

THE HONORABLE MARSHA J. PECHMAN

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

**A.B., et al.,****Plaintiffs,****v.****Washington State Department of Social  
and Health Services, et al.,****Defendants.****No. 14-cv-01178-MJP****PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT****NOTE ON MOTION CALENDAR:  
DECEMBER 5, 2014****ORAL ARGUMENT REQUESTED****I. INTRODUCTION**

The Due Process Clause protects incapacitated pretrial detainees' liberty interests in both freedom from incarceration and in restorative treatment. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003). For years, Defendants have routinely subjected pretrial detainees, including Plaintiffs and class members, to lengthy incarceration in city and county jails because they fail to provide these services in a timely manner. In the past four months alone, it is undisputed that pretrial detainees were routinely incarcerated for up to sixty days for competency restoration services and over thirty days for evaluation services.

The only question for this Court is one of law: Do these wait times violate the Due Process Clause of the Fourteenth Amendment? The Ninth Circuit's holding in *Mink* is squarely on point and requires a finding that Defendants' withholding of services violates Plaintiffs and class members' due process rights. Plaintiffs respectfully request that this Court enter summary

1 judgment and declare that Defendants' conduct has violated Plaintiffs' and class members' due  
 2 process rights.

## 3 II. PROCEDURAL HISTORY

4 This case was originally filed by the Snohomish County Public Defender Association  
 5 ("SCPDA") on August 4, 2014. SCPDA simultaneously sought an immediate Temporary  
 6 Restraining Order ("TRO"). This Court denied that TRO on August 7, 2014. On August 22,  
 7 2014, Disability Rights Washington, Carney Gillespie Isitt PLLP, the American Civil Liberties  
 8 Union of Washington Foundation, and the Public Defender Association substituted as Plaintiffs'  
 9 counsel. Plaintiffs filed a Second Amended Complaint on September 12, 2014. On October 3,  
 10 2014, Plaintiffs filed a second Motion for a TRO. The Court denied the TRO on October 8, 2014.  
 11 On October 22, 2014, the Court held a status conference, setting a March 16, 2015 trial date. On  
 12 October 30, 2014, this Court entered a stipulated order certifying the Class of Plaintiffs.<sup>1</sup>

## 13 III. FACTUAL BACKGROUND

### 14 A. Defendants' Duty to Timely Provide Competency Evaluation and Restoration 15 Services to Plaintiffs and Class Members.

16 Washington law charges Defendants with overseeing competency evaluation and  
 17 restoration for individuals charged with crimes under state law. Wash. Rev. Code §§ 10.77 *et*.  
 18 *seq.* (2014). Whenever there is reason to doubt that an individual charged with a crime is  
 19 competent to stand trial, the court orders an evaluation to determine competency. *Id.* § 10.77.060.  
 20 If the individual is found to be incompetent to stand trial, state law places responsibility on  
 21 Defendants for "providing mental health treatment and restoration of competency." *Id.* §  
 22 10.77.088; *see also* -.084 and -.086. Counsel for Defendants has acknowledged that competency

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23 <sup>1</sup> The parties submitted evidence into the record in the course of litigating preliminary motions. Plaintiffs  
 24 incorporate by reference all evidence that has been submitted by the parties.

1 evaluation and restoration are “two discrete points where due process arises, and those two  
2 points are within the State’s control.” Case Status Conf. Tr. 15-16, Oct. 22, 2014.

3 When a court has ordered an individual to undergo competency evaluation or restoration,  
4 the individual’s criminal case is stayed during all competency-related proceedings. *See* Wash.  
5 Rev. Code § 10.77.084 (providing that after a criminal defendant has been found incompetent,  
6 the proceedings against the defendant are stayed); Wash. Ct. R. Crim. R. 3.3(e) (excluding all  
7 proceedings related to the competency of a defendant to stand trial when computing time for  
8 trial). State law sets a target deadline of seven days for Defendants to complete competency  
9 evaluations and restorations for individuals detained in city and county jails, matching the Ninth  
10 Circuit’s ruling in *Mink*. Wash. Rev. Code § 10.77.068.

