The Honorable MARSHA J. PECHMAN

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

| | |
|---|---|
| TRUEBLOOD *et al*,<br>Plaintiffs,<br>v.<br><br>WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES *et al*,<br><br>Defendants. | NO. C14-1178 MJP<br><br>DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (DKT NO. 87)<br><br>**NOTED FOR DECEMBER 5, 2014** |

To evaluate whether waiting times for competency evaluation and restoration comply with due process, a court must balance the individual's liberty interest against the government's interest in detention. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003). There are a number of different waiting periods at issue in this case, each giving rise to different State interests. The Department of Social and Health Services (the Department) concedes that some of the waiting periods are excessive and indefensible, and therefore that partial summary judgment is appropriate. The remaining reasonable waiting periods comply with due process. If they are contested by the Plaintiffs (and it appears that they are not), the Court should allow the Department to present expert testimony regarding the nature of the waiting periods and the government's interests to enable the Court to make a fully



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

informed application of the balancing test. In any event, the Court should limit any summary judgment ruling based on the specific facts presented here.

There are two categories of detention at issue: detention for competency evaluation and detention for competency restoration. Within the evaluation category, there are two classes of court ordered detention: A) evaluation in-jail; and B) inpatient evaluation at a state hospital. Wash. Rev. Code § 10.77.060(1)(c) and (d). With respect to detention for in-jail felony competency evaluations by Eastern State Hospital (ESH) evaluators, the State agrees that the current average 59-day wait period is excessive and indefensible and that partial summary judgment is appropriate. The average wait time for in-jail misdemeanor evaluations by ESH is 31 days. The average wait period for in-jail evaluations by Western State Hospital (WSH) evaluators, by contrast, is consistently below 20 days. Misdemeanor defendants ordered to undergo inpatient evaluations at ESH wait no time, and felony defendants wait 47 days. The Department concedes that 47 days is excessive and indefensible and that partial summary judgment is appropriate. All inpatient evaluations at WSH wait less than 30 days. Plaintiffs appear to concede that this complies with due process. If they are not making this concession, there are issues of material fact in dispute that will impact the Court's application of the balancing test.

The second category of detention occurs after a state court has ordered competency restoration. Wash. Rev. Code § 10.77.086, .088. Within this category, there are three classes of detention for court-ordered restoration based on the crime charged: A) serious felonies; B) non-serious felonies; and C) serious misdemeanors. Wash. Rev. Code §§ 10.77.086, .088. Currently, the average waiting times for admission to WSH for competency restoration for criminal defendants with serious and non-serious felony charges are 89 and 71 days, respectively. The State agrees that these wait times are excessive and indefensible. The average waiting times for admission to WSH for serious misdemeanors is far lower, at 21 days. The average waiting times for admission to ESH for competency restoration are 20 days or less



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

regardless of the nature of the criminal charges. If Plaintiffs are contesting these lower waiting times, summary judgment should be denied so that the State can present evidence regarding its legitimate interest in these reasonable waiting periods.

As the Department's concessions should indicate, the State recognizes that current wait times for many criminal defendants are excessive and indefensible. The Court should limit its holding to addressing the problems currently presented, rather than seeking to establish bright-line rules to govern every future case. The Supreme Court's longstanding directive to federal courts is particularly appropriate here: A federal court must never " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Brockett v. Spokane Arcades*, 472 U.S. 491, 501 (1985).

## I. COUNTER STATEMENT OF FACTS

The Department has worked diligently to provide competency evaluation and restoration services to criminal defendants. However, provision of these services is frustrated by a lack of funding, persistent increases in demand, difficulty in maintaining staffing levels, and problems created by third parties whom the Department does not control. Because of this, completion of evaluations and admission to the hospital has at times been delayed. The Department does not dispute that during the relevant period of this lawsuit[1] some criminal defendants have waited an excessive and indefensible period of time. It is not true that *all* class members have waited an excessive amount of time.

The Court should be wary of the manner in which Plaintiffs present statistical facts. Specifically, presenting the Court with the number of years the Department has used a waitlist or the total number of people on such waitlists on a given day is misleading. Even if the Department were providing competency services to all criminal defendants within three days, a

[1] This suit is brought under 42 U.S.C. § 1983. "[T]he appropriate statute of limitations in a § 1983 action is the three-year limitation of Wash. Rev. Code § 4.16.080(2)." *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991).



