

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

(1) LESLIE BRIGGS, as next friend of T.W. )  
and B.S.; )  
(2) EVAN WATSON, as next friend of C.R.; )  
and, )  
(3) HENRY A. MEYER, III, as next friend )  
of A.M., for themselves and for others )  
similarly situated, )

Plaintiffs, )

v. )

Case No: 23-cv-81-GKF-JFJ

(1) ALLIE FRIESEN, in her official capacity )  
as Commissioner of the Oklahoma )  
Department of Mental Health and )  
Substance Abuse Services; and )  
(2) DEBBIE MORAN, in her official )  
capacity as Interim Executive Director of the )  
Oklahoma Forensic Center, )

Defendants. )

**SUPPLEMENT TO JOINT MOTION FOR PRELIMINARY APPROVAL**

In accordance with the Court’s Order entered June 24, 2024 (Doc. 47), Plaintiffs and Defendants jointly submit this supplement in further support of their *Joint Motion for Preliminary Approval of Consent Decree, Class Certification, and Plan of Notice to Class* (Doc. 46) (the “*Joint Motion*”). Below, the parties discuss: (i) the legal basis of Plaintiffs’ due process claims, which are redressed by the proposed Consent Decree (Doc. 46-1); (ii) the factual basis of Plaintiffs’ due process claims; (iii) the requirements for class certification under Rule 23(a) and (b)(2); (iv) responses to the Court’s specific Rule 23(e) inquiries; and (v) a proposal for notice to future Class Members. Plaintiffs contemporaneously submit a separate

application for preliminary approval of their attorney fees to which the parties stipulated in the proposed Consent Decree (*see* Doc. 46-1, ¶¶ 101–105) to address the Court’s request for additional information to assess the reasonableness of the stipulated fees. (Doc. 47, pp. 8–9).

**I.**  
**Legal Basis of Plaintiffs’ Due Process Claims**

To facilitate the Court’s evaluation of the proposed Consent Decree (Doc. 46-1), the parties provide here a non-exhaustive description of the legal framework underlying Plaintiffs’ federal due process claims.<sup>1</sup> This section aims to provide the Court with additional context for the proposed settlement, in response to the Court’s observation that “the parties have not briefed the merits of the claims.”<sup>2</sup> (Doc. 47, p. 8).

The Due Process Clause of the Fourteenth Amendment commands that no state shall deprive any person of their liberty without due process of law. U.S. Const. amend. XIV, § 1. The Supreme Court has held that “the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions

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<sup>1</sup> Plaintiffs’ Class Action Complaint (Doc. 2) also asserts claims for violations of rights secured by Oklahoma’s Constitution (Art. 2, Sec. 7) and the Americans with Disabilities Act (“ADA”). Redressing the federal due process claims is, however, the focus of the proposed Consent Decree, which the parties believe, if entered, would subsume and moot the remedies sought in the ADA and state constitutional claims.

<sup>2</sup> Statements contained herein constitute neither an admission of liability nor a waiver of any party’s right to argue for extending or modifying existing law or for establishing new law if the Consent Decree is not approved.

regardless of the fairness of the procedures used to implement them.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (internal quotation marks omitted).<sup>3</sup>

Under the substantive component of the Due Process Clause, a state may not engage in conduct that “shocks the conscience” or otherwise “interferes with rights implicit in the concept of ordered liberty.” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (internal quotation marks and citations omitted). To determine whether a state has violated a right that substantive due process protects, a court must balance “the individual’s interest in liberty against the State’s asserted reasons for restraining individual liberty.” *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

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<sup>3</sup> The Tenth Circuit has addressed the contested nature of the substantive due process doctrine as follows: “While true that the substantive due process doctrine has been vociferously debated, it is also true that it has continually endured. To quarrel with its existence is not within our power nor our preference.” *Bledsoe v. Carreno*, 53 F.4th 589, 605 (10th Cir. 2022) (citations omitted) (holding that plaintiff sufficiently pled a § 1983 claim based on violation of substantive due process rights); *see also Hunt v. Montano*, 39 F.4th 1270, 1278 (10th Cir. 2022) (holding that plaintiffs pled a plausible § 1983 claim “rooted in the substantive component of the Fourteenth Amendment’s Due Process Clause”); *cf. Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 260 (2022) (“We have held that the established method of substantive-due-process analysis requires that an unenumerated right be deeply rooted in this Nation’s history and tradition before it can be recognized as a component of the ‘liberty’ protected in the Due Process Clause.” (citation and internal marks omitted)); *but see also id.* at 332–33 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents,” and “[a]fter overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are privileges or immunities of citizens of the United States protected by the Fourteenth Amendment.” (citations and internal marks omitted)).

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).<sup>4</sup> Accordingly, the Supreme Court has long recognized constitutional limits on the nature and duration of pretrial detention. In *Jackson v. Indiana*, the Supreme Court held that “the nature and duration” of an incompetent criminal defendant’s pretrial detention must “bear some reasonable relation to the purpose for which the individual” is detained. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). When a state detains a criminal defendant based on his or her incapacity to proceed to trial, the state may not detain the defendant “more than the reasonable period of time necessary to determine whether there is a substantial probability that he [or she] will attain that capacity in the foreseeable future.” *Id.* If there is not a substantial probability that the defendant will attain capacity in the foreseeable future, then the state must either commence civil commitment proceedings or release him or her. *Id.*

It is well established that, under the Due Process Clause, “[a] detainee may not be *punished* prior to an adjudication of guilt in accordance with due process of law.” *Colbruno v. Kessler*, 928 F.3d 1155, 1162 (10th Cir. 2019) (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). Thus, the Tenth Circuit has held that “the

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<sup>4</sup> See also *Foucha*, 504 U.S. at 80 (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”); *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977) (“While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.”).

Fourteenth Amendment’s guarantee of due process prohibits *any* punishment of those awaiting trial,” and “punishment is *never* constitutionally permissible for presumptively innocent individuals awaiting trial.” *Blackmon v. Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013) (citing *Bell*, 441 U.S. at 535).

To determine whether a particular restriction amounts to punishment, “[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.” *Colbruno*, 928 F.3d at 1162 (quoting *Bell*, 441 U.S. at 538). “[T]hat determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.” *Id.* (quoting *Bell*, 441 U.S. at 538). “[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Id.* (quoting *Bell*, 441 U.S. at 539).<sup>5</sup>

Here, Plaintiffs contend that the State of Oklahoma is unconstitutionally infringing the right of Class Members, who are pre-trial detainees, to receive timely competency restoration services after being declared incompetent to stand trial. Neither the Supreme Court nor the Tenth Circuit Court of Appeals has directly

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<sup>5</sup> *Cf. United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (“[W]e believe that valid pretrial detention assumes a punitive character when it is prolonged significantly.”); *Dodds v. Richardson*, 614 F.3d 1185, 1192–93 (10th Cir. 2010) (addressing liberty interests of pretrial detainees); *Gaylor v. Does*, 105 F.3d 572, 575–76 (10th Cir. 1997) (same).

addressed the constitutionally permissible duration a state can force incompetent pretrial detainees to wait to receive competency restoration services. Numerous other federal courts, however, have examined that issue and determined, based in part on the holding in *Jackson v. Indiana*, that due process imposes a temporal limit on an incompetent pretrial detainee's wait for restorative services.

Recognizing that incapacitated criminal defendants “have a liberty interest in receiving restorative treatment,” the Ninth Circuit Court of Appeals has held: “Holding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.” *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1121–22 (9th Cir. 2003). *Mink* upheld the district court's injunction requiring the relevant state agency to admit “mentally incapacitated criminal defendants within **seven days** of a judicial finding of incapacitation.” *Id.* at 1123 (emphasis added).

Applying *Mink*, the United States District Court for the Western District of Washington entered a permanent injunction requiring the Washington State Department of Social and Health Services to “admit persons ordered to receive competency restoration services into a state hospital within **seven days** of the signing of a court order calling for restoration services.” *Trueblood v. Washington*

*State Dep't of Soc. & Health Servs.*, 101 F. Supp. 3d 1010, 1024 (W.D. Wash. 2015) (emphasis added),<sup>6</sup> *vacated in part on other grounds*, 822 F.3d 1037 (9th Cir. 2016).<sup>7</sup>

At least three district courts within the Tenth Circuit have addressed similar issues. *See United States v. Lara*, 671 F. Supp. 3d 1257, 1258 (D.N.M. 2023); *Disability L. Ctr. v. Utah*, 180 F. Supp. 3d 998, 1009 (D. Utah 2016); *Ctr. for Legal Advoc. v. Bicha*, 2018 WL 5892669, at \*1 (D. Colo. Nov. 9, 2018).

In *Lara*, the United States District Court for the District of New Mexico held that “the pre-hospitalization custody period is subject to reasonableness limitations,” explaining that an excessive period “runs afoul of the Constitution’s guarantee of due process.” 671 F. Supp. 3d at 1258, 1264.

Likewise, in *Disability L. Ctr. v. Utah*, the United States District Court for the District of Utah explained:

The lengthy detention of incompetent defendants in county jails without adequate mental health treatment is not reasonably related to the State’s interest in determining whether there is a substantial probability that the

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<sup>6</sup> The *Trueblood* litigation concerned excessive wait times with respect to both: (i) competency evaluations; and (ii) restorative services following a determination of incompetency.

<sup>7</sup> *See also Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 2016 WL 4418180, at \*5 (W.D. Wash. Aug. 19, 2016) (“[T]he Court finds once again that wait times in excess of seven days contravene the interests of both the state and class members, and do not bear a reasonable relation to the purpose of the confinement.”)(emphasis added); *A.B. by & through Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 681 F. Supp. 3d 1149, 1154 (W.D. Wash. 2023) (describing procedural history in *Trueblood* litigation); *Willis v. Washington State Dep't of Soc. & Health Servs.*, 2017 WL 1064390, at \*6 (W.D. Wash. Mar. 21, 2017) (“[I]t was clearly established that indefinitely incarcerating incompetent defendants while they awaited competency restoration, because there was not room in the state hospital, violated their constitutional due process rights.”).

defendants' competency can be restored in the foreseeable future or to its interest in actually restoring their competency so they may quickly and fairly be tried.

180 F. Supp. 3d at 1012. Accordingly, the court concluded that the plaintiffs had “stated a plausible claim for relief under the Due Process Clause of the Fourteenth Amendment.” *Id.*

In *Bicha*, the United States District Court for the District of Colorado approved, and later enforced, a settlement agreement that required the Colorado Department of Human Services “to offer admission to pretrial detainees within **28 days** of a court order requiring in-patient competency evaluations or restorative treatment, and to maintain a quarterly average of **24 days** for both categories.” 2018 WL 5892669, at \*1 (emphasis added); *see also* Order of Dismissal, *Ctr. for Legal Advoc. v. Bicha*, No. 11-CV-02285-NYW, ECF No. 52 (D. Colo. Apr. 9, 2012) (approving agreement).

Numerous other courts across the country have similarly found that excessive wait times for competency restoration services violate pretrial detainees'



constitutional due process rights.<sup>8</sup> Accordingly, other courts have approved consent decrees or settlement agreements intended to redress other states' failures to provide timely competency restoration services to pretrial detainees. *See, e.g., Hunter v. Beshear*, 2018 WL 564856, at \*1 (M.D. Ala. Jan. 25, 2018) (granting final approval of proposed consent decree); Order, *Disability L. Ctr. v. Utah*, No. 2:15-cv-645-RJS, ECF No. 91 (D. Utah July 12, 2017) (approving settlement agreement); Order of Dismissal, *Ctr. for Legal Advoc. v. Bicha*, No. 11-CV-02285-NYW, ECF No. 52 (D. Colo. Apr. 9, 2012) (approving settlement agreement).

Plaintiffs' due process claims fall squarely within the line of cases discussed above that: (i) apply (expressly or implicitly) *Jackson v. Indiana* to find that due process imposes a temporal limitation on the state's obligation to provide restoration

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<sup>8</sup> *See, e.g., United States v. Calderon-Chavez*, 688 F. Supp. 3d 472, 479 (W.D. Tex. 2023) (holding that excessive "pre-hospitalization delay" violated the Due Process Clause, as keeping the criminal defendant "in a nonmedical detention facility without access to competency restoration services" bore "no reasonable relation to the reason for committing him"); *United States v. Reeves*, 690 F. Supp. 3d 531, 535 (W.D.N.C. 2023) (holding that prolonged pre-hospitalization detention violated due process rights); *Stiavetti v. Clendenin*, 65 Cal. App. 5th 691, 730, 280 Cal. Rptr. 3d 165, 198 (2021) ("[W]e conclude the court acted within its broad discretion when it found that due process requires that defendants commence substantive competency services for IST defendants within 28 days of service of the order transferring responsibility to DSH or DDS."); *Advoc. Ctr. for Elderly & Disabled v. Louisiana Dep't of Health & Hosps.*, 731 F. Supp. 2d 603, 610 (E.D. La. 2010) (granting preliminary injunction and finding plaintiffs had demonstrated "a substantial likelihood of success on the merits of their Fourteenth Amendment challenge" to the "defendants' policy of subjecting Incompetent Detainees to extended delays in jail before their transfer to" a forensic facility); *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 943 (E.D. Ark. 2002) (finding that the Arkansas violated pretrial detainees' due process rights because "the delay in transferring court ordered pretrial detainees to the [state facility] for evaluation or treatment, amount[ed] to punishment of the detainees").

treatment to incompetent pretrial detainees; and (ii) fashion or approve remedies to reduce prolonged wait times, which is the goal of the proposed Consent Decree.

## **II. Summary of Factual Basis of Plaintiffs' Claims**

To facilitate the Court's evaluation of the proposed Consent Decree (Doc. 46-1), the parties provide here a joint recitation of certain uncontested facts, which provide additional context for the proposed settlement.

On March 1, 2023, three (3) guardians ad litem filed the Complaint (Doc. 2) on behalf of four (4) individuals detained in jails and declared incompetent but capable of achieving competency within a reasonable time. The four (4) individuals had been declared incompetent on March 16, 2022, July 1, 2022, August 31, 2022, and December 5, 2022, respectively. As of March 1, 2023, however, all four (4) individuals were still detained in custody awaiting competency restoration treatment. Shortly after the suit was filed, all four (4) individuals were transported to the Oklahoma Forensic Center ("OFC"), reflecting the Department's effort to moot the Plaintiffs' standing to bring this action.

On or about June 7, 2023, Defendants produced to Plaintiffs the Jail Based Competency Restoration List (hereinafter "JBCRL" or "the list") containing information regarding all individuals (and then-known putative class members) in the physical custody of jails and deemed incompetent but capable of restoration within a reasonable time pursuant to 22 O.S. § 1175.1(6) and 22 O.S. §1175.6a(D). The JBCRL listed 304 individuals ordered into the care of the Oklahoma Department of Mental Health and Substance Abuse Services ("ODMHSAS" or the "Department")

as of June 7, 2023. The list included information regarding the individuals' medication compliance and contacts with the Department or its vendors. When suit was filed on March 1, 2023, thirty-eight (38) individuals on the list were in custody and had been waiting for more than a year to receive competency restoration treatment pursuant to court order, and seventeen (17) individuals had been ordered to receive competency treatment as early as 2021.

As of June 26, 2024, the JBCRL contains over 200 individuals; however, multiple individuals on the current JBCRL were also on the list produced on June 7, 2023. Five (5) of the individuals on the current JBCRL were ordered to receive treatment a year or more before the Complaint was filed, while fifteen (15) of the individuals on the current JBCRL were ordered to receive treatment between one (1) month and sixteen (16) months prior to the instant suit being filed.

Not all individuals on the JBCRL are currently receiving any form of treatment. As of July 2024, Defendants are **unable to provide any** in-jail competency restoration services in Tulsa County, as the Tulsa County Sheriff and the Department could not reach an agreement regarding a treatment program. Furthermore, Oklahoma County officials have questioned the efficacy of the Department's jail treatment program. Fifty-two (52) individuals on the June 7, 2023 list were in Oklahoma County while the current list names twenty-three (23) individuals in Oklahoma County.

Since this lawsuit was filed, Oklahoma County judges have conducted show cause proceedings in at least four (4) criminal cases requiring the Department to answer for its apparent failures to complete court-ordered remedial treatment.

