

The Honorable Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

<p>A.B., by and through her next friend Cassie Cordell Trueblood, <i>et al.</i></p> <p>Plaintiffs,</p> <p>v.</p> <p>Washington State Department of Social and Health Services, <i>et al.</i>,</p> <p>Defendants.</p>	<p>No. 14-cv-01178-MJP</p> <p>PLAINTIFFS’ MOTION TO RECONSIDER SCOPE OF INJUNCTION REGARDING IN-JAIL EVALUATIONS</p> <p>Noted for Hearing: June 24, 2016</p> <p><i>Oral Argument Requested</i></p>
--	---

I. INTRODUCTION

This matter comes before the Court on remand from the Ninth Circuit Court of Appeals. The questions before this Court require a substantive due process balancing of the parties’ interests, based on the evidence, to determine (1) the appropriate timeframe for which Defendants must complete in-jail competency evaluations;¹ (2) whether any non-clinical exceptions must be included in the injunction; and (3) whether Defendants’ purported target deadline of fourteen (14) days, embodied in Wash. Rev. Code 10.77.068, is sufficient to protect

¹ The Ninth Circuit’s remand only pertains to jail-based evaluations. This Court’s injunction requiring admission of class members who have been ordered to the state hospital for evaluation within seven (7) days remains in effect.

Plaintiffs’ Mot. to Reconsider Scope of Injunction
Regarding In-Jail Evaluations - 1
No. 14-cv-01178-MJP

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION
901 FIFTH AVENUE #630
SEATTLE, WA 98164
(206) 624-2184

1 class members' from unconstitutional prolonged detention and forward legitimate state interests.
2 Dkt. 131 at 22. In this matter, the substantive due process balancing test of the parties' interests
3 as informed by pretrial briefing, evidence adduced at trial, and post-trial evidence, clearly
4 requires Defendants to complete competency evaluations within ten (10) days of the issuance of
5 a court order as a ten-day timeframe protects Plaintiffs' interests in being free from infringement
6 on their liberty and respects Defendants' interests in operating an efficient forensic mental health
7 system.

8 II. FACTUAL BACKGROUND

9 A. Defendants' History of Failing to Provide Timely Competency Evaluations

10 It is undisputed that the Defendants have failed to timely complete competency
11 evaluations due to persistent funding and staffing problems. Dkt. 95 at 1 (conceding that "some
12 of the waiting periods are excessive and indefensible."). Defendants have long been aware of
13 problems with delays of competency evaluation and the unnecessary and unjustifiable restriction
14 on Plaintiffs' liberty such delays cause. For example, Defendants admit that they have failed to
15 timely evaluate the competency of individuals in jails and have, in fact, maintained waitlists for
16 evaluation for the last fifteen years. Dkt. Nos. 57-1 at 3-47; 57-2 at 37.

17 In 2012, state law set a target deadline of seven days for Defendants to complete
18 competency evaluations for individuals detained in city and county jails. Wash. Rev. Code §
19 10.77.068 (2012) (amended 2015). This target deadline mirrored the Ninth Circuit's ruling in
20 *Mink*, which protected people who have been court-ordered to receive competency services from
21 languishing in jails for longer than seven (7) days. *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101,
22 1123 (9th Cir. 2003). The purpose of the 2012 state law was, in part, to reduce the time class
23 members spend in jail awaiting evaluation. Wash. Rev. Code 10.77.068 (2012) (amended 2015).

1 However, according to the Joint Legislative Audit and Review Committee (“JLARC”) who was
2 tasked to review Defendant’s legislative reports, even though the law was in effect for three (3)
3 years prior to the trial in this matter Defendants never consistently met the seven-day target
4 deadline. Dkt. No. 42-3 at 2, 7, 16, 24 and 34.

