Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants
and
CORIZON, INC., et al.,
Defendants-Appellants

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

DEFENDANTS-APPELLANTS' JOINT REPLY IN SUPPORT OF JOINT MOTION TO VACATE DISTRICT COURT'S ORDER

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Pursuant to this Court's Order (Dkt. 37, p. 2), Defendants-Appellants Idaho Department of Correction (IDOC), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, Rona Siegert, Corizon, Inc. Dr. Scott Eliason, Dr. Murray Young, and Dr. Catherine Whinnery (collectively, the "Defendants"), by and through their respective counsel of record, hereby provide this reply brief in support of Defendants-Appellants' Joint Motion to Vacate the District Court's Order. (Dkt. 31)

A. The District Court Failed to Make the PLRA Findings that the Ninth Circuit Requires.

It is clear that the district court's Order (ER 001-045) failed to include any actual findings that the relief granted satisfied the "need-narrowness-intrusiveness criteria" of the Prison Litigation Reform Act (PLRA), 18 U.S.C.A. § 3626(a)(1)(A). Nor did the district court make any findings that it gave any weight, let alone "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." § 3626(a)(1). Notwithstanding, Ms. Edmo represents incorrectly and without citation that the district court's Order "made findings that the relief ordered satisfies the PLRA requirements" (Dkt. 68, p. 10) and, in the alternative, that the district court was not required to make actual findings that its Order complied with the PLRA. (Dkt. 68 p. 10; Dkt. 32-1, p. 70).

The language of the PLRA is clear that the district court shall expressly make such "findings" and that any order granting relief "in the absence of a finding" is

subject to immediate termination. § 3626(a)(1)(A), (a)(2), and (b)(2). Where an order lacks "specific findings that any of the preliminary injunction's requirements satisfied the need-narrowness-intrusiveness criteria in § 3626(a)(2), much less an explanation of how they did," the order violates the PLRA. *U.S. v. Secretary, Florida Dept. of Corrections*, 778 F.3d 1223, 1229 (11th Cir. 2015) (hereinafter "*FDOC*"); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) (requiring that the district court make, at the very least, "a determination that it has found the requisite need, narrowness and lack of intrusiveness" criteria) (citing *Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001) (noting that the district court there "specifically made the findings required by the PLRA")); and *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998) ("We interpret the statute [18 U.S.C. § 3626(a)(1)] to mean just what it says – before granting prospective relief, the trial court must make the findings mandated by the PLRA.") (Emphasis added)).

Here, the Order failed to make even conclusory findings, let alone provide any explanation of how the district court believed its Order satisfied the need-narrowness-intrusiveness criteria. Ms. Edmo previously cited *Oluwa v. Gomez* to this Court (Dkt. 32-1, p. 70), but neglected to inform the Court of the decision when suggesting there is no "controlling Ninth Circuit case law interpreting the PLRA to require that a district court use the exact 'needs-narrowness-intrusiveness' words" (Dkt. 68, p. 10). However, that is exactly how *Oluwa* interpreted the PLRA in

striking down a district court's order that similarly failed to make the requisite findings:

> Applying the terms of section 3626 to this case, we find that the district court erred in ordering prospective relief for Oluwa without finding that such relief was narrowly drawn, extended no further than necessary to correct the violation of the right, and was the least intrusive means necessary to correct the violation of the right. See 18 U.S.C. § 3626(a)(1). Accordingly, we hold that the district court erred in granting summary judgment against defendants without complying with the PLRA.

133 F.3d at 1239-1240.[1]

Absent pure speculation, there is no way to determine from the Order whether the district court even engaged in the requisite inquiries, or ever considered whether ordering defendants to provide a yet-unidentified and irreversible Gender Confirming Surgery (GCS) was narrowly drawn, extended no further than necessary, and was the least intrusive relief available. Even if the district court's now-expired Order had made the findings required by the PLRA, such findings would have been in clear error.

[1] Ms. Edmo cited to a footnote in *Gilmore v. Cal*, 220 F.3d 987 (9th Cir. 2000) to suggest that the PLRA does not require explicit findings to have been made. (Dkt. 68, p. 9). However, that case neither overruled *Oluwa* nor provided an inconsistent interpretation of what *Oluwa* held was required by the PLRA. In a footnote containing mostly dicta, the Court in *Gilmore* suggested that an injunction entered before the PLRA was enacted would not be immediately terminable if it did not include explicit findings, which were "totally unnecessary under the law at the time of decision…." *Id*. at 1008, fn. 25.