For example, in an October 5, 2023 hearing in Oklahoma County, the Honorable Nikki Kirkpatrick expressly found that the Department had violated her prior order in connection with a criminal defendant who had been waiting in custody for transfer to the OFC for some fourteen (14) months.<sup>9</sup> *See* Ex. 1, Tr. at 60:6–60:23. At that hearing, Judge Kirkpatrick remarked on the Department’s arguments as follows:

But Counsel [for the Department], you’re talking in circles because you say that, “I don’t have to provide a report regarding how the Defendant’s doing until I take custody of him,” but, “We’re not taking custody of him because we don’t have a bed.” So I don’t know when he’s ever going to get a bed or how his progress is going because you’re not giving me reports. And I don’t know what the statute says, but I know what my order says, and my order says that the director makes reports to this Court and his attorney of record, Taylor Thompson, Assistant Public Defender of Oklahoma County, and to the District Attorney of Oklahoma County, Oklahoma, every 120 days regarding the status of the defendant. And there is no qualification or asterisks on that saying that it is only if he is in your custody. How am I supposed to know if you’re derelict in your duties or not if I’m not getting a report? Which you said you don’t have to give me a report because you’re not taking him into custody.

It’s a circular argument, Counsel. This Court’s order was very clear: There were supposed to be reports made to this Court and to the defense Counsel and to the State’s

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<sup>9</sup> Attached as Exhibit 1 are pertinent excerpts from the transcript of the October 5, 2023 hearing in the Oklahoma County District Court case captioned *State of Oklahoma v. West*, No. CF-2022-4399.

Counsel, which you did not comply with, nor have I had any evidence whatsoever that there were no beds available in the nine and a half months that the Defendant was in the Oklahoma County Jail from report one to report two made by Dr. Christopher. And the record is completely silent as to the fact that there were zero beds available for this Defendant. And when he did not achieve competency within a reasonable amount of time or within one of those 120-day reporting periods, this Court didn't have an opportunity to make sure that something intervened so that Defendant didn't sit in jail unnecessarily without properly getting competency restoration services. . . .

The Motion for Show Cause; having heard that and the testimony that was brought before this Court and also the testimony that has not been brought before this Court, I find that the Department of Mental Health has violated this Court's December 1, 2022 order, they have not complied with reporting requirements to the bare minimum reporting requirement put in this Court's order on that date, that the Department of Mental Health has violated this Court's order, and therefore in order to purge this violation and this contempt, I order furthermore that the Department of Mental Health take custody of Mr. West and immediately transfer him to the Oklahoma Forensic Center at the very first bed available because he has now been in custody 14 months. He should certainly be at the front of the line. So I order that he be taken immediately into the Oklahoma Forensic Center at the very first bed that is available, and that competency restoration services be administered until he does in fact achieve competency and is ready to proceed with criminal proceedings. I find that this Defendant is incompetent and that he is clearly in need of treatment and still is presently dangerous due to his charges and the totality of the circumstances as found by Dr. Christopher on her August 3, 2022 report.

*See Ex. 1, Tr. at 58:14–61:3.*

As another example, in a January 12, 2024 hearing before the Honorable Cindy Truong, the Department employee assigned to provide competency restoration treatment at the Oklahoma County Jail testified that, to his knowledge, there was no

competency restoration program in the Oklahoma County Jail before February 2023, when he was hired.<sup>10</sup> See Ex. 2, Tr. at 12:13–12:23. This Department employee was a therapist specializing in marital and family therapy with no prior training specific to forensic psychology or competency restoration. Between February 2023 and the January 2024 hearing, the employee’s training in competency restoration solely consisted of a six-hour Zoom training and the employee’s independent internet research. Ex. 2, Tr. at 11:8–12:12, 13:1–17:7. The Department employee testified that he saw Oklahoma County criminal defendants approximately every ten (10) to fourteen (14) days for ten (10) to forty-five (45) minutes. Additionally, for approximately three (3) out of every four (4) visits conducted, the Department employee saw the criminal defendants through the “bean hole” or “through the crack and then we look at each other through the glass” and the conversation would be held by yelling through the cell door. Ex. 2, Tr. at 24:2–26:10.

At that same hearing, Shawn Roberson, Ph.D., testified for the public defender. Dr. Roberson has a bachelor’s degree in psychology, a master’s degree in experimental psychology, and a doctorate in counselling psychology. Ex. 2, Tr. at 48:7:48:13. Dr. Roberson has completed a predoctoral internship in forensic psychology and was previously the Director of Forensic Psychology at the OFC. Ex. 2, Tr. at 48:14:48:22. During his testimony, Dr. Roberson opined that the jail treatment provided by the

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<sup>10</sup> Attached as Exhibit 2 are pertinent excerpts from the transcript of the January 12, 2024 hearing in the Oklahoma County District Court case captioned *State of Oklahoma v. Fleming, et al.*, Nos. CF-2022-3891 and CF-2022-4777.

Department was “not in any way, shape or form” being done consistent with professional norms. Ex. 2, Tr. at 59:11–59:13.

On January 26, 2024, Judge Truong resumed her show cause hearing at which the Interim Executive Director of the OFC, Debbie Moran, testified.<sup>11</sup> See Ex. 3, Tr. at 7:21–7:24. Ms. Moran is a defendant in this matter and is a licensed therapist but not a psychologist or psychiatrist. See Ex. 3, Tr. at 98:22–99:1. Ms. Moran opined that she considered the two criminal defendants, who were the subject of the show cause hearing, as not “dangerous” and ineligible for transfer to the OFC despite never having met either defendant and both defendants being recently reevaluated by a licensed psychologist and found to be incompetent and dangerous under Title 43A. See Ex. 3, Tr. at 70:11–71:5, 73:4–73:17. Ms. Moran further testified that she alone decides who is admitted to the OFC. See Ex. 3, Tr. at 26:11–26:12, 39:4–48:2. Prior to a February 14, 2024 continuation of the show cause hearing, both criminal defendants were transported to the OFC for in-patient restoration treatment.

In further support of the parties’ *Joint Motion*, Dr. Crystal Hernandez, the former executive director of the OFC, has submitted a sworn declaration, which is attached hereto as Exhibit 4, describing Oklahoma’s competency restoration system as “significantly broken.” (See Ex. 4, ¶ 6.) Plaintiffs originally sued Dr. Hernandez in her official capacity as the OFC’s executive director. Dr. Hernandez resigned from

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<sup>11</sup> Attached as Exhibit 3 are excerpts from the transcript of the January 26, 2024 hearing in *State of Oklahoma v. Fleming, et al.*

the Department in August 2023. Thereafter, Debbie Moran, the interim OFC executive director, was substituted as a defendant. (Doc. 30).

Here are a few highlights of Dr. Hernandez' first-hand observations of the Department's competency restoration program:

- The Department has a history of manipulating the waitlist to avoid judicial scrutiny of prolonged wait times. The Department has a “common practice” of leapfrogging defendants on the wait list who file contempt proceedings in their state court cases ahead of other defendants who have been waiting longer. *Id.* at ¶ 9. This type of list manipulation, which evades state court review of individual defendants' prolonged wait times, is “an egregious and arbitrary management of the waitlist because it disregards the waitlisted persons' medical needs and time waiting on the list while incarcerated in jail, in favor of advancing the administration's goal to avoid judicial scrutiny of the competency restoration program.”<sup>12</sup> *Id.*
- The Department's competency restoration operating procedures are “questionable at best, and the data [paint] a clear picture that the system was in desperate need of revamp and investment.... the number of forensic beds at OFC was insufficient given the waitlist and trend line for demand.” *Id.* at ¶ 10.
- In December 2022, the Department “rushed” to launch a purported statewide jail based restoration program without (i) sufficient planning, lead time, and infrastructure; (ii) assigning OFC staff for administration or monitoring; or (iii) providing adequate notice to most of the jail administrators or other stakeholders at the county level. “This created chaos and resulted in a flood of complaint calls and emails to OFC from jails, defense attorneys, prosecutors, and judges.” *Id.* at ¶¶ 12,14.
- The Department “hastily” launched the purported statewide jail-based restoration program “as a tactic to attempt to reduce [the Department's] legal risk associated with its [competency restoration] waitlist and prolonged waiting times for clients....” *Id.* at ¶ 16.
- When the Department launched its purported statewide competency restoration program, there were approximately 300 persons on the

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<sup>12</sup> This type of list manipulation is ongoing.



competency restoration waitlist. After the Department announced its launch, the Department publicly stated that there was “no waitlist” and “all persons” declared incompetent were receiving restoration treatment. These statements were false. Three-hundred incompetent people on the waitlist spread across Oklahoma “did not all suddenly start to receive restoration treatment when [The Department] launched its purported statewide jail-based restoration program.” *Id.* at ¶ 15.

- The Department’s purported statewide jail-based restoration program does “not provide legitimate competency restoration services consistent with accepted professional standards in most, if not all, Oklahoma counties.” *Id.* at ¶ 16.

As the former OFC executive director, Dr. Hernandez’s perspective on the Department’s failed competency restoration system is damning. Significantly, Dr. Hernandez supports the Plan in the proposed Consent Decree as a “step in the right direction” to address Oklahoma’s broken competency restoration program. *Id.* at ¶ 19.

In sum, the parties have, over the course of the past 18 months, separately evaluated the Department’s competency restoration program and have jointly concluded that the Department is, and has been, routinely violating the putative Class Members’ due process rights by failing to provide timely competency restoration services.

### III.

#### **Rule 23(a) and (b)(2) Class Certification Requirements Are Satisfied**

The prerequisites for class certification set forth in Rule 23(a)—often referred to as numerosity, commonality, typicality, and adequacy—and the requirements of Rule 23(b)(2) are satisfied here.

**A. Numerosity**

Rule 23(a)(1) requires that “the class is so numerous that joinder of all members is impracticable.” The factors relevant in determining whether a class is sufficiently numerous include:

the class size, the geographic diversity of class members, the relative ease or difficulty in identifying class members, the nature of the action, the size of the individual claims, and the ability of class members to institute individual lawsuits.

*Disability L. Ctr. v. Utah*, 2016 WL 5396681, at \*3 (D. Utah Sept. 27, 2016) (citing *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014)). Multiple factors weigh in favor of finding numerosity here.

*First*, approximately 200 incompetent criminal defendants were waiting to receive competency restoration services as of June 26, 2024. The proposed class also includes an unknown, additional number of future class members. Thus, the size of the class weighs in favor of finding numerosity. *Cf. Hunter*, 2018 WL 564856, at \*4 (finding that settlement class in similar context met numerosity requirement).

*Second*, the proposed class includes incompetent defendants dispersed across dozens of counties throughout Oklahoma. The geographic diversity of class members weighs in favor of numerosity.

*Third*, the composition of the class is fluid as incompetent defendants are added to the list and others are transferred to OFC for treatment. Moreover, the class contains unknown, unnamed future members. The difficulty of identifying all individual class members, including those in the future, weighs in favor of numerosity. *See Disability L. Ctr. v. Utah*, 2016 WL 5396681, at \*4.

*Finally*, members of the proposed class are, by definition, arrested persons charged with criminal violations who have been declared incompetent. They are therefore unlikely to be able to fund and direct individual litigation themselves. Moreover, Plaintiffs here seek injunctive and declaratory relief, reducing the economic incentive that would justify the cost of individual litigation. “And although a prevailing party in a § 1983 action may recover attorneys’ fees under 42 U.S.C. § 1988(b), many class members are likely indigent and unable to fund a lawsuit at the outset.” *Disability L. Ctr. v. Utah*, 2016 WL 5396681, at \*4. Thus, many individual class members would be deterred from bringing individual lawsuits based on the nature of the action and the size of individual claims. Considering the foregoing, the proposed class is sufficiently numerous that joinder is impracticable.

## **B. Commonality**

Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” “Factual differences between class members’ claims do not defeat certification where common questions of law exist.” *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). Moreover, “[a] finding of commonality requires only a single question of law or fact common to the entire class.” *Id.*

Common questions exist here. As alleged in the Complaint, these common questions include: (i) whether Defendants have failed to provide competency restoration treatment to the putative class members within a reasonable period of time; (ii) whether and to what extent prolonged periods of confinement in county jails or similar detention facilities while awaiting restorative services cause or exacerbate mental, emotional and physical harm to class members; (iii) whether Defendants’

failures to admit individuals with mental illness to the OFC facility for competency restoration services, or to otherwise provide such services in a timely manner, violate the Due Process Clause of the Fourteenth Amendment; and (iv) whether the remedies proposed in the Consent Decree will improve wait times. (Doc. 2 at p. 23, ¶ 68). A class-wide proceeding has the capacity to generate common answers that are apt to drive the resolution of the litigation. Thus, the proposed class satisfies the commonality requirement.

### C. Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” That said, “[t]he interests and claims of Named Plaintiffs and class members need not be identical to satisfy typicality.” *Devaughn*, 594 F.3d at 1198.

The typicality requirement is met here because “Plaintiffs’ claims and the class members’ claims are based on the same legal and remedial theory: that the substantive due process right of incompetent defendants requires injunctive relief against the allegedly unconstitutional delays.” *Disability L. Ctr. v. Utah*, 2016 WL 5396681, at \*6 (finding typicality requirement satisfied); *see also Hunter*, 2018 WL 564856, at \*6 (same). Moreover, the Plaintiffs’ claims and the class claims arise from and relate to the same underlying pattern or practice—*i.e.*, the administration of the competency restoration waitlist. The Plaintiffs and all Class Members share the same dispositive characteristics. All have been (or will be) declared incompetent by a state court to stand trial, are incarcerated in county jails or other detention facilities, and have been court-ordered to receive competency restoration treatment

by the Department. There are no other individual variables or characteristics that materially distinguish Plaintiffs' due process claims from the class members' claims.

#### **D. Adequacy**

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” “Courts assess adequacy of representation by asking (1) whether ‘the named plaintiffs and their counsel have any conflicts of interest with other class members,’ and (2) whether ‘the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class.’” *Disability L. Ctr. v. Utah*, 2016 WL 5396681, at \*6 (quoting *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002)).

Here, the proposed class satisfies the adequacy requirement, as neither the named Plaintiffs nor their counsel have any conflicts of interest with the class. As described above, each class member has a strict identity of interest in pursuing their due process claim—*i.e.*, to alleviate the prolonged wait times for restoration treatment. Moreover, Plaintiffs' counsel are experienced and qualified to prosecute this action on behalf of the proposed class, as discussed in the contemporaneously filed *Unopposed Supplemental Motion for Preliminary Approval of Attorney Fees in Support of Joint Motion for Preliminary Approval of Consent Decree* (the “Supplemental Fee Motion”). Indeed, Plaintiffs' counsel have prosecuted this action vigorously and, after extensive negotiation, reached a settlement that is favorable to all class members. *Cf. Hunter*, 2018 WL 564856, at \*7 (finding adequacy under similar circumstances, as “continued litigation would only serve to delay class relief”).

In some cases, mootness of the named plaintiffs' claims can raise adequacy concerns. But this is not such a case. As the Supreme Court has explained, "some claims are so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 399 (1980) (addressing a class of people arrested without warrant being denied prompt judicial determinations of probable cause); see also *Clark v. State Farm Mut. Ins. Co.*, 590 F.2d 1134, 1140 (10th Cir. 2009); 1 *Newberg and Rubenstein on Class Actions* § 2:13 (6th ed.); but see *D.G. v. Henry*, 2009 WL 1011595, \*2 (N.D. Okla., April 15, 2009) (Frizzell, J.) (recognizing the "inherently transitory" exception, but finding it inapplicable to the particular case).

Although the "inherently transitory" exception is often applied in the context of the justiciability doctrine, courts have applied the same concept to find named plaintiffs whose claims have been mooted to be adequate representatives under Rule 23(a)(4). Indeed, the inherently transitory exception makes it clear that "plaintiffs with moot claims may adequately represent a class." *J.D. v. Azar*, 925 F.3d 1291, 1313 (D.C. Cir. 2019) (internal quotation marks omitted). As the D.C. Circuit explained:

The very existence of the inherently-transitory exception disproves any suggestion that the mootness of a plaintiff's claims necessarily demonstrates her inadequacy as a representative. The entire object of that exception is to allow a class action to proceed even though the inherently fleeting nature of the class's claims will predictably render a given class member's claims moot before the class is certified.

*Id.*; see generally 1 *McLaughlin on Class Actions*, § 4:28 (20<sup>th</sup> ed.) (“[I]n the ‘inherently transitory’ context. . . a plaintiff with a moot claim who otherwise meets the requirements of Rule 23(a)(4) may serve as a class representative.”).

