The Honorable MARSHA J. PECHMAN

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

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| TRUEBLOOD *et al*.<br>Plaintiffs,<br>v.<br>WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES *et al*,<br>Defendants. | NO. C14-1178 MJP<br>DEFENDANTS' MOTION TO RECONSIDER SCOPE OF INJUNCTION REGARDING TIMING OF SERVICES AND INPATIENT EVALUATIONS<br>**NOTED FOR JULY 15, 2016** |

## I. INTRODUCTION

District courts are "bound not only by the holdings of higher courts' decisions but also by their mode of analysis." Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Under that principle, the Ninth Circuit's reasoning in reversing this Court's deadline for providing in-jail competency evaluations requires this Court to revisit two other narrow aspects of its injunction: (1) when the clock starts for providing other services, and (2) when defendants must be transferred to the state hospital for in-hospital evaluations.

On the first point, the Ninth Circuit specifically rejected this Court's approach of starting the clock for providing in-jail competency evaluations from the time of a court order. Trueblood v. Washington State Dep't of Soc. & Health Servs., No. 15-35462, 2016



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WL 2610233, at *7 (9th Cir. May 6, 2016). As the Ninth Circuit noted, starting the clock from entry of the order "goes beyond what Trueblood requested and fails to account for any period from issuance of the court order to receipt" by the Department. Id. Those same flaws hold true as to the other services covered by this Court's order: restoration services and inpatient evaluations. As to both, Plaintiffs *stipulated* that such services could not be provided until the court order was received and agreed that individuals would not become members of the class until that point. Dkt. #84, at 1-2. The evidence shows that there can be significant time between the issuance of a court order and the Department's receipt of the order, through no fault of the Department. Given that these flaws made it inappropriate to calculate time in this way as to in-jail evaluations, they also make it inappropriate as to other competency services.

On the second point, Washington law requires that when a court orders a person for inpatient competency evaluation, the defendant must be transferred to a state hospital within 14 days, without exception. Wash. Rev. Code § 10.77.068(1)(a)(i)(B) (2015). In its prior ruling, this Court rejected that timeline, imposing a seven-day rule. But the Ninth Circuit's reasoning undermines that holding for two reasons. First, this Court based that ruling on what it considered " 'reasonable and achievable,' " a test the Ninth Circuit rejected. Trueblood, 2016 WL 2610233, at *6. Instead, the Ninth Circuit held that the question is whether "the state's present fourteen-day [statutory] requirement bears the constitutionally requisite reasonable relationship" to the parties' respective interests. Id. Second, this Court reached that ruling without considering the important differences between those already found incompetent and those not yet evaluated. Id. ("[T]he district court did not . . . distinguish sufficiently between the pre- and post-evaluation categories at issue.").

In short, to comply with the Ninth Circuit's holding, this Court "must implement both the letter and the spirit of the mandate." Vizcaino v. U.S. Dist. Court for W. Dist. of Washington, 173 F.3d 713, 719 (9th Cir. 1999). Doing so here requires revisiting these two aspects of the Court's injunction.



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## II. STATEMENT OF FACTS

### A. Timing of Receiving Court Orders For Competency Services

As this Court and the Ninth Circuit recognized, there are often delays between entry of a court order for competency services and the Department's receipt of that order and other necessary documentation. Despite extensive efforts by the State to reduce that time difference and significant progress in reducing the difference, delays still occur through no fault of the Department. This matters not only because Plaintiffs become members of the class only upon the Department's receipt of the order, Dkt. #84, at 1, but also because the parties agree that the Department cannot provide services until it receives the court order and necessary documentation. Id. Indeed, until the Department receives the court order, the Department is not even aware that a county or municipal court has ordered the Department to provide services. Trial Transcript Vol. 4 at 99.

Following trial, this Court found that there were "delays of one to three days in receiving all of the required documentation[.]" Dkt. #131, at 11. Required documentation "may include the court referral, charging documents, discovery and criminal history information." Dkt. #84, at 1-2. While many court orders were quickly transmitted, a large portion of the court orders were received by the Department several days after signature. *See* Trial Exhibit No. 199.

