IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No.

IN RE PIERCE COUNTY,

Petitioner,

vs.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,

Respondent,

SANDRA HERRERA, et al.,

Real Parties in Interest.

From the United States District Court
for Western District of Washington
No. C95-5025 RJB/JKA

PETITION FOR WRIT OF MANDAMUS

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I. RELIEF SOUGHT

Pierce County seeks a writ of mandamus requiring the District Court to vacate its order denying the County's motion to remove the present Monitor, revoke his appointment, and impose guidelines for any replacement.

II. ISSUES PRESENTED

1. Should mandamus issue where a District Court fails to revoke the appointment of its Court Monitor when the Monitor was appointed without consent of defendant as expressly required by the consent decree?

2. Should mandamus issue where a District Court fails to remove its Court Monitor when that Monitor has a per se conflict of interest due to his simultaneous and ongoing employment in other cases by the same entity that is the sponsor of this litigation and that acts as plaintiffs' counsel?

3. Should mandamus issue where a District Court fails to remove its Court Monitor when the Monitor has shown actual bias by the adversarial and divisive manner in which he performs his duties, his intrusion into institutional functions that are outside his role as monitor, and his undisclosed ex parte partisan communications exclusively with plaintiffs' counsel?

III. STATEMENT OF FACTS

A. FACTUAL BASIS FOR MONITOR'S REMOVAL

Since 1995, the American Civil Liberties Union (hereinafter "ACLU")

has "sponsored this litigation" involving the federal rights of prisoners at the Pierce County Detention and Corrections Center (hereinafter "PCDCC") and acted as their counsel. See Ex. pp. 1, 16-17, 136, 168, 365. In 1986 the ACLU and Pierce County officials entered into a "Stipulated Order and Final Judgment" which provided that an "agreed expert to be designated by the parties shall serve as a Court Monitor" and would function for at least "two years following the adoption of a comprehensive policy and procedure manual" and during that term would report to the Court "with respect to Defendants' progress towards meeting and compliance with the requirements" of the Decree concerning "the constitutional standard of meeting the serious medical needs of all inmates in a timely fashion." Ex. p. 24 ¶ 6.3 & p. 26 ¶ 6.9. The Decree was made "enforceable as an injunction." Ex. p. 16 ¶ 17.1.

For ten years Steven Shelton, M.D., Medical Director of the Oregon Department of Corrections, served as the agreed Monitor without any party expressing concern as to the accuracy, quality, or objectivity of his work, until his responsibilities in Oregon and on the national level eventually interfered with his filing of timely reports and required his replacement. Ex. pp. 37-125. In his final report to the Court Dr. Shelton advised: "It is my opinion that PCDCC is ready for accreditation review by the National Commission on Correctional Health Care (NCCHC)" and that such would be "evidence al-

lowing closure of the health portion of the Herrera case." Ex. p. 76. Though the parties thereafter agreed to a specific successor for the position, the latter thereafter withdrew and each party then recommended a different candidate when they could not agree on a mutually acceptable alternative. See Ex. pp. 126-134. Over the County's objection that the curriculum vitae of plaintiffs' candidate revealed he repeatedly had "been retained as a consultant by an interested party to this litigation," Ex. pp. 120, 127, the Court appointed plaintiffs choice of Dr. Joseph Goldenson. Ex. p. 135.

After the new Monitor's appointment, the adversarial and divisive manner in which he approached his reporting duties,[1] his intrusion into clinical functions of PCDCC medical staff,[2] as well as his repeated failure to accurately communicate to the Court the information provided by the County,[3]

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[1] This includes but is not limited to undermining jail managers and creating divisions among management in meetings, Ex. pp. 224-25, 232, 234, as well as pressuring staff to agree to assertions to which they disagree. Id. at 224, 234.

[2] The Monitor intrudes into clinical functions outside his role as monitor by such acts as dictating the medical care of particular inmates and unilaterally imposing specific language into PDCC policies. Ex. pp. 231-32, 234-44, 260-65. Though he agrees his "function as a monitor is not overseeing particular call for treatments of particular patients," he states the Decree "doesn't tell me I can't do it, either, though." Id., 293 lns 4-7, 298 lns 4-9. However the Monitor is not licensed to practice in Washington. Ex. p. 123.

[3] The Monitor has repeatedly filed inaccurate reports to the Court concerning PCDCC staff's alleged statements to him and the supposed conditions at the PCDCC. See Ex. pp. 224, 228, 239.

eventually led staff uniformly to request the presence of counsel in its contacts with him and compelled the County to seek discovery on those issues. Ex. 185, 223-40, 241, 370, 432. This discovery revealed that though it had been disclosed at the time of his appointment that Dr. Goldenson in the past had "served as an expert on behalf of the ACLU," Ex. p. 80, 120, neither he nor the ACLU disclosed that at that time and thereafter he also while simultaneously serving as Monitor in this case was also actively in the employ of the ACLU and serving as its retained expert in other lawsuits. [4] Ex. p. 268 ln 2-p. 269 ln 22. Indeed, the County learned that even at the time of his deposition the Monitor is "still involved" as the ACLU's expert in an "ongoing" and "current case." Id. at 268 lns 9-21. Further, from the few records that the

