NO. 16-35945

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASSIE CORDELL TRUEBLOOD, next friend of Ara Badayos, an incapacitated person; et al.,

Plaintiffs - Appellees,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES; et al.,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 2:14-cv-01178-MJP
The Honorable Marsha J. Pechman
United States District Court Judge

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Congress enacted the Prison Litigation Reform Act (PLRA) "to minimize the costs" to taxpayers of litigation brought by prisoners. 42 U.S.C. § 1997e; *Webb v. Ada County*, 285 F.3d 829, 837 (9th Cir. 2002). The PLRA accomplishes this by limiting the "attorney's fees that can be awarded for services performed in actions brought on behalf of prisoners." *Webb*, 285 F.3d at 834. As defined by the PLRA, a "prisoner" is "any person incarcerated or detained in any facility who is accused of [or] convicted of" any crime. 42 U.S.C. § 1997e(h). The plaintiff class includes only those who are "charged with a crime" and "who are waiting in jail for [competency] services." ER 125. Therefore, the PLRA's fee limitation applies.

When Disability Rights Washington, a nonprofit organization, later intervened in the litigation, it did not negate the PLRA's fee cap. Adding a non-prisoner to the suit does not exempt a claim from the PLRA, because it is still an action brought by a prisoner. *Montcalm Pub. Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 171-72 (4th Cir. 1999) (Motz, J.). And under the PLRA's plain language, fees are limited in "any action brought by a prisoner." 42 U.S.C. § 1997e(d)(1). Congress chose the expansive modifier "any" rather than enacting a restricted provision that would exempt certain prisoner suits

from the PLRA. *Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 796 (11th Cir. 2003). Ignoring the PLRA's text would create a clear split with the Fourth and Eleventh Circuits.

Prisoners cannot evade the PLRA by adding a nonprofit plaintiff whose standing is based solely on its interest in advocating for the prisoners. If that were allowed, every prisoner lawsuit could escape the PLRA by adding an organizational nonprofit, even one created by prisoners.

In addition to violating the PLRA fee cap, the district court failed to correct the attorney's fees on remand. The plaintiffs lost a significant, distinct issue on appeal. It is well settled that when a plaintiff is only partially successful, the attorney fee award must reflect the limited degree of success. *E.g.*, *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). The decision should be reversed and remanded for proper calculation of attorney's fees, consistent with the PLRA and plaintiffs' partial victory.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction under 42 U.S.C. § 1983 (civil action for deprivation of rights) and awarded attorney's fees pursuant to 42 U.S.C. § 1988. This Court has jurisdiction under 28 U.S.C. § 1291 (appeal of final decision).

On October 13, 2016, following remand from this Court the district court reinstated the award of attorney fees without modification. ER 4. The State timely filed a Notice of Appeal on November 14, 2016, in compliance with Federal Rule of Appellate Procedure 4(a)(1)(A). ER 1.

III. STATEMENT OF THE ISSUES

(1) The Prisoner Litigation Reform Act limits the attorney's fees available in "any action brought by a prisoner," including pretrial detainees. Did the district court err in adding an exception for an action brought by prisoners, if the case is joined by a non-prisoner organization that is advocating for the prisoners?

(2) Did the district court err in refusing to adjust the original award of attorney's fees after the district court order on the merits was reversed on appeal, and the award of fees was remanded for reconsideration consistent with that reversal?

IV. STATEMENT OF THE CASE

A.B. was arrested on a charge of Assault in the Third Degree and found incompetent to stand trial. ER 170. While in jail, she filed a lawsuit alleging that the length of time she waited to receive competency restoration services violated her rights under the Fifth, Sixth, Eighth, and Fourteenth amendments.

ER 150. The Snohomish County Public Defender Association joined the complaint, on its own behalf and "on behalf of clients—past, present, and future" injured by the wait time for competency restoration. ER 152.

The complaint was amended three days later to assert a plaintiff class of approximately 100 additional incompetent criminal defendants, and all other similarly situated criminal defendants waiting in county jails to receive competency restoration treatment. ER 148.

A second amended complaint was filed a month later, omitting mention of the Snohomish County Public Defender Association, and substituting Disability Rights of Washington as a plaintiff. ER 131. Disability Rights is a nonprofit agency designated by Washington's governor to provide "advocacy services" for persons with developmental disabilities and persons with mental illness. ER 87; Wash. Rev. Code § 71A.10.080(2). Unlike the Snohomish County Public Defender Association named in the first complaint, Disability Rights did not allege that it was damaged. *See* ER 131.