Changes to state law and increased coordination with the Department have reduced the average number of days it takes for a county or municipal court to transmit the court order, but delays persist. Dkt # 271-5 at 8-10. As of April 2016, it took an average of 1.7 days for a court to transmit an inpatient evaluation order to the Department, and 1.7 days for a court to transmit a restoration order. Id. at 10. This April 2016 average is a decrease from the peak average of 7.8 days for inpatient evaluation orders, and a peak average of 3.3 days for restoration orders. Id. However, individual cases demonstrate that longer delays still occur.



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For example, in extreme cases the sending court did not transmit the court order for as long as 17 days, 14 days, 29 days, or longer. Id. at 35, 37, 51.

While these long delays are rare, delays of three to four days are quite common. Id. at 52; Trial Exhibit No. 199. These delays often coincide with weekends. See Dkt #271-5, at 52. Court orders entered on a Thursday or Friday are often transmitted to the Department the following Monday. Id. at 51-53. Delays that coincide with an intervening weekend occur in multiple counties. Id. (delays of 3-4 days with an intervening weekend seen from Pacific County, Clark County, Kitsap County, and Thurston County). These delays persist despite the passage of a state law that sets short timelines for transmission of documents, and despite the Department's efforts to advocate for timely transmission of lawful court orders and required documentation. Dkt. #267, at 1-5.

It takes even more time for the Department to receive other necessary documentation besides the court order. These additional documents come from various third-parties, including courts, prosecutors, and jail staff. Wash. Rev. Code § 10.77.075 (2015). The Parties stipulated that the Department "cannot perform competency evaluation and restoration services without receipt of the necessary information, which may include the court referral, charging documents, discovery and criminal history information." Dkt. #84, at 1-2. For this same reason, under state law the time periods for provision of competency services are calculated beginning from the "date on which the state hospital receives the court referral and charging documents, discovery, police reports, the names and addresses of the attorneys for the defendant and state or county, the name of the judge ordering the evaluation, information about the alleged crime, and criminal history information related to the defendant." Wash. Rev. Code § 10.77.068(1)(b) (2015).

While much of the necessary documentation is quickly transmitted, a large portion of the necessary documentation is received by the Department several days after signature of a court order. See Trial Exhibit No. 200. As of April 2016, it took an average of 1.8 days for



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third parties to transmit additional discovery information to the Department for inpatient evaluations, and an average of 2.0 days for third parties to transmit additional discovery information for restorations. Dkt #271-5, at 10. This April 2016 average is a decrease from the peak average of 11 days for inpatient evaluation orders, and a peak average of 3.8 days for restoration orders. Id. As with transmission of court orders, intervening weekends create delays in transmission of necessary documentation. See Dkt #271-5, at 51-53.

Other entities that perform competency services, such as the Pierce County evaluator panel, experience similar delays in receiving court orders and other necessary documentation. Trial Transcript Vol. 1 at 49-50. Pierce County also cited intervening weekends as a factor that delayed transmission of documentation. Id. at 49, 97-98. The Plaintiffs' expert also testified that delays of one to three days for gathering of documentation were a factor in how quickly the Department could begin to provide a service. Trial Transcript Vol. 2 at 19-20.

**B. Defendants Ordered For Inpatient Competency Evaluation**

Washington law provides four scenarios in which an individual may be referred for an inpatient competency evaluation rather than an in-jail evaluation. A defendant may be referred for inpatient evaluation if: 1) the defendant is charged with murder in the first or second degree; 2) the court finds that it is more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation; 3) the court finds that an evaluation outside the jail setting is necessary for the health, safety, or welfare of the defendant; or 4) the evaluator assesses the defendant in a jail, detention facility, the community or in court, and determines that an inpatient evaluation is necessary to complete an accurate evaluation. Wash. Rev. Code §§ 10.77.060(c), (d) (2015).

It is the court or an evaluator that makes the determination of whether a defendant should receive an in-jail or an inpatient evaluation. Wash. Rev. Code § 10.77.060(c), (d) (2015). Common reasons that inpatient referrals are made include: the defendant has been uncooperative with the in-jail evaluation, the possibility of malingering, the defendant is



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experiencing ongoing intoxication resulting from drug or alcohol use, or the health and safety of the defendant warrants an inpatient referral. Trial Transcript Vol. 4 at 91-92. State statute keeps these categories intentionally narrow, and not every defendant referred for a competency evaluation is necessarily appropriate for inpatient care. Trial Exhibit No. 24, at 27; Trial Exhibit No. 35, at 16; Trial Transcript Vol. 4, at 91-92; Trial Transcript Vol. 6, at 94-98.

