UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY,

Plaintiff,

v.

MARK SELING, et al.,

Defendants.

NO. C91-664WD

JERRY R. SHARP, et al.,

Plaintiffs,

v.

MARK SELING, et al.,

Defendants.

NO. C94-121WD

RANDY PEDERSEN, et al.,

Plaintiffs,

v.

TIM HILL, et al.,

Defendants.

NO. C94-211WD

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JOHN F. HALL, et al.,

Plaintiffs,

v.

LYLE QUASIM, et al.,

Defendants.

NO. C95-1111WD

RONALD PETERSEN, et al.,

Plaintiffs,

v.

WILLIAM DEHMER, et al.,

Defendants.

NO. C96-415WD

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE MOTIONS HEARD OCTOBER 19-21, 1999

I. INTRODUCTION

These cases, consolidated for purposes of injunctive relief, involve the conditions of confinement of persons civilly committed as sexually violent predators at the Special Commitment Center ("SCC") at McNeil Island, Washington, pursuant to a Washington statute, RCW ch. 71.09. The SCC is administered by the State of Washington's Department of Social and Health Services ("DSHS"). It is located within the perimeter of the McNeil Island Correctional Center ("MICC"), a prison administered by the Department of Corrections ("DOC"). The plaintiffs are residents of the SCC; the defendants are the SCC's superintendent and clinical director.[1] The history of these cases is thoroughly set out in the orders entered on November 25 and December 23, 1998 (Dkt. ## 1026 and 1067 in the Turay case), and need not be repeated here. In brief, the Fourteenth Amendment Due

[1]Dr. Mark Seling, the superintendent, has been and remains a defendant. By stipulation of the parties, Dr. Vincent Gollogly, the acting clinical director, is hereby substituted for the recently-resigned Dr. Robert Smith as co-defendant.

Process Clause requires state officials to provide civilly committed persons with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. See Youngberg v. Romeo, 457 U.S. 307, 319-22 (1982). This rule applies to sex offenders, and "[l]ack of funds, staff or facilities cannot justify the State's failure to provide [those confined] with that treatment necessary for rehabilitation." Ohlinger v. Watson, 652 F.2d 775, 778-79 (9th Cir. 1980). The Youngberg constitutional standard "determines whether a particular decision has substantially met professionally accepted minimum standards." Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1248 (2nd Cir. 1984). In the present cases, the departures from professionally accepted minimum standards have been so substantial "as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323. Following a 1994 jury verdict adverse in part to defendants, and findings made by the court, the defendants were enjoined on June 3, 1994, to take certain steps to make constitutionally adequate mental health treatment available to the SCC residents. When progress was slow, a special master – Dr. Janice K. Marques, who had been nominated by defendants – was appointed to assist defendants in achieving compliance and to submit reports to the court. Dr. Marques has now submitted sixteen reports. The court has monitored injunction compliance and has held several hearings on plaintiffs' motions for a finding of contempt and defendants' motions for release from the injunction. On each occasion the court has found areas of improvement but a continuing failure to afford constitutionally adequate mental health treatment. The findings have concerned the staffing, staff training, treatment plans and programs, and treatment environment at the SCC. The findings and conclusions entered on November 25, 1998, following an evidentiary hearing, culminated in an order enjoining the defendants to take specific steps to achieve compliance with the injunction. The order of December 23, 1998, amended the November 25 order in two respects and denied a stay of the injunction pending defendants' appeal to the Ninth Circuit.

A further hearing on injunction compliance was held in open court on May 18, 1999.[2] The court found again that progress had been made but that the SCC still failed to meet constitutional and professional minimum standards for providing mental health treatment to persons civilly committed, and that the defendants had not yet complied, or substantially complied, with the injunction. The defendants were enjoined to complete the steps required by the order of November 25, 1998, as amended by the order of December 23, 1998; the special master's fifteenth report dated May 6, 1999, was adopted as a statement of work remaining to be done. Counsel for defendants stated at the hearing that some of the steps called for by the fifteenth report could be accomplished within several weeks, while others would take until about the end of 1999. Plaintiffs' renewed motion for contempt, and defendants' renewed motion for dissolution of the injunction, were denied. A further evidentiary hearing was scheduled for October 19, 1999, to be preceded by a further report by the special master. See Order on Renewed Motions for Contempt and for Dissolution of Injunction, May 27, 1999.

