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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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United States of America, Plaintiff, v. Armando Quintana-Rivera, Defendant.	No. CR-18-02463-001-TUC-RM (LCK) **REPORT AND RECOMMENDATION**

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16 Pending before the Court is Defendant Quintana-Rivera's Motion to Dismiss based on unreasonable delay in transporting him to a Bureau of Prisons ("BOP") medical facility to be restored to competency. (Doc. 34.) The Government filed a response. (Doc. 38.) Defendant filed a Reply and two Notices of Supplemental Authority. (Docs. 37, 39, 40.) This matter came before the Court for a hearing and a Report and Recommendation ("R&R") as a result of a referral, pursuant to LRCrim 57.6.

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22 A motion hearing was held on January 15, 2020. Defendant appeared via video teleconference from the U.S. Medical Center for Federal Prisoners ("MCFP") Springfield. (Doc. 43.) The parties stipulated (both in writing and orally at the hearing) to the admission of testimony from a recent two-day evidentiary hearing, before Magistrate Judge Eric Markovich in *United States v. Alvarez-Dominquez,* CR 18-00589-TUC-JAS-EJM, wherein two co-defendants were litigating the same issue. (Docs. 37, 37-1, 37-2; Doc. 38 at 11-12.) The parties further orally stipulated to the admission of testimony from a 2014 evidentiary hearing, before Magistrate Judge Bernardo Velasco in *United States v. Fierro-*

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Gomes, CR 13-01984-TUC-JAS-BPV. (Docs. 40, 40-3.) No additional evidence was presented at the hearing in this case, only argument. (Doc. 43.) At the hearing, the government provided the Court with a copy of the R&R in *Alvarez-Dominguez*, which had been filed that same day. (CR 18-00589, Doc. 121.) The instant matter was submitted following oral argument. Subsequent to the hearing, Defendant filed additional supplemental authority, to which the government responded, and Defendant replied. (Docs. 48-50.)

Having now considered the matter, the Magistrate Judge recommends that the District Court, after its independent review, deny Defendant's Motion to Dismiss.

I. FACTUAL BACKGROUND

A. Defendant Quintana-Rivera's Charges

On October 30, 2018, Defendant was arrested and charged in a criminal complaint with possession with the intent to distribute approximately 10.32 kilograms of methamphetamine. (Doc. 1.) He was ordered detained pending trial. (Docs. 2-3.) On November 28, 2018, Defendant was indicted on the charges of conspiracy to possess, and possession, with the intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(viii). (Doc. 7.)

B. Procedural History of Defendant's Motion to Determine Competency

On March 6, 2019, defense counsel filed a Motion to Transport Defendant for Psychological Evaluation for Purposes of his Defense. (Doc. 17.) Specifically, defense counsel requested Defendant be transported for an evaluation by psychologist Marisa Menchola on a date to be determined by Dr. Menchola and the U.S. Marshals Service ("USMS"). Defense counsel had concerns Defendant was suffering from significant cognitive deficits and wanted Dr. Menchola to determine whether mental health or cognitive issues necessitated a formal competency evaluation. (*Id.*) The Court granted the motion that same day (Doc. 18); however, an appointment was not scheduled until May 16, 2019, due to Dr. Menchola's availability. (Doc. 21.) Dr. Menchola completed her evaluation on May 22, 2019, and provided a diagnostic impression of unspecified mild

neurocognitive disorder, adjustment disorder with depressed mood, and multiple substance use disorders in various stages of remission. (Doc. 31 at 3 (citing Dr. Menchola's Report).) Dr. Menchola found Defendant's overall intellectual function was borderline with both his verbal and nonverbal intellectual abilities in the low-average range, and he had deficits in cognitive domains consistent with a mild neurocognitive disorder. (*Id.*) The doctor "did not perform an assessment of competency to stand trial" but she expressed "concerns about [the defendant's] ability to competently participate in the legal process against him" and opined that "he can likely be restored to competency through intensive restoration interventions." (Doc. 38 at 2 (citing Dr. Menchola's Report at 5).)

As a result of Dr. Menchola's evaluation and information gathered from Defendant's family and friends, on June 26, 2019, defense counsel filed a Motion to Determine Competency requesting Defendant be evaluated by forensic psychologist Eva Maldonado-Renta, again with transport determined between Dr. Maldonado and the USMS. (Doc. 27.) In his motion, defense counsel stated that based on information he had obtained from numerous sources, he believed Defendant had significant cognitive deficits that deeply compromised his ability to assist defense counsel or adequately understand the criminal proceedings. (*Id.* at 1.) The Court granted defense counsel's motion that same day and set a status conference. (Doc. 29.)

Dr. Maldonado-Renta conducted her evaluation on August 6, 2019, and her report was filed on August 15, 2019. Dr. Maldonado-Renta also diagnosed unspecified mild neurocognitive disorder and multiple moderate to severe substance use disorders in various stages of remission. (Doc. 31 at 6.) The doctor ultimately concluded that, even though Defendant appeared to exaggerate his cognitive impairment, he was not competent to stand trial due to symptoms of the neurocognitive disorder, a limited understanding of the legal process, and mildly impaired decisional capacities. However, Dr. Maldonado-Renta also stated Defendant could likely be restored to competency taking into consideration his diagnoses, his education level, and cognitive limitations. (*Id.* at 5-6.) Neither doctor

indicated that Defendant required psychiatric medication or immediate treatment for his diagnoses.

At the status conference on August 20, 2019, the parties stipulated to Dr. Maldonado-Renta's conclusion that Defendant was not competent to stand trial but likely restorable. The Court, without opposition, ordered Defendant committed to the custody of the Attorney General to determine whether there was a substantial probability that in the foreseeable future Defendant could be restored to competency to permit the criminal proceedings to go forward. (Doc. 33.) On September 11, 2019, defense counsel received an email from Diana Esquibel, a BOP employee at MCFP Springfield, stating that Defendant had been designated to Springfield. (Doc. 34 at 3; Doc. 34-1.) On November 4, 2019, when defense counsel contacted the USMS to inquire as to the reason for the delay in transporting Defendant, he was told there was a lack of available bed space at Springfield. (Doc. 34 at 4; Doc. 40 at 1; Doc. 40-1.) On November 18 and 19, Ms. Esquibel told defense counsel that she expected Defendant to be transported and arrive at Springfield in November or December due to a 3-4 month wait for inmate transfers. (Doc. 40 at 1-2; Doc. 40-2.) Defendant arrived at MCFP Springfield for competency restoration on December 30, 2019 (132 days after the Court's August Order). (Doc. 38 at 3.)