Overall, inpatient evaluations represent only a small portion of the larger competency evaluation population, with over 90% of evaluations occurring outside the state hospitals. Trial Exhibit No. 25, at 3, 16; Trial Exhibit No. 35, at 16; Trial Transcript Vol. 2, at 49. Inpatient evaluations are also a smaller proportion of all competency services provided. Trial Ex. 25, at 7 (over a 5 month period, courts ordered: 928 in-jail evaluations, 359 restorations, and 119 inpatient evaluations); see also Dkt. #271-5, at 10. Typically, referrals for inpatient evaluations involve defendants facing felony charges, not misdemeanors. Trial Exhibit No. 24, at 5-7 (98% of misdemeanants at WSH referred for outpatient evaluations; 88% at ESH).

The transition to a majority of competency evaluations occurring outside the state hospital has been a deliberate policy choice by Washington State. Noting an increase in wait times at Eastern State Hospital related to a higher proportion of inpatient evaluations, in 2004 the Washington Legislature amended Wash. Rev. Code § 10.77.060 to allow for evaluations to be conducted in jails "upon agreement of the parties." Engrossed Second Substitute Senate Bill 5216, 2004 Wash. Sess. Laws, ch. 9 § 1 (Wash. 2004).

Following this change, Washington State made "clear and significant improvements" to the balance of inpatient and in-jail competency evaluations, aligning more with national practices. Trial Ex. 35, at 16 ("Consistent with national trends, Washington has shifted from a system in which most evaluations were conducted in the state hospitals (requiring many days of inpatient care for a brief evaluation) to a system in which most evaluations are conducted on an outpatient basis . . . This is the first step in reducing unnecessary hospitalization for forensic patients; this transition has saved state resources and better protected defendants' liberties.")



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Admitting defendants to a state hospital not only impacts their proximity to their community, placing them far from family, friends, and counsel, but it also uses state resources that could otherwise be directed to individuals who need hospital-level care. See Trial Transcript Vol. 6, at 97-98. Previously, when there has been an influx of referrals for inpatient admissions, there have been impacts on bed space resources and impacts on limited evaluation staff resources. Trial Transcript Vol. 5, at 67-68; Vol. 4, at 186.

## III. ARGUMENT

### A. The Ninth Circuit's Opinion Requires Modification of the Injunction

Lower courts must adhere not only to the holdings of Ninth Circuit panels, " 'but also to their explications of the governing rules of law.' " Miller, 335 F.3d at 900 (quoting County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part)). When the Ninth Circuit announced in Trueblood the criteria that must be weighed in determining whether a waiting period complies with due process, its reasoning became the law of the circuit, binding on this Court and other Ninth Circuit panels. See, e.g., Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit.").

In Trueblood, the Ninth Circuit held that due process does not require completion of in-jail evaluations within seven days of a competency order being signed. Trueblood, 2016 WL 2610233, at *6. In doing so, the Ninth Circuit rejected the mode of due process analysis used by this Court to determine whether pre-evaluation waiting periods violate due process. The Court held that the question is not "what is 'reasonable and achievable' "; it is whether "the state's present fourteen-day [statutory] requirement bears the constitutionally requisite reasonable relationship" to the parties' respective interests. Id. The Court also rejected this Court's approach of starting the clock for providing in-jail competency evaluations from the



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time of a court order. Id. at *7. The Court held that starting the clock from entry of the order "goes beyond what Trueblood requested and fails to account for any period from issuance of the court order to receipt" by the Department. Id. The Ninth Circuit's approach to analyzing these issues is now the law of the circuit, binding on this Court.

**B. The Court Should Alter the Injunction so That All Time Periods Start from Receipt of a Court Order**

The Ninth Circuit specifically rejected this Court's approach of starting the clock for providing in-jail competency evaluations from the signing of a court order. Trueblood, 2016 WL 2610233, at *7. The portions of the injunction not vacated by the Ninth Circuit also calculate time in this same manner, and, as detailed below, they suffer from the same flaws identified by the Ninth Circuit. Dkt. #131, at 22. Because the Ninth Circuit explicitly found that calculation of time in this manner was deficient, the Court should modify its injunction.

