

The Honorable Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

I. INTRODUCTION

Plaintiffs respectfully request that this Court reconsider the scope of its injunction in light of the Ninth Circuit remand and order Defendants to complete in-jail evaluations within ten (10) days. This timeframe is required by Constitution because it appropriately balances both parties' legitimate interests. In opposition, Defendants urge this Court to reject a "bright line" rule and instead find that an unenforceable state statute passed on the eve of trial is sufficient to protect the parties' interests. See Dkt. 279 at 1. This argument further demonstrates that Defendants have lost sight of the fact that the legitimate state interest justifying class members' detention is to provide them mental health services. Defendants' arguments are further undercut by facts revealed since trial

1 that make clear all of Defendants’ proffered reasons for delaying the completion of in-jail
 2 evaluations are unfounded either as a matter of fact or as a matter of law. In fact, this
 3 Court has already considered and rejected these barriers, finding they could be addressed
 4 with “appropriate planning, coordination, and resources.” Dkt. 131 at 12. Finally,
 5 Defendants’ argument that a state statute is determinative of constitutional protections is
 6 inconsistent with federal jurisprudence, fails to consider the parties’ interests as mandated
 7 by the Ninth Circuit, and should be rejected.

8 II. ARGUMENT

9 After Defendants appealed only the portion of this Court’s injunction governing
 10 in-jail evaluations, the Ninth Circuit affirmed the need for an injunction for “monitoring
 11 and ensuring that class members’ constitutional rights are protected” but remanded the
 12 constitutional timeframe for the completion of in-jail competency services for
 13 reconsideration. *Trueblood v. DSHS*, ___ F. 3d ___, No. 15-35462, 2016 WL 2610233, at
 14 *7-8 (9th Cir. 2016). On remand, the Ninth Circuit directs this Court to modify its
 15 injunction “including considering Washington’s 2015 law and taking into account the
 16 balancing of interests related specifically to initial competency evaluations.” *Id.* at *8.

17 The Ninth Circuit also requested that this Court articulate a sufficiently strong
 18 foundation, including assessment of the parties’ legitimate interests, to support a
 19 mandatory injunction requiring Defendants to complete in-jail evaluations in a certain
 20 timeframe.¹ *Id.* at *6. From evidence presented prior, during, and after trial, it is clear

22 ¹ Although the Ninth Circuit remanded for reconsideration regarding timeframes for providing in-jail
 23 evaluations, it affirmed the need for an injunction for “monitoring and ensuring that class members’
 constitutional rights are protected.” *Id.* at *7.

1 that a ten (10) day timeframe for the completion of in-jail evaluations balances the
2 legitimate interests of the parties and provides essential constitutional protections.

3 Although it is certain that class members suffer great harm for each day they are
4 incarcerated while awaiting competency services, *see* Dkt. 131 at 19, Defendants seek to
5 prolong the time period in which they are required to complete in-jail evaluations based
6 on factors that are not legitimate state interests. Balancing of the parties' legitimate
7 interests, including consideration of the state statute, supports the crafting of a modified
8 injunction requiring the completion of in-jail competency evaluations in ten (10) days.

9 **A. The State's Legitimate State Interests Are Satisfied by Completing In-Jail
10 Competency Evaluation Within Ten Days**

11 A court must balance the parties' legitimate interests to determine the scope of
12 constitutional protections under Fourteenth Amendment substantive due process
13 protections. *Trueblood* at *5. The parties agree that the State has a legitimate interest in
14 running an efficient, accurate forensic mental health system. *See* Dkt. 279 at 6. The task
15 here is to separate the State's legitimate interests for delay from those that do not
16 constitute legitimate interests, such as staffing and funding.² *Or. Advocacy Ctr. v. Mink*,
17 322 F.3d 1101, 1121 (9th Cir. 2003). Further, when determining the scope of substantive
18 due process protections, it is important to recall that only the State's legitimate interests
19 should be balanced against class members' constitutional rights, and all other interests,
20 such as staffing and funding, must be excluded from the balancing test. *Id.* Defendants'

21
22 ² Additionally, the Defendants' argument demonstrates that the oppositional nature of litigation appears to
23 have clouded the fact that the interests of both Plaintiffs and Defendants are largely overlapping: The
Plaintiffs have an interest in receiving competency evaluation services, and the Defendants have an interest
in conducting these evaluations in a timely manner in order to more speedily bring Plaintiffs to trial.