C. Testimony from Evidentiary Hearing on the Motion to Dismiss in *United States v. Fierro-Gomes,* CR 13-01984-TUC-JAS-BPV: Captain Stephanie Middleton-Williams

In 2014, Captain Middleton-Williams was employed with the United States Public Health Service and was one of five medical designators for BOP. (Tr. 3 at 4-5, 16.)[1] She has a Baccalaureate in Nursing and a Master's in Counseling, Psychology. (Tr. 3 at 5.) Since 2008, she had been working as the main medical designator for 18 U.S.C. § 4241(d) forensic study designations. (Tr. 3 at 5, 20.) In that position, she reviewed files and medical records to determine whether an inmate met medical and/or "psych" criteria for designation. (*Id.*) After a court ordered a forensic study, Captain Middleton-Williams was

[1] "Tr. 3" refers to the Reporter's Transcript of the July 2, 2014 evidentiary hearing in *United States v. Fierro-Gomes,* CR 13-01984-TUC-JAS-BPV, filed as Attachment C to Defendant Quintana-Rivera's Notice of Supplemental Authority. (Docs. 40, 40-3.)

responsible for reviewing the court's order, along with the security and custody level of a defendant, in order to determine the appropriate institution for the inmate's designation. (Tr. 3 at 6-7.) An inmate was classified based on multiple factors, including education, age, previous convictions, if any, and type of crimes, etc. (Tr. 3 at 9.) Once a designation was made, that information was provided to the USMS who then communicated with the medical facility about bed space for transportation purposes. (Tr. 3 at 7, 21.) A designation did not equate to being transported to the facility. (Tr. 3 at 22.) If there was a change in an inmate's condition, including an acute medical or psychological condition, or other emergency-situation, requiring an expedited move, the holding facility and/or USMS could contact the medical designator or designated facility to request an expedited transfer. (Tr. 3 at 10, 14, 26.) Restoration of competency, pursuant to 18 U.S.C. § 4241(d), could only be performed at two BOP medical centers that had inpatient units with 24-hour nursing care: MCFP Springfield in Springfield, Missouri and FMC Butner, in Butner, North Carolina. (Tr. 3 at 8-9, 19.) Restoration for adult inmates could not be completed outside of the BOP. (Tr. 3 at 24.)

Captain Middleton-Williams did not have control over bed space availability. (Tr. 3 at 11.) When an inmate was designated, his name was added to a list which tracked the next available slot for the designated facility. (*Id.*) Inmates were generally transported one week before their slotted move date. (*Id.*) Captain Middleton-Williams testified that it usually took four to eight weeks (in 2014) for an inmate to be admitted to the designated facility, however, an emergency case would push that date back. (Tr. 3 at 12.) Captain Middleton-Williams, who had been detailed to BOP since 1996, generally noticed yearly increases in court-ordered forensic studies with some fluctuations or small decreases. (Tr. 3 at 12-13, 26-27.) In 2014, Captain Middleton-Williams testified that Butner was down two psychiatrists who retired but were in the process of hiring, and Springfield was undergoing a renovation for additional bed space to be completed by September 2014. (Tr. 3 at 13, 28.) Additionally, there were fluctuations in staffing that impacted the time inmates waited for transfers. (Tr. 3 at 13-14.) Captain Middleton-Williams testified that the

backlog in admitting inmates was not caused by the designation or transportation process; rather, "the problem is the bed space . . . [e]ach medical center has a finite number of beds, and there's always someone occupying them." (Tr. 3 at 29.) From 2008 to 2014, for inmate restoration cases, there was consistently a waiting list for bed space. (*Id.*)

D. Testimony from Evidentiary Hearing on the Motion to Dismiss in *United States v. Alvarez-Dominguez*, CR 18-00589-TUC-JAS-EJM

On October 18, 2019, the government called Dr. Dia Boutwell as a witness. On October 29, 2019, the defense called Dr. Donald Lewis as a witness. Magistrate Judge Markovich summarized the testimony of each witness in his R&R (CR 18-00589, Doc. 121.) This Court has reviewed the actual transcripts of the testimony, along with the R&R. Unless otherwise indicated by "[]", this Court is quoting the summarized testimony from Judge Markovich's R&R.

1. Dr. Dia Boutwell

Dr. Boutwell testified as follows on direct examination by government counsel. Dr. Boutwell has been employed at the Federal Bureau of Prisons since 2006. (Tr. 1 at 6-7.)[2] She has a doctorate's degree in clinical psychology, a bachelor's and master's degree in psychology, and a master's degree in criminal justice. (Tr. 1 at 7.) For her doctorate degree, she specialized in psychology law, which is a combination of correctional psychology and forensic psychology. (*Id.*) She is board certified in forensic psychology and is licensed as a psychologist in West Virginia. (Tr. 1 at 9.)

Dr. Boutwell has spent her entire professional career at the Federal Bureau of Prisons. (Tr. 1 at 10.) She started as an intern at the medical center in Springfield, Missouri from 2006 to 2007; she was a staff psychologist at FCI Beckley from 2007 to 2009; and she was a forensic evaluator at FMC Lexington from 2009 to 2015. (*Id.*) She joined the Central Office in the Psychology Services Branch in later 2015 and worked as a mental health treatment coordinator until last year when she assumed the duties of National

[2] "Tr. 1" refers to the Reporter's Transcript of the October 18, 2019 evidentiary hearing in *United States v. Alvarez-Dominguez*, CR 18-00589-TUC-JAS-EJM, filed as Attachment A to Defendant Quintana-Rivera's Notice of Supplemental Authority. (Docs. 37, 37-1.) Footnotes from Judge Markovich's R&R are italicized.

Forensic Evaluations Coordinator. (*Id.*) In all of her positions, except her current one, she was involved in the treatment of patients at the Bureau of Prisons. (*Id.*) She has published several articles on the practice of psychology and the law. (Tr. 1 at 11.) One of her current duties is to provide training for field psychologists, particularly forensic evaluators. (*Id.*)

Dr. Boutwell has testified in court around 30 times. Most of her testimony involved forensic evaluations that she completed of defendants. (Tr. 1 at 10) She has also testified about her duties in her current position. (*Id.*)

As the National Forensic Evaluations Coordinator, Dr. Boutwell oversees all of the forensic evaluation programs in the Bureau of Prisons. (Tr. 1 at 12.) She explained that there are twelve outpatient sites that complete forensic evaluations and [f]ive inpatient sites that complete forensic evaluations and treatment. (*Id.*) Dr. Boutwell oversees those programs and is a consultant for field psychologists completing that type of work. (*Id.*) She also oversees the wait list for competency restoration defendants and works very closely with other departments within the BOP to effectuate those transfers. (*Id.*) Basically, she is a subject matter expert for forensic evaluations for the BOP.