The inherently-transitory exception applies here. By its nature, pretrial detention is, or ought to be, temporary. See *Hunter*, 2018 WL 564856, at \*3 n.1 (discussing the “well-recognized exception to mootness where the class members consist of pretrial detainees”). The Department moved all four named Plaintiffs into the OFC shortly after Plaintiffs filed their Complaint, which required the Department to leapfrog the Plaintiffs ahead of dozens of other incompetent pretrial detainees who had been waiting longer for restoration treatment than the named Plaintiffs.<sup>13</sup>

Although Plaintiffs complain that class members languish in jails, “the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class.” *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (finding exception applicable to jail inmates eligible for conditional release). And the exception is “particularly fitting when *defendants* create ‘a significant possibility that any single named plaintiff would be [dismissed]

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<sup>13</sup> As described in the Complaint, the four named Plaintiffs had been on the waitlist, awaiting competency restoration services, for many months. Within days after the Complaint was filed, the Department found beds for the named Plaintiffs at OFC, in a transparent attempt to moot the proposed Class. This type of manipulation of class members by a defendant who controls the class members’ status gives rise to another standing exception. See *Reed v. Heckler*, 756 F.2d 779, 786 (10th Cir. 1985) (recognizing exception where claims “have been rendered moot by purposeful action of the defendants”); *D.G.*, 2009 WL 1011595, at \*2 (same); see generally 1 *Newberg and Rubenstein on Class Actions* § 2:14 (6th ed.).

prior to certification.” *Jonathan R. by Dixon v. Just.*, 41 F.4th 316, 326 (4th Cir. 2022) (quoting *Olson*, 594 F.3d at 582).

Here, as in *J.D. v. Azar*, “the ephemerality of individual claims makes class-action treatment ‘particularly important’ so as to ‘ensur[e] that a justiciable claim is before the Court.” 925 F.3d at 1313 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003)). Courts have routinely applied this principle to analogous transitory classes to find class representatives “adequate” under Rule 23(c)(4) after their individual claims have been mooted.<sup>14</sup> The same result should obtain here.

#### **E. Certification under Rule 23(b)(2) is appropriate**

Plaintiffs seek class certification under Rule 23(b)(2), which is satisfied where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Just as all class members’ due process

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<sup>14</sup> See, e.g., *Afghan and Iraqi Allies v. Pompeo*, 334 F.R.D. 449, 462–63 (D.D.C. 2020) (Afghan and Iraqi nationals sued, claiming unreasonable delay of visa application adjudications); *J.S.X. v. Foxhoven*, 330 F.R.D. 197, 211–12 (S.D. Ia. 2019) (class of male juveniles who had been adjudicated delinquent sued concerning treatment practices); *McLaughlin v. Wells Fargo Bank, NA*, 2016 WL 34183357, \*6 (N.D. Cal., June 21, 2016) (class alleging breach of truth in lending obligation to provide accurate payoff statements on home mortgages); *Reid v. Donlan*, 297 F.R.D. 185, 192 (D. Mass. 2014) (class of habeas corpus petitioners protesting lack of individualized immigration bond hearings); *Chief Goes Out v. Missoula County*, 2013 WL 139938, \*6-7 (D. Mont., Jan. 10, 2013) (juveniles incarcerated in detention facility sued alleging lack of fresh air and outdoor exercise); *M.A. v. Newark Public Schools*, 2009 WL 4799291, \*10 (D.N.J., Dec. 7, 2009) (students suing to vindicate rights under IDEA); *Christina A v. Bloomberg*, 197 F.R.D. 664, 671 (D.S.D., July, 2000) (residents challenging conditions in juvenile training school); *Kutschbach v. Davies*, 885 F. Supp. 1079, 1086 (S.D. Ohio, 1993) (class seeking to have automobile seizure statute declared unconstitutional).



claims are based on the same unifying characteristic—awaiting restoration treatment while incarcerated in county jails for prolonged periods—the Defendants’ treatment, or failure to treat, class members applies generally to the class, such that injunctive relief is appropriate respecting the proposed class as a whole. As alleged in the Complaint, the problems of which Plaintiffs complain reflect a *systemic* failure, and Plaintiffs seek a transformation of that system. (See Ex. 5, Joint Declaration of William Neil Gowensmith Ph.D. and Elizabeth Lauren Kois Ph.D.) Accordingly, certification pursuant to subpart (b)(2) is appropriate. See *Hunter*, 2018 WL 564856, at \*7 (granting motion to certify Rule 23(b)(2) class of incompetent pretrial detainees); *Disability L. Ctr. v. Utah*, 2016 WL 5396681, at \*8 (same).

#### IV.

#### **Responses to Court’s Specific Rule 23(e)(2) Inquires**

The Court enumerated certain Rule 23(e)(2) factors the parties should address to meet their burden to show that the Court will “likely be able to approve the proposed settlement.” (Doc. 47, p. 7.) Those factors are discussed next.

**A. The conduct of the litigation and negotiations leading up to the proposed Consent Decree, including whether the proposal was negotiated fairly, honestly and at arms’ length**

The Court’s Order (Doc. 47, pp. 1–3) accurately describes the course of the litigation as reflected in court filings. The *Joint Motion* briefly described the course of the parties’ negotiations leading to the proposed Consent Decree. (Doc. 46, pp. 3–

4.) Additional detail is provided here to address the Court's inquiry as to whether the Consent Decree was fairly and honestly negotiated at arms' length.<sup>15</sup>

Shortly after the Department filed its Motion to Dismiss (Doc. 16), the Attorney General instructed his team to evaluate the merits of Plaintiffs' due process claim. This evaluation yielded the preliminary conclusion that the Department's delivery of competency restoration services was ineffective and poorly administered, which was causing protracted delays in hundreds of criminal cases in Oklahoma courts. The Attorney General's litigation team determined that, when the lawsuit was filed: (i) more than 300 pretrial detainees who had been declared incompetent were waiting for the Department to provide competency restoration treatment while incarcerated in county jails; and (ii) the average wait time for incompetent pretrial detainees to obtain competency restoration treatment exceeded 100 days.

Based on that preliminary analysis, the Attorney General instructed his litigation team to investigate the Department's competency restoration system and, in tandem with Plaintiffs' counsel, develop solutions to ameliorate the protracted wait times. On April 12, 2023, Plaintiffs' counsel met with the Attorney General and his litigation team to discuss the Attorney General's preliminary analysis. The parties developed a joint due diligence plan that involved, among other things, meeting with

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<sup>15</sup> This discussion focuses on the parties' negotiations with one another. Not included here are the parties' separate due diligence and investigation, including separate meetings with district attorneys, chief public defenders and defense attorneys, law enforcement personnel, judges, mental health professionals, and other stakeholders.

the Department's CCBHC service providers<sup>16</sup> who provide mental health services in Oklahoma county jails.

Over the next several months, the Attorney General's litigation team and Plaintiffs' counsel jointly met and conferred with representatives from: (i) Family & Children's Services, which provides in-jail mental health services in the Tulsa County Jail; (ii) Red Rock Behavioral Health Services, which provides mental health services in counties in western Oklahoma;<sup>17</sup> (iii) Turn Key Health, which provides in-jail mental health services in the Oklahoma County Jail;<sup>18</sup> (iv) Grand Mental Health, which provides mental health services in counties in northeast Oklahoma;<sup>19</sup> and (v) Green County Mental Health, which provides mental health services in jails in McIntosh and Muskogee Counties. The parties' counsel also toured the Oklahoma Forensic Center, accompanied by Department personnel. Counsel twice toured the Tulsa County Jail, in part, to investigate the feasibility of a pilot jail-based program in the Tulsa County Jail.

By the fall of 2023, the parties had mutually come to the firm conclusion that the Department's delivery of competency restoration services was severely deficient

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<sup>16</sup> Certified Community Behavioral Health Care Clinics ("CCBHC") are federally designated non-profit organizations that provide a wide range of community-based mental health services, including in jails.

<sup>17</sup> Red Rock Behavioral Health Services provides mental health services in Beckham, Blaine, Caddo, Canadian, Custer, Greer, Kingfisher, Kiowa, Lincoln, Logan, Pottawatomie, Roger Mills, and Washita Counties.

<sup>18</sup> The parties' counsel also met with Department personnel responsible for providing, or overseeing, mental health services in the Oklahoma County jail.

<sup>19</sup> Grand Mental Health provides services in Craig, Delaware, Kay, Mayes, Noble, Nowata, Osage, Ottawa, Rogers, Payne, Pawnee and Washington Counties.

and poorly administered, and that the prolonged wait times for restoration treatment violated prevailing due process norms. The parties mutually decided to shift their focus to developing concrete remedial solutions.

On September 25, 2023, the parties' counsel, including the Attorney General, met with Dr. Crystal Hernandez, the former executive director of the OFC, to discuss the Department's broken competency restoration program and remedial solutions. Dr. Hernandez's input was invaluable, in light of her frontline experience with the failures of the Department's competency restoration program. *See* Ex. 4 (Hernandez Declaration).

In early October 2023, the parties' counsel held two videoconference meetings to negotiate the elements of a remedial plan to improve the Department's delivery of competency restoration services. On October 23, 2023, the parties' counsel, including the Attorney General, and Department personnel, including former Commissioner Carrie Slaton-Hodges, met to discuss and negotiate the remedial plan. At that meeting, the Attorney General and Plaintiffs' counsel discussed their mutual belief that a consent decree, containing an effective enforcement mechanism, was the best approach to fix the Department's broken competency restoration system.<sup>20</sup>

On December 7, 2023, Plaintiffs' counsel transmitted to Defendants' counsel the first draft of the proposed Consent Decree. From that date until the time of filing

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<sup>20</sup> The parties' counsel came to this shared belief based not only on the Department's current constitutionally deficient competency restoration system, but also because of the Department's historic failure over several years to administer an effective and transparent restoration system.

of the *Joint Motion* on June 17, 2024, the parties exchanged at least a dozen different redlined drafts of the proposed Consent Decree negotiating material terms. The parties' negotiations were, in general, fraught with a tension between, on the one hand, Plaintiffs' counsel's desire to implement a comprehensive remedial plan as soon as possible with stiff enforcement mechanisms; and, on the other hand, Defendants' counsel's desire to mitigate costs to the Department, ensure that the Department's compliance timeframes in the Consent Decree are achievable and fair to the Department, and ensure the proposed remedies were directed only to class members, and not broadened by "class creep."<sup>21</sup>

Critically, each side hired their own subject matter experts who independently advised each side, helped develop the Plan, and ultimately approved the Consent Decree's terms.<sup>22</sup>

On April 8, 2024, after a series of video conferences between counsel, the parties' counsel (including the Attorney General), the parties' experts, and Department personnel (including Commissioner Friesen) met in the Attorney General's office to discuss and negotiate the terms of the Consent Decree.

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<sup>21</sup> As merely one example, Defendants' counsel rejected Class Counsel's hard-fought proposal to include an obligation for the Department to develop and implement a diversion program that would divert *potential* Class Members out of the criminal justice system before being declared incompetent.

<sup>22</sup> Plaintiffs' counsel retained Neil Gowensmith, Ph.D. and Lauren Kois, Ph.D., clinical and forensic psychologists, with the consulting firm Groundswell Services, Inc. Defendants' counsel retained John Petrila, J.D., a recognized national expert in mental health law and competency restoration issues. (*See* Doc. 46-3.)

During the course of the parties' discussions, counsel sharply negotiated and compromised numerous Consent Decree provisions, including (among others): (i) the Plan's components; (ii) the timeframes for developing and implementing the Plan components;<sup>23</sup> (iii) the timeframes for achieving the Maximum Allowable Wait Times;<sup>24</sup> (iv) the benchmarks for Maximum Allowable Wait Times, including the ultimate benchmark of 21 days;<sup>25</sup> (v) the structure and timing of the Fines and the cap on Fines;<sup>26</sup> (vi) the cessation of the Department's alleged statewide jail based restoration program balanced against the Department's desire to continue to provide enhanced mental health services to class members in jail;<sup>27</sup> (vii) the qualifications for Qualified Forensic Examiners who provide competency evaluations and restoration treatment;<sup>28</sup> and (viii) the definition of the "Best Efforts" standard by which the Department's compliance is judged.<sup>29</sup>

In sum, from early September 2023 until the eve of filing the *Joint Motion* on June 17, 2024, aided by subject-matter experts, the parties engaged in extensive back-and-forth negotiations to develop the Plan contained in the Consent Decree. The parties' counsel, and the designated Consultants, believe the Consent Decree is a state-of-the art solution to fix the constitutionally deficient competency restoration

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<sup>23</sup> See, e.g., Doc. 46-1, Consent Decree, ¶ 54.

<sup>24</sup> See *id.* at ¶ 86.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* at ¶ 92.

<sup>27</sup> See *id.* at ¶¶ 58–59.

<sup>28</sup> See *id.* at ¶ 31.

<sup>29</sup> See *id.* at ¶ 18.

system in Oklahoma in the most cost-efficient manner, when compared to protracted litigation. The Consent Decree was the product of arm's-length, fair and honest negotiations as contemplated by Rule 23(e)(2).

**B. “The costs, risks, and delay of trial and appeal” favor granting preliminary approval**

If the Consent Decree is not approved and the case proceeds to trial, the costs to the State (*i.e.* the Department) of contested class certification proceedings, discovery, and trial will be immense. The parties would likely depose dozens of witnesses scattered across the State. Discovery will involve substantial document and ESI productions, which will require third-party vendor electronic hosting and searching platforms, with the associated expenses. The trial would likely last several weeks. Because the Plaintiffs are likely to prevail on their due process claims, the State would also be required to pay Plaintiffs' reasonable attorney fees and litigation expenses (42 U.S.C. § 1988), which would certainly be seven figures by the end of trial.<sup>30</sup>

The delay in obtaining a remedy and resolution to the Plaintiffs' claims would be devastating to the hundreds of current and future Class Members languishing in county jails. The Consent Decree provides an immediate pathway for dramatic improvement in the wait times incompetent defendants must endure to receive competency restoration treatment. *See* Ex 5, Joint Declaration of William Neil Gowensmith Ph.D. and Elizabeth Lauren Kois Ph.D. Incarcerated defendants who

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<sup>30</sup> As explained in Plaintiffs' contemporaneously filed Supplemental Fee Motion, p. 3, Plaintiffs' counsel (FDLaw) has already incurred \$539,259.75 in attorney fees up to the filing of the *Joint Motion*.

are suffering mental illness: (i) are at greater risk to suffer harm, abuse and suicide while in jail while their mental health decomposes (*id.* at ¶ 7); (ii) are at greater risk to pick up new charges while incarcerated; and (iii) strain limited correctional resources of county jails.

Oklahoma's competency restoration regime is broken,<sup>31</sup> causing serious harm daily to hundreds of Oklahomans. The Consent Decree offers an immediate pathway to significant improvement. The risks of delay favor granting preliminary approval of the Consent Decree.

**C. The Consent Decree is an effective means of “distributing relief to the class,” as contemplated by Rule 23(e)(2)(C)(ii)**

To establish this factor, the parties offer the Joint Declaration of William Neil Gowensmith, Ph.D. and Elizabeth Lauren Kois, Ph.D. (*See* Ex. 5). Both work for the consulting firm Groundswell Services, Inc., which Plaintiffs' counsel retained as a consulting expert. Both are licensed forensic psychologists with extensive experience with competency restoration systems, including as a federal court monitor, program administrators, and consultants in numerous other states.<sup>32</sup> Collectively, they have extensive research and academic experience in forensic competency issues. Collectively, they have spent scores of hours studying Oklahoma's competency

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<sup>31</sup> *See* Ex. 4, Hernandez Decl.; Ex. 5, Gowensmith/Kois Joint Decl.

<sup>32</sup> Groundswell has (collectively) worked in or with competency restoration systems in Washington, California, Texas, Colorado, Georgia, Minnesota, North Carolina, Hawaii, Nevada, Alaska, and Alabama. *See* Ex. 5, ¶¶ 3–4.



restoration program.<sup>33</sup> Dr. Gowensmith is one of the three designated “Consultants” in the proposed Consent Decree.