1 assertion that a “bright line” rule is not required has no basis in the facts of this case or
 2 the law and supports only a self-serving policy that provides them with as much time as
 3 possible to perform in-jail evaluations. Dkt. 279 at 6.

4 Many of the State’s purported barriers to the timely completion of in-jail
 5 competency evaluations are unfounded, so it can hardly be said that these barriers cause
 6 delays that are “reasonably related” to the State’s interest in “evaluating and restoring the
 7 competency of defendants so they may fairly be brought to trial.” Dkt. 131 at 12-13.
 8 Lengthening the time of confinement based on these “barriers” as Defendants propose is
 9 not appropriate.

10 **1. Court orders and necessary discovery are routinely provided within**
 11 **twenty-four hours and are not legitimate causes for the delay in**
 12 **completing in jail competency evaluations.**

12 Defendants claim that delays in the provision of state court orders, discovery, and
 13 related materials necessary to complete in-jail evaluations are legitimate state interests
 14 that justify a longer timeframe for Defendants to perform in-jail evaluations. Dkt. 279 at
 15 7. Defendants presented facts about these delays at trial and argued them before the trial
 16 and appellate courts. Based upon the evidence before it, this Court found that receiving
 17 documents is not a substantial barrier. Dkt. 131 at 11-12. Further, post-trial evidence
 18 shows that intervening weekends or holidays are also not a substantial barrier as
 19 document transmission typically occurs on the same day. Cooper Decl. Ex. A at 27-29,
 20 47-58; Dkt. 271-5 at 35-50, 57-69; Dkt. 241-1 at 46-58, 65-78; Dkt. 271-6 at 46-60, 67-
 21 80; Dkt. 271-7 at 48-63, 71-82; Dkt. 271-8 at 45-58, 66-79.

22 Even though the Ninth Circuit deferred to the factual findings of this court,
 23 Defendants continue to argue that “discovery” remains a barrier to timely complete in-jail

competency evaluations. Dkt. 279 at 7. Since trial there have been two fundamental changes that further eviscerate Defendants' claim that delays in the provision of underlying documents justifies the State requesting more time to complete in-jail evaluations. *First*, Washington law now requires that an order for evaluation and the underlying documents be provided to Defendants by county prosecutors within twenty-four (24) hours of the entry of the order. Wash. Rev. Code 10.77.075. This law requires the following information to be transmitted to Defendants within twenty-four hours: (1) "the court order and the charging documents" (2) the discovery packet and (3) medical clearance from the jail housing a class member. *Id.* *Second*, Defendants' own documents produced since trial reveal that delays in receiving orders and discovery are not a meaningful barrier. Indeed, as the charts below indicate, the receipt of court orders and discovery occurs in a consistently timely manner such that crafting a blanket extension to the governing timeframe is unnecessary.³

May 2016		
Number of Days	Instances of Court Orders Received (% of Total)	Instances of Discovery Received (% of Total)
0	265 (72.60%)	252 (71.19%)
1-3	85 (23.29%)	85 (24.01%)
4-7	10 (2.74%)	12 (3.39%)
8-10	1 (0.27%)	1 (0.28%)
11-20	2 (0.55%)	2 (0.56%)

³ If a delay is necessary, in the small number of cases where orders and discovery, for anomalous reasons, do not reach Defendants in an extended period of time, Defendants are not prohibited from requesting an extension of time from a state court judge by demonstrating that the necessary orders and discovery did not reach them through no fault of their own and despite their best good faith efforts to coordinate with court clerks, prosecutors, and defense attorneys.

