The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRUEBLOOD *et al*., Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES *et al*., Defendants.	NO. C14-1178 MJP DEFENDANTS' MOTION FOR CLARIFICATION AND RECONSIDERATION NOTE ON MOTION CALENDAR: APRIL 16, 2015

The Department respectfully asks this Court to clarify and potentially reconsider certain portions of the Court's April 2, 2015 Order. This motion does not attack the fundamental premises of the Court's Order, but rather seeks minor modifications and clarifications to avoid inconsistent interpretation of the Order and unknowing noncompliance by the Department, as well as to align the relief ordered with the Court's findings of fact and conclusions of law. Specifically, the Department requests clarification or reconsideration on four limited points: (1) the scope of the "clinical good cause" exception; (2) the starting point for the seven-day period; (3) what happens at the end of the seven-day period if a motion for a good cause exception is pending; and (4) the Department's responsibility when defense counsel's demand to be present makes compliance with the Court's seven-day timeline impossible.

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I. REQUESTS FOR CLARIFICATION OR RECONSIDERATION

A. Does The Psychiatric And Medical Good Cause Exception Apply To All Groups, Or Only Those Awaiting Evaluation In Jail?

The Court found that "[i]f the evaluation will be completed at one of the state hospitals, the individual must also be medically cleared, i.e., cleared by a medical professional at the jail as stable enough to receive care in a psychiatric hospital, which is not equipped to handle all types of medical emergencies." Dkt. #131 at 6. This factual finding recognizes that the state hospitals cannot medically care for certain individuals.

The Court's Order partially accommodates this factual conclusion, but not fully. Specifically, under section (1) of the Court's Order, when a state court orders an in-jail competency evaluation, the Department can "secure an extension from the ordering court for individualized clinical good cause," which presumably would include that the individual was not medically stable enough to be transferred to a state hospital. Dkt. #131 at 22. But sections (2) and (3) of the Order, which pertain to criminal defendants ordered for in-hospital evaluations and restorations, do not contain this good cause exception. This omission leaves no apparent mechanism for the state criminal courts or the Department to address those criminal defendants who are not medically stable but have been ordered to the state hospital for evaluation or restoration. The absence of this mechanism for all criminal defendants who may be ordered to the state hospital is inconsistent with the Court's recognition that the state hospital is not capable of providing certain levels of medical care.

The Department respectfully requests that the Court clarify whether the good cause exception applies to all class members, or only to class members who have been ordered to be evaluated in jail. Because good cause clinical reasons will arise across all sections of the class, regardless of what particular service has been ordered, the Department suggests that the good cause exception should apply to all groups to be consistent with the Court's factual finding.

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B. Does The Seven-Day Timeline Begin At The Signing Of The Court Order Or The Department's Receipt Of The Court Order?

The Court ordered the Department to provide in-jail competency evaluations "within seven days of the *signing* of the court order calling for an evaluation" and to admit persons ordered to the state hospital for a competency evaluation or competency restoration "within seven days of the *signing* of the court order." Dkt. #131 at 22 (emphasis added). But starting the clock from the signing of the court's order rather than the Department's receipt of the order goes beyond what even the Plaintiffs asked for in this case and beyond what the Court deemed reasonable in its findings of fact and conclusions of law. The Department respectfully asks that the Court clarify whether the Department is permanently enjoined to provide competency services within seven days of the *signing* of a court order for competency services, even when notice of that order has not yet been provided to the Department, or within seven days of the Department's *receipt* of a court order.

Under the Court's own findings, the timeline for providing services should not begin until the Department receives a court order for services. As this Court recognized in its Pretrial Order: "Defendants cannot perform competency evaluation and restoration services without receipt of necessary information." Dkt. #118 at 4. Thus, the Court adopted a class definition that includes only those for "whom DSHS receives the court order." Dkt. #131 at 4. Further, the Court acknowledged that "[w]ithout clear, consistent court orders that attach all statutorily required information and are immediately transmitted to DSHS, DSHS cannot start the evaluation or restoration process." Dkt. #131 at 20.

Similarly, Plaintiffs repeatedly acknowledged that an evaluation can be commenced only "upon receipt of a court order and the certificate of probable cause." Dkt. #128 at 9. Plaintiffs' assertions about the Department's ability to comply with a seven-day timeline were also based on receipt of a court order. Dkt. #128 at 10 ("Defendants could provide competency service within seven days of receipt of a court order."). Crucially, Plaintiffs' requests for relief

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reflected this same starting point, asking this Court to adopt a holding that competency services must be provided "within seven days *of receipt of a court order*." Dkt. #128 at 13 (emphasis added).

Nonetheless, the Court's Order appears to require the Department to provide competency services "within seven days of the *signing* of the court order." Dkt. #131 at 22 (emphasis added). This is unfair to the Department and unsupported by the record, as the evidence at trial demonstrated that local courts can take several days or more to send orders to the Department. Verbatim Report of Proceedings ("Verbatim Report"), Vol. 4, at 96-102 (Dr. Waiblinger discussing how quickly orders are transmitted to the Department); Exhibit 199 (histogram depicting the number of days between when an order is signed and when the order is received by the Department); Exhibit 200 (histogram depicting the number of days between when an order is signed and when the complete referral is received by the Department). The Department should not be punished for failing to provide services as to orders it has not even received.

