The Ninth Circuit Court of Appeals and Jail-Based Competency Evaluation and Restoration

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The U.S. Ninth Circuit is the largest of the federal appeals courts, encompassing the states of Alaska, Washington, and Oregon to the north, Hawaii, Guam, and the Northern Mariana Islands to the west, California and Arizona to the west and southwest, along with the three intermountain states of Idaho, Montana, and Nevada. The landmass within the Ninth Circuit represents great diversity of geography, climate, population density, and cultural and political traditions. This article considers two landmark Ninth Circuit decisions, one from Oregon and the other from Washington, two states that share geography, culture, and political orientation. Informed by these decisions, we consider how the Ninth Circuit might view the jail-based competency evaluation and restoration programs in the state of Arizona. We explore: the due process rights of jail detainees who are awaiting an evaluation of trial competency; and the time necessary for admission to, and the adequacy of, Arizona's jail-based competency restoration programs after a finding of incompetency.

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The question of trial competency involves evaluation and potentially restoration. The initial evaluation process ends when a judge finds an individual either competent or incompetent to stand trial (IST). If a defendant is adjudicated IST, the judge then determines whether restoration services are warranted or the defendant is IST and not restorable.[1] Competency restoration traditionally is carried out in state psychiatric facilities, but a small group of states offer restoration programs in jails. The time spent in competency evaluation or waiting for transfer to a restoration program and the adequacy of that restoration program is especially important for those detained in jails where lengthy confinement impinges on their due process.[2]

In Oregon and Washington, once the question of competency to stand trial is raised, an evaluation takes place in the jail, a state psychiatric facility, or in a community setting. If competency restoration is ordered, this process occurs in a psychiatric hospital or in the community.

In contrast to Oregon and Washington, in Arizona both evaluation and restoration most often occur in jails and, to a lesser extent, in the community. Permitting competency restoration services in jail is at the discretion of each county's board of supervisors. A recent paper focused on Arizona's jail-based competency restoration programs and challenges in these programs related to medication refusal.[3] The authors[3] reported that jail-based competency restoration services are provided in five different county jails, with two serving multiple counties. These jail-based restoration programs are administered by county government, with two using subcontracts with a private correctional health management company.[3] While the Arizona State Hospital (ASH) historically had a major role in competency restoration services, today ASH serves only a few IST individuals per year. No statewide data were available to the authors regarding the amount of time it takes to complete a competency

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evaluation and then to transfer detainees from county jails to the jail-based restoration programs, nor are there generally accepted statewide guidelines regarding the program elements necessary for each program.[3] These time periods are important, however, and certainly the adequacy of each jail-based restoration program is also of paramount importance.

Oregon

Oregon Advocacy Ctr. v. Mink[4] was filed in the U.S. District Court for the District of Oregon by the Oregon Advocacy Center and the Metropolitan Public Defender Services on behalf of a jail detainee with mental illness who was awaiting transfer for competency restoration from jail to OSH. The district court judge found in favor of the plaintiffs. OSH then appealed to the Ninth Circuit, whose decision was filed on March 6, 2003.[4]

The Ninth Circuit noted that the plaintiffs alleged that OSH was "violating mentally incapacitated defendants' due process rights by unreasonably delaying such defendants' transfer from county jails to OSH for treatment" (Ref. 4, p 1105; "incapacitated defendants" is Oregon's term for IST defendants), and that, in 2001 and 2002, detainees had to wait two to five weeks for a hospital bed. During this waiting period, the jails were able to provide medications on a voluntary or an emergency basis but were unable to involuntarily administer medication for competency restoration. In addition, detainees were often kept in their cells for up to 23 hours a day, resulting in an exacerbation of their mental illnesses. The court's findings included that the plaintiffs had standing to sue, that the case was not moot, and that "OSH was violating the incapacitated defendant's Fourteenth Amendment due process rights by unreasonably detaining them in county jails that lack the facilities to treat and restore the defendants' mental health. The district court entered an injunction requiring OSH to admit mentally incapacitated defendants within seven days of the judicial finding of their incapacity to proceed to trial" (Ref. 4, p 1107).

