THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.B., by and through her next friend Cassie Cordell Trueblood, *et al.* Plaintiffs, v. Washington State Department of Social and Health Services, *et al.*, Defendants.	No. 14-cv-01178-MJP PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO RECONSIDER SCOPE OF INJUNCTION REGARDING TIMING OF SERVICES AND INPATIENT EVALUATIONS *ORAL ARGUMENT REQUESTED* NOTE ON MOTION CALENDAR: JULY 15, 2016

I. INTRODUCTION

Fifteen months after this Court issued its final ruling and injunction in this matter, Defendants belatedly seek to re-litigate issues that properly decided against them and that they did not appeal. However, their motion is timebarred. Even if this motion was not time-barred, Defendants' motion should be denied. Nothing in the Ninth Circuit's decision compels this Court to reopen its injunction regarding in-hospital competency services. Nor does the Ninth Circuit's opinion require that this Court uncritically adopt the fourteen day limits prescribed by

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the state statute championed by Defendants in an effort to avoid enforcement of class members' rights. This Court should reject Defendants' motion.

II. ARGUMENT

In *Trueblood*, the Ninth Circuit observed that

> DSHS appeals only the first part of the permanent injunction: the requirement that competency evaluations be conducted within seven days, absent a court-ordered extension for clinical good cause. ***It does not appeal the injunction as it applies to individuals ordered to be evaluated in a state hospital*** or who have already been found incompetent and are awaiting restoration services.

Trueblood v. Washington State Dep't of Soc. and Health Servs., No. 15-35462, 2016 WL 2610233, at *4 (9th Cir. May 6, 2016) (emphasis added). Now Defendants seek a second bite at the apple by filing a motion for reconsideration four hundred and fifty-five (455) days after the injunction was imposed. This is four hundred and forty-one (441) days too late under Local Rule 7(h), which requires a party to file a motion for reconsideration "within fourteen days after the order to which it relates is filed." Local Rule 7(h). If this Court finds Defendants' motion is not timebarred, this Court should deny Defendants' motion because post-trial evidence shows that in the majority of cases Defendants receive court orders on the same day that they are issued or within a reasonable amount of time; dicta does not demand this Court to reopen its longstanding final injunction regarding in-hospital competency services; and reject Defendants' argument that the 14 day statute meets constitutional muster.

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A. Defendants' Motion for Reconsideration is Time Barred

Defendants' motion is plainly untimely, having been filed 455 days after the original injunction and 143 days after the modified injunction. *See* Dkt.132, Dkt. 186, Dkt. 257.[1] Even if the clock did not start until the Ninth Circuit issued its mandate on June 2, 2016, Defendants did not file this motion for reconsideration until June 30, 2016.[2] Similarly, Defendants lost their right to appeal the undisturbed parts of this court's permanent injunction when they chose not to appeal them within 30 days of judgment. Fed. R. App. P. 3(a), 4. The purpose of Rule 4 is to "promot[e] finality of judgments." *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1300 (9th Cir. 1982). *See In re Alexander*, 197 F.3d 421, 424 (9th Cir. 1999) (explaining that Rule 4(a) stands for the proposition that "judgments should achieve finality at some point"); *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (holding that "[t]he essence of Rule 4(a)(6) is finality of judgment"); *Diliberti v. United States*, 4 Cl. Ct. 505, 507 (Cl. Ct. 1984) (finding that the purpose of Rule 4(a) is to "insur[e] finality of judgment"). Promoting this finality protects the "value" of "maintain[ing] order in the judicial process." *Selph v. Council of City of Lost Angeles*, 593 F.2d 881, 882 (9th Cir. 1979). Further, because the deadline to file an appeal is "mandatory," *Bowles v. Russell*, 551 U.S. 205, 209 (2007), Defendants lost their right to challenge this court's permanent injunction regarding in-hospital competency evaluations when they chose not to appeal the parts of the injunction that govern the provision of those services. *See also* Fed. R. App. P. 3(a)(4). To allow Defendants to use this motion as a

[1] *Cf.* Courts sometimes examine motions to reconsider under Federal Rule of Civil Procedure 59(e). *See 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999); *Curtis v. Illumination Arts, Inc.*, 2014 WL 2931823, *6. Defendants' motion, however, is untimely even under the more liberal 28-day filing window of 59(e).

