IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL

Plaintiff,

v.

JOHN KERESTES, Former Superintendent State Correctional Institution Mahanoy

Theresa DelBalso, Superintendent State Correctional Institution Mahanoy

Andre Norris, DOC Acting Director of Bureau of Health Care Services

Christopher Oppman, DOC Deputy Secretary for Administration

Dr. John Lisiak, SCI Mahanoy

Dr. Shaista Khanum, SCI Mahanoy

Scott Saxon, Physician's Assistant, SCI Mahanoy

Chief Health Care Administrator John Steinhart, SCI Mahanoy

GEISINGER MEDICAL CENTER
Defendants.

Case No. 15-Cv-00967 (RDM)(KM)

Judge Robert D. Mariani

Magistrate Judge Karoline Mehalchick

ELECTRONICALLY FILED

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. A REASONABLE FACT-FINDER COULD CONCLUDE THAT THE DOC DEFENDANTS HAVE BEEN DELIBERATELY INDIFFERENT TO A SERIOUS MEDICAL NEED

1. Summary Judgment Standard[2]

The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and the undisputed facts establish the movant's right to judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden remains with the moving party "regardless of which party would have the burden of persuasion at trial." *Amon v. Cort Furniture Rental*, 85 F.3d 1074, 1080 (3d Cir. 1996). The duty of the court is not to weigh the evidence and determine the truth of the matter but to determine whether there are issues to be tried. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986). In making that determination, the court is to draw all inferences in favor of the party against whom summary judgment is sought, viewing the factual assertions in materials such as affidavits, exhibits and depositions in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 255. "[T]he evidence of the non-movant is to be

[1] Pursuant to this Court's order, plaintiff's opposition papers to the instant motion is to be filed no later than August 5, 2016. On this date, while final edits on plaintiff's opposition papers were taking place, this Court issued orders granting in part the motions of defendants Kerestes, Steinhart and Oppman to dismiss and granting plaintiff leave to file a second amended complaint. Dkts. 169 and 171. These opposition papers are nonetheless filed in accordance with this Court's order but given the timing, the arguments raised herein do not address the orders issued today.

[2] Summary Judgment legal principles set forth here apply with equal force to all of the arguments raised by the Defendants.

believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotter*, 134 S.Ct. 1861, 1863 (2014). "'if…there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain summary judgment…'". *Amon v. Cort Furniture Rental*, 85 F.3d at 1081, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, at 330, n.2 (1986).

2. The Standard Under the Eighth Amendment

Prison officials "have an obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To prevail on an Eighth Amendment medical care claim a plaintiff "must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate a deliberate indifference to that need." *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 582 (3d Cir. 2003).

"Hepatitis C constitutes the type of 'serious medical need' which triggers Eighth Amendment scrutiny in a corrections context." *Barndt v. Pennsylvania Dept. of Corrections*, 2011 WL 4830181 *9 (M.D.Pa. 2011); see also, *Christy v. Robinson*, 216 F.Supp.2d 398, 413 (D.N.J. 2002) and *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). Deliberate indifference to a serious medical need "requires proof that the official 'knows of and disregards an excessive risk to inmate health or safety.'" *Natale*, 318 F.3d at 582 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

3. Personal Involvement.

i. Plaintiff Cannot Adequately Respond Absent Discovery.

Defendants Kerestes, Oppman and Steinhart argue that plaintiff has not shown sufficient personal involvement to warrant a finding that they have been deliberately indifferent to a serious medical need. This Court should deny their motion as premature. Fed.R.Civ. P. 56(d)(1).

It is well established that a court "is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery." *Shelton v. Bledsoe*, 775 F.3d 554 565 (3d Cir. 2015). If discovery is "incomplete, a district court is rarely justified in granting summary judgment…" *Id.* Rule 56(d) relief should be granted "as a matter of course" when a non-movant submits a declaration setting forth the particular information necessary to respond to the summary judgment motion. *Id.*

This is not a case where discovery has simply been insufficient. There has been no discovery. The defendants' have not answered the complaint and there has not been a Fed.R.Civ.P. 26(f) conference.