The BOP has six medical centers, but only two of the medical centers – Butner and Springfield – provide competency restoration treatment [for males]. (Tr. 1 at 12-13.) Butner has a capacity of about 216 mental health patients; the large majority of those patients are either competency restoration cases or are civilly committed individuals. (Tr. 1 at 13.) Butner is over capacity right now, as it has 299 mental health inmates. (*Id.*) Butner is fully staffed in terms of the psychology staff, but they are down a couple of psychiatrists. (*Id.*) Springfield has a capacity of 287 patients, and they currently have around 200 mental health patients; again, they are a combination of restoration cases and civilly committed individuals. (*Id.*) Springfield is understaffed; they are down at least two full-time forensic evaluators, two to three psychologists, and two or three psychiatrists. (Tr. 1 at 14.) Springfield does not have its full staff to perform the treatment, which explains why it is not filled to capacity. (*Id.*) Butner accepts 16 patients per month and

Springfield accepts six patients per month. (*Id.*) The discharge rate at each facility is consistent with the acceptance rate. (*Id.*)

Testimony then turned to the process of a patient being admitted into Butner or Springfield for competency restoration treatment. (*Id.*) Once a court orders that a defendant be sent for restoration, the order is entered into the electronic designation system by the U.S. Marshals. The staff at the Office of Medical Designations receive notification that a new order has been entered. The staff will then determine what their security needs are, and any specific issues identified in the order, and will enter a designation for that individual to be ultimately sent to a specific facility. (Tr. 1 at 14-15.) Once that designation is made, the patient goes on a wait list. (Tr. 1 at 15.)

Dr. Boutwell acknowledged that there are a number of individuals who are waiting for restoration services at Butner and Springfield. (*Id.*) While they are waiting, the staff is continually working to get other individuals moved. She described it as "quite a big endeavor." (*Id.*) But there is always a wait list for individuals needing competency restoration services. (*Id.*) In the past, the wait list was around 30 days, but it has increased recently. The wait list for Butner is 3.3 months, and the wait list for Springfield is 3 months. She again explained that Butner has bed space issues and Springfield has staffing issues, "so there really are some significant issues that have been at play that have lengthened that wait list." (Tr. 1 at 16.) Dr. Boutwell testified that the BOP is "seeing an upward trend in the number of restorations that are ordered and also the number of forensic evaluations ordered." (*Id.*)[3]

Placement on the wait list is determined by when the court's restoration order is received and processed. (Tr. 1 at 17.) As soon as the United States Marshal's Service

[3] *The BOP has never done outpatient competency restoration "because of the way that the statutory language reads that it is only done on an inpatient basis." (Tr. 1 at 17.) Moreover, in order to do competency restoration, individuals with specialization in forensic psychology and forensic treatment are needed, and those individuals "are not always easy to find, so generally they are not available at just any local facility." That same analysis applies to federally contracted facilities. (Id.) The BOP does not contract with third parties to perform competency treatment. (Tr. 1 at 22.)*

enters the order into the eDesignate system, "that's the placeholder . . . for the wait list." (*Id.*) Dr. Boutwell testified that individuals on the wait list can "skip in line" if:

> [W]e receive notification from either the marshals or from one of our local detention facilities . . . that an individual is decompensating very rapidly or is really having a significant mental health symptom that can not be managed at the local level through emergency medication or through other types of intervention, then we can and we have prioritized those individuals due to their clinical acuity.

(Tr. 1 at 17-18.)

In terms of what the BOP is doing to reduce wait times, Dr. Boutwell testified that there is a unit that is close to being opened at the Federal Medical Center in Fort Worth. (Tr. 1 at 18.) That facility will have 28 open cells and 12 locked cells for defendants in need of competency restoration treatment. (*Id.*) The opening of this new facility should decrease wait times. (*Id.*) The Fort Worth facility has "been in the works for several years," but it is "a long process to bring a new mission online." (Tr. 1 at 19.) Part of the process involved converting that facility back to a medical center "so that they had a total mission analysis and mission change." (*Id.*) The Fort Worth facility has psychology staffing already in place; they just have "some final touches that they need to make from an infrastructure perspective," and hire a couple more correctional officers. (*Id.*) Part of the delay in opening the Fort Worth facility has been caused by "limitations in terms of the budget," which is determined by Congress. (Tr. 1 at 21.) The BOP had to get "pretty creative in terms of how to produce those funds." (*Id.*)

Additionally, the BOP is trying hard to recruit staff for the Springfield facility, which has open bed space, by offering relocation incentives. (Tr. 1 at 18.) The BOP is also starting a new forensic postdoctoral position at Springfield in an attempt to recruit staff who will then stay on and become forensic evaluators at Springfield. (*Id.*)

Finally, Dr. Boutwell testified about her involvement in the Mental Health Care Committee. She explained that the committee meets bi-monthly (sometimes quarterly) "to discuss bed utilization specific to the mental health units." (Tr. 1 at 21.) She described the mental health beds as "a precious resource."

Dr. Boutwell testified as follows on cross-examination. Dr. Boutwell is not aware of any discussions by the Mental Health Care Committee about using contract restoration facilities. (Tr. 1 at 24.) In addition to Butner and Springfield, she testified that the Federal Medical Center in Devens occasionally performed inpatient competency restoration in the past.[4] (Tr. 1 at 22-23.) They [Devens] no longer perform those services because that facility has a very small secure mental health unit. The facility only has 24 beds in their secure unit and those beds are also used for patients with dementia and other mental health patients who need some stability before moving to an open unit. (Tr. 1 at 23.) Thus, the restoration patients would have to compete with other mental health patients for bed space at that facility. (*Id.*)

Dr. Boutwell again testified that the wait time for Butner is currently 3.3 months and there is a three-month wait time for Springfield. (Tr. 1 at 24.) The wait times are not longer for Spanish speakers, as they are on the same wait lists. (*Id.*)

The testimony then turned to the total number of inpatient restoration detainees across the BOP system for the past several years. (Tr. 1 at 25.) In 2016, there were 281 inpatient detainees who needed competency restoration treatment; in 2017, there were 290 restoration defendants; and in 2018 there were 325 defendants who needed restoration services. (Tr. 1 at 26.) Dr. Boutwell does not have insight on why there has been an increase in restoration evaluations. (*Id.*) Although restoration cases have to compete with other mental health referrals for bed space, only restoration cases are currently being sent to Butner. (Tr. 1 at 27.) But there are a significant number of civilly committed individuals at Butner and Springfield who are taking up bed space that could be used for restoration cases. (Tr. 1 at 28.) Initial competency evaluations for in-custody defendants are not being done at Butner or Springfield. (*Id.*)

Dr. Boutwell again testified that Springfield's maximum inmate inpatient capacity is 287, and they currently are under capacity with 200 inpatient cases because of staff

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[4] *The Federal Medical Center in Carswell completes restorations for female defendants. (Tr. 1 at 24.) The wait list is always under 30 days simply because there are not many female defendants. (Id.)*

shortages. (Tr. 1 at 32-33.) Staff retention at Springfield has gotten worse, as there are currently only two evaluators at Springfield. (Tr. 1 at 34, 36.) BOP has taken steps to address staff shortages such as: (1) advertising the positions outside of the BOP and to the general public; (2) a 25 percent recruitment incentive; and (3) paid moves. (Tr. 1 at 34.) As a result, Dr. Boutwell foresees hiring more evaluators in the near future. (Tr. 1 at 36.)