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[4] FRE 201authorized the District Court to take judicial notice the National ACLU and its state affiliates are one and the same. See www.commentary magazine.com/viewarticle.cfm/more-on-aclu-12667 (ACLU Executive Director: "state affiliates are the ACLU itself. Each state affiliate is responsible for all litigation arising in its own state. The national office backs up affiliate litigation"); https://www.acluwa.org/donate/ moreinfo.cfm (Wash. ACLU: "When you join, you are automatically a member of the national ACLU and the ACLU of Washington, and your dues and contributions are shared"); www.aclunc.org /about/finacial_statements/asset_ upload _file121_5368.pdf (Cal. ACLU: "A portion of the national ACLU's share is allocated to help smaller affiliate offices around the country"); www.aclu.org/pdfs/ about/fy2008_aclu_990.pdf (ACLU, Inc. in 2007 reports $10M of $25M in program expenses go to "affiliate support"). The ACLU in response presented no evidence disputing these facts or that Dr. Goldenson currently is in its employ while he continues to serve in the case which it "sponsors" and acts as legal counsel.

Monitor and ACLU allowed defendant to have in discovery[5] and the Monitor's own deposition testimony, the County uncovered overwhelmingly one-sided undisclosed ex parte contacts about this case exclusively with ACLU counsel in which the Court's communications with the Monitor are being discussed, litigation strategy of plaintiffs is being previewed and that of defendant is anticipated, suggestions for the Monitor's conduct of jail visits and writing of reports are secretly being made and followed, and plaintiffs' counsel's advice about the Monitor's performance of his official duties is requested, given and carried out without notice to defendants. Indeed, the Monitor concedes that -- unlike defense counsel -- plaintiffs' counsel shares "litigation strategy" with him and that they provide him "advice" about the

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[5] The Monitor not only actively opposed the County's motion to allow discovery of his communications with the ACLU, Ex. p. 315, but -- even after the Court entered a stipulated order authorizing such discovery, id. at 242 -- the Monitor refused to comply with a subpoena filed thereunder requesting those ACLU communications in other cases in which he is their expert because he deems them not "really any of your business." Id. 266-67, 317-21. However, no objection to the subpoena, no motion to quash, and no privilege log was ever filed as required. Id., 270 ln 23-p. 271 ln 16. See also F.R.C.P. 26(c), 45(c)(2)(B), 45(d). Even as to communications between the Monitor and the ACLU in the instant case, most records that were once in the Monitor's possession have not been provided by him because purportedly he destroyed them. See Ex. p. 272 ln 3-p. 273 ln 17. Though the ACLU has provided none of its communications with him in other cases, it "as a matter of courtesy" has begrudgingly provided some of their missing ex-parte communications with the Monitor in the instant case. Id., pp. 362-64.

performance of his duties without defendant's knowledge. Ex. p. 283 ln 22-28 ln 1, p. 284 lns 11-16, p. 296 lns 12-15, p. 298 ln 23- p. 299 ln 12, p. 309 lns 9-12. Because "a lot of communication" of this nature is occurring exclusively with ACLU counsel and not being disclosed to defendant, id, p. 306, even the Monitor admitted it "sort of made sense" that his relationship with plaintiffs' counsel has led defendant to question his objectivity, that "I shouldn't have" made at least some requests to the ACLU for advice, and that he "really [does not] have a response to that" other than that "I knew Diamondstone [i.e. plaintiffs' counsel] better." Id., p. 295 lns 13-15, p. 299 ln 23- p. 300 ln 5, p. 306 lns 13-22, p. 307 lns 11- 23. Specific examples are:

1. Disclosure of Court Communication And Advice What To Tell It

The Monitor discloses exclusively to plaintiffs' counsel his communications with the Court. See, e.g., id., p. 300 ln 22-p. 301 ln 17, pp. 330, 353. Further, the Monitor exclusively requests and follows ACLU advice on what to tell the Court. For example, the Monitor without the County's knowledge or seeking its input, asked only plaintiffs' counsel for advice on how the Court expected him to respond to a request for time from defendant and in response was provided counsel's detailed list of what to "let the Court know:"

> You were at the jail in Nov
> You prepared a draft report in Dec which the Defts [sic] have reviewed.
> They want to respond in mid Jan, before you finalize. You think it

> best to honor that request and have the benefit of their comments before finalizing the report to send to plaintiffs' counsel and the Court. You plan to report by end of Jan (???)

Id. 283 ln 22-p. 284 ln 16, pp. 327-329. Though the record reveals other occasions where the Monitor also sought and followed advice exclusively from plaintiffs' counsel about what he should ask the Court to do in the case -- and reported back to plaintiffs' counsel exclusively -- only some of those communications have been disclosed. See e.g. id., p. 286 lns 3-23, p. 330.

