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' RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER SCOPE OF INJUNCTION REGARDING IN-JAIL EVALUATIONS **Oral Argument Requested**

I. INTRODUCTION

Those who ignore history are doomed to repeat it, yet that is what Plaintiffs propose here. Despite the Ninth Circuit's emphatic rejection of Plaintiffs' arguments for a bright-line rule requiring that jailed criminal defendants have their competency evaluated within seven days, Plaintiffs make essentially identical arguments here. Though they now propose a 10-day rule instead of seven, their proposal suffers from at least four of the same flaws that led to the Ninth Circuit's reversal last time and would again if the Court accepted Plaintiffs' request. The Court should instead order the State to comply with State law, which sets one of the most aggressive deadlines in the nation. Such an order would ensure timely competency evaluations while avoiding the constitutional errors that led to the Ninth Circuit's reversal.

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The first flaw in Plaintiffs' proposal is that it again ignores the State's legitimate interests in and reasons for sometimes taking more than 10 days to complete competency evaluations. In particular, as the Ninth Circuit recognized, the State has legitimate interests in "accurate evaluations, preventing the stigma of an incorrect determination, avoiding undue separation of a detainee from her counsel and family, and protecting the detainee's rights to counsel and against self-incrimination." Trueblood v. Washington State Dep't of Soc. & Health Servs., No. 15-35462, 2016 WL 2610233, at *6 (9th Cir. May 6, 2016). Protecting these interests takes time, which is why virtually every state and the federal government allow vastly more than 10 days to complete evaluations and why expert organizations oppose bright-line deadlines and typically recommend allowing significantly more than 10 days.

Second, and closely related, Plaintiffs' arguments are based on the wrong legal standard. Plaintiffs again ask the Court to assess what timeline the State could theoretically meet in most cases. But the question is not "what is 'reasonable and achievable' "; it is whether "the state's present fourteen-day [statutory] requirement bears the constitutionally requisite reasonable relationship" to the parties' respective interests. Id. It does, as again evidenced by the State's timeline being one of the shortest in the nation and well within what experts recommend as a *best practice*, not a constitutional maximum.

Third, Plaintiffs again ask this Court to declare a new substantive due process right that would invalidate the competency evaluation systems of the federal government and virtually every state, which almost uniformly allow more than 10 days. Yet "[t]he fact that a practice is followed by a large number of states . . . is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Schall v. Martin, 467 U.S. 253, 268, (1984) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Can a 10-day rule really be deeply rooted in our traditions and conscience when there is a near universal consensus to allow longer?

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Fourth, although Washington law now imposes one of the strictest evaluation deadlines in the country, and although Washington now meets its statutory deadline the overwhelming majority of the time, Plaintiffs again ask this Court to reject the State's considered policy judgment. But as the Ninth Circuit emphasized, "federal courts have often looked to a state's own policies for guidance because 'appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.' " Trueblood, 2016 WL 2610233, at *7 (quoting Rizzo v. Goode, 423 U.S. 362, 379 (1976)). The Court should not repeat Plaintiffs' mistake of ignoring this guidance.

In contrast to Plaintiffs' deeply flawed proposal, the State's proposal avoids the constitutional flaws identified by the Ninth Circuit while still providing more protections for potentially incompetent criminal defendants than virtually any other jurisdiction in the country. The Court should adopt the State's proposal and avoid repeating history.

II. STATEMENT OF THE CASE

A. Since 2015, Washington Law Has Set a Fourteen-Day Deadline for In-Jail Competency Evaluations, with a Seven-Day Extension Available Only for Clinical Reasons

Over the last 18 months, Washington has made its competency evaluation laws much more robust and has invested substantially in its competency evaluation system.

Washington law now sets a maximum time limit of fourteen days, plus an additional seven-day extension if needed for clinical reasons, to complete competency evaluations for defendants held in jail. Wash. Rev. Code § 10.77.068(1)(a)(iii)(B). The time limit is calculated "from the date on which the state hospital receives the court referral and charging documents and related information." Wash. Rev. Code § 10.77.068(1)(b). Courts are now required to send this information promptly. "Within twenty-four hours of the signing of a court order," "[t]he clerk of the court shall provide the court order and the charging documents[,]" "[t]he prosecuting attorney shall provide the discovery packet[,]" and "[i]f the court order requires transportation of the defendant to a state hospital, the jail administrator

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shall provide the defendant's medical clearance information[.]" Wash. Rev. Code § 10.77.075(1)-(3) (2015).

