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' REPLY - MOTION TO RECONSIDER SCOPE OF INJUNCTION REGARDING TIMING OF SERVICES AND INPATIENT EVALUATIONS **NOTED FOR JULY 15, 2016**

The Department's motion is procedurally appropriate, and asks the Court to consider important questions raised by the Ninth Circuit's Opinion. The Department respectfully requests that the Court consider how the law of the Circuit, as set forth by the Ninth Circuit's Opinion, impacts portions of the injunction not specifically vacated.

A. The Department's Motion Is Not Time Barred and Is Procedurally Appropriate Following Remand from the Ninth Circuit

The Department's motion is timely. The Court accepted the Plaintiffs' filing of a "Motion To Reconsider Scope Of Injunction," twenty-nine days after the Ninth Circuit's ruling. Dkt. #259. Several weeks later, the Department now files a similarly styled motion seeking similar relief from the Court. The Department's motion is also procedurally

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appropriate under Fed. R. Civ. P. 60. Such motions may be brought when a judgment is "based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(5), (6). Motions brought under 60(b)(4), (5), and (6) are timely when brought "within a reasonable time" and do "not affect the judgment's finality or suspend its operation." Fed. R. Civ. P. 60(c)(1)-(2). The Department's motion is reasonably timely, filed the same month as Plaintiffs' motion addressing similar issues on remand, and before that motion has been heard. Dkt. #259; see also Dkt. #290.

While the Department seeks reconsideration of an element not expressly vacated by the Ninth Circuit, the Court is still bound to apply the holdings and the reasoning of the Ninth Circuit. *See* Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004). Regardless of the procedural mechanism employed, it is appropriate for the Department to seek relief from this Court following remand from the Ninth Circuit. If the Department were unable to bring the same type of "Motion For Reconsideration" that Plaintiffs filed, the Department would be unfairly barred from seeking relief related to remand only because those issues were not raised by Plaintiffs in their motion.

The relevant Fed. R. Civ. P. 60(b) inquiry "asks only whether 'a significant change either in factual conditions or in law' renders continued enforcement of the judgment 'detrimental to the public interest.' " Horne v. Flores, 557 U.S. 433, 453 (2009) (internal quotation omitted). The Opinion of the Ninth Circuit is the type of significant change in the law that is appropriately addressed under Fed. R. Civ. P. 60(b)(5). *See* Horne, 557 U.S. at 447. "Instead of focusing on the failure to appeal, the Court of Appeals should have conducted the type of Rule 60(b)(5) inquiry prescribed in Rufo." Id. at 457 (citing Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367 (1992)).

Plaintiffs other procedural attacks on the Department's motion are similarly unavailing. In addition to Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) and Cetacean Cmty. v. Bush,

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386 F.3d 1169, 1173 (9th Cir. 2004), there is a plethora of authority that stands for the proposition that this Court should apply the legal analysis supplied by the Ninth Circuit.[1] Plaintiffs argue that the Ninth Circuit's holding concerning calculation of time "presents a case in which the Ninth Circuit did not resolve an issue after reasoned consideration." Dkt. #291 at 9. That is untenable. "[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, regardless of whether doing so is necessary in some strict logical sense." Cetacean Cmty., 386 F.3d at 1173 (quoting United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J., concurring)). The Ninth Circuit specifically rejected the Court's starting point for calculation of time for clearly articulated reasons. Trueblood v. Washington State Dep't of Soc. & Health Servs., No. 15-35462, 2016 WL 2610233, at *7 (9th Cir. May 6, 2016). The Ninth Circuit articulated clear holdings regarding the appropriate constitutional analysis and the calculation of time, and the reasoning and analysis applied to those issues cannot not be ignored as dicta, as Plaintiffs urge.

B. Under Controlling Circuit Authority, All Portions of the Injunction Should Be Calculated from the Date the Court Order Is Received

The Supreme Court has stressed that Rule 60(b) "serves a particularly important function in what we have termed 'institutional reform litigation.' " Horne, 557 U.S. at 447 (citing Rufo, 502 U.S. at 380). Injunctions requiring institutional reform "raise sensitive federalism concerns" which are heightened when the injunction "has the effect of dictating state or local budget priorities." Horne, 557 U.S. at 448. In holding that the Constitution

[1] In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895); *see also* Cowgill v. Raymark Indus., Inc., 832 F.2d 798, 802 (3d Cir.1987); Firth v. United States, 554 F.2d 990, 993 (9th Cir.1977) ("When a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court."). District courts "must implement both 'the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.' " Vizcaino v. U.S. Dist. Court for W. Dist. of Washington, 173 F.3d 713, 719 (9th Cir.), *as amended* (June 10, 1999), *opinion amended on denial of reh'g sub nom* (quoting Delgrosso v. Spang & Co., 903 F.2d 234, 240 (3d Cir.1990)).

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requires that the clock begin running on the date the order is issued, rather than the date the order is received, the order directly conflicts with the law of the Circuit. Modification of the order will address the federalism concerns created by an order that is no longer based on constitutional law.