21+	2 (0.55%)	2 (0.56%)
TOTAL	365 (100%)	354 (100%)

Cooper Decl. Ex. A at 47-58.

April 2016		
Number of Days	Instances of Court Orders Received (% of Total)	Instances of Discovery Received (% of Total)
0	250 (70.82%)	238 (69.59%)
1-3	82 (23.23%)	81 (23.68%)
4-7	13 (3.68%)	16 (4.68%)
8-10	1 (0.28%)	0 (0%)
11-20	5 (1.42%)	4 (1.17%)
21+	2 (0.57%)	3 (0.88%)
TOTAL	353 (100%)	342 (100%)

Dkt. 271-5 at 57-68.

2. Evidence produced at trial made clear intoxicants are not a legitimate basis to delay the completion of in-jail competency evaluation.

Defendants also resurrect their failing argument that “more time” is necessary for intoxicants to clear class members’ systems. Dkt. 279 at 7. Defendants raised the same argument on appeal, and the Ninth Circuit did not deem it a sufficiently significant concern to even merit a mention in its opinion. *See generally Trueblood*, 2016 WL 2610233. Given the timing of orders to evaluate competency, which occur at least two weeks following arrest, there is simply no significant likelihood that intoxication will pose a barrier to prompt evaluations. Scheinman Decl. at 4. In any case, this Court has already developed a good cause exception where the State may request individual extensions for clinical reasons that will adequately address any concerns regarding class

1 members who are waiting in jail for evaluation but may be intoxicated. Dkt. 131 at 22.
 2 Further, there is no legitimate state interest in delaying the timeframe for evaluating *all*
 3 class members simply because one or two class members may prove to be more difficult
 4 to evaluate. In the nearly fifteen months since this Court's order, Defendants have not
 5 needed to avail themselves of a clinical exception even once. Cooper Decl. Ex. A at 27-
 6 29, 47-58; Dkt. 271-5 at 35-50, 57-69; Dkt. 241-1 at 46-58, 65-78; Dkt. 271-6 at 46-60,
 7 67-80; Dkt. 271-7 at 48-63, 71-82; Dkt. 271-8 at 45-58, 66-79.

8 **3. Defendants' alleged concerns regarding stigma and family separation**
 9 **are not legitimate state interests upon which it can justify delays in**
 10 **completing in-jail evaluations.**

11 Defendants argue that protecting class members from "undue separation from . . .
 12 family" and the "stigma of an incorrect determination" are legitimate reasons to subject
 13 class members to prolonged incarceration while they wait for in-jail evaluations. Dkt.
 14 279 at 2. Defendants' stigma argument fails for many reasons, including the fact that it
 15 fails to address the stigma associated with class members being incarcerated for
 16 prolonged periods in city and county jails.⁴ Defendants' historic delays infringe on class
 17 members' liberty interests and have had broad consequences for all class members, not
 18 just for those who are separated from their families.⁵ The underlying cause of separation
 19 from family is the continued incarceration, which would be more quickly remedied if
 20

21 ⁴ Defendants should not normalize negative stigmatization of those with mental illness by making
 22 arguments that presume one would rather be incarcerated absent conviction rather than be identified as
 23 having a mental illness.

⁵ Defendants' interests in ensuring that class members have easy access to family and friends is
 commendable. However, such a concern was not a factor when Defendants decided to open the restoration
 centers in Yakima and Rochester.

1 class members' competency issues were resolved.⁶ Given Defendants' lengthy history of
 2 "indefensible" delays resulting in prolonged, harmful incarceration of class members,
 3 their new-found concern rings hollow. Regardless of which stigma may be more
 4 problematic, responding to perceived stigmas is not a legitimate state interest upon which
 5 Defendants may govern their forensic mental health system.