5 To determine the cause of the significant delays in the provision of competency services,
6 Defendants hired consultants, Groundswell, as recommended by JLARC. Dkt. No. 194-6.
7 Groundswell found there are systemic problems with Washington’s forensic mental health
8 system, including a “lack of infrastructure specific to forensic services, a lack of systemic
9 training and oversight for forensic clinicians, and a lack of community-based alternatives to
10 lengthy inpatient hospitalization for incompetent defendants and [not guilty by reason of
11 insanity] acquittees.” *Id.* at 4. Groundswell stated that Defendants have “an insufficient number
12 of evaluators to conduct all the evaluations required.” *Id.* at 10. Groundswell concluded that
13 Washington’s forensic mental health system was unable to meet its obligations under state law
14 because it is inadequately funded and therefore understaffed. *See id.* at 11. Testimony at trial
15 was consistent with the Groundswell, JLARC, and Defendants’ legislative reports. Dr. Danna
16 Mauch, Plaintiffs’ expert witness on statewide forensic mental health systems and now this
17 Court’s monitor in this matter, found that delays in competency evaluations were primarily due
18 to shortages in evaluators. Cooper Decl. Ex. A at 152-53.

19 In early 2015, weeks before the trial in this matter, Defendants championed a bill that
20 maintained a target of seven days for providing in-jail competency evaluations, and purported to
21 set a maximum deadline of fourteen days. Cooper Decl. Ex. B. This bill passed both houses on
22 March 10, 2015, less than a week before the bench trial in this matter began. *Id.*

1 **B. Class Members Are Often Court-Ordered to Both Receive Competency**
2 **Evaluations and Competency Restoration Services and Have Liberty**
3 **Interests in Timely Receipt of Services**

4 Class members waiting in jail for competency services from Defendants may be either
5 waiting for evaluation or restoration. The distinction between class members waiting for
6 competency evaluations and those waiting for competency restoration services is the latter has
7 been evaluated and found incompetent. *See Trueblood v. Washington State Dep't of Soc. &*
8 *Health Servs.*, No. 15-35462, 2016 WL 2610233, at *5 (9th Cir. May 6, 2016). However, all
9 class members have several things in common.

10 First, all class members are incarcerated in city and county jails waiting for a court-
11 ordered competency service due to a court finding that there are such significant mental health
12 issues that their trial cannot proceed. Dkt. 83. And delays in the provision of competency
13 services causing class members to languish in jail trigger similar constitutional concerns of
14 undue infringement on liberty interests regardless of whether the delay is the completion of
15 evaluation or admittance to a hospital for evaluation or restoration services. This is because in
16 all instances, the underlying criminal proceedings cannot advance for any class member court-
17 ordered to be evaluated or restored until they receive those services and are deemed competent to
18 stand trial. *See Wash. Rev. Code § 10.77.050; Wash. Rev. Code § 10.77.084; see also Wash.*
19 *Sup. Ct. Crim. R. 3.3(e)(1)* (excluding all proceedings related to the competency of a defendant
20 to stand trial when computing time for trial). This means that if class members are found
21 innocent or incompetent, the time these class members spend in jail waiting for evaluation or
22 restoration will simply be time lost.

23 Second, a person deemed incompetent and in need of restoration services cannot receive
24 those services until they receive a competency evaluation. In Washington State approximately

1 fifty percent of people court-ordered to receive a competency evaluation are deemed incompetent
2 to stand trial. Cooper Decl., Ex. C at 8. This means that while pre-evaluation class members
3 may be incompetent and in need of restoration treatment, and thereby protected by *Mink*'s seven
4 (7) day standard for the provision of restoration services, there is no way to make that
5 determination until an evaluation is conducted.

6 Finally, the longer Defendants wait to provide competency services the longer it takes for
7 class members' criminal matters to be adjudicated. For class members who are ultimately
8 deemed incompetent, prolonged delays in completing the in jail evaluation undermines
9 Defendants' interest in restoring them as the longer Defendants delay providing competency
10 restoration services the more entrenched mental illness can become and the harder it can be to
11 restore a person to competency. Cooper Decl., Exhibit C at 27-28.