2. Advice On Law And Monitor's Contacts With County Agents

The Monitor also solicits legal advice about his duties from plaintiffs' counsel rather than from the Court without notifying either the Court or defendants of such. For example, after being served defendant's subpoena duces tecum pursuant to the stipulated court order, see id., p. 242, p. 317, the Monitor -- without notice to defendant -- spoke on February 22, 2009 with plaintiffs' counsel and "asked if this is something that I needed to do." Id. p. 272 lns 3-12. Similarly, when he later was served with defendant's deposition subpoena, the Monitor -- again without notice to defendant -- asked plaintiffs' counsel legal questions about the Court's "February 17 order" that authorized his deposition and was advised by plaintiffs' counsel as to what they believed defendant "can question you about …." Id., p. 275 lns 6-18, p. 322. Though the Monitor also had other undisclosed conversations exclu-

sively with plaintiffs' counsel regarding defendant's subpoenas and his deposition, he testified he made no notes of those conversations. Id. p. 272 ln 20-p. 273 ln 4; p. 274 ln 24-p. 276 ln 10, p. 277 lns 2-10, p. 324. It is well documented, however, that the Monitor refuses to provide existing communications with the ACLU in the other cases in which it is retaining him as its expert -- despite a Court authorized subpoena. Id., p. 267 lns 18-22, pp. 317-21.

The Monitor also regularly requests guidance exclusively from plaintiffs' counsel on how to interact with PCDCC medical staff and its counsel without notice to the County. For example, on July 9, 2008, the Monitor requested plaintiffs' counsel tell him "what you'd like me to do" about County medical staff's request for additional time to respond to his draft report and was told by plaintiffs' counsel: "Let's go ahead: give them the time and send me a copy of the draft." Id., p. 338 (emphasis added). Similarly, on October 27, 2008, the Monitor secretly requested plaintiffs' counsel's guidance on a proposed response he was considering sending defense counsel and was advised by plaintiffs counsel to "let it percolate, for now …" since "I have no interest in picking a fight on this." Id., 346 (emphasis added). The Monitor followed plaintiffs' counsel's advice. Id., p. 300 lns 11-12.

3. How To Conduct Visits, What To Put In Report, When To File It

When the Monitor conducts jail inspections he meets with ACLU

counsel for dinner -- meetings of which he has not advised, and to which he has never requested the presence of, defense counsel. Id. 279 ln 21-p. 280 ln 5. The Monitor does not recall who pays for those dinners, id., but does recall that over the meals plaintiffs' counsel will "express[] some concerns that he'd like us to look into" -- as plaintiffs' counsel also regularly does on other occasions likewise without defendant's knowledge, id., p. 295 lns 4-24, p. 302 lns 1-23, pp. 336, 339-341, 348, 352, 358 -- and the Monitor does so "if they seem reasonable to me." Id., p. 278 lns 11-17, p. 282 lns 3-15. Accordingly, prior to the Monitor's visit in June of last year, plaintiffs' counsel wrote him in exhaustive detail -- again without defendant's knowledge -- about supposed medical issues of specific inmates and, before thanking him for "your attention to these matters," specifically directed him to:

> … review the charts of all individuals mentioned in this letter and my earlier April 29th letter and that you also conduct a chart review in a number of randomly selected cases involving medical issues of your choosing. As part of your chart review, I ask that you also contact the inmates whose charts you reviewed and who may still be incarcerated at Pierce County to ascertain whether they have any complaints or observations relevant to your assessment of issues related to access to care as well as quality of medical care.

Id., p. 335. See also id., p. 288 ln 21-p. 290 ln 19s, 75. Apparently after discussing this over dinner, id., p. 291 ln 25-p. 292 ln 13, the Monitor did as advised and later reported back to plaintiffs' counsel -- again without notice to defendants. Id., p. 289 ln 22-p. 290 ln 5. Rather, the County's first hint that

the Monitor was acting at plaintiffs' behest was when Dr. Goldenson specifically arranged to examine a particular inmate -- who unknown to defendant had been listed in plaintiffs' counsel's letter and that had earlier asserted to staff that his attorney "Fred Diamondstone" wanted an MRI of his shoulder -- and the Monitor against staff advice coincidentally required an unnecessary MRI. Id. at 290 lns 6-13; 231. See also 287 ln 2-p. 288 ln 1.

Also at these dinners, the Monitor reviews with plaintiffs' counsel his observations from his jail visits before his report is written and plaintiffs' counsel requests -- without defense counsel's knowledge or specific acknowledgement in the report -- that the Monitor incorporate certain findings or suggested language or mention certain alleged incidents to assist them on particular motions they want to file with the Court. See id., p. 281 lns 1-23, p. 283 lns 1-9, pp. 325-26. An example of this occurred after the aforementioned June 2008 visit and dinner when plaintiffs' counsel -- again without the knowledge of defense counsel -- emailed the Monitor and advised him that they intended "to bring some concerns … to the Court's attention" and therefore would be attaching "your earlier report" and asking to "add some language for you to approve" to his report that supposedly "dental concerns that you noted earlier were persistent, that the County has thus far failed to act on your recommendations, and that their indications as to what they planned to

do to 'catch up' would not fundamentally address the problem …." Id., p. 336 (emphasis added). Plaintiffs' counsel explained their request was being made because "we need to move forward on the dental care problems sooner, rather than later, and we anticipate that your report will take more than a few weeks to draft …" Id. Though plaintiffs' actual suggested additional language that the Monitor was to "review and edit" before incorporating it into his report has not been disclosed, plaintiffs' suggestions apparently became part of the report. Id. 155-56. Plaintiffs' undisclosed influence on the Monitor's function even extends to requesting the Monitor follow up on whether the County got "back to you … as they said they would," and secretly requesting he report to them his "current plan re finalizing and filing your report." Id. p. 354.