The overarching goal of the Consent Decree is to substantially reduce the wait times all Class Members must endure to receive competency restoration treatment. The elements of Plan in the Consent Decree were already summarized in the *Joint Motion*. (Doc. 46, 7-11). As explained by Drs. Gowensmith and Kois, the Plan adopts and customizes components and approaches successfully used in similar settings, and is designed to benefit all Class Members equally:

The Plan and Consent Decree contain elements intended to deliver benefit to all Class Members equally. Individual circumstances of specific defendants will not materially change the services mandated by the Plan or Consent Decree. Although individual circumstances might dictate that some services be individually tailored to the defendant, just as reasonable medical care would, individual circumstances will not preclude anyone from accessing timely, high quality, robust options for competence services developed and implemented under the Plan. Some Plan and Consent Decree components aim to divert or remove appropriate individuals from the restoration waitlist, while others focus on maximizing the efficiency and quality of competence services for those that must remain in the competence system; both sets of components will ultimately reduce the overall restoration wait times for all defendants.<sup>34</sup>

Drs. Gowensmith and Kois conclude that the Plan’s components “have been very effective in reducing delays for competence evaluations and restoration services in other states;” and the “the evidence, and our experience, strongly suggest that these components will have similar impacts in Oklahoma.” *Id.* at ¶¶ 17, 22.

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<sup>33</sup> See Ex. 5, at ¶¶ 1–3, 10.

<sup>34</sup> *Id.* at 12.

**D. The existence of any agreement required to be identified under Rule 23(e)(3)**

Other than the Consent Decree, and the joint stipulations contained therein, there are no other agreements between the parties subject to disclosure under Rule 23(e)(3).

**E. The Consent Decree “treats class members equitably relative to each other.”**

To establish this factor, the parties again refer to the Joint Declaration of William Neil Gowensmith, Ph.D. and Elizabeth Lauren Kois, Ph.D. (*See* Ex. 5). Their Joint Declaration describes in detail how “[t]he Plan and Consent Decree apply uniformly to all [incompetent] defendants in Oklahoma....” *Id.* at ¶ 12. The expected result of the Plan will be to reduce wait times for all Class Members regardless of the individual characteristics of their underlying criminal cases or mental health issues. The pilot programs in the Plan are designed as interim models to expand to all Oklahoma counties once the best practices that lead to successful outcomes are established. *Id.* at ¶ 14.

**V.**

**Adequacy of Notice to Future Class Members**

The Court has raised concerns about whether the parties’ plan of Notice comports with due process’ command to be “reasonably calculated” to reach all Class Members, specifically referencing future Class Members. (Doc. 47, p. 10). Future Class Members are individuals who are declared incompetent after entry of the Consent Decree and are awaiting restoration services while incarcerated in county jails. Although there is no Tenth Circuit authority on the question of notice to future

class members, at least one Circuit has held that future class members are not entitled to notice because their claims are not ripe and, therefore, nonjusticiable. *See Ashok Babu v. Wilkins*, 2023 WL 6532647, \*1 (9th Cir. Oct. 6, 2023). That said, Class Counsel believes the best course is to provide notice to future Class Members.

As to future Class Members, the parties propose the Department provide written notice to defense counsel of record for all persons who, after entry of the Court's order preliminarily approving the Consent Decree, are declared by a state criminal court to be incompetent to stand trial and ordered to receive competency restoration treatment by the Department. The Department must provide such notice within seven (7) days after the Department receives notice of the state court's order finding a person incompetent and requiring competency restoration treatment. The Department can fulfill this notice requirement by emailing or mailing defense counsel a notice substantially in the same form as Exhibit 4 to the *Joint Motion* (Doc. 46-4), which also includes a link to the Consent Decree posted on the Department's public facing website or on the lawsuit website hosted by Class Counsel.<sup>35</sup> Courts requiring notice to future class members consider the particular facts and circumstances of the

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<sup>35</sup> As stated in the Notice form attached to the *Joint Motion* (Doc. 46-4, p. 3), Class Counsel created a website to post case documents and provide a clearinghouse for comments or objections to the Consent Decree. *See* <https://www.okcompetencyrestoration.com>.

case.<sup>36</sup> Here, the parties’ proposed notice procedure is reasonably calculated to notify future Class Members of the Consent Decree because the Department already maintains a routinely updated list of persons declared incompetent and committed to the Department’s care, which includes details about the referring state court case. The Department is, therefore, in the best position to timely notify new Class Members’ defense counsel. Notice to future Class Members’ defense counsel is reasonably designed to ensure that the Class Members’ rights in their criminal proceeding are protected. It should be noted, however, that the proposed Consent Decree does not prejudice or limit any “rights, remedies or arguments” available to Class Members in their state-court criminal cases. (Doc. 46-1, p. 40, ¶ 112).

## VI.

### **The Prison Litigation Reform Act (“PLRA”)**

Plaintiffs do not believe the PLRA applies to the proposed Consent Decree, as explained in their contemporaneously filed Supplemental Fee Motion.<sup>37</sup> Regardless,

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<sup>36</sup> See, e.g., *Remick v. Philadelphia*, 2022 WL 2703601, at \*7 (E.D. Pa., July 12, 2022) (court found that best notice to class members who in the future would be confined to Philadelphia Department of Prisons housing areas would be by posting notices at each prison facility); *Martinez v. Reams*, 2021 WL 603054, at \*3 (D. Colo., Feb. 16, 2021) (in action challenging COVID practices of county jail, court finds revised settlement notice procedure adequate, which included each guard station having copy of English and Spanish version of class settlement notice); *Whitted v. Easter*, 2020 WL 4605224, at \*3 (D. Conn., Aug. 11, 2020) (notice to future class members of COVID federal prison class by providing copy of the notice to future class members upon admission); *Hunter v. Beshear*, 2018 WL 565002, at \*15 (M.D. Ala., Jan. 1, 2018) (notice given to circuit judge in each Alabama county identifying the Alabama mental health department official responsible for initiating the process of identifying and arranging emergency care treatment for persons awaiting inpatient mental evaluations and/or competency restoration treatment).

<sup>37</sup> The parties reserve the determination of the PLRA’s applicability should the Consent Decree not be approved.

the parties believe the Court need not decide whether the PLRA applies to the proposed Consent Decree because, even assuming *arguendo* it applies, the relief contained in the Consent Decree is PLRA compliant. The Consent Decree satisfies the PLRA's three central injunctive relief requirements that: "the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 42 U.S.C. § 3626(a)(1). Also, the Consent Decree will have a positive impact on "public safety and "the operation of a criminal system." *Id.* As one district court observed in the same competency restoration class settlement context, "the relief provided is likely to contribute positively to the efficient operation of the criminal justice system, by ensuring timely transfer of inmates for competency evaluation and restoration." *Hunter*, 2018 WL 564856, at \*16 n.5 (identifying, but finding it unnecessary to resolve, issue of whether PLRA applied to competency restoration class action settlement because court believed the relief complied with the act's requirements).

## VII. Conclusion

For the reasons discussed herein, and in the *Joint Motion*, Plaintiffs have established that the Court is likely to approve the proposed Consent Decree and certify the proposed Class under Rule 23(e).

RESPECTFULLY SUBMITTED,

/s/ Paul DeMuro

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# **Exhibit 1**





1 forensic bed becomes available. Because we don't have a  
2 bed available for him, we have not taken custody, and  
3 therefore the reports have not been provided.

4 Now, if the Court reads that differently and would  
5 like -- believes that a report should be provided as soon  
6 as the order is issued, then that is definitely something  
7 that I can pass along -- for lack of a better phrase --  
8 so that we can start having those reports coming in that  
9 fashion. But at this time, that is not -- so it's not  
10 anything willful that we have been doing to not provide  
11 those reports. Just with how many Defendants we have  
12 waiting for a bed, the reports have been -- being  
13 provided once custody has been taken.

14 THE COURT: But Counsel, you're talking in  
15 circles because you say that, "I don't have to provide a  
16 report regarding how the Defendant's doing until I take  
17 custody of him," but, "We're not taking custody of him  
18 because we don't have a bed." So I don't know when he's  
19 ever going to get a bed or how his progress is going  
20 because you're not giving me reports. And I don't know  
21 what the statute says, but I know what my order says, and  
22 my order says that the director makes reports to this  
23 Court and his attorney of record, Taylor Thompson,  
24 Assistant Public Defender of Oklahoma County, and to the  
25 District Attorney of Oklahoma County, Oklahoma, every 120

1 days regarding the status of the defendant. And there is  
2 no qualification or asterisks on that saying that it is  
3 only if he is in your custody. How am I supposed to know  
4 if you're derelict in your duties or not if I'm not  
5 getting a report? Which you said you don't have to give  
6 me a report because you're not taking him into custody.

7 It's a circular argument, Counsel. This Court's  
8 order was very clear: There were supposed to be reports  
9 made to this Court and to the defense Counsel and to the  
10 State's Counsel, which you did not comply with, nor have  
11 I had any evidence whatsoever that there were no beds  
12 available in the nine and a half months that the  
13 Defendant was in the Oklahoma County Jail from report one  
14 to report two made by Dr. Christopher. And the record is  
15 completely silent as to the fact that there were zero  
16 beds available for this Defendant. And when he did not  
17 achieve competency within a reasonable amount of time or  
18 within one of those 120-day reporting periods, this Court  
19 didn't have an opportunity to make sure that something  
20 intervened so that Defendant didn't sit in jail  
21 unnecessarily without properly getting competency  
22 restoration services.

23 So with that being said, here's this Court's order:  
24 Having heard the testimony brought before this Court, the  
25 Defendant's motion for Suspension of Criminal Proceedings

1 and release of the Defendant, Kevin West, to be  
2 supervised by DHS is hereby denied after witness, Dr.  
3 Samina Christopher, testified.

4 The Motion for Show Cause; having heard that and the  
5 testimony that was brought before this Court and also the  
6 testimony that has not been brought before this Court, I  
7 find that the Department of Mental Health has violated  
8 this Court's December 1, 2022 order, they have not  
9 complied with reporting requirements to the bare minimum  
10 reporting requirement put in this Court's order on that  
11 date, that the Department of Mental Health has violated  
12 this Court's order, and therefore in order to purge this  
13 violation and this contempt, I order furthermore that the  
14 Department of Mental Health take custody of Mr. West and  
15 immediately transfer him to the Oklahoma Forensic Center  
16 at the very first bed available because he has now been  
17 in custody 14 months. He should certainly be at the  
18 front of the line. So I order that he be taken  
19 immediately into the Oklahoma Forensic Center at the very  
20 first bed that is available, and that competency  
21 restoration services be administered until he does in  
22 fact achieve competency and is ready to proceed with  
23 criminal proceedings.

24 I find that this Defendant is incompetent and that  
25 he is clearly in need of treatment and still is presently

1 dangerous due to his charges and the totality of the  
2 circumstances as found by Dr. Christopher on her August  
3 2022 report.

4 So with that being said, Counsel, once the  
5 Department of Mental Health has taken custody of Mr. West  
6 and gotten him either at the Oklahoma Forensic Center,  
7 then I expect a report of that or if he has achieved  
8 competency in the time that we've been litigating this,  
9 -- maybe even as we've gone today -- if he has achieved  
10 competency, I expect a report of that. And so I expect a  
11 report back to this Court as soon as that first bed  
12 becomes available and Mr. West is in it.

13 Is there anything further for this record at this  
14 time?

15 MR. KENNEDY: Not from the defense.

16 MR. NIEMEYER: Not from the State.

17 MR. BERRY: No, Your Honor.

18 MS. BARRETT: No.

19 THE COURT: All right. Thank you. You may  
20 all be released.

21 **(End of proceedings.)**

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## **Exhibit 2**

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

**STATE OF OKLAHOMA,** )  
)  
Plaintiff, )  
)  
vs. )  
)  
**JOVAN DAVID FLEMING,** )  
**JEFFERY DANIEL MONTGOMERY,** )  
)  
Defendants. )

CASE NO. CF-2022-4777  
CASE NO. CF-2022-3891

\* \* \* \* \*

SHOW CAUSE HEARING

TRANSCRIPT OF PROCEEDINGS

HAD ON THE

12TH DAY OF JANUARY, 2024

BEFORE THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

\* \* \* \* \*

Reported By:

Cynthia Kay Jones, RMR  
Official Court Reporter  
321 W. Park, Room 700  
Oklahoma City, Oklahoma 73102  
(405) 713-1406

1 A. Yes.

2 Q. For purposes of the record, we are talking about  
3 diverting mental health patients, or people with a mental  
4 health need, away from both the system and competency; is that  
5 correct?

6 A. Correct, yeah. It's one of, I believe, nine diversion  
7 programs.

8 Q. You -- what is your title? You gave -- you said you were  
9 a therapist. Tell me your title.

10 A. I'm a senior triage specialist and then I'm a licensed  
11 marital and family therapist.

12 Q. You're not a psychologist, correct?

13 A. No, I'm not.

14 Q. You're not a psychiatrist, right?

15 A. No. Correct.

16 Q. Do you have any forensic training?

17 A. What I've -- not specifically in terms of -- well, let me  
18 back up. Yes. Probably about 12 hours.

19 And then I have been -- I felt it was incumbent on me to  
20 continue my education and to learn more about that, so I've  
21 looked into one of the programs that's in Ohio and so I've  
22 studied that. I spent about a week looking into that.

23 Q. You looked into it?

24 A. Uh-huh.

25 Q. Did you go?

1 A. Oh, no, I didn't.

2 Q. You haven't completed any programs in forensic  
3 psychology?

4 A. No, I've not.

5 Q. What training have you had in competency restoration?

6 A. The specific training I've had has been provided by the  
7 Department of Mental Health and that was, oh, maybe three or  
8 four months ago, and then I signed up to participate in  
9 another one.

10 Q. So the first training you had in competency restoration  
11 was three or four months ago?

12 A. Correct.

13 Q. How long has this program existed?

14 A. To my knowledge -- I was hired late February of last year  
15 from -- I was working for the Department and then they had  
16 asked me to come to the jail and start doing this.

17 Q. When did they ask you to do that?

18 A. That was in February of 2023.

19 Q. So approximately -- a little less than a year ago.

20 A. Correct, yeah.

21 Q. Prior to February of 2023, was there a competency  
22 restoration program in the jail?

23 A. Not to my knowledge.

24 Q. Tell me about that training a little bit. What did that  
25 consist of?



1 A. It spoke to what you want to try to accomplish with the  
2 individual, approaches that you use for resistant people.

3 Q. What do you mean, "resistant people"?

4 A. Oh. Folks that are not wanting to participate or they're  
5 argumentative or they're hostile. You know, approaches for  
6 dealing with a challenging person, somebody who's resistant to  
7 actually even talking to or participating in any way.

8 Q. Who put on the training?

9 A. It was the Department of Mental Health.

10 Q. Where was it?

11 A. The -- it was out of Vinita but I participated by Zoom,  
12 so I was in the detention center.

13 Q. How long was it?

14 A. A little over six hours.

15 Q. Who taught it?

16 A. It was Dr. Scott Orth--

17 Q. So --

18 A. -- from the forensic center. He is one of the head  
19 psychologists -- or I think he is the head psychologist.

20 Q. So since the inception of this program you've had  
21 six hours of Zoom training for competency restoration.

22 A. As far as formal. And then when I first went to the jail  
23 I had a great deal of time on my hands the first probably  
24 three or four weeks trying to put an office together there in  
25 the detention center.

1           And so what I did, I took it upon myself to start looking  
2 on the internet and find out what other programs are doing and  
3 that's when I discovered the one from Ohio. So I downloaded  
4 that packet and then I read it several times.

5 Q.    That packet is part of a course that somebody actually  
6 puts on, correct?

7 A.    Well, no. The one from Ohio is actually their program.  
8 It's the State of Ohio's program.

9 Q.    Well, tell me about the State of Ohio's program. What  
10 does that consist of?

11 A.    Well, similar -- similar things. An emphasis on training  
12 the individual to assist them or facilitate their  
13 understanding of courtroom processes, behavioral expectations  
14 in the courtroom, potential outcomes.

15 Q.    What kind of staff do they use?

16 A.    They used, if I recall, correctly --

17           MR. BERRY: Your Honor, if I could object. I don't  
18 see the relevancy of Ohio's program with how it relates to  
19 Oklahoma and the motion that defense counsel has filed in this  
20 matter.

21           THE COURT: Well, he's saying he is using that as  
22 part of his training, so I would like to know what kind of  
23 training he received, so go ahead.

24 A.    Okay. So if I recall correctly, they are using master's  
25 level therapists, PhD psychologists and psychiatrists, and

1 then also medical doctors.