12 III. PROCEDURAL HISTORY

13 The original Complaint in this matter was filed on August 4, 2014. Dkt. 1. Plaintiffs
14 filed a Second Amended Complaint on September 12, 2014, establishing Disability Rights
15 Washington ("DRW") as the organizational plaintiff and alleging Defendants were violating the
16 due process rights of pre-trial detainees waiting in jail for weeks or months for court-ordered
17 competency services. Dkt. 24. On November 6, 2014, Plaintiffs moved for summary judgment,
18 alleging that there was no dispute that Defendants failed to provide timely competency services
19 and that, as a matter of law, this failure constituted a violation of Plaintiffs' due process rights.
20 Dkt. 87. Defendants conceded that many of its wait times were "indefensible." Dkt. 95 at 1.
21 The District Court granted partial summary judgment, finding that the "in jail wait time [of two
22 weeks to months] experienced by Plaintiffs and class members [were] far beyond any
23 constitutional boundary." Dkt. 104 at 11. The District Court declined to rule that Defendants

1 were required to provide services in seven days and instead found “that determination of the
2 precise outer boundary permitted by the Constitution depends on facts to be proven at trial.” *Id.*
3 at 11.

4 After a seven-day bench trial, during which the District Court heard extensive testimony
5 from witnesses presented by both parties, the Court concluded that Defendants were violating
6 class members’ substantive due process rights and found “seven days to be the maximum
7 justifiable period of incarceration absent an individualized finding of good cause to continue
8 incarcerating that person” without providing court-ordered competency services. Dkt. 131 at 13.
9 The Court explained that all parties’ interests are furthered by a seven-day deadline finding that
10 the timeframe limits class members’ incarceration and provides them with prompt treatment
11 while the timeframe also forward the State’s legitimate interests by enabling the State to bring
12 those accused to trial swiftly and to run an efficient forensic mental health system. *Id.*

13 This Court issued a three-part permanent injunction that had the effect of requiring
14 Defendants to: (1) complete in-jail evaluations within seven days and in the instances where
15 evaluations will take longer than seven days to admit class members to the hospital where they
16 can wait for an evaluation in a therapeutic environment; (2) admit class members to a hospital for
17 evaluation within seven days; and (3) admit class members to a hospital for restoration services
18 within seven days. Dkt. 131 at 22.

19 Defendants subsequently appealed the first part of the injunction moving the Ninth
20 Circuit to reverse the district court’s holding that the Constitution requires competency
21 evaluations to be *completed* within seven days. *Trueblood v. Washington State Dep’t of Soc. &*
22 *Health Servs.*, No. 15-35462, 2016 WL 2610233, at *4 (9th Cir. May 6, 2016).

1 In its opinion, the Ninth Circuit agreed with this Court that the Fourteenth Amendment
2 requires that “DSHS must conduct competency evaluations within a reasonable time following a
3 court’s order.” *Trueblood*, 2016 WL 2610233, at *1. The Ninth Circuit also affirmed this Court’s
4 finding that an injunction was necessary and held that an injunction “remains an appropriate
5 vehicle for monitoring and ensuring that class members’ constitutional rights are protected.” *Id.*
6 However, the Ninth Circuit vacated the specific seven-day time limit to complete in jail
7 evaluation and remanded this case back to this Court to modify its order in a fashion that
8 provides an explicit balancing of interests more specific to in jail evaluation including
9 consideration of a 2015 state statutory change. *Id.* at *7-8. The Ninth Circuit’s partial reversal
10 was predicated on the fact that this Court –“unduly focused its ruling on the timing of services
11 that were attainable as a practical matter rather than the constitutional parameters of the remedy,”
12 *id.*, and that this Court’s “findings [were] couched in terms of what is ‘reasonable and
13 achievable,’ not whether the state’s present fourteen-day requirement bears the constitutionally
14 requisite reasonable relationship, or whether the balancing of the interests requires a seven-day
15 deadline,” *id.* at *6. With its reversal, the Ninth Circuit directed this Court to modify its
16 permanent injunction and fashion a remedy that takes into account “the balancing of interests
17 related specifically to initial competency evaluations,” *id.* at *8; “weigh the interests related to
18 competency evaluations as distinct from other competency services”, *id.* at *6; and “articulate a
19 sufficiently strong constitutional foundation to support the mandatory injunction,” *id.*