Ultimately, the parties entered a stipulation regarding the class. Pursuant to the stipulation, the district court certified the class as:

> All persons who are now, or will be in the future, charged with a crime in the State of Washington and: (a) who are ordered by a court to receive competency evaluation or restoration services

> through DSHS; (b) who are waiting in jail for those services; and (c) for whom DSHS receives the court order.

ER 125.

The plaintiff class prevailed at trial. The district court entered a three-part injunction limiting (1) the time a class member can wait for an in-jail competency evaluation; (2) the time a class member can wait for admission for evaluation in a mental hospital; and (3) the time a class member can wait for admission to a facility for competency restoration, after a court has determined incompetency. ER 104. No relief was provided to Disability Rights, other than the requested relief for the class members.

The State appealed the district court's order with respect to the time limits for competency evaluation. The time period established for competency restoration was not appealed. The State separately appealed the order awarding attorney fees. ER 108; *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 822 F.3d 1037 (9th Cir. 2016). In response to the merits appeal, this Court reversed the district court's seven-day standard for evaluation and remanded for further proceedings. *Trueblood*, 822 F.3d at 1046. A separate order was issued regarding the attorney's fees, remanding the case for reconsideration consistent with the decision on the merits. Order, *Trueblood v.*

Washington State Dep't of Soc. & Health Servs., No. 15-35601 (9th Cir. May 6, 2016) (Dkt. No. 24).

On remand, the district court reinstated the original award of fees—without modification. ER 4. The State filed a timely appeal of the reinstated award of attorney fees.

V. SUMMARY OF ARGUMENT

The plain language of the attorney's fees limiting provision applies to all members of the Plaintiff class. The organizational co-plaintiff, Disability Rights Washington, asserted no claims on its own behalf. Rather, Disability Rights joined the complaint solely in its capacity as an advocate for imprisoned individuals with mental illness. Allowing inmates to evade the PLRA by adding an advocacy organization to the complaint conflicts with the plain language of the Act and leads to absurd results. Congress chose to adopt expansive language in applying the PLRA's fee limit to "*any* action brought by a prisoner." 42 U.S.C. § 1997e(d)(1) (emphasis added). As multiple circuits have held, the PLRA does not allow an exception to be made for prisoner suits joined by an advocacy group that is not incarcerated. *Montcalm*, 199 F.3d 168; *Jackson*, 331 F.3d at 796. There is no statutory basis for exceeding the PLRA's cap on attorney fees when an advocacy agency joins a prisoner suit. In addition

to overriding the plain language of the law, such a limitation would lead to the absurd consequence of allowing prisoners to negate the PLRA's limits by adding a family member or friend that is not incarcerated, or advocacy group, to every suit.

In addition, the district court abused its discretion in failing to adjust the fee award when the Court reversed the district court on a significant portion of the merits, and directed that the earlier award of fees be reconsidered in light of that reversal. Because the degree of success is a critical factor in calculating fees, the attorney's fees should have been reduced to reflect the loss on appeal.

VI. ARGUMENT

A. Standard of Review

Although an award of attorney's fees is typically reviewed under an abuse of discretion standard, "[i]f the parties contend the district court made a legal error in determining the fee award, then de novo review is required." *Thomas v. City of Tacoma*, 410 F.3d 644, 647 (9th Cir. 2005). Application of the PLRA to the award of fees is reviewed de novo. *See, e.g.*, *id.*; *Barrios v. California Interscholastic Fed'n*, 277 F.3d 1128, 1133 (9th Cir. 2002) ("Any elements of legal analysis and statutory interpretation that figure in the district court's attorneys' fees decision are reviewed de novo.").

The district court's refusal to modify the fees on remand is reviewed under an abuse of discretion standard. The decision is an abuse of discretion if "it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 883 (9th Cir. 2005). "'[A]bsent some indication of how the district court's discretion was exercised . . . [the appellate] court has no way of knowing whether that discretion was abused.'" *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 815 (9th Cir. 2003) (internal citation omitted) (alterations in original).