Though the Monitor concedes many of his exclusive undisclosed ex parte communications with plaintiffs' counsel concern the latter's litigation strategy, id., p. 312 lns 14-24, he neither discusses strategy with defense counsel nor accepts direction from them. Id., p. 309 lns 1-12. As to jail medical staff, they in contrast only are offered an opportunity to respond to the Monitor's reports after they are drafted and have incorporated plaintiffs' unidentified input, while their comments both are openly provided to plaintiffs and specifically acknowledged to the Court. See id., pp. 313-14, 327.

B. MOTION TO REMOVE MONITOR AND IMPOSE GUIDELINES

On July 9, 2009, the County filed a motion requesting removal of Dr. Goldenson and appointment of "a new agreed upon Monitor who has not been, and is not being, retained" by those involved in this litigation as well as the imposition of guidelines on any future Monitor's undisclosed ex parte contact with counsel so as to "avoid similar problems in the future." Ex. p. 256. Though its motion confirmed "there is nothing inappropriate about limited ex parte contacts with [the parties'] respective counsel solely on administrative and other non-substantive issues," id., the County detailed the aforementioned appointment over the County's objection, divisive conduct, overreaching and undisclosed ex parte contacts exclusively with ACLU counsel in which the Monitor -- not just communicates in a manner inconsistent with the duties of an impartial agent of the Court and with the appearance of fairness[6] -- but without County knowledge requests and is secretly offered and follows

[6] Plaintiffs' counsel not only without notice to the County confide in the Monitor when they are "planning to go to the judge on" an issue, Ex. p. 349, but consult about their "reading" of the County's anticipated responsive strategy. Id., p. 304 lns 6-16, p. 355. Plaintiffs' counsel also provide the Monitor their detailed views of mediation issues and the Monitor asks only plaintiffs' counsel to advise him how ADR progresses. Id., p. 298 ln 2-p. 299 ln 2, pp. 342-45. Similarly, the Monitor sends plaintiffs' counsel copies of communications with jail staff, but does not correspondingly share with PCDCC staff his communications with plaintiffs' counsel. Id., p. 297 lns 5-11, p. 342. Even when the Monitor seeks copies of the County's filings, his request is directed to plaintiffs' counsel rather than to the more logical authoring defense counsel. Id., pp. 303 lns 17-24, 324, 355.

plaintiffs' counsel's advice on how to perform his duties and thereby acts more as plaintiffs' agent than the Court's officer. Id.

On July 29, 2009, the County received Magistrate Judge J. Kelly Arnold's recommendation that the motion be denied and that restated County concerns as only "displeas[ure] with Dr. Goldenson's involvement with other correctional facilities as an expert witness for prisoner plaintiffs, and what they perceive as a close relationship with plaintiffs' counsel." Ex. p. 368. When the County on August 6, 2009, filed its objection to that recommendation, 374, plaintiffs quickly the next week moved to modify the consent decree to "order increased nursing staff based on the Court Monitor's recommendation" at an additional cost to County taxpayers during difficult economic times of approximately $1 million. Id. p. 387, 401, 427-28. On September 4, 2009, District Court Judge Robert J. Bryan denied the County's objection concluding, among other things, that "what is surprising … is not what has gone on with the monitor and counsel for the plaintiffs, but what has not gone on between the monitor and counsel for the defendants" since "I would have expected that there would be the same kind of open discussion with the monitor with defense counsel as apparently has gone on with plaintiffs' counsel." See p. 442. Specifically, the Court held: 1) it is "too late" to object that the Monitor was not agreed to as required by the Consent decree, id.; 2) there

was no per se conflict because 28 U.S.C. §455 "does not apply to court monitors," id. at 444; and 3) there was no showing of "actual bias here." Id.

Because the subject order warrants the issuance of a writ of mandamus and because in moving to disqualify a court officer counsel has "an independent responsibility as an officer of the court" to raise the issue, see In re Bernard, 31 F. 3d 842, 847 (9th Cir. 1994), the County has filed a notice of appeal and now alternatively also petitions the Court for a writ of mandamus.

IV. REASONS WHY WRIT SHOULD ISSUE

Though Pierce County has filed a notice of appeal because the District Court's denial of its motion to remove the monitor is an order "continuing … or refusing to … modify" an injunction within the meaning of 28 U.S.C. § 1291(a)(1) and therefore is immediately appealable, see Ex. p. 34 ¶17.1 ("This Stipulated Order and Final Judgment shall be enforceable as an injunction."); Hook v. Arizona Dept. of Corrections, 107 F.3d 1397, 1401 (9th Cir. 1997)(denial of motion to substitute another judicial officer for a special master under consent decree was appealable as of right because denial resulted in defendants being required to continue to pay fees and expenses of master), there also is authority that holds under certain circumstances an appeal is not available concerning an appointment under the consent decree of the Court's agent and that a writ of mandamus is the only available remedy for that issue.