20 Plaintiffs now move this Court, consistent with the Ninth Circuit’s direction, for an order
21 finding that the proper balancing of the state's legitimate interests with the constitutionally
22 protected interests of the class supports an injunction mandating that Defendants complete in-jail
23

1 evaluations for class members within ten days of the signing of a state court order for such
2 services.

3 IV. ARGUMENT

4 “It is well recognized that detention in a jail is no substitute for mentally ill detainees
5 who need therapeutic evaluation and treatment.” *Id.* at 1; Dkt. 131 at 9-11. To ensure that class
6 members’ liberty interests are not unduly infringed and that they are not subjected to correctional
7 facilities that may harm them, this Court must determine the appropriate balance of the parties’
8 interests and determine a timeframe in which Defendants are to complete court-ordered, jail-
9 based competency evaluations for class members.

10 Since this Court’s April 2, 2015 order, the parties and this Court are in a much better
11 position to determine the legitimacy of Defendants’ arguments that factors outside of its control
12 require this Court to develop a lenient timeframe for Defendants to complete jail-based
13 competency evaluation. This is because, pursuant to this Court’s orders, Defendants have kept
14 record of the causes of the delays in evaluations. Having access to the underlying reasons for the
15 delays allows this Court to analyze Defendants’ proffered reasons for the delays, determine
16 whether any have merit, and weigh the legitimate state interests against Plaintiffs’ vulnerability
17 and interest in being free from prolonged incarceration while awaiting evaluations.

18 A. Substantive Due Process Requires Class Members’ Detention be Reasonably 19 Related to the Underlying Purpose of the Incarceration

20 The fundamental right to freedom from restraint is expressly guaranteed by the
21 Fourteenth Amendment and has always been at the core of due process protections. *See*
22 *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). This “vital liberty interest” is “a basic
23 assumption with which we guide our lives: the state may not incarcerate any individual randomly

1 and without specific protective procedures.” *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470,
 2 1476 (9th Cir. 1992); *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014).

3 **B. A Balancing of the Parties’ Legitimate Interests Require an Injunction**
 4 **Directing Defendants to Provide In-Jail Competency Evaluations Within Ten**
 5 **Days**

6 1. Plaintiffs Have a Liberty Interest in Freedom from Incarceration

7 The right to be free from incarceration is so fundamental that when a state confines a
 8 person to evaluate their competency, such confinement “must be justified by progress toward
 9 that goal.” *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Further, “[d]ue process requires that
 10 the nature and duration of commitment bear some reasonable relationship to the purpose for
 11 which the individual is committed.” *Id.* *See also Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir.
 12 1980) (holding that “a person committed solely on the basis of his mental incapacity has a
 13 constitutional right to receive such individual treatment as will give each of them a realistic
 14 opportunity to be cured or to improve his or her mental condition” (internal quotation marks
 15 omitted)).

16 Similar to the plaintiffs in *Mink*, *Oviatt*, and *Ohlinger*, class members here have a
 17 constitutionally protected liberty interest in freedom from prolonged incarceration while waiting
 18 for Defendants to provide them mental health competency evaluation. This is, in part, because
 19 the jails in which class members are incarcerated are punitive, not therapeutic environments,
 20 which undermine the mental health of individuals awaiting competency evaluations. Dkt. No. 42
 21 at ¶ 12; Dkt. No. 56 at ¶ 10; Dkt. No. 57-2 at 16, Cooper Decl., Ex. A at 4-11; Ex. D at 11- 30:
 22 Indeed, the rate of medication compliance in jails is low and class members do not receive
 23 treatment beyond minimum crisis management. *Id.* Local jails “often lack resources to identify
 and offer even initial treatment. This lack of resources can cause delays in treatment, but also