[2] Even if a Ninth Circuit opinion could reset the window of opportunity to file a motion for reconsideration of a District Court's un-appealed final order, Defendants failed to timely bring a motion for reconsideration. The window of opportunity for such a motion, if it is even procedurally sound, expired on June 16, 2016. Defendants' motion was late, even assuming they had a new time period following the mandate, and should be denied.

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backdoor means of appeal would frustrate the interests in finality and judicial economy Rule 4 is intended to serve.

Further, "motions for reconsideration are disfavored," and will normally be denied under Local Rule 7(h). Local Rule 7(h). *See Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp.2d 1104, 1118 (W.D. Wash. 2010); *S.E.C. v. Kuipers*, 399 Fed.Appx. 167, 171 (9th Cir. 2010); *Gentry v. Sinclair*, 609 F.Supp.2d 1179, 1182 (W.D. Wash. 2009). Moreover, "failure to comply with [timing requirements] may be grounds for denial of the motion." *Id.* And "[n]either the Local Civil Rules nor the Federal Rules of Civil Procedure, which allow for a motion for reconsideration, is intended to provide litigants with a second bite at the apple." *Aronson*, 738 F.Supp.2d at 1118; Local Rule 7(h).

B. Post-Trial Evidence Proves That Receipt of Court Orders Is Not a Primary Cause of Delays

Defendants rely upon the Ninth Circuit opinion for the proposition that constitutional protections from prolonged incarceration do not attach until Defendants have received a court order. Dkt. 288 at 8. Defendants fail to acknowledge—as evidenced by their reliance on trial exhibits instead of more recent data—that post-trial evidence shows Defendants receive the majority of court orders on the same day that they are signed, and Defendants have the authority to create systems that would ensure timely receipt of court orders. Dkt. 284-1 8-14; 28-66. Although the Ninth Circuit did articulate concern that this Court found that constitutional protections attach at the signing of the court order and not the receipt, it did so in a factual vacuum. Before this Court ordered Defendants to keep data regarding the cause of delays, no one—including Defendants—knew how often Defendants received court orders in an untimely

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manner. Now this Court has what the Ninth Circuit did not: actual data regarding the timeliness of Defendants' receipt of court orders.[1]

Defendants' data shows that delays in the provision of court orders and discover are rare:

April 2016

Number of Days	Instances of Court Orders Received (%)	Instances of Discovery Received (%)
0	250 (70.82%)	238 (69.59%)
1-3	82 (23.23%)	81 (23.68%)
4-7	13 (3.68%)	16 (4.68%)
8-10	1 (0.28%)	0 (0%)
11-20	5 (1.42%)	4 (1.17%)
21+	2 (0.57%)	3 (0.88%)
TOTAL	353 (100%)	342 (100%)

May 2016:

Number of Days	Instances of Court Orders Received (%)	Instances of Discovery Received (%)
0	265 (72.60%)	252 (71.19%)
1-3	85 (23.29%)	85 (24.01%)
4-7	10 (2.74%)	12 (3.39%)
8-10	1 (0.27%)	1 (0.28%)
11-20	2 (0.55%)	2 (0.56%)
21+	2 (0.55%)	2 (0.56%)

[1] It is true that Plaintiffs agreed to define the class as including those for whom Defendants have received a court order. At the time, however, Defendants had faulty data maintenance protocols that made it impossible to know the extent of any potential problem regarding the timely transmission of court orders and discovery. Dkt. 131 at 8. Further, nothing in that class definition precludes this Court from making reference to the evidence presented at and after trial regarding the date an order was entered in order to delineate the time limits required by the constitutional balancing test.

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TOTAL	365 (100%)	354 (100%)

Dkt. 271-5 at 47-58; 57-68.

