

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 16 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

OREGON ADVOCACY CENTER;
METROPOLITAN PUBLIC DEFENDER
SERVICES, INC.,

Plaintiffs-Appellants,

v.

PATRICK ALLEN, Director of the
Department of Human Services, in his
official capacity; DOLORES MATTEUCCI,
Superintendent of Oregon State Hospital, in
her official capacity,

Defendants-Appellees.

No. 20-35540

D.C. No. 3:02-cv-00339-MO

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted May 6, 2021
Submission Withdrawn May 7, 2021
Resubmitted August 16, 2021
Portland, Oregon

Before: W. FLETCHER and FRIEDLAND, Circuit Judges, and BLOCK,**
District Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Frederic Block, United States District Judge for the
Eastern District of New York, sitting by designation.

Since 2002, the Oregon State Hospital and the Oregon Health Authority (collectively “OSH”) have been subject to a permanent injunction that requires the hospital to admit certain mentally incompetent pretrial detainees “in a reasonably timely manner,” and “not later than seven days” after the issuance of an order finding incompetence. *Or. Advoc. Ctr. v. Mink*, CV No. 02-339, 2002 WL 35578910, at *7 (D. Or. May 10, 2002); *see also Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1105 (9th Cir. 2003). Those pretrial detainees are known as “.370 patients.”¹ On April 17, 2020, in light of the COVID-19 pandemic, OSH filed a motion in the district court seeking a modification of the *Mink* injunction’s seven-day deadline for admitting .370 patients until “it is medically safe for OSH to begin accepting patients in the normal course again.” The district court granted the motion over the objection of Plaintiff Oregon Advocacy Center, which advocates for the rights of individuals with mental illnesses. This appeal followed. We vacate and remand.

We review a district court’s grant of a motion to modify a permanent injunction for abuse of discretion. *See United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005). To prevail in its motion to modify the *Mink* injunction, OSH

¹ Under Oregon law, if a court finds that a defendant is incompetent to stand trial and that he requires a hospital level of care, the court may order that the defendant be committed to OSH. Or. Rev. Stat. § 161.370. Such orders are known as “.370 orders.”

had to demonstrate a significant change in factual conditions that made compliance with the injunction “more onerous, unworkable, or detrimental to the public interest.” *Id.* at 979 (quoting *Small v. Hunt*, 98 F.3d 789, 795 (4th Cir. 1996)). If OSH made such a showing, the district court could fashion a modification order that was “suitably tailored to resolve the problems created” by the changed factual conditions. *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1097 (9th Cir. 2021) (quoting *Asarco*, 430 F.3d at 979).

1. OSH met its burden to demonstrate that the COVID-19 pandemic made compliance with the *Mink* injunction more onerous. In response to the pandemic, OSH reconfigured units at both of its campuses to allow for isolation of potentially infected patients and protection of high-risk patients. For new admissions, OSH opened two admissions monitoring units, each of which could safely receive between fifteen and nineteen new .370 patients every two weeks. Opening those units required transferring patients among units at both campuses, all while attempting to prevent an outbreak among the patient population. Unsurprisingly, this proved burdensome for OSH during the pandemic’s early stages.

2. The district court abused its discretion by failing to issue a modification order that was suitably tailored to the factual circumstances. Citing the district court’s 2002 order in *Mink*, Plaintiffs argue that jails cannot provide adequate mental health treatment to individuals with .370 orders. As the district court stated

in 2002, “[d]epriving [individuals with .370 orders] of necessary medical treatment increases the likelihood that they may decompensate and suffer unduly,” meaning that their conditions may worsen, or they may have difficulty gaining competency. At the same time, jails primarily employ disciplinary tools—such as solitary confinement—to control inmates’ behaviors. These tools are ineffective when used to manage people with mental illnesses, and they can be very harmful. Individuals with .370 orders have a “high suicide risk,” and disciplinary actions “exacerbate[] their mental illness.” Consequently, according to the district court in 2002, “[e]very day of delay in transport harms those found unfit to proceed and hampers their ability to defend themselves.”

The district court’s modification order relaxes the *Mink* injunction’s mandatory seven-day deadline for OSH to admit .370 patients without imposing meaningful parameters to ensure that the interests of those patients are served to the greatest possible extent. The modification order’s only oversight requirements are that OSH provide progress reports to the court and to Plaintiffs “every three weeks,” and that OSH appear at status conferences.² Although the circumstances presented by a new pandemic were certainly challenging, the district court had other options available. For example, the district court could have adopted

² Although we do not base our holding on events that postdate the district court’s decision, we note that the court’s reporting requirements have not been consistently followed.

parameters such as a sunset date after which the order would terminate (thereby requiring a new motion from OSH if it still wanted relief from the seven-day requirement), or it could have imposed a concrete alternative timeline for admitting individuals with .370 orders if seven days proved unworkable, or both.

Alternatively, the district court could have ordered the modification to terminate at some date that would be tied to public health policy milestones, such as the lifting of Oregon's State of Emergency.

To be sure, the district court faced a difficult task during an unprecedented time. But an open-ended modification order is inconsistent with the urgent need to transfer individuals with .370 orders out of jails. The order is thus not "suitably tailored" to the factual circumstances. *Rousseau*, 985 F.3d at 1097.

On remand, the district court is instructed to reconsider whether a modification to the permanent injunction is needed, and, if so, to craft a more "suitably tailored" modification order. *Id.*; *cf. Hook v. Arizona*, 120 F.3d 921, 926 (9th Cir. 1997). The examples listed above are not directives; the district court should have the flexibility to conduct further factfinding and consider alternatives before issuing any further order.

VACATED AND REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

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The Clerk is requested to award costs to (*party name(s)*):

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