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

waitlist would be necessary to track who should be admitted tomorrow, and who should be admitted three days from now. Similarly, stating that *x* number of criminal defendants are awaiting services on a given day is completely devoid of context without considering how long those persons had waited. Plaintiffs cherry-pick a specific moment in time to arrive at a conclusion that the wait times are 30 days for evaluation and 60 days for restoration, but offer no reason or rationale as to why that particular moment is the one this Court should consider. The present wait times are not reflective of what Plaintiffs propose, and thus renders their request anchorless, with no basis in the current facts.

Under Washington statutory law competency evaluation and restoration are governed by distinct statutory sections and mechanisms. Wash. Rev. Code §§ 10.77.060, .084. Both categories of competency services are further distinguished based on either the setting of the evaluation or the length of the initial restoration period. Wash. Rev. Code §§ 10.77.060, .086, .088. Criminal trial courts may order an evaluation to occur either at the state hospital, in the community, or in jail. Wash. Rev. Code § 10.77.060(1)(c) and (d). The setting for an evaluation may change based on the unique needs of a particular criminal defendant. Wash. Rev. Code 10.77.060(1)(c). When a criminal trial court orders an incompetent defendant to receive competency restoration at a state hospital the length of time allowed for the initial restoration period is based on the crime charged. Wash. Rev. Code §§ 10.77.086(1)(a) and (b), .088(1)(a). Criminal defendants charged with nonfelonies may be committed to the state hospital only if the nonfelony is classified as "serious," as defined in Wash. Rev. Code § 10.77.092. Wash. Rev. Code § 10.77.088(1)(a) and (2). Criminal defendants charged with a class C felony or "a class B felony that is not classified as violent under [Wash. Rev. Code] 9.94A.030" may be initially committed for 45 days. Wash. Rev. Code § 10.77.086(b). All other criminal defendants charged with felonies may be committed for up to 90 days for their initial restoration period. Wash. Rev. Code § 10.77.086(1)(a). These statutorily created distinctions result in different wait times for



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

criminal defendants because of the Department's efforts to maximize admissions to the state hospital. The current wait times are as follows:

| | Western State Hospital[2] | Eastern State Hospital[3] |
|---|---|---|
| In-Jail Evaluations | 15 days (average) | 59(felony)/31(misdemeanor) |
| Inpatient Misdemeanor Evaluations | 13 days | 0 days |
| Inpatient Felony Evaluations | 27 days | 47 days |
| Misdemeanor Restorations | 21 days | 0 days |
| 45 Day Felony Restorations | 71 days | 20 days |
| 90 Day Felony Restorations | 89 days | 5 days |

In early 2014, WSH reinstituted the use of a prioritization algorithm for the admissions waitlist. Declaration of Barry Ward, Psy.D. (Ward Decl.) ¶ 5. The bed allocation algorithm takes advantage of the differential lengths of stay for the various types of admissions to most efficiently use available bed space. *Id.* To account for these differences, WSH has assigned a certain portion of forensic beds based on the average number of "bed days" used[4], which results in a more rapid turnover of these beds. Ward Decl. ¶ 6. Because some categories of court-ordered criminal defendants have lower average lengths of stay/bed day utilization, those shorter-term categories of beds turn over 3-6 times faster than the longer term categories allowing for more forensic admissions in those categories over time. *Id.* Within those beds available, WSH uses two "wheels" to allocate forensic beds – a fast-turning "wheel" (shorter average stays) and a slow-turning "wheel" (cases with longer average stays, typically felony

[2] Declaration of Alfred Bouvier ¶ 5.
[3] Declaration of Yaroslav Trusevich ¶¶ 5-6.
[4] "Bed days" are the average number of days a particular category of court-ordered criminal defendant occupies bed space at WSH on that specific order. For example, felony inpatient evaluations use an average of 12.4 bed days, and misdemeanor inpatient evaluations use an average of 11 bed days. Misdemeanor restorations use an average of 21.4 bed days, 45-day restorations use an average of 34.9 bed days, and 90-day restorations use an average of 69.9 bed days. Ward Decl. ¶ 5.



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

restoration). Ward Decl. ¶ 7. This use of a short term category improves admission efficiency for at least some criminal defendants. *Id.* This algorithm has reduced the wait times for the inpatient competency evaluation cases, the misdemeanor restoration cases, and has prevented as great a rise in the 45-day restoration wait times despite increased referral and reduction in available beds due to increased number of beds occupied by Not Guilty by Reason of Insanity referrals. *Id.* Those wait times for the shorter term cases will continue to reduce in the coming months. Ward Decl. ¶ 8. Between August 8, 2014 and November 25, 2014, inpatient felony evaluation wait times have dropped from 42 days to 27 days, and misdemeanor restoration wait times have dropped from 42 days to 21 days. Inpatient misdemeanor referrals are currently waiting an average of 13 days. *Id.* The WSH inpatient evaluations and misdemeanor restoration wait times have come down, and the statutory target of seven days or less to admission is expected to be reached sometime in December 2014 or January 2015. *Id.*