6 **B. An Unenforceable State Statute Does not Limit this Court's Jurisdiction**

7 Contrary to Defendants' argument, the Ninth Circuit asked this Court simply to
 8 consider the state statute when modifying its order, not to relinquish its authority to
 9 determine constitutional parameters to a state statute enacted on the eve of trial. *See* Dkt.
 10 279 at 3. Although government must be granted "the widest latitude in the dispatch of its
 11 own internal affairs," deference is not required and injunctive relief is appropriate when
 12 "irreparable injury" is threatened and remedial attempts are superficial and timed to avoid
 13 judicial review of unconstitutional practices. *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th
 14 Cir. 2001). An ambiguous policy that appears crafted to avoid court scrutiny shortly
 15 before judicial proceedings need not be given great weight or deference. *Floyd v. City of*
 16 *New York*, 959 F. Supp.2d 540, 608-09 (S.D.N.Y. 2013) ("An untested, last-minute
 17 adjustment—even if undertaken in good faith—cannot undo ten uninterrupted years of
 18 willful disregard."); *see also Ohlinger v. Watson*, 652 F.2d 775, 780 (9th Cir. 1980)
 19 (finding Oregon State Penitentiary's plan to improve medical treatment of inmates was
 20 not enough to forestall injunction because it was "undefined" and "unclear whether the

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 22 ⁶ Defendants also half-heartedly argue for the first time since this case has been litigated that they need
 23 more time to conduct initial evaluations to interview "providers and family." Dkt. 279 at 7. Nowhere does
 the applicable state statute require evaluators to provide this information. *See* Wash. Rev. Code 10.77, *et al.*

1 improvements would incorporate the methods which the experts indicated would be
2 adequate to treat appellants”).

3 Defendants’ argument fails for two reasons. *First*, Wash. Rev. Code 10.77.068
4 was modified on the eve of trial and appeared to anticipate court scrutiny. *See* Wash. Bill
5 Tracking Senate Bill No. 5889, 64th Sess. (2015). As in *Floyd*, this Court should be
6 skeptical of the legitimate nature of policy reasons underlying the revised statute,
7 RCW 10.77.068, which doubled the time the State had to complete in-jail evaluations,
8 eradicated any enforcement mechanisms, and was not predicated on the extensive fact-
9 finding legislative process that undergirded the previous seven (7) day standard.⁷ *See*
10 Wash. Rev. Code 10.77.068. The absence of legitimate state interests at play is further
11 evidenced by the lack of a policy statement regarding purpose or directive for ensuring
12 that the new targets would be met by ensuring that Defendants reported progress to the
13 Legislature. The statute is wholly missing any articulation of how shifting the target from
14 seven to fourteen days furthers the state’s legitimate interests.⁸ Given the long and
15 troubled history of the state’s failures to comply with the law and court’s orders regarding
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18 ⁷ At trial, this Court asked Tim Hunter, the DSHS State Hospital Forensic Policy and Legislative
19 Administrator, regarding the new statute’s target and the inability to reduce wait times absent the requested
20 resources. Dkt. 138 at 51:22-25. Mr. Hunter replied “I don’t think it’s going to be a year before we’re
21 accomplishing the hitting-the-target, we would hope.” *Id.* at 52:3-10. He would on to testify that
22 Defendants’ “modeling” demonstrated the “injection of sources - the beds and the new evaluators” would
23 help them meet the new statutory targets. *Id.* However, fifteen months after trial Defendants’ are not even
in compliance with the state statute. *See* Dkt. 278-1.

⁸ The statute’s purported “maximum” is ambiguous as it contains a non-exhaustive list of exceptions to the
“fourteen day” limit. RCW 10.77.068(1)(c)(i)-(vi). These include defense counsel availability and
“unusual spikes” in referrals. *Id.* at (iii), (vi). However, Defendants’ documents reveal that there is no real
data regarding what percentage of time is actually attributable to defense counsel availability. Dkt 236-1 at
32-53. Delays due to “unusual spikes” in referrals are in reality nothing more than thinly-disguised delays
due to failure to secure adequate staffing, funding, and data to anticipate the demand for services, which are
not legitimate state interests. Thus, these cannot be deemed legitimate state interests.

