UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

J.H., by and through his next friend, Flo Messier; L.C., by and through her next friend, Flo Messier; R.J.A., by and through his next friend, J.A.; Jane Doe, by and through her next friend Julia Dekovich; A.B., by and through his next friend J.B.; S.S., by and through his next friend, Marion Damick; G.C., by and through his next friend, Luna Pattela; R.M., by and through his next friend, Flo Messier; P.S., by and through his next friend M.A.S.; T.S., by and through his next friend Emily McNally; M.S., by and through his next friend Emily McNally; and all others similarly situated; **Plaintiffs,** **v.** **Theodore Dallas in his official capacity as Secretary of the Pennsylvania Department of Human Services; Edna I. McCutcheon in her official capacity as the Chief Executive Officer of Norristown State Hospital; Robert Snyder in his official capacity as the Chief Executive Officer of Torrance State Hospital;** **Defendants.**	**Civil Action No. 1:15-cv-02057-SHR** **Judge Sylvia H. Rambo**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs are each individuals who have been declared incompetent by the courts to stand trial on criminal charges, and who have been ordered committed to Norristown State Hospital ("Norristown") or Torrance State Hospital ("Torrance") for treatment to help them attain competence, but who instead have been left to languish in jail, in some cases for over a year. Plaintiffs bring this motion for a preliminary injunction to be admitted to Norristown and Torrance on behalf of themselves and a class of similarly situated persons.

Persons who are incompetent cannot be tried. 50 Pa. Stat. and Cons. Stat. Ann. § 7402(a). Their criminal prosecutions are suspended. *Id.* § 7403(b). If the Commonwealth wishes to try these individuals, then it must help them to attain competency. *Id.* § 7403(e). If the Commonwealth fails to restore their competency, then it must either civilly commit those individuals, *id.* §§ 7301, 7304, or release them, *id.* § 7403(d). In Pennsylvania, however, Plaintiffs are simply jailed for weeks and months until whenever there might happen to be room for them at Norristown or Torrance.

The delays challenged in this case are an embarrassment to a civilized society. The 23 patients from Philadelphia that Norristown finally admitted this year waited an average of 397 days before they were transferred, with one patient waiting 589 days. *See* PI Ex. A, ¶¶ 18-19. Plaintiff J.H., a mentally ill homeless

man who was arrested for stealing $3.00-worth of Peppermint Patties has been waiting in jail for transfer to Norristown for over eleven months. *See* Compl. Ex. A, ¶¶ 14-18. And if the past is any prologue, he can expect to wait approximately another two months before being moved. Some people wait even longer, such as Plaintiff Jane Doe, who has been at Philadelphia's Riverside Correctional Facility awaiting admission to Norristown for over sixteen months. Compl. Ex. D, ¶ 11. Three people in the past year waited over 500 days, with the longest time being 589 days. *See* Compl. Ex. M, fig. 1. The delays at Torrance are shorter but still can be as long as an intolerable two to four months. *See id.* at fig. 3 (showing longest monthly wait times for 35 counties in Torrance from Jan. 2014 to Jan. 2015 averaging 66 days with the longest wait time at 119 days). These delays also are unconstitutional. As federal courts have held in Washington and Oregon, the Due Process Clause of the Fourteenth Amendment requires that persons incompetent to stand trial be transferred to a hospital to receive restoration treatment within ***seven*** days. *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, No. C14-1178 MJP, 2015 WL 1526548, at *13 (W.D. Wash. Apr. 2, 2015); *Oregon Advocacy Ctr. v. Mink*, No. CV-02-339-PA, 2002 WL 35578910, at *6-7 (D. Or. May 10, 2002), *aff'd*, 322 F.3d 1101 (9th Cir. 2003); *see also* U.S. Const. amend. XIV, § 1.

The jails are no place for the mentally ill, and the results of Defendants' failure to timely admit Plaintiffs and the class members into Norristown and

Torrance are predictably lamentable and in some cases horrific. In a Philadelphia jail, one mentally ill man awaiting transfer to Norristown was brutally murdered by his cellmate. *See* Matt Gelb, *Philly Inmate Charged with Killing Cellmate*, Phila. Inquirer (Apr. 30, 2015), http://www.philly.com/philly/news/20150501_Philly_inmate_charged_with_killing_cellmate.html?c=r. Another committed suicide. PI Br. Ex. B, ¶ 8. Each of the Plaintiffs bringing this motion has deteriorated during his or her all too lengthy incarceration in jail.

The undersigned counsel wish to advise the Court that this motion for a preliminary injunction is brought only on behalf of those Plaintiffs and class members in this case who are awaiting treatment to try to restore them to competency. These are the Class A Members. *See* Compl. ¶ 181. They are the persons injured by the "front-end" problem of Defendants' failure to provide proper treatment for mentally ill persons accused of crimes. Other Plaintiffs in this lawsuit are persons who, despite having received treatment at Norristown and Torrance, have been unable to attain competency. Defendants unlawfully have continued to detain those persons in forensic facilities instead of transferring them to the less restrictive civil units or a community placement, or releasing them. These Plaintiffs and the class of similarly situated persons they represent are the Class B Members. *See* ¶ 193. They are the persons injured by the "back-end"

problem of Defendants' failure to provide timely and adequate attention to the mentally ill in their charge. Plaintiffs intend to present evidence on the back-end problem at the ultimate trial in this case, but seek the instant preliminary injunction in an effort to obtain immediate relief for the Class A Members, who would remain incarcerated absent this Court's intervention.[1]

PROCEDURAL HISTORY

Plaintiffs filed the Complaint, Motion for Class Certification, and Motion for Preliminary Injunction in this case on October 22, 2015. *See* ECF Nos. 1, 2, 4. Plaintiffs also have filed a consent motion for leave to file a brief in excess of 15 pages or 5,000 words (specifically, up to 45 pages) in support of the Motion for Preliminary Injunction. Plaintiffs now file that supporting brief.

STATEMENT OF FACTS

I. THE CLASS A MEMBERS

Plaintiffs bring this motion for a preliminary injunction on their own behalf and on behalf of a class of all similarly situated individuals defined as:

> all persons who have been, or will be in the future, charged with a crime in the State of Pennsylvania, and who: (i) are adjudged by a court to be mentally incompetent to stand trial; (ii) are committed to Defendants for competency restoration treatment; and (iii) have not been admitted by Defendants for such treatment within seven (7) days of the date of the court's commitment order.