ESH does not utilize a bed allocation algorithm as WSH does. Dkt. #61, ¶ 12 (Declaration of Dorothy Sawyer). ESH faces different difficulties with wait times, the longest of which are for criminal defendants awaiting in-jail evaluations. ESH provides forensic services for 20 counties, covering a large geographic area. All of ESH's forensic evaluators are based at ESH in Spokane County. *Id.* ¶ 7. The vast distances between the various counties create unique difficulties for ESH in coordinating and staffing the in-jail evaluations in those counties. *Id.*

Plaintiffs also present facts regarding how often the Department has met the statutorily set performance target. Dkt. #87, at 4. While the Department does not dispute these statistics, facts regarding how often the Department met Washington's *statutory performance target* are wholly irrelevant to the constitutional question at issue in this motion. Similarly, the conclusions contained in the JLARC and consultant reports, *id.* at 4-5, are based on the premise of improving wait times to the point of meeting the statutory performance targets. While this information is useful in answering the question of how to lower wait times, the reports were



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

not formulated with the constitutional minimums in mind and are not evidence of a constitutional violation. This evidence, although undisputed, cannot be conflated to dictate what is necessary for the Department to meet the constitutional minimum. The Court should disregard irrelevant information in deciding the legal question raised in this summary judgment motion, and focus on the narrow set of relevant and agreed facts presented by Plaintiffs' motion. Although the Department does not materially dispute that wait times indeed exist for Plaintiffs and many class members, the Department encourages this Court to consider the whole factual picture, not just the limited and outdated points in time Plaintiffs rely upon to support their case.

## II. ARGUMENT

This Court should grant only a narrow and constrained partial summary judgment that addresses the most extreme wait times because: the Plaintiffs' motion presents only a narrow question of law based on limited and undeveloped facts; due process analysis requires a full balancing of the state's interests against the criminal defendants' liberty interests; because under the Constitution reasonable wait times are allowable and additional facts are necessary for this Court to balance less than the most extreme wait times; and the record is incomplete as to the extent and nature of legitimate governmental interests at play when analyzing reasonable wait times. This analysis, and a full record that supports it, are necessary because the Supreme Court authority supporting *Mink* declines to set arbitrary bright lines, the *Mink* court did not engage in a meaningful balancing test, and Washington law distinguishes this case from *Mink*. Finally, this Court should carefully tailor rules concerning the right to restorative treatment to recognize that the right to such treatment arises only in the context of ongoing governmental confinement.

This Court should decline to specify an exact and uniform point in time at which a violation arises. Instead, this Court should do exactly what the Plaintiffs request in this motion – adjudicate whether the current undisputed facts present such a violation as a matter of



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

law, and only later craft an injunctive remedy, if necessary, after hearing the evidence presented at trial. The narrow set of undisputed facts before the Court in this motion allows for partial summary judgment only on the most extreme wait times. Summary judgment on lesser wait times is not proper at this time because disputes of material fact exist regarding the Department's legitimate interest in a reasonable delay.

**A. Summary Judgment Standard**

Summary judgment is warranted pursuant to Fed. R. Civ. P. 56(a) if the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine dispute as to any material fact. *Tarin v. Cnty. of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). Once a party has moved for summary judgment, Fed. R. Civ. P. 56(c) requires the nonmoving party to go beyond the pleadings and identify facts that show that a genuine issue for trial exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If a plaintiff moves for summary judgment, the plaintiff has the burden of presenting admissible evidence to support each of these elements. *See Lujan v. Wildlife Fed.*, 497 U.S. 871, 888-89 (1990). It is then incumbent on defendants to demonstrate that there are legitimate issues of fact that preclude the granting of summary judgment. *Celotex*, 477 U.S. at 323-24. While Plaintiffs may be entitled to partial summary judgment concerning the most extreme of the evaluation and restoration wait times, summary judgment is otherwise precluded by disputed material facts concerning what legitimate state interests justify a *reasonable* period of delay.

**B. This Court Should Answer Only The Narrow Question Presented By Plaintiffs' Motion**

The Plaintiffs ask that this Court declare that violations of Constitutional principles of due process exist for class members. The Department disagrees with Plaintiffs that this Court's declaration should identify substantive due process violations based on arbitrary numbers. The Court should instead base its ruling on the more detailed facts presented by the



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

Department. This Court should only formulate a narrow rule of constitutional law based on the precise facts before it, and not based on arbitrary, outdated or speculative numbers. This narrow approach is supported by law, the narrow set of agreed facts underlying this summary judgment motion, and the approach that other district courts have taken to this issue.