B. The Plain Language of the PLRA Limits the Fees Available to Plaintiffs Here

The PLRA "limits the amount of attorney's fees that can be awarded for services performed in actions brought on behalf of prisoners." *Webb*, 285 F.3d at 834. The limitation applies to "any action brought by a prisoner who is confined to any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(d)(1); *Kimbrough v. California*, 609 F.3d 1027, 1031 (9th Cir. 2010). Because the plaintiff class members were in jail at the time they brought this case, the PLRA limits fee recovery. Nothing in the plain language of the PLRA allows the limits to be circumvented when a group advocating for the incarcerated plaintiffs joins the litigation.

Under the PLRA, "[n]o award of attorney's fees in an action [brought by an inmate] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3). "In other words, the district court has authority to award attorney's fees up to 150 percent of the hourly rate for counsel established in the Criminal Justice Act, 18 U.S.C. § 3006A." *Perez v. Cate*, 632 F.3d 553, 555 (9th Cir. 2011).

Applying the relevant rate, the PLRA allows an award of attorney's fees based on an hourly rate up to 150 percent of $127, or $190.50. *See id*. at 556. This results in a maximum permissible award of $615,842.69. ER 116-17. The district court grossly exceeded the statutory limit in awarding a lodestar amount of $1,267,769.10. ER 7.

1. This case is an "action brought by a prisoner"

The PLRA encompasses "any action brought by a prisoner." 42 U.S.C. § 1997e(d)(1). The term "prisoner" is defined by the PLRA to include "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). Because the PLRA contains no ambiguity, its

plain language is controlling. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").

The plaintiff class members fall squarely within the PLRA's definition of a prisoner. The class certification requires that each member of the class be "charged with a crime" and be "waiting in jail" to receive a competency evaluation. ER 122. Therefore, it is impossible to be a member of the plaintiff class without being a prisoner, as that term is defined by the PLRA. Disability Rights argued below that the plaintiff class members "are detained solely for the purpose of receiving competency related services," rather than as a result of being accused of a criminal offense, and therefore fall outside the PLRA's definition of a prisoner. ER 112-13. That is incorrect. To be included in the class, each individual had to be held in jail because they were arrested and "charged with a crime." ER 125. They are in jail because they did not post bail. Because they are "incarcerated or detained" and "accused of . . . violations of criminal law," they meet the PLRA definition of a "prisoner." 42 U.S.C. § 1997e(h). The length of time class members wait in jail for evaluation or restoration has absolutely no impact on the reason for their detention, the pending criminal charges, or application of the PLRA. Every aspect of the

complaint, record, and order demonstrates that this is an action brought by prisoners to address alleged harm to the prisoners.

2. The addition of an organization advocating on behalf of the incarcerated plaintiffs does not create a PLRA exemption

The district court held that the PLRA does not apply because Disability Rights is a party to the litigation and is not a prisoner. ER 6-7. In so ruling, the district court overlooked appellate cases soundly rejecting the notion that exceptions can be read into the PLRA's limit on fees in cases brought by prisoners.

In a case strikingly similar to the present case, the Fourth Circuit applied the PLRA to limit attorney's fees awarded to a non-prisoner intervening in a prisoner suit. *Montcalm*, 199 F.3d 168. In *Montcalm*, prisoners filed suit alleging that prison officials violated the prisoners' First Amendment rights by preventing them from receiving a sexually explicit magazine. *Id.* at 170. Prior to the hearing, the magazine publisher intervened as a plaintiff. *Id.* Unlike Disability Rights, the magazine was not participating as an advocate for the prisoners. It contended that the magazine itself was harmed by the prison's refusal to provide the magazine with notice and an opportunity to be heard before banning its distribution. *Id.* at 170-71. Although the prisoners' claim

was rejected, the magazine was successful on appeal and requested attorney's fees. *Id.*at 171.

The Fourth Circuit held that "Congress has mandated that statutory fee limits apply not 'solely to prisoners' but to '*any* action brought by a prisoner.'" *Id.* at 172 (emphasis added). Because the case was brought by prisoners, the plain language of the PLRA limited the amount of attorney's fees that could be awarded. *Id.* at 171-72. The Court explained that "[a]lthough this holding may seem harsh," it was driven by the magazine's decision to intervene in the prisoners' action rather than bringing an independent action. *Id.* at 172. The Court stated that an intervenor must be treated as if it were an original party. *Id*. (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1920 (2d ed.1986)).