The accompanying Fed.R.Civ.P. 56(d) Declaration of Bret Grote, Esq.[3] sets forth some of the information that might be revealed during discovery that would establish plaintiff's claims against each of the individual defendants. To establish the liability of defendant Kerestes, Oppman and Steinhart, plaintiff must show that they

[3] The Rule 56(d) declaration is in the Appendix to this opposition at Exhibit 1.

were aware of and disregarded a risk to Mr. Abu-Jamal's health. *Farmer v. Brennan*, 511 U.S. at 844. It is only through depositions and document production that plaintiff be able to learn what they knew about plaintiff's medical condition. This would include knowledge of plaintiff's hepatitis C and its extrahepatic manifestations, such as the skin condition, hyperglycemia and anemia. Plaintiff would also learn whether the defendants were aware of the existence of the anti-virals that would cure his hepatitis C, and, if so, whether they played any role in denying plaintiff that medication. (See Fed.R.Civ.P. 56(d) Declaration Pl. Appendix. Ex. 1, ¶¶ 7-11; 15-17; 19-20). Should it be revealed that defendants Kerestes, Oppman and/or Steinhart were aware of plaintiff's medical conditions and directed, or concurred in, the decision to deny the plaintiff a known cure, a reasonable fact-finder could conclude that they were deliberately indifferent to a serious medical need. *Farmer*, 511 U.S. at 837.

The defendants argue that prison officials, such as defendant Kerestes are entitled to rely upon the expertise of their medical staff (Dkt. 156, p. 20). This argument vividly illustrates why discovery is necessary. With the notable exception of plaintiff's grievances, discussed *infra*., the record is silent on what, if anything, defendant Kerestes was told by medical personnel about plaintiff's health and the availability of treatment. Only through discovery will plaintiff be able to learn those critical facts and whether defendant Kerestes relied on such statements.

The defendants' may argue that the December 2015 preliminary injunction hearing provided sufficient opportunity for discovery. That is not true. A party does

not waive his right to Fed.R.Civ.P. 26 discovery by making a Fed.R.Civ.P. 65 motion for preliminary relief. As the United States Supreme Court has explained,

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete that a trial on the merits. A party thus is not required to prove his case at a preliminary injunction hearing.

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). *See also New Jersey Hospital Association v. Waldman*, 73 F.3d 509, 519 (3d Cir. 1995)(stating that findings of fact and conclusions of law made on preliminary injunction motions do not bar courts from making contrary findings or conclusions at a final hearing). The December 2015 preliminary injunction hearing concerned plaintiff's request for prospective injunctive relief. His damage claims against the defendants in their individual capacities was not litigated. The proceeding was not preceded by discovery. The only documents that were exchanged were plaintiff's medical records and the documents that the parties chose to offer into evidence.

The Federal Rules of Civil Procedure contemplate that a motion for summary judgment, like a trial on the merits, will be preceded by Rule 26 discovery. That has not happened here. The defendants' motion should be denied. Fed.R.Civ.P. 56(d)(1).

ii. Personal Involvement Has Been Shown

Alternatively, there is evidence in the record from which a reasonable fact-finder could conclude that defendants Kerestes, Steinhart and Oppman were personally involved in violating Mr. Abu-Jamal's Eighth Amendment rights.

Plaintiff Abu-Jamal filed a series of grievances and grievance appeals concerning his health care. He demanded, *inter alia*, a treatment plan for his skin condition and adequate diagnostic testing to determine its source. Defendant Steinhart denied plaintiff's grievance at the first level review, and Defendant Kerestes denied plaintiff's appeal. *See* Copies of Grievances and Replies, Dkt. 37-2, Ex. 2.

Both this court and the Third Circuit have held that where, as here, the claimed constitutional violation is a continuing one, the denial of an administrative grievance constitutes the type of "personal involvement" required by § 1983. As this court recently explained:

> In some circumstances a grievance may be sufficient to put a prison official on notice of alleged continuing abuse by other prison staff and therefore may show actual knowledge of an alleged constitutional violation and acquiescence in the events forming the basis of a prisoner's claims…

Fogle v. Cumberland Cty. Prison, No. 1:15-CV-01608, 2015 WL 8732064, at *5 (M.D. Pa. Nov. 2, 2015). Thus, a constitutional violation that is continuing in nature may render supervisory officials who are aware of it and have the authority to intervene and remedy the violation, liable. *See also Diaz v. Palakovich*, 448 F. App'x 211, 214-15 (3d Cir. 2011).