As scheduled, a three-day evidentiary hearing on injunction compliance was held on October 19-21, 1999. Counsel and some plaintiffs were present in person (all plaintiffs were enabled to attend, if they chose to, by a court order issued in advance of the hearing). The motions on which evidence was taken were plaintiffs' motion for contempt and sanctions, plaintiffs' separate motion for contempt regarding the SCC's telephone facilities, and defendants' motion to change the ombudsman provider.

At the October 1999 hearing, defendants did not contend that injunction compliance has been achieved, and did not seek dissolution of the injunction. Instead, they recognized through the

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[2]Fed. R. Civ. P. 62(c) provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." A contempt finding may be made, and sanctions imposed, while an appeal from an injunction is pending. See, e.g., Vac-Air Inc. v. John Mohr & Sons, Inc., 54 F.R.D. 580 (E.D. Wis. 1972), citing Howat v. Kansas, 258 U.S. 181, 189-190 (1922).

testimony of managerial employees, and through counsel, that minimum professional standards for treating sex offenders are not yet fully met and that the goal of providing constitutionally adequate mental health treatment is still unattained. Defendants' Revised Proposed Findings of Fact and Conclusions of Law, filed on November 1, include the following at page seven: "While defendants have demonstrated progress in a number of areas, they have not yet achieved total compliance with the November 25, 1998, injunction." Defendants' proposed order provides that they "will continue to be enjoined" with certain specific directions. Id. at 8. Defendants, however, oppose any finding of contempt or the imposition of sanctions, noting that "[i]t is not unusual for such injunctions to last many years." Id. at 1.

The importance of injunction compliance in these cases is underscored by two Washington Supreme Court decisions filed on October 21, 1999, In re Detention of Turay, No. 64100-5, 1999 WL 958446, and Campbell v. Washington, No. 63986-8, 1999 WL 958445. The state supreme court there declined by 6-2 votes to order two SCC residents released, holding that their remedies of injunctive relief and damages were sufficient and citing the present injunction as demonstrating that constitutionally adequate mental health treatment can be provided. The federal injunction, the state court held, gives residents "an adequate remedy that will guarantee that conditions at the SCC will meet or exceed constitutional standards." Turay, 1999 WL 958446 at *19. See also Campbell, 1999 WL 958445 at *4 ("Remediation is already ongoing under the direction of the federal district court.").

Also of importance is Young v. Weston, No. 98-35377, 1999 WL 718467 (9th Cir., Sept. 16, 1999), in which the Ninth Circuit held that while RCW ch. 71.09 is constitutional on its face, conditions of confinement at the SCC could render it punitive as applied, in which event the ex post facto and double jeopardy clauses could be violated.[3] The issue in the present cases is limited to whether constitutionally adequate mental health treatment is being afforded; that question is related,

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[3]The Ninth Circuit granted a motion to stay the issuance of the mandate in Young on October 21, 1999.

but not identical, to the question whether the conditions of confinement are punitive for purposes of ex post facto and double jeopardy analysis. The latter issue is not before the court in these cases. Nevertheless, the present injunction proceedings are important not just in their own right but to the above-cited cases and to others brought by SCC residents in state and federal courts.

II. FINDINGS OF FACT

At the October 19-21, 1999, hearing, the court heard testimony from Dr. Janice Marques (the special master), Dr. Mark Seling (the SCC superintendent), Dr. Vincent Gollogly (the acting clinical director), Dr. Robert Smith (the former clinical director), Lee Mosley (the resident advocate), Samuel Elwonger (the ombudsman), Keith Chiefmoon (the Native American chaplain), plaintiffs Ronald Petersen and Samuel Donaghe, current and former SCC staff members, and family members of some SCC residents. Exhibits were received in evidence. All parties rested and submitted post-hearing proposed findings and conclusions. The following findings have been established by clear and convincing evidence.

1. Court's Ex. 1, a summary prepared by Dr. Marques for a recent national meeting of the Association for the Treatment of Sexual Abusers ("ATSA"), sets out the accepted professional standards for providing mental health treatment to persons confined in a facility such as the SCC. It is essentially the same as the professional standards summarized in Finding of Fact 4, pages 11-12, in the order of November 25, 1998. In their testimony at the recent hearing, both the special master and the SCC superintendent confirmed the correctness and applicability of the standards set out in Court's Ex. 1.