[1] This motion and this case do not challenge Pennsylvania's Mental Health Procedures Act ("MHPA"), which sets out the procedures for incompetency determinations and involuntary commitments.

See Pls.' Mot. Class Certification ¶ 5.

Plaintiff J.H. is a homeless African-American man in his late 50's from Philadelphia who suffers from schizophrenia. Compl. Ex. A, ¶¶ 6, 8, 9. His case is typical of the Class A Members. In January 2012, J.H. was arrested for reportedly stealing $36.24 of food from a WaWa. *Id.* ¶¶ 7, 9. He spent time in jail and later, after being declared incompetent to stand trial in June 2012, at Norristown for treatment to try to make him competent. *Id.* ¶¶ 9, 10. After 19 months from the time he was arrested, Norristown found that J.H. was unlikely to regain competency. *Id.* ¶¶ 9, 11. Nine months later, J.H. was transferred to a community center run by Volunteers of America ("VOA"). *Id.* ¶¶ 11, 12. Within a few days, J.H. wandered away from VOA's center and set up a shelter in the parking lot behind the center because he "just wanted to be free." *Id.* ¶ 13.

On July 21, 2014, J.H. was arrested for reportedly stealing approximately $3.00 of Peppermint Pattie candies from a Dollar General store, and was charged with theft. *Id.* ¶ 14. On, November 13, 2014, J.H. was, unsurprisingly, declared incompetent to stand trial, and was committed to both Norristown and the Philadelphia Detention Center Forensic Unit ("DCFU"). *Id.* ¶ 15; *see also* PI Br. Ex. A, ¶ 15 (describing the DCFU, a licensed hospital inside the Philadelphia Detention Center that does not provide competency restoration treatment). Notwithstanding the commitment order, J.H. has not been transferred to

Norristown. Compl. Ex. A, ¶ 18. He has yet to receive treatment to try to make him competent. Instead, J.H. has waited more than eleven months in jail since the order, where his condition has deteriorated.[2] *Id.* ¶ 19. Based on the length of the waiting list to get into Norristown and recent history, J.H. can expect to wait approximately another 50 days, on top of the almost 350 days he already has waited, before transfer to Norristown. *See* PI Ex. A, ¶ 19 (calculating the average for recent transfers from Philadelphia at 397 days).

Plaintiff L.C. is an African-American woman in her mid-20's from Philadelphia who suffers a mental impairment. Compl. Ex. B, ¶ 6. She was arrested on October 17, 2014, for allegedly violating conditions of her release relating to an earlier charge of aggravated assault stemming from an incident where she reportedly spat on a correctional officer's jacket, for which she had been found incompetent to proceed and was released on conditions of bail. *Id.* ¶¶ 7-9. The court found L.C. incompetent to stand trial on November 13, 2014, and committed her to the DCFU,[3] but she was not moved there. *Id.* ¶¶ 10, 11.

[2] J.H. and all of the other Plaintiffs in this case are unable to protect their legal interests and thus are represented by next friends. *See, e.g.*, Compl. Ex. A, ¶ 4.

[3] The DCFU does not provide competency restoration treatment. *See* PI Ex. A, ¶ 15; PI Ex. C., ¶ 9. After the wait times for transfer to Norristown began growing considerably in late 2012, some public defenders began requesting that some of their more stable clients be committed to the DCFU before they were committed to the Norristown waitlist, in order to keep the Norristown waitlist from ballooning still further, to keep waiting times shorter for the most needy and severely ill individuals, and with the hope that Norristown wait times would ultimately decrease. *Id.* ¶¶ 17, 21, 22.

On February 12, 2015, the Court committed L.C. to Norristown. *Id.* ¶ 19. Since then, the Court has issued three more orders committing L.C. to Norristown, but L.C. has never been moved there.[4] *Id.* As of this filing, L.C. has been waiting for treatment for over eleven months since she was found incompetent and for over eight months since she was first ordered to Norristown. *Id.* ¶¶ 10, 19. During this time, her condition has deteriorated. *Id.* ¶¶ 12, 13, 21, 22. Based on recent delays, L.C. may wait approximately four hundred days from her February 2015 commitment to Norristown, in addition to the approximately three months she was committed only to the DCFU, before being transferred to Norristown. *See* PI Ex. A, ¶ 19.

Plaintiff R.J.A. is an African-American man in his mid-40's from Philadelphia who has a family history of mental illness and who has been diagnosed with paranoid schizophrenia. Compl. Ex. C, ¶¶ 5-7. He has been in and out of multiple psychiatric hospitals, and was court ordered on a prior simple assault charge in 2006 to attend an outpatient clinic after a prison psychiatrist testified that the Philadelphia prison system was incapable of treating R.J.A.'s mental disorders. *Id.* ¶¶ 7-9.

[4] L.C. was moved to the DCFU sometime between August 25 and September 2, 2015, but she is still not receiving any competency treatment because such services are only available to L.C. at Norristown. Compl. Ex. B, ¶¶ 23-24; *see also* PI Br. Ex. A, ¶ 15.

R.J.A. was arrested in January 2015 on aggravated assault and other charges after his father called police to have him civilly committed and R.J.A. reportedly fired a weapon into the air. *Id.* ¶ 10. The court found R.J.A. incompetent to stand trial and committed him to Norristown on February 11, 2015. *Id.* ¶ 11. R.J.A. has been detained for more than eight months in the Philadelphia Detention Center since the order, awaiting an opening for treatment at Norristown. He has decompensated substantially while waiting in jail. *Id.* ¶¶ 16, 18-20. Based on the length of the waiting list and recent history, R.J.A. too can expect to wait approximately four hundred days before transfer to Norristown. *See* PI Ex. A, ¶ 19.

Plaintiff Jane Doe is an African-American woman in her early 40's who is charged with assault relating to an alleged incident in April 2013. Compl. Ex. D, ¶¶ 6, 8. She was originally found incompetent to stand trial in January 2014,[5] and was committed to Norristown for treatment on June 26, 2014. *Id.* ¶¶ 10, 11. Jane Doe has been jailed in the Philadelphia Detention Center for longer than 20 months since she was first declared incompetent, and almost 16 months (over 480 days) since she was first ordered to Norristown. *Id.* ¶¶ 10, 11. During this time, Jane Doe's condition appears to have deteriorated substantially. *Id.* ¶ 13.