By upholding the district court's injunction, the Ninth Circuit emphasized the critical point that pretrial detainees are distinct from sentenced prisoners, so their situation should be analyzed using principles derived from the Fourteenth Amendment rather than the Eighth Amendment to the U.S. Constitution. Citing the Supreme Court's decision in *Youngberg v. Romeo*,[5] the Ninth Circuit wrote, "To apply the deliberate indifference standard here would be to relegate incapacitated criminal defendants to the same level of treatment afforded to convicted prisoners, a result Youngberg rejected" (Ref. 4, p 1120). The court went on to state, "Because incapacitated criminal defendants have not been convicted of any crime, they have an interest in freedom from incarceration. They also have a liberty interest in restorative treatment" (Ref. 4, p 1121). In citing an earlier Ninth Circuit decision, the court found that "[l]ack of funds, staff or facilities cannot justify the State's failure to provide [such persons] with the treatment necessary for rehabilitation. *Ohlinger v. Watson*, 652 F2d 775, 779" (Ref. 4, p 1121).

The Ninth Circuit, referring to *Jackson v. Indiana*,[2] ruled that "[a]lthough *Jackson* involved a pretrial commitment to a mental health facility for three and one-half years, rather than pretrial detention for several weeks or months in a county jail, the principles enunciated in *Jackson* apply to the case before us." (Ref. 4, p 1122). In sum, the view of the Ninth Circuit was that the amount of time that mentally incapacitated detainees spent in jail awaiting an OSH restoration bed was conceptually similar to the time a defendant spent in hospital restoration services in *Jackson*.

Sixteen years later, in 2019, the *Mink* decision was revisited when Disability Rights Oregon, the successor organization to the Oregon Advocacy Center, filed an *Amicus Memorandum Regarding Contempt Motions* calling out OSH's failure to comply with the 2003 decision that seven days was the maximum time that an incapacitated detainee could be held in jail awaiting transfer to OSH.[6] In response, OSH acknowledged that wait times had increased due to a greater number of incapacitated detainees held in jails awaiting OSH beds. Working under pressure from the federal district court, OSH was brought back into compliance with *Mink* over a period of months.[7] To reestablish compliance, however, OSH limited admissions of civil commitment patients waiting in general hospitals for OSH beds, causing a crisis in other parts of the mental health system.[8]

Washington

During the past decade, Washington faced crises in two of its most important public forensic mental health services: civil commitment and trial competency evaluation and restoration. Very often, these

separate programs share the single endpoint of a state hospital bed. Contributing to the statewide problem was that between 2010 and 2016 the total number of psychiatric beds in the Washington state hospital system decreased from 1,220 to 729, a loss of 491 beds.[9] In each area, the state was overwhelmed by increased demand, leading to a backlog of individuals in need of services. As a result, many of these individuals were competing for a state hospital bed. Involuntary patients were entered into the state civil commitment process in general hospital emergency rooms and held for long periods of time awaiting a bed at the next level of the involuntary process, a form of psychiatric boarding.[10] Almost simultaneously, pretrial detainees were held in jails for long periods of time awaiting state hospital beds for competency evaluation or restoration services.

These problems in civil commitment were settled eventually by the Washington Supreme Court case from Pierce County, *In re the Detention of D.W. v. Department of Social and Health Services*.[11] The court found that the use of a component of the state's civil commitment statute did not justify keeping involuntarily detained individuals in general hospital emergency rooms for significant periods of time. The decision compelled the state to provide the necessary evaluation and treatment services in a timely manner for those detained under its Involuntary Treatment Act. The state supreme court quoted from *Mink* that "[l]ack of funds, staff or facilities cannot justify the State's failure to provide such persons with the necessary treatment" (Ref. 11, p 8). The state responded to the court's decision by developing a legislatively approved plan that added beds to the involuntary treatment system.[10]

The *Trueblood* cases were Washington's equivalent of *Mink*.[12,13] These cases were filed initially in the U.S. District Court for the Western District of Washington by a class of plaintiffs who were held in jails waiting for psychiatric hospital beds.[12] The Ninth Circuit Court of Appeals delivered its ruling in *Trueblood v. Wash. Dept. of Social and Health Servs* on May 6, 2016.[13] The Ninth Circuit summarized the challenges as follows: "Following a bench trial, the district court detailed Washington's shortcomings in providing competency evaluation and restoration services, the insufficient number of beds and personnel as a result of inadequate funding and planning, and the deleterious effects of prolonged incarceration without evaluation and treatment for mentally ill detainees" (Ref. 13, p 1039).