Plaintiffs stipulated that delays in receiving court orders beyond the State's control should not be counted against the State, Dkt. #84 at 1-2, but now argue that the Court should ignore such delays because of the State's progress in reducing them. Br. at 6-7. This makes no sense. The State has taken many steps to reduce delays and has had great success, but that does not mean that the remaining delays are the State's fault or should be ignored. To the contrary, the evidence that delays are rare highlights the problem with the Plaintiffs' reasoning.

The Plaintiffs contend that the Ninth Circuit's holding regarding the starting of the clock "presents a case in which the Ninth Circuit did not resolve an issue after reasoned consideration." Br. at 9. That argument is indefensible. The Ninth Circuit resolved the issue by holding that mandating compliance within seven-days of the signing of the competency order, rather than receipt of the order by DSHS is a "deficienc[y]" that "fails to account for any period from issuance of the court order to receipt." Trueblood, 2016 WL 2610233, at *7. The Ninth Circuit reasoned that "practical impediments, such as intervening weekends or the time necessary to obtain documents can eat up the time period." Id. Both the holding and the supporting rational were clearly articulated.

The data Plaintiffs submitted in their response demonstrates that delays in transmission of court orders and documents remain an issue for nearly a third of all cases, and that the intervening weekends recognized by the Ninth Circuit continue to be a "practical impediment." *See* Dkt #271-5; see also Dkt #291 at 5-6. The evidence before the Court demonstrates that practical impediments are a real concern that must be accounted for consistent with Circuit law.

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C. Plaintiffs Fail to Apply the Proper Constitutional Balancing Analysis Pursuant to the Ninth Circuit's Opinion

Plaintiffs once again resort to the same argument already rejected by the Ninth Circuit; if it is possible to achieve, then it is required by the Constitution. *See* Dkt. #291 at 6-7. They attempt to revisit the same interests that were outlined in this Court's April 2, 2015 order and in Mink, instead of the interests identified by the Ninth Circuit. Dkt. #291 at 6, 7 n.2; *see* Trueblood, 2016 WL 2610233, at *6. This formula was expressly rejected by the Ninth Circuit, which held that the Court erred in couching its findings "in terms of what is 'reasonable and achievable'" instead of articulating "a sufficiently strong constitutional foundation" for the injunction. Id. at *7. Plaintiffs are asking that the Court turn a blind eye to the Ninth Circuit's holding, and enter an order in direct conflict with the law of the Circuit. In keeping with the Ninth Circuit decision, the State requests that the Court apply a reasonable relationship test and conduct a balancing analysis for inpatient evaluations. As argued in the Department's motion, a proper balancing of the interests demonstrates that there is a reasonable relation between the policies set forth in Washington State law, and the admission time mandated for inpatient evaluations.

1. In determining what time is reasonable, the Court should begin by looking to Washington law

The Ninth Circuit emphasized that in determining what amount of time is reasonable, it is appropriate to start by looking at State law. Trueblood, 2016 WL 2610233, at *7. Federalism principles require that "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.' " Id. (citing Rizzo v. Goode, 423 U.S. 362, 379 (1976)). Contrary to Plaintiffs arguments, State law should not be discarded as unconstitutional because the legislators who passed the bill were aware of the impending federal trial; the plain language of the statute is clearly understood and it is unnecessary to resort to the intent of the legislature. Darby v. Cisneros, 509 U.S. 137, 147

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(1993); Rubin v. United States, 449 U.S. 424, 430 (1981). Applying the correct analysis supplied by the Ninth Circuit, this Court should conclude that the inpatient evaluation timelines established by State law are constitutional and the Department should be ordered to adhere to that State law.

2. Plaintiffs oversimplify and mischaracterize the inpatient evaluation group

Plaintiffs argue that persons ordered for inpatient evaluations are the functional equivalent of persons ordered for restoration treatment, mischaracterizing the circumstances under which a defendant can be referred for an inpatient evaluation. Dkt. #291 at 10. As argued in Defendants' Motion to Reconsider Scope of Injunction, an evaluator can refer a defendant for an inpatient evaluation to ensure an accurate evaluation (including to rule out malingering), or a court can refer a defendant for an inpatient evaluation if: (i) the defendant is charged with murder in the first or second degree; (ii) the court finds that it is more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation; *or* (iii) the court finds that an evaluation outside the jail setting is necessary for the health, safety, or welfare of the defendant. Wash. Rev. Code. § 71.05.060(2)(c) and (d); Dkt. #288, at 5-6. This group has distinct interests that require a distinct analysis. They should not simply be treated as an analog to class members who have been adjudicated as incompetent.

D. Conclusion

The Department respectfully requests that the Court consider the additional remand questions raised by the Department's motion. The reasoning and analysis of the Ninth Circuit's Opinion have an undeniable impact on these other portions of the injunction. If these portions of the injunction were to remain unmodified, as Plaintiffs urge, the various parts of the injunction would be left legally and logically inconsistent. Time should be calculated from the receipt of the order for all parts of the class, and the Court should apply the reasonable

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relationship analysis to inpatient evaluations, while also considering principles of federalism.

RESPECTFULLY SUBMITTED this 15th day of July 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 15th of July 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 15 day of July 2016, at Olympia, Washington.

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