2 Q. Okay.

3 A. And I think a neurologist or two. I think.

4 Q. Are the inmates housed in a separate unit?

5 A. In Ohio?

6 Q. Yes.

7 A. It didn't go into that. It was talking about what you  
8 would do and the approaches that you would take. If I read  
9 that, I don't recall.

10 Q. So you don't know if there is anything about the Ohio  
11 program that is designed to model an inpatient or hospital  
12 setting?

13 A. No, I don't. I'm going to guess it would. I don't  
14 recall.

15 Q. Are you familiar with other programs? Have you  
16 researched other programs across the nation, competency  
17 restoration? For example, Fulton County, Georgia or Arizona?

18 A. I've not. I use Google and Google thought Ohio's was the  
19 better one.

20 Q. You didn't use any medical research search engine?

21 A. I didn't.

22 Q. So in other words, you looked for things that I could  
23 find.

24 A. Yes.

25 Q. Before you started doing what the Department asked you to

1 do, had you ever done any competency restoration before in  
2 your role as a therapist?

3 A. Not -- not formally, no.

4 Q. What did you do before you were asked to do this?

5 A. So I have been a licensed therapist since 1991. And so  
6 I've provided counselling and psychotherapy to individuals  
7 with depression, anxiety, perceptual disturbances like  
8 schizophrenia or schizoaffective disorder, bipolar disorder.

9 Q. Where was that?

10 A. That was in Oklahoma City and then --

11 Q. Like a family practice?

12 A. Oh, no. I started at Red Rock Behavioral Health in 1988  
13 and that's where I got -- I started actually as a case  
14 manager. I finished a master's degree and then I went  
15 through -- at that time they had a really good training  
16 program and they paid for the last part of my master's.

17 And then I became a licensed therapist, and so then I  
18 started practicing with outpatient folks. And then I also did  
19 what are called -- what were called hospitals, now called day  
20 treatments for folks with chronic mental illness.

21 The goals are kind of similar because you want -- you  
22 want the person to be reality oriented and to understand  
23 what's going on and to understand how their thinking affects  
24 their moods and then also how their behaviors can affect  
25 everything.

1 Q. What was your experience with jail population prior to  
2 taking this on in February of 2023?

3 A. I had never worked specifically with people that were  
4 incarcerated. I had worked with people -- I had worked with  
5 guys that had gotten out of prison and that had been in prison  
6 for some time, but I never worked with inpatient or in-jail  
7 folks.

8 Q. As far as Oklahoma County's competency restoration  
9 program in the jail, what does the staff consist of for that?

10 A. For -- for my part, we have, of course, a forensic  
11 center. And then Dr. Stan Ardoin is the head psychiatrist and  
12 he is housed at Griffin Memorial Hospital. And then there is  
13 Dr. Scott Orth who is the head psychologist and then --

14 Q. Let's back up right there. Who is the first person you  
15 said?

16 A. Oh, Dr. Stan Ardoin.

17 Q. Sorry. The first thing you said was the forensic center.  
18 What does the forensic center do in the jail?

19 A. Okay. They actually -- they work through me. I'm kind  
20 of their eyes and ears, and so I get my direction and guidance  
21 from them in terms of what they want me to do with a specific  
22 person.

23 So every two weeks we'll have a staffing, and that's  
24 where we will discuss each and every case. And then what  
25 we're doing, what changes need to be enacted, who needs to go

1 much time -- well, let's do it this way.

2 Jovan Fleming, for example. How often do you meet with  
3 Jovan Fleming?

4 A. Approximately every 10 days. I try to get there once a  
5 week and sometimes I'm able to accomplish that.

6 Q. What do you mean "get there once a week"?

7 A. Well, I have to be escorted by a detention officer.

8 Q. To the pod.

9 A. To each and every cell, yes. So optimally it happens  
10 once a week. Sometimes it happens about every 10 days.

11 Q. And for how long do you meet with Jovan Fleming, for  
12 example?

13 A. With Jovan it's usually a little bit longer.

14 Q. Does it vary?

15 A. It does.

16 Q. Okay.

17 A. It can be anywhere from 10, 12 minutes to 30, 45 just  
18 depending on how much time I have and what we have to talk  
19 about.

20 Q. Can the same be said about Mr. Montgomery?

21 A. Uh-huh.

22 Q. Do you remove them from the cell?

23 A. If I'm allowed to. It depends on how many staff members  
24 they have. If there's a -- if there's a monitor in the pod,  
25 and then I have my detention officer, then I request that they

1 be removed from the cell and then we go set at a table.

2 If that's -- if that's not the case then I have to  
3 basically talk to them through the door, through the crack in  
4 the door.

5 Q. So today is January 12th. Let's go back to the beginning  
6 of December, approximately 45 days, 43 days. Let's say you've  
7 met with Jovan Fleming approximately 5 to 6 times, is that  
8 fair, going back to the beginning of this month?

9 A. No. I took a 10-day vacation.

10 Q. Okay. And nobody is holding that against you. So did I.

11 A. Right.

12 Q. So maybe a little bit -- we can use any -- let's just use  
13 any span you want to. Over a month you see somebody about  
14 four times?

15 A. Three to four times, yeah.

16 Q. Three to four times. And of those three or four times,  
17 on average how many times do they get removed from the cell?

18 A. Probably one.

19 Q. So about 75 percent of the time they are staying in the  
20 cell --

21 A. Uh-huh, yes.

22 Q. -- for the treatment period.

23 A. That's correct.

24 Q. How do you accomplish that? Is that through the bean  
25 hole or is that --

1 A. Sometimes if the officer has the keys to the bean hole.  
2 Other times it's through the crack and then we look at each  
3 other through the glass.

4 Q. I've been over there, tried to talk to somebody through a  
5 crack and the bean hole, or through the bean hole or through  
6 the crack. Are you yelling? Are you -- I'm being pretty loud  
7 right now.

8 A. We're talking very -- yes. Not quite yelling, but I'm  
9 talking very loud and then I have to get very close to be able  
10 to hear. Like in Jovan's case, he talks a little bit softer.

11 Q. He is not a loud person, is he?

12 A. Huh-uh. Jeffery can enunciate -- or enunciates a little  
13 bit better. Jovan talks kind of softly. I have to talk loud,  
14 yes.

15 Q. For Mr. Fleming, does -- I mean, does he speak back to  
16 you?

17 A. Uh-huh.

18 Q. Is that a "yes"?

19 A. Yes.

20 Q. Are you able to hear what he's saying? I mean, I know  
21 Mr. Fleming. I've met with him many, many times. I can't  
22 imagine ever being able to communicate with Mr. Fleming  
23 through a cell door in any meaningful way. Is that fair?

24 A. That's not been my experience.

25 Q. Okay. Are there other cellmates in the cell?



1 been first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. SULLIVAN:

4 Q. Dr. Roberson, will you tell the court reporter and the  
5 Court your name?

6 A. It is Dr. Shawn Roberson, R-O-B-E-R-S-O-N.

7 Q. And tell us about your qualifications for what we are  
8 going to talk about here today.

9 A. I have a bachelor's degree in psychology and a master's  
10 degree in experimental psychology, both from the University of  
11 Central Oklahoma.

12 I have a doctorate in counselling psychology from the  
13 University of Missouri, Kansas City.

14 I completed a predoctoral internship at Western Missouri  
15 Mental Health Center in Kansas City where I was trained in  
16 forensic psychology.

17 I am licensed as a psychologist in the State of Oklahoma  
18 as well as holding a temporary license in the State of Texas  
19 to practice there a limited number of days a year.

20 And I previously worked as the director of forensic  
21 psychology at the Oklahoma Forensic Center for a number of  
22 years.

23 Q. Tell us about the rest of your professional background.

24 A. Well, I initially started working at what was called  
25 Eastern State Hospital which turned into the Oklahoma Forensic

1 before they decided that this wasn't working and we would send  
2 somebody to inpatient treatment?

3 A. It was approximately three months.

4 Q. Is that -- is that a fair number in your opinion for --  
5 to be -- well, let's say this. Do you think jail-based  
6 competency restoration could work theoretically?

7 A. It's not particularly effective as compared to hospital  
8 settings, but it is an alternative when you cannot put people  
9 in a hospital setting. And it can be effective for some  
10 people if done correctly.

11 Q. Does it sound to you like Oklahoma County is doing this  
12 correctly?

13 A. Not in any way, shape or form.

14 Q. Even if jail-based competency restoration could be  
15 effective, if implemented correctly, is an inpatient setting  
16 still preferable?

17 A. Absolutely.

18 Q. For any reason that we haven't already discussed?

19 A. Well, I would just say this. Jail-based competency  
20 restoration has arisen in relation to lawsuits and in relation  
21 to long waiting lists. That's the only reason it's in  
22 existence.

23 If those weren't the issue you would not see jail-based  
24 competency restoration.

25 We did not have this even a handful of years ago. We did

# **Exhibit 3**

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

<b>STATE OF OKLAHOMA,</b>	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
<b>JOVAN DAVID FLEMING,</b>	)	<b>CASE NO. CF-2022-4777</b>
<b>JEFFERY DANIEL MONTGOMERY,</b>	)	<b>CASE NO. CF-2022-3891</b>
Defendants/Petitioners.	)	

\* \* \* \* \*

SEVENTH JUDICIAL DISTRICT OF OKLAHOMA

CONTINUED SHOW CAUSE HEARING

HAD ON THE 26TH DAY OF JANUARY, 2023

BEFORE THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

\* \* \* \* \*

Reported By:

Regina Garnett, CSR  
Official Court Reporter  
321 Park Avenue  
Suite 706  
Oklahoma City, Oklahoma 73102  
(405) 713-7116

1 order of the witnesses for this afternoon. So first we'll  
2 call Debbie Moran.

3 THE COURT: Okay.

4 MR. SULLIVAN: Petitioner calls Debbie Moran.

5 THE COURT: All right. Ms. Moran, if you would  
6 please come on up. All right. If you would please raise your  
7 right hand for me.

8 (The witness is sworn.)

9 THE COURT: If you would please have a seat here and  
10 pull the microphone in front of you and speak as loud as you  
11 can for me.

12 Mr. Sullivan, you may proceed when you're ready.

13 MR. SULLIVAN: Thank you, Judge.

14 **DIRECT EXAMINATION**

15 BY MR. SULLIVAN:

16 Q. Ms. Moran, am I saying that correctly?

17 A. Yes.

18 Q. Okay. Can you state your name and spell the last name  
19 for the court reporter?

20 A. Debbie Moran, M-O-R-A--N.

21 Q. What do you do, Ms. Moran?

22 A. I'm the executive director at the Oklahoma Forensic Unit  
23 and I'm also the executive director at Carl Albert Community  
24 Mental Health Center.

25 Q. Are you directly employed by the Department of Mental

1 A. A person requiring treatment, statutory. It would be  
2 like -- and examples would be most recently, the people who  
3 are eating their feces, the people who are bashing their heads  
4 against the wall, the people who are hitting the other guards  
5 or stripping off naked and then trying to assault others.

6 Q. So those people will always go to the front of the line?

7 A. Always.

8 Q. Okay. Is it affected by whether there is a show cause  
9 motion pending?

10 A. For me, it's not.

11 Q. Well, who makes the call?

12 A. Basically at this point myself -- myself.

13 Q. Okay. Is it affected by whether the Department is being  
14 fined \$500 a day for every day that somebody is not admitted  
15 to the Forensic Center?

16 A. My decision will always be based on the consumer.

17 Q. And it's solely your decision?

18 A. Right now, I mean it's me. I've got Dr. Orth, I have  
19 Dr. Tandon, we can all bounce things off people. I mean, to  
20 me, for the lack of a better way to say it, it's a no-brainer  
21 if someone is eating their feces. That's not healthy. That  
22 is dangerous for them. It's dangerous if they're throwing it  
23 on guards and on other consumers. That's dangerous. But if I  
24 have someone that's just no aggressive outbursts, not  
25 displaying any of that, attempting to take their medicine

1 correct?

2 A. I disagree with you.

3 Q. Okay.

4 THE COURT: Hold on. So is it your position that you  
5 are going to leave Mr. Fleming and Mr. Montgomery in the  
6 Oklahoma County Jail indefinitely because they're not  
7 qualified to go to the Forensic Center?

8 MS. MORAN: At some point, I mean, if we get through  
9 the dangerousness list, you know, and they are not proceeding,  
10 their growth -- and I don't have that statute right in front  
11 of me, so I can't really quote it, and I apologize for that --  
12 but, you know, they will eventually be able to come to a bed.  
13 I just don't have the beds. And there is just --  
14 unfortunately, I'm not willfully trying to disregard your  
15 order at all, I wish I had beds for everybody that was found  
16 incompetent, but that doesn't -- that is not the system that I  
17 have.

18 THE COURT: That's not an excuse, so...

19 MS. MORAN: I'm not saying -- I'm not trying to make  
20 an excuse, you know. I apologize if it came off that way.

21 THE COURT: Go ahead, Mr. Sullivan.

22 Q. (By Mr. Sullivan) I'm going to take one more stab at  
23 this, and then at that point I feel like we're going around in  
24 circles. But I do need to establish this for purposes of the  
25 record.

1 A. Okay.

2 Q. Okay. One cannot be committed to the Department of  
3 Mental Health without a finding of dangerousness, a/k/a a  
4 person requiring treatment, is that fair? Under 1175.7c, "The  
5 Court may not commit the incompetent person to the custody of  
6 the Department of Mental Health and Substance Abuse Services  
7 unless the person is a person requiring treatment as defined  
8 by Title 43A in the Oklahoma Statutes."

9 A. That is correct.

10 Q. Okay. The definition of dangerousness is also defined by  
11 Title 43A, correct?

12 A. Correct.

13 Q. Both of these individuals have already had a finding of  
14 dangerousness or a person requiring treatment, correct?

15 A. That is -- they have had -- it has been marked yes on the  
16 most recent competency evaluation, yes.

17 Q. That would be a finding by the Court, correct?

18 A. I guess. I'm not really sure what you're asking me. I'm  
19 telling you that on the last competency evaluation --

20 Q. Do you know how the orders from the court work --

21 A. I do understand orders.

22 Q. -- when the Court makes a finding that somebody is both  
23 incompetent and a person requiring treatment so that they can  
24 be committed, do you --

25 A. I do understand, yes.



1 Q. Okay. So given what I've just said, how can someone be  
2 not clinically dangerous, a/k/a a person requiring treatment,  
3 and still lawfully be committed to the Department of Mental  
4 Health?

5 A. 43A says immediate. Immediate dangerousness to self or  
6 others. "Immediate" is the word.

7 Q. And that's the same finding that's already been made --

8 A. Okay.

9 Q. -- correct?

10 A. That is what paperwork I've seen, yes.

11 Q. Okay. So everybody that is committed to the Department  
12 of Mental Health has had a finding of substantial and  
13 immediate dangerousness that they are a person requiring  
14 treatment, correct?

15 A. That is what the order says, yes.

16 Q. And you cite in your letter Title 22, 1175.6a, to say  
17 that it allows for individuals to remain in the jail when in  
18 their best interest. I think you've already said that your  
19 determination of whether it's in their best interest is  
20 whether or not they are dangerous, and if they're not  
21 dangerous, it's not in their best interest to go to the  
22 Forensic Center.

23 A. That is what I said earlier, yes, sir.

24 Q. Okay. So if everybody with a commitment has already been  
25 found to be dangerous, what else do you rely upon? Like what

1 is more dangerous? I'm just trying to --

2 A. I -- in my opinion, Mr. Fleming -- if we're just talking  
3 about these two cases, Mr. Fleming and Mr. Montgomery do not  
4 meet the level of dangerousness of those that I have been  
5 admitting.

6 Q. So more -- who's more dangerous?

7 A. Yes.

8 Q. Okay. Have you ever been in the county jail?

9 A. The Oklahoma County Jail, I have not.

10 Q. Okay. Have you ever seen where Jovan Fleming and Jeffery  
11 Montgomery stay?

12 A. I have not.

13 Q. How can you determine what's in their best interest?

14 A. Again, it's all about how -- what they're doing. There  
15 have been no acts -- when I read the notes, there have been no  
16 acts of any aggressiveness, assaultiveness, they have not had  
17 any acting out, they're denying any suicidal/homicidal  
18 ideations, they're denying any auditory/visual hallucinations,  
19 and get back to the immediate dangerousness. When I have  
20 someone that's throwing feces or eating their feces, I'm  
21 going to pick that person over someone who is not having any  
22 issues.