[5] The court deemed Jane Doe competent in March 2014, but again found her incompetent on May 2, 2014. Compl. Ex. D, ¶ 10.

A.B. is an African-American man in his late 30's from Beaver County who is diagnosed with paranoid schizophrenia. Compl. Ex. E, ¶ 4. He was arrested on August 25, 2015 and charged with aggravated and simple assault and tampering with property following an incident at a psychiatric hospital where A.B. was staying. *Id.* ¶ 7. He was found incompetent to stand trial and ordered to Torrance shortly after his arrest. *Id.* ¶ 8. Over a month has passed since A.B.'s initial commitment to Torrance, and he has deteriorated notably while waiting. *Id.* ¶ 10.

S.S. is a Caucasian man in his mid-20's from Erie who suffers from mental health problems. Compl. Ex. F, ¶¶ 6, 7. He was arrested on August 4, 2015, on simple assault, defiant trespass, and possession of a weapon charges, was found incompetent to stand trial on September 3, and was committed to Torrance for competency treatment. *Id.* ¶¶ 8, 10. S.S. has been detained—currently in solitary confinement in the mental health unit at the Allegheny County Jail—for more than six weeks since the order to be moved to Torrance, awaiting an opening for treatment. *Id.* ¶¶ 9, 11.

II. DEFENDANTS

Defendant Theodore Dallas is Secretary of the Pennsylvania Department of Human Services ("DHS"), which is the state agency designated to administer or supervise the administration of competency restoration treatment in Pennsylvania. *See* 50 Pa. Stat. and Cons. Stat. Ann. § 7105 ("Involuntary treatment and voluntary

treatment funded in whole or in part by public moneys shall be available at a facility approved for such purposes by the county administrator . . . or by the Department of Public Welfare . . . ."); *see also* 62 Pa. Stat. and Cons. Stat. Ann. § 103 (redesignating Department of Public Welfare as Department of Human Services). In his capacity as Secretary, Defendant Dallas is responsible for the administration of DHS, which operates the only two facilities in Pennsylvania that provide competency restoration treatment: (i) Norristown, which is in Montgomery County and serves patients from Bucks, Chester, Delaware, Montgomery, Philadelphia, and surrounding counties; and (ii) Torrance, which is in Derry, Westmoreland County and serves patients from Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Fayette, Indiana, Somerset, Westmoreland, and surrounding counties. *See* PI Br. Ex. A, ¶¶ 11-12 (noting that DHS has licensed only two facilities, Norristown and Torrance, for competency restoration treatment); *see generally* 50 Pa. Stat. & Cons. Stat. Ann. § 7105 (authorizing DHS to approve facilities by regulation). Defendant Dallas is obligated to ensure that patients committed to the care of Norristown and Torrance are treated in accordance with the Constitution and laws of the United States. Defendant Dallas has at all relevant times hereinafter mentioned acted under color of state law. He is sued in his official capacity.

Defendant Edna I. McCutcheon is the Chief Executive Officer ("CEO") of Norristown, a state psychiatric hospital operated by DHS that is charged with, *inter alia*, providing services to individuals committed to Norristown by Pennsylvania courts for competency restoration treatment. As CEO, Defendant McCutcheon is responsible for oversight, operation, and management of Norristown, including but not limited to the provision of competency services to individuals committed to Norristown by the Pennsylvania criminal courts. Defendant McCutcheon has at all relevant times hereinafter mentioned acted under color of state law. She is sued in her official capacity.

Defendant Robert Snyder is the CEO of Torrance, a state psychiatric hospital operated by DHS that is charged with, *inter alia*, providing services to individuals committed to Torrance by Pennsylvania courts for competency restoration treatment. As CEO, Defendant Snyder is responsible for oversight, operation, and management of Torrance, including but not limited to the provision of competency services to individuals committed to Torrance by the Pennsylvania criminal courts. Defendant Snyder has at all relevant times hereinafter mentioned acted under color of state law. He is sued in his official capacity. *See generally* Staff Contact Information, Pennsylvania Department of Human Services, http://www.dhs.state.pa.us/dhsorganization/officeofmentalhealthandsubstanceabus

eservices/staffcontactinformation/ (listing Ted Dallas as Secretary, Edna I. McCutcheon as CEO of Norristown, and Robert Snyder as CEO of Torrance).

III. INCOMPETENTCY PROCEEDINGS IN PENNSYLVANIA

All Plaintiffs, and the Class A Members they seek to represent, have been (a) examined and deemed incompetent by a psychiatrist to stand trial on pending criminal charges; and (b) ordered by a Pennsylvania state court judge to either Norristown or Torrance for competency restoration treatment. Norristown and Torrance are the only two DHS facilities that provide competency restoration treatment. *See* PI Br. Ex. A, ¶ 14.

In committing a criminal defendant for competency restoration treatment under the MHPA, the court must find that the person is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense" and that it is "reasonably certain that the involuntary treatment will provide the defendant with the capacity to stand trial." 50 Pa. Stat. and Cons. Stat. Ann. § 7402(b).

Individuals like Plaintiffs who are declared incompetent to stand trial suffer from a range of mental status issues, including intellectual and cognitive disabilities, traumatic brain injury, and mental illness, including serious mental illness and even dementia. *See* PI Br. Ex. A, ¶ 4. Plaintiffs and class members share several other characteristics. Most incompetent individuals have trouble

communicating effectively. *Id.* ¶ 5. Their mental statuses range from brief periods of lucidity to complete incomprehensibility to a catatonic state wherein they cannot respond at all. *Id*.

IV. PLAINTIFFS AND THE CLASS ARE TYPICALLY JAILED FOR EXCESSIVE PERIODS RANGING FROM MONTHS TO OVER A YEAR BEFORE BEING ADMITTED TO NORRISTOWN OR TORRANCE.

The lengthy waits in jail experienced by Plaintiffs are typical. Both Norristown and Torrance are at capacity. Norristown has 137 forensic beds and Torrance has 100 beds for a total of 237 beds that might be used for competency restoration. Compl. Ex. L, ¶ 18. There are, however, many other claims on the forensic beds including, but not limited to, competency evaluations, treatment of criminal defendants found not guilty by reason of insanity, and treatment of criminal defendants found guilty but mentally ill. *Id.* ¶ 25. Thus, the number of beds available for competency restoration is substantially less than 237. The wait lists for admission to Norristown and Torrance have been as long as 122 patients and 48 patients, respectively, in 2014. *See* Compl. Ex. M, figs. 1, 3. Counsel has reason to believe that discovery will show that, at least in Norristown, the waitlist increased substantially in 2015, and reached 174 on Thursday, October 22.

