

VIA ELECTRONIC SUBMISSION

October 7, 2016

The Honorable David Gilbertson
Chief Justice, South Dakota Supreme Court
Chair, Task Force on Community Justice and Mental Illness Early Intervention

Re: **ACLU of South Dakota Public Comment to the Task Force on Community Justice and Mental Illness Early Intervention**

Dear Justice Gilbertson and members of the Task Force:

The American Civil Liberties Union of South Dakota (ACLU SD) works across the state in courts, communities, and the legislature to defend and preserve individual rights and liberties that the Constitution guarantees everyone in this country. We are deeply committed to criminal justice reform – from policing to sentencing and beyond – to create a fairer, more just system in which constitutional rights are protected and government accountability and transparency are paramount.

We are submitting the following public comment to the Task Force on Community Justice and Mental Illness Early Intervention (Task Force) to emphasize the serious constitutional issues at play when the state incarcerates a mentally ill individual while he or she is awaiting a court-ordered forensic evaluation to determine competency to stand trial. We applaud the Task Force for tackling the serious problems at the intersection of criminal justice and mental health, and urge the Task Force to heavily weigh and incorporate the constitutional demands of due process in any proposed policy considerations.

I. Defendants in South Dakota Often Incarcerated During Months-Long Wait for Competency Evaluations

Beginning in November 2015, the Argus Leader published a series of articles investigating delays defendants experience while awaiting court-ordered competency evaluations. Among other things, the investigation revealed:

- The average wait time for a competency evaluation at the state's mental health hospital is four months, but some have waited six months or longer¹;

¹ Mark Walker, *Court Delays Leave Mentally Ill Waiting Behind Bars*, ARGUS LEADER, Nov. 14, 2015.



- The state's court system saw 147 requests for mental competency exams in fiscal year 2015. The state's mental hospital will only conduct 36 per year²;
- At least one defendant experienced an eight month wait time for an exam, and another reported a wait of 11 months³;
- A public defender in Pennington county told the Argus Leader that wait times average six months in the county⁴;
- Human Services Center in Yankton, SD has a practice of capping the number of competency exams at three per month, and a spokeswoman for the facility indicated that the practice is not a result of staffing issues.⁵

Data presented at the May 2016 Task Force meeting corroborated the newspaper's report of a large increase in the number of forensic examinations ordered from FY 2014 to 2015; the number of examinations ordered tripled in that time period, and the number of exams required on those orders showed the same trend.⁶ This increase in needed examinations coupled with the months-long wait times revealed by the Argus Leader investigation are deeply concerning, and implicate both the constitutional rights and the mental well-being of defendants who are incarcerated awaiting examination.

As data presented at the May 2016 Task Force meeting indicates, pretrial detention is used more often in cases where a defendant has a history of mental illness⁷ and offenders with commitment history also stayed longer in pretrial detention than those without.⁸ Further, a survey of 24 South Dakota jails indicated that 60% of jails report no access to a contracted or staff psychologist, and most jails have either no access or report "as needed" access to other qualified mental health professionals.⁹ One jail reported that they "currently hold an individual with development disabilities in jail for over [two] months due to the State saying there is no bed available, even with a court order. Yet, due to the seriousness of the crime cannot release him to the public."¹⁰

As one federal court noted, "[j]ails are inherently punitive institutions, and are not designed or administered so as to provide for the needs of the mentally ill. A correctional environment, calibrated to provide safety and order, is incongruous with the particular needs of the mentally ill, and results in people with confirmed or suspected mental illness spending more time in solitary confinement, where their mental health further deteriorates."¹¹ Jails typically control inmates via discipline. While discipline may be necessary overall for the security and safety of inmates and staff, disciplinary systems are often ineffective for individuals with mental health

² *Id.*

³ *Id.*

⁴ Mark Walker, *Competency Delays Threaten Defendant's Legal Rights*, ARGUS LEADER, Nov. 16, 2016.

⁵ Mark Walker, *State Hospital Has No Policy Limiting Court Evaluations*, ARGUS LEADER, Dec. 5, 2016.

⁶ Meeting Summary, Task Force on Community Justice and Mental Illness Early Intervention, May 26, 2016 (available at <https://mentalillnesscommunityjustice.sd.gov/docs/Task%20Force%20Meeting%203%20Summary%20.pdf>).

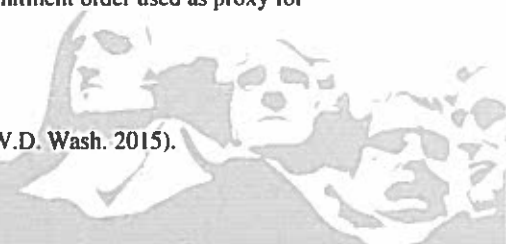
⁷ Presentation, Task Force on Community Justice and Mental Illness Early Intervention, May 26, 2016 at slide 31 (available at <https://mentalillnesscommunityjustice.sd.gov/docs/May%2026%20Presentation.pdf>) (prior commitment order used as proxy for mental illness in absence of other available data).

⁸ *Id.* at slide 32.

⁹ *Id.* at slide 101-102.

¹⁰ *Id.* at slide 112.

¹¹ Trueblood v. Washington State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010, 1017 (W.D. Wash. 2015).



disabilities and may in fact be harmful as some forms of discipline can exacerbate underlying mental health conditions.

II. Months-Long Wait Times Violate the Due Process Requirement of the Fourteenth Amendment

In 2015, one federal district court addressed the issue at the heart of this public comment letter: the lengthy detention of defendants awaiting court-ordered competency exams. In this case, Trueblood v. Washington State Dep't of Soc. & Health Servs.¹² (Trueblood) the court held that it was a violation of due process for the State of Washington to take longer than *seven days* from the court order to provide a competency examination to an incarcerated defendant being held pre-trial.

It is well-established that under the Due Process Clause, an individual detained pretrial may not be punished prior to an adjudication of guilt.¹³ In Trueblood, the court noted that “[t]he purpose of a [defendant’s] incarceration during this portion of his or her case is either the completion of an evaluation in a jail, or admission to a state hospital for competency services. Because [defendants] have not been convicted of a crime, they are not being incarcerated as punishment.”¹⁴ Additionally, the current system creates a particular problem for defendants charged with relatively minor offenses. The system’s status quo places these individuals in the unfortunate position of potentially being detained for less time than if they plead guilty and forego the competency evaluation altogether.

With South Dakota wait times just for competency examinations averaging four months or more, and some defendants experiencing waiting times of up to 11 months, the deprivation of these defendants’ due process rights is almost certain. Though the Trueblood case made specific reference to statutorily proscribed waiting periods of 7 days, it is difficult to imagine a scenario in which a four month or more wait time could be considered constitutionally permissible. At issue in the Trueblood were facts that South Dakotans may find familiar: the State had been hampered in providing services due to insufficient funding for beds and personnel. Though funding for services and professional staff are real concerns, these concerns do not in any way lessen the State’s burden to provide the substantive and procedural due process required by the Constitution. As the court in Trueblood noted, “[t]he mentally ill are deserving of the protections of the Constitution that our forefathers so carefully crafted. The rights protected can be difficult and sometimes costly to secure; however, the Constitution is a guarantee to all people, and is not dependent upon a price tag.”¹⁵ Though the State in Trueblood identified various causes of delayed examinations (such as delays in receiving required documents, delays due to long travel times, delays caused by lack of evaluation facilities in jails, and delays caused by jail transportation of individuals to state hospitals) the court did not deem these reasons sufficient to justify existing delays and found that “with appropriate planning, coordination, and resources, none of these barriers prevent [the state] from providing competency services within seven days.”¹⁶

¹² Trueblood v. Washington State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010 (W.D. Wash. 2015).

¹³ *Id.* at 1021 (citing Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979)).

¹⁴ *Id.*

¹⁵ *Id.* at 1013.

¹⁶ *Id.* at 1018.



III. Policy Considerations

It is evident that the Task Force has considered numerous angles from which to approach the challenges and problems at the intersection of criminal justice and mental illness. We applaud the Task Force for taking a wide view of the issues facing the State of South Dakota in this area, from early identification of mental health issues to community-based alternatives and many topics in between. In submitting public comment, the ACLU SD chose to highlight one particular aspect of the Task Force's work because we believe that the current system is violating the rights of defendants that are guaranteed by the Constitution. We believe our expertise in that area could assist the Task Force in evaluating the problems presented by competency examination wait times and hope that the due process rights of defendants are a key focus in any proposed policy solutions on the matter.

We certainly believe that policy or practice solutions such as diversion, training for law enforcement officers and jail staff, and expanding treatment options into communities will go far in creating a fairer and more well-functioning system in South Dakota. However, we believe that the long wait times incarcerated defendants face before they are able to receive a competency examination are a problem that simply cannot go unresolved. Though solving this problem will likely be complex and may be costly, it is what the Constitution demands. Defendants in South Dakota simply cannot continue waiting while their rights are being violated. We urge the Task Force to craft policy or practice solutions to shorten the delays in competency examination access for incarcerated defendants.

We appreciate the opportunity to submit public comment on this important issue, and thank the Task Force's consideration of our recommendations. Should you have any questions, please feel free to contact Courtney Bowie, Legal Director, ACLU SD at cbowie@aclu.org or Libby Skarin, Policy Director, ACLU SD at eskarin@aclu.org or (605) 332-2508.

Sincerely,

/s Courtney Bowie

Courtney Bowie*
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*Admitted only in Mississippi, Alabama,
And Massachusetts (inactive)