This case is far easier than *Montcalm*. Unlike the plaintiff magazine, Disability Rights does not allege that it was injured. Instead, Disability Rights has associational standing to sue only to the extent that it sues on behalf of its incarcerated constituents. *See Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1109-13 (9th Cir. 2003) (finding that the Oregon equivalent of Disability Rights Washington has associational standing to sue to represent the interests of incapacitated criminal defendants). Associational standing requires

Disability Rights to show that at least one of its constituents has standing to sue in his or her own right. *Id.* at 1112 (citing *United Food Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996)). While the plaintiff magazine in *Montcalm* had independent standing to sue based on its own interests, Disability Rights' standing depends entirely on injury alleged by its imprisoned constituents. Unlike *Montcalm*, there is no colorable argument to be made that Disability Rights' intervention changes the nature of the prisoners' action.

Like the Fourth Circuit, the Eleventh Circuit has also held that the phrase "any action brought by a prisoner" must be read broadly. *Jackson*, 331 F.3d at 795 (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). In rejecting an argument that the phrase excludes certain types of prisoner lawsuits, the Eleventh Circuit noted that Congress opted to use "'an expansive modifier—the word "any"—instead of a restrictive one.'" *Id*. (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2011)). The Court held that "without any language to limit the significance of this modifier, 'any means all.'" *Id*. (quoting *CBS Inc.*, 245 F.3d at 1223).

The appellate courts' reading of the PLRA is consistent with Supreme Court decisions holding that when the word "any" precedes a phrase it

indicates that Congress intends the phrase to be interpreted expansively. For example, in *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218 (2008) the Supreme Court rejected an argument that the phrase "any other law enforcement officer" could be read to include exceptions for officers acting in certain capacities. *Id.* at 218. The Court held that "Congress inserted the word 'any' immediately before 'other law enforcement officer,' leaving no doubt that it modifies that phrase." *Id.* at 220; *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) (holding that "the word 'any' has an expansive meaning" and the absence of restrictive language left no basis for limiting the phrase "any other term of imprisonment" to federal sentences); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 584, 589 (1980) (concluding that the phrase "any other final action" in the Clean Air Act is intentionally expansive and provides "no indication whatever" of intent to limit the phrase).

The district court's interpretation of the PLRA invents an exception rather than applying one. There is no basis for splitting with the Fourth and Eleventh Circuits' application of the plain meaning of the phrase "any action brought by a prisoner" and lifting the attorney's fee cap for prisoners that add a non-prisoner to the suit. When "the PLRA's language is clear on its face, 'the sole function of the court[ ] is to enforce it according to its terms.' " *Siripongs v.*

Davis, 282 F.3d 755, 758 (9th Cir. 2002) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

3. None of the cases cited by the district court supports a different result

Rather than examining appellate court decisions addressing the scope of the PLRA's limit on attorney fees or considering the Supreme Court's decisions regarding the plain language reading of the modifier "any," the district court supported its decision by citing three opinions that have no bearing on the issue of whether an exception can be found based on the participation of a non-prisoner, representing the interests of prisoners.

The first case the district court cites is *Page v. Torrey*, 201 F.3d 1136 (9th Cir. 2000). ER 7. *Page* holds that the PLRA is not applicable to a litigant who is civilly committed as a sexually violent predator, because the PLRA's definition of a prisoner only encompasses persons "detained as a result of accusation, conviction, or sentence for a *criminal* offense." *Id.* at 1139 (emphasis added). Because the PLRA did not apply to the *civilly* committed litigant, the Court did not address the PLRA's fee cap.

The second case cited by the district court is *Turner v. Wilkinson*, 92 F. Supp. 2d 697 (S.D. Ohio 1999). ER 7. This case does not support the district court's decision either. In *Turner*, an imprisoned woman and her non-prisoner

husband claimed that they were each independently harmed by the prison's decision to bar the husband from attending the birth of the couple's child. *Id.* at 699. The district court for the Southern District of Ohio held that because the husband filed a claim contending that he was damaged, the case was not impacted by the PLRA's limit on attorney's fees in actions brought by prisoners. This decision conflicts with the appellate decisions holding that the phrase "any action brought by a prisoner" does not contain an exception for prisoner suits joined by a non-prisoner, as well as Supreme Court decisions applying the plain meaning of the expansive modifier "all." But it is also distinguishable on its facts. Unlike the husband in *Turner*, Disability Rights did not allege that it suffered any harm. Rather, it joined the complaint only to advocate for the interests of the imprisoned class members. *See* ER 134-35.