This Court is the arbiter of the U.S. Constitution, tasked with drawing the outer bounds of acceptable governmental behavior on the most limited and narrow basis. Federal Courts have adhered to the tenet " 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,' " *United States v. Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us to consider the case that is actually before us," *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring). As the Supreme Court in *Addington v. Texas* recognized, it is the role of the federal court to enforce the constitutional minimum. *Addington v. Texas*, 441 U.S. 418, 431 (1979) ("As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.").

The narrow question presented by Plaintiffs' summary judgment motion is whether a substantive due process violation exists at the boundaries of the current wait times for competency services. Plaintiffs also request this Court to make a factual finding absent a full and complete record that the current wait times are 60 days and 30 days for restoration and evaluation respectively because "pretrial detainees were routinely incarcerated" for those periods of time. Dkt. #87, at 1, Proposed Order at 3. At trial, witnesses will testify about the function of competency services in Washington. State expert witnesses are expected to testify to the disutility in setting restoration standards arbitrarily, and are expected to point to the lack of nationwide uniformity in setting bright line standards. In addition, they are expected to address, in light of the relative complexity of Washington's statutes, the facts that can and should be taken into account when applying the due process balancing test described herein.



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

These considerations represent material facts that will fully inform this Court's decision, and without which a full and complete decision cannot be had. Further, the factual deficiencies identified by this Court in denying the Plaintiffs' second TRO motion are not remedied by the facts submitted with the instant motions. Those same facts are relevant to assessing whether or not the governmental interests the Department has proffered are sufficient to overcome the liberty interests of Plaintiffs. While these facts will be important at trial, they are not properly developed and before this Court in this summary judgment motion. These precise facts are yet to be presented by either party, and absent such precision, this Court should decline to formulate a rule declaring when due process violations occur other than based on the limited facts before the Court. In this motion, the only legal question supported by the undisputed facts now before the Court is whether or not the outer boundaries of the wait times are repugnant to substantive due process. The Department agrees that at the extremes, the wait times for certain classes of criminal defendants are indefensible under any legal analysis, but, absent a full and complete record, the Department discourages this Court from formulating answers to constitutional questions based on arbitrary, overly broad, and outdated timeframes as requested by Plaintiffs.

Other courts take a deliberate approach to avoid proclaiming a bright-line for due process violations defined in an exact number of days. These courts typically engage in two separate inquiries: (1) is the current delay a violation of constitutional rights, and (2) what remedy will prevent future violation? *See Mink*, 322 F.3d 1101, 1107, 1122 (concluding that waiting for "weeks and months" was a violation of due process, and the remedy employed by the district court was not an abuse of discretion); *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934 (E.D. Ark. 2008) (concluding that "lengthy and indefinite" periods of incarceration caused by the lack of space cannot be constitutionally inflicted upon the members of the class, but the Court stated that it would await the remedy phase to determine what length of wait is constitutionally permissible, even though the "length of wait experienced by inmates today is



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

far beyond any constitutional boundary"); *Advocacy Center for Elderly and Disabled v. Louisiana Dep't of Health and Hospitals*, 731 F. Supp. 2d 603, 621-24 (E.D. La. 2010) (concluding that preliminary injunction was appropriate because the state's interest did not outweigh the criminal defendants liberty interests, declining to specify what number of days were appropriate as a matter of law). Each of these courts was able to retain the concept of reasonableness by divorcing the rule of law from what remedy was necessary to prevent future constitutional violation.

Approaching the question using this two-part analysis allows courts to avoid the problem of creating a *de facto* time limit at which substantive due process is offended. Creating such a fixed, inflexible legal bright-line is contrary to the individualized balancing test called for by the Fourteenth Amendment, and leaves no room for structured implementation of relief intended to remedy wait time violations. While these court orders provide some guidance about what wait times may be violative of due process, none creates a constitutional rule for violations of due process for those awaiting competency services. Plaintiffs cite the *Mink* case as illustrative and "indistinguishable" from the case at hand. But even *Mink* does not set a constitutional rule of substantive due process defined in days. In *Mink*, the Ninth Circuit affirmed that *absent a legitimate state interest* it was a constitutional violation to delay transport for "weeks or months," and affirmed the remedy issued by the district court: injunctive relief ordering admission within seven days based upon Oregon's own statute. In this manner, the district court in *Mink* avoided declaring a bright line, and this Court should similarly decline to make such a declaration.