Immediately before trial, DSHS was able to secure the passage of a new state law requiring courts and prosecutors to transmit competency services orders and other necessary documents to Defendants within 24 hours. Wash. Rev. Code § 10.77.075 (2015). In April of 2016, in 70% of cases Defendants received both the court order and the discovery on the *same day* that the court order was entered, and in 93% of cases received both within the first 1-3 days after the order was entered. The numbers continued to improve in May, when Defendants received both court order and discovery on the same day the order was entered in 71% of cases, and within 1-3 days in more than 95% of cases. Defendants' actions show that if they take reasonable steps, they have the ability to rectify any systemic issues with delays in the transmission of court orders.

Defendants' argument thus boils down to the proposition that the existence of a tiny minority of cases with delays in receiving documents constitutes a legitimate state interest in delaying the provision of competency services to the overwhelming majority of class members. But the Ninth Circuit was clear that the Due Process analysis is a balancing of the legitimate interests of the state against those of the class. *Trueblood*, 2016 WL 2610233, at *5 ("Thus, '[w]hether the substantive due process rights of incapacitated criminal defendants have been violated must be determined by balancing their liberty interests … against the legitimate interests of the state,'" citing *Mink*, 322 F.3d at 1121 and *Youngberg*, 457 U.S. at 321).

As long as the time limit prescribed by this Court's injunction protects legitimate state interests, any further delay predicated on non-legitimate interests is precluded in order to protect the interests of the class. Defendants' interest in running an efficient forensic mental health

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system would be sufficient to warrant delaying constitutional protections if delays in court orders were rampant and outside of their control.[2] But because only a small percent of court orders are not received in a timely manner and Defendants have control over systems of court order distribution, there is no legitimate state interest in postponing providing competency services until receipt of a court order. Neither is Defendants' seeming preference not to exercise their authority to demand timely transmission of court order a legitimate state interest. Once again, Plaintiffs feel compelled to observe that Defendants' interests should largely align with those of their clients, but when compared against the needs of class members who have been adjudicated in need of transfer to a hospital, Defendants' interests are outweighed by class members' liberty interests. This Court should stand by its original injunction and require that the timeframe for providing competency services begin to run at the signing of the court order.[3] [4]

C. Defendants' Misread the Ninth Circuit's *Trueblood* Opinion

1. The Ninth Circuit did not hold that all evaluation deadlines must begin with receipt of the court order

Defendants' strained reading of the *Trueblood* decision is that the Ninth Circuit mandated that time periods for all competency evaluations must start at receipt of the court order. Dkt. 288

[2] Defendants have a primary interest in bringing individuals to trial. *Trueblood*, 73 F. Supp.3d at 1315. Additional interests include conducting effective and accurate competency evaluations, restoring competency to those who need it, and having an "efficient and organized competency evaluation and restoration system." *Id.*

[3] If this Court wishes to reconsider the triggering moment for constitutional protections, if could address Defendants' concerns within the terms of its enforcement of the original injunction. Any legitimate state interest implicated in the increasingly rare occasions when the receipt of orders is delayed, can be addressed by requiring Defendants to thoroughly document delays and include detailed information regarding each instance of delayed receipt of a court order in their monthly reports to the court monitor. The documentation should include what steps Defendants have taken to prevent the delay, the cause of the delay, and steps Defendants will take to ensure no further delays occur. This Court can then review that documentation, at its discretion, and determine whether Defendants have taken all reasonable steps in good faith to prevent the delay; if so, this Court could find that Defendants have not violated its injunction with respect to those instances of delay.

[4] Defendants gesture at a state interest in not admitting class members within seven days, citing "impacts on bed space resources" and asserting that class members will be "taking spots [in state hospitals] away" from others in need. Dkt 288 at 7, 12. This is transparently an illegitimate interest. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir.2003) ("Lack of funds, staff or facilities cannot justify the State's failure to provide [such persons] with [the] treatment necessary for rehabilitation.")

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at 8. However, that decision only held that this Court improperly focused on what was achievable when determining the constitutional parameters within which Defendants must perform in-jail evaluations. Further, Defendants' argument overlooks two critical issues.