11 **B. Long Waits for Competency Evaluation and Restoration Services Are a Recurring**  
12 **Problem for Defendants Causing Plaintiffs and Class Members to Remain**  
**Incarcerated in City and County Jails for Extended Periods of Time.**

13 Defendants have long been aware of problems with delays in providing competency  
14 evaluation and restoration services. Defendants themselves admit that they have failed to timely  
15 evaluate and restore the competency of individuals in jails and have in fact maintained waitlists  
16 for evaluation and restoration for the last fifteen years. Dkt. No. 57, Ex. A-C; Ex. J at 37; Mot.  
17 Hrg Tr. 24, August 7, 2014 (Defendants’ testimony that “there is always a waiting list.”). This  
18 failure is further reflected in sanctions that state courts have begun to impose upon Defendants  
19 for their failure to provide competency evaluation and restoration services in timely fashion.  
20 Case Status Conf. Tr. 12, Oct. 22, 2014. Thus far, state courts have cumulatively imposed  
21 approximately \$70,000 in sanctions on Defendant Department of Social and Health Services  
22 (“DSHS”). *Id.*

23 Recent data from DSHS indicates that class members are forced to wait over two months  
24 for restoration services and over one month for evaluation services. According to waitlists from

1 Defendant Western State Hospital (“WSH”), on October 27, 2014, one hundred and one people  
 2 had spent more than seven days waiting in city and county jails for competency evaluation or  
 3 restoration services from Defendants. Declaration of Emily Cooper (“Cooper Decl.”), Ex. G. Of  
 4 those, eighty-five have been found incompetent but are still incarcerated in city and county jails  
 5 while they wait for Defendants to provide them restoration services. *Id.* Of those found not  
 6 competent, seventy-six individuals have been charged with misdemeanors. *Id.*

7 According to Defendants, as of September 12, 2014 the current *minimum* wait for felony  
 8 restoration treatment at WSH is sixty days, Cooper Decl., Ex. H at 30, and the wait times at  
 9 WSH for evaluations and misdemeanor restorations is approximately forty-five days. *Id.* at 33.

10 Defendants’ October 24 and 27, 2014 waitlists for Defendant Eastern State Hospital  
 11 (“ESH”) reveal that forty-four people had spent more than seven days incarcerated in city and  
 12 county jails awaiting competency evaluation or restoration services. Cooper Decl., Ex. F. Most  
 13 were incarcerated in city and county jails for over thirty days awaiting competency evaluation  
 14 due to either “bed” or “evaluator availability.” *Id.* at 3-6. As of October 31, 2014, there were a  
 15 total of ninety-four people waiting for competency evaluations by ESH. Declaration of Kari  
 16 Reardon (“Reardon Decl.”), Ex. C. ESH currently has only eight evaluators. *Id.*

17 Washington’s Joint Legislative Audit and Review Committee (“JLARC”) assists the  
 18 legislature to “more effectively examine how efficiently state agencies perform their  
 19 responsibilities and whether the agencies are achieving their goals.” 1996 Wash. Sess. Laws  
 20 1496. JLARC has reviewed Defendants’ forensic mental health system to help the legislature  
 21 make “an independent assessment of the performance of the state hospitals with respect to”  
 22 target deadlines adopted in Wash. Rev. Code § 10.77.068. Wash. Rev. Code § 10.77.810.

1 JLARC found that from November 1, 2012, to April 30, 2013, individuals waited in jail  
2 on average twenty-nine days for evaluation and fifteen days for restoration at WSH, and fifty  
3 days for evaluation and seventeen days for restoration at ESH. Dkt. No. 42, Ex. N at 7. On  
4 January 3, 2012, there were over one hundred individuals waiting in city and county jails for  
5 competency evaluation or restoration services from WSH. Cooper Decl., Ex. I. Individuals  
6 charged with felonies had a sixty-five day wait for competency restoration and a seventy-three  
7 day wait for competency evaluation at WSH. Dkt. No. 45, Ex. B at 1; *see also* Cooper Decl., Ex.  
8 I.

9 From March through December 2011, the average time pre-trial detainees spent  
10 incarcerated in jail waiting for admission to a state hospital for a competency evaluation was  
11 forty-one days. Final Bill Report, S.S.B. 6492, 61st Leg., Reg. Sess. (Wash. 2012). Based on  
12 these findings and its research, JLARC issued reports on December 2, 2012 and April 23, 2014,  
13 finding that Defendants WSH and ESH were failing to meet the statutory guidelines passed by  
14 the legislature regarding the timely provision of competency evaluation and restoration services.  
15 Dkt. No. 42, Exs. M-N.