2. On October 4, 1999, pursuant to Washington law, an Inspection of Care 1999 Committee Report ("IOC Report") was issued concerning the SCC. The committee members were a certified sex offender treatment provider, the chief operating officer of a child study and treatment center, a clinical nurse specialist, and a psychiatrist. Following inspection visits to the facility, record reviews, and interviews of staff and residents, the committee made findings of deficiencies similar to

those found by the court and the special master in the present cases. The IOC report was received in evidence as Plaintiffs' Ex. 1. It adds a further serious concern, that of inadequate medical staff and facilities for the SCC residents. The SCC superintendent has expressed agreement with the findings and recommendations of both the IOC and the special master.

3. Shortly before the October 1999 hearing, the DSHS made several improvements in the conditions at the SCC. These belated changes show that injunction compliance can be achieved if the necessary effort is made. There is still a failure, nevertheless, to meet professional minimum standards and to afford constitutionally adequate mental health treatment. The shortcomings do not reflect the judgment of any qualified professional; they exist, and have existed, despite uncontradicted professional opinion to the contrary. The evidence establishes the following in regard to the steps required by the November 25, 1998, order as amended by the December 23, 1998, order (the amendments are noted in brackets):

> (a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.

This requirement corresponds to items A and E of the original 1994 injunction, which required defendants to adopt and implement a plan for initial and ongoing training and/or hiring of competent sex offender therapists at SCC and to provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff, including monitoring of the treatment plans of individual residents, and to consult with staff regarding specific issues or concerns about therapy that may arise. The fifteenth report of the special master, approved and adopted by the court, identified four steps needed in regard to this part of the injunction: (1) implement strategies for reducing clinical and residential staff turnover; (2) document how and when remaining staff training will be completed; (3) structure and document the supervision provided

to therapists, including specific feedback on delivery of treatment components; and (4) strengthen communication and teamwork between clinical and residential staff.

This requirement has not adequately been met. Some staff members lack the necessary training, and others have received it untimely. Among the results are confusion as to staff roles and, in some instances, inappropriate behavior by staff toward residents. Some residential staff have not been sufficiently trained to understand the SCC's clinical mission. These problems are related to a high turnover rate and to recurring vacancies, some of which still exist. There has been a vacancy since August 1999 in the permanent clinical director's position.

The staff-to-resident population ratio has worsened. The staff includes dedicated and capable people, and recent budgetary approvals for additional positions, and hirings shortly before the recent hearing (including the hiring in August of a full-time executive assistant), show that adequate recruitment and training can be achieved; but at this point neither has been.

> (b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.

This requirement corresponds to items C and D of the original injunction, which ordered SCC to implement a treatment program for residents that includes all therapy components recognized as necessary by prevailing professional standards in comparable programs where participation is coerced, including the involvement of spouses and family members in the treatment of residents, and plans for encouraging the visitation and support of families, and to develop and maintain individual treatment plans for residents that include objective benchmarks of improvement so as to document, measure, and guide an individual's progress in therapy. The fifteenth report of the special master identified four steps needed in regard to this part of the injunction: (1) develop and implement comprehensive, individualized treatment plans that follow a standard format and are approved by the clinical director; (2) ensure that appropriate, individualized treatment is provided to residents with

special needs (e.g., major mental disorders, neurological impairments and developmental disabilities), including hiring and/or contracting with experts to provide specialized assessment and treatment planning for these individuals; (3) keep systematic records of resident participation and progress during each trimester, provide specific feedback on performance and clearly specify goals that must be achieved for advancement to the next treatment phase; and (4) further develop the structures (e.g., treatment, supervision and housing options) that are required for community transition and demonstrate their viability.

As noted in the IOC Report, "there has been a definite improvement in the treatment offered." Plaintiffs' Ex. 1 at 8. Treatment plans have improved in both quality and quantity. Nevertheless, as all parties recognized at the recent hearing, the plans for some residents are inadequate in that they fail to address individual histories, lack clarity, and fail to consider those with special needs (perhaps twenty-five percent of the population). As for the road map to release or to a less restrictive alternative ("LRA"), three residents have advanced recently to Level 5 (the highest being 7), which is a first and is encouraging. But the level system in general remains inadequate and there is still no half-way house (despite the Advisory Board's recommendation) and no systematic program for LRAs. For most residents, there is no clear track to improvement and release. These basic treatment requirements were ordered long ago; the continued failure to achieve full compliance is unexcused.