Finally, the district court cited *Alabama Disabilities Advocacy Program v. Wood*, 584 F. Supp. 2d 1314 (M.D. Ala. 2008). ER 7. The case is inapplicable because it is not a prisoner suit. The Alabama Disabilities Advocacy Program filed a case against the director of Alabama's Department of Youth Services. Alabama's Disability Advocacy Program is statutorily charged with monitoring and investigating on behalf of individuals with mental illness. *Id.* at 1315. Alabama's program claimed that it was harmed by the

Department of Youth Services' refusal to allow the program to access the Department of Youth Services' residents, facilities, staff, and records. *Id.* The court held that because the Alabama program sought "to enforce its own right of access under federal law," and did not bring the claim on behalf of prisoners, the PLRA was inapplicable. *Id.* at 1316. In sharp contrast, the present case was brought by prisoners. And unlike the Alabama program, Disability Rights did not contend that the organization suffered any harm or request any relief for the organization. Instead, the complaint states that Disability Rights joined the complaint to advocate on behalf of the imprisoned class members. ER 134-35.

The cases cited by the district court provide no basis for departing from the Fourth and Eleventh circuits, and writing an exception into the plain language of the phrase "any action brought by a prisoner." 42 U.S.C. § 1997e(d)(1). The PLRA controls here, and the district court erred by inventing an exception where one does not exist. The award of fees must be reversed.

C. A Prisoner's Need for Competency Services Does Not Exempt Him From the PLRA

The PLRA defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of . . . violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."

42 U.S.C. § 1997e(h). Regardless of their need for competency services, the plaintiff class includes only people "in jail" and "charged with a crime." ER 125. Therefore, the PLRA applies.

Stay of the plaintiffs' criminal cases during competency evaluation or restoration does not remove the plaintiffs from the PLRA's definition of a "prisoner" while they wait. The Second Circuit made that clear in *Gibson v. City Mun. of New York*, 692 F.3d 198 (2nd Cir. 2012). In *Gibson*, the plaintiff argued that he was not a "prisoner" at the time he filed his action because he had been found incompetent to stand trial and sent to a state mental institution for treatment. *Id.* at 199. The Court rejected this argument, holding that under the PLRA's plain language, an individual who is detained and charged with a crime continues to be a prisoner even if the criminal proceeding are stayed. *Id.* at 202. Only if the defendant cannot be restored to competency and the charges are dropped does the PLRA no longer apply. *Id.* at 202.

The Seventh Circuit reached a similar conclusion in *Kalinowski v. Bond*, 358 F.3d 978 (7th Cir. 2004). The Court recognized that in some circumstances, where a person has served his sentence but is still detained (e.g., for civil commitment), it may be difficult to determine whether the definition of a prisoner still applies. *Id.* at 979 (citing *Page v. Torrey*, 201 F.3d 1136,

1139-40 (9th Cir. 2000)). "For a person held on unresolved criminal charges, however, there is no difficulty at all." *Id.*

All of the class members in this case are detained because they are currently accused of a crime. That does not change if a court orders competency evaluation or restoration. To the contrary, the purpose of such a court order is to ensure that the defendant is competent so that the criminal case can proceed to trial.

D. The District Court Erred in Failing to Reduce the Fees Following Remand from Reversal on Appeal

When a plaintiff obtains a partial victory and moves for an award of attorney's fees, "[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). Determining that the plaintiff is a "prevailing party" does not end the inquiry. The court must determine "whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Id*. The district court abused its discretion when it refused to undertake this analysis.

The plaintiffs' complaint raised three distinct issues: (1) whether class members who are ordered to receive an in-jail competency evaluation have a due process right to evaluation to within seven days; (2) whether class

members who are ordered to be evaluated in a mental hospital must be admitted within seven days; and (3) whether the State is required to admit a class member to a facility for competency restoration services within seven days of a court order determining incompetency. The plaintiffs initially prevailed in the district court on all three issues, and the district court entered a "three-part permanent injunction" that set separate requirements with respect to each of the three issues. *See* ER 12.