Because the Court did not explain why the starting point for the seven-day timeline changed from what Plaintiffs requested, the Department is unsure whether the change was intentional or inadvertent. If it was inadvertent, the Department asks the Court to clarify that it was not its intent to start the clock until the Department receives the order. If it was intentional, the Department asks the Court to reconsider this aspect of the order, because it is unfair, goes beyond what even Plaintiffs requested, and lacks support in the Court's findings.

C. What Is The Department's Obligation Where the State Court Has Not Ruled On A Motion For Good Cause Exception By the Seventh Day?

The Court ordered that "[w]here an in-jail evaluation cannot be completed within seven days of a court order, [the Department] must secure an extension from the ordering court for individualized clinical good cause, or must immediately admit the individual to a state hospital to finish conducting the evaluation." Dkt. #131 at 22. The Department seeks clarification

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concerning its obligations where it has requested "an extension from the ordering court for individualized clinical good cause," but the court has not yet ruled on the motion by the seventh day. Requesting such extensions will require the Department to intervene in the criminal case and request a hearing to determine whether the good cause exception is satisfied. Even if the Department used every procedural mechanism possible to expedite such requests and shorten time, crowded local court dockets will likely often mean that when the seventh day passes, the Department is still waiting for a ruling on the good cause issue.

The Department respectfully requests guidance about what action it should take in this inevitable situation. Should the criminal defendant be transported to the state hospital where the Department believes good cause exists, but the state criminal court has not yet ruled on that issue? Or is it constitutionally permissible for the criminal defendant to remain in jail pending the hearing? The Department suggests that the criminal defendant may permissibly remain in jail until the good cause issue is resolved, because the nature and purpose of the incarceration is to await the good cause court hearing. If transport must occur regardless of any good cause that may exist, the Court's exception recognizing "the unique medical or psychiatric needs of the particular individual" will be rendered meaningless in a number of cases. Dkt. #131 at 22.

D. What Is The Department's Responsibility When A Criminal Defendant's Invocation Of The Right To Counsel Blocks Compliance With The Seven-Day Timeline?

Criminal defendants have a right that their counsel be present for competency evaluations. *Estelle v. Smith*, 451 U.S. 454, 470 (1981); *see also* Wash. Rev. Code 10.77.020(3). They often and understandably invoke this right given that statements made during the evaluation are not privileged and may be used against them. *Estelle*, 451 U.S. at 464-5; *see also* Wash. Rev. Code 10.77.020(3). In addition, many criminal defendants ordered to undergo competency evaluations are indigent and represented by court-

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appointed counsel. In many counties, such court-appointed counsel carry heavy workloads and often are unavailable at times the Department proposes to schedule evaluations.[1]

If the Department offers competency evaluation services within the seven days required by the Court's order, but the Defendant invokes his right to have counsel present and counsel is unavailable during that window, is the Department still required to transfer the Defendant to a state hospital? The Department respectfully suggests that such a requirement would effectively penalize a defendant for invoking his right to counsel, as it would require many defendants to be transferred to the state hospital even though they are competent. The Department respectfully requests guidance from the Court about this situation, which will inevitably arise as the Department works to comply with the Court's Order.

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[1] *See, e.g.*, Verbatim Report, Vol. 5, at 13, lines 10-13, 16-18 (Dr. Powers testifying that the Department is receiving "an increasing number of referrals where the defense attorney indicates on the order that they want to be present during the interview, and that significantly delays things . . . . Then you have to wait for the attorney to get back to you, or you have to contact the attorney, if they're repeatedly not getting back to you . . . ."); Verbatim Report, Vol. 5, at 82, lines 8-17 (Dr. Ward characterizing attorney presence as one of the "obstacles to [evaluations] being completed in a timely manner") Verbatim Report, Vol. 1, at 143-44, lines 23-7 (Plaintiffs' expert Dr. Mauch agreeing that there are "occasional delays associated with scheduling with the defense attorneys so that they can be present for the evaluation"); Verbatim Report, Vol. 1, at 46, lines 9-13 (Plaintiffs' witness Judy Snow testifying about delays created by defense counsel availability in Pierce County); Verbatim Report, Vol. 5, at 126, lines 9-22 (Dr. Fredrickson testifying regarding the delays created by defense counsel in Eastern Washington); Verbatim Report, Vol. 4, at 104, lines 12-13 (Dr. Waiblinger testifying about "other complicating factors, like an attorney requiring to be present"); Verbatim Report, Vol. 6, at 88-89, lines 18-2 (Defendants' expert. Dr. Gowensmith identifying "the attorney wants to be present in the evaluation" as one of the "issues that impact the process that are beyond the clinician").

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II. CONCLUSION

The Department respectfully asks this Court to clarify or potentially reconsider the four issues described above. These clarifications will help avoid uncertainty as to the Order's meaning and better align the Order with the Court's findings of fact and conclusions of law.

RESPECTFULLY SUBMITTED this 16th day of April 2015.

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CERTIFICATE OF SERVICE

Christine Hawkins, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this 16th day of April, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 16th day of April, 2015 at Olympia, Washington.

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