See Thompson v. Enomoto, 815 F.2d 1323, 1327 (9th Cir.1987) (§1291(a)(1) appeal not available to revoke appointment of special master because it was "pursuant to, and not a modification of, the original consent decree."); Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003)(appeal of appointment of Monitor to Special Master on grounds of overreaching and ex parte contacts did not concern an injunction so as to be appealable but mandamus warranted because "there is no other way for the Department to obtain effective relief on its claims that Kieffer should not have been appointed ….")

Though its "considerations are cumulative and proper disposition will often require a balancing of conflicting indicators," Bauman v. United States Dist. Court, 557 F.2d 650, 655 (9th Cir. 1977), the following are the considerations used to analyze if mandamus is appropriate under 28 U.S.C. §1651:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. [citations omitted]. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) [citations omitted]. (3) The district court's order is clearly erroneous as a matter of law. [citations omitted] (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. [citations omitted] (5) The district court's order raises new and important problems, or issues of law of first impression.

557 F.2d at 654-655. See also Douglas v. U.S. Dist. Court for Cent. Dist. of California, 495 F.3d 1062, 1066 (9th Cir. 2007)(granting mandamus in class action because "all five factors need not be satisfied at once.")(citing and

quoting Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1551 (9th Cir.1994) and Valenzuela-Gonzalez v. U.S. Dist. Court, 915 F.2d 1276, 1279 (9th Cir.1990)). Here, four of these factors support mandamus. See United States v. Harper, 729 F.2d 1216, 1222 (9th Cir. 1984)("Four of the five considerations" warranted mandamus and "[r]arely, if ever, will the final two Bauman guidelines both be applicable in a given case" so if "one of the two is present, the absence of the other is of little or no significance.")

A. IF DIRECT APPEAL IS UNAVAILABLE, NO OTHER ADEQUATE MEANS EXISTS TO REVOKE MONITOR'S APPOINTMENT

If the subject order is not appealable under 28 U.S.C. §1292 as to the issue of the Monitor's appointment under the consent decree, Pierce County would have no other adequate means, such as a direct appeal, to attain removal of the Monitor on that ground. See Cobell, 334 F.3d at 1139 (mandamus appropriate because "there is no other way for the Department to obtain effective relief on its claims that Kieffer should not have been appointed ….")

B. APPOINTMENT AND CONTINUING HARM NOT OTHERWISE CORRECTABLE ON LATER APPEAL

The first Monitor served for ten years without dispute as to his objectivity and fairness and concluded his service years ago by reporting to the Court that the PCDCC provided care so far beyond the constitutional minima that it would pass "accreditation review by the National Commission on Correc-

tional Health Care (NCCHC)" and that "closure of the health portion of the Herrera case" was near. See Ex. p. 76. See also Bell v. Wolfish, 441 U.S. 520, 543 (1979)("while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question"); Rhodes v. Chapman, 452 U.S. 337, 349 (1981) (same); Gary H. v. Hegstrom, 831 F.2d 1430, 1433 (9th Cir. 1987) ("the wholesale adoption of various professional associations' concepts for model institutions as if they were constitutionally mandated was unwarranted"). In contrast, under the current Monitor, litigation of the case continues year after year because his reports continue to claim such is required based on outside standards rather than constitutional requirements. See Ex. p. 388 (ACLU seeks nearly $1 million per year in extra staffing costs "based on the Court Monitor's recommendations"), p. 401, p 406-24, p 428-29, p. 430. See Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir. 1986)("We will scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' constitutional rights and does not require more of state officials than is necessary to assure their compliance with the constitution"); Madrid v. Gomez, 889 F.Supp. 1146, 1256 (N.D. Cal. 1995)("Eighth Amendment does not require that prison officials provide the most desirable medical and mental health care; nor should judges simply

'constitutionalize' the standards set forth by professional associations").

Hence, denial of a motion to remove the Monitor "is by its nature irreparable" because by the time of appeal the prejudice "has worked its evil and a judgment of it in a reviewing tribunal is precarious." See Berger v. United States, 255 U.S. 22, 36 (1921). See also Cobell, supra.; In re United States, 666 F.2d 690, 694 (1st Cir. 1981)(review on the grounds appointment violated the terms of the consent decree was not correctable on appeal because a "case involving a motion for disqualification is clearly distinguishable from those were a party alleges an error of law that … may be fully addressed and remedied on appeal"). Absent appellate review, damage and prejudice to petitioner will continue without correction so long as the current Monitor remains.

C. ORDER WAS CLEARLY ERRONEOUS AS A MATTER OF LAW

The district court's order is "clearly erroneous as a matter of law" because, as demonstrated below, for numerous reasons an examination leaves "the definite and firm conviction that a mistake has been committed." Harper, 729 F.2d at 1222.

