Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

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I. INTRODUCTION

Defendants concede that their failure to timely provide competency evaluation and restoration services is a violation of Class Members' Due Process rights. Nonetheless, they ask this Court to issue a "narrow and constrained partial summary judgment" order because Defendants may, at some point in the future, provide evidence of the State's interests in delaying the provision of competency evaluation and restoration services. However, all Defendants' asserted interests are merely proxies for a lack of adequate funds and staffing and, as such, Defendants' request is not supported by the Constitution or relevant case law. Nor is Defendants' promise of evidence to come sufficient to defeat summary judgment. The Court should grant Plaintiffs' Motion for Summary Judgment and find that the Fourteenth Amendment requires Defendants provide competency services within seven days of a receiving a court order.

II. ARGUMENT

This Court evaluates a Substantive Due Process claim by balancing class members' liberty interests against the legitimate and compelling interests of the state. *Youngberg v. Romeo*, 457 U.S. 307 (1982). Defendants do not dispute that Plaintiffs and Class Members have liberty interests in their freedom from incarceration and in restorative treatment. *See* Dkt. No. 95 at p. 12. Nor do they dispute that they have failed to provide these services in a timely manner. *See id.* at p. 2. But the other side of the balance is completely missing: Defendants present no evidence of a legitimate state interest that would outweigh Plaintiffs' and Class Members' liberty interests.

A. There Are No Genuine Issues of Material Facts Before the Court

Defendants must designate specific facts establishing a genuine issue for trial to successfully defend against Plaintiffs' Motion for Summary Judgment. *Celotex Corp. v. Catrett*,

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477 U.S. 317, 323 (1986). As such, Defendants "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Ratio Corp.*, 475 U.S. 574, 586 (1986). A party opposing summary judgment must present significant probative evidence tending to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). Bare allegations, speculations, or conclusions, as well as inadmissible evidence or even a "scintilla" of evidence, will not meet this burden. *See Nelson v. Pima Cnty. Coll.*, 83 F.3d 1075, 1081 (9th Cir. 1996).

Defendants argue that there are disputed issues of fact that prevent this Court from granting summary judgment, but offer only speculations, bare allegations, and unfounded conclusions in support of these claims. Dkt. No. 95 at p. 9. This is made evident by the fact that the only material issues of fact that Defendants identify is what they speculate unidentified experts and other witnesses may testify about at trial. Dkt. No. 95 at pp. 9-10 ("State expert witnesses are expected to testify about the disutility of setting arbitrary restoration standards, lack of national uniformity in bright line standards, and facts that can and should be taken into account when applying the due process balancing test[.]"). Defendants have offered no evidence supporting what they claim are disputed issues of fact that defeat summary judgment. Nor have Defendants presented any material evidence that casts doubt on Plaintiffs' Statement of Facts. As such, Defendants failed to meet the evidentiary burden required to defeat Plaintiffs' Motion for Summary Judgment.

B. Defendants Concede That They Fail to Provide Timely Competency Evaluation and Restoration Services

Defendants urge this Court to be "wary" of Plaintiffs' Statement of Facts but failed to present any evidence that the waitlists presented to this Court by Plaintiffs portray wait times

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inaccurately.[1] Defendants did reference the "agreed facts presented by Plaintiff's motion" and admit they do not "materially dispute that wait times indeed exist for Plaintiffs and many class members." Dkt. No. 95 at p. 7. This agreement regarding the facts is unsurprising considering the facts Plaintiffs presented to explain both the scope of the wait list and the estimated length of those wait times are either the wait lists that Defendants have created or the testimony they have provided. Dkt. No. 45-1 at pp. 3-6; Dkt. No. 57-1 at pp. 3-47; Dkt. No. 57-2 at pp. 17-18; Dkt. No. 88-1 at pp. 16-36, 39-51; Dkt. No. 88-2 at pp. 1-65. As such, Defendants' unfounded allegation that Plaintiffs' characterization of the wait times is suspect does not create a factual dispute. *Nelson*, 83 F.3d at 1081-82.

Further, it is undisputed that Defendants consistently cause individuals in need of competency services to suffer prolonged incarcerations at local jails by failing to provide the court ordered services within seven days described by Wash. Rev. Code § 10.77.068 and approved in *Mink. Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003). For example, Jonte Willis, a local boxing legend with no prior convictions, who decompensated after sustaining head injuries during his career, was recently incarcerated for approximately ninety days at Pierce County Jail, mostly in solitary confinement, while he awaited a competency evaluation at Western State Hospital (WSH). Dino Sepe Declaration ("Sepe Decl."), ¶ 5; *id.* at Ex. A, G. Eighty-nine of these days were after the court ordered him to WSH for competency services and thirty-five days after Defendants were held in contempt for failing to timely provide Mr. Willis these services. *Id.* at ¶ ¶ 8, 11-12; *id.* at Exs. C, E-F.