### C. Substantive Due Process Requires Balancing An Individual's Liberty Interest Against The Government's Legitimate Interest In Restraining That Liberty

Courts have repeatedly recognized that under certain circumstances the government may fairly infringe on an individual's liberty interest and detain individuals prior to any adjudication of guilt. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (police may arrest and



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

detain until a neutral magistrate can determine whether probable cause exists); *Bell v. Wolfish*, 441 U.S. 520, 536 (1979) (the government may deny bail and continue to detain a defendant pretrial in order to ensure his appearance); *United States v. Salerno*, 481 U.S. 739, 747-48 (1987) (the government's interest in preventing crime by arrestees is both legitimate and compelling).

A criminal defendant awaiting competency services in jail unquestionably has a liberty interest in freedom from restraint. Freedom from involuntary physical restraint has always been at the core of the liberty interest protected by the Due Process Clause from arbitrary governmental action. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Foucha*, 504 U.S. 71, 80 (1992). The state's primary governmental interest is a fundamental one: bringing the accused to trial. *See Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."). In deciding "[w]hether the substantive due process rights of incapacitated criminal defendants have been violated[,]" courts must consider the facts of the individual case and proceed "by balancing [the criminal defendant's] liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state[.]" *Mink*, 322 F.3d at 1121; s*ee Youngberg v. Romero*, 457 U.S. 307, 321 (1982); *Sell v. U.S.*, 539 U.S. 166, 179-80 (2003) (distinguishing the seriousness of the crime, among other factors, as essential to the determination of the government's interest in restraining the liberty interests of pretrial detainees in refusing involuntary medications).

Plaintiffs do not challenge the ability to, at least initially, detain criminal defendants for the purpose of evaluating or restoring their competency for trial. Instead, Plaintiffs argue that the prolonged detention of criminal defendants waiting in jail for competency services is a per se violation of the criminal defendants' due process rights because those defendants have a liberty interest in freedom. But after declaring that all criminal defendants have an identical



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

liberty interest, Plaintiffs only balance one side of the due process scale. Dkt. #87, at 12. Plaintiffs erroneously exclude the essential counterbalance in any substantive due process analysis: the legitimate government interest in evaluating and restoring the competency of defendants so that they may fairly be brought to trial. The government also has a legitimate interest in detaining individuals awaiting competency services who have pending criminal charges, particularly when those charges are of a serious nature. Persons with criminal charges such as murder, serious assaults, and sexual assaults are currently members of the Plaintiff class. Ward Decl. ¶ 9. Further, the government has a legitimate interest in providing competency services to criminal defendants in an organized and efficient manner that appropriately uses public resources.

These legitimate governmental interests may outweigh an incompetent defendant's liberty interest in being free from confinement, but it requires a balancing of these dueling interests and a review of the particular facts supporting the government's interest in prosecution of criminal defendants. *Youngberg*, 457 U.S. at 320 (as with any substantive due-process claim, a court must balance the individual's liberty interest against the government's asserted interest in restraining that liberty). Courts must consider the facts of each individual case in evaluating this interest in prosecution to fairly reach any substantive due process determination. As discussed in more detail below, these legitimate government interests exist even if *Mink* did not recognize them, and the failure of *Mink* to recognize a legitimate interest in a reasonable delay can be explained by the dissimilar nature of competency evaluation and restoration under Oregon State Law versus Washington Law. Based on the appropriate analysis, Washington State does have a legitimate interest in <u>*reasonable*</u> delays before provision of competency services.

///

///

///



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

**D. Plaintiffs' Analysis Of The Legitimate Government Interest In This Case Is Incomplete**

In support of their argument, Plaintiffs rely heavily on the Supreme Court's decision in *Jackson v. Indiana*, 406 U.S. 715 (1972) and the Ninth Circuit's decision in *Mink*, 322 F.3d at 1121. In concluding that Jackson's *indefinite* confinement was unconstitutional, the Supreme Court recognized that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738; *see also Foucha*, 504 U.S. at 72 (the nature of commitment must "bear some reasonable relation to the purpose for which the individual is committed"). The *Mink* analysis abandons the concepts of indefinite detention and reasonableness to fashion new law regarding the constitutionality of pretrial detentions. The correct analysis to be applied to this case must take into account the controlling law *Mink* is based on, the limitations of the *Mink* court's analysis, and the dissimilar nature of competency services under Washington law.