1. Appointment Over County's Objection Violated Decree

The Supreme Court has explained that because in a consent decree a defendant has "waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given

that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." United States v. Armour & Co., 402 U.S. 673, 681-82 (1971). Though the Consent Decree here expressly provides that only an "agreed expert to be designated by the parties shall serve as a Court Monitor" for "no less than two years following the adoption of a comprehensive policy and procedure manual," Ex. p. 26 ¶ 6.9, the current Monitor was appointed over the County's objection and has continued despite its motion two years later. Ex. p. 127. However, the District Court rejected this violation of the Consent Decree as a basis for removing the Monitor because such "may be unfortunate, but at this point, that's not grounds to remove him" because it "comes too late." Ex. p. 2.

However, in the only authority discovered that addresses mandamus for denial of a motion to revoke the appointment of a monitor on the ground it was done contrary to the consent decree, a writ was granted and the District Court ordered to remove the monitor where the government alleged the latter had "intruded unduly into the function of the Executive branch" and had his inappropriate "ex parte meetings had created an appearance of partiality" because the appellate court found "the District Court does not have inherent power to appoint" such a monitor "over a party's substantial objection." Co-

bell, 334 F.3d at 1141-43. Such was the holding despite plaintiffs' claim the government initially had consented to the appointment "for at least one year from this date" but "after a year's experience" objected absent certain limiting conditions. Id. Here, as noted above, Pierce County never consented to the Monitor and -- after its experience and discovery that the Monitor consistently performs his duties in an adversarial and divisive manner, fails to accurately communicate in his reports the information provided him by the County, has undisclosed ex parte partisan communications exclusively with plaintiffs' counsel and intrudes into clinical functions of PCDCC medical staff by dictating the medical care of particular inmates and unilaterally imposing specific language into its policies, see e.g. Ruiz v. Estelle, 679 F.2d 1115, 1162, opinion amended in other respects, 688 F.2d 266 (5th Cir. 1982)("monitors are not to consider matters that go beyond superintending compliance with the district court's decree," because "the powers of the court's appointed agents should not intrude to an unnecessary extent on prison administration.") -- filed a motion to remove him by the end of his minimum two term under the decree. Ex. pp. 231-32, 234-35, 260-265.

As in Cobell v. Norton, the absence of an immediate motion for the District Court to revoke the Monitor's initial appointment does not forever preclude the County from reasserting its lack of consent under the Decree

when the Monitor's initial term has expired. Here, the consent decree expressly authorizes the appointment of the Monitor would be for "no less than two years following the adoption of a comprehensive policy and procedure manual," Ex. p. 26 ¶ 6.9, so that -- after some experience with him -- the County's renewed objection two years later to his continued service is little different from that of the federal government's objection on the same grounds in Cobell. Indeed, under the terms of the decree here, the rejection of the County's motion to remove the Monitor on the two year anniversary of his appointment amounted to his reappointment over the County's objection -- and was just as subject to mandamus as the Monitor's reappointment in Cobell. Indeed, the District Court's denial here of the County's motion to remove the Monitor in effect -- as the District Court had fatally done in Cobell -- gave the Monitor "a license to intrude into the internal affairs of the Department" and have "ex parte meetings" when the court is instead required to "confine … its agents … to its accustomed judicial role." 334 F.3d at 1142.

2. Contemporaneous Ongoing Employment By Plaintiffs' Counsel And Sponsor Is Per Se Conflict

Though 28 U.S.C. §455(a) requires disqualification when a judicial officer's "impartiality might reasonably be questioned," here the District Court held such "does not apply to court monitors" because they "are a different kind of an animal than the court officers that are referenced in that statute."

Ex. p. 444. Rather, the District Court explained:

> [I]t is entirely possible that an appointed court monitor would lose his credibility with the Court. The fact that somebody is the monitor does not necessarily mean that he is the only person that the Court would listen to on contested issues. I think he does not have a legal conflict on the basis of that statute. …. We have a problem here with the appearance of fairness, and the county has decided that because of the relationships with the defense that the monitor is appearing to be unfair …. If he is in fact in some way biased, that will come out when we get to the point of resolving issues raised in his reports.

Ex. p. 444-45.

First, disqualification has been held equally applicable to Court appointees not otherwise referenced in §455(a). See, e.g., Lister v. Commissioners Court, Navarro County, 566 F.2d 490, 493 (5th Cir. 1978) ("Having served as a witness for one side in the case, the [court's] appointee was accordingly disqualified" because he "should have no interest in or relationship to the parties" and should not have been appointed "special master to formulate plans"); Petroleos Mexicanos v. Crawford Enterprises, Inc., 826 F.2d 392, 402 (5th Cir. 1987) (previous witness for one of parties should not have been appointed "special master to monitor … discovery compliance"). Though the above cases concern "special masters," the responsibilities there to report and

make recommendations mirror the function of the Monitor here.[7] Indeed, plaintiffs here seek costly relief from the court "based on the Court Monitor's recommendation," Ex. p. 388, and where a "monitor makes recommendations on reformulating the remedy, to that extent he functions as a master," see The Remedial Process In Institutional Litigation, 78 Colum. L. Rev. 784, 830 (1978), and as a matter of law "the ethical restrictions of § 455 apply to a special master." In re Brooks, 383 F.3d 1036, 1044 (D.C. Cir. 2004). See also Cobell, 334 F.2d at 1141-42 (monitor's "ex parte meeting had created an appearance of partiality" and "appointing him Special Master-Monitor … was clear error" under §455); Lister, supra.; Petroleos Mexicanos, supra.