> (c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.

This requirement also corresponds to items C and D of the injunction. The fifteenth report of the special master noted that SCC must ensure that family relationships and support are addressed in treatment plans and that appropriate counseling is provided on a timely basis. The report also referenced the need for SCC to install a system to allow outgoing calls and to assign a social worker to the living unit for the purpose, among others, of increasing family outreach.

Family involvement in treatment has been an agreed step from the beginning but is still largely unrealized. Defendants continue to acknowledge its importance but SCC has failed to encourage family support and in many cases has discouraged it. Testimony from several witnesses at the hearing confirmed that SCC has failed to respond to family members who have asked for assistance, leading family members to feel rejected, out of touch with their confined relatives, and hopeless. Little has been done to develop family support and a social network policy. A July 1999 social event for residents in treatment and family visitors was a success, but remains an isolated occurrence. Dr. Seling testified over a year ago that he would consider ways to involve family members as a way of encouraging residents not in treatment to get involved, yet SCC's policy, adopted in June 1999, makes regular family counseling available only to residents involved in treatment, and nothing has been done to address or encourage family support for the non-treatment group.

> (d) Pending the construction of a separate treatment-oriented facility, to reduce the negative effects of the current connection with MICC by taking the following steps:
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> (i) Eliminate the routine strip searches of SCC residents following every visit [time for compliance extended to January 22, 1999];
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> (ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);
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> (iii) Negotiate with MICC management to obtain better meal and activity schedules, and to eliminate harassment of residents by prisoners; and
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> (iv) [Negotiate to] acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

This requirement corresponds to item B of the original injunction, which required SCC to implement strategies to rectify the lack of trust and rapport between residents and treatment providers. The fifteenth report of the special master identified steps needed in regard to this part of the injunction: (1) install a system to allow outgoing calls; (2) negotiate with MICC management to improve conditions including "big yard" access and appropriate segregation conditions; and (3) provide a complete facility planning document (showing each step from now until the new facility

is constructed, including population estimates, data on space per resident, an end date for "temporary" overcrowding, and a proposal for separating groups).

A separate treatment-oriented facility is in the planning stages and is expected to be funded by the next legislature, which will convene in January 2000. Given the population growth, such a facility is vital to the SCC's future success and legality. The present population is 95, and the superintendent estimates 115 by the end of this year, with major increases to follow. The tentative site for the new facility is McNeil Island at a location separate from the prison. The IOC Report, Drs. Smith and Seling, and residents' family members all recommend a more accessible location free of any proximity to a prison. The evidence shows that the advantages expected in the April 1998 move from Monroe to McNeil Island (more ample space, use of an infirmary on the island, increased recreational and vocational opportunities, availability of resources at Western State Hospital (which is nearby on the mainland), and an improved relationship with DOC) have not materialized except for larger space with better views. To the contrary, MICC's pervasive influence has made SCC's mission more difficult than it has to be. But there is expert opinion (including the special master's opinion) that SCC can provide adequate mental health treatment at McNeil Island, both at the present location (assuming that adequate space for the growing population will be provided) and, more easily, when the new facility opens in 2002. That being so, the present record does not justify an order requiring that SCC be located elsewhere. The current need, as stated in the November 25, 1998, order, is to reduce the negative effects of the connection with MICC to the point where constitutionally adequate mental health treatment can be provided. In that regard:

Routine strip searches of residents have been eliminated in compliance with the injunction. The result is to reinstate the policy that prevailed at Monroe.

Defendants have failed to comply with the November 25 order requiring them to eliminate the bar on outgoing telephone calls (other than collect). After the program was relocated to McNeil Island, and until September 1999, residents were able to make only outgoing collect or legal calls.

Although SCC could quickly have installed business lines and implemented a system like that in Monroe, it elected not to, deferring to DOC's preference for a system requiring residents to use PIN numbers, and restricting them to making outgoing calls to five pre-approved numbers. Even this limited telephone access is not yet fully implemented. State mental hospitals do not have the restrictions on use imposed by the PIN system; at Western State, residents can go to a regular pay phone and place calls. SCC's delay in implementing the court's order has made it more costly for residents to contact family members and has had a detrimental effect on residents and their families. SCC still does not have a system that allows incoming calls to be made directly to residents to comply with a state regulation, Wash. Admin. Code § 275-155-050(2)(f).