Defendant Oppman is the director of the Bureau of Health Care Services of the DOC. (Defendants' Statement of Material Facts hereinafter "DSMF" ¶¶ 9-10) . Defendant Oppman is sued for his role in the hepatitis C treatment committee. (Dkt. 150-7, p. 7 listing the BHCS as participants in the committee). DOC's failure to treat plaintiff's hepatitis C. Defendant Oppman's participation in the creation and implementation of the hepatitis C protocol is sufficient to implicate his personal involvement. *Santiago v. Warminster, Twp.*, 629 F.3d 121, 129, n.5 (3d Cir. 2010).

4. A Reasonable Fact-Finder Could Conclude That Defendants Kerestes, Oppman and Steinhart Have Been Deliberately Indifferent.

DOC defendants Kerestes, Oppman and Steinhart argue that even if personal involvement has been shown, they have not been deliberately indifferent to plaintiff's serious medical needs. (Dkt 156, p. 22). Viewing the evidence in the light most favorable to plaintiff, a reasonable fact-finder could find deliberate indifference in at least two ways. First, the DOC defendants have deviated from the standard of care in the community by refusing to provide an available, safe, and effective cure for Mr. Abu-Jamal's hepatitis C, a serious medical need. Second, and alternatively, they are being deliberately indifferent in his individual case.

i. A Reasonable Fact-Finder Could Conclude That The Defendants' Deviation From The Standard Of Care For Treatment Of Hepatitis C Constitutes Deliberate Indifference.

Hepatitis C is a major public health issue "[i]n the United States and worldwide". Cowan, V3, 20.[4] Those who, like Mr. Abu-Jamal, have chronic hepatitis C have a 20-50% chance of deteriorating to cirrhosis, or severe liver scarring. That condition can cause liver failure and other life-threatening complications such as portal hypertension. Plaintiff's Statement of Material Facts ("PSMF") ¶ 20; Harris: V1, 111-112, 151; Noel: V3, 112; Plaintiff's Ex. 13, p. 1; Plaintiff's Ex. 16, p. 2, stating that between 1% and 5% of all chronic hepatitis C patients will die from decompensated cirrhosis. Moreover, of those who develop cirrhosis, 2% to 7% per year will develop liver cancer.[5] This represents an actual risk of liver cancer of between 11% and 20%. PSMF ¶¶ 20, 22; Plaintiff's Ex. 13, p. 1. According to the Center for Disease Control ("CDC"), hepatitis C is responsible for more deaths each year than all other infectious diseases combined (CDC Press release May 4, 2016, Pl. Appendix, Ex. 2).

In 2014, drugs known as Direct-Acting Anti-Viral medications became available for treatment of hepatitis C. If administered to someone who like Mr. Abu-Jamal has genotype 1, there is a 90-95% chance of cure. Risk of disease progression to conditions such as cirrhosis, liver cancer or even severe fibrosis would be reduced to zero. In addition, early treatment (i.e. prior to advanced fibrosis) affords numerous other health benefits. PSMF ¶¶ 51, 55; Harris: V1, 118-121; Cowan: V3, 22-27;

[4] "V, " refers to the Volume Number and page number of the December 2015 Preliminary Injunction Hearing.
[5] "Plaintiff's Ex. " refers to the Exhibit designation given during the December 2015 Preliminary Injunction Hearing.

Plaintiff's Ex. 18, American Association for the Study of Liver Diseases ("AASLD") Guidelines, p. 2-4, describing benefits of early treatment.[6]

These new medications are so effective and the individual and societal benefits so great, that the AASLD now recommends that all chronic hepatitis C patients regardless of disease stage or risk of progression be treated. PSMF ¶ 61; Harris, V2, 5-6; Plaintiff's Ex. 18, Pl. Appendix, Ex