**1. The U.S. Supreme Court Did Not Set A Bright Line Standard In *Jackson***

In *Jackson*, the state criminal trial court found that Mr. Jackson "lack(ed) [sic] comprehension sufficient to make his defense" and ordered him committed to the Indiana Department of Mental Health until such time as that Department should certify to the court that "the defendant is sane[.]" This amounted to an indefinite commitment. *Jackson*, 406 U.S. at 720. The *Jackson* Court went on to hold:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

*Jackson*, 406 U.S. at 738. A constitutional inquiry under *Jackson* is properly focused on (1) whether the incompetent defendant has been held for a *reasonable* amount of time to determine whether he will attain competency; and (2) when it is believed that the defendant's competency can be attained, whether his *continued* commitment is "justified by progress toward that goal." *Id.* The *Jackson* court declined to set "arbitrary time limits" for the reasonable duration of pretrial commitment. *Id.* at 738-39. This Court should do the same. Therefore the concept of reasonableness is inextricably linked to the *Jackson* analysis, and thus the wait times in this case.

The Federal Courts faced an analogous legal question in how to define and enforce the guarantees of the Constitution's speedy trial right. In the seminal U.S. Supreme Court decision addressing speedy trial, the Court explained "We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise." *Barker v. Wingo*, 407 U.S. 514, 523 (1972). The wisdom of *Barker* supports the conclusion that this Court should create a flexible rule that adopts the concept of reasonableness embraced by *Jackson* and *Barker*.

**2. The *Mink* Court Did Not Engage In A Meaningful Balancing Test**

In *Mink*, relying on *Jackson*, the Ninth Circuit took a step further and enunciated that "[h]olding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." *Mink*, 322 F.3d at 1122. Plaintiffs rely heavily on this statement and analogize the Oregon plaintiffs to the Plaintiffs and class members in this case calling them "indistinguishable". Dkt. #87, at 15. This comparison completely misapprehends the *Mink* case and the different nature of the Plaintiffs and class members before this Court. The *Mink* decision failed to



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

engage in a complete due process balancing analysis based on the conclusion that no legitimate state interest was presented to the court. *Mink*, 322 F.3d at 1121. The *Mink* court considered only a "lack of funds, staff or facilities[,]" concluding that did not excuse a lack of performance. *Id.* (citing *Ohlinger v. Watson,* 652 F.2d 775, 779 (9th Cir.1980) (finding adequate and effective treatment is constitutionally required for sexually dangerous persons because, absent treatment, they could be held *indefinitely* as a result of their mental illness)). In the instant case, the government's interests in detaining incompetent criminal defendants extends beyond "lack of funds, staff, or facilities" as asserted by Plaintiffs, and includes the interest in fairly and quickly determining competency, an interest in an ordered and efficient forensic system, and an interest in detaining criminal defendants awaiting competency services and adjudication.

Further distinguishing this case, unlike the plaintiffs in *Mink*, the Plaintiffs here are neither limited to one category of criminal defendants who are all governed by the same statutory mechanisms, nor subject to the possibility of an "indefinite commitment" as they were in Oregon. Moreover, the admission of criminal defendants to the state hospitals in Washington are not governed by a statute placing the sole burden on the Department to admit within seven days. Wash. Rev. Code §§ 10.77 *et. seq.*; *but see Mink*, 322 F.3d at 1119.

The criminal defendant plaintiffs in *Mink* were ordered to Oregon State Hospital (OSH) for the same duration of restoration treatment, regardless of their criminal charges. Or. Rev. Stat. § 161.370(5) ("[t]he superintendent of a state hospital or director of a facility to which the defendant is committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery into the superintendent's or director's custody"). But even prior to ordering such commitment for inpatient treatment, the Oregon criminal trial courts did a balancing analysis by determining whether the governmental interest in detention outweighed the defendants' liberty interest. Or. Rev. Stat. § 161.370(2) ("the court may release the defendant on supervision if it determines that care other than commitment for incapacity to



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

stand trial would better serve the defendant and the community.")[5] All plaintiffs in *Mink* faced up to 60 days, once admitted to the state hospital, before an evaluation had to be completed. Or. Rev. Stat. § 161.370(5). Furthermore, all *Mink* plaintiffs faced the possibility of an "indefinite" commitment under Oregon law, only limited by three years or the period of time equal to the maximum sentence the court could have imposed if convicted, whichever was shorter. Rev. Or Stat. § 161.370(6) and (7)(a).[6] The Oregon statutory scheme led the *Mink* court not to engage in a more nuanced balancing inquiry of when detention was violative of due process for Oregon criminal defendants awaiting competency services; to the *Mink* court, the legitimate governmental interests in additional detention were the same: non-existent. The Oregon legislature removed any such governmental interest in drafting its statutory scheme. For criminal defendants facing potentially indefinite commitments, who had already been determined to require inpatient rather than community treatment and whose time for treatment would not begin until admission to the hospital, there can be no legitimate government interest in additional time in detention absent treatment. Oregon was granted, by statute, ample time and opportunity to accomplish its "fundamental interest in bringing the accused to trial." *Mink*, 322 F.3d at 1121. Any additional detention without treatment only frustrated that interest. In this case, however, the governmental interests in additional detention prior to admission to the state hospital are preserved by the time limited and state hospital-focused statutory scheme of Washington.