Defendants have made substantial improvements in meal and activity schedules, and the acquisition of a separate dining room for SCC has brought more reasonable meal times, a reduction of contact between SCC residents and MICC inmates, and twenty-one work stations for employment of residents.

Defendants succeeded on October 11, 1999 – eight days before the hearing – in taking over all of A Unit for SCC, which avoids overcrowding for the moment and permits the separation of residents accepting treatment from those who harass them. This marks the most important step forward since the May 1999 hearing. The living space in A Unit, however, will become inadequate as the population grows.

Yard space is still unduly limited because of MICC's refusal to let residents use the "big yard" after routine strip searches were stopped. The requirement that defendants negotiate with MICC for more adequate yard space is not yet fully met.

Although defendants have made progress in reducing the negative effects of SCC's connection with MICC, the prison's influence remains pervasive and damaging. As one staff member testified, the atmosphere is "always on yellow." Residents are restricted in their movements by DOC schedules or emergencies, must go through DOC for medical treatment and medications, and

are shackled and dressed in prison jumpsuits when they leave the island. Defendants have not made a sufficient effort to separate SCC from DOC influence and control.

(e) To improve the treatment environment in the following respects:
(i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;
(ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and
(iii) Afford reasonable opportunities to all residents for educational, religious, vocational/work, and recreational activities.

This requirement also corresponds to item B of the original injunction. The fifteenth report of the special master identified steps needed in this regard: (1) revise the grievance process to increase its resolution rate and demonstrate the credibility of the appeal process and clarify, via policy, when mediation services will be employed in grievance and other conflict situations; (2) document that the new policies have undergone a professional review (to ensure that they are consistent with each other and have clear procedures) and review by the resident advocate (to ensure that they are fair and understandable to residents); (3) expand educational, vocational and work opportunities and integrate these domains into the treatment planning process; (4) provide consistent access to religious activities for all residents; (5) assign a social worker to the living unit, with duties to include increasing social activities, family outreach, and building support networks for residents; (6) ensure that residents with disabilities have access to hobby and recreation, as well as to the law library (e.g., consider CD-ROM editions for the unit); and (7) demonstrate that management is considering and responding to the Resident Advisory Council and focus group input.

The recently-acquired living space (A Unit) now provides the needed separation of residents.

Grievance policies and processing are still too cumbersome and ineffective. Behavior management plans, and segregation in the prison's F Unit, are used too frequently to be consistent with a treatment-oriented environment.

Educational, religious, vocational/work, and recreational activities are still under-provided. A part-time Native American chaplain now is available, but defendants have failed unjustifiably to provide a sweat lodge (an area about fifteen feet square) for Native American religious purposes.

> (f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or another entity.

This uncontested requirement stems from a court order of February 4, 1997, which required external oversight to guarantee that the essential program features operate in practice and not just on paper. The fifteenth report of the special master identified the steps needed: with the court's approval, fully implement the oversight package recommended by the Advisory board, including clarifying the ombudsman and investigator roles and requiring non-DSHS participation in IOC reviews.

Defendants have now satisfied this requirement. The Governing Body, the Advisory Board, and the IOC are providing external oversight. Internal oversight is provided by the ombudsman and the resident advocate.

> (g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

This basic requirement is still unmet, as shown by the foregoing findings and by the evidence that staff members, on too many occasions, have interacted with residents in unprofessional and damaging ways. Residential as well as clinical staff must act consistently with SCC being a civil-commitment, treatment-oriented facility.

4. In consultation with the special master, the superintendent decided following the May 1999 hearing that certain compliance goals could be met by October and the remainder by about the beginning of 2000. The most urgent attention was to be given to staff training, staff recruitment, treatment plans, measures of progress, facility plans, and oversight. The timetable has not been realized; there are shortfalls as to the goals set for October, and the superintendent in his testimony

has estimated that nearly another year – until September 2000 – will be needed before compliance is complete. With nearly a hundred men in confinement, such a long delay is unacceptable in view of the time already allowed.

5. The failures to comply with the injunction, set forth above, are failures to meet constitutionally required minimum professional standards for the treatment of sex offenders.