State law recognizes that there are circumstances "outside of the department's control" that can compel a need for additional time. The statute includes a non-exhaustive list of such circumstances, including medical clearance, individual clinical circumstances of a defendant, lack of availability of third parties (defense counsel, jail or court personnel, interpreters), lack of access to private space in jails, a defendant's assertion of legal rights, or an unusual spike in competency referrals. Wash. Rev. Code § 10.77.068(1)(c)(i)-(vi) (2015).

In addition to expanding legal protections for jailed defendants awaiting competency evaluations, the State has also expanded the resources available to complete evaluations. In February of 2015, Substitute House Bill 1105 made a supplemental appropriation of over $8 million to the Mental Health Division of the Department, a portion of which was earmarked for competency evaluation and restoration services. SHB 1105, 2015 Wash. Sess. Laws, ch. 3, § 5. The 2015-2017 biennial budget included over $40 million dollars of new funding to effectuate the statutory changes made during the 2015 session. 2015-17 Operating Budget.[1] In total, Washington will spend more than $2.2 billion on mental health services in the 2015-2017 biennium, over $427 million (or 23 percent) more than the State spent in the 2013-2015 biennium. Id.

B. The Vast Majority of Evaluations Are Now Completed Within 14 Days

The changes to the law and significant influx of State spending have greatly reduced in-jail evaluation wait times. The most recent reports to the district court reflect that in March and April of 2016, the Department completed 86% of all jail-based evaluations within 14 days of the signing of a court order. Dkt. #236 at 2–3. The percentage completed in 14 days is even higher when the time is calculated based on the date of DSHS receipt of the order, rather than

[1] Agency Detail and Statewide Summary, p. 172-73 (Jun. 29, 2015), http://leap.leg.wa.gov/leap/budget/lbns/2015operating1517.pdf

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the date the order is signed. Id. In addition, the data reflects that in those cases in which the time between receipt of the order and completion of the evaluation exceeded 14 days, scheduling conflicts with attorneys and interpreters were a significant cause of delay. Dkt. #236–2 at 23–38.

C. Procedural History

In 2015, this Court entered a permanent injunction requiring, among other things, that competency evaluations be completed within seven days. Dkt. #131 at 22. The State appealed that portion of the injunction, and the Ninth Circuit reversed and remanded. Trueblood v. Washington State Dep't of Soc. & Health Servs., No. 15-35462, 2016 WL 2610233 (9th Cir. May 6, 2016). The Court held that "due process does not compel competency evaluations to be completed in seven days." Id. at *5. The constitutionally mandated time period is not founded on what is "reasonable and achievable." Id. at *6. Instead, compliance with due process is determined by considering whether there is "some reasonable relation between the timing and the confinement," based on a balancing of the defendants' interests in reducing the waiting time in jail and the State's interests in accurate evaluations and respecting defendants' rights to counsel and against self-incrimination. Id.

The Ninth Circuit further held that any determination of the requirements of due process should not exclude the possibility of extensions based on non-clinical interests, such as the unavailability of defense counsel or a defense expert. Id. In addition, the time period must account for the period of time between issuance of the court order and receipt of the order by DSHS. Id. at *7. Finally, the Ninth Circuit noted that in keeping with principles of federalism, an injunction should not be imposed without giving adequate consideration to the State's policies and determining whether State law "would pass constitutional muster." Id. at *7.

The Ninth Circuit remanded for modification of the injunction "consistent with this opinion, including considering Washington's 2015 law and taking into account the balancing of interests related specifically to initial competency evaluations." Id. at *8.