In terms of the Fort Worth facility, which is due to be opened shortly, it will have 28 beds that will solely be used for competency restoration patients. (Tr. 1 at 35.) Dr. Boutwell anticipates sending about eight competency restorations patients a month to the Fort Worth facility. (*Id.*)

Dr. Boutwell [testified at the *Alvarez-Dominguez* hearing that she] is not familiar with the defendant's [Bryan Alvarez-Dominguez's] case.[5] (Tr. 1 at 39.) As such, she does not have any insight on why the defendant's [Bryan Alvarez-Dominguez's] wait time to be transferred to Springfield was 153 days, which is above the average wait time of three months that Dr. Boutwell referred to earlier. (Tr. 1 at 39-40.) Some of the delay may have resulted from the fact that the defendant's initial designation was to Butner, but the designation was later changed to Springfield. (Tr. 1 at 40.) Dr. Boutwell agreed with defense counsel that for someone with developmental delays like the defendant [Bryan Alvarez-Dominguez], spending five months without mental health treatment could result in psychological harm. (Tr. 1 at 40-41.)

On redirect examination, Dr. Boutwell testified that she does not know if the defendant [Bryan Alvarez-Dominguez] was evaluated to see if any mental harm was inflicted as he waited to be transported. (Tr. 1 at 44.) However, she testified that even while a defendant is waiting to be transported, if they are in a BOP facility, the defendant is still under the care of a psychologist. (*Id.*) If a defendant is in one of the U.S. Marshal's holding facilities, then the Marshal is charged with ensuring the patient receives adequate care in those facilities. (Tr. 1 at 45.) If there was an acute issue, the Marshal contacts either the Office of Medical Designations or Dr. Boutwell. (*Id.*)

[5] Presumably, Dr. Boutwell also is not familiar with Defendant Quintana-Rivera's case.

In response to the Court's [Judge Markovich's] question, Dr. Boutwell testified that Butner and Springfield prioritize restoration cases over other mental health cases because these are the only two facilities that provide restoration services. (Tr. 1 at 47-48.) Springfield currently [October 18, 2019] has 18 competency restoration patients on its wait list, and Butner between 52 to 54 restoration cases on its wait list. (Tr. 1 at 48.)

2. Dr. Donald Lewis

Dr. Lewis testified as follows on direct examination by defense counsel. Dr. Lewis has been the Chief Psychiatrist for the Federal Bureau of Prisons since January of 2009. (Tr. 2 at 6-7.)[6] In terms of his job duties, he testified that his role is administrative in that he oversees the psychiatric program for the BOP. (Tr. 2 at 7.) He has minimal direct patient contact. (*Id.*) His position includes oversight of other psychiatrists at the BOP. He also travels to many of the different medical centers where the psychiatrists work to help supervise, perform peer review, and educate. (Tr. 2 at 8.) He has testified in court on two prior occasions, one of which was similar to the issue at hand in this case. (*Id.*)

Dr. Lewis testified that a Medical Referral Center ("MRC") is a place within the BOP which houses patients needing medical and/or psychiatric care. (*Id.*) There are five MRCs within the BOP that provide mental health treatment: a female facility in Carswell, Texas, and four male facilities in Devens, Massachusetts, Springfield, Missouri, Rochester, Minnesota, and Butner, North Carolina. (Tr. 2 at 9.) There are approximately 1,000 mental health beds at those five facilities. Dr. Lewis does not know how many of the 1,000 beds are functioning inpatient beds. (Tr. 2 at 10.) There are about 250 mental health beds at Springfield, and 250 to 260 at Butner. (Tr. 2 at 9.) However, Springfield currently has only 200 functioning inpatient beds. (*Id.*) Dr. Lewis believes that only two of the MRCs - Butner and Springfield – perform competency restoration. (Tr. 2 at 10.) There is currently a wait list for restoration treatment at those facilities; and there has been a wait

[6] "Tr. 2" refers to the Reporter's Transcript of the October 29, 2019 evidentiary hearing in *United States v. Alvarez-Dominguez*, CR 18-00589-TUC-JAS-EJM, filed as Attachment B to Defendant Quintana-Rivera's Notice of Supplemental Authority. (Docs. 37, 37-2.) Footnotes from Judge Markovich's R&R are italicized.

list for as long as Dr. Lewis has been employed by the BOP. (*Id.*) Dr. Lewis does not know the average wait time for competency restoration patients; however, he believes that in 2014 he testified that the wait time was between eight and twelve weeks. (*Id.*) He is not aware whether there are different wait times for Butner and Springfield. (Tr. 2 at 11.)[7]

Testimony turned to the Mental Health Clinical Care Committee. Dr. Lewis believes that this committee was formed about four to five years ago. (Tr. 2 at 12.) Dr. Lewis has been a member of the committee since it was formed, and he may be the only remaining member since the committee's inception. (Tr. 2 at 12-13.) The committee currently meets every other month; the committee used to meet monthly, but there was not enough new information to present to warrant monthly meetings. (Tr. 2 at 13.) The committee is aware of the wait list issue for competency restoration cases; in fact, that was one of the reasons the committee was formed. (Tr. 2 at 13-14.) The committee is "a multidisciplinary team that includes medical health services staff, social work staff, psychiatry staff, psychology staff, and then the forensics is part of that as well." (Tr. 2 at 14.) The committee has been involved in the plan to open a new inpatient mental health facility in Fort Worth. (*Id.*) Dr. Lewis does not know how many beds will be available. He believes that the psychology staff has been hired. (Tr. 2 at 15.) Dr. Lewis does not know if the committee was involved in creating "utilization review nurses." (*Id.*)

Dr. Lewis explained that utilization review nurses are utilized for many different disciplines. (Tr. 2 at 15-16.) They help review cases in the BOP for different reasons. The nurses look at how long psychiatric patients have been at a particular institution, and whether those patients can be moved to a different level of care to free up a bed for another patient. (Tr. 2 at 16.) The nurses also look at the wait list for forensic cases to determine if a patient can be moved to a bed more quickly. (*Id.*)

