

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' LCR 7(g)
SURREPLY REQUESTING THE
COURT TO STRIKE MATERIAL
IN PLAINTIFFS' REPLY (DKT.
NO. 87)

The Department of Social and Health Services (the Department) requests this Court to strike material contained in Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment (Dkt. #99) pursuant to LCR 7(g). Plaintiffs inclusion of new facts and arguments not originally presented as part of Plaintiffs' Motion for Summary Judgment (Dkt. #87), robs this Court of a complete legal analysis and record. The Court should strike Plaintiffs' argument that substantive due process is violated at seven days for criminal defendants awaiting competency services in jail and new facts presented via declaration and attachment.

I. ARGUMENT

New issues and evidence may not be raised in reply briefs. *See, e.g., Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir.1996) ("[i]ssues raised for the first time in the reply brief are waived."); *see also Karpenski v. American General Life Companies, LLC.*, 999 F. Supp. 2d

1 1218, 1226 (W.D. Wash. 2014). “It is not acceptable legal practice to present new evidence or
 2 new argument in a reply brief....” *Roth v. BASF Corp.*, 2008 WL 2148803, at *3 (W.D. Wash.
 3 May 21, 2008). When new material is raised, courts have discretion to strike that material.
 4 *See, e.g., Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993) (striking portions of
 5 a reply brief that presented new information); *Nautilus Grp., Inc. v. Icon Health & Fitness,*
 6 *Inc.*, 308 F. Supp. 2d 1208, 1214 (W.D. Wash. 2003) (striking a declaration with new evidence
 7 submitted in reply). Striking new arguments on reply is necessary if the new argument
 8 undercuts the Court’s ability to apply the standard of review applicable to summary judgment,
 9 and “review the record and draw all inferences in the light most favorable to the nonmoving
 10 party.” *Cia. Petrolera Cirebe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985). A
 11 party may file a surreply asking the Court to “strike material contained in or attached to a reply
 12 brief.” LCR 7(g). That surreply “shall be strictly limited to addressing the request to strike.”
 13 LCR 7(g)(2). Because Plaintiffs present both new facts and new argument for the first time in
 14 their reply, striking the novel argument and material is appropriate.

15 In Plaintiffs’ motion for summary judgment, Plaintiffs did not argue that Constitutional
 16 Due Process requires that competency services be provided within seven days. Instead,
 17 Plaintiffs stated, “[t]he only question for this Court is one of law: Do these wait times violate
 18 the Due Process Clause of the Fourteenth Amendment?” Dkt. #87 at 1. Immediately
 19 preceding that statement, Plaintiffs reference wait times of 60 days for competency restoration,
 20 and 30 days for competency evaluations. *Id.* Thus, in framing the legal question as whether
 21 “these wait times...” violate due process, Plaintiffs argued only that substantive due process is
 22 violated when criminal defendants wait more than 60 days for restorations or more than 30
 23 days for evaluations. The response presented to the Court focused only on this question.


24 Nonetheless, in their reply brief, for the first time Plaintiffs introduce to the Court
 25 “seven days” as a constitutionally mandated time frame to be considered as part of the
 26 summary judgment proceedings. Plaintiffs fundamentally change their summary judgment

argument by changing their request for relief only in their reply. The reply is replete with references to this new seven-day argument. Dkt. #99 at 1, 3, 4 n.2, 6, 8, 11. Plaintiffs also file two new declarations, with over 80 pages of attachments and numerous additional factual assertions. *See* Declarations of Emily Cooper and Dino Sepe, Dkt. #100 and Dkt. #101. Plaintiffs previously referred to “seven days” only as a “target deadline” in their original argument, Dkt. #87 at 3, and nowhere do Plaintiffs argue to the Court that Constitutional Due Process demands that evaluation or restoration be provided within seven days to individuals awaiting competency services. Plaintiffs’ proposed order made only one passing reference to seven days, and is void of any request for this Court to draw a due process bright line at seven days. Dkt. # 87-1, at 3 ¶ 7 (“[s]tate law establishes a seven-day *target deadline* for the provision of competency evaluation and restoration services by Defendants.”) (emphasis added). Asking this Court to generally “declare that Defendants’ conduct has violated Plaintiffs’ and class members’ due process rights” is drastically different from “declaring that the Fourteenth Amendment’s Due Process Clause requires that Defendants provide competency services within seven days of receiving a referral.” *Compare* Dkt. #87 at 1-2 *with* Dkt. #99 at 11. Had Plaintiffs presented such an argument in their summary judgment motion, the Department would have presented the Court with argument and facts relevant to this position. Instead, Plaintiffs now ask the Court to resolve a separate and distinct legal question that calls for a different analysis, different legal authority, and different material facts. Plaintiffs chose to forego that argument in their original motion, and it is unacceptable to present this new seven-day argument in a reply brief. This argument and the additional facts filed with the reply should be stricken.

This Court should strike all references in Plaintiffs’ reply to this novel seven-day bright line argument, and strike the additional factual declarations filed only on reply. Alternatively, the Department respectfully requests an opportunity to file additional briefing to fully and fairly respond to this new legal argument.

1 RESPECTFULLY SUBMITTED this 10th day of December, 2014.

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3 Attorney General

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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 10th day of December 2014, 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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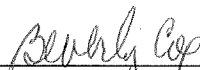
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 10 day of December 2014, at Olympia, Washington.


Beverly Cox
Legal Assistant

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