1 exacerbation of symptoms for the defendant.” Dkt. No. 57-2 at 16.22, Cooper Decl., Ex. D at 29-
 2 30. Further, while incarcerated in county jails, class members are isolated and are often
 3 victimized. *Id.* The result is that, while incarcerated in local jails, “class members are not
 4 receiving the mental health treatment they need[,]” and “[e]ach additional day of incarceration
 5 causes further deterioration of class members’ mental health, increases the risks of suicide and of
 6 victimization by other inmates, and causes illness to become more habitual and harder to cure,
 7 resulting in longer restoration periods or in the inability to ever restore that person to
 8 competency.” Dkt. 131 at 4-11, 19; *see also* Cooper Decl., Ex. D at 11-30.

9 2. Defendants Have a Legitimate State Interest in Detention Only for the
 10 Period Necessary to Complete a Jail-Based Competency Evaluation

11 In findings and conclusions that were not challenged by Defendants on appeal, this Court
 12 found that “[t]he State’s primary governmental interest in regard to Plaintiffs and class members
 13 is to bring those accused of a crime to trial.” ER 23; *See* Dkt. 95 at 12-13 (discussing State’s
 14 interest in “evaluating and restoring the competency of defendants so they may fairly be brought
 15 to trial”). The State has a corresponding “legitimate interest[s] in evaluating a potentially
 16 incompetent defendant’s competency so as to determine whether he or she may stand trial” and
 17 doing so through an “efficient and organized competency evaluation... system[.]” Dkt. 131 at 18.

18 However, the state's legitimate interest in conducting accurate competency evaluations
 19 does not include a legitimate interest in delay for the sake of delay, past the length of time
 20 needed to efficiently complete the evaluation. Delaying competency services “undermines the
 21 state’s fundamental interest in bringing the accused to trial.” *Mink*, 322 F.3d at 1122 (citing
 22 *Illinois v. Allen*, 397 U.S. 337, 347 (1970)). This is because delaying competency services for
 23 those who are incompetent often make it difficult to restore them to competency. Cooper Decl.,
 Ex. D at 11-30. Defendants acknowledge that prolonged incarceration makes it more difficult to

1 restore class members to competency. Dkt. No. 51-1 at 4; Dkt. 88-2 at 18. Further, during such
 2 delays, evidence and testimony can go stale which undermines Defendants' interests in a timely
 3 adjudication of criminal matters.

4 3. Staffing and Funding Shortages are not Legitimate State Interests to
 5 Justify Prolonged Incarceration of Class Members

6 “[L]ack of funds, staff or facilities” is not a legitimate state interest that would justify a
 7 state health agency subjecting vulnerable class members to prolonged detention by failing to
 8 provide necessary services and thereby violating their substantive due process rights. *Mink*, 322
 9 F.3d at 1121.

10 It is undisputed that the Defendants have failed to timely complete competency
 11 evaluations as required by state law. Dkt. No. 42-3 at 2, 7, 16, 24 and 34. Likewise it is
 12 undisputed that the overwhelmingly predominant causes of delays are persistent funding and
 13 staffing problems. *See supra* at 3. At trial, Defendants conceded that funding and staffing were
 14 the predominating causes of delays in competency evaluations. For example, former Assistant
 15 Secretary for Behavioral Health and Service Integration Administration, Jane Beyer,
 16 acknowledged that only 7-10% of the delay in completion of outpatient evaluations could be
 17 attributed to outside factors. Cooper Decl., Ex. C at 5-6; 8-9.