Washington's statutory procedure differed from Oregon's in that both evaluation and restoration services were accomplished under state authority. As a result, *Trueblood* set time limits for the completion of competency evaluations in jails or at a state hospital and for the transfer of incompetent detainees from jail to a state hospital restoration program. While the case was in progress, the Washington state legislature passed a law establishing time limits for hospital admissions. Now, competency evaluations in jail must occur within seven to 14 days with a possible seven-day extension if clinical reasons delayed the evaluation. Once competency restoration is ordered by the court, hospital admission must occur within seven to 14 days.[14] *Trueblood* ended in December 2018 with a settlement agreement that promised to augment the involuntary component of Washington's mental health system significantly.[15]

Arizona

Arizona defines the process for competency evaluation and restoration in its Rule 11 of Criminal Procedure.[16] This rule prescribes time limits for each phase of evaluation. Once the court finds there are reasonable grounds for an evaluation of competency, it appoints two experts (psychiatrists or psychologists) to examine the defendant. These experts are ordered to submit written reports to the court within 10 business days of their examinations (Ref. 16, Rule 11.3(a)(1)]. Within 30 days of submitting their reports to the court, a hearing is held to determine the defendant's trial competence (Ref. 16, Rule 11.5(a)).

If the court adjudicates the defendant as incompetent but restorable,

> . . . it must either dismiss the charges on the State's motion or order competency restoration treatment, unless there is clear and convincing evidence that the defendant will not regain competence within 15 months. The court may extend treatment if it finds that the defendant is progressing toward competence. The extension may be up to 6 months so long as this period does not exceed the defendant's maximum possible sentence . . . (Ref. 16, Rule 11.5(b)(2) (A and C)).

The permissible locations for competency restoration programs are defined in statute as determined by county boards of supervisors (Ref. 17, §A). The county supervisors can enter into contracts with "providers, including the Arizona State Hospital, for inpatient, in custody competency restoration

treatment" (Ref. 17, §C) and can also "provide competency restoration treatment to a defendant in the county jail, including inpatient treatment" (Ref. 17, §C1).

Graves v. Arpaio

A separate lawsuit, *Graves v. Arpaio*,[18] began in 1977 as a prisoner lawsuit in the U.S. District Court in Phoenix. The case, later titled *Graves v. Penzone*, focused on the medical and psychiatric care of all pretrial detainees in Arizona's largest jail in Maricopa County, which includes Phoenix and its environs. *Graves* was a class-action prisoner lawsuit analyzed under the Eighth and Fourteenth Amendments to the U.S. Constitution and the Prison Litigation Reform Act (PLRA)[19], which limits the powers of the courts in such deliberations.

As a component of the PLRA, Section A of the U.S. Code defines the term prospective relief as it pertains to what courts can order to remedy problematic jail or prison conditions as follows:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief (Ref. 19, Section A).

Section C of the code further limits the powers of the courts by stating, "Nothing in this section shall be construed to authorize the courts in exercising their remedial powers, to order the construction of prisons, or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts." (Ref. 19, Section C). Over the years, the disputes between the parties in *Graves* were narrowed by multiple orders of prospective relief and eventual court-determined compliance by the jail.

It is important to note that the questions in *Graves* initially focused on health and mental health conditions for all detainees in the jail and not solely on pretrial detainees in the Rule 11 process. When *Graves* was filed in 1977, there were no jail-based competency restoration programs in Arizona's county jails, and restoration was done primarily at ASH. Arizona's jail-based programs first began in Maricopa County in 2003 and followed later in other county jails.