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III. ARGUMENT

A. Substantive Due Process Does Not Impose a Bright Line Rule Requiring Completion of Evaluations Within 10 Days

The bright line, 10-day deadline Plaintiffs now propose is just as disconnected from the requirements of the Due Process Clause as their earlier request for seven days. What might be possible to achieve, if the entirety of the State mental health budget were devoted to eliminating wait times, is not the test. Id. at *6. Rather, the standard articulated by the Ninth Circuit requires consideration of whether there is a "reasonable relationship" between the time the court order is issued and the beginning of the evaluation. Id. at *6. In determining whether State law's presumptive 14-day requirement bears the constitutionally required reasonable relationship, the Plaintiffs' interests in mitigating the harm of waiting for evaluation must be weighed against the State's interests in "accurate and efficient evaluations" and in respecting the right to counsel and against self-incrimination. Id. at *6-7. As detailed in the next section, Washington's statutory 14-day timeline, with the possibility of extensions, exceeds the dictates of due process.

The Plaintiffs' request for a 10-day restriction reflects the Plaintiffs' interest in reducing delay, but largely ignores the other side of the required balancing test. As the Ninth Circuit recognized, the State has a legitimate interest in: "accurate evaluations, preventing the stigma of an incorrect determination, avoiding undue separation of a detainee from her counsel and family, and protecting the detainee's rights to counsel and against self-incrimination." Id. at *6.

A defendant who is incorrectly labeled incompetent is needlessly sent to a mental institution, which can lead to stigmatization, separation from family and counsel, and significant delay in final resolution of his case, not to mention the unnecessary cost and delay borne by the State. See, e.g., Rodriguez v. City of New York, 72 F.3d 1051, 1065 (2d Cir. 1995) ("[A]n erroneous commitment [in a psychiatric hospital] may result not only in an

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unwarranted deprivation of liberty but also in the unwarranted stigma of being labelled mentally ill by the state."). Conversely, an incorrect finding of competence, results in trial of an incompetent defendant, violating his rights and creating a risk for the State of appellate reversal.

As the Plaintiffs concede, the State "certainly [has] a legitimate interest in gathering the information necessary to conduct a competency evaluation." Dkt. #259, at 14. This is consistent with the Supreme Court's recognition that "the question [of competence] is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts." Drope v. Missouri, 420 U.S. 162, 180 (1975). The State needs time for evaluators to gather and review relevant medical and mental health records, allow drugs and alcohol to clear a defendant's system, and to conduct necessary interviews with the defendant's mental health providers and family.

Even after the information is gathered and drugs and alcohol have cleared the defendant's system, scheduling with defense counsel routinely causes evaluations to begin more than 10 days after receipt of the court order. Trial Transcript Vol. 6, at 102-03, Trial Transcript Vol. 5, at 13, 21-22, Trial Transcript Vol. 5, at 13, 40-41, Exhibit 25 at 5, 22, 59-60. As the Plaintiffs admit, "[t]he majority of class members are represented by public defenders that are scheduled to be in court the vast majority of all typical working hours." Dkt. #259, at 13. Scheduling challenges with interpreters can also add from several days up to several weeks to the evaluation process. Trial Transcript Vol. 5, at 39. Even a well-funded and efficiently functioning system is impacted by the time constraints of defense counsel and interpreters. As a result, Plaintiffs agree with the Ninth Circuit that the unavailability of defense counsel is an appropriate reason for extending their requested 10-day time limit. Dkt. #259, at 13; Trueblood, 2016 WL 2610233, at *7.

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The need for more than 10 days to complete an accurate evaluation is further demonstrated by guidance from expert sources. For example, the National Judicial College's best practices manual for mental health competency, and the American Academy of Psychiatry and the Law's practice guidelines for competency evaluations all encourage the use of collateral information, medical and mental health records, and multiple interviews in conducting a competency evaluation. Trial Transcript Vol. 6 at 87; *see also* Trial Transcript Vol. 6 at 83-89, 146-47, Exhibit 133 at 13-14. These expert sources also recognize that rigid, short deadlines for completing competency evaluations are problematic. For example, the National Judicial College guidelines, issued in 2012, recommended fifteen days for completing a misdemeanor competency evaluation and twenty-one to thirty days for a felony competency evaluation. Trial Transcript Vol. 6 at 138; *see also* Exhibit 133 at 6,10.