[1] Defendants also contend that the mere fact that a waitlist exists does not support a finding of a constitutional violation. Plaintiffs have focused their argument only on individuals who are on the waitlist who have been waiting more than seven days. Dkt. No. 87 at pp. 3-4.

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C. Plaintiffs' Liberty Interests Outweigh Any Interest Claimed by Defendants

Defendants concede that Plaintiffs and Class Members have fundamental liberty interests in freedom from incarceration and in restorative treatment, and that these interests are protected by the Due Process Clause. *See* Dkt. No. 95 at p. 12 ("A criminal defendant awaiting competency services in jail unquestionably has a liberty interest in freedom from restraint); *id.* at pp. 19-20 ("[R]estorative treatment . . . is . . . required when current confinement exists."). *See also Mink*, 322 F.3d at 1121. Defendants also concede that any wait times for competency evaluation and restoration services that are longer than thirty days are unconstitutional.[2] *See* Dkt. No. 95 at p. 2.

However, they appear to argue that wait times of up to thirty days are justified by legitimate state interests. *Id.* However, Defendants fail to produce any evidence or law to support their contention that a thirty-day bright line rule is justified and do not discuss how such a rule would comport with *Mink* or the statutory guidance in Wash. Rev. Code § 10.77.068.[3] The State also failed to present evidence regarding its alleged interests that it claims outweigh Plaintiffs' and Class Members' interest in being free from incarceration that is not part of the criminal process nor is part of the competency evaluation or restoration process.

[2] Defendants also suggest that because different categories of defendants have different wait times, only partial summary judgment is appropriate. Defendants conflate constitutional standards with a determination of the appropriate remedy. Due Process requires that Plaintiffs and class members wait no more than seven days in jail after Defendants receive a referral for competency-related services. The question of whether different remedies (e.g. changes to algorithms, additional staff, etc.) are appropriate for different categories of pre-trial detainees awaiting trial is one this Court can answer after hearing evidence at trial. *See Mink*, 322 F.3d at 1122-23; Declaration of Emily Cooper ("Cooper Decl.") Ex. A at p. 14 (ordering admission of pre-trial detainees "not later than seven days after the issuance of an order determining a criminal defendant" requires competency restoration and considering remedy at a later time).

[3] Defendants incorrectly contend that the Supreme Court and lower courts have refused to impose timelines in defining constitutional rights. *See Cournty of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (requiring probable cause hearing within forty eight hours of arrest in order to provide some degree of certainty so that states and counties may establish procedures with confidence that they fall within constitutional bounds).

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1. Defendants failed to produce any evidence supporting a legitimate interest in delaying the provision of competency evaluation and restoration services

Defendants argue that they have legitimate interests in delaying provision of competency-related services to Plaintiffs and that the *Youngberg* balancing test would tilt in their favor once this Court heard evidence regarding those interests. Dkt. No. 95 at pp. 13, 19. *See Youngberg*, 457 U.S. at 320 ("In determining whether a substantive right protected by the Due Process Clause has been violated, . . . [the] Court weigh[s] the individual's interest in liberty against the State's asserted reasons for restraining individual liberty."). Defendants describe their interests in withholding competency evaluation and restoration services from Class Members as: (1) evaluating and restoring the competency of defendants so that they may fairly be brought to trial; (2) detaining individuals awaiting competency services who have pending criminal charges, particularly when those charges are of a serious nature; and (3) providing competency services to criminal defendants in an organized and efficient manner that appropriately uses public resources. Dkt. No. 95 at p. 13.

Although Defendants proffer three interests that they claim outweigh Class Members' liberty interests, Defendants fail to offer any evidence to support their asserted interests or evidence that shows that prolonged incarceration of those awaiting services is necessary to meet these stated interests. Instead, Defendants contend that summary judgment should be denied so that, at trial, the State "can present evidence regarding its legitimate interest in these . . . waiting periods." Dkt. No. 95 at p. 3. Defendants' bare assertion of these interests without any evidence in support of their claims is insufficient to create a dispute of material fact or to prove the

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reasonableness of the interests asserted.[4]

2. Even if Defendants had produced evidence in support of their stated interests, the balance tips in favor of Plaintiffs

Defendants fail to present any evidence justifying their claimed interest and fail to connect their asserted interests with the thirty-day wait time they ask this Court to approve. However, even if this Court were to consider Defendants' unsupported assertion of interests in prolonging Plaintiffs' and Class Members' detention, the balance of their fundamental liberty interests and Defendants' interests tilts in Plaintiffs' favor.