---

[5] This language is from the Oregon statute in effect at the time of *Mink*. Or. Rev. Stat. §161.370 has been modestly changed since that time, but remains substantially similar on the relevant points.

[6] Or. Rev. Stat. § 161.370(6): "[i]f the superintendent or director determines that there is a substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the court otherwise orders, the defendant shall remain in the superintendent's or director's custody where the defendant shall receive treatment designed for the purpose of enabling the defendant to gain or regain capacity."

Or. Rev. Stat. § 161.370(7)(a): "A defendant who remains committed under subsection (6) of this section shall be discharged within a period of time that is reasonable for making a determination concerning whether or not, and when, the defendant may gain or regain capacity. However, regardless of the number of charges with which the defendant is accused, in no event shall the defendant be committed for longer than whichever of the following, measured from the defendant's initial custody date, is shorter: (A) Three years; or (B) A period of time equal to the maximum sentence the court could have imposed if the defendant had been convicted."



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

### 3. Washington Law Distinguishes This Case From *Mink*

The substantive issue presented in this motion is what factual circumstances inform the determination of a reasonable period of time during which a criminal defendant may be detained without treatment awaiting competency restoration services. By beginning restoration timeframes at admission, releasing some defendants on supervision if appropriate, and allowing for long-term commitments in all circumstances, Oregon law provided ample time in which to determine competency, and to restore it for purposes of trial. Conversely, in Washington, all competency services are expressly time-limited, Washington competency restoration law is not limited to a single category of pretrial detainees who are all governed by the same statute, the admissions of those detainees to the state hospital are not governed by a statute placing the sole burden on the Department to admit within seven days, and Washington law does not start the time for competency services from the point of admission on all types of competency referrals.[7] *See* Wash. Rev. Code §§ 10.77.084, .086, .088. The Plaintiffs and class members in this case do not come before the Court in the same position as the plaintiffs in *Mink* or the criminal defendant in *Jackson*.

Unlike *Jackson* or *Mink*, at least some of the Plaintiffs and class members in this case are waiting reasonable periods of time based on the government's legitimate interest in detaining them. The U.S. Supreme Court in *Jackson* did not set the due process line at "weeks and months", and the Ninth Circuit in *Mink* only does so absent a proper balancing analysis. Without question, an indefinite commitment of criminal defendants awaiting competency services without treatment would be repugnant to the Due Process Clause of the Constitution. But the point when detention becomes violative of due process, in the absence of an indefinite commitment, requires the courts to engage in a balancing test to identify the precise facts in

[7] Inpatient evaluations: 15 days admission to state hospital. Wash. Rev. Code 10.77.060(1)(c).
Nonfelony restoration: 14 days, plus any unused evaluation time, from admission to state hospital. Wash. Rev. Code §10.77.088.
Nonserious felony restoration: 45 days for the initial restoration. Wash. Rev. Code 10.77.086(1)(b).
Serious felony restoration: 90 days for initial restoration. Wash. Rev. Code 10.77.086(1)(a).



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

which competing state interests might outweigh the protected constitutional interest. *See Washington v. Harper*, 494 U.S. 210, 221 (1990) (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)). This Court has not been presented with a sufficient factual record to fully engage in the proper balancing analysis concerning wait times that are not patently excessive or indefensible. The Department agrees that a criminal defendant's continued detention in jail awaiting competency services must be justified by a legitimate government interest, such that due process rights are violated if the Department fails to provide competency services within a reasonable amount of time following receipt of the order of competency services. But what amount of time is reasonable, and when a due process violation occurs, necessarily depends on balancing the liberty interest not to be detained against all of the government's legitimate interests in that detention.

The Department argues that it is premature to formulate a constitutional rule declaring when a substantive due process violation occurs absent a full and complete record. Plaintiffs erroneously focus on a purported governmental interest of "lack of funds, staff or facilities[,]" and assume that other government interests do not exist or assume the governmental interest is identical for all named plaintiffs and class members simply because the Plaintiffs' liberty interests are identical. Within the context of this motion, the Court should refrain from formulating a constitutional rule based on an incomplete balancing test, without the facts necessary to perform the balancing test, and using the arbitrary time periods set out by Plaintiffs.