1 competency services, this Court should not abdicate its authority to an unenforceable,
2 ambiguous state statute.

3 *Second*, the State's untested statute neither articulates nor balances the parties'
4 interests as substantive due process requires. Nor does it ensure that Defendants'
5 legitimate interests in running an efficient forensic mental health system and class
6 members' rights to avoid the harms associated with prolonged incarceration are equally
7 considered and weighed. A ten (10) day timeframe is protective of class members'
8 liberty interests and the State's legitimate interests in overcoming some systemic
9 difficulties that were articulated in trial and on appeal. The facts consistently
10 demonstrate that Plaintiffs experience mounting harm with each additional day they
11 spend incarcerated while awaiting competency services. Dkt. 131 at 4-11, 19; *see also*
12 Dkt. 260-4 at 11-30. Thus, for Plaintiffs—the very people Defendants are tasked with
13 serving and protecting—a fourteen day timeframe with a non-exhaustive list of
14 extensions means additional days of deterioration of their mental health, additional days
15 of increased suicide risk, and additional days of increased risk of victimization by other
16 inmates.

17 **C. Other Jurisdictions' Practices Are not Controlling**

18 Defendants argument that Washington State should not implement a more
19 aggressive timeline for providing in-jail competency services than other jurisdictions
20 should be rejected. Dkt. 279 at 2, 9. None of those jurisdictions are the subject of this
21 litigation. Those jurisdictions may have statutes that require much more extensive
22 findings than Washington, including requiring detailed finding, a diagnosis, a prognosis,
23 and whether the individual should be transported to the state hospital regardless of

1 whether they are competent to proceed to trial. *See* Dkt. 139 at 22-29. Other
2 jurisdictions may also have different interests to balance than those in Washington,
3 especially when those jurisdictions allow pretrial detainees to wait for competency
4 services in hospital—rather than jail—settings. These variations in both other
5 jurisdictions’ and pretrial detainees’ interests alter the balance of what constitutes a
6 “constitutionally requisite reasonable relationship” between timing of evaluations and
7 parties’ interests.

8 Second, Defendants cite to *Schall v. Martin*, which actually supports the
9 proposition that just because a large number of other jurisdictions have long wait times
10 does not mean those wait times would pass constitutional muster if challenged. *Schall v.*
11 *Martin*, 467 U.S. 253, 268, (1984)(internal citations omitted). Dkt. 279 at 9. The fact
12 that a large number of other jurisdictions have long wait times is not dispositive on the
13 question of whether it is constitutional for Washington to follow suit.

14 Here, we have undisturbed findings of fact regarding the harms suffered to class
15 members due to prolonged detention in jail—and evidence that these harms increase with
16 each passing day, compromising in turn the state’s own legitimate interests in
17 competency restoration and running an efficient and safe forensic mental health system.
18 These undisputed harms include serious decompensation and, it bears reminding, class
19 members have died.

20 Ultimately, this Court only has before it the facts and parties here in
21 Washington State. This Court must properly balance these parties’ interests in
22 crafting its remedy to address a long-standing practice caused by the failure to
23 ensure sufficient resources and resulted in lasting harm to class members.

III. CONCLUSION

Washington's 2015 unenforceable law with countless exceptions fails to properly balance the interests of the parties related specifically to initial competency evaluations. Instead, a review of the evidence presented prior, during, and after trial reveal that the appropriate balance of the parties' legitimate interests under the Substantive Due Process test are served by completing in jail competency evaluations within ten (10) days.

Dated this 24th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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)
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DATED: June 24, 2016, at Seattle, Washington

/s/Christopher Carney

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