

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DOE,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

DISABILITY LAW CENTER,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

Case No. 3AN-18-09814CI<sup>1</sup>

**MOTION FOR APPOINTMENT OF SPECIAL MASTER AND MEMORANDUM IN  
SUPPORT**

This court should appoint a Special Master to implement and oversee the court's order requiring limitations on detaining civil committees in correctional settings.<sup>2</sup> Consistent oversight by a Special Master will replace the current decentralized, inefficient, and sporadic system of judicial review. A Special Master

<sup>1</sup> The two probate matters, 3AN-18-02687PR and 3AN-18-02688PR are closed. Upon consolidation, the court directed that future pleadings should be filed in case number 3AN-18-09814CI. Order (January 24, 2019).

<sup>2</sup> Doe petitioner filed an earlier motion for a special master on May 24, 2019. DHSS filed an opposition dated June 4, 2019. The court denied the request for a special master. Order (October 21, 2019).

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can provide centralized daily review of the Department of Health and Social Services' plan, and recommend orders—including sanctions—to enforce the court's order.<sup>3</sup>

## ARGUMENT

**I. The court has authority to appoint a Special Master to oversee the cases for individuals held in correctional settings or at risk of being placed in correctional settings.**

In its order dated October 21, 2019, the court set out requirements for the DHSS plan. The order directed DHSS to develop a plan so that individuals subject to evaluation orders sought by the Department of Corrections (DOC) would be held no more than twenty-four hours.<sup>4</sup> DHSS was also ordered to provide a plan that would prevent detention in correctional settings except in extremely limited

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<sup>3</sup> Doe petitioner sought remedies specifically regarding the detention of civil respondents in correctional settings and accordingly the remedies sought here focus on that specific population. The court may wish to consider whether the oversight by the Special Master should be expanded to ensure compliance with the court's orders regarding individuals delayed in transport from hospitals or other settings.

<sup>4</sup> Order at 59-60 (October 21, 2019).

The population of civil detainees in a DOC facility can be divided into two groups: a) persons subject to an evaluation order that DOC obtained while the person was in DOC custody, and b) persons subject to an evaluation order who were brought to DOC because an evaluation facility was unable to admit them and there were no criminal charges pending.

For the first group DHSS shall demonstrate a procedure whereby members of the group remain at the DOC facility for no more than 24 hours after criminal charges were dismissed. For the second group, DHSS shall demonstrate a procedure whereby members do not go to a DOC facility, except in the rarest circumstances (and providing guidelines concerning those circumstances).

circumstances for those individuals with no criminal charges.<sup>5</sup> DHSS was also ordered to develop priorities and protocols for admissions to evaluation facilities.<sup>6</sup>

DHSS has proffered no remedial plan to prevent respondents from being held in correctional settings longer than twenty-four hours. In its response DHSS asserts: "While it is DHSS' intention to limit jail stays as much as possible, it cannot guarantee that every person in protective custody can or will be released within 24 hours."<sup>7</sup> The plan likewise does not provide meaningful remedies to prevent respondents from being detained in correctional settings when they have no criminal charges pending.<sup>8</sup> The DHSS plan is insufficient on its face to remedy the violations of respondent's rights if they are held in correctional settings while under civil detention orders. Accordingly, there is an immediate need for court oversight and enforcement.

This court has authority under Civil Rule 53 to appoint a Special Master to oversee the individual cases for all respondents held in correctional settings.<sup>9</sup> The court can specify the powers of the master and "may direct the master to report only

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 59.

<sup>7</sup> DHSS, Addressing Gaps in the Crisis Psychiatric Response System at 19 (January 21, 2020).

<sup>8</sup> *Id.* at 19-20.

<sup>9</sup> Alaska R. Civ. P. 53(b) provides: "The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report."

on particular issues.”<sup>10</sup> Having a daily status hearing with a Special Master would create an opportunity to have more timely information about respondents and should also reduce the workload for the parties and the court. A Special Master would provide triage and bring some consistency to the initial court review.

Although the Public Defender Agency can file for individual review hearings, this process is both time consuming and challenging to manage. Cases are assigned to different Superior Court Judges. Judges have different protocols for the hearings. Because of the confidentiality order governing this case, judges do not have access to the evidence considered by this court regarding the conditions of confinement at DOC. Hearings are set randomly and often without regard to the availability of counsel. A Special Master would have access to the existing litigation and provide a central point of oversight.

The proposed order details the scope of what the Special Master should consider at the daily status hearings. The Master’s report would supplant the status report now being filed by the Department of Law. The individual reports could be collated for this court’s consideration. If the reports are sufficiently redacted, they can also be shared with the Disability Law Center.

This court has the power to appoint a Special Master to manage a centralized calendar to monitor all the respondents who are subject to an order authorizing hospitalization and who are detained in a correctional setting. Consistent oversight

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<sup>10</sup> *Id.*

by a single judicial officer will improve the efficiency of the initial court review, better protect respondents' liberty interests, and assist this court in understanding the causes, frequency, and length of civil detentions in correctional settings.

