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 RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO SUPPLEMENT THE RECORD AND REQUEST FOR JUDICIAL NOTICE

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May 6, 2019

INTRODUCTION

On January 9, 2019, the Defendants-Appellants Idaho Department of Correction (IDOC), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert (collectively, the IDOC Defendants) and Defendants-Appellants Corizon, Inc. (Corizon), Dr. Scott Eliason, Dr. Murray Young, and Dr. Catherine Whinnery (collectively, the Corizon Defendants) filed timely notices of appeal from the District Court's Order granting Plaintiff Adree Edmo's Motion for Preliminary Injunction (hereinafter, GCS Order) (ER 1-45). On March 6, 2019, Defendants submitted their Joint Opening Brief, arguing, *inter alia*, that the district court's GCS Order should be vacated because it failed to comply with the requirements of the Prison Litigation Reform Act (PLRA), 18 U.S.C.A. § 3626. (Dkt. 13-1, pp. 68-71). Specifically, the GCS Order was devoid of the requisite findings that the preliminary injunction was "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 violation of the Federal right." 18 U.S.C.A. § 3626(a)(1). The PLRA is clear that a district court "shall not grant or approve any prospective relief unless the court finds that such relief" meets the so-called *need-narrowness-intrusiveness* criteria. 18 U.S.C.A § 3626(a)(1) and (a)(2) (emphasis added).

The PLRA mandates that a preliminary injunction automatically expires when a court fails to make the requisite findings and does not make the order granting the injunction final within 90 days. 18 U.S.C.A. § 3626(a)(2). Defendants filed their Joint Opening Brief eighty-three (83) days after the district court entered its GCS Order. After the 90-day period had run without the district court making the *needs-narrowness-intrusiveness* findings or making the GCS Order final, Defendants filed a Joint Motion to Vacate the Order on April 3, 2019, arguing that it had automatically expired. (Dkt. 31). Both the substantive issues of Defendants' appeal and the Motion to Vacate will be heard at oral argument on May 16, 2019.

On March 28, 2019, Ms. Edmo filed a Motion for Indicative Ruling below, asking the district court to issue an indicative ruling that it would grant a motion to modify its GCS Order to meet the requirements of the PLRA. Defendants opposed the Motion on the grounds that the GCS Order had automatically expired and thus, the district court had lost jurisdiction to modify it. Defendants further opposed the Motion because Ms. Edmo failed to file a separate Motion to Modify as required by Federal Rule of Civil Procedure 62.1 and because the Motion sought to correct a substantive error of law, which was impermissible under Rule 60(a). *See Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990), *as amended on denial of reh'g* (Feb. 27, 1991), a*s amended on denial of reh'g* (May 24, 1991).

The district court denied Ms. Edmo's Motion and declined to issue an indicative ruling that it would modify its GCS Order. Ms. Edmo now moves this Court for permission to supplement the record with the district court's Order Denying the Indicative Motion (hereinafter, Indicative Order) because it is "material to the issues." (Dkt. 82-1, pp. 5-7). In the alternative or in addition to supplementing the record, Ms. Edmo asks this Court to take judicial notice of the Indicative Order. Ms. Edmo's Motion is an attempt to provide this Court with an inappropriate advisory opinion from the district court months after it issued its GCS Order and lost jurisdiction to modify it upon appeal. Accordingly, and for the reasons set forth below, Ms. Edmo's Motion should be denied.

ARGUMENT

I. Ms. Edmo's Motion to Supplement the Record is a Baseless Attempt to Provide this Court with an Impermissible Advisory Opinion and Comment from the District Court Regarding the Order Granting Ms. Edmo's Motion for Preliminary Injunction.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982) (per curium). Once Defendants filed their timely Notices of Appeal, the district court lost jurisdiction over its GCS Order granting Ms. Edmo's motion for preliminary injunction. The district court then denied Ms. Edmo's motion for an indicative

ruling below, terminating any authority it had to provide this Court with comment on its GCS Order. Therefore, Ms. Edmo's Motion to Supplement the Record with the district court's Indicative Order should be denied because it is an inappropriate attempt to provide this Court with an advisory opinion from the district court, contrary to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and established precedent.