18 **C. Defendants' Legitimate State Interests Justify Only Very Narrow Exceptions**

19 In its remand, the Ninth Circuit notes that this Court “excludes the possibility of an
 20 extension for delays attributable to non-clinical interests of a detainee awaiting evaluation,
 21 including the unavailability of defense counsel or a defense expert.” *See Trueblood*, 2016 WL
 22 2610233, at *7. Plaintiffs agree that a narrow exception for defense counsel availability could be
 23 drawn that will protect both legitimate state interests and the interests of the class. Defendants

1 have not identified any other non-clinical issue that justifies an exception to the time limits to
2 complete in-jail competency evaluations.

3 At trial and on appeal, Defendants argued that non-clinical matters outside of their
4 control such as defense counsel availability and time to obtain court orders and other necessary
5 documents compromised their ability to meet a seven-day time limit for in-jail competency
6 evaluations. Cooper Decl., Ex. C at 6-7; *see Trueblood*, 2016 WL 2610233, at *7.

7 At trial, the testimony and evidence provided by the Defendants conceded that the
8 combination of all such factors outside Defendants' control were barriers to the timely provision
9 of competency services only 7-10 percent of the time, whereas in the vast majority of cases
10 delays were caused by shortages of staff and funding. Cooper Decl., Ex. G at 15-16; Ex. E at 5-9.

11 Defendants' post-trial records make clear that the testimony presented at trial correctly
12 identified the cause of the delays. Indeed, the post-trial records and trial testimony are all
13 consistent with the Groundswell, JLARC, and Defendants' reports. *See Supra* at 3; Dkt. 236-1 at
14 33-59. All of the evidence points to the fact that delays in jail-based competency evaluations are
15 primarily due to shortages in evaluators and Defendants' failure to prioritize services to class
16 members – not as a result of any legitimate state interest in delaying all competency evaluations.
17 *See* Cooper Decl, Ex. A.

18 1. Concern over defense counsel availability is not a legitimate state interest
19 justifying a universal deadline beyond 10 days

20 The State's own documents generally acknowledge that defense counsel availability is
21 not a substantial cause of the delays. Dkt. 25-4 at 61-71; Dkt. 180 at 31 ("Absent the wait lists
22 that are attributed to staff shortages, DSHS notes they soon will have enough evaluators to
23 address routine levels of demand for evaluations.."); Dkt. 194-3 ("Washington's primary strategy

for expediting access to competency evaluations is focused on adding qualified evaluation

1 personnel based on forecasted demand.”); Dkt. 223-1 at 13:15-17. The evidence at trial was that
2 defense counsel availability was not a significant problem causing delays, and that with adequate
3 effort to accommodate evening and weekend scheduling, it should not become a problem.

4 Cooper Decl., Ex. A at 13-15.

5 Moreover, Defendants have refused to take reasonable steps to address the potential for
6 delays caused by the schedules of defense attorneys and other professionals. The majority of
7 class members are represented by public defenders that are scheduled to be in court the vast
8 majority of all typical working hours. Thus, Defendants must offer substantial evaluation
9 opportunities during non-traditional work hours including weekends and evenings. However,
10 “[t]o date, no evaluators have opted to work additional hours to tackle the backlog of cases.”
11 Dkt. 180 at 24. Regardless, defense counsel availability has not been a cause of delay in the vast
12 majority of cases, and because Defendants have not demonstrated reasonable efforts to work
13 with defense counsel to facilitate scheduling, defense counsel availability does not constitute a
14 legitimate state interest to delay competency evaluations past ten days in all cases.

15 However, Plaintiffs agree with the Ninth Circuit that it is possible that in certain cases
16 defense counsel availability may justify Defendants in seeking to invoke a narrowly-drawn
17 exception to the ten-day time limit. The Court should expand the good cause exception as
18 suggested by the Ninth Circuit to permit delays past ten days for availability of defense counsel,
19 but only where the Defendants have demonstrated to a court, prior to the expiration of ten days,
20 that all reasonable efforts to accommodate the schedule of the defense attorney have been made
21 including by offering evening and weekend scheduling.