The predictable result of the mismatch between the number of persons awaiting competency treatment and the limited bed space available is that delays have grown intolerable. Philadelphia supplies by far the largest number of patients

for competency restoration treatment. The average wait time for the 23 Philadelphia patients sent to Norristown in 2015 was 397 days. *See* PI Ex. A, ¶¶ 18-19. Three of these patients were jailed for more than 500 days before being admitted at Norristown, with one patient from Philadelphia County waiting 589 days. *See* Compl. Ex. M, fig. 1.[6]

Moreover, in some cases, the Philadelphia courts initially committed certain defendants to the DCFU alone, and only later to Norristown in addition to the DCFU (because the waitlist for DCFU was perceived to be shorter and at least the DCFU could provide some medication). PI Br. Ex. A, ¶¶ 21-22. In such cases, the incompetent individuals were not placed on the Norristown waitlist when initially committed to the DCFU and instead were only put on the Norristown list—and then at the very bottom of the Norristown list—after the later commitment to Norristown. *Id.* ¶ 27. As a result, the waitlists may grossly understate the time of individuals' wait by two to eight months, or even more. *Id.* ¶ 28.

This is illustrated by one individual who was charged with a misdemeanor in June 2013. PI Br. Ex. C, ¶ 12. Although this man was offered a plea deal for nine

[6] Public reports have put the average wait time for transfer to Norristown at 297 days and the average wait time for transfer to Torrance at 51 days. Daniel Simmons-Ritchie, *Pennsylvania's Mentally Ill Inmates Trapped in Legal Purgatory*, Penn Live (August 10, 2015), http://www.pennlive.com/midstate/index.ssf/2015/08/trapped_both_physically_and_le.html [hereinafter *Trapped*]. However, as explained above and in the Complaint, the wait times are even longer. *See* Compl. ¶¶ 1, 57-59; Compl. Ex. M, figs. 1-4.

months of probation in October 2013—meaning he only would have spent about four months in jail—he could not accept the plea deal because the court found him incompetent and committed him to the DCFU. *Id.* ¶¶ 12-13. This individual sat in jail for the next nine months, where he did not receive any competency treatment. *Id.* ¶ 13. Finally, in late July 2014 (more than 13 months after his arrest), the court issued an order dually committing this man to the DCFU and to Norristown. *Id.* Despite having already waited in jail for so long while deemed incompetent, this individual was added to the bottom of the waitlist for Norristown, and continued to be housed in jail for almost another full year until he moved to the top of the waitlist and a bed at Norristown became available for him. *Id.* ¶¶ 13, 14. He was finally moved to Norristown in June 2015, nearly two full years after his arrest for a misdemeanor. *Id.* ¶ 14.

Some of the longest wait times by county for admission to Norristown are set forth in the chart below.

County	**Longest Wait Times in Days (Jan 2014 to Jan 2015)** *from the first available weekly DHS list of each month*
Berks	233
Bucks	349
Carbon	42
Chester	366
Delaware	386
Lackawanna	183
Lancaster	>394
Lebanon	>333
Lehigh	231
Luzerne	296
Monroe	>360
Montgomery	>429
Northampton	>218
Philadelphia	>420
Pike	>351
Schuylkill	>116
Susquehanna	196
Wayne	184
Wyoming	no data
">": Our last available relevant DHS list is dated 1/2/2015, at which point these individuals were still awaiting admission.	

Compl. Ex. M, fig. 2.

Wait lists at Torrance are not as long as at Norristown, but still are unacceptably high. By county, Torrance waits were as high as the following in 2014:

County	**Longest Wait Times in Days (Jan 2014-Dec 2014)** *from every weekly DHS list*
Adams	65
Allegheny	77
Bradford	72
Cambria	58
Cumberland	70
Dauphin	119
Elk	71
Erie	80
Fayette	67
Franklin	84
Indiana	70
Jefferson	99
Northumberland	88
Potter	93
Snyder	78
Somerset	72
Tioga	70
Westmoreland	58
York	78

Id. at fig. 4.

These lengthy delays are conservative. If anything, the waits are in fact longer. In addition to the issue of DCFU single commitments described above, DHS does not appear to add an individual to the waitlist at the time of the court's commitment order, but rather from a later date when all necessary paperwork for a transfer has been completed. *See Trapped* (explaining in online version of chart

"Comparing States' Average Waits for Forensic Beds" that "Pennsylvania measures a patient's wait from the day that a state hospital receives their paperwork following a judge's commitment order"); *see, e.g.*, Compl. Ex. B, ¶ 20 (showing a difference between the date on Norristown's transfer list and other records).

V. CLASS A PLAINTIFFS AND MEMBERS ARE HARMED BY BEING LEFT IN JAIL WHERE THEY RECEIVE NO COMPETENCY RESTORATION TREATMENT; RECEIVE MINIMAL, IF ANY, MENTAL HEALTH CARE; AND OFTEN LIVE IN SOLITARY CONFINEMENT.

The jails are inappropriate places to house the mentally ill for extended periods. In jail, the very sick patients awaiting competency restoration treatment are often confined in their cells for 23 hours a day (or all day if they refuse to leave their cells, as many do) because of their behavior or because of policies that simply require segregation of anyone with apparent psychiatric disabilities. *See, e.g.*, Compl. Ex. E, ¶ 10 (describing how Plaintiff A.B. is not allowed to leave his cell in a restricted housing unit for 23 hours a day). Not only does the patient remain untreated, but the isolation causes the patient to decompensate, exacerbating the mental health condition.