23 Q. Okay. I'm not talking about comparing people, I'm  
24 talking about what's in one individual's best interest.

25 A. Sorry. There was a squealing bothering my ear.

1 Q. That's okay. I'm not talking about comparing people to  
2 see who's more dangerous, I'm talking about deciding what's in  
3 Jovan Fleming's best interest.

4 A. Okay.

5 Q. Without knowing what his setting is like in the county  
6 jail, how can you make a determination of what's in his best  
7 interest?

8 A. This is what I do. I mean, I have to pick the people who  
9 are the most dangerous.

10 Q. So it really doesn't have anything to do with what's in  
11 his best interest?

12 A. In my opinion, they're better off in the Oklahoma County  
13 Jail. And I haven't seen it and I know, but I have seen OFC  
14 and I have -- I do deal with that every day.

15 Q. Someplace that you've never been to?

16 A. Oh, I go to OFC all the time.

17 Q. No.

18 A. Sorry.

19 Q. In your opinion they're better off in a place that  
20 you've never been to that's been condemned by the federal  
21 government?

22 A. At this point, yes.

23 Q. Okay. And I want to read to you the statute in 1175.6aA,  
24 where it does state, "The Department may designate a willing  
25 entity to provide such competency restoration." Skipping down

1 to the part about best interest. "The Court shall further  
2 order the Department to take custody of the individual as soon  
3 as a forensic bed becomes available unless both the Department  
4 and the county jail where the person is being held determine  
5 that it is in the best interest of the person to remain in the  
6 county jail."

7 Who do you consult with as a part of the county jail  
8 to determine if it's in Jovan Fleming's or Jeffery  
9 Montgomery's best interest to stay in that county jail?

10 A. I have not consulted with the Oklahoma County Jail.

11 Q. You also say that jail-based competency treatment reduces  
12 the time for an individual's disposition. Do you have any  
13 records to back that up, or numbers?

14 A. Well, I can tell you, again, since the beginning of the  
15 -- in December of 2022 to current, 119 individuals have been  
16 found competent and have never set foot in OFC. And all  
17 that's been through jail-based competency.

18 Q. Is that all you have to back up your statement that  
19 jail-based competency reduces the time for individuals?

20 A. That's the only immediate number I have in my head. I  
21 mean, I didn't go down and try to get specifics.

22 Q. Did you average how long it took for those 119?

23 A. I did not.

24 Q. Okay. Well, say if Jovan Fleming suddenly, a year later,  
25 regains judicial competency, would you include him in that

1 number just the same even though it took a year?

2 A. I would.

3 Q. And is it your position that that could not have happened  
4 faster at the Forensic Center?

5 A. Again, it's six to nine months is what the average is.

6 Q. You also state that -- in both Exhibit 1 and 2, that both  
7 individuals are currently compliant with their medication as  
8 of January 12th of 2024.

9 A. Yes.

10 Q. Where do you get those numbers from?

11 A. That comes from the documentation in this case that Brad  
12 puts in the competency app.

13 Q. Is it that he tells you that word "compliant" or do you  
14 actually look at the days that they took medication and don't  
15 take medication?

16 A. He tells us that they're compliant.

17 Q. So he just gives you that word and that's what you write?

18 A. He puts in there that they're medication compliant, yes.

19 Q. Have you ever asked -- so you don't review the notes of  
20 whether, you know, Jovan Fleming took his medication every  
21 single day --

22 A. I do not.

23 Q. -- the records from the jail?

24 A. I do not.

25 Q. Okay. Have you asked him what his number is for saying

1 the word "compliant"?

2 A. I have not. I have not spoken to either of these  
3 individuals ever.

4 Q. No. No. No. I mean Brad McKay.

5 A. Oh, sorry.

6 Q. Sorry.

7 A. Can you repeat your question?

8 Q. Have you ever asked Brad McKay what his number is to use  
9 the word "compliant"?

10 A. I have not.

11 Q. What would be an appropriate number for you?

12 A. Compliant means they take it on a regular basis.

13 Q. I mean, how often?

14 A. I don't know.

15 Q. What do you mean by "regular basis"?

16 A. I mean, I'm not a medical provider, so that would be a  
17 better question for them. I mean, even if I take my own self  
18 and I miss a day here or there my own self, so -- but I would  
19 consider myself compliant.

20 Q. Okay. Is Brad McKay a medical provider?

21 A. No, he's an LMFT.

22 Q. So two people who are not medical providers are relaying  
23 to the Court whether or not somebody is medication compliant  
24 on antipsychotic medication?

25 A. That is where I get my documentation, yes, sir.

1 Q. Is it coming from anybody else?

2 A. You would have to ask Brad where he's getting his  
3 information.

4 Q. No, I mean you, when you write these letters?

5 A. No, that's where I get my information.

6 Q. Okay. Is there any limit to the amount of time that you  
7 would have somebody continue jail-based competency restoration  
8 services before you would say they need to be transported to  
9 the Forensic Center and bump them up the list if they're not  
10 throwing feces and attacking guards?

11 A. I mean as we review and 90 days out and they are not  
12 making any progress, then they will go on that expedite list.  
13 But even on the expedite list -- and I hate to use the word  
14 "list," but they will be at the bottom of that list and then  
15 make their way to the top, depending on the dangerousness.

16 Q. There's no guarantee they'll ever get to the top, right?

17 A. Yeah, I can't answer that question.

18 Q. You make the decision. How can you not answer that  
19 question?

20 A. Because I don't know at any given time how many dangerous  
21 -- more severely acute dangerous people will be presenting  
22 that need to be admitted.

23 Q. And my question was: So there's no guarantee that they  
24 will ever get to the top of the list?

25 A. I can't.

1 Q. Sounds like you're saying yes.

2 A. I can't guarantee that, no, I cannot.

3 MR. SULLIVAN: Okay. May I have a moment Judge?

4 THE COURT: Yes, you may.

5 Mr. Sullivan, Ms. Moran is asking for a rest room  
6 break, so let's give her a 10-minute break.

7 How many more witnesses do you have?

8 MR. SULLIVAN: Four.

9 THE COURT: Okay. And how many witnesses do you  
10 have?

11 MR. BERRY: Three.

12 THE COURT: Okay.

13 MR. SULLIVAN: A lot of them are the same.

14 MR. TUBB: Yeah. I think that what Mr. Berry is  
15 saying is he would only question Ms. Moran afterwards and  
16 question Mr. McKay afterwards. There aren't any independent  
17 witnesses that are not already incapsulated in the addition of  
18 this that the petitioner has called.

19 THE COURT: Okay. So do we plan to stay here as long  
20 as it takes or do we plan to come back?

21 MR. SULLIVAN: I can talk to my witnesses and see  
22 what they would prefer. I would prefer to just go as long as  
23 it takes and get done. I'm almost done here.

24 THE COURT: Okay.

25 MR. SULLIVAN: But I also realize it's a Friday and



1 43A.

2 Q. When was the most recent one by Ms. Christopher again --  
3 by Dr. Christopher?

4 A. It was in the first part of January. I don't know, it  
5 was the 4th or 5th, something like that.

6 Q. So a couple of weeks ago?

7 A. Right.

8 Q. And you want to change that?

9 A. I'm not asking to change her evaluation, no, sir, that's  
10 not what I said.

11 Q. You disagree with her?

12 A. I'm saying in my opinion, they do not meet the immediate  
13 dangerousness of 43A.

14 Q. So you disagree with Dr. Christopher?

15 A. As of today, I disagree. I don't know what she saw on  
16 that day. I am not --

17 Q. When is the last time you met with Mr. Fleming?

18 A. Again, I have already told you that I didn't meet with  
19 either one of them. It was a review of the records.

20 Q. So are you giving the Court --

21 A. And I'm saying that it would be prudent for the State to  
22 have an evaluation of dangerousness, 43A -- an evaluation of  
23 43A to see if they meet that criteria.

24 Q. Even though it was just done two weeks ago?

25 A. A competency evaluation was done two weeks ago.

1 Q. Which always includes the question of whether they're  
2 presently dangerous and a person requiring treatment, correct?

3 A. That question is in there, yes, sir.

4 Q. And it was answered in the affirmative for both?

5 A. It was.

6 Q. Do you want to do another competency evaluation every two  
7 weeks?

8 A. No.

9 Q. And, in fact, that's not even feasible, is it?

10 A. No, it's not.

11 Q. It took Jeffery Montgomery two months to get his first  
12 one. Did you look at those records?

13 A. I did look at his records, yes.

14 Q. Who determines whether they get evaluated?

15 A. By the people who are going in to, like, in Oklahoma  
16 County, Brad.

17 Q. The Department of Mental Health determines when they get  
18 evaluated?

19 A. He puts in the documentation and deems whether he  
20 believes they are ready to be reevaluated. And when he thinks  
21 that they are, he will submit a request for a second  
22 evaluation.

23 Q. And so it's your position to this Court that Jovan  
24 Fleming should be conditionally released?

25 A. That's not what I -- no, sir, that's not what I said.

1 a person requiring treatment, having never met him?

2 A. I said -- again, I said it was my opinion and that they  
3 should be evaluated for that.

4 Q. Okay. Yeah. And my question was: Do you think it's  
5 appropriate to be relaying that opinion to the Court, having  
6 never met him?

7 A. By the review of the records, I gave you my opinion.

8 Q. That's still not an answer to my question. Do you  
9 believe it's appropriate to be giving that information to the  
10 Court, your opinion of that, having never met Mr. Fleming?

11 A. Yes. It's my opinion, it can be taken or not taken.

12 Q. That's similar to your opinion of whether competency  
13 restoration is effective in Oklahoma County when you don't  
14 know the numbers.

15 A. I don't have the data for that, no, sir.

16 Q. When is he scheduled to be re-evaluated?

17 A. I don't know. I did not look.

18 Q. Well, who sets that up?

19 A. Again, Mr. McKay will put into the app when he believes  
20 that he has progressed enough to be able to do another  
21 evaluation.

22 Q. Why does he need to do that if you've looked at the  
23 records and you decided that he does?

24 A. Now, what I just said was he needed to be evaluated for  
25 dangerousness. That's a totally different thing in

1 going to consider it.

2 Q. Okay. But considering it, is it fair to say that someone  
3 who is dangerous would not be allowed to have that  
4 consideration and move to general population?

5 A. Yes.

6 Q. Okay. So similar to Mr. Montgomery, Mr. Fleming you  
7 didn't -- you haven't observed any signs of dangerousness,  
8 anything like that in your most recent --

9 A. No, I have not.

10 Q. Okay. So where they're at now has been an improvement,  
11 do you believe that improvement is based on the treatment that  
12 you're providing along with the medication that these  
13 defendants are taking?

14 A. Yes.

15 MR. BERRY: I have no further questions.

16 THE COURT: Redirect.

17 **REDIRECT EXAMINATION**

18 BY MR. SULLIVAN:

19 Q. Mr. Berry used the term "psych evals." What is "psych"  
20 short for?

21 A. Psychological.

22 Q. Do you do psychological evaluations?

23 A. I do not do formal psychological evaluations as a Ph.D.  
24 psychologist would do.

25 Q. You wouldn't be allowed to do those, would you?

1 A. Correct.

2 Q. Okay. So I mean, it sounds like you're saying they've  
3 improved, they're getting better, both Mr. Montgomery and  
4 Mr. Fleming?

5 A. Yes.

6 Q. Okay. Why are they on the expedited list? Things are  
7 going well.

8 A. They are.

9 Q. Why are they on the expedited list?

10 A. I guess it's an issue of movement. These guys have been  
11 incarcerated for a while, they're looking good. It's my goal  
12 to help them get on with the process as quickly as possible,  
13 to get through the court process.

14 Q. Well, why not make that call at three months instead of  
15 12? How long have they been on the expedited list?

16 A. I'm not sure.

17 Q. I mean, I could --

18 A. I don't know.

19 Q. We could look at e-mails and stuff, but when did you  
20 first recommend that they be put on the expedited list?

21 A. I don't know. I don't recall.

22 Q. Did you ever do that?

23 A. Yes. After -- okay. Shortly after I learned of them not  
24 having been deemed competent, which would have been -- hang  
25 on -- two weeks ago, before the hearing here.

# **Exhibit 4**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

(1) LESLIE BRIGGS, as next friend of T.W. )  
and B.S.; )  
(2) EVAN WATSON, as next friend of C.R.; )  
and, )  
(3) HENRY A. MEYER, III, as next friend )  
of A.M., for themselves and for others )  
similarly situated, )

Plaintiffs, )

v. )

Case No: 23-cv-81-GKF-JFJ

(1) ALLIE FRIESEN in her official capacity )  
as Commissioner of the Oklahoma )  
Department of Mental Health and )  
Substance Abuse Services; and )  
(2) DEBBIE MORAN, in her official )  
capacity as Interim Executive Director of the )  
Oklahoma Forensic Center, )

Defendants. )

**DECLARATION OF DR. CRYSTAL HERNANDEZ**

I, Crystal Hernandez, hereby declare as follows:

1. I make this declaration in support of the parties' *Joint Motion for Preliminary Approval of Consent Decree, Class Certification, and Plan of Notice to Class* (Doc. 46). I have personal knowledge of the matters set forth herein and can testify thereto if called upon to do so.

2. I hold a doctorate in forensic psychology (Psy.D.), as well as a Master of Business Administration (MBA).

3. I was the Executive Director of the Oklahoma Forensic Center (OFC) in Vinita, Oklahoma, between December 2019 and August 2023. I was originally named, in my official capacity, as a defendant in this lawsuit when it was filed in March 2023.

4. OFC is the sole forensic mental health hospital for the state, serving all adults determined incompetent to stand trial and requiring competency restoration, in addition to other individuals determined incompetent for execution, as well as those found not guilty by reason of insanity/mental illness.

5. In my role as OFC's Executive Director, I was an employee of the Oklahoma Department of Mental Health and Substance Abuse Services ("ODMHSAS"), and I had a direct view into, and involvement with, the workings and management of ODMHSAS's adult forensic mental health system, including competency restoration.

6. Based on my observations, the competency restoration system has been and continues to be significantly broken. During my tenure at ODMHSAS, I observed a manifest disregard, on the part of the ODMHSAS administration, for the urgent need to address the health and safety of those clients declared incompetent to stand trial and committed to ODMHSAS care and custody via court order . The broken nature of the competency restoration system is illustrated by, among other things, ODMHSAS's history of mismanaging the OFC waitlist.

7. When I started as the OFC's Executive Director, OFC executive administrative staff/ODMHSAS maintained a waitlist of persons declared incompetent and ordered to receive restoration treatment. The waitlist was readily available to ODMHSAS administration, as well as OFC executive leadership. The waitlist was separated by referring county and listed the date on which the order for competency restoration was received by OFC. There were also notes and other relevant information for each person, such as "refusing food," "lawyer/judge called on this case," or "show cause" court dates.



8. Individuals on the waitlist should have been admitted, in order of their time on the waitlist or according to the severity of the client's mental health condition and need for treatment, as beds became available at OFC. In practice, however, the date of the commitment order for competency restoration, and the client's clinical condition, were not always the determining factors that established a person's order of admission. Instead, the procedure which predated my employment and that was directed by ODMHSAS administration was that incompetent persons from Oklahoma County could "bump the line" as a priority. This priority status afforded to Oklahoma County was the result of an arrangement from years prior to avoid "show cause" filings and other negative actions against ODMHSAS for not moving incompetent defendants from the jail quickly enough.

9. Contempt "show cause" filings, or even threats of "show cause" filings, by defense attorneys and/or district attorney offices from other Counties, also impacted the order in which people were scheduled to be admitted to OFC. It was a common practice for ODMHSAS administration and legal to instruct staff that those defendants who had filed "show cause" or contempt motions be "bumped" ahead of others on the waitlist and into an OFC bed to avoid judicial scrutiny. In my view, this practice was an egregious and arbitrary management of the waitlist because it disregarded the waitlisted persons' medical needs and time waiting on the list while incarcerated in jail, in favor of advancing the administration's goal to avoid judicial scrutiny of the competency restoration program.

10. The issues with the OFC waitlist began well before my employment with ODMHSAS started in December 2019. When I arrived, operating procedures were questionable at best, and the data painted a clear picture that the system was in desperate need of revamp and investment. I notified ODMHSAS administration almost

immediately upon hire that the existing system was flawed, and that the number of forensic beds at OFC was insufficient given the waitlist and trend line for demand. In early 2020, I submitted the first of many proposals to ODMHSAS administration aiming to alleviate the worsening problem of defendants waiting prolonged periods of time in jail for competency restoration services. Such proposals over the years included community-based competency restoration services, additional forensic dedicated beds, a pilot jail-based competency program operated as an extension of OFC, and several other concepts aimed at alleviating the issues.