16 Defendants have seen the number of referrals to WSH and ESH rise by approximately  
17 8% every year for the past ten years. Cooper Decl., Ex. H at 24. Between 2001 and 2011, the  
18 number of referrals for competency evaluation increased 82%. *Id.*; *see also* Dkt. No. 42, Ex. M at  
19 8. However, according to JLARC, “[w]hile the number and types of individuals requiring  
20 evaluations is outside of DSHS’s control, DSHS is responsible for hospital staffing and evaluator  
21 productivity.” Dkt. No. 42, Ex. M at 11. Further, although both WSH and ESH blame staffing  
22 issues as a “key barrier” to meeting statutory target deadlines for competency evaluation and  
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1 restoration services, *id.* at 28, WSH has consistently had psychiatrist vacancies from 2008 to  
2 2012. *Id.* at 29.

3 Pursuant to its findings, JLARC concluded that DSHS “is not consistently meeting the  
4 performance targets for competency services, as intended by statute. DSHS is also not  
5 consistently meeting its assumed evaluator staffing and productivity levels.” Dkt. No. 42, Ex. N  
6 at 2. JLARC further found that “DSHS has not completed basic planning and analysis necessary  
7 to identify the best approach to meet the targets.” *Id.* at 2. Nor is DSHS “fully meeting its three  
8 key assumptions that supported its conclusion that it could meet the targets, and is not fully  
9 implementing its plan to reach the targets.” *Id.* at 7. Indeed, JLARC found that for the period  
10 November 1, 2012 to April 30, 2013, ESH provided evaluations within seven days only 11% of  
11 the time and restoration only 35% of the time. *Id.* For the same period, WSH provided  
12 evaluations within seven days only 14% of the time and restoration only 30% of the time. *Id.*  
13 JLARC issued a recommendation that Defendants “should hire an independent, external  
14 consultant” to develop both a service delivery approach to “meet the statutory targets” and “a  
15 staffing model to implement the new approach.” *Id.* at 19.

16 Defendants hired consultants, as recommended by JLARC, and those consultants  
17 concluded there are systemic problems with Washington’s forensic mental health system,  
18 including a “lack of infrastructure specific to forensic services, a lack of systemic training and  
19 oversight for forensic clinicians, and a lack of community-based alternatives to lengthy inpatient  
20 hospitalization for incompetent defendants and [not guilty by reason of insanity] acquittees.”  
21 Dkt. No. 57, Ex. K at 2. Defendants’ consultants further stated, “DSHS currently has an  
22 insufficient number of evaluators to conduct all the evaluations required.” *Id.* at 10. The report  
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1 concluded that Washington's forensic mental health system is inadequately funded, resulting in  
 2 its inability to fulfill its obligations under Wash. Rev. Code §§ 10.77 *et. seq. See Id.* at 11.

3 **C. Local Jails in Which Plaintiffs and Class Members Are Incarcerated Cannot**  
 4 **Provide Plaintiffs and Class Members with Appropriate Mental Health Services.**

5 The city and county jails in which Plaintiffs and class members are incarcerated while  
 6 awaiting competency evaluation and restoration services are correctional, not therapeutic  
 7 environments. Dkt. No. 42 at ¶ 12; Dkt. No. 56 at ¶ 10; Dkt. No. 57, Ex. K at 16. Jails are  
 8 punitive by nature, and the conditions of confinement in correctional settings undermine the  
 9 mental health of individuals awaiting competency evaluation and restoration services. Dkt. No.  
 10 50, Ex. A at 4-9. The rate of medication compliance in jails is low. *Id.* Local jails "often lack  
 11 resources to identify and offer even initial treatment. This can cause delays in treatment, but also  
 12 exacerbation of symptoms for the defendant." Dkt. No. 57, Ex. K at 16. Defendants have  
 13 acknowledged that individuals waiting for competency services tend to do worse the longer they  
 14 wait. This is evidenced by Defendants' own actions: DSHS prioritizes the admission to ESH or  
 15 WSH of class members who must undergo a second round of restoration treatment. Cooper  
 16 Decl., Ex. H at 18; Dkt. No. 51, Ex. D at 4. The reason for this prioritization is because  
 17 completing a first restoration period and then sending that person back to jail where they are then  
 18 waitlisted, to await their second restoration, would undermine the progress made during their  
 19 first restoration. Cooper Decl., Ex. H at 18; Dkt. No. 51, Ex. D at 4.