It is well-documented that jails do not meet the needs of the mentally ill. *See* Maureen C. Olley et al., *Mentally Ill Individuals in Limbo: Obstacles and Opportunities for Providing Psychiatric Services to Corrections Inmates with*

Mental Illness, 27 Behav. Sci. Law 811, 819 (2009) ("[W]e know from decades of research that correctional settings are not generally well equipped nor are they necessarily the most appropriate source of mental health services." (citation omitted)). Studies reveal that individuals with major mental illnesses, as a group, face a substantial likelihood of incurring serious harm in prison, and are substantially more likely to suffer serious harms than non-ill prisoners. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. Crim. L. & Criminology 159-60 (2013); *see also* Olley et al., *supra*, at 818 ("Inmates with mental health problems are more likely to be charged with breaking facility rules (19%) than inmates without mental health problems (9%). They are four times more likely (8%) to be involved in a verbal or physical assault than non-[mentally ill individuals] (2%) and three times more likely to have been injured in a fight since admission to the local jail.").

Confining severely mentally ill patients "in close quarters with (and without adequate protection from) large numbers of antisocial persons with excess time and few productive activities results in bullying and predation." Johnston, *supra*, at 150. For instance, these individuals are "more susceptible than non-ill persons to physical and sexual assault in prison." *Id.* at 151; *see also id.* at 161-69 (describing research on increased likelihood of physical and sexual assault); *see also* Nancy Wolff and Jing Shi, *Victimisation and Feelings of Safety Among Male and Female*

Inmates with Behavioural Health Problems, 20 J. Forensic Psychiatry & Psychology, S56-77 (Apr. 2009) (exploring characteristics of individuals with mental illnesses who are victimized inside prisons).

Furthermore, because these individuals often lack the skills to cope with a prison environment, they are more prone to accrue disciplinary violations. Johnston, *supra*, at 151; *see also id.* at 169-78 (describing higher incidence of disciplinary infractions and solitary confinement); Compl. Ex. B, at n.1. This can lead to harsh punishments such as solitary confinement, where such persons "are especially susceptible to decompensation, psychotic breaks, and suicide ideation." Johnston, *supra*, at 151. "These experiences—the trauma of physical and sexual victimization and conditions of solitary confinement, either alone or in combination—may aggravate inmates' psychiatric symptoms and even precipitate the onset of new mental disorders. Inadequate mental health treatment available in many prisons . . . compounds this psychiatric deterioration." *Id.* at 160-61 (footnotes omitted).

Experiences in the Pennsylvania jails are illustrative of these problems. In 2013, a 20-year-old Bengali man committed suicide after waiting for nearly six months in the Philadelphia Detention Center for a bed to become available at Norristown. PI Br. Ex. B, ¶¶ 6-8. Both a guard and a cell mate noted to the man's attorney that the man's mental health had deteriorated during his confinement in

the Detention Center. In April 2015, another mentally ill Philadelphia man awaiting a bed at Norristown was murdered by blunt trauma to the head at the Philadelphia Industrial Correctional Center by his cell mate. *See* Matt Gelb, *Philly Inmate Charged with Killing Cellmate*, Phila. Inquirer (Apr. 30, 2015), http://www.philly.com/philly/news/20150501_Philly_inmate_charged_with_killing_cellmate.html?c=r.

The Plaintiffs' mental conditions have deteriorated during their time waiting in punitive settings without receiving any competency restoration treatment. Plaintiff J.H. exemplifies one type of mentally ill offender who circulates through the competency restoration process, often more than once. He is a non-violent, low-level offender who has spent time in jail awaiting transfer to Norristown without adequate mental health treatment. He has worsened during his time in jail. Before detention, J.H. did not display hostility, was relatively engaged during conversations, and was willing and able to answer simple questions. Compl. Ex. A, ¶ 19. Now, however, J.H. is visibly agitated, hostile, and unable or unwilling to engage in conversation. *Id.* He does not even know why he is in jail. *Id.*

The other Plaintiffs have decompensated similarly. Plaintiff L.C. could respond to simple questions and retain some conveyed information when she began her stay in jail on the present charges. Compl. Ex. B, ¶¶ 12, 13. As time passed, she began screaming answers, and then seemed completely distracted by what was

going on in her head. *Id.* ¶ 14, 17. Later, L.C. began sucking her fingers, not making eye contact, staring blankly at visitors, and could not answer any questions or retain any information explained to her. *Id.* ¶¶ 18, 22.

R.J.A. went from allowing his attorney to visit, hugging his father, and telling his father that he loved him, to refusing attorney visits, threatening to "piss on" his father's grave, and blaming his father for his being in jail. Compl. Ex. C, ¶¶ 16-21. Formerly, Jane Doe could engage in long conversations about her case. Compl. Ex. D, ¶ 13. Then, she began talking about aliens and space ships in her body and being married to Jesus Christ. *Id.* Jane Doe also has lost considerable weight. *Id.* When A.B. was first in Beaver County Jail, he was clean-shaven, had combed hair, and would interact with his sister. *See* Compl. Ex. E, ¶¶ 9-10. Now, he will not speak with his sister when she visits, and he looks disheveled. *Id*. A.B. is unshaved, his hair is not combed, and he does not appear to be showering. *Id.*[7]

[7] Although not a Plaintiff or Class Member, E.M., an African-American man in his mid-20's discussed in the Complaint, also illustrates how the mental condition of an incompetent individual can deteriorate during time waiting in a punitive setting without competency treatment. *See* Compl., ¶¶ 176-78. When he was only 21 years old, E.M. was charged in June 2012 with public drunkenness, supposedly patting a teenager on the behind, and other misdemeanors. PI Br. Ex. D, ¶ 6. E.M. then spent nearly three months in jail waiting to be transferred to Torrance. *Id.* ¶ 7. E.M.'s family visited him after he arrived at Torrance, and found that he did not look like he was showering, his hair was unkempt, his fingernails were long and dirty, and he seemed more disoriented than ever before. *Id.* E.M. did not appear to recognize any of his family members, and did not speak. *Id.* He only mumbled and giggled to himself. *Id.*

STATEMENT OF QUESTION INVOLVED

Whether Plaintiffs and Class A Members are entitled to a preliminary injunction requiring Defendants to transfer Plaintiffs and Class A Members to Norristown and Torrance promptly to stop Defendants' continuing violation of their obligations under the Due Process Clause to (a) only detain individuals who have not been convicted where a reasonable relationship exists between the nature and duration of the detention and the purpose of such detention; and (b) provide for the welfare and safety of individuals who Defendants are detaining and preventing from helping themselves.

ARGUMENT

The Class A Members are entitled to a preliminary injunction because: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of the injunction; (3) Defendants will not suffer greater harm than the Class A Members if the injunction is granted; and (4) granting the injunction is in the public interest. *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 391 (M.D. Pa. 2014).