Just as starting the clock from entry of a court order "goes beyond what Trueblood requested" as to in-jail evaluations, Trueblood, 2016 WL 2610233, at *7, it also does so as to other competency services. The Parties stipulated that persons do not even become members of the class until the Department has received the order for competency services. Dkt. #84, at 1. The Parties also explicitly stipulated that services could not be provided until the court order was received. Id. In fact, the stipulation went even further to state that in addition to the court order, the services could not be provided "without receipt of the necessary information, which may include the court referral, charging documents, discovery and criminal history information." Id. at 1-2. This stipulation governs all class members, regardless of the type of competency services a person was ordered to receive. Dkt. #84, at 1.

Starting the clock for other services from entry of a court order also "fails to account for any period from issuance of the court order to receipt" by the Department, just as with in-jail evaluations. Trueblood, 2016 WL 2610233, at *7. As detailed above, although the State has made extensive progress in reducing the average time between entry of a court order



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and the Department's receipt of the order, delays of 3-4 days are common (especially where a weekend intervenes), and even longer delays sometimes occur through no fault of the Department. Dkt #271-5, at 35, 37, 51-52. The State has a legitimate interest in not being ordered to provide services on a timeline that ignores these "practical impediments" that "can eat up the time period." Trueblood, 2016 WL 2610233, at *7.

The stipulation, evidence, and class definition here distinguish this case from Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003). In a footnote in Mink, the Ninth Circuit held that it was not an abuse of discretion for the district court there to start the clock for admission of a defendant found incompetent from entry of the court order, finding that was when the defendant's interest "in obtaining timely treatment accrues" and that there was "no evidence in the record of delays in the communication of commitment orders[.]" Id. at 1122 n.13. While that timeline may not have been an abuse of discretion in Mink given the facts there, it is error here for three reasons. First, unlike in Mink, Plaintiffs here stipulated that they do not become members of the class and cannot receive services until the Department receives the court order. Dkt. #84, at 1. Second, unlike in Mink, here there is clear, undisputed evidence that there are often delays in the communication of court orders for competency services. Finally, unlike in Mink, the Plaintiffs here have not all already been found incompetent; even if starting the clock for that group from entry of the order were acceptable here (which it is not, for the two reasons just stated), it would clearly be inappropriate for those ordered for inpatient evaluation, just as it is for those ordered for in-jail evaluation.

The Court also should not overlook a final consideration. Washington law calculates the time for providing competency services from when the state hospital receives the necessary information. Wash. Rev. Code § 10.77.068(1)(b). In ordering a different starting point, the Court is effectively rejecting state law, which it should do only if it concludes that the state law is unconstitutional. See Trueblood, 2016 WL 2610233, at *7 ("Where an injunction is issued against state officials, a district court will be deemed to have committed an abuse of discretion



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. . . if its injunction requires any more of state officers than demanded by federal constitutional or statutory law.") (quoting Katie A., ex rel. Ludin v. Los Angeles Cty., 481 F.3d 1150, 1155 (9th Cir. 2007)). But the Court has articulated no reason why the State's considered judgment is beyond the constitutional pale (especially where Plaintiffs stipulated to it here). Therefore, giving "appropriate consideration" "to principles of federalism," Rizzo v. Goode, 423 U.S. 362, 379 (1976), the Court should modify its injunction to calculate time consistent with Washington Law. Calculating time from when the Department receives the documents specified by state law has a "reasonable relation" to the Department's interests because the Department "cannot perform competency evaluation and restoration services without receipt of the necessary information[.]" Dkt. #84, at 1-2.