20 **D. Plaintiffs and Class Members Are Incarcerated in Jails Waiting for Competency**  
 21 **Evaluation or Restoration Services from Defendants.**

22 Plaintiffs and class members are individuals charged with crimes in Washington State  
 23 who have been court-ordered to undergo competency evaluation or restoration by Defendants.  
 24 They are detained in county and city jails that cannot provide the competency evaluation and  
 restoration services they greatly need and that Defendants are statutorily required to provide.

1 Plaintiff A.B. was an inmate at the Snohomish County Jail on July 2, 2014, when a court  
 2 found her incompetent and ordered her to be admitted to WSH for competency restoration  
 3 services. Dkt. No. 51, Ex. B. WSH received the court order on or about July 3, 2014. Declaration  
 4 of Cassie Trueblood (“Trueblood Decl.”), Ex. A. While waiting for transportation to WSH for  
 5 court-ordered competency services, A.B. was incarcerated for thirty-seven days in solitary  
 6 confinement where she declined to take medication or wash herself. Dkt. No. 51 ¶¶ 5-6. On  
 7 August 8, 2014, a court found that incarcerating A.B. any further while awaiting a bed date was  
 8 “not reasonable” and ordered her release. Trueblood Decl., Ex. B. A. Within two days of her  
 9 release, A.B. was civilly committed to Providence Hospital in Everett, Washington, because she  
 10 was considered to be “gravely disabled” and in need of immediate treatment for her own safety.  
 11 Trueblood Decl. ¶ 7. On August 22, 2014, A.B. was transported to WSH for competency  
 12 restoration services, or fifty days after WSH received the court order. Trueblood Decl., Ex. C.

13 Plaintiff D.D. was an inmate in Spokane County Jail on August 5, 2014, when a court  
 14 ordered that ESH conduct a competency evaluation. Dkt. No. 54, Ex. A. ESH confirmed receipt  
 15 of the court order for competency evaluation on August 6, 2014. Cooper Decl., Exs. B, K. D.D.  
 16 was evaluated by ESH on September 10, 2014. Dkt. No. 54, ¶ 7. D.D. waited thirty-five days in  
 17 solitary confinement or on suicide watch after making numerous statements about wanting to die  
 18 at Spokane County Jail before the evaluation was completed. Dkt. No. 54, ¶¶ 6, 7.

19 Plaintiff K.R. was an inmate at the Thurston County Jail on July 3, 2014, when a court  
 20 ordered WSH to evaluate his competency. Cooper Decl., Ex. A. The evaluation was completed  
 21 on July 23, 2014. *Id.* On July 30, 2014, the court found K.R. incompetent and ordered that he be  
 22 admitted to WSH for competency restoration treatment. Cooper Decl., Ex. B. WSH confirmed  
 23 receipt of the order on June 30, 2014. Cooper Decl., Ex. C. The state court found that it could  
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1 not hold WSH in contempt due to lack of clarity regarding the enforceability of the aspirational  
2 targets set forth in Wash. Rev. Code §§ 10.77.220 and 10.77.068. Cooper Decl., Ex. D at 8.  
3 K.R. spent four months in jail without medication, and the vast majority of that time was spent in  
4 solitary confinement after being assaulted by his cellmate. Dkt. No. 49 ¶¶ 15-16. During this  
5 time, he lost a significant amount of weight and lost touch with reality. *Id.* at ¶ 13.

6 The state court also noted concerns regarding the inherent individual approach in state  
7 court proceedings to address a statewide issue and stated that the above-captioned federal action  
8 “appears to be a much more structured possibility as far as a global solution.” *Id.* at 11. On  
9 September 26, 2014, after waiting twenty days in Thurston County Jail for competency  
10 evaluation and fifty-six days for competency restoration, K.R. was conditionally released from  
11 Thurston County Jail. Cooper Decl. ¶ 11. On October 3, 2014, K.R. was admitted to WSH for  
12 competency evaluation. Cooper Decl., Ex. E.