I. THE CLASS A MEMBERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

The Class A Members are entitled to relief on two independent grounds: (1) the indefinite incarceration of the Class A Members for weeks and months in jail,

rather than transferring them in accordance with a court order to a state forensic hospital for mental competency restoration services, violates the due process requirement of the Fourteenth Amendment that there be some reasonable relation between the detention and a legitimate purpose for which an individual is detained, *see Jackson v. Indiana*, 406 U.S. 715, 738 (1972); and (2) Defendants are breaching their separate constitutional duty of due process to protect the safety and welfare of the Class A Members, who Defendants are holding involuntarily and preventing from being able to help themselves, *see DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 198-200 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). Success on either of these two grounds satisfies Plaintiffs' burden to show the likelihood of success on the merits, and as discussed below, Plaintiffs are likely to succeed on both grounds.

A. Due Process Is Violated When There Is No Reasonable Relationship Between The Nature And Duration Of Commitment And The Purpose For Which An Individual Is Detained.

More than 40 years ago, the Supreme Court held that, once a state determines that a criminal defendant is incompetent to stand trial, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738. In *Youngberg*, the Court held that an involuntarily committed man with an intellectual development disorder had "constitutionally

protected interests in conditions of reasonable care and safety, [and] reasonably nonrestrictive confinement conditions . . . [as] would comport fully with the purpose of respondent's commitment. 457 U.S. at 324 (citing *Jackson*, 406 U.S. at 738). The Court reached this result by balancing the liberty interests of the individual against the state's asserted reasons for restraining his liberty. *See id.* at 324 ("In deciding this case, we have weighed those post-commitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate.").

Following *Jackson* and *Youngberg*, every federal court to consider the question has found that prolonged jailing of incompetent criminal defendants awaiting competency restoration treatment violates their due process liberty interests. In *Advocacy Center for the Elderly and Disabled v. Louisiana Department of Health and Hospitals*, the U.S. District Court for the Eastern District of Louisiana entered a preliminary injunction against three Louisiana state officials for the Louisiana Department of Health and Hospitals and for the Eastern Louisiana Mental Health System ("Louisiana Defendants") after finding that the Louisiana Defendants' practice of keeping incompetent criminal defendants in parish jails was an economic one, not a decision made out of concern for the individuals' mental-health treatment based on professional judgment. 731 F. Supp.

2d 603, 623 (E.D. La. 2010). There, defendants had been waiting "many months" to be transferred to the state's forensic facility at Feliciana, and at least two individuals had been waiting for over a year. *Id.* at 619.

The *Advocacy Center* court determined that the balance of the defendants' liberty interests and the state's interests required restorative treatment at a forensic facility, not the minimal care that was provided to them while they remained in jail. *Id.* at 610, 623. It ruled that the Louisiana Defendants' practice of leaving these individuals in jails bore "no rational relationship to the restoration of their competency or a determination that they will never become competent." *Id.* at 610. It summarized:

> [A] lack of funding cannot justify the continued detention of defendants who have not been convicted of any crime, who are not awaiting trial, and who are receiving next to no mental-health services. While these Detainees are in parish jails, their continued confinement bears no rational relationship to the restoration of their competency.

Id. at 624.

In *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003), the Ninth Circuit found that the Oregon state officials violated the substantive due process rights of the mentally incapacitated criminal defendants by jailing them for an average of one month before accepting them for evaluation and treatment, holding that "[i]ncapacitated criminal defendants have liberty interests in freedom from incarceration and in restorative treatment." *Id.* at 1106, 1121-22. Relying on

Jackson, the Court of Appeals found that "[h]olding 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." *Id.* at 1122.

The Ninth Circuit also explained that, in balancing liberty interests against the state's interests in detention, the unwarranted jailing of incapacitated defendants "undermines the state's fundamental interest in bringing the accused to trial." *Id.* at 1121. Importantly, the Court squarely rejected any defense based on a "[l]ack of funds, staff or facilities." *Id.* (internal quotation marks and citation omitted). As a result, *Mink* affirmed an injunction requiring the defendants to admit incompetent criminal defendants within seven days of a judicial finding of incompetency. *Id.* at 1123.

Trueblood v. Washington State Department of Social and Health Services, applied an analysis similar to the one used in *Mink* to determine that Washington State violated the Due Process Clause by failing to provide competency restoration treatment within seven days of a court order for such services. No. C14-1178, 2015 WL 1526548, at *1, *13 (D. Wash. Apr. 2, 2015). In *Trueblood*, criminal defendants waited, on average, 29 days for evaluation and then an additional 15 days for restoration services at one of the two state hospitals charged by state law

with performing competency services for criminal defendants. These defendants then waited, on average, 50 days for evaluation and then another 17 days for restoration services at the other hospital. *See Trueblood v. Wash. State Dep't of Soc. and Health Servs.*, 73 F. Supp. 3d 1311, 1313 (W.D. Wash. 2014).

The *Trueblood* court found seven days to be "the maximum justifiable period of incarceration absent an individualized finding of good cause to continue incarcerating that person." 2015 WL 1526548, at *11.

> A seven-day limit is required by the Constitution because of the gravity of the harms suffered by class members during prolonged incarceration—harms which directly conflict with class members' rights to freedom from incarceration and to the competency services which form the basis of their detention, and also directly conflict with the State's interests in swiftly bringing those accused of crimes to trial and in restoring incompetent criminal defendants to competency so as to try them. . . . Each additional day of incarceration causes further deterioration of class members' mental health, increases the risks of suicide and of victimization by other inmates, and causes illness to become more habitual and harder to cure, resulting in longer restoration periods or in the inability to ever restore that person to competency.

Id. *Trueblood* also rejected a lack of funding as a defense by the state: "the Constitution is a guarantee to all people, and is not dependent upon a price tag." *Id.* at *2; *see also id.* at *10 (explaining that a lack of funds, staff, or facilities cannot justify a state's failure to provide the treatment necessary for rehabilitation).

Terry v. Hill found a due process violation under similar circumstances. 232 F. Supp. 2d 934, 945 (E.D. Ark. 2002). In *Terry*, incompetent criminal defendants

waited an average of more than eight months for evaluations and more than six months for treatment. *Id.* at 938. The *Terry* court determined that "[t]he lengthy and indefinite periods of incarceration, without any legal adjudication of the crime charged, caused by the lack of space at [the state hospital], is not related to any legitimate goal, is purposeless and cannot be constitutionally inflicted upon the members of the class." *Id.* at 943-44. The court explained that limited resources was not an excuse, and thus, the defendant violated the class members' constitutional rights to due process. *Id.* at 944-45.