First, the Ninth Circuit explicitly disavowed consideration of the part of the injunction of which Defendants now seek reconsideration. *Trueblood*, 2016 WL 2610233, at *1, *4. When an appellate court explicitly states that it is not considering an issue, as did the Ninth Circuit in *Trueblood* for in-hospital evaluations, it strains credulity to claim the decision nonetheless resolves that issue.

Second, the Ninth Circuit remanded portions of this Court's injunction that govern the length of time that Defendants have to *complete* in-jail evaluations. Defendants, relying on the Ninth Circuit's decision regarding in-jail evaluations, now belatedly seek to re-litigate the time period before in-hospital competency services must *begin*. Defendants ignore this crucial distinction between the competency services that were before the Ninth Circuit and the in-hospital evaluation services in question here.

2. Dicta in the Ninth Circuit's opinion is not binding precedent

Defendants argue that this Court is compelled by the Ninth's Circuit's decision to start time limits for all competency services at the receipt of court orders, rather than the entry of those orders. Dkt 288 at 1. Defendants primarily rely upon *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) and *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004). In each case, Defendants misapprehend or misapply the case law. *Miller* represents the lynchpin of Defendants' argument, but the scope of the holding in *Miller* is narrower than Defendants recognize. Citing *Miller*, Defendants argue, "Lower courts must adhere not only to the holdings of Ninth Circuit panels, 'but also to their explications of the governing rules of law.'" Dkt. 288 at

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7. However, unlike *Miller*, there is nothing in the *Trueblood* opinion that announced a governing rule of law with respect to whether time periods should begin when a court order is received, as opposed to when it is entered. Rather, the *Trueblood* decision agreed that the due process balancing test was the appropriate rule of law, but disagreed with this Court's emphasis on what was achievable as opposed to what was constitutionally mandated as determined by balancing the parties' interests.

In a further effort to support their argument that *Trueblood* requires beginning the time limit upon receipt of court orders, Defendants offer a partial quote from *Cetacean Cmty*.: "where a panel confronts an issue germane to the eventual resolution of the case, and resolves [the issue] after reasoned consideration in a published opinion, that ruling becomes the law of the circuit." Defendants omitted the full context for the quote, which is as follows:

> "A statement is dictum when … '"made during the course of delivering a judicial opinion, but ... is unnecessary to the decision … and [is] not precedential."'"

Cetacean Cmty., 386 F.3d at 1173. Indeed, the decision in *Cetacean Cmty.* found that the language in question was non-binding dicta. Unlike *Miller* and *Cetacean Cmty*, the *Trueblood* opinion presents a case in which the Ninth Circuit did **not** resolve an issue after reasoned consideration. Rather, the appellate court expressly remanded the question of timelines for in-jail competency evaluations, including how to calculate those timelines, and it only indicated that the district court's injunction did not allow sufficient time to serve legitimate state interests relating to in-jail evaluations. *Trueblood*, 2016 WL 2610233, at *7-8.

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3. Both In-Hospital Competency Evaluations and Competency Restoration Demand the Same Constitutional Protections

Defendants claim that "this Court's prior analysis concerning the inpatient evaluation group was based on was rejected" by the Ninth Circuit and, as such, this Court must reconsider its injunction. Dkt. 288 at 10. This is incorrect. The Ninth Circuit's opinion only addressed the matter before it: the scope of protections for class members court-ordered to receive in-jail evaluations. Nothing in the Ninth Circuit's opinion addressed analysis of the constitutional protections for court ordered in-hospital evaluations.

Assuming arguendo that there is a difference between the needs of those receiving in-jail evaluations and those receiving in-hospital evaluations, class members court-ordered to receive in-hospital evaluations have exhibited symptoms such that a Washington State judge has taken the unusual step of ordering an evaluation in a hospital setting. Doing so makes class members court-ordered to receive in-hospital evaluations more similar to those provided protections by *Mink* than those court-ordered to receive in-jail evaluations because they have been adjudicated as needing mental health services in a hospital.