In the later years of the case, the plaintiffs' attorneys attempted to focus more on what they considered to be the dire circumstances experienced by pretrial detainees in the jail, which included inadequate psychiatric care for detainees with the most serious mental disorders, involuntary medication treatment, and the lack of access to hospital-level care outside of the jail. These were very similar to the challenges that the Ninth Circuit addressed in *Mink* and *Trueblood*, but the judge declined to intervene.[20] In his March 1, 2017, decision, Judge Wake wrote:

> Providing constitutionally adequate mental health care for pretrial detainees confined in the Maricopa County Jail presents important, complex and challenging issues. Plaintiffs' motion brings attention to public policy concerns regarding who should provide and how to provide appropriate mental health care for the chronically and seriously mentally ill, avoid repetitive incarceration, and balance individual freedom with safety concerns. But this class action on behalf of pretrial detainees confined in the Maricopa County Jail addresses only confinement conditions within Defendant's control . . . . To the extent that Plaintiffs advocate on behalf of the seriously mentally ill residents of Maricopa County generally and seek to increase the availability of inpatient psychiatric care and to accelerate procedures resulting in civil commitment, they must do it in a different lawsuit (Ref. 20, Section A).

After being active for 42 years, *Graves v. Penzone* officially ended on September 19, 2019.[21] The court never ruled on the rights and problems of detainees with mental illness in Maricopa County jails under Rule 11.

Discussion

With this background, we now examine the possible effects of the Ninth Circuit decisions in *Mink* and *Trueblood* if and when cases regarding jail-based competency evaluation, and restoration in Arizona reach the same court. The overall statutory scheme for competency evaluation is similar in both Oregon and Washington. Evaluation takes place in jail, in a psychiatric hospital, or in the community, whereas most restoration takes place in a state psychiatric hospital. The time limits in both *Mink* and *Trueblood* were designed to keep jail time to a minimum as the Ninth Circuit viewed the typical jail setting as particularly deleterious to detainees who were incompetent due to mental illness. In these decisions, the Ninth Circuit determined that lack of hospital beds was not an acceptable reason to hold a detainee in a jail for

inordinate lengths of time. Based on due process and equal protection rights of pretrial detainees, time in jail was to be kept at a minimum, and lack of funds, staff, or facilities were not to justify a state's failure to provide necessary treatment to these individuals.

Graves was fundamentally a prisoner lawsuit focused on the services provided to all jail inmates in a county jail. This point is important in the context of this article because, in later phases of the case, the plaintiffs' attorneys were prepared to raise questions directly related to *Mink* and *Trueblood* (Ref. 3, pp 236–8). The Arizona District Court declared, however, that it was limited in this case to the remedies it could order due to the PLRA and limitations to federal action presented by 18 U.S.C. 3626.[19] Notwithstanding the points that the plaintiffs attempted to present, the judge made it very clear that plaintiffs could not do that in this lawsuit and that they needed a "different lawsuit."

We next discuss how the *Mink* or *Trueblood* decisions might influence a decision from a lower court challenging Arizona's approach to competency evaluation and restoration as outlined in Arizona's Rule 11 approach to competency evaluations that occur in jail. What the Ninth Circuit might require would be determined by empirical investigation of the time it takes for competency evaluation and adjudication to occur for pretrial detainees. Currently, no publicly available statewide data exist on this subject; anecdotally, however, it appears that this process may take longer than is now allowed in Washington and Oregon. If this is the situation, the authors expect the Ninth Circuit would emphasize that determinations of trial competency in jail should occur more quickly, in line with its earlier decisions. Similarly, we do not know how long it takes to transfer an incompetent detainee to a jail-based program within the same county, nor do we know how long it takes for a single county jail working with a contracted jail-restoration service to transfer detainees to the contracted program. These are all empirical questions that the Ninth Circuit is likely to be interested in and incorporate into its decision.

Next would be the Ninth Circuit's view of the adequacy of Arizona's program, where the majority of its in-custody competency restoration services now occur in jails. As noted earlier, *Mink* (2003) took a skeptical view of what a typical jail might be able to provide with respect to psychiatric treatment and restoration (Ref. 4, pp 1119–20). In 2003, in contrast to the current situation, there were few jail-based competency restoration programs in the country, garnering little attention in the professional literature. The situation regarding jail-based competency restoration programs was different when *Trueblood* was decided in 2016.[22] The existence of jail-based competency restoration programs was certainly known to the *Trueblood* courts,[23,24] yet section III of the federal district court's findings focused on the harms caused by prolonged incarceration, and the trial judge listed concerns very similar to those defined in *Mink* 13 years earlier (Ref. 12, pp 1017–8). Additionally, Washington's attempt to operate Yakima Competency Restoration Center in a retired correctional facility was unsuccessful, and, in lieu of a jail-based competency restoration program, the services were transferred to a state hospital campus under the state Department of Social and Health Services.[25]

