or restoration. Plaintiffs agree. *See* Dkt. 41 at 2. Plaintiffs claim that the Fourteenth Amendment requires that individual Plaintiffs receive treatment services in a timely manner. Wash. Rev. Code § 10.77.068 supports Plaintiffs' claim, but is not necessary to it. There is no need for further state court interpretation of this statute.

Second, Defendants rely on Wash. Rev. Code § 10.77.086(1)(a)(i) to suggest that unlike in *Mink*, where the hospital had a duty to take custody of an incompetent detainee, Washington law contemplates alternative placements, such as "an appropriate facility" or "an agency designated by the department." Defendants' reading ignores the plain text of the statute. It provides

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that after a detainee has been found incompetent, the court shall court "[s]hall commit the defendant to the custody of [DSHS] who shall place such defendant in an appropriate facility of the department for evaluation and treatment." Regardless of where DSHS places an individual, it is obligated to take custody of the person.

Third, Defendants contend that the seven-day deadline referenced in Wash. Rev. Code § 10.77.220 is directed only at admission of detainees who have been found not guilty by reason of insanity. Plaintiffs have not relied on this statute in their motion for a temporary restraining order, and no question regarding this statute needs to be certified to the state supreme court.

Finally, Defendants contend that Wash. Rev. Code § 10.77.088 anticipates that individuals charged with misdemeanors will wait in jail for restoration. Plaintiffs do not contest this, but the question of how long these individuals can be held in jail while awaiting restoration requires this court to interpret the constitution, not Washington statutes.

b. Federal Law Holds That Certification Is Neither Necessary Nor Appropriate Because State Law Is Clear and Certification Will Not Save Time, Energy, or Resources.

None of the state statutes Defendants cite are ambiguous, but under federal law, even where state law is unclear on a particular issue, certification is not mandatory. *Carolina Cas. Ins. Co. v. McGhan*, 572 F. Supp. 2d 1222, 1225 (D. Nev. 2008) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974)). Rather, when a federal court confronts an issue of state law that the state's highest court has not addressed, the federal court's task typically is to predict how the state's highest court would decide the issue. *See Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 812 (9th Cir. 2002); *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 865 (9th Cir. 1996).

In some circumstances, certification to a state's highest court is appropriate because it may "save time, energy, and resources and help [ ] build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391. Those circumstances are not present here. None of the statutes De-

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fendants cite create any confusion regarding Plaintiffs due process claims and certifying a question will only prolong the harm suffered by plaintiffs as they languish in jail awaiting evaluation and treatment.

III. CONCLUSION

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

Dated this 7th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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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DATED: October 7, 2014, at Seattle, Washington.

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