Moreover, Defendants' argument that delays outside of their control create a legitimate state interest in delaying the provision of in-hospital evaluations just as they may for in-jail evaluations fails. The factors Defendants allege delay evaluations (timely transfer of information and availability of defense counsel) only impact the timely *completion* of in-jail evaluations, and do not have the same level of impact on the timely transfer to the hospital to *begin* an evaluation. Further, Defendants claim that a short timeframe for in-hospital evaluations somehow

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incentivizes class members and their attorneys to "game the system" by seeking in-hospital evaluations. This argument misstates the statutes governing in-patient competency evaluations.[5]

D. The *Trueblood* decision does not compel the adoption of a fourteen-day limit

This Court should reject Defendants' argument that it should defer to the toothless state law that Defendants tailored in response to this litigation. This argument is nothing more than a transparent attempt to continue violating the rights of class members with no consequence or supervision.[6] The Ninth Circuit did not, as Defendants assert, mandate that this Court must defer to state law on this issue. Rather, the *Trueblood* decision held that:

> The court's findings and conclusions do not take into consideration this legislative change, nor do they consider whether this time limit would pass constitutional muster. ***On remand, the district court should evaluate the effects of the revised legislation.***

Trueblood, 2016 WL 2610233, at *7 (emphasis added).

If the Ninth Circuit had intended to instruct this Court to simply adopt the time limits of the state statute, it could have done so. It did not. Instead, this Court is directed to *consider* and *evaluate* the state statute. As discussed in Plaintiffs' remand motion relating to in-jail evaluations, the state law was passed only in response to this litigation, and should be viewed

[5] A judge must find that class members are in need of competency services before Defendants have any obligation to provide them services, whether in-jail or in the state hospitals. Subsequently, a class member will only be ordered for in-patient evaluation pursuant to the judgment of an evaluator or by ruling of the court based on a finding that it is necessary to perform in-patient evaluation for the accuracy of the evaluation or the safety of the class member, or in the case of murder charges. Wash. Rev. Code § 10.77.060(1)(c)-(d). Defense attorneys are not in a position to unilaterally demand in-patient evaluations.

[6] Ironically, Defendants argue that this Court should abdicate its duty to analyze the Constitutional balancing test and defer to state law that they have utterly failed to comply with.

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with skepticism as a result.[7] *See* Dkt. 259 at 15-16; Dkt. 283 at 8-10. As such, based on the evidence presented deference to the state statute is improper.

In general, "[c]ourts must beware of attempts to forestall injunctions through remedial efforts and promises of reform that seem timed to anticipate legal action, especially when there is the likelihood of recurrence." *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987). Further, when the statute at issue has little to no legislative findings, as here, then a district court giving "significant weight to evidence in the judicial record . . . is consistent with [the Supreme Court's] case law." *Whole Woman's Health v. Hellerstedt*, ___S. Ct.___, 2016 WL 3461560, at *16-17. As such, this Court should not simply defer to the statute, and should do its duty to perform the substantive due process balancing test weighing only *legitimate* state interests against the interests of class members. As discussed above, the proper result of that balancing test is that there is no legitimate state interest in delaying in-hospital competency services past seven days after the entry of a court order, as there is no evidence of delay in receipt of court orders.

III. CONCLUSION

For the foregoing reasons this Court should deny Defendants' motion.

DATED this 11th day of July, 2016.

[7] Whether Washington had legitimate government interests motivating enactment of a 14-day timeline in SSB 5889 can be illustrated by the context surrounding the bill's passage. The legislature considered two companion bills to address the timeline for competency evaluation and restoration services, but neither bill contained any findings to explain the new 14-day timelines each proposed. HB 2060, 2015 Leg., 64th Sess. (Wash. 2015); SSB 5889, 2015 Leg., 64th Sess. (Wash. 2015). Further, the statements of legislators and the language of the statute itself provide context and guidance for the statute's purpose. Legislators speaking in support of a 14-day timeline cited the impending trial as cause for support. House Floor Debate for Final Passage of SSB 5889, March 9, 2015, http://www.tvw.org/watch/?eventID=2015031054; House Floor Debate for Passage of HB 2060, March 4, 2015, http://www.tvw.org/watch/?eventID=2015031013.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- Nicholas A Williamson (NicholasW1@atg.wa.gov)
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