These earlier negative views of the typical jail environment expressed in *Mink* and *Trueblood* portend a rejection of jail-based restoration programs, although footnote 13 in the *Mink* decision provides a possible clue to how the Ninth Circuit might view Arizona's jail-based competency programs:

> We conclude, however, that the district court's unchallenged findings establish a sufficiently pervasive systemic and consistent pattern of injury to justify the state-wide sweep of the injunction. If OSH has evidence that one or more Oregon county jails can and will provide timely and adequate restorative treatment to incapacitated criminal defendants, OSH can seek a modification of the injunction from the district court (Ref. 4, footnote 13).

The Ninth Circuit might view a jail-based competency restoration program in a positive light as per their choice of the words "timely and adequate restorative treatment to incapacitated criminal defendants" (Ref. 4, footnote 13). The court signaled that a properly implemented therapeutic jail restoration program could be permissible. At the time of the *Mink* decision, it did not appear that such a program existed in Oregon; as a result, the court issued an injunction mandating that all incompetent defendants be transferred to OSH within seven days.

In Arizona, again due to the lack of statewide data on jail-based competency restoration programs, more evidence is needed to determine if the programs that currently exist in the state provide a sufficiently therapeutic environment to satisfy the Ninth Circuit. We hypothesize, however, that for jail-based competency restoration programs to pass the Ninth

Circuit's scrutiny, Arizona would have to commit to statewide program elements including staffing, funding, public reporting of program data, and routine program evaluation. Additionally, it is important to note that the literature cited in this article suggests that psychosis in the setting of sustained medication refusal was a reason for transferring an individual to a psychiatric hospital for competency restoration services. Thus, we anticipate that the way forced medications are handled in a jail-based program would be carefully reviewed by the Ninth Circuit.

On the national level, two recent articles highlight the complexities involved in defining what is meant by a jail-based restoration program. Ash *et al.*[26] describe a model program from the city of Atlanta that developed a continuum of restoration services. The program utilized an in-jail restoration unit, restoration services for other pretrial detainees in the general jail population, outpatient restoration in the community, and transfer to the state hospital for the most serious medication-refusing detainees. Whether jail-based competency restoration services taking place in the general population meets the definition of "timely and adequate restoration treatment" would require careful deliberation (Ref. 5, footnote 13).

In another article, Danzer *et al.*[27] compared competency restoration programs in three different locations: psychiatric hospitals, jails, and outpatient programs. Jail-based restoration is presented in this article as potentially under-developed but as a possibility to explore further for various reasons, with cost and the lack of hospital beds being the most prominent. The authors make no distinction about where within the jail restoration should occur (i.e., in specialized units, psychiatric units, or the general population), nor do they mention necessary program elements to determine adequacy when compared with a hospital (hopefully one accredited by The Joint Commission).

Conclusion

Oregon Advocacy Center v. Mink[4] was the seminal decision in what is now reported to be a line of cases in other jurisdictions. In a recent article in *The Atlantic*, Tullis reported on a project sponsored by the MacArthur Foundation entitled the Presence of Justice, which focused on the rights of pretrial detainees under the Fourteenth Amendment.[28] Reporting on data from the National Disability Rights Network, Tullis wrote that the *Mink* decision opened the "floodgates" for similar lawsuits. Starting from *Mink*, in 2003 there were 11 such lawsuits, and every suit but the one from Texas was resolved by a consent decree in favor of the plaintiffs (Ref. 28, pp 4-6). Given the apparent national strength of the Ninth Circuit's decisions in Oregon and later in Washington, we conclude that the Ninth Circuit decisions will be regarded as seminal in other jurisdictions well into the future. We also conclude that, if presented with a similar case in Arizona, the Ninth Circuit is likely to rule in a manner that identifies expectations that the state should expeditiously evaluate detainees for competency to stand trial, and then, if jail-based restoration is contemplated, to transfer quickly and adequately treat detainees engaged in jail-based competency restoration programs.

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