First, Defendants offer no explanation or evidence to show that forcing Plaintiffs and Class Members to wait longer than seven days for competency-related services furthers the state interest of evaluating and restoring the competency of defendants so that they may fairly be brought to trial. Defendants' argument runs directly counter to Ninth Circuit precedent. In *Mink*, the court held that refusal to provide class members with restorative treatment "undermines the state's fundamental interest in bringing the accused to trial." *Mink*, 322 F.3d at 1121. Thus, Defendants' claim does not survive scrutiny as the Ninth Circuit has held that a state's legitimate interest in bringing individuals to trial is not forwarded by denying pre-trial detainees competency services for prolonged periods of time. Further, Defendants agree that prolonging Plaintiffs' incarceration in local jails undermines their ability to provide competency-related

[4] If there were legitimate state interests as Defendant now contend, not only would Defendant present evidence of them to this Court, they would have a clear record of presenting them to state courts ordering them to show cause. A review of filings in several such cases does not show Defendants provided evidence of or even an argument that there are legitimate state interests in delaying provision of services. To the contrary, the state's rationale for delay focuses on a lack of sufficient resources. *See, e.g.* Cooper Decl. Ex. C at p. 10 (Defendants argue they are unable to comply with court orders for prompt treatment due to "bed space and allocation limitations, staffing challenges, and regulatory rules that constrain patient to staff ratios"); Dkt. No. 51-1 at pp. 17-71; Dkt. No. 54-1 at pp. 22-35; Dkt. No. 57-2 at pp. 5-66; Dkt. No. 88 at pp. 16-36; Dkt. No. 88-2 at pp. 1-36, 42-65.

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services to those Plaintiffs,[5] and Defendants' own consultants found jails "often lack resources to identify and offer even initial treatment [which] can [not only] cause delays in treatment, but also exacerbate[e] . . . symptoms[.]" Dkt. No. 57-2 at p. 84; *see also* Dkt. No. 50-1 at pp. 15-16.

Second, Defendants assert an interest in "detaining individuals awaiting competency services who have pending criminal charges, particularly when those charges are of a serious nature." Dkt. No. 95 at p. 13. Essentially, Defendants assert an interest in prolonged confinement, for the sake of confinement alone, of class members who have not been convicted of any crime in the same conditions as if they had been convicted. However, the Ninth Circuit has expressly rejected this argument. *Mink*, 322 F.3d at 1121 (finding that the State "has not advanced . . . a legitimate state interest in keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months").

Finally, warehousing class members in local jails that cannot provide competency services taxes the resources of the local jail, Dkt. No. 46 at p. 2, and exacerbates individual's mental health concerns and, as such, cannot forward the state's interest in "providing competency services to criminal defendants in an organized and efficient manner that appropriately uses public resources[.]" Dkt. No. 95 at p. 13. Perhaps to support this asserted interest in "organized and efficient" operations, Defendants present evidence relating to an "algorithm" Western State Hospital uses to manage admissions. However, Defendants' arguments that their limited resources, budget, and "algorithm" requires that Plaintiffs and class members wait up to thirty days for competency-related services are legally insufficient as the Ninth Circuit has held "lack of funds, staff or facilities cannot justify the State's failure to provide treatment." *Ohlinger v.*

[5] Defendants have also testified in state court proceedings that incarceration in jails causes individuals to lose "a significant portion" of any gain made in competency restoration, which is why Defendants do not send individuals to jails between successive competency restoration periods. Dkt. No. 88-2 at p. 19.

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Watson, 652 F.2d 775, 779 (9th Cir. 1980).

Ultimately all of Defendants' asserted State interests are nothing more than proxies for the State's failure to provide adequate staff and funding. There would be no need for the administrative juggling or warehousing individuals while they wait for services if the State were simply capable of providing competency evaluation and restoration services within the seven days required by the Constitution. Defendants' argument that these three interests outweigh Plaintiffs' and Class Members' liberty interest further fails because the interests Defendants articulated in their responsive briefing are best served by providing competency evaluations and restoration services as quickly as possible, not by prolonged detention. The only way one could conclude these interests support prolonging a detention is if there are insufficient funds and resources to timely provide the services. Dkt. No. 95 at p. 3. But the Ninth Circuit has foreclosed this argument. *Mink*, 322 F.3d at 1121.

3. Defendants unlawfully punish class members by prolonging their incarceration

Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. *Mink*, 322 F.3d at 1120. *See also Jones v. Blanas*, 393 F.3d 918, 931-32 (9th Cir. 2004) ("[A]n individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime."). This is because the Due Process Clause prevents a detainee who has not yet been convicted from being subjected to conditions designed to punish. *Bell v. Wolfish*, 441 U.S. 520 (1979).