But the degree of plaintiffs' success was significantly decreased on appeal. *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 822 F.3d 1037 (9th Cir. 2016). The State appealed the evaluation periods imposed by the district court, and argued that there is no constitutional basis for requiring a competency evaluation within seven days. (The State did not appeal the time limit imposed for admission to a facility for competency restoration). This Court agreed that the district court abused its discretion by requiring evaluation within seven days. *Id.* at 1046. The district court order was reversed and remanded for consideration of the state law's fourteen-day requirement. *Id.* On remand, the district court modified the injunction. ER 10. Consistent with the Court of Appeals order, it allowed in-jail evaluations to be completed within fourteen days, as required by state law. ER 10, 41-43. In response to the Court

of Appeals decision, the district court also adopted good cause exceptions it had previously rejected. ER 41-43.

The State separately appealed the district court's award of attorney fees. The Court of Appeals remanded the fee award for reconsideration in light of the reversal on the merits. Order, *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, No. 15-35601 (9th Cir. May 6, 2016) (Dkt. No. 24). Yet on remand, the district court simply stated that the plaintiffs are a prevailing party, and reinstated the fee award with no adjustment for the plaintiffs' loss on appeal or the subsequent alteration of the permanent injunction. ER 4. Although the limited success obtained by the plaintiffs' was clearly segregated in the three-part injunction, the district court explained that it "chooses to focus (as the Supreme Court has advised) on the overall excellent results achieved by Plaintiff's efforts." ER 6 (citing *Hensley*, 461 U.S. at 434).

Contrary to the district court's assertions, the Supreme Court has emphasized that "the inquiry does not end with a finding that the plaintiff obtained significant relief." *Hensley*, 461 U.S. at 440. As the Supreme Court explained in *Hensley*, "even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith," the district court's award of fees should contain a reduction to reflect the plaintiff's limited success. *Id.* at 436. "'[T]he

most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (quoting *Hensley*, 461 U.S. at 436); *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993) (holding that reasonable attorney's fees "must be reduced to reflect the limited degree of [ ] success."). As the Supreme Court explained, "[a]pplication of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions." *Hensley*, 461 U.S. at 436.

There are at least three principled methods the district court could have employed to determine the relationship between the degree of success and the fee award. First, the court could have directed counsel to segregate the hours worked on the in-jail claim and reduced the fee according to the hours devoted to the claim. The plaintiffs had the burden of maintaining billing records that would "enable a reviewing court to identify distinct claims." *See Hensley*, 461 U.S. at 437. In the absence of such records, the district court had discretion to "attempt to identify specific hours that should be eliminated . . . ." *Id.* at 436. This is not a case in which the facts and issues are so intertwined that it is impossible to perform any separation. To the contrary, the distinct nature of the claims was recognized by the district court injunction, which segregated the

analysis and relief provided for each claim. On appeal, this Court also acknowledged that in fashioning a remedy, the pre- and post-evaluation categories must be properly distinguished. *Trueblood*, 822 F.3d at 1044.

Second, the district court could have reduced the fee based on the portion of the class comprised of persons waiting for in-jail evaluation. Because this is a large portion of the class, the reduction would have been significant. Finally, the district court could have reduced the award based on the fact that in-jail evaluations reflect one-third of the issues, as reflected in the three-part injunction (inpatient evaluation and restoration being the other two).

The one option not open to the district court was to refuse to consider the plaintiffs' limited success. This Court should reverse.

VII. CONCLUSION

The State respectfully requests that this Court reverse the district court's award of attorney's fees and direct the district court to enter an award in compliance with the limitation imposed by the PLRA. In addition, the State requests that the Court direct that the award of fees be properly adjusted to reflect the diminished degree of success.

RESPECTFULLY SUBMITTED this 24th day of March 2017.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c) the State notes that *Cassie Cordell Trueblood, next friend of Ara Badayos, an incapacitated person, et al. v. Washington State Department of Social and Health Services, et al.*, No. 16-35744 (9th Cir.) is a related case. It involves the same parties as this matter, but is an appeal of the district court's merits ruling, not its award of attorney's fees.

CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 5,075 words.

March 24, 2017.

s/ Anne E. Egeler
ANNE E. EGELER, WSBA 20258
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing opening brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Anne E. Egeler
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