6. The ombudsman's role was redefined by an order, stipulated to by all parties, entered on July 23, 1999 (Dkt. # 1170 in the Turay case). Defendants now move to replace the current ombudsman, Samuel Elwonger (who was hired with their approval), with an outside private agency, and to change the ombudsman's responsibilities in certain respects. Neutrality is a requirement of the job, and Mr. Elwonger often has seemed more like a partisan than a neutral. He has shown a growing understanding of the job's requirements, however, and his knowledge of and experience with the SCC are valuable. His relations with SCC's management have improved over time. There is no justification for the direction given to some SCC staff members that they should not talk to the ombudsman during working hours. On the assumption that Mr. Elwonger can and will act with full neutrality in the future, the court will deny, without prejudice to its later renewal, defendants' motion to replace him. The proposed changes in the ombudsman's role would move him from outside to inside the SCC chain of command, jeopardizing his neutrality; the motion to make those changes is denied.

7. Bearing in mind that the test for contempt is whether the alleged contemnors have failed to take all reasonable steps within their power to comply with the injunction, findings must be made as to the causes of the failure to achieve compliance. Based on the evidence received at the October 1999 hearing, and the entire record in these cases, the court finds that the causes have been and are as follows:

(a) The State of Washington, through its DSHS (which operates the SCC) and its DOC (which operates the MICC), has failed to devote the resources necessary to achieve compliance.

This is the chief cause. Instead of doing what must be done, the state has treated SCC as an unwanted stepchild of a medium-security prison. Dr. Seling, the superintendent, is dedicated to achieving a successful treatment-oriented program, but neither he nor other staff members can succeed without adequate resources. Dr. Smith, until recently the clinical director, testified that his repeated requests for adequate staffing, other resources, and more freedom from MICC were rejected on budgetary or prison security grounds; eventually, he gave up and stopped making requests. As noted in an earlier order, nothing compels a state to adopt a statute of this nature in the first place and many states have not done so (see December 23, 1998, order at 8, n.3); but a state that chooses to have such a program must make adequate mental health treatment available to those committed.

(b) The defendants have fallen into a pattern of first denying that anything is amiss at SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting at the hearing that shortfalls of constitutional magnitude still exist, then returning to denial. For example, Defendants' Reply Brief filed September 27, 1999, states at page 1 that "defendants believe they have long ago achieved constitutionally adequate treatment for the residents of the SCC . . . ." Yet at the October 19-21 hearing both Dr. Seling and Dr. Smith testified candidly to the contrary – Dr. Smith even used the term "dysfunctional" in describing SCC's program – and defendants now propose that the injunction be maintained at least for the next several months. Parties to litigation are entitled to deny opposing parties' claims and to appeal adverse rulings, but in these cases the entrenched resistance has impeded prompt and wholehearted compliance with court orders protecting basic liberties.

(c) The placement of SCC within the perimeter of MICC continues to make it difficult to achieve a treatment-oriented environment.[4] On issues such as routine strip searches

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[4]There is a persistent misunderstanding in DSHS as to where the SCC should be located. It is not required to be on the grounds of a prison. The error in arguing otherwise was pointed out in the December 23, 1998, order at 6-7. As made clear in that order, the law requires that SCC be a civil

(conducted against the wishes of SCC management and ended only after two court orders were entered), outgoing telephone calls (still a bone of contention), and the use of the "big yard" (unavailable to SCC residents because of prison security concerns), MICC continues to have adverse effects upon SCC. The IOC Report states: "The site at present definitely operates more like a correctional facility than a treatment center or program." Plaintiffs' Ex. 1 at 5. As the special master testified, compliance at this location, although difficult, is possible if the necessary effort is made; so far, the full effort has not been made.

(d) After three years of service, Dr. Robert Smith resigned as clinical director in August 1999. His departure followed a long period of discord with Dr. Seling, of which the court was informed only at the October 19-21 hearing. Dr. Smith is a qualified expert in the treatment of sex offenders. The unproductive dispute between the two highest SCC officials, and Dr. Smith's resignation, have hampered the SCC program. Fortunately, Dr. Vincent Gollogly, serving as acting clinical director despite a shortage of credentials as an expert in sex offender treatment, appears to have done an excellent job to date. The evidence supports the resident advocate's report that "Dr. Gollogly has assumed a dynamic and positive role in clinical leadership." Defendants' Ex. A-2 at 1. The search for a permanent clinical director is under way but needs to be expedited.