**II. The Special Master should be granted the authority to provide recommendations to this court regarding the imposition of sanctions.**

In issuing the order for a preliminary injunction, the court found that DHSS has acted in violation of the law by failing to promptly transport civil detainees to evaluation facilities.<sup>11</sup> Court oversight is needed to ensure adequate conformity with the court's directives. The DHSS' weekly updates document that civil respondents continue to be held in correctional settings. The most recent weekly update reveals that for *ex parte* orders starting on October 1, 2019 or later, approximately 47 people—over 10% of a total of 422 respondents—have been held in correctional settings.<sup>12</sup>

Other jurisdictions have used special masters to oversee remediation of legal deficiencies in state mental health services. For example, in a case brought by the United States against the State of Mississippi to address the failings of its mental health system the court found that the case was well-suited for a special master.<sup>13</sup>

This Court is keenly aware of the judiciary's limitations in a systems case such as this. The only role of this Court is to consider whether Mississippi's mental health system is operating in compliance with that law. The weight of the evidence proves that it is not. . . . This case is

<sup>11</sup> Order at 52-53 (October 21, 2019).

<sup>12</sup> DHSS Ex Parte Weekly Report (2.1.20 to 2.7.20).

<sup>13</sup> See, e.g., *U.S. v. Mississippi*, 400 F. Supp. 3d 546, 579 (D.Ct. Miss. 2019).

well-suited for a special master who can help the parties craft an appropriate remedy . . . .

Ideally, the Special Master would have some expertise with regard to mental health, commitments, and competency.<sup>14</sup> Having a central point of judicial review would assist the parties in evaluating whether DHSS' plan is working, and allow for ongoing problem-solving as implementation progresses.

Additionally, if DHSS fails without justification to meet its legal obligations to civil committees, the Special Master should be granted the authority to make recommendations for a finding of contempt. Civil contempt is an appropriate remedy if DHSS fails to follow the court's order to the detriment of civil detainees without justification.<sup>15</sup> Fines can also be levied against DHSS to ensure compliance: "A person who commits a civil contempt is subject to damages, a civil penalty of \$5,000 or less for each violation, and other orders as the court finds appropriate."<sup>16</sup>

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<sup>14</sup> Competency is relevant because some individuals who are found incompetent and whose criminal cases are dismissed may be evaluated—by DOC evaluators or other clinicians—and determined to meet criteria for civil commitment.

<sup>15</sup> AS 09.50.010; see also *State v. Williams*, 356 P.3d 804, 806–07 (Alaska Ct. App. 2015) ("In contrast, a prosecution for contempt is classified as "civil" if the punishment (1) is primarily designed to benefit a litigant who is harmed or disadvantaged by the defendant's continuing refusal or neglect to obey a court order, and if the punishment (2) "is conditional upon the defendant's continued refusal to comply with the court's order." (citation omitted) That is, a prosecution for contempt is "civil" if the punishment is designed to coerce an obstinate or neglectful party to honor their obligations under the court's order, and if the punishment ceases once that party has complied with their obligations.").

<sup>16</sup> AS 09.50.020; see, e.g., *Trueblood v. Washington State*, Case No. C14-1178-MUP, Order of Civil Contempt (July 7, 2016) (contempt order issued when state failed to comply with court order regarding deadlines for providing competency evaluations) available at <https://docs.justia.com/cases/federal/district-courts/washington/wawdce/2:2014cv01178/202545/289> (last accessed 2/9/20).

Alaska Public Defender Agency  
Linda R. Beecher • linda.beecher@alaska.gov  
900 W. 5th Avenue, Suite 200 • Anchorage, AK 99501  
Phone: (907) 334-4438 • Fax: (907) 868-2588  
Service: PdaCivilDivision@alaska.gov

Sanctions would motivate DHSS to comply with the court's order and could be purged if DHSS came into compliance.<sup>17</sup>

### CONCLUSION

The Public Defender Agency and the Disability Law Center filed the original actions in this case in October 2018. Over a year later, on October 21, 2019, the court ordered DHSS to produce a remedial plan to address detention in correctional settings and delays in transport to evaluation facilities. DHSS has yet to proffer a workable plan to prevent the placement of civil committees in correctional settings.

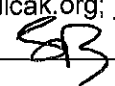
A Special Master is warranted to provide oversight of DHSS as it implements the court's order. Having a Special Master will ensure that the rights of civil detainees are protected, will obviate the need for ad hoc and sporadic review by individual judges, will provide appropriate supervision of the government's remedial plan, and will inform the court regarding options for enforcement of its order setting limitations on the placement of respondents in correctional settings.

DATE 2/11/20

ALASKA PUBLIC DEFENDER AGENCY

  
Linda R. Beecher  
Deputy Public Defender  
Alaska Bar No. 8606041

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delivered to: AG-Bookman; AG-Cicotte; and emailed to: LawTitle47.30@alaska.gov;  
mregan@dlcak.org; jcahoon@dlcak.org; jeff.pickett@alaska.gov

By: 

<sup>17</sup> See, e.g., *Diggs v. Diggs*, 663 P.2d 950, 951 (Alaska 1983) ("Under this procedure the court cannot impose a fixed jail term; any sanction which is imposed as a result of the civil contempt proceeding must afford a continuous opportunity to the defendant to purge the contempt.").