13 Class member R.H. is an inmate at Franklin County Jail. On October 28, 2014, a court  
14 ordered him to be evaluated by Defendant ESH. Declaration of Anna Guy (“Guy Decl.”), Ex. B.  
15 On October 28, 2014, Disability Rights Washington attorney Anna Guy spoke to R.H. in  
16 Franklin County Jail. R.H. could not remember his own name or whether anyone in his family  
17 had visited him in the jail. Guy Decl. ¶ 4. R.H. reported constant head pain and blurry vision,  
18 and also reported visual hallucinations of bright orange and white lights. *Id.* ¶ 5. R.H. had a dark  
19 brown substance on his hands, which he explained was his own feces. *Id.* ¶ 6. While visiting  
20 with Plaintiffs’ counsel Anna Guy, R.H. used his own feces to make markings on the walls of the  
21 jail, and also licked his feces from his fingers. *Id.* Based on current waitlists predictions stated  
22 by Defendant ESH, R.H. can expect to wait a total of forty-five days in this condition before he  
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1 receives services for evaluation of his competency, and will likely wait another seventeen days  
2 before any treatment to restore competency begins. Reardon Decl., Ex. C.

3 Class member M.W. is an inmate at Spokane County Jail who was ordered to receive a  
4 competency evaluation by ESH on October 1, 2014. Reardon Decl. ¶ 5, Ex. A at 2, 12. ESH  
5 confirmed receipt of the court order on the same day. Reardon Decl. ¶ 6, Ex. A at 2, 12. M.W. is  
6 scheduled for a competency evaluation by ESH on November 13, 2014, or forty-four days after  
7 the court order was entered and received by ESH. Reardon Decl. ¶ 7, Ex. A at 2.

8 Class member C.C. in jail at the King County Regional Justice Center in Kent,  
9 Washington. Declaration of Mark Adair (“Adair Decl.”), ¶ 4. C.C. was ordered to undergo a  
10 competency evaluation on October 8, 2014. *Id.* ¶ 5, Ex. A. C.C. was found incompetent to  
11 proceed to trial on October 22, 2014. *Id.* ¶ 6, Ex. B. C.C. is confined in solitary lockdown  
12 twenty-three hours of each day. *Id.* ¶ 10. His attorney has been able to observe deterioration in  
13 C.C.’s mental health during his incarceration. *Id.* ¶ 10. C.C. can expect to wait a total of sixty-  
14 five days to begin competency restoration treatment, as his mental health continues to  
15 deteriorate. *Id.* ¶ 7. The prosecution has offered to resolve C.C.’s charges as misdemeanors. *Id.* ¶  
16 9. Were C.C. competent to accept that offer, he has already served more time than the sentence  
17 recommendation and would be released immediately. *Id.* ¶ 9.

### 18 III. ARGUMENT

19 There is no genuine issue of material fact that Defendants are responsible for providing  
20 competency evaluation and restoration services to Plaintiffs and class members under state law.  
21 Similarly there is no genuine issue of material fact that those services routinely take weeks or  
22 months to commence. As a matter of law, the delays in the provision of competency services  
23 violate Plaintiffs’ and class members’ due process rights under the Fourteenth Amendment of the  
24

U.S. Constitution, and Plaintiffs hereby respectfully request that this Court enter summary judgment against Defendants.

### A. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trial when there is no dispute as to the material facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1997). Summary judgment is therefore appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1158 (9th Cir. 2005). When moving for summary judgment the moving party has the initial burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). This burden may be satisfied by any kind of admissible evidence. *Id.* at 324.

Once the moving party demonstrates that there are no genuine issues of material fact warranting trial, the non-moving party is required to produce evidence in opposition to the motion. *Id.* at 324. The opposing party must come forward with "specific facts" showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The non-movant must offer more than merely colorable evidence that a genuine issue of material fact exists. *FTC v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001).

### B. Defendants Violate Plaintiffs' and Class Members' Substantive Due Process Rights By Prolonging Their Detention in Jails.

"The Due Process Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests,' . . . 'forbid[ding] the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"

1 *Lopez-Valenzuela v. Arpaio*, No. 11-16487, 2014 WL 5151625, at \*6 (9th Cir. Oct. 15, 2014)  
 2 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) and *Reno v. Flores*, 507 U.S.  
 3 292, 302 (1993)). Here, Plaintiffs and class members have fundamental liberty interests in  
 4 “freedom from incarceration and in restorative treatment” protected by the Due Process Clause.  
 5 *Mink*, 322 F.3d at 1121.

6 To determine whether Defendants have violated the protections afforded to Plaintiffs and  
 7 class members by the Due Process Clause, this Court must balance Plaintiffs and class members’  
 8 liberty interests against the legitimate and compelling interests of the state. *See id.*; *Lopez-*  
 9 *Valenzuela*, 2014 WL 5151625, at \*6.