Testimony then turned to some of the discussions and findings made by the Mental Health Care Committee regarding the wait lists for restoration patients and staffing

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[7] *Dr. Lewis is not very familiar with the competency restoration process. (Tr. 2 at 11.) He knows that a psychiatrist helps with medication management, but he is not sure of the psychologist's role. (Id.)*

shortages. In a committee report dated June 12, 2017, the committee notes reflect that "[w]aiting periods are currently manageable for the MRCs. Butner is expected to have staffing issues due to one staff resignation and one staff pending maternity leave. Recommendation is for Butner to submit exemption request." (Tr. 2 at 17-18; Ex. 69.) The notes also reflect that "Springfield is hiring two psychologists, but they have seven vacancies and two psychologists. We need to plan for staff at both Butner and Springfield. Butner has 170 commitments with one psychologist." (Tr. 2 at 18.) Dr. Lewis testified that staff shortages is an ongoing issue and thus, subject to ongoing discussion by the committee. (*Id.*) The committee notes dated April 29, 2019 reflect that "wait time has increased in the MRCs for restoration cases. Springfield is significantly down in staffing. Right now, Butner and Springfield are the only two institutions that are able to take restoration cases. There's now an average of 60 to 90 days for inmates to come into the restoration sites." (Tr. 2 at 19; Ex. 77.) The committee notes from June 2019 reflect that "the wait time has increased to three to four months for inmates to come into the restoration sites." (*Id.*; Ex. 78.)

The Mental Health Care Committee does not meet to discuss the actual wait list in terms of moving certain patients up or down on that list. (Tr. 2 at 20.) A priority meeting is held every Thursday by a different committee to discuss that issue. (*Id.*) At that meeting, the committee reviews every patient that is on the transfer list to come into an MRC and prioritizes the patients based on their need for mental health services. (*Id.*) There are actually three wait lists: a medical list for medical beds; a psychiatric list for the psychiatric beds; and then a forensic list for restoration patients. (Tr. 2 at 21.) Dr. Lewis explained that the psychiatric beds and forensic beds are "kind of mixed together with that total of 1,000" beds referred to earlier; so those two groups of patients are competing for the same 1,000 beds. (*Id.*)

Testimony turned to records reflecting the forensic study assignment counts by institution. (Tr. 2 at 22.) Dr. Lewis is not very familiar with these records. He agreed that in 2014, he testified that between 2006 and 2014, there were about 331 restoration cases

per year. (Tr. 2 at 23.) Defense counsel pointed out that in 2016 there were 281 restoration cases, in 2017 there were 290 restoration cases, and in 2018 there were 325 such cases. (*Id.*) Dr. Lewis cannot account for the increase in restoration cases in 2018. (Tr. 2 at 24.) In terms of the non-restoration cases that take up bed space at MRCs, Dr. Lewis explained that there are about 120 facilities in the BOP that house inmates, and there are psychiatric emergencies throughout those facilities. (*Id.*) Those individuals take up bed space at MRCs, as do civilly committed individuals and individuals who are presenting an insanity defense. (Tr. 2 at 24-26.) However, some civilly committed individuals who do not need 24-hour care can be transferred to other BOP facilities to free up bed space in MRCs. (Tr. 2 at 25.) Dr. Lewis does not know how many beds are dedicated at Butner or Springfield for restoration cases. (Tr. 2 at 28.)[8]

Dr. Lewis agreed that Springfield is currently understaffed. (*Id.*) He believes there are five psychiatrist positions that need to be filled which have been vacant for some time. (Tr. 2 at 28-29.) He is not familiar with forensic psychology staffing. (Tr. 2 at 29.) He explained that psychiatrists are in demand across the nation, and not just at the BOP. (*Id.*) To address the shortage of psychiatrists, the BOP hired telepsychiatrists who can be located anywhere in the country. (*Id.*) The telepsychiatrists have started to do forensic work at Butner and Springfield. (Tr. 2 at 30.) Dr. Lewis agreed that in 2014 he testified that the BOP was down to six psychiatrists across Butner and Springfield out of fifteen available positions, and there is currently an additional vacancy. (Tr. 2 at 31.)

He also previously testified in 2014 that one of the problems with retention and hiring of psychiatrists was that BOP psychiatrists were not offered the pay scale of the Veteran's Administration. (Tr. 2 at 32.) However, in 2016 the BOP was able to convert all of its psychiatrists to match the VA pay scale. (*Id.*) As a result, one psychiatrist rescinded their resignation, and a couple psychiatrists have come back from the VA to the BOP. (*Id.*) However, factors other than the pay scale, such as a psychiatrist having to

[8] *The BOP facilities at Devens and Rochester perform very few competency restorations. (Tr. 2 at 33.) Dr. Lewis is not certain as to when the Fort Worth facility will be opening; hopefully, within a couple of months. (Tr. 2 at 39.)*

reside in Springfield, Missouri, or Butner, North Carolina, have still resulted in vacant positions. (*Id.*) Additionally, it takes months for an individual who has been hired to start working at an MRC because of background checks and paperwork. (Tr. 2 at 33.)

Dr. Lewis is not familiar with Bryan Steven Alvarez-Dominguez's case.[9] (Tr. 2 at 34.) Defense counsel [for Bryan Alvarez-Dominguez] pointed out that it took 153 days for the defendant to be transferred to Springfield, and it took another defendant [listed next on a redacted spreadsheet from BOP entitled Forensic Cases Transferred to the MRC] 162 days to be transferred. (*Id.*[; Exs. 8, 55].) Dr. Lewis agreed that these wait times are longer than the average wait times to be transferred to Springfield. (*Id.*) Dr. Lewis cannot account for the 54 to 56 day wait times for some defendants who were transferred to Butner. (Tr. 2 at 35.) He presumes the difference in wait times has to do with staffing shortages at Springfield. (*Id.*) Dr. Lewis testified that the ideal transfer time for a person ordered to be restored to competency would be one day. (*Id.*) He testified that "[t]o be quicker is always better" so the person "can be seen and evaluated and treated." (*Id.*) Defense counsel [for Bryan Alvarez-Dominguez] went through a list of the defendant's medications that he received while waiting to be transferred to Springfield. (Tr. 2 at 36-38.) Dr. Lewis agreed that none of the medicines were used to treat mental health conditions. (*Id.*) Dr. Lewis also agreed that a developmentally delayed person who spent five months without any sort of mental health treatment could suffer psychological harm. (Tr. 2 at 38.)

On cross-examination by government counsel, Dr. Lewis testified that the subject matter expert on the issue of the wait list for competency restoration is Dr. Boutwell. (Tr. 2 at 40.) Dr. Boutwell is on the committee that Dr. Lewis testified about earlier. (Tr. 2 at 41.) Dr. Lewis also testified that psychiatrists have virtually no role in competency evaluation and treatment; they focus primarily on medication management (if medication is needed). (*Id.*)

[9] Presumably, Dr. Lewis also is not familiar with Defendant Quintana-Rivera's case.