As defendants previously illustrated, the Order requiring defendants "to provide Plaintiff with adequate medical care, including [GCS]" was vague, overbroad, premature, and unnecessarily intrusive. (Dkt. 13-1, at 68-71). Most notably, the district court ordered defendants to provide Ms. Edmo with an irreversible surgical procedure despite the record being devoid of evidence establishing the necessary predicate: that a qualified surgeon has determined, consistent with the surgeon's ethical and professional obligations, that Ms. Edmo is mentally and physical eligible to undergo the procedure.[2]

Moreover, to the extent the WPATH[3] applies as contended by Ms. Edmo, the record lacks any WPATH-compliant referral letters that a surgeon could rely upon in evaluating whether Ms. Edmo meets the criteria for surgery. (ER 2964-2965)

[2] Additionally, the district court ordered Defendants to provide a surgery within six months, but did not even attempt to identify what surgical procedure or whether any such procedure could be completed in six months. Thus, the Order was overbroad, intrusive, and unnecessary. The WPATH guidelines recognize numerous types of male-to-female procedures, including "Breast/chest surgery", "Genital surgery: penectomy, orchiectomy, vagioplasty, clitoroplasty, vulvoplasty;" and "Non-genital, non-breast surgical interventions: facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures." (ER 208) The Order did not even identify what category (or categories) of procedures (*i.e.,* breast/chest, genital, or non-genital) the District Court felt was medically necessary.

[3] Defendants do not admit that the WPATH guidelines establish the applicable standard of care or appropriateness of care or treatment for treating Gender Dysphoria (GD) or for providing GCS.

("Two referrals – from qualified mental health professions who have independently assessed the patient – are needed for genital surgery."). Ms. Edmo's retained experts did not provide such referral letters, and the WPATH is clear that the "[m]ental health professionals who recommend surgery share the ethical and legal responsibility for that decision with the surgeon." *Id*. As set forth on the record, none of the Defendants' medical and mental health providers familiar with Ms. Edmo were able to provide referral letters because of their professional opinions that Ms. Edmo does not meet the criteria for surgery.

Finally, Ms. Edmo has not come forward with any controlling case law or persuasive argument that the district court's Order to provide surgery before a surgical consult complied with the PLRA's need-narrowness-intrusiveness criteria. To the contrary, case law Ms. Edmo cited in her brief (Dkt. 32-1, at 50) suggests that, at the very most, the district court could only have ordered the Defendants to provide Ms. Edmo with a surgical consult, not a surgery. *See, e.g.*, *McNearney*, 2012 WL 3545267, at *16 (ordering an examination by a specialist, not surgery or specific treatment); *Miller v. Bannister*, No. 3:10-cv-00614, 2011 WL 666106, at *5 (D. Nev. Feb. 14, 2011) (ordering the plaintiff be given an evaluation for liver transplant eligibility, not the actual transplant procedure); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (not ordering prison to provide hormone therapy, but only enjoining a state statute prohibiting state funds to be used for hormone therapy). The district

court's Order strays from even these cases because it ordered surgery that Defendants do not have the ability to perform and that a surgeon needs to separately evaluate.

B. Having Not Timely Made the Requisite PLRA Findings, the District Court's Order Automatically Expired.

Ms. Edmo fails to recognize that the district court's failure to make the explicit PLRA need-narrowness-intrusiveness findings on or before March 13, 2019 (90 days after the December 13, 2018 Order was entered), alone caused the Order to automatically expire. The PLRA mandates that an injunctive relief order automatically expires within 90 days unless the district court "makes the findings required under subsection (a)(1) for the entry of prospective relief **and** makes the order final before the expiration of the 90-day period." 18 U.S.C.A § 3626(a)(2) (Emphasis added) Here, neither one of the two mandatory requirements occurred in the 90-day period. Consequently, the district court's December 13, 2018 preliminary injunction Order has since expired and "passed on to injunction heaven". *FDOC*, 778 F.3d at 1229 (11th Cir. 2015).

Additionally, the district court's Order also automatically expired because the court failed to make its preliminary injunction order "final" within the 90 day period. *Id*. *See also, Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001) ("Because the district court in the present case did not make either of the preliminary

injunctions at issue final within 90 days, both injunctions expired pursuant to [§ 3626(a)(2)].")).

Despite Ms. Edmo's assertions to the contrary, Defendants have never argued that the district court properly (or actually) entered a "final" injunction. Rather, Defendants have maintained that "to the extent" the district court attempted to convert the preliminary injunction hearing into a final trial on the merits, such attempt was highly improper and should be reversed. (Dkt. 13-1, p. 71-75) Likewise, Defendants argue that it was improper for the district court to grant Ms. Edmo preliminary injunctive relief, when what she was requesting was actually a permanent injunction. (*Id*.)

Regardless, Ms. Edmo concedes that the district court did not convert or otherwise rule that the preliminary injunction hearing was a final trial on the merits. (Dkt. 32-1, p. 39, 71) Moreover, Ms. Edmo concedes that she never requested a "final" injunction and that the district court only granted her preliminary, albeit mandatory, injunctive relief. (*Id*. at 72) (Citing ER 368:23-369:5) The district court only granted Ms. Edmo's "Motion for *Preliminary* Injunction". (ER 045) (Emphasis added) Accordingly, and absent any subsequent order finalizing or making

permanent the preliminary injunction, the district court's Order automatically expired on March 13, 2019.[4]

Ms. Edmo's belated attempts to salvage the district court's Order on appeal are futile. Ms. Edmo cites no authority for the proposition that this appeal "tolled any applicable expiration period." (Dkt. 68, p. 14). *Cf. Mayweathers*, 258 F.3d at 936 (9th Cir. 2001) (did not hold that a timely appeal tolls the PLRA requirements, but rather held that the "PLRA mandates the expiration of the preliminary injunctions 90 days after entry").