Rule 62.1 provides the district court with a limited opportunity to decide a motion that is otherwise barred by a pending appeal. Upon a proper and timely Rule 62.1 motion for indicative ruling, the district court has three options: 1) defer considering the motion; 2) deny the motion; or 3) state that it would either grant the motion if this Court remands for that purpose or that the motion raises a substantial issue. F.R.C.P. 62.1(a). When a district court chooses option three and states that it would grant such a motion or that the motion raises a substantial issue, this Court then considers whether to remand for a decision during the pendency of an appeal. F.R.C.P. 62.1(b) and (c).

The district court here chose to deny Ms. Edmo's Rule 62.1 motion.[1] It did not state that it would grant a motion to modify its order, nor did it state that Ms.

[1] Ms. Edmo's F.R.C.P. 62.1 motion inappropriately sought modification of the lower court's order on substantive issues of law – whether the GCS Order met the requirements of the PLRA – which is not a permissible use of an F.R.C.P. 60(a) motion to modify. *See* F.R.C.P. 60(a) ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment,

Edmo's motion raised a substantial issue. Had the district court done so, this Court would have been provided notice of the district court's decision, reviewed the district court's order, and determined whether remand was appropriate. *See* Advisory Committee Notes to Rule 62.1 ("In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal."(emphasis added)). Such review and consideration represents the limits of this Court's authority to review a Rule 62.1 order, as contemplated by the plain language of the Rule.

Ms. Edmo now argues that the Indicative Order is material to this Court's decision on appeal and attempts to use Federal Appellate Rule 10 to circumvent F.R.C.P. 62.1. *See* Dkt. 82-1, pp. 3-5. This is contrary to the district court's decision to deny Ms. Edmo's motion below. As described above, had the district court determined that it would likely grant the motion to modify its GCS Order or that the motion presented substantive issues for remand, it would have so stated

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order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.") (emphasis added). *See also Sanchez, supra*. The use of Rule 60(a) to modify an order with additional substantive findings is another example of Ms. Edmo seeking to circumvent independent appellate review of the district court's GCS Order based on the record at the time the GCS Order was issued.

and this Court would have received notice of the Court's order. At that time, this Court could have considered any substantial issues and decided whether remand was appropriate. Despite Ms. Edmo's arguments, there is no provision in Rule 62.1 nor is there any controlling case authority holding that an appeals court may consider a district court's denial of a Rule 62.1 motion as part of the record on appeal.

None of the cases upon which Ms. Edmo relies upon hold otherwise. For example, this Court noted in *In re Ashley*, 903 F.2d 599, 606 n.9 (9th Cir. 1990), cited by Ms. Edmo, that a district court has authority to "issue *sua sponte* an order for supplementation if anything 'material to either party' was missing from the record below." That case involved bankruptcy proceedings testimony that was missing from the record on appeal, not an order issued by the court subsequent to the final judgment. *Id*., at 605-606. Certainly, hearing testimony in that case was material to the issues on appeal. However, Ms. Edmo does not seek to supplement the record with testimony or an order that predated the district court's issuance of its GCS Order.