(e) The task is inherently difficult. The statute, although constitutional on its face under Kansas v. Hendricks, 521 U.S. 346 (1997), in practice causes resentment and resistance because it re-confines, for an indefinite period, offenders who have served their sentences and have been released. Successful treatment of sex offenders is no easy task even among those who voluntarily seek it; it is harder yet, by and large, among those involuntarily committed. But the

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commitment facility, not a prison, and be operated by the DSHS, not by the DOC. But the error has surfaced again in the October 17, 1999, Draft Space Program Report of DSHS's consulting firm for the planned new facility, which says at section 2, page 1: "RCW 71.09, through WAC 275-155010, provides that the Special Commitment Center must be located at a secure Department of Corrections operated facility . . . ."

difficulties have been recognized fully in the generous time already allowed for compliance, and at this point, on this record, do not excuse a further failure to perform.

8. The record in these cases shows footdragging which has continued for an unconscionable time. The court finds by clear and convincing evidence that the defendants have not taken all reasonable steps within their power to comply with the injunction, and have intentionally disregarded the injunction's requirements. Although this conduct does not represent the choice of Drs. Seling and Gollogly, it must be attributed to them as the defendants herein.

9. Compliance should have been complete long ago. The time now estimated by the SCC superintendent to achieve it – September 2000 – is unnecessarily long and would unnecessarily harm the residents. There appears to be no reason why compliance could not be complete in six months following the recent hearing, i.e., by April 2000.

III. CONCLUSIONS OF LAW

1. The court has jurisdiction herein pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

2. The Washington statute involved here, RCW ch. 71.09, is a civil commitment statute. A sex offender, typically one who has served his prison term or is about to complete his sentence, may be detained and committed under it for an indefinite time. The term "sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(1). If a committed person petitions for discharge from confinement, the central question is whether his mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged. RCW 71.09.090(1).

3. The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly-committed persons, such as these plaintiffs, with access to

mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. See Youngberg, 457 U.S. at 319-22; Ohlinger, 652 F.2d at 778. Moreover, defendants have a duty to provide plaintiffs with "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg, 457 U.S. at 322. Recognizing these requirements, the Washington statute provides that "[a]ny person committed pursuant to this chapter has the right to adequate care and individualized treatment." RCW 71.09.080(2).

4. The state, however, "enjoy[s] wide latitude in developing treatment regimens [for sex offenders]," Hendricks, 521 U.S. at 368 n.4, and "liability [on a claim of constitutional deprivation] may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323 (1982).

5. As set out in the foregoing findings of fact and in earlier orders, the defendants persistently have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment.

6. Injunctive measures ordered against a state agency or official ordinarily must be no broader than necessary to remedy the constitutional violation, but a remedy may go beyond the precise terms of the specific violation "when there is a record of past constitutional violations and violations of past court orders." Gary v. Hegstrom, 831 F.2d 1430, 1433 (9th Cir. 1987) (citing Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982)). The court may "order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy constitutional violations." Gluth v. Kangas, 951 F.2d 1504, 1510 n.4 (9th Cir. 1991) (citing Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986)). The orders of November 25 and December 23,

1998, and May 27, 1999, listed specific steps to be taken that were within the scope of the injunction as originally issued.

7. In the respects set forth in the findings of fact, defendants have continued to violate the injunction herein and the implementing orders of November 25 and December 23, 1998.

8. The test for determining contempt is "whether the defendants have performed 'all reasonable steps within their power to insure compliance'" with the order. Stone v. City of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992). The contempt "need not be willful." In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987). "[T]here is no good faith exception to the requirement of obedience to a court order." See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1323 (9th Cir. 1998). The party alleging civil contempt must demonstrate by clear and convincing evidence that parties to be held in contempt violated the court's order. Federal Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999). The burden then shifts to the alleged contemnors to demonstrate why they were unable to comply. Id. A party's inability to comply with a court's order constitutes a defense to a charge of civil contempt. Id.

9. The record shows by clear and convincing evidence that defendants have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction's requirements. There is no showing that the defendants are or have been unable to comply. Accordingly, the defendants are now held to be in contempt of court.