II. DISCUSSION

Defendant argues the Court should dismiss the indictment based on a due process violation or pursuant to its supervisory powers because extended delays in transporting defendants for competency restoration has been a systemic and recurrent problem for many years. He believes the evidence shows that BOP has known for years, but failed to adequately address, the ever-increasing delays in transporting pretrial detainees for restoration treatment. Defendant asserts that this persistent pattern evidences the government's reckless disregard for its constitutional obligations and constitutes flagrant misconduct warranting dismissal pursuant to the Court's supervisory powers. Defendant also contends that the 132-day delay in his case violated his right to due process and caused him prejudice.

The government argues that the evidence does not show a colorable ground for the drastic and extreme remedy of dismissal of the indictment. Specifically, that Defendant failed to present evidence of government conduct so grossly shocking, flagrant, or outrageous as to violate the universal sense of justice. Instead, the government contends evidence established that BOP has made good-faith efforts to address the issue of wait times, which defy an easy solution given the nature of its complexity. Further, there is no new evidence requiring this Court to revisit and disavow the prior rulings within the District of Arizona finding that delays in transportation do not warrant dismissal under the Due Process Clause or the Court's supervisory powers. Finally, the government argues that Defendant was not prejudiced by the delay in transportation for restoration treatment.

A. District of Arizona Decisions

Defendant has cited no cases that support dismissal of the indictment based on a due process violation or pursuant to the Court's supervisory powers; instead, he relies on the same arguments and case law cited and rejected in previous District of Arizona cases addressing similar motions. This Court must consider those decisions, all of which held that delay in transporting a defendant for competency restoration is not a basis to dismiss an indictment. The Court examines, in particular, the rulings from the two cases in which

testimony was admitted in this proceeding. In turn, those cases cited and relied on other cases from the District of Arizona that addressed analogous issues.

1. *United States v. Fierro-Gomes*, CR 13-01984-TUC-JAS-BPV

The defendant in *Fierro-Gomes* was admitted to MCFP Springfield for competency restoration treatment 98 days after the Magistrate Judge ordered him committed. (CR 13-01984, Doc. 57 at 2-3.) Based on that delay, the defendant filed a motion to dismiss the indictment. The Magistrate Judge recommended dismissal of the indictment based on three grounds: (1) a constitutional violation; (2) the Court's supervisory powers; and (3) violation of the Speedy Trial Act. (*Id*. at 3.) The judge reasoned that the government had been aware of the systemic delays in transporting prisoners for competency restoration treatment, and the delay was unreasonable and prejudicial to the defendant. (*Id*.)

The District Court rejected the recommendation of the Magistrate Judge and denied the motion to dismiss. (*Id*. at 7.) The Court first decided that the three cases upon which the Magistrate Judge had relied did not support dismissal of the indictment. (*Id*. at 3 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003); *United States v. Magassouba*, 544 F.3d 387 (2nd Cir. 2008)).) The District Court found that *Magassouba* actually supported the government's position that dismissal of the indictment was not warranted. (*Id*. at 4.) Further, the District Court pointed out that other decisions within the district had determined that *Jackson* and *Mink* did not support dismissing an indictment. (*Id*. at 3-4.) In those cases, the District Court "held that delays associated with getting a bed at Butner or Springfield for mental evaluation and restoration were not sufficient grounds for dismissing an indictment based on due process or pursuant to the Court's supervisory power." (*Id*. at 5 (citing *United States v. Yazzie*, No. CR 04-1210-PCT-DGC, 2006 WL 2772636, at *1-3 (D. Ariz. Sept. 25, 2006) (111-day delay did not warrant dismissal); *United States v. Kabinto*, No. CR 08-1079-PCT–DGC, 2009 WL 2358946, at *1-2 (D. Ariz. July 31, 2009) (102-day delay did not warrant dismissal), and 2010 WL 3851998, at *1-3 (Sept. 29, 2010) (second 165-day delay did not warrant dismissal); *United States v. Lazaro-Cobo*, No. CR 10-846-PHX-JAT, 2011 WL 5006516,

at *1-3 (D. Ariz. Oct. 20, 2011) (67-day delay did not warrant dismissal). The Court further concluded that the 98-day delay to get a bed at Springfield was not so "grossly shocking and outrageous as to violate the universal sense of justice," and did not constitute "flagrant misbehavior" or impose "substantial prejudice" on the defendant. (*Id*. at 6.) Accordingly, the District Court found no due process violation or reason to dismiss the indictment pursuant to the Court's supervisory powers. (*Id*.)

Finally, the District Court held that the Magistrate Judge's finding – that the 98-day delay violated the Speedy Trial Act – was contrary to controlling Ninth Circuit authority. (*Id.*) He cited circuit and intra-district cases holding that "all delay relating to proceedings pertaining to mental competency issues, evaluations, and restorations are excludable time periods" under the Speedy Trial Act. (*Id*.)

2. *United States v. Alvarez-Dominguez*, CR 18-00589-TUC-JAS-EJM

More recently, in *Alvarez-Dominguez*, the Magistrate Judge concluded that a 153-day and 102-day delay in transporting co-defendants for competency restoration, although longer than the delay in *Fierro-Gomes* and some of the other cases cited above, was not so grossly shocking and outrageous as to violate the universal sense of justice.[10] (CR 18-00589, Doc. 121 at 16.) Nor did the delay constitute flagrant misbehavior resulting in substantial prejudice to the defendants. (*Id.*)

After considering the same testimony of Drs. Boutwell and Lewis that the parties stipulated to admit in the instant case, the Magistrate Judge found the BOP is both cognizant of, and concerned about, the wait time for bed space at its medical facilities. (*Id*.) As a result, the BOP has been proactive in taking steps to alleviate the wait time. (*Id*.) The judge found two BOP actions of particular relevance: a new facility with forty beds dedicated primarily to competency restoration treatment will be opening shortly in Fort Worth, Texas, which will reduce wait times; and, the BOP is taking steps to recruit psychological staff at MCFP Springfield and, once hired, they can treat more inmates at

[10] The Magistrate Judge filed his R&R on January 15, 2020. (CR 18-00589, Doc. 121.) Since then, the defendant filed an objection and the government responded. (*Id*., Docs. 129, 133.) The District Court has not ruled yet on the objection.

that facility. (*Id*. at 16-17.) The Magistrate Judge found that, although the wait time for bed space has been a long-standing issue, there was no evidence the BOP "has been callously disregarding its obligation to timely provide competency restoration services." (*Id*. at 17.) As such, he concluded that the government's conduct did not warrant the "drastic and disfavored remedy of dismissal of an indictment." (*Id*.)