In another case cited by Ms. Edmo, the Court held that F.R.A.P. 10(e) may not be used to "supplement the record with material not introduced or with findings not made." *United States v. Garcia*, 997 F.2d 1273, 1278 (9th Cir. 1993). In *Garcia*, a criminal defendant filed a motion to suppress evidence, which the district

court denied during a telephonic hearing. That ruling was not placed on the record until two years later. In the meantime, the defendant was convicted, appealed his conviction, and had submitted an opening brief on appeal. The district court supplemented the record with its written decision denying the motion to suppress and this Court allowed the defendant time to revise his opening brief as a result. On appeal of the district court's supplementation of the record with the suppression order, this Court held that "the district court simply overlooked entry of a written order after it telephonically denied Garcia's motion to suppress." *Garcia*, 997 F.2d at 1278. Importantly, unlike the situation here with Ms. Edmo, the supplemental suppression order in *Garcia* did not offer new findings or conclusions, or new analysis of a prior order. Rather, it simply memorialized an earlier decision by the district court, which was mistakenly not included in the record. *Id*. Further, the cases cited in *Garcia* suggest that it is improper for this Court to consider findings by the district court not previously made. *Id*.

Ms. Edmo also relies upon a Sixth Circuit Court of Appeals decision, *McKinney v. Ozburn-Hessey Logistics*, LLC, 875 F.3d 333, 342 (6th Cir. 2017), which she describes as: "citing district court order denying motion for indicative ruling that specifically related to injunction being appealed." Dkt. 82-1, p. 6. The *McKinney* Court did not address supplementation of the district court's order on appeal pursuant to F.R.A.P. 10(e), nor does it provide any analysis or detail

regarding how the district court's order came before the appellate court. Therefore, absent that analysis, the *McKinney* decision is neither persuasive nor applicable to the circumstances of this appeal.

This Court has held that, "[a]bsent extraordinary circumstances, we generally do not permit parties to supplement the record on appeal." *Gonzalez v. United States*, 814 F.3d 1022, 1031 (9th Cir. 2016). Ms. Edmo has not demonstrated that extraordinary circumstances exist to supplement the record. The Indicative Order was issued months after the factual record was complete, the GCS Order was issued, and the district court lost jurisdiction. Furthermore, Ms. Edmo has not argued that she will be prejudiced should the record not be supplemented to include the Indicative Order. Indeed, Ms. Edmo cannot establish any prejudice should this Court decline to consider the Indicative Order as part of the record on appeal. Relying upon the current Excerpts of Record and citing to case law she believes supports her argument, Ms. Edmo asserts that the district court's GCS Order contains the needs-narrowness-intrusiveness findings. Moreover, it cannot be prejudicial to Ms. Edmo for the Court not to consider factual and legal findings that were not made below. *See Garcia*, 997 F.2d at 1278 (district court's written findings denying motion to suppress were previously issued orally prior to the judgment of conviction).

The issue on appeal is whether the district court erred when it granted Ms. Edmo's motion for preliminary injunction, based on the record at the time of its decision. Ms. Edmo argues that the Indicative Order is material to that issue on appeal, despite the fact that the Indicative Order was not part of the proceedings below and was not overlooked or accidentally left out of the record. *See Kilian v. Equity Residential Properties Tr.*, 191 F. App'x 537, 539 (9th Cir. 2006) (the Court has the authority to correct the accidental omission of materials from the record). This Court previously considered a similar question in *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 422 F.3d 782, 799–800 (9th Cir. 2005). In that case, issues arose after the district court issued its preliminary injunction, which the parties agreed necessitated modification. Rather than granting the parties' motion to supplement the record with new facts supporting the need for modification, this Court held that it was inappropriate to decide those questions for the first time on appeal and remanded to the district court for it to determine whether modification was appropriate. *Id*. That is what could have occurred in this case, had the district court indicated that it would grant a motion to modify its injunction or that substantial issues were presented by Ms. Edmo's Rule 62.1 motion. Instead, the district court denied Ms. Edmo's motion. As a result, whether remand for modification would be helpful to this Court on appeal was never an

issue. Thus, it is inappropriate for the Court to consider the district court's subsequent Indicative Order on appeal.

Inclusion of the district court's Indicative Order also unduly prejudices Defendants because it is an advisory opinion that has no legal impact on the parties and could inappropriately influence the disposition of the instant appeal. *See* Jesse 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). Once the district court lost jurisdiction to decide issues related to its GCS Order on appeal, any further interpretation of that GCS Order is purely advisory and should not be considered as part of the record.