10. The purpose of civil contempt sometimes is not to punish but "to coerce the defendant into compliance with the court's order, and to compensate the complainant for the losses sustained." Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992); see also International Union, United Mineworkers of America v. Bagwell, 512 U.S. 821, 829 (1994). While the court must use the "least possible power adequate to the end proposed," Spallone v. United States, 493 U.S. 265, 276 (1990), it also "must consider the character and magnitude of the harm threatened by continued

contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." Whittaker, 953 F.2d at 516. Defendants' footdragging is an important factor in weighing the use of a contempt sanction. See Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 476-77 (1986) (upholding affirmative action plan and fine imposed by the district court and stating that "[i]n light of petitioners' long history of 'foot dragging resistance' to court orders, simply enjoining them from once again engaging in discriminatory practices would clearly have been futile.").

11. The present injunction is five and one-half years old and the defendants have been given repeated opportunities to comply without sanctions being imposed. It is now clear that sanctions are essential. The primary sanction requested by plaintiffs – that all SCC residents be ordered released – is not justified at this point as a measure to induce compliance. It is therefore not necessary to decide whether release could be ordered in a civil rights case such as this as distinguished from a habeas corpus case. See, e.g., Heck v. Humphrey, 512 U.S. 477 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973). Financial sanctions should be sufficient, and, in view of defendants' recent belated efforts to improve the SCC's treatment practices and environment, should be deferred for six months from the time of the last hearing to afford a final opportunity to comply.

12. A sanction for "[c]ivil contempt is characterized by the court's desire to compel obedience to a court order or to compensate the contemnor's adversary for the injuries which result from the noncompliance." Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983). The amount of a compensory contempt fine is in the discretion of the court. United States v. Asay, 614 F.2d 655, 660 (9th Cir. 1980). The appropriate sanction here is a payment of $50 per day per resident confined on that day (which, with about 100 residents, would equal roughly $5000 per day), to be paid into the registry of this court for subsequent disbursement, pursuant to court order, to the residents or for their benefit. For the sanction to be effective, the parties must be assured that it will not be nullified by a state claim for the cost of each resident's custody. The state has used a

threat of such recoupment as a means of discouraging damages claims by residents. See Plaintiffs' Ex. 14. Therefore, the sanction payments will not be subject to a lien or claim by the state for costs of confinement, evaluation, or care pursuant to RCW 71.09.110, Wash. Admin. Code § 275-155-060, or any other statute or regulation. The sanction amount will be due for each day commencing May 1, 2000, unless the court sooner determines that injunction compliance is complete or substantially complete, and will be paid monthly, for the preceding month, beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed.

13. This order will not preclude the imposition of other sanctions should defendants continue to violate the injunction.

IV. ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ordered that:

1. Plaintiffs' motion for a finding of contempt of court and for the imposition of sanctions is granted. Defendants are held to be in contempt of court for having failed to take all reasonable steps within their power to comply with the injunction herein by making constitutionally adequate mental health treatment available to the SCC residents.

2. A civil contempt sanction is hereby imposed as follows: Defendants shall pay into the registry of this court a sanction of $50 per day per resident confined at the SCC on that day, which amount will be due for each day commencing May 1, 2000, unless the court sooner determines that injunction compliance is complete or substantially complete. The sanction will be paid monthly, for the preceding month, beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed. The sanction proceeds will be disbursed, pursuant to court order, to the residents or for their benefit, and will not be subject to a lien or claim by the state for the costs of confinement, evaluation, or care pursuant to RCW 71.09.110, Wash. Admin. Code § 275-155-060, or any other statute or regulation.

3. Plaintiffs' separate motion for a finding of contempt as to the changes required in the SCC telephone system is granted. This being an item of injunction compliance within the scope of paragraphs 1 and 2, above, no separate sanction will be ordered.

4. Defendants' motion to replace the ombudsman is denied without prejudice to its renewal in the event of any future demonstrated lack of neutrality on the ombudsman's part, or for other cause.

5. Defendants again are enjoined to comply fully with the injunction herein, as detailed in the orders entered on November 25 and December 23, 1998, and in doing so to use the assistance provided by the special master.

6. A further report by the special master will be due on April 12, 2000. A hearing as to injunction compliance will be held at 8:45 a.m. on April 18, 2000. Any party may move for contempt, dissolution of the injunction, or other relief before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, the pro se plaintiffs, amici curiae, and the special master.

Dated: November 15, 1999.

William L. Dwyer
United States District Judge

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