The Magistrate Judge further determined that the defendants' three claims of substantial prejudice arising from delay were speculative and/or unsupported by evidence. (*Id*.) First, contrary to the defendants' arguments, the Magistrate Judge found no evidence that, while awaiting transport, either defendant needed medication to address mental health issues or experienced a deterioration in their mental health. (*Id*.) The judge relied upon Dr. Boutwell's testimony that, if there had been an acute issue with either defendant's mental health, the USMS would have contacted her or the Office of Medical Designations. (*Id*.) Second, the defendants claimed prejudice arising from their inability to engage in meaningful conversations with counsel about their cases while awaiting competency restoration. (*Id*.) Because 7 to 8 months passed between the defendants' arrests and their counsel filing motions to evaluate competency, the Magistrate Judge concluded some "meaningful" conversations must have occurred during that period. (*Id*. at 17-18.) The judge found no evidence to support finding that additional meetings, while the defendants were awaiting transportation, would have been futile or served no purpose. (*Id*. at 18.) Finally, the defendants argued they would suffer prejudice because their extended pretrial detention would cause them to face a higher sentence than other first-time, nonviolent, youthful couriers. (*Id*.) The Magistrate Judge noted that, if the defendants are restored to competency and convicted of the offense, their sentencing guideline range will be substantially greater than the entire time they would have been in custody from arrest, through restoration, and to sentencing. (*Id*.) And, because their ultimate sentence is unpredictable at this time, the sentencing argument was wholly speculative.

B. Analysis

Dismissal of an indictment is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial remedy is available. *United States v. Struckman*, 611 F.3d 560, 575 (9th Cir. 2010). "To warrant dismissal on due process grounds, government conduct must be so grossly shocking and outrageous as to violate the universal sense of justice . . . . Dismissal under the Court's supervisory powers for prosecutorial misconduct requires: (1) flagrant misbehavior and (2) substantial prejudice." *United States v. Kearns*, 5 F.3d 1251, 1253-54 (9th Cir. 1993). However, "[b]ecause it is a drastic step, dismissing an indictment is a disfavored remedy." *Struckman*, 611 F.3d at 577.

In resolving this case, the Court is guided by the prior District of Arizona decisions, which applied the standards from *Struckman* and *Kearns*. Defendant's motion also relies extensively on the case of *Mink*, 322 F.3d 1101. (Doc. 34 at 6-10, 15.) This Court agrees with prior decisions in this District, which found that *Mink* is not controlling in the determination of whether to dismiss a criminal indictment because it was a civil suit for injunctive relief. (*See* CR 13-01984, Doc. 57 at 3 (citing *Yazzie*, 2006 WL 2772636, at *3 n.1; *Kabinto*, 2009 WL 2358946, at *1; *Lazaro-Cobo*, 2011 WL 5006516, at *1).)

In the absence of a Ninth Circuit test for determining the reasonableness of pretrial detention for incompetent defendants, the parties agree the Court should evaluate the due process claim under the five-factor totality of circumstances test set forth in *United States v. Magassouba*, 544 F.3d 387 (2d Cir. 2008). (Doc. 49 at 1; Doc. 34 at 6; Doc. 38 at 4.) The *Magassouba* factors include (1) the length of time at issue; (2) the medical assessment of the defendant's ability to attain competency; (3) the reason for any delay in helping the defendant attain competency; (4) the defendant's assertion of his rights, whether as to custody or treatment; and, (5) any prejudice to the defendant, whether in attaining competency or in proceeding thereafter to trial. 544 F.3d at 416-17.

The length of time for Defendant to be transported to MCFP Springfield from the date of the Court's order was 132 days. Comparable delays in this District, associated with

transportation to Butner or Springfield for mental evaluation and restoration, have been held insufficient to dismiss an indictment based on due process or the Court's supervisory powers: *Fierro-Gomes*, CR 13-01984 (98-day delay); *Yazzie*, 2006 WL 2772636 (111-day delay); *Kabinto*, 2009 WL 2358946, 2010 WL 3851998 (initial 102-day delay and second 165-day delay); *Lazaro-Cobo*, 2011 WL 5006516 (67-day delay); and, *Alvarez-Dominguez,* CR 18-00589 (153-day and 102-day delays).

Although the Court does not take a four-month delay lightly, it also must evaluate the reason for it, pursuant to *Magassouba* factors one and three. The BOP is both cognizant of, and concerned about, the wait time for bed space at its medical facilities and has been proactive in trying to decrease their length. Drs. Boutwell and Lewis testified that the recent upward trend in the number of restorations needed was contributing to higher wait times, but they identified specific efforts by the BOP to combat the delays. The doctors described BOP's efforts to increase bed space for competency restoration by opening a new facility in Fort Worth and recruiting additional staff for Springfield, in order to utilize all available bed space at that facility. Dr. Lewis explained that, as of 2016, the BOP was able to convert to the VA pay scale which helped with both retention and hiring of psychiatrists. However, other factors continued to limit their ability to recruit staff. The BOP is now advertising open positions to the general public, and offering 25% recruitment bonuses, paid moving expenses, and relocation incentives. Additionally, the BOP created a new forensic post-doctoral position at Springfield and hired telepsychiatrists to do forensic work at Butner and Springfield. Despite the extended delay, the Court agrees with the finding in *Alvarez-Dominguez* that the government's actions did not evidence "callous disregard" for its obligations or flagrant misbehavior. (CR 18-00589, Doc. 121 at 17.)

Regarding factor two from *Magassouba*, Dr. Menchola and Dr. Maldonado-Renta found Defendant suffered from an unspecified mild neurocognitive disorder and multiple substance use disorders in various stages of remission. Dr. Menchola also found an adjustment disorder with depressed mood, borderline intellectual functions, and nonverbal intellectual abilities in the low-average range. Dr. Maldonado-Renta concluded Defendant

exaggerated his cognitive impairment. Regardless of their differences, the doctors agreed that Defendant likely could be restored to competency with restoration services. Neither mental health care evaluator recommended psychiatric medications or immediate psychiatric treatment.