Additionally, the district court's "Memorandum Decision and Order" (Dkt. 68, p. 19-23) has no legal effect, was improperly provided to this Court, and should be disregarded and stricken from the record as procedurally defective and/or as an unconstitutional advisory opinion.[5] Given that the Order had already automatically

[4] To the extent Ms. Edmo now argues that the district court actually finalized its Order by way of entering a "permanent injunction" (see Dkt. 68, p. 13), Defendants emphasize that the injunction must be reversed given the absence of any findings that Ms. Edmo actually succeeded on the merits of her Eighth Amendment claim. *See, Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.") (Citations omitted).

[5] See, Jess D.H. Snyder, *Does Federal Rule of Civil Procedure 62.1 Entice District Courts to Render Unconstitutional Advisory Opinions?*, 42 U Dayton L. Rev., 1, 2 (2017). Ms. Edmo's motion for an indicative ruling pursuant to FRAP 62.1, and the district court's subsequent order, sought and obtained nothing more than an unconstitutional advisory opinion that, among other things, has no legal impact on

expired, and because this case is on appeal, the district court lacked any authority to modify, add to, or otherwise interpret its Order. *Griggs v. Provident Consumer Discount*, 459 U.S. 56 (1982).[6]

Likewise, FRCP 60(a) was not available to the district court to correct the substantial error of noncompliance with the PLRA contained in its Order. *See, Waggoner v. R. McGray, Inc.*, 743 F.2d 643 (9th Cir. 1984) (Rule 60(a) is "limited to correcting errors arising from oversight or omission and cannot be used to correct more substantial errors, such as errors of law.") (quotations and citations omitted). Moreover, FRAP 12.1(b) cannot afford Ms. Edmo a limited remand because the district court ultimately "**DENIED**" Ms. Edmo the relief she requested (Dkt. 68, p. 23) (Emphasis in original) and because Ms. Edmo never actually filed a "timely motion" in the district court. (SER 003-011)[7]

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the parties, could be changed by the district court at a later date, and could inappropriately influence the disposition of appellate opinions.

[6] The district court here made no attempt to extend or finalize its December 13, 2018 Order pursuant to FRCP 62(d) or otherwise prior to March 13, 2019.

[7] FRAP 12.1(b), titled "Remand After an Indicative Ruling", states that a court of appeals may remand for further proceedings only "[i]f the district court states that it would grant the motion or that the motion raises a substantial issue…." The rule does not state that a court of appeals is permitted to remand when the district court denies the motion. Moreover, Ms. Edmo never filed an actual FRCP 60(a) motion or other "timely motion…in the district court for relief that it lacks authority to grant because of an appeal" as was required by FRAP 12.1(a).

C. Because the District Court's Order Has Expired, the Appeal is Moot and the Order Should be Vacated.

In responding to Defendants' argument that expiration of the Order renders this appeal moot, Ms. Edmo only cites *Mayweathers,* 258 F.3d 930 (9th Cir. 2001). (Dkt. 68, p. 16)[8] However, the holding in *Mayweathers* is limited and not helpful to Ms. Edmo. Unlike here, no mootness argument was raised or addressed during the appeal in *Mayweathers*, and the district court there enacted a second injunction after the first one expired (which was also appealed). *Id*. at 934-35. The limited holding in *Mayweathers* was that the district court did not violate the PLRA by entering a second injunction after the first injunction had expired. *Id*. at 936. Here, the district court only entered one injunction, which has since expired. The district court has not entered a second injunction, so *Mayweathers* is neither applicable, controlling, nor persuasive.

CONCLUSION

Despite Ms. Edmo's arguments to the contrary, the district court's Order automatically expired on March 13, 2019. The appeal is moot and Defendants request that this Court enter an order vacating the district court's Order and remanding the case back to the district court.

[8] Ms. Edmo did not attempt to address or distinguish the controlling and/or persuasive cases Defendants cited (see Dkt. 31, p. 8-9) from the United States Supreme Court and the Fifth, Ninth, and Eleventh circuits holding that an expired injunction moots the appeal and requires vacatur.

This 22nd day of April, 2019.

s/ Dylan A. Eaton
Dylan A. Eaton, ISB #7686

s/ Brady J. Hall
Brady J. Hall, ISB #7873

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Defendants-Appellants' Joint Reply in Support of Joint Motion to Vacate District Court's Order by electronic filing on the date stated below and counsel for all registered CM/ECF will be served by the appellate CM/ECF system.

DATED: April 5, 2019.

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