Second, the ACLU has conceded that a court monitor must be "a disinterested and objective assistant to the Court," Ex. pp. 66, 73-74, and both the Magistrate Judge and case law confirm a monitor "is an officer of the Court." See Ex. p. 368; English v. Cunningham, 269 F.2d 517, 526 (D.C. Cir. 1959). Indeed, as a matter of law a monitor is an "agent" of the Court, Cobell, 334 F.2d at 1142, and a Court monitor "should perform his duties objectively."

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[7] Though a monitor does not conduct quasi-judicial hearings for the District Court, "this point is of small consequence" as to the District Court's treatment of his reports because as a practical matter his expert "reports will carry weight and be respected by the court." See The Remedial Process In Institutional Litigation, 78 Colum. L. Rev. 784, 830 (1978).

Ruiz, 679 F.2d at 1161-62. See also 78 Colum. L. Rev. at 830 (Monitor "as agent of the Court, … should ensure that the court receives unbiased and reliable compliance information.") Because he is an "officer" and "agent" of the Court who must act "objectively," and because as a matter of law the "power of an agent cannot exceed that of his principal," American Standard Credit, Inc. v. National Cement Co., 643 F.2d 248, 267 (5th Cir. 1981), the Monitor is bound by the same constraints as the Court.

Indeed, in English v. Cunningham, supra., a court monitor was appointed to report on defendant's compliance with a consent decree and years later the defendant moved for his disqualification on the ground of a conflict of interest. Reversing the District Court's holding that there was no such conflict, the Circuit Court found a monitor "is an officer of the District Court" yet "during the time [he] has been a Monitor he has represented" defendant's non-party adversaries in other matters. Id. at 526. The Court explained:

> There is no suggestion by us that in any of these matters, or otherwise, Mr. Schmidt has not conducted himself lawfully, in good conscience, and openly; but we believe conflict of interest exists nonetheless. His private employment in negotiating with Teamster locals on behalf of employers tends potentially- and that is all that is necessary to create conflict of interest- to condition the exercise of his public responsibility as an officer of the court.

Id. at 526 (emphasis added). Here, the ongoing conflict of interest is far greater because "during the time [he] has been a Monitor," Dr. Goldenson's

outside employment has not been with the County's adversaries in other matters but with the "sponsor of this litigation" while the Monitor also is acting as "an officer of the District Court" in this litigation. The Monitor's private employment as a trial expert on behalf of plaintiffs' "sponsor" and attorney the ACLU, at the same time he is also acting as Court Monitor, has far more potential -- which is "all that is necessary to create conflict of interest" -- to condition the exercise of his public responsibility as an officer of the court than did the outside employment in English.

Third, In re Brooks, 383 F.3d 1036, 1045-46 (D.C. Cir. 2004) held that a district court's similar proposal to overcome the prejudicial appearance of its agent's ex parte contacts by reviewing "findings de novo does not solve the problem of 'unchecked and uncheckable' partiality" because:

> [I]t seems likely, if not inevitable, that [the appointee's] compilation of the record for the district court's review, not to mention his reports and his recommendations, would be subject to selection bias; at the very least, an observer apprised of all the facts would reasonably question his impartiality.

Indeed, Brooks recognized that if the court's appointee could properly advise the district court despite his ex parte contacts without regard to §455, "it would seem equally permissible for a judge presiding over a criminal proceeding to dispatch his law clerk to visit the scene of the crime, take fingerprints, interview witnesses, and report back to the judge about his findings"

but the "judge's undertaking to review the clerk's findings de novo would not be assurance against the biases of the clerk affecting the judgment of the court" so any "proposed de novo review of [its appointee's] findings does not render his task … non-adjudicative." Id. at 1146. As the Court noted:

> Our concern is not with information that 'enters the record and may be controverted or tested by the tools of the adversary process,' [citation omitted]; our concern is with information that "leave[s] no trace in the record," id. - such as [the appointee's] ex parte contacts … - that may reasonably be expected to color the way in which he approaches his task, and ultimately his reports and recommendations to the district court, and thus to taint the … proceedings despite the steps taken to insulate those proceedings from the information to which [the appointee] was exposed ex parte.

Id. Accordingly, rejecting the District Court's similar attempt to minimize its appointee's conflict of interest, the Circuit Court held the appointee's "ex parte communications …. required his recusal … pursuant to § 455(b)(1)" for "personal bias or prejudice," while "the nature and extent of his ex parte contacts could lead an informed observer reasonably to question his impartiality, thereby requiring his recusal independently pursuant to § 455(a)."

Though the record confirms far more than a mere "potential" conflict and more than "suggests" favorably disparate treatment of plaintiffs' counsel that has been far from "open," the potential effect on the exercise of the Monitor's public responsibilities of being at the same time privately employed as an expert witness by the "sponsor" of the County's adversary in this

action alone warrants removal.