1 2. Receiving complete referrals is not a legitimate state interest in delay

2 In order to conduct a competency evaluation, Defendants must receive the order for
3 evaluation, the charging documents, and discovery. Cooper Decl., Ex. C at 6. The evidence at
4 trial was that these documents by themselves are sufficient to complete a competency evaluation
5 in nearly all cases. Cooper Decl., Ex. D at 21-25. At the time of trial, the evidence revealed it
6 took Defendants one to three days to gather that information. Cooper Decl., Ex. C at 6-7; Ex. H.
7 Now, the receipt of discovery should be even shorter. Post-trial, in an attempt to remedy the
8 delays in evaluations, the State passed RCW 10.77.075 (effective July 1, 2015), requiring courts
9 and prosecutors to transmit competency orders and all necessary documentation to Defendants
10 within 24 hours from entry of the competency evaluation order. Even before RCW 10.77.075
11 was enacted, Western State Hospital, the larger of the two state hospitals, received court orders
12 within 24 hours of their entry and complete discovery within three days of the entry of the court
13 order. Cooper Decl., Ex. G. Presumably the wait times have only decreased since then.
14 Defendants certainly have a legitimate interest in gathering the information necessary to conduct
15 a competency evaluation. However, the state has no legitimate interest in delay beyond the time
16 necessary to do so. In light of statutory requirements that the necessary documents be provided
17 to the Defendants within 24 hours, there is no further legitimate state interest in delay beyond
18 that point. In the small number of edge cases, when Defendants will need more information,
19 courts may grant exceptions for clinical reasons.

20 **D. When the Interests of the Parties are Properly Balanced as Required by Due**
21 **Process, a Ten Day Standard is Constitutionally Mandated**

22 As discussed above, *supra* at 11-14, Defendants' proffered reasons at trial and on appeal
23 to justify the need for a relaxed timeframe for the completion of evaluations are not supported by
post-trial evidence. It is clear that Defendants have no legitimate state interest in failing to

1 complete jail-based competency evaluation within ten days and prolonging the incarceration of
 2 class members who have liberty interests in freedom from incarceration. Indeed, what is clear
 3 from reviewing Defendants' data is that every legitimate interest that they relied upon in
 4 claiming that timely completion of evaluations are not actually reasons that Defendants fail to
 5 timely complete evaluations. *Supra* at X. Thus, the balancing of the interests requires
 6 Defendants to complete in jail evaluations within ten (10) days of the signing of the court's
 7 order. Indeed, a ten-day (10) standard is consistent with the trial testimony of Dr. Mauch.
 8 During trial, Dr. Mauch testified that ten (10) days was an adequate time period to serve the
 9 legitimate state interests relevant to in-jail competency evaluations.² Cooper Decl., Ex. D at 6-8.

10 **E. The Policy Articulated in the Statute Enacted on the Eve of Trial Fails to**
 11 **Provide Adequate Protection of Plaintiffs' Liberty Interests**

12 The Ninth Circuit remanded the in jail evaluation portion of this Court's injunction for
 13 reconsideration in light of Washington State's newest law governing target deadlines for the
 14 completion of evaluations. *See* Dkt. 233 at 18-19. This Court considered the state statute that
 15 was passed on the eve of trial noting both the state statute's policy was that evaluations should
 16 occur within seven days and Defendants concession that "some of the waiting periods are
 17 excessive and indefensible." Dkt. 131, FOF 23.

18 "Courts must beware of attempts to forestall injunctions through remedial efforts and
 19 promises of reform that seem timed to anticipate legal action, especially when there is the
 20 likelihood of recurrence." *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176
 21 (9th Cir. 1987). Here, Defendants contend that the District Court's injunction was unnecessary

22 ² However, her testimony was based on the assumption that it would continue to take up to three days to gather the
 23 referral packet. *Id.*, Cooper Decl., Ex. D at 10. Because state law now requires that the complete referral packet be
 provided to Defendants within 24 hours of the entry of the order, the deadline of ten days is even more fair to
 Defendants.