11. In October and November 2022, ODMHSAS administration presented a proposal to launch Certified Community Behavioral Health Clinics (CCBHCs) into a purported statewide jail-based competency program, despite the CCBHCs' lack of expertise and experience in competency-to-stand-trial work.

12. In December 2022, ODMHSAS attempted to launch the CCBHC jail-based restoration treatment program in 76 counties.<sup>1</sup> In an attempt to alleviate growing legal pressure created by burgeoning waitlist, ODMHSAS rushed to launch the program without (i) sufficient planning, lead time, training of providers, and infrastructure; (ii) assigning/having OFC staff necessary for administration or monitoring; or (iii) providing adequate notice to most of the jail administrators or other stakeholders at the county level. This created chaos and resulted in a flood of complaint calls and emails to OFC from jails, defense attorneys, prosecutors, and judges.

---

<sup>1</sup> ODMHSAS administration decided to structure a different program in the Oklahoma County Jail. Rather than a CCBHC provider rendering services, an embedded ODMHSAS staff member was supposed to provide services and provide feedback to OFC staff and ODMHSAS administration.



13. The launch included a mere two-sentence statement of work added to all existing CCBHC contracts, indicating that the CCBHC provider should see the inmate a minimum of twice monthly and provide psychotropic medications to them in jail. Several CCBHCs voiced concerns over the lack of training, lack of lead time, and difficulty managing stakeholders' frustrations; some also expressed anger directed at ODMHSAS about being forced into providing a service they were ill-equipped to provide.

14. Following the launch of the jail-based program, ODMHSAS administration directed OFC and CCBHC providers to cease using the term "waitlist" for those still in jail and pending competency restoration services. ODMHSAS administration devised this semantic directive because it was thought to minimize the legal risks associated with having a waitlist of incompetent defendants waiting to receive restoration treatment. Instead, we were asked to use an alternative name, which developed into the euphemistic phrase "treat to competency by location." A second "waitlist" evolved following the launch of the jail-based program for those needing to be admitted to OFC due to (i) refusal of medications or program participation in jail, (ii) high-profile cases, or (iii) threats of legal action.

15. When ODMHSAS administration launched its purported statewide jail-based restoration program, there were approximately 300 people on the waitlist, many clients had been waiting many months to receive restoration treatment. ODMHSAS's public statements, at that time, that there was "no waitlist," or that all persons declared incompetent were receiving restoration treatment, were false. The 300-plus people on the waitlist did not all suddenly start to receive restoration treatment when ODMHSAS administration launched its statewide jail-based restoration program.

16. In my opinion, the ODMHSAS administration statewide jail-based restoration program did not provide legitimate competency restoration services consistent with accepted professional standards in most, if not all, Oklahoma counties. The ODMHSAS administration hastily launched the program as a tactic to attempt to reduce ODMHSAS's legal risk associated with its waitlist and prolonged waiting times for clients to receive competency restoration services.

17. From January to June 2023, ODMHSAS administration continued to receive a flood of complaints regarding the CCBHCs' lack of experience in competency restoration services from county jails, defendant's families, and courts. OFC administrative staff began maintaining data regarding treatment compliance and issues of the jail-based restoration program. Those data tables were sent nearly weekly via emails to ODMHSAS administration. The data I observed until my departure were abysmal, with a large percentage of inmates refusing to participate in the program, refusing to comply with medications prescribed, and receiving suboptimal frequency of treatment. Additionally, data demonstrated that some of the CCBHCs were failing to provide the minimum twice monthly appointments, were inserting themselves into the criminal proceedings, and lacking understanding of competency restoration knowledge.

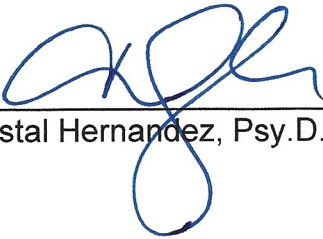
18. During my tenure at ODMHSAS, I observed other areas of concern as well. For example, I witnessed ODMHSAS administration inappropriately insert themselves into many decisions at OFC, including decisions impacting clinical services and movement of patients. Additionally, staffing at OFC has been a concern predating my tenure, with difficulty recruiting and retaining the quality and the quantity of staff necessary to perform a difficult and expertise-driven service in a safe manner. Salaries are low, the

degree of risk for the job is great, and the environment of care is significantly lacking (including inappropriate furnishings, fixtures, and layout for a high-security psychiatric environment). Without the number and type of staffing necessary, treatment quality and availability are negatively impacted. With compromised treatment and supervision, length of stay and overall effectiveness of care are questionable.

19. I have read the proposed Consent Decree (Doc. 46-1), and I believe it is a step in the right direction to address the concerns discussed above.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 21, 2024.

  
\_\_\_\_\_  
Crystal Hernandez, Psy.D., MBA

# **Exhibit 5**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

(1) LESLIE BRIGGS, as next friend of T.W. )  
and B.S.; )  
(2) EVAN WATSON, as next friend of C.R.; )  
and, )  
(3) HENRY A. MEYER, III, as next friend )  
of A.M., for themselves and for others )  
similarly situated, )

Plaintiffs, )

v. )

Case No: 23-cv-81-GKF-JFJ

(1) ALLIE FRIESEN in her official capacity )  
as Commissioner of the Oklahoma )  
Department of Mental Health and )  
Substance Abuse Services; and )  
(2) DEBBIE MORAN, in her official )  
capacity as Interim Executive Director of the )  
Oklahoma Forensic Center, )

Defendants. )

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**COMBINED DECLARATION OF WILLIAM NEIL GOWENSMITH, Ph.D.  
and LAUREN ELIZABETH KOIS, Ph.D.**

**I.  
CONSULTANTS' EXPERIENCE WORKING WITHIN FORENSIC BEHAVIORAL  
HEALTH SYSTEMS AND ENVIRONMENTS,  
AND AS EXPERT CONSULTANTS IN SIMILAR CONSENT DECREE  
AND CLASS ACTION AGREEMENTS**

William Neil Gowensmith, Ph.D., and Lauren Elizabeth Kois, Ph.D., upon oath and under penalty of perjury, and upon personal knowledge, state:

1. Dr. Gowensmith is a licensed forensic psychologist and the president of Groundswell Services, Inc. ("Groundswell"), which is a consulting business dedicated to reviewing, coordinating, and improving public forensic mental health systems across the United States. His career has been spent in the specialty area of forensic psychology, which represents the



intersection of mental health and the legal system. His main focus in forensic psychology is on competence to stand trial (CST) – in lay terms, the constitutional assurance that a person has the requisite mental and developmental capacities to meaningfully understand and participate in their legal defense after being charged with a crime. To this end, he conducts CST evaluations, researches CST practices and standards, serves on national boards regarding forensic psychology and CST, writes articles and books on CST, teaches graduate students about CST, trains graduate students and postdoctoral fellows to conduct high-quality CST evaluations, and consults with forensic mental health systems throughout the country regarding CST practices and standards.

- a. In addition to overseeing Groundswell Services, he is a full professor of psychology at the University of Denver, created and directs our forensic psychology clinic (The University of Denver’s Forensic Institute for Research, Service, and Training, i.e., Denver FIRST), and oversees and supervises their postdoctoral fellowship in forensic psychology. Previously he served as the Chief of Forensic Services for the State of Hawaii’s Department of Health, overseeing all forensic evaluations and staff, community forensic programs and staff, and legislative and policy efforts to improve the state’s forensic mental health system (including CST).
- b. As President of Groundswell Services, he subcontracts with many exceptionally qualified forensic mental health experts from across the country to accomplish the various tasks and demands needed across states. For Oklahoma, he has worked (and will continue to work) closely with Dr. Lauren Kois.

2. Dr. Kois is a licensed forensic psychologist and Assistant Professor of Psychiatry and Neurobehavioral Sciences at the University of Virginia School of Medicine’s Institute of Law, Psychiatry, and Public Policy. Her clinical, research, and consulting work focus on enhancing the



quality, efficiency, and implementation of forensic mental health services in the public sector, specifically competency evaluation and restoration practices. She has implemented forensic programs in inpatient, jail, and community settings, including in areas lacking infrastructure and resources, such as rural areas. She is nationally recognized for her research and consulting activities and has assisted many state systems in addressing restoration demands prior to and since joining Groundswell in 2022.

- a. Prior to joining the University of Virginia, she served as core faculty of the University of Alabama's Clinical Psychology-Law doctoral program, where she trained undergraduate and graduate students in forensic psychology and assisted the Alabama Department of Mental Health in its efforts to improve forensic services.
- b. Dr. Kois has taught Criminal Forensic Assessment courses and seminars to doctoral, postdoctoral, and professional trainees. She has trained thousands of mental health and legal professionals in matters of competence evaluation and restoration standards and practices throughout the country.

3. Groundswell Services works in multiple states regarding the challenges presented within CST systems. Presently, Groundswell is working in the states of Washington, California, Texas, Colorado, Georgia, Minnesota, and North Carolina on issues regarding CST wait times and other challenges associated with competence services. We have also worked successfully in Hawaii, Nevada, Alaska, and Alabama on CST systems issues.

4. In Colorado, Dr. Gowensmith serves as one of two Special Masters overseeing a Consent Decree and associated processes designed to transform Colorado's competence services system into one that provides timely, high quality competence evaluations and competence restoration services.

5. In some states, Groundswell is at times retained by attorneys or mental health advocacy agencies to explore solutions to competence wait times. In others, Groundswell is retained by the requisite state mental health agency to implement new programs and policies to mitigate competence services challenges. Regardless of the retaining party, Groundswell's recommendations represent a consistent approach; that is, while our recommendations are tailored to specific state realities, they do not change substantially whether we are retained by plaintiffs or defendants.

6. The challenges Oklahoma faces with its CST system are in some ways unique to Oklahoma and in other ways very commonly experienced by most other states. Oklahoman defendants ordered to competence evaluation and restoration routinely face long waits for those services to occur, or for appropriate court-ordered settings to become available. As reflected in the proposed Consent Decree, Oklahoma's CST system faces a wide range of challenges, including but not limited to:

- a. A lack of adequately trained and experienced CST evaluators across the state
- b. Inadequate conditions for the clinical treatment of persons with serious mental illness in county jails across the state, especially for individuals needing long term treatment
- c. Insufficient capacity for competence restoration, including lack of sufficient inpatient hospital beds, community / outpatient options, and jail-based programs aligned with standard restoration practices
- d. A lack of adequately trained competence restoration staff
- e. Poor coordination with courts and other relevant legal stakeholders to resolve competence in a timely fashion
- f. Inadequate diversion options in most counties across the state

7. As a result of these systemic deficits, as reflected and outlined in the proposed Consent Decree, Oklahoman defendants court-ordered to CST services are at heightened risk and vulnerability for physical and mental harms, as well as inhumane and unconstitutional delays to both legal trial proceedings and clinical treatment.

8. These challenges are similar or identical to those found in other states. Many other states face long waitlists of defendants who have been court-ordered to competence evaluations and/or competence restoration. As a result, these states are either facing class-action lawsuits and other legal remedies to these waitlists. Some are in the midst of federal oversight for those waitlists or have just emerged from federal oversight given successful resolution of those waitlists.

9. Given Groundswell's experience and expertise in successfully mitigating CST-related delays and harms across several states, Groundswell has been retained by plaintiff's counsel to address similar CST-related delays and harms in Oklahoma.

## **II. HOW WE DEVELOPED KNOWLEDGE AND UNDERSTANDING OF COMPETENCY RESTORATION ISSUES IN OKLAHOMA**

10. Over the past year, Groundswell has spent many hours learning about the Oklahoma forensic system.

- a. We have reviewed statutes and proposed legislation; policy papers; media accounts; ODMHSAS data, presentations, and reports; ODMHSAS service plans and proposals; and other sources of material specific to competence services and delays in Oklahoma.
- b. We have toured mental health and correctional facilities on multiple occasions within the last 12 months, including the Oklahoma Forensic Center and the Tulsa County Jail.
- c. We have interviewed dozens of stakeholders, including current and former state mental health administrators, jail-based and hospital-based mental health staff, defense

attorneys, prosecutors, governmental staff, law enforcement and correctional staff, and multiple individuals ordered to competence services themselves.

- d. We have also compared all of this information with similar sources of information from other states, national trends, best practices, and evidence-based information within the forensic mental health literature.

11. After reviewing and synthesizing all the above information, we worked with plaintiff's counsel and the defendants, including ODMHSAS's independent expert, John Pettila, J.D., to craft a collaborative Consent Decree and concurrent remedial Plan to address the delays and challenges found in Oklahoma's current competence services system.

### **III.**

#### **THE PLAN IS DESIGNED TO REDUCE WAIT TIMES AND IMPROVE THE QUALITY OF COMPETENCY EVALUATIONS AND RESTORATION TREATMENT FOR ALL CLASS MEMBERS**

12. The Plan and Consent Decree apply uniformly to all defendants in Oklahoma, and they will address services and options before, during, and after competence services occur. The Plan and Consent Decree contain elements intended to deliver benefit to all Class Members equally. Individual circumstances of specific defendants will not materially change the services mandated by the Plan or Consent Decree. Although individual circumstances might dictate that some services be individually tailored to the defendant, just as reasonable medical care would, individual circumstances will not preclude anyone from accessing timely, high quality, robust options for competence services developed and implemented under the Plan. Some Plan and Consent Decree components aim to divert or remove appropriate individuals from the restoration waitlist, while others focus on maximizing the efficiency and quality of competence services for those that must remain in the competence system; both sets of components will ultimately reduce the overall restoration wait times for all defendants.

13. For example, the Plan sets specific maximum allowable wait time deadlines that apply to all Class Members regardless of individual factors or case characteristics. These deadlines reduce incrementally over time, ultimately requiring all class members to receive restoration services within the same period of time. Another component of the Plan mandates that a triage screening protocol will apply statewide to expedite Class Members in acute need of hospitalization, so that the sickest individuals will access care immediately – regardless of geographical location.

14. The Plan addresses defendants, settings, deadlines, and court-mandated requirements across the state of Oklahoma. While some pilot programs are included in specific locations, these will operate locally to provide proof of concept; once they have been determined to be effective, they will serve as templates for similar programs and policies to be implemented statewide.

**IV.  
THE PLAN'S ELEMENTS ARE STRONGLY ASSOCIATED WITH REDUCING WAIT  
TIMES IN OTHER JURISDICTIONS AND WITHIN OTHER SYSTEMS**

15. Each of the components of the Plan and Consent Decree has been implemented in other states facing similar competence-related delays. However, not all components from other states' Plans are included in Oklahoma's Plan and Consent Decree, nor are all components from the Oklahoma Plan and Consent Decree found in all other states' Plans. The Oklahoma Plan and Consent Decree, then, borrow only those components from other Plans that fit best for Oklahoma's unique circumstances.

16. The Plan and Consent Decree contain remedies that have been specifically tailored to Oklahoma, including the following:

- a. Reevaluating all current incompetent defendants by qualified staff

- b. increasing inpatient and outpatient competence restoration capacity
- c. hiring qualified forensic mental health staff
- d. improving forensic literacy and training in ODMHSAS staff
- e. implementing a triage system to promote quick access to inpatient treatment for those in acute need and to promote discharge to alternative settings for those whose symptoms and risks are manageable
- f. imposing deadlines for competence evaluations
- g. enhancing mental health services to incarcerated incompetent defendants
- h. creating pilot programs for jail-based competence restoration aligned with standard practice
- i. creating pilot programs for outpatient competence restoration aligned with standard practice
- j. enhancing forensic mental health data collection, analysis, and dissemination
- k. enhancing communication and training among relevant stakeholders, including ODMHSAS, local jails, courts, law enforcement, community providers, housing agencies, and peers

17. These remedial components, both individually and collectively, have been very effective in reducing delays for competence evaluations and restoration services in other states. In the next sections we describe their impacts in Colorado, California, and Washington.

18. Colorado uses many of the same plan components in its current Consent Decree. Colorado operates three jail-based competence restoration units, a large outpatient competence restoration program, several coordinated community housing and service options, a strong forensic training and oversight program, enhanced mental health services for incarcerated

incompetent defendants, and a triage system that oversees the placement and timing of incompetent defendants.