This case does not involve a procedural oversight that caused documents considered by the district court to go missing from the record. Accordingly, F.R.A.P. 10(e) should not be used to add substantive findings of facts and conclusions of law (or analysis thereof) to an order that's the subject of an appeal, particularly when a district court has already denied a motion for an indicative ruling that it would modify its previous order. Allowing supplementation of the record with substantive changes and analysis to the district court's GCS Order circumvents the district court's lack of jurisdiction and prejudices Defendants' right to independent appellate review without interference from the district court. Accordingly, Ms. Edmo's Motion to Supplement the Record must be denied.

Defendants further request that the Court strike and decline to consider the Indicative Order, which Ms. Edmo has attached to her Opposition to Defendants' Joint Motion to Vacate (Dkt. 68) and her Motion to Supplement the Record (Dkt. 82-1).

II. It is Improper for this Court to Take Judicial Notice of Factual and Legal Findings made by the District Court after Losing Jurisdiction to Modify or Interpret its Order.

This Court "may take judicial notice of judicial proceedings in other courts." *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014). However, judicial notice of public records, including judicial proceedings, is not without limit. First, "a court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). Second, "'[j]udicial notice may be taken at any stage of the proceeding,' including on appeal, as long as it is not unfair to a party to do so . . . . *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995) (quoting Fed. R. Evid. 201(d) (internal citations omitted)); *United States v. Jones*, 574 F.3d 546, 551 n.2 (8th Cir. 2009). Based on these limitations, the Court should decline to take judicial notice of the district court's Indicative Order or, at the very least, significantly limit the scope of its judicial notice.

The Court may take judicial notice of the fact the district court denied Ms. Edmo's motion for indicative ruling, but the Court should not take judicial notice of the factual findings or legal conclusions (or analysis thereof) in the Indicative Order. "Just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). Thus, a court may "take judicial notice of the *fact* of [an] extradition hearing [and] the *fact* that a Waiver of Extradition was signed by [arrestee]." *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001) (emphasis in original). However, it would be error to take judicial notice that the waiver was valid. *Id.* Thus, in this case, the Court may take judicial notice of the Indicative Order for the limited purpose of recognizing the "judicial act" that the order represents. However, the Court should not take judicial notice of the district court's reasoning and analysis, new factual findings, or supplemental legal conclusions contained within the Indicative Order because, as contended above, the underlying GCS Order is the subject of appeal and the district court should not be allowed to circumvent the appeals process by trying to provide an advisory opinion to this Court.

Furthermore, the Court should not take judicial notice of the district court's reasoning, because it would be unfair to Defendants. Regarding the timing, judicial notice should not be taken when it would be unfair to the opposing party. *In re*

Indian Palms Assocs., Ltd., 61 F.3d at 205. Ms. Edmo has not disclosed why she seeks to introduce the district court's Indicative Order into the record. Presumably she hopes to use the district court's reasoning in the Indicative Order to show that the injunction at issue on appeal complies with the PLRA (which it does not). In the Indicative Order, the district court discusses at length why he believes the underlying GCS Order complies with the PLRA. To the extent the district court's post hoc legal findings are relevant on appeal, Defendants would be unduly prejudiced because they would be unable to address the district court's new findings, conclusions of law, and reasoning. Moreover, because Ms. Edmo has not disclosed why she seeks judicial notice, Defendants are not able to prepare for any arguments Ms. Edmo might present at oral argument related to the district court's new reasoning. Thus, the Court should decline to take judicial notice because it is unnecessary, untimely, unfair, and, unduly prejudicial to the Defendants.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Ms. Edmo's Motion to Supplement the Record and Request for Judicial Notice (Dkt. 82-1).

This 6th day of May, 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 Response to Plaintiff-Appellee's Motion to Supplement the Record and Request for Judicial Notice 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: May 6, 2019.

s/ Dylan A. Eaton

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