**C. The Court Should Alter the Injunction As to Inpatient Evaluations and Defer to State Law**

Washington law requires that when a court orders a person for inpatient competency evaluation, the defendant must be transferred to a state hospital within 14 days, without exception. This Court rejected that deadline and instead imposed a seven-day rule, but it did so without independently considering this element of state law or the interests of this group. The Ninth Circuit's opinion provided legal direction concerning how this Court should analyze all competency evaluations, drawing a sharp distinction between criminal defendants who have already been deemed incompetent, as in Mink, and those who have not yet been evaluated. Trueblood, 2016 WL 2610233, at *6. Because this Court's prior analysis concerning the inpatient evaluation group was based on the now rejected "reasonable and achievable" test, and because the Court failed to independently assess the interests of those ordered for inpatient evaluation, the Court should now consider the inpatient evaluation group independently and under the proper test, giving appropriate deference to State law.

Washington's 14-day maximum for transferring defendants ordered for inpatient evaluation complies with due process. This deadline is one of the strictest in the country, see



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Trial Exhibit No. 186, at 5-6, and does not " 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Medina v. California, 505 U.S. 437, 445 (1992) (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)). As the Ninth Circuit emphasized, this Court should look to the State's own policies for guidance. Trueblood, 2016 WL 2610233 at *7 (" '[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.' ") (citing Rizzo, 423 U.S. at 379). The State law governing admission for inpatient evaluation bears the constitutionally required reasonable relationship between the State's interests and the criminal defendant's rights.

"[B]oth the class members and the state have different interests at the pre-evaluation stage than they do once a finding of incompetency has issued." Trueblood, 2016 WL 2610233, at *6. The "pre-evaluation stage" encompasses both inpatient and in-jail evaluations, so it is inappropriate for the Court to treat those ordered for inpatient evaluations as though they have already been found incompetent. For example, one reason that a patient can be ordered for inpatient evaluation is simply that he is charged with Murder in the first or second degree. But that factor alone makes it no more likely that a defendant will be found incompetent or will need the specialized care available in a state hospital. Similarly, inpatient orders entered for the purpose of an accurate evaluation are often entered because the defendant has been uncooperative with the in-jail evaluation or because the defendant may be malingering. Trial Transcript Vol. 4, at 91-92. This is a population that does not necessarily have a mental illness and is potentially using the evaluation system to gain personal benefits (delaying their trial, or possible dismissal), not a population that should be rushed to the hospital. Trial Transcript Vol. 4, at 149-150. Meanwhile, the State has a legitimate interest in ensuring that spaces in the state hospital go to those who need them most urgently, namely those actually in confirmed



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need of mental health treatment, not those simply awaiting evaluation. Thus, the State had legitimate interests in allowing up to 14 days to transfer a defendant for evaluation.[1]

The State also has a legitimate interest in avoiding a system that encourages defendants and defense counsel to seek inpatient evaluations as a means to obtain a faster evaluation. A system that has shorter timelines for inpatient evaluation versus in-jail evaluations, regardless of the reason for the inpatient evaluation, encourages such misuse. Such a system would lead to more defendants who have no mental illness being held in state hospitals, taking spots away from those who truly need treatment. See Trial Transcript Vol. 6, at 97-98; Trial Transcript Vol. 5, at 67-68; Trial Transcript Vol. 4, at 186. Such a system would also be contrary to Washington's stated public policy of avoiding needless commitment in state hospitals and to the State's legitimate interest in "avoiding undue separation of a detainee from her counsel and family." Trueblood, 2016 WL 2610233, at *6.

In short, different considerations are at stake with those ordered for inpatient evaluation than with those ordered for restorative treatment, and an independent analysis is warranted. That analysis does not demonstrate that Washington's 14-day statutory requirement " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Medina, 505 U.S. at 445 (quoting Patterson, 432 U.S. at 201-202).

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[1] The State acknowledges that the defendant's interest in speedy transfer is strongest where an inpatient evaluation is ordered specifically for the health and safety of the defendant. Wash. Rev. Code § 10.77.060(d)(iii).



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## IV. CONCLUSION

Fidelity to the Ninth Circuit's reasoning in this case requires this Court to reevaluate the two elements of its prior injunction discussed above. The State respectfully asks that the Court abide by the Ninth Circuit's reasoning and revisit these two points.

RESPECTFULLY SUBMITTED this 30th day of June 2016.

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**CERTIFICATE OF SERVICE**

*Beverly Cox*, 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 30th of June 2016, 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 30 day of June 2016, at Olympia, Washington.

Beverly Cox

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