1 because, in a last-minute effort before the trial on this matter, Defendants lobbied for, and the
2 Washington Legislature passed, a law targeting the completion of evaluations with seven days
3 but establishing “a maximum time limit of fourteen days.” Cooper Decl. Ex. B.

4 However, the timeline of SB 5889 and the Defendants testimony suggests that the bill
5 was introduced and expedited to undermine this litigation, not to protect vulnerable class
6 members or promote a legitimate state interest. The bill was introduced February 9, 2015—only
7 55 days after the District Court granted plaintiff’s motion for summary judgment—and was
8 signed by the Governor on March 12, 2015, just four days before trial began. *See* Wash. Bill
9 Tracking Senate Bill No. 5889, 64th Sess. (2015).

10 Additionally, during her testimony the day after the bill was introduced, Assistant
11 Secretary Beyer asked the Senate Human Services Committee to “move it [SB 5889] quickly,
12 given an upcoming trial date of March 16.” *Hearing on SB 5889 Before the S. Comm. on Human*
13 *Servs. & Mental Health & Hous.*, 2015 Leg., 64th Sess. (Wash. 2015), available at
14 <http://www.tvw.org/watch/?eventID=2015021195>. Ms. Beyer later explained that she
15 “believe[d] that the bill . . . established maximum timelines that are consistent with the
16 Constitutional provisions that are at-issue in the *Trueblood* litigation.” *Id.*

17 This timeline and testimony are highly suggestive that the legislation was not introduced
18 to ensure forensic resources are used efficiently and are clinically appropriate, but based on an
19 administrative impulse to circumvent litigation. In any case, there is no authority holding that
20 this Court must defer to a state's determination of the due process balancing test. Instead, federal
21 courts “have been vested with the ultimate authority to determine the constitutionality of the
22 actions of the other branches of the federal government.” *LaDuke v. Nelson*, 762 F.2d 1318,
23 1325 (9th Cir.1985).

V. CONCLUSION

All legitimate state interests relating to the timely completion of jail-based competency evaluations are served by a ten-day (10) standard starting from date of the court order. This standard also respects Plaintiffs' constitutionally protected interest in not being subjected to prolonged detention for purposes not reasonably related to the cause of their detention. Therefore, the Due Process balancing test requires a ten-day (10) time limit for the completion of jail-based competency evaluations.

Dated this 2nd day of June, 2016.

Respectfully submitted,

/s/ La Rond Baker

La Rond Baker, WSBA No. 43610
Emily Chiang, WSBA No. 50517
Margaret Chen, WSBA No. 46156
ACLU of Washington Foundation
900 Fifth Avenue, Suite 630
Seattle, Washington 98164
(206) 624-2184
echiang@aclu-wa.org
lbaker@aclu-wa.org
mchen@aclu-wa.org

/s/ Emily Cooper

David R. Carlson, WSBA No. 35767
Emily Cooper, WSBA No. 34406
Anna Guy, WSBA No. 48154
Disability Rights Washington
315 Fifth Avenue South, Suite 850
Seattle, WA 98104
(206) 324-1521
davidc@dr-wa.org
emilyc@dr-wa.org
annag@dr-wa.org

/S/Christopher Carney

Christopher Carney, WSBA No. 30325
Sean Gillespie, WSBA No. 35365
Kenan Isitt, WSBA No. 35317
Carney Gillespie Isitt PLLP

1 315 5th Avenue South, Suite 860
2 Seattle, Washington 98104
3 (206) 445-0212
4 Christopher.Carney@cgilaw.com

5 *Attorneys for Plaintiffs*
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, 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:

- Nicholas A Williamson (NicholasW1@atg.wa.gov)
- Sarah Jane Coats (sarahc@atg.wa.gov)
- Amber Lea Leaders (amberl1@atg.wa.gov)

DATED: June 2, 2016 at Seattle, Washington.

/s/La Rond Baker