A flexible constitutional standard that includes a range of acceptable timeframes is logical in light of the litany of legitimate interests articulated by the Ninth Circuit and the many clinical and structural barriers recognized by this Court. "The Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." Kansas v. Crane, 534 U.S. 407, 413 (2002). Not every person ordered to undergo a competency evaluation will have the same balancing of these interests, or will experience the same clinical or structural barriers to completion of their evaluation.

In sum, there is no constitutional basis for a bright line, 10-day limit. Due process permits reasonable delays that are related to the underlying purpose of obtaining an accurate evaluation while respecting the right to counsel and against self-incrimination.

B. The Court Should Order Compliance with State Law, Which Exceeds Due Process Requirements

Washington law now provides robust protections for jailed defendants awaiting competency evaluation, imposing a presumptive 14-day limit for completion while recognizing the necessity of exceptions in certain instances. As the Ninth Circuit emphasized, the court

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should look to the State's own policies for guidance. Trueblood, 2016 WL 2610233, at *7. " '[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.' " Id. (citing Rizzo v. Goode, 423 U.S. 362, 379 (1976)).

Washington has adopted one of the strictest deadlines in the country, a deadline that clearly passes constitutional muster if followed. See Trueblood, 2016 WL 2610233, at *6. Most states have no statutory deadline for completing competency evaluations for defendants in jail. Exhibit 186, at 5-6 (showing that at least thirty-one states have no statutory deadline for in-jail competency evaluations). Roughly fifteen states have statutory deadlines that apply regardless of where the person is awaiting trial (including to those in jail), and of those, the average deadline is thirty-two days. Exhibit 186, at 6. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Schall v. Martin, 467 U.S. 253, 268, (1984) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

In addition to surpassing the deadlines imposed in other states, Washington exceeds federal requirements. As the Ninth Circuit recognized, federal law allows thirty days to complete a competency evaluation of a federal defendant and a potential extension of another fifteen days, for a total of up to forty-five days. 18 U.S.C. § 4247(b). A district court commits "an abuse of discretion . . . if its injunction requires any more of state officers than demanded by federal constitutional or statutory law." Katie A., ex rel. Ludin v. Los Angeles County, 481 F.3d 1150, 1155 (9th Cir. 2007) (quoting Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995)). That is precisely what the Plaintiffs are requesting. There is no constitutional basis for holding Washington to a more restrictive rule than federal law requires.

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The State's 14-day deadline " 'does not run foul of the Fourteenth Amendment because another method may seem to [a court's] thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' " Medina v. California, 505 U.S. 437, 451 (1992) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). As the Ninth Circuit explained, compliance with due process does not turn on what is "reasonable and achievable." Trueblood, 2016 WL 2610233, at *7. Even in considering the required burden of proof in criminal cases, the Supreme Court has held that " '[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' " Medina, 505 U.S. at 451 (quoting Patterson v. New York, 432 U.S. 197, 209 (1977)).

Plaintiffs' primary attack on the State's law is one of timing. Dkt. #259, at 15–16. They argue that the Legislature, a body constitutionally independent from the executive branch and the Department, passed SB 5889 to "undermine" this litigation. This argument is patently absurd. State law was previously silent on a maximum allowable time period. Rather than allowing the federal courts to make a policy decision for the State, the Washington legislature properly exercised its state legislative authority. Respecting the State's independent authority to make policy decisions regarding its criminal justice system, within the bounds of due process, is a compelling federalism concern.

The State's statutory14-day limit is an aggressive deadline and creates strong pressure on the Department to promptly address clinical and structural barriers and complete evaluations on a very swift timeline. When all of the interests are balanced, and the related clinical and structural barriers are considered, Washington's statutory timelines are well within the constitutional boundary. The state law is the standard the State should be held to by this Court. If the State fails to follow its law, the Court has authority to order compliance.

IV. CONCLUSION

Properly weighing the parties' interests, as identified by the Ninth Circuit, this Court should conclude that Washington state laws governing competency evaluations fall within the

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bounds of the Constitution. Under principles of federalism, this Court should defer to those state laws because they create a reasonable relation between the timing of evaluations and the interests of the parties, while also accounting for the clinical and structural barriers identified by this Court and the Ninth Circuit.

RESPECTFULLY SUBMITTED this 20th day of June 2016.

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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this 20th day of June 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 20 day of June 2016, at Olympia, Washington.

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