Here, as in *Jackson*, *Advocacy Center*, *Mink*, *Trueblood*, and *Terry*, the prolonged incarceration of patients in Class A without transfer to receive competency restoration treatment is a clear violation of due process rights. No legitimate state objective can justify leaving the Class A Members in jail for many months and up to 589 days. *See* Compl. Ex. M, fig. 1. A lack of funds is not a legitimate state interest. *See Advocacy Ctr.*, 731 F. Supp. 2d at 624 ("[L]ack of funding cannot justify the continued detention of defendants who have not been convicted of any crime, who are not awaiting trial, and who are receiving next to no mental-health services."); *Mink*, 322 F.3d at 1121 ("Lack of funds, staff or facilities cannot justify the State's failure to provide . . . treatment necessary for rehabilitation." (internal quotation marks and citation omitted)); *Trueblood*, 2015 WL 1526548 at *2, *10 (explaining that a lack of funds is not an excuse for failing

to provide treatment); *Terry*, 232 F. Supp. 2d at 944 (same). *See also Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir. 1987) (stating that the financial burden was not a legitimate state interest in failing to accommodate the rights of prisoners under *Roe v. Wade*, and that "in the absence of alternative methods of funding, the County must assume the cost of providing inmates with elective, nontherapeutic abortions").

The only legitimate state purpose for holding the Class A Members is to allow Defendants to provide the Class A Members with restoration treatment so that these individuals might stand trial. However, incarcerating the Class A Members for many weeks, months, or sometimes more than a year undermines the Commonwealth's interest in treating the Class A Members because, while they wait, these "incapacitated criminal defendants do not receive care giving them a realistic opportunity of becoming competent to stand trial." *Mink*, 322 F.3d at 1121.

The delays in this case exceed any conceivable Constitutional norm. In *Mink*, the challenged delays were on average one month, and the court ordered that they be reduced to seven days. *Id.* at 1106, 1123. In *Advocacy Center*, the Court required transfers to the state mental hospital within 21 days. 731 F. Supp. 2d at 619, 627. In *Trueblood*, the court ordered that persons awaiting competency

restoration services be transferred within seven days. *See Trueblood*, 73 F. Supp. 3d at 1313; *id.* 2015 WL 1526548, at *13.

The delays in this case of months, and in some cases more than a year, exceed any wait time imposed by a Court in a litigated case and, thus, are not "reasonably related" to the legitimate state interest in restoration of competency or to any other legitimate state interest and thereby violate the Due Process Clause. *See Advocacy Ctr.*, 731 F. Supp. 2d at 621-22; *Mink*, 322 F.3d at 1122-23; *Trueblood*, 2015 WL 1526548, at *10-11, *13; *Terry*, 232 F. Supp. 2d at 943-45. Accordingly, as in *Mink*, *Trueblood*, and *Advocacy Ctr.*, Plaintiffs are likely to succeed on the merits of their request for an injunction requiring that they and all Class A Members be promptly admitted to Norristown or Torrance. *Mink*, 322 F.3d at 1123; *Trueblood*, 2015 WL 1526548, at *13; *Advocacy Ctr.*, 731 F. Supp. 2d at 625.

B. Defendants Also Are Violating The Class A Members' Rights To Treatment Based On Their Detention.

Defendants are also violating the Class A Members' constitutional rights by failing to provide for their mental welfare and safety during their detention and, thus, preventing them from helping themselves or seeking help from persons unconnected to Defendants. The Supreme Court ruled in *DeShaney* and *Youngberg* that if a State takes an individual into custody, the State has an obligation to protect that individual.

In *DeShaney*, the Court held that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199-200; *see also Youngberg*, 457 U.S. at 317 ("When a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist . . . ."). The Court explained that:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, . . . medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The ***affirmative duty to protect*** arises . . . from the limitation which [the State] has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 489 U.S. at 200 (internal citations omitted) (emphasis added); *see also Nicini v. Morra*, 212 F.3d 798, 808 (3d. Cir. 2000) (the State owes affirmative duty to children it places in foster care system because they cannot seek their own alternative arrangements and thus are like the "institutionalized mentally retarded persons at issue in *Youngberg*").

In *Youngberg*, the Court held that whether there was a breach of the affirmative duty to protect those in custody depends on whether the treatment

decision being challenged by the plaintiff was made by a professional, such as a doctor. If so, the decision being challenged is "presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323; *see also Shaw by Strain v. Strackhouse*, 920 F.2d 1135 (3d Cir. 1990) (genuine issues of fact existed as to whether professional employees at state mental health institution failed to exercise professional judgment before sexual assault of mentally handicapped resident).

Here, because the court order sending Class A Members to treatment effectively transfers them to Commonwealth custody, Compl. Ex. L, ¶¶ 40-49, Defendants have an "affirmative duty" to provide services and care to protect the Class A Members' welfare and safety while they are involuntarily confined. Plaintiffs submit that the evidence will show that the decision to delay transfer of Plaintiffs and the Class A Members to Norristown and Torrance—and thus the refusal to provide treatment to protect the welfare and safety of the Class Members' mental health—is not based on any professional judgment, standards, or practice relating to either (1) the furtherance of Class A Members' restorative treatment goals—the sole purpose of their commitment to Defendants' care; or (2) the furtherance of the state's sole legitimate purpose in bringing the accused to

trial. Plaintiffs further submit that the evidence will show that Defendants' decision is instead based entirely on their failure to provide adequate resources. If more resources were available, Plaintiffs and the Class A Members would have already been transferred out of the punitive settings and received treatment. For this reason, Plaintiffs and the Class A Members are entitled to an injunction based on their incarceration and Defendants' failure to comply with their "affirmative duty" under *DeShaney* and *Youngberg* to provide Plaintiffs and Class Members with appropriate treatment while in the Commonwealth's custody.