10 1. Plaintiffs and Class Members Have a Liberty Interest in Freedom from  
 11 Incarceration That Is Protected by the Fourteenth Amendment.

12 The restraint on physical freedom experienced during incarceration is the quintessential  
 13 deprivation of a person’s liberty. *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir.  
 14 1992); *Mink*, 322 F.3d at 1121 (noting fundamental right of people in a free society to be “from  
 15 incarceration absent a criminal conviction”). Not surprisingly, the Ninth Circuit has determined  
 16 that there is a “constitutional right to be free from continued detention after it was or should have  
 17 been known that the detainee was entitled to release.” *Lee v. City of Los Angeles*, 250 F.3d 668,  
 18 683 (9th Cir. 2001). *See also Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (holding that  
 19 pretrial detainee had a liberty interest in being free from a twelve-day incarceration).

20 By Defendants’ own admissions, their failure to timely provide competency evaluation  
 21 and restoration services results in many class members being incarcerated in city and county jails  
 22 for extended periods without being convicted of any crime. *See* Dkt. No. 42, Ex. N at 7 (noting  
 23 that between November 1, 2012 and April 30, 2013 pretrial detainees who have been court-  
 24 ordered to receive competency evaluations or restoration services at WSH are incarcerated

awaiting services for approximately twenty-nine days for evaluation and fifteen days for restoration); Final Bill Report, S.S.B. 6492, 61st Leg., Reg. Sess. (Wash. 2012) (noting the average time spent incarcerated in jail awaiting admission for a competency evaluation was forty-one days between March and December 2011).

Plaintiffs and class members have suffered prolonged incarceration in jails awaiting court-ordered competency evaluation and restoration services. For example, Plaintiff A.B. waited thirty-seven days in jail solitary confinement for admission to WSH for competency restoration services. Trueblood Decl. ¶ 8, Ex. C. Plaintiff K.R. waited twenty days in Thurston County Jail for a competency evaluation and fifty-six days for competency restoration services. Cooper Decl. ¶ 11. Plaintiff D.D. was held for thirty-five days in solitary confinement at Spokane County Jail before he received a competency evaluation. Dkt. No. 54, ¶¶ 6, 7. Class Member R.H. is expected to wait forty-five days for a competency evaluation from ESH. Guy Decl.; Reardon Decl., Ex. C.

The longstanding trend of prolonging the incarceration of individuals in need of mental health treatment in city and county jails, as evidenced by Defendants' own reports and Plaintiffs' and class members' experiences, show that Defendants' failure to provide timely services unlawfully infringes upon Plaintiffs' and class members' liberty interest in being free from incarceration without an underlying conviction.

2. Plaintiffs and Class Members Have a Liberty Interest in Competency Evaluation and Restoration Services That Is Protected by the Fourteenth Amendment.

Pretrial detainees requiring competency evaluation and restoration services also have separate "liberty interests in . . . restorative treatment." *Mink*, 322 F.3d at 1121. This interest is recognized in Supreme Court precedent holding that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is

1 committed.” *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Mink*, 322 F.3d at 1121 (quoting  
2 *Jackson*).

3 In *Jackson*, the Supreme Court found that the continued detention of a criminal defendant  
4 who was found incompetent to stand trial despite physician testimony that he was unlikely to  
5 improve to the point where he could stand trial was incompatible with due process. 406 U.S. at  
6 731. The Court held that an incompetent pre-trial detainee “who is committed solely on account  
7 of his incapacity to proceed to trial cannot be held more than the reasonable period of time  
8 necessary to determine whether there is a substantial probability that he will attain that capacity  
9 in the foreseeable future.” *Id.* at 738. The Court further stated that “even if it is determined that  
10 the defendant probably soon will be able to stand trial, ***his continued commitment must be***  
11 ***justified by progress toward that goal.***” *Id.* (emphasis added).