- a. Groundswell Services is very familiar with jail-based mental health services in Colorado. At some jails, enhanced mental health services are provided to defendants who are either awaiting competence evaluations or who have already been found incompetent to proceed and are awaiting transfer to an inpatient restoration program. As part of the enhanced services to these defendants, psychiatric and mental health services are offered on a more frequent basis to more efficiently treat identifiable psychiatric symptoms that may be a barrier to competence. While these enhanced services have been found to improve the likelihood of defendants either being initially opined competent or achieving competence while awaiting transfer to a more formal restoration program, a program such as this still has limitations. Despite these enhanced services (which are significantly greater than services offered to most defendants in traditional jail settings), defendants still occasionally refuse to engage in treatment until they are sent to the more formal restoration treatment programs where the structure and more comprehensive services increase the likelihood of compliance with both medication treatment and legal education. Our experience with the challenges that confront Colorado's jail-based restoration services supports our view that, in Oklahoma, a pilot jail-based program is the best approach rather than re-launching a statewide program without sufficient infrastructure and experience to promote a successful outcome.
- b. Colorado has time frames for competence evaluations that range from 7-21 days and for restoration that range from 7-28 days. Most months, Colorado has met its time

frames for conducting jail-based competence evaluations, all while maintaining the most stringent examiner qualification standards in the country.

- c. Colorado's restoration time frame compliance has proven more challenging, with the pandemic causing unexpected delays and barriers to compliance. In May of 2023, 480 defendants remained in Colorado jails awaiting transfer to restoration services. One year later, as restoration staffing and capacity returned to pre-pandemic levels, the number is now 251. Colorado estimates full compliance by May 2025.
- d. The Colorado Consent Decree mandated new procedures and programs that have increased access, capacity, and efficiency for defendants awaiting competence related services. These initiatives facilitated a significant decrease in median wait times for defendants accessing inpatient competence restoration. In the past year, these wait times have reduced by months.
- e. Colorado maintains the nation's most robust outpatient competence restoration system. More than 500 defendants participate in outpatient restoration across the state.
- f. Colorado maintains the nation's most sophisticated competence triage system. Defendants are categorized into one of two tiers upon a finding of incompetence: immediate need (Tier 1) vs less urgent need (Tier 2). In May of 2023, approximately 50 Tier 1 individuals were awaiting inpatient restoration; in May 2024, the number was 14. The median wait time for those individuals has reduced significantly and the state is now often in compliance with Tier 1 time frames, with full compliance expected in the fall of 2024.

19. California, which requires a 28-day time frame for incompetent defendants to be placed in competency restoration services, also uses many of the components of Oklahoma's Plan



and Consent Decree to mitigate their competence delays.

- a. California operates a robust, evidence-informed system of jail-based competence restoration units, a strong outpatient competence restoration program in Los Angeles, several coordinated community housing and service options, a strong forensic training and oversight program, enhanced mental health services for incarcerated incompetent defendants, a strong array of diversion options, and an assertive re-evaluation service for persons on their waitlist. California also employs a robust involuntary medication service for incompetent defendants; although this is not a specific element of Oklahoma's Plan and Consent Decree, it does align with their plans for enhanced mental health service efforts in many county jails.
- b. Formal jail-based competence restoration occurs in several California jails. These contrast to the enhanced mental health services found in several jails in other states (and within California). In one such program, defendants meet weekly with the psychiatric provider, which allows targeted medication adjustments to efficiently treat psychiatric symptoms that may be a barrier to competence. The defendant also meets with a forensic mental health specialist several times a week in order to receive manualized legal education as well as therapeutic support based upon identified treatment needs specific to that individual. The program team meets on a weekly basis to provide updates on the progress of the program participants which allows for comprehensive communication of an individual's ongoing psychiatric status and response to treatment from mental health providers and security personnel. This program also has a psychologist on the treatment team who reevaluates competence monthly, though this can occur more frequently if the treatment team believes that the

defendant is ready.

- c. California also operates a new but sophisticated administrative oversight system for their population of incompetent defendants. This oversight system provides support and resources for enhanced mental health services, re-evaluations of competence, medication consultation, and background psychosocial benefit acquisition to those individuals in jail on the waitlist for transfer to inpatient settings. The program started as a pilot in a small number of jails, but it is now expanding significantly and should be implemented statewide by 2025.
- d. In November 2021, more than 1700 incompetent defendants were incarcerated in county jails across California awaiting transfer to inpatient services, with wait times often exceeding several months. In April 2024, after implementing the above components, California now has fewer than 400 people waiting for competence restoration, and the average wait time is now approximately 14 days. California has achieved compliance in most settings with most of their defendants.

20. Washington also uses many components found in the Oklahoma Plan and Consent Decree in their response to the seminal *Trueblood* lawsuit. Washington operates several outpatient competence restoration programs, several coordinated community housing and service options, a strong forensic training and oversight program, enhanced mental health services for incarcerated incompetent defendants, and a wide array of diversion options. Unlike the Plans in Colorado, California, and the proposed Plan in Oklahoma, Washington does not operate jail-based restoration.

- a. The Settlement Agreement constructed in Washington requires that competence evaluations be conducted within 14 days and that IST defendants begin competence

restoration services within 7 days.

- b. Previously, wait times in Washington for evaluations exceeded several weeks. Wait times for jail-based evaluations are now within two weeks, and nearly always meets compliance.
- c. Previously, wait times in Washington for competence restoration to begin exceeded several months. Inpatient restoration now typically occurs within 10 days.

21. Other states rely on similar components and have seen similar results. Hawaii has no waitlist for inpatient restoration, instead relying on outpatient restoration and increased inpatient capacity to manage demand. Alaska’s waitlist is minimal, thanks in part to the recent launch of a pilot outpatient restoration program in Anchorage. Virginia operates a very minimal waitlist, instead relying on outpatient and jail-based restoration options as well as a highly qualified forensic examiner pool and good collaborations with community mental health service providers. Pennsylvania has relied on increasing the number of forensic staff in jails to ameliorate crises and reduce wait times. Utah and Oregon recently increased inpatient restoration capacity, resulting in drastic reductions in their respective waitlists.

22. Given that these components are associated with reduced wait times across multiple states – each with its own unique collection of geographical and cultural factors, population size, statutory limitations and service provision options – the evidence, and our experience, strongly suggests that these components will have similar impacts in Oklahoma. Several of the above states achieved compliance (or are on their way to achieving compliance) with similar time frames and mandated services outlined in Oklahoma’s Plan and Consent Decree.

**V.  
LOCALIZED PILOT PROGRAMS ARE SHORT-TERM, RESOURCEFUL  
STRATEGIES FOR SOLVING LONG-TERM, STATEWIDE ISSUES**

23. Pilot programs are early alternatives to wide-scale implementation. Pilot programs allow new initiatives to “start small,” identify trouble areas, learn from challenges, and capitalize on emerging successes. Pilot programs are designed to collect reliable and valid data to allow stakeholders and administrators to review, analyze, and share outcomes and lessons learned as larger-scale projects are considered. Administrators learn what works and what does not, and then use this information to adapt and expand the pilot to other settings.

24. The pilot programs specific to the Plan and Consent Decree are the Community-Based Restoration Treatment Pilot Program and the Jail-Based Competency Restoration Pilot Program. Both are designed as strategic, initial steps toward potential statewide implementation, with the goal of eventually allowing all Class Members equal opportunity to participate. The pilot strategy should launch in select locations, which has several key advantages, suggesting it is the most appropriate approach to developing such programs in Oklahoma.

- a. Oklahoma is unique, and programs should be implemented based on Oklahoma-specific needs and realities. For example, Oklahoma has a significant shortage of forensic mental health providers. Full, statewide implementation of these programs would be impossible given the infrastructure, staffing, and training necessary to run these programs safely, effectively, and with fidelity.
- b. The controlled, smaller-scale implementation of piloting allows for closer monitoring and quicker course-corrections than would be possible during a simultaneous, statewide implementation.
- c. Pilots encourage reliable and valid data collection, such as information on restoration rates and lengths of stay, which will allow ODMHSAS to assess pilot success and adjust pilot components as needed. This method allows administrators and other

- stakeholders to review, analyze, and disseminate outcomes and lessons learned as larger-scale projects are considered.
- d. By starting small, pilots mitigate risk and potential negative impacts compared to a full implementation.
  - e. Pilots reserve full access to resources until administrators and other stakeholders are satisfied that the pilot has demonstrated feasibility.
  - f. The thoughtful rollout of a pilot encourages stakeholder engagement and feedback, which are then incorporated into program adjustments.
  - g. By using the controlled pilot approach, ODMHSAS can systematically develop, test, and refine programs in alternative restoration settings. If successful, they can be expanded across the state to reduce restoration wait times and improve service delivery for all Class Members.

25. Statewide implementation of a jail-based restoration program, at this point, it is not feasible nor advisable. Our investigation and analysis found that ODMHSAS does not currently have the infrastructure, expertise, or experience to launch and administer an effective jail-based program across Oklahoma's 77 counties at once. Indeed, competence services are already quite complex because they require interfacing of the mental health, correctional, and legal systems. The pilot approach can focus only on a small number of jurisdictions. Statewide implementation would require a level of coordination across local courts, jails, and ODMHSAS that would be extremely challenging, if possible. These programs also require significant "buy-in" and cooperation from mental health and legal stakeholders, as well as community residents. Educating such a wide range of stakeholders, engaging in discussion, and securing stakeholder approval and readiness—without the ability to share established evidence of pilot success *specific to Oklahoma*—would be a

monumental task.

26. Considering these constraints, the pilot program approach is a balanced strategy for maximizing the long-term success of the Plan and Consent Decree for all Class Members.

**VI.  
THE FINES STRUCTURE IS AN EFFECTIVE AND NECESSARY MECHANISM  
TO ENCOURAGE COMPLIANCE**

27. The collection of financial penalties for non-compliance (“fines”) is a commonly utilized, crucial component of any state’s oversight and transformation. Reasonable fines amounts can be constructed to address delays in accessing competence services, and they can be constructed to be reduced or eliminated as compliance is demonstrated.

28. Fines provide an incentive for compliance, progress, hard work, and desired outcomes. They serve as tangible deterrents against non-compliance and foster accountability. Based on our experience, parties are more likely to adhere to the terms of the settlement to avoid financial loss. Of course, compliance is critical for achieving success and ensuring the agreed-upon measures are implemented effectively. Indeed, states without a fines mechanism typically show slower progress and poorer compliance. For example, Alabama, a state that has been under federal oversight for its restoration waitlist since 2016, has not faced fines for non-compliance. Despite ongoing federal oversight, Alabama’s waitlist has only grown: as of this writing, it has ballooned to approximately two years long. Without the consequence of potential fines, parties may view agreed-upon plans as lacking enforceability, which undermines the settlement’s objectives. In addition, fines underscore the seriousness of the issue. They convey a clear and motivating message that non-compliance will have consequences. They can also be directed to targeted ancillary services (housing, specialized community programs, innovative court initiatives, collaboration with law enforcement, etc.) that can further maximize the goals of the Consent

Decree.

29. Our experience in other states strongly suggests that fines are effective *and* necessary mechanisms to encourage compliance within the context of restoration waitlists. Fines in Washington and Colorado are specifically earmarked to address gaps in the competence service array. They have been used to secure community housing options, intensive case management, court innovations, additional inpatient restoration capacity, tangible resources, diversion staff, training and education efforts, and other ancillary services that mitigate waitlists and competence service delays.

30. Also, the specter of fines often motivates states and legislatures to encourage change and compliance with mandated expectations of federal oversight.

31. Risk management research indicates the imposition of fines substantially increases compliance in regulated entities.<sup>1,2</sup> In many cases, consent decrees have included provisions for fines, but the real cost of penalties remained minimal because plaintiffs made reasonable progress in implementing agreed-upon efforts and achieving results.<sup>3,4</sup>

32. Ultimately, fines uphold the integrity of the Plan and Consent Decree.

**VII.  
THE TIMETABLE FOR REACHING THE ULTIMATE TARGET WAIT TIME  
(21 DAYS IN 16 MONTHS AFTER CONSENT DECREE ENTRY)  
IS ACHIEVABLE AND REALISTIC**

33. As mentioned earlier, states with similar oversight Plans to the Consent Decree proposed in Oklahoma have shown remarkable improvement in their competence systems. Wait

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<sup>1</sup>Shimshack, J. P., & Ward, M. B. (2005). Regulator reputation, enforcement, and environmental compliance. *Journal of Environmental Economics and Management*, 50(3), 519-540. <https://doi.org/10.1016/j.jeem.2005.02.002>

<sup>2</sup>Kim, K. M., Max, W., White, J. S., Chapman, S. A., & Muench, U. (2020). Do penalty-based pay-for-performance programs improve surgical care more effectively than other payment strategies? A systematic review. *Annals of Medicine and Surgery*, 2012(60), 623–630. <https://doi.org/10.1016/j.amsu.2020.11.060>

<sup>3</sup>United States v. City of Los Angeles, No. 00-11769 GAF (C.D. Cal. June 15, 2001).

<sup>4</sup>Charlie and Nadine H. v. Murphy, No. 99-3678 (D.N.J. June 9, 2003).

times are reduced, the number of people on waitlists are reduced, and fewer harms are suffered by those waiting. Moreover, once the basic components are implemented to fidelity, significant changes and drastically improved outcomes often occur within two years.

34. Some states, like Colorado, implement a “stairstep” approach to compliance time frames. That is, states utilize gradually decreasing maximums over the course of months to years before hitting their ultimately fixed time frames. This approach allows for grace and acknowledgement of the complexity and difficulty needed to overhaul a competence service system.

35. In Oklahoma, the proposed fixed time frame will ultimately reach 21 days for evaluations and transfer to restoration services. However, time frames start much higher and gradually decrease over the span of 16 months before that final time frame is met.

36. Combined with the several months that it would take for a Consent Decree to be vetted and finally approved by the Court, along with the 16 months’ worth of gradually decreasing time frames currently outlined by the Consent Decree itself, ODMHSAS should have ample opportunity to achieve compliance given the outcomes found by other states facing similar delays and implementing similar remedies.

### VIII.

#### **ALL THREE CONSULTANTS PARTICIPATED IN CRAFTING THE PLAN’S COMPONENTS, AND ALL THREE CONSULTANTS AGREE THAT THE CONSENT DECREE IS A REASONABLE AND EFFECTIVE STRATEGY FOR REDUCING WAIT TIMES FOR THE CLASS**

37. The Plan and Consent Decree were crafted through collaborative efforts of several stakeholders. The Plan and Consent Decree call for the utilization of a three-person consulting panel (“Consultants”). This panel as named includes Neil Gowensmith, PhD, John Petrila, Esq., and Darren Lish, MD. All three Consultants worked collaboratively to research and draft the



components and elements of the Plan and Consent Decree, along with important contributions from other consultants and subject matter experts (in particular, Lauren Kois, PhD).

38. The Consultants were mutually agreed to by counsel for plaintiffs' and defendants. In fact, ODMHSAS had previously and independently retained Mr. Petrila before the proposed Consent Decree was formally drafted and the Consultants were formally designated.

39. All three Consultants collaborated with plaintiff's counsel, defendants, and other subject matter experts to help create the Plan and Consent Decree.

40. All three Consultants believe, based on their individual and collective experiences and expertise in forensic mental health and law, that the Plan and Consent Decree represent reasonable and effective strategies for reducing wait times and improving the quality of competence services for the Class.

41. Based on our professional experience, education, and training, the Plan and Consent Decree, if successfully implemented, will reduce wait times to competence evaluations and competence restoration for Oklahoma's Class Members. These same elements have been implemented and tested in other states, with subsequent successful outcomes.

## **IX. CONCLUSION**

42. We submit this affidavit in support of the parties' Joint Motion for Preliminary Approval of Consent Decree, Class Certification, and Plan of Notice to Class, filed June 17, 2024 (Doc. 46) (the "Motion").

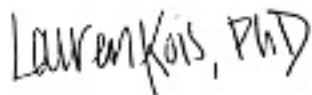
We affirm under penalty of perjury that the foregoing is true and correct to the best of our knowledge.

Further Affiants Sayeth Naught.



W. Neil Gowensmith, Ph.D.

Executed on: 07/23/24



Lauren Elizabeth Kois, Ph.D.

Executed on: 07/23/24