3. Monitor's Conduct Showed Actual Bias Favoring Plaintiffs

In addition to a per se conflict, the undisputed record also extensively details the Monitor's actual "personal bias or prejudice" in favor of plaintiffs. 28 U.S.C. §455(b). As noted, the Monitor not only has displayed an adversarial and divisive approach to his reporting duties and a failure to accurately communicate in his reports to the Court the information provided by County medical staff, but also regularly has undisclosed ex parte contacts exclusively with plaintiffs' counsel wherein his communications with the Court are being discussed, litigation strategy of plaintiffs is being previewed and that of defendant is anticipated, suggestions for the Monitor's conduct of jail visits are being made and followed, and plaintiffs' counsel's advice on the Monitor's performance of his official duties are requested, given and carried out. See supra at 3-12. See also In re Brooks, supra. ("ex parte communications" also required recusal of appointee "pursuant to § 455(b)(1)"). Hence, where the prior Monitor in this case reported there was evidence for "closure of the health portion of the Herrera case," Ex. p. 76, the new Monitor in contrast now intrudes into specific clinical functions and misquotes staff to recommend extensive hiring of additional personnel with no end in sight to the Court's supervision. See supra. at p. 3 n. 2, pp. 13, 17.

The District Court's observation that the Monitor has "the task of reporting with respect to the defendants' progress towards meeting in compliance with the requirements" of the Consent Decree and "investigating trying to find facts about the defendants," Ex. p. 444, does nothing to explain why such requires the Monitor also consistently to have undisclosed contact exclusively with plaintiffs' counsel about their legal strategy and the ACLU's guidance and advice on the performance of his duties. That the District Court in effect holds the Monitor somehow must be allowed to have such an ongoing special relationship with plaintiffs' counsel while the Monitor himself opposes the mere presence of County counsel when requested by medical staff as "inhibit[ing] my ability to gather accurate information," Ex. p. 315, says much about the Monitor's bias and prejudice for one side over the other and is further proof of his inability to "perform his duties objectively" as required of a monitor as a matter of law. See e.g. Ruiz, 679 F. 2d at 1161-62. See also 28 U.S.C. §455(b); 78 Colum. L. Rev. at 830 (monitor "as agent of the Court, … should ensure that the court receives unbiased and reliable compliance information.") The District Court's expectation that the County have "the same kind of open discussion with the monitor … as apparently has gone on with plaintiffs' counsel," Ex. p. 442, disregards that: 1) the record shows no similar "open discussion" by the Monitor is available to the County; 2) undisclosed

legal advice and discussions of legal strategy have nothing to do with the Monitor's sole duty to report to the Court "with respect to Defendants' progress towards meeting and compliance with the requirements" of the Decree, Ex. p. 26 ¶ 6.9, and 3) are improper because what the Court cannot do its agents also cannot do.

D. NEW AND IMPORTANT ISSUES OF FIRST IMPRESSION RAISED

Finally, as is shown above, the subject order raises new and important issues of law of first impression regarding the standards to be applied to the conduct and removal of court appointed monitors. Pierce County's motion to remove the monitor cited authority holding that court appointed monitors -- like other recognized "agents" and "officers of the Court" -- are held to some standard of conduct that complies with the appearance of fairness, that avoids relationships and conduct that have the potential to condition the exercise of his public responsibility as an officer of the court, and that requires transparency and impartially in his interactions with the parties and their representatives. See discussion supra. at pp. 19-28. Though plaintiffs provided no case law holding that court monitors somehow are not subject to such standards, the order of the District Court apparently held for the first time that court monitors are authorized by the Court to act on its behalf in ways which it cannot.

V. CONCLUSION

The District Court's observation that the "fact that somebody is the monitor does not necessarily mean that he is the only person that the Court would listen to on contested issues," Ex. p. 444, overlooks both the harm he continues to cause defendant and the absence of any rationale why an agent of the Court may continue to represent it when "his impartiality might reasonably be questioned" under 28 U.S.C. §455(a) or when "personal bias or prejudice" is raised under 28 U.S.C. §455(b). The current Monitor was appointed over the County's objection and in conflict with the Consent Decree's provision that only an "agreed expert designated by the parties shall serve as a Court Monitor," Ex. p. 26 (emphasis added), and defendant since has learned how well its objection was warranted.

Because the Monitor's conflict of interest and unequal treatment will otherwise continue without correction, if there is no right to appeal there is a clear right to a writ of mandamus.

DATED: October 2, 2009.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Pierce County states it alternatively has also contemporaneously filed a notice of appeal with this Court pursuant to 28 U.S.C. § 1291(a)(1).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a member of the bar of the Court in good standing and counsel of record for Petitioner.

The foregoing Petition for Writ of Mandamus was served this date by delivering the same to ABC Legal Messengers Inc. for delivery within three calendar days to the following:

Fred Diamondstone
Attorney at Law
710 Second Avenue, Suite 700
Seattle, WA 98104

U.S. District Court Clerk
Union Station Courthouse
1717 Pacific Avenue
Tacoma, WA 98402

I declare under penalty of perjury that the foregoing is true and correct, and that this Certificate was executed in Tacoma, Pierce County, Washington, on October 2, 2009.

MARK LINDQUIST
Prosecuting Attorney

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