12 Following this reasoning, the Ninth Circuit has found that *Jackson* “indicate[s] that a  
13 person committed solely on the basis of his mental incapacity has a constitutional right to receive  
14 such individual treatment as will give each of them a realistic opportunity to be cured or to  
15 improve his or her mental condition.” *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980)  
16 (internal quotation marks omitted). The Ninth Circuit has further reasoned that where the  
17 purpose of confinement is not punitive, the state must provide pretrial detainees such as Plaintiffs  
18 and class members “with more considerate treatment and conditions of confinement than  
19 criminals whose conditions of confinement are designed to punish.” *Sharp v. Weston*, 233 F.3d  
20 1166, 1172 (9th Cir. 2002) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)). Based on  
21 *Jackson* and *Ohlinger*, the *Mink* court held that refusal to provide restoration services in a  
22 “timely manner” violates due process. 322 F.3d at 1122 (finding due process violation where  
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delays lasted “weeks or months” and upholding injunction imposing seven-day time limit to admit incapacitated criminal defendants).

The claims in *Mink* are indistinguishable from the claims here and, as such, this Court should find that Plaintiffs and class members have a liberty interest in receiving restorative treatment. Like the plaintiffs in *Mink*, Plaintiffs and class members are forced to wait weeks and months in local jails while they await admittance into WSH and ESH for competency services. *See* Dkt. No. 42, Ex. N at 7; Final Bill Report, S.S.B. 6492, 61st Leg., Reg. Sess. (Wash. 2012). Plaintiff K.R. waited fifty-six days in Thurston County Jail for competency restoration services. Cooper Decl. ¶ 11. Class member M.W. is expected to wait forty-four days in Spokane County Jail until ESH evaluates his competency. Reardon Decl. ¶ 7, Ex. A at 2. Similarly, class member C.C. is expected to wait at least sixty-five days for competency restoration services. Adair Decl. ¶ 7. *See also* Trueblood Decl. ¶ 8; Dkt. No. 54, ¶¶ 6, 7. There is no dispute, as in *Mink*, that the services Plaintiffs and class members need, and that Defendants have been court-ordered to provide, are unavailable to them while they are incarcerated in city and county jails. Cooper Decl., Ex. A; Guy Decl., Ex. B; Reardon Decl., Ex. A; Dkt. No. 51, Ex. B; Dkt. No. 54, Ex. A; Adair Decl., Ex. A.

Further, there is no dispute that Defendants’ prolonging of Plaintiffs’ and class members’ incarceration in city and county jails is not justified by progress towards the goal of evaluation and restoration of competency. *See Jackson*, 406 U.S. at 738. Jails are not therapeutic environments, Dkt. No. 42 at ¶ 12; Dkt. No. 56 at ¶ 10; Dkt. No. 57, Ex. K at 16; and undermine Plaintiffs’ and class members’ mental health. Dkt. No. 50, Ex. A at 4-9. Defendants acknowledge that prolonged incarceration makes it more difficult to restore Plaintiffs and class members to

1 competency and prioritize admission to WSH or ESH of individuals who must undergo a second  
 2 round of restoration treatment. Cooper Decl., Ex. H at 18; Dkt. No. 51, Ex. D at 4.

3 As such, this Court should find that Plaintiffs and class members have a liberty interest in  
 4 receiving timely competency evaluations and restoration services and that Defendants are  
 5 unlawfully infringing upon that interest.

6 3. Defendants' Failure to Timely Provide Competency Evaluation and Restoration  
 7 Services Does Not Advance or Arise From a Legitimate State Interest.

8 “[C]ommitment for any purpose constitutes a significant deprivation of liberty that  
 9 requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979). The government  
 10 must have “a constitutionally adequate purpose for the confinement.” *O'Connor v. Donaldson*,  
 11 422 U.S. 563, 574 (1975). Defendants do not have a legitimate state interest in prolonging the  
 12 detention of Plaintiffs and class members in jails across the state.

13 It is undisputed that Plaintiffs and class members are *not* in jail because their incarceration  
 14 is related to the evaluation or restoration of their competency. Rather, they are incarcerated  
 15 because Defendants, who are required under state law to provide competency evaluation and  
 16 restoration services, do not provide those services in a timely manner. Defendants have no  
 17 legitimate interest in Plaintiffs and class members' continued incarceration while awaiting  
 18 competency evaluation and restoration services.

19 “[L]ack of funds, staff or facilities” is not a legitimate state interest that would justify a  
 20 state health agency violating the substantive due process rights of pretrial detainees and failing to  
 21 provide necessary services. *Mink*, 322 F.3d at 1121. Indeed, delaying evaluation and restoration  
 22 services “undermines the state’s fundamental interest in bringing the accused to trial.” *Id.* at 1122  
 23 (citing *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (bringing “accused to trial is fundamental to  
 24 . . . ‘ordered liberty’ and prerequisite to social justice and peace.”)).