In *Magassouba*, the court found relevant the timing and impact of the defendant's assertion of his rights as to treatment and/or custody (factor four). Specifically, the Second Circuit evaluated how quickly the district court acted when the defendant challenged his confinement without competency restoration treatment and whether treatment was delayed due to the defendant's refusal of voluntary competency restoration treatment. 544 F.3d at 418-19. Here, Defendant did not create delay by refusing treatment. However, the evidence does not reveal that delay in transport extended beyond that necessary for bed space to become available. And, the delay in receiving treatment resolved shortly after Defendant filed his motion to dismiss. Neither the Court nor the government ignored Defendant's custodial challenge. The Court finds this factor is of limited relevance to this case, a finding supported by Defendant's choice not to rely upon it to support his position.[11]

The Court next looks at the final *Magassouba* factor, Defendant's assertion of prejudice arising from the delay in receiving competency restoration. Defendant argues that: (1) he decompensated, was unable to understand the reason for the delay, and his attorney-client relationship was damaged (Doc. 34 at 3-4, 11-12; Doc. 39 at 5-6); (2) the delay prevented him from reaching an efficient resolution with the government (Doc. 34 at 10); (3) even if restored, counsel will argue for a sentence of 24 months or less and the delay could cause him to remain in custody longer than his sentence (*id.* at 11-12); and, (4) a four-month delay necessarily violates a defendant's right to due process and the statutes governing competency restoration (*id.* at 13-14; Doc. 39 at 5).

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[11] In evaluating this factor, the government argued that Defendant created delay by not requesting a competency evaluation earlier in the case. (Doc. 38 at 7.) This Court does not believe the court in *Magassouba* intended this factor to encompass the parties' actions prior to the Court ordering Defendant committed to the Attorney General's custody for competency restoration. Therefore, the Court does not discuss the government's argument or Defendant's response regarding that time period.

First, the Court finds no evidence that Defendant's mental health or attorney-client relationship deteriorated during the 132 days he waited for transport to Springfield. No doctor opined that Defendant was in immediate need of psychiatric medication or treatment for an acute mental health issue. Further, Dr. Boutwell testified that, if a defendant has an acute issue with his or her mental health, the USMS would know to contact her or the Office of Medical Designations. Captain Middleton-Williams also testified that emergency cases would be expedited on the wait list. Counsel presented no evidence of a significant deterioration in the attorney-client relationship, citing only Defendant's confusion about the delay and repeated queries as to when he would be transported. (*See* Doc. 34 at 3.) Based on counsel's representation at the evidentiary hearing, that he had spoken with his client recently, it appears they have maintained ongoing contact and a functional relationship (within the parameters available when representing an incompetent client).

Next, Defendant was not prejudiced by the potential of a longer sentence or inability to reach an efficient resolution with the government. Defense counsel argued that, based on previous cases in this district, and mitigating arguments premised on Defendant's diminished capacity at the time of the offense, he believes Defendant could receive a sentence of 24 months or less. Based on the nature of the charges, Defendant is facing a 10-year minimum mandatory sentence if he is deemed not safety valve eligible. Even if he is found safety valve eligible, and receives a reduction for mitigated role, the advisory guideline sentence post-plea is approximately 5 years. Even if Defendant is sentenced to a lesser sentence, he has been in custody less than 18 months, which is still less than 2 years and significantly less than the guideline sentence of 60 months. Defendant also will receive credit for any time already served including time at Springfield. Although the federal sentencing guidelines are non-binding, neither this Court nor defense counsel can predict the sentence the District Court ultimately will impose. Therefore, finding prejudice on this basis would be speculative.

Lastly, the Court finds that Defendant's prejudice arguments based on a per se violation of due process and the government's failure to follow the applicable competency statutes are unfounded. There is no law to support Defendant's suggestion that, if a delay lasts for four months (or longer), the Court is bound to find both prejudice and a violation of due process without considering any other factors. Rather, this R&R is evaluating whether a due process violation has occurred in light of the totality of circumstances.

Defendant also argues the government is violating the plain language and spirit of 18 U.S.C. § 4241.[12] The statute provides that, after a court finds a defendant not competent and commits him to the custody of the Attorney General, the government shall hospitalize him for treatment. 18 U.S.C. § 4241(d)(1). That hospitalization is limited to four months and is for the purpose of evaluating "whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward." *Id.* MCFP Springfield has reported to the Court that it will complete its initial restoration treatment within four months of Defendant's arrival at the facility and, thereafter, the evaluator will draft a report; therefore, the Court has set a status conference for May 21. (Docs. 46, 51.) To date, Defendant has not been hospitalized for more than four months. And, the facility has expressed an intent to complete its evaluation within the statutory time frame. Therefore, the plain language of the statute has not been violated.

The purpose of the statute is to prevent the indefinite commitment of incompetent defendants without evaluation of restorability. *See United States v. Strong*, 489 F.3d 1055, 1060-61 (9th Cir. 2007) (citing *Jackson*, 406 U.S. 715). Although Defendant was subjected to an extended wait for a hospital bed, it was not indefinite, and he was transported within the time estimate the USMS provided to defense counsel. Because Defendant now has been transported for an evaluation of restorability limited to four months, and the time of hospitalization may be extended only upon a Court finding that there exists a "substantial probability that within such additional period of time [Defendant] will attain the capacity

[12] Defendant raised this issue within a broader argument based on 18 U.S.C. § 3553(a). (Doc. 34 at 12-13.) As acknowledged by Defendant, this statutory provision governs sentencing. Because it has no bearing on the pending motion, the Court does not evaluate it.

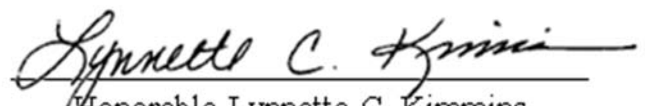
to permit the proceedings to go forward," he is not currently at risk of an indefinite commitment. 18 U.S.C. § 4241(d)(2)(A). Additionally, the facility has expressed its intent to comply with the statute and the Court has set a status conference to ensure the process remains on track. Therefore, the government also is not violating the spirit of the statute.

For all the foregoing reasons, Defendant has not shown that he has been substantially prejudiced by the delay in his transportation for competency restoration treatment. Further, having evaluated the five *Magassouba* factors and the totality of the circumstances, the Court finds that the delay in commencing transport of Defendant to Springfield did not violate his right to due process. Although the delay was lengthy, comparable delays for other defendants in this district have not been found to warrant dismissal. Additionally, the Court found that the BOP is taking concrete steps to reduce the wait time for a defendant to be allotted a hospital bed for competency restoration. And, Defendant has been deemed to have a reasonable likelihood of restoration. In conclusion, the Court finds that the government's conduct was not flagrant misbehavior or so shocking and outrageous as to justify the drastic and disfavored remedy of dismissing the indictment based on due process or the Court's supervisory powers. For these reasons, dismissal of the indictment is not warranted.

III. RECOMMENDATION

It is recommended that, after its independent review, the District Court deny Defendant's Motion to Dismiss (Doc. 34). Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party may serve and file written objections within 14 days of being served with a copy of this Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed waived.

Dated this 26th day of March, 2020.



Honorable Lynnette C. Kimmins
United States Magistrate Judge