Here, Class Members are incarcerated in local jails even though they are pretrial detainees, who have not been convicted of any crime, and who currently have no active criminal

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proceedings against them. *See* Wash. Rev. Code § 10.77.084 (providing that after a criminal defendant has been found incompetent, the proceedings against the defendant are stayed); Wash. Ct. R. Crim. R. 3.3(e) (excluding all proceedings related to the competency of a defendant to stand trial when computing time for trial). As such, Class Members' continued incarceration is not pursuant to their criminal cases, but rather a result of Defendants' failure to admit them for competency restoration services. By virtue of their detention in local jails, Class Members who have been convicted of no crime are being subjected to punishment as they remain incarcerated in conditions that were designed to punish. This is a violation of Class Members' Due Process rights.

D. The Ninth Circuit's Ruling in *Mink* Governs These Claims

Although Defendants may not agree with the Ninth Circuit's decision in *Mink*, that case is binding and requires a finding that Defendants are violating Class Members' Due Process rights. Like the *Mink* plaintiffs, Class Members are detained in jails that cannot provide the competency-related services they have been court-ordered to undergo.[6] Like the *Mink* plaintiffs, Class Members' confinement in local jails bears no relationship to the goal of their confinement—competency evaluation and restoration. Like the *Mink* defendants, Defendants claim its interests in administrative ease and budgetary concerns trump the liberty interests of those who are incarcerated awaiting services only Defendants can provide.

[6] Defendants suggest that this Court should grant only partial summary judgment because named Plaintiffs and class members' individual circumstances have changed and they are no longer detained. This argument is unavailing for two reasons. First, the class is defined as individuals "who are waiting in jail" for competency services. Dkt. No. 83 at p. 4. Second, Supreme Court and Ninth Circuit case law have clearly established that even if named Plaintiffs' individual claims have been mooted, they may represent the class. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1974) (allowing pretrial criminal defendants to pursue class action although individual claims became moot); *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997) (permitting plaintiff who brought class action challenging working conditions of at the county jail to pursue claims even after he was transferred to a different facility).

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Defendants expend considerable effort attempting to distinguish the facts in *Mink* from the facts here. The factual differences Defendants point out, however, are not relevant to the legal analysis in *Mink*. First, Defendants argue that the *Mink* court's legal analysis was insufficient as it did not meaningfully balance the legitimate state interests in delaying provision of competency-related services. Dkt. No. 95 at pp. 15-17. Their argument is unpersuasive because *Mink* did engage in a balancing test when it held "[l]ack of funds, staff or facilities cannot justify the State's failure to provide [such persons] with [the] treatment necessary for rehabilitation." 322 F.3d at 1121. Defendants' may have wanted a more nuisanced analysis but their disagreement with the Ninth Circuit's inquiry does not make *Mink* any less binding.

Second, Defendants argue that because Washington statutes RCW 10.77.086, .088, and .092 limit how long a class member can spend at WSH or Eastern State Hospital (ESH) for evaluation or restoration purposes, and does not have a statute requiring admission within seven days, *Mink* does not apply. Dkt. No. 95 at pp. 16, 18. Differences in Oregon and Washington's statutes regarding how long a class member may spend at the state psychiatric hospital are not relevant to the issue here—the length of time class members *wait in jail* to obtain constitutionally-required competency-related services.

Finally, at the time *Mink* was litigated, the Oregon "statute [was] silent on how quickly transport must occur." Cooper Decl. Ex. A at p. 4. Indeed, there, the only state statutes the Ninth Circuit considered were those that allocated responsibility for pre-trial detainees who had been ordered to undergo competency restoration. The Court considered these statutes when rejecting the *Mink* defendants' arguments that other entities were responsible for the ongoing violation of the *Mink* plaintiffs' constitutional rights. Here, Defendants have conceded that they, like the defendant in *Mink*, are responsible for providing court-ordered evaluation and restoration

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services once they have received a complete referral.[7] Dkt. No. 95 at pp. 4-5; Wash. Rev. Code §§ 10.77 *et. Seq.* (2014). This Court need not inquire further into Washington's statutory scheme regarding the provision of competency evaluation and restoration, when the issue, here, is the significant length of time class members wait in jail for these services.

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant summary judgment and enter an order declaring that the Fourteenth Amendment's Due Process Clause requires that Defendants provide competency services within seven days of receiving a referral.

DATED this 5th day of December, 2014.

Respectfully submitted,

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[7] Defendants assert in passing that third parties may be responsible for delays in provision of competency-related services. Dkt. No. 95 at p. 3. It is undisputed, however, that once Defendants receive a complete referral, they are solely responsible for the provision of services. Also, Defendants' own evidence suggests that in the vast majority of cases, delays in provision of competency services are caused by Defendants' resource constraints rather than third parties. Cooper Decl. at Ex. B.

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I hereby certify that on December 5, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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