1 Here, it is undisputed that the Defendants have failed to timely provide competency  
2 evaluation and restoration services as required by state law due to persistent funding and staffing  
3 problems. The JLARC found “DSHS is not consistently meeting the performance targets for  
4 competency services,” and “DSHS is also not consistently meeting its assumed evaluator staffing  
5 and productivity levels.” Dkt. No. 42, Ex. N at 2. Defendants’ own consultants similarly  
6 concluded that DSHS “has an insufficient number of evaluators to conduct all the evaluations  
7 required,” and that Washington’s forensic mental health system is inadequately funded, resulting  
8 in its inability to fulfill its obligations under Wash. Rev. Code §§ 10.77 *et. seq.* Dkt. No. 57, Ex.  
9 K at 10-11.

10 Dr. Brian Waiblinger, the medical director of WSH, has testified that the delays in  
11 providing competency evaluation and restoration services has been caused by staff shortages.  
12 Cooper Decl., Ex. J pp. 4-5. Further, Defendants acknowledge that additional beds would reduce  
13 the length of the waitlists for competency evaluation and restoration services. Case Status Conf.  
14 Tr. 22, Oct. 22, 2014. It is thus undisputed that the appropriation of additional funds and the  
15 addition of beds would enable Defendants to admit class members more quickly. Defendants’  
16 “lack of funds, staff, or facilities” does not justify their ongoing violation of Plaintiffs and class  
17 members’ substantive due process rights. *Mink*, 322 F.3d at 1121.

18 Defendants have no legitimate state interest in failing to timely provide competency  
19 evaluation and restoration services and prolonging Plaintiffs’ and class members’ incarceration  
20 in city and county jails, while Plaintiffs and class members have significant liberty interests in  
21 freedom from incarceration and in restorative treatment. Accordingly, the Court should find that  
22 Defendants are violating Plaintiffs’ and class members’ substantive due process rights.

1 IV. CONCLUSION

2 For the foregoing reasons, Plaintiffs request that the Court grant summary judgment on  
3 Plaintiffs' Due Process Claim and enter an order declaring that Defendants have violated  
4 Plaintiffs' constitutional rights.

5 DATED this 6th day of November, 2014.

6 Respectfully submitted,

7 ACLU OF WASHINGTON FOUNDATION

8 /s/ Sarah A. Dunne

9 Sarah A. Dunne, WSBA No. 34869  
10 La Rond Baker, WSBA No. 43610  
11 Margaret Chen, WSBA No. 46156  
12 900 Fifth Avenue, Suite 630  
13 Seattle, Washington 98164  
14 (206) 624-2184  
15 dunne@aclu-wa.org  
16 lbaker@aclu-wa.org  
17 mchen@aclu-wa.org

18 CARNEY GILLESPIE ISITT PLLP

19 /s/ Christopher Carney

20 Christopher Carney, WSBA No. 30325  
21 Sean Gillespie, WSBA No. 35365  
22 Kenan Isitt, WSBA No. 35317  
23 315 Fifth Ave South, Suite 860  
24 Seattle, Washington 98104  
(206) 445-0212  
Christopher.Carney@CGILaw.com  
Sean.Gillespie@CGILaw.com  
Kenan.Isitt@CGILaw.com

DISABILITY RIGHTS WASHINGTON

/s/ David Carlson

David R. Carlson, WSBA No. 35767

Emily Cooper, WSBA No. 34406

Anna Guy, WSBA No. 48154

315 Fifth Avenue South, Suite 850

Seattle, WA 98104

(206) 324-1521

davidc@dr-wa.org

emilyc@dr-wa.org

annag@dr-wa.org

PUBLIC DEFENDER ASSOCIATION

/s/ Anita Khandelwal

Anita Khandelwal, WSBA No. 41385

810 Third Avenue, Suite 800

Seattle, Washington 98104

(206) 447-3900

anitak@defender.org

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 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:

- John K McIlhenny (JohnM5@atg.wa.gov)
- Nicholas A Williamson (NicholasW1@atg.wa.gov)
- Sarah Jane Coats (sarahc@atg.wa.gov)
- Amber Lea Leaders (amberl1@atg.wa.gov)

DATED: November 6, 2014, at Seattle, Washington

/s/Mona Rennie

Legal Assistant, Disability Rights Washington