**E. Absent Confinement, There Is No Freestanding Constitutional Right To Restorative Treatment**

Because named Plaintiffs and some class members may no longer be confined, this Court must carefully approach and analyze Plaintiffs' request for a finding that there is a right to restorative treatment. Dkt. #87, at 13-16. There is no such freestanding right under the Fourteenth Amendment, and restorative treatment by the government is only required when



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

current confinement exists. Prosecution of a criminal defendant who is legally incompetent to assist in his or her own defense violates fundamental interests of due process. *Dusky v. United States*, 362 U.S. 402, 402, (1960). To ensure protection of this right, Washington has established statutory procedures in criminal courts for the determination and restoration of competency. Wash. Rev. Code §§ 10.77 *et. seq*. An incompetent defendant's continued detention for competency restoration must be justified by progress toward that goal, such that his due process rights are violated if he or she fails to receive any competency restoration within a reasonable amount of time following the court's entry of the order of commitment. *Supra*. However, absent this continued confinement and prosecution, "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 196 (1989). Controlling legal authority such as *Jackson* and *Youngberg* "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. Therefore, any right that a criminal defendant class member has to receive competency restoration treatment arises from the fact that competency restoration is the state's sole justification for infringing on the defendant's liberty interest in being free from confinement.

The imprecise statement in *Mink* that "[i]ncapacitated criminal defendants have liberty interests in freedom from incarceration *and* in restorative treatment[,]" failed to carefully limit this statement to only those persons to whom it must necessarily apply: criminal defendants who are currently confined. *Mink*, 322 F. 3d at 1121 (emphasis added). That confinement is a necessary component of this right to restorative treatment is borne out by the authority upon which *Mink* relies, mainly *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir.2000) (finding the Due Process Clause requires states to provide civilly-committed sexual offenders with access



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

to mental health treatment that gives them a realistic opportunity to be cured and released and not committed *indefinitely)* and *Ohlinger v. Watson*, 652 F.2d at 779 (9th Cir.1980) (finding adequate and effective treatment is constitutionally required for sexually dangerous persons because, absent treatment, they could be held *indefinitely* as a result of their mental illness). Both of these decisions focus on what care the government must provide when the government confines a person.

This Court must be particularly careful in adjudicating this case, where disparate groups of competent and incompetent criminal defendants have been grouped into a single class, and where named Plaintiffs' and class members' factual circumstances have changed because they have been released from confinement. This Court should not endorse the idea that there is a stand-alone right to restorative treatment under the Fourteenth Amendment. Any right to receive treatment must be explicitly linked to an ongoing governmental restraint. Because some of the named Plaintiffs and class members no longer suffer from ongoing restraint, the Court should carefully dissect Plaintiffs' request for a finding "that Plaintiffs and class members have a liberty interest in receiving restorative treatment," *see* Dkt. #87, at 15, and narrowly tailor any declaration of the right.

///

///

///

///

///

///

///

///

///

///



ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

## III. CONCLUSION

The Department recognizes that current wait times for many criminal defendants are excessive and indefensible. However, the Court should limit its order to addressing the problems put at issue by Plaintiffs' current motion, rather than seeking to establish bright-line rules to govern every future case or possible wait time. The Court should limit any summary judgment ruling based on the specific facts presented here, and, as such, only partial summary judgment is appropriate.

RESPECTFULLY SUBMITTED this 1 day of December, 2014.

ROBERT W. FERGUSON
Attorney General

JOHN K. MCILHENNY, JR., WSBA No. 32195
SARAH J. COATS, WSBA No. 20333
AMBER L. LEADERS, WSBA No. 44421
NICHOLAS A. WILLIAMSON, WSBA No. 44470
Assistant Attorneys General
Attorneys for Defendants

Office of the Attorney General
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

**CERTIFICATE OF SERVICE**

*Beverly Cox*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this 1 day of December 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David Carlson: davidc@dr-wa.org

Emily Cooper: emilyc@dr-wa.org

Sarah A. Dunne: dunne@aclu-wa.org

Margaret Chen: mchen@aclu-wa.org

Anita Khandelwal: anitak@defender.org

Christopher Carney: Christopher.Carney@CGILaw.com

Sean Gillespie: Sean.Gillespie@CGILaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 1 day of December 2014, at Olympia, Washington.

Beverly Cox

Beverly Cox
Legal Assistant

Office of the Attorney General
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565