II. THE CLASS A MEMBERS WILL SUFFER IRREPARABLE HARM IF THE COURT DENIES THEIR REQUEST FOR AN INJUNCTION.

Harm is "irreparable" when money cannot rectify the injury following a trial. *See HR Staffing Consultants LLC v. Butts*, No. 15-2357, 2015 WL 5719655, at *4 (3d Cir. Sept. 30, 2015) (harm irreparable because money damages would not remediate the harm to plaintiff's business); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (harm irreparable because an "after-the-fact money judgment would hardly make up for [plaintiffs'] lost opportunity" to exercise their right to free speech).

Here, Plaintiffs and the Class A Members are threatened with classic irreparable harm, loss of liberty. *See, e.g., United States v. Washington*, 549 F.3d 905, 917 & n.17 (3d Cir. 2008) ("potential for excess prison time" is irreparable harm); *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) ("unnecessary

deprivation of liberty clearly constitutes irreparable harm") (citation omitted); *Forchion v. Intensive Supervised Parole*, 240 F. Supp. 2d 302, 310 (D.N.J. 2003) (if plaintiff remains incarcerated, "this is a harm which cannot be redressed following a trial."). As recognized in *Advocacy Center*, Plaintiffs are not serving a sentence following a conviction. Their prosecutions are suspended. Defendants' only legitimate interest is in bringing Plaintiffs to trial, which they cannot do unless they help Plaintiffs to attain competency. Their continued incarceration of Plaintiffs is justified only if Defendants are working toward that goal, which they clearly are not. *Jackson*, 406 U.S. at 738. Accordingly, Plaintiffs are being harmed irreparably by the continued, unjustified deprivation of their liberty.

In addition, the prolonged incarceration of Plaintiffs and the Class A Members without appropriate treatment threatens to worsen their conditions. *See supra* Section V. The same worsening of conditions has been found by other federal courts: Thus, *Trueblood* found that "prolonged incarceration exacerbates mental illness, making symptoms more intense and more permanent, and reducing the likelihood the person's competency can ever be restored." 2015 WL 1526548, at *6. Similarly, *Advocacy Center* found that psychotic individuals' conditions can be exacerbated while in jail, 731 F. Supp. 2d at 625, and *Terry* cited evidence that delay in evaluation and/or treatment makes it more difficult to treat mentally ill inmates in the future. 232 F. Supp. 2d at 940-41; *see also M.R. v. Dreyfus*, 697

F.3d 706, 733 (9th Cir. 2012) (Medicaid beneficiaries who challenged threatened loss of in-home mental and physical health services demonstrated a likelihood of irreparable injury because loss of services would "exacerbate [their] already severe mental and physical difficulties" and place them at "serious risk of institutionalization").

Accordingly, the Class A Members are suffering and will continue to suffer irreparable harm absent an injunction.

III. GRANTING THE INJUNCTION WILL NOT RESULT IN GREATER HARM TO DEFENDANTS.

Defendants will not suffer a greater harm than the Class A Members if the Court grants this injunction. DHS—and by extension Norristown and Torrance—are already charged with ensuring that individuals with mental illnesses receive adequate treatment under the MHPA. 50 Pa. Stat. and Cons. Stat. Ann. § 7401(b); Compl. Ex. L, ¶¶ 40, 49. The expenditure of additional funds to address the waiting list that Defendants have created pales in comparison to the individual liberty interests at stake in this matter. *See Kos Pharms., Inc. v. Andrx Corp.,* 369 F.3d 700, 728 (3d Cir. 2004) (rejecting defendant's "significant time and expense" argument because "[s]uch costs . . . are compensable by money damages and thus do not constitute irreparable harm as a matter of law"). "A state's constitutional duties toward those involuntarily confined in its facilities does not wax and wane based on the state budget." *Advocacy Ctr.*, 731 F. Supp. 2d at 626 (holding that

budgetary concerns were "insufficient to prevent the issuance of a preliminary injunction").[8]

Moreover, Defendants cannot, as a matter of law, have an interest in pursuing conduct that violates the Constitution. *See New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388-89 (3d Cir. 2012) ("Granting the preliminary injunction would not result in a greater harm to the State because the State 'does not have an interest in the enforcement of an unconstitutional law[.]'" (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003))).

IV. THE PUBLIC INTEREST FAVORS INJUNCTIVE RELIEF.

Absent "legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights . . . ." *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997). In this case, the issuance of an injunction would serve the public interest not only by providing individuals deemed incompetent with timely treatment, but also by potentially making them competent so that they may stand trial. *See Advocacy Ctr.*, 731 F. Supp. 2d at 626 ("It cannot be denied that there is a strong public interest in protecting the Fourteenth Amendment rights of those in state custody who have not been

[8] In any event, there is little doubt that the Commonwealth could raise the necessary funds. Pennsylvania ranks sixth in the nation in gross state product. *See* Kaiser Family Foundation, State Health Facts: Total Gross State Product (GSP) (2013), http://kff.org/other/state-indicator/total-gross-state-product/. Viewed on a stand-alone basis, Pennsylvania would be the 18th largest economy in the entire world. *See* Pennsylvania Competes, *available at* http://www.pennsylvaniacompetes.org/business/.

convicted of a crime. There is a similar public interest in having those charged with criminal offenses proceed speedily to trial." (footnote omitted)); *see also McCahon v. Pennsylvania Tpk. Comm'n*, 491 F. Supp. 2d 522, 528 (M.D. Pa. 2007) (holding that the public interest is "clearly served" by protecting the plaintiffs' constitutional rights).

CONCLUSION

Plaintiffs and class members are mentally ill individuals who are being forced to languish in jails by Defendants' failure to allocate necessary facilities and resources. Plaintiffs' incapacity prevents them from protecting their interests or even crying out for help. Most are estranged from their families and friends. These individuals are truly the forgotten among the forgotten. Defendants simply have no justification or excuse for creating and allowing to persist what are believed to be the longest wait times in the country for admission into facilities for competency restoration treatment. The law is well established, the irreparable harm to Plaintiffs substantial, and the justification for Defendants' callous indifference nonexistent. Preliminary injunctive relief is necessary and urgent.

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction requiring Defendants to transfer Plaintiffs and Class A Members to Norristown and/or Torrance to begin competency restoration treatment within seven days of a court ordering their commitment to the respective hospital.

Respectfully submitted,

/s/ ***Witold J. Walczak***
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October 26, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2015, a copy of the foregoing memorandum of law was served, via electronic mail, on Defendants' counsel, Doris Leisch, at dleisch@pa.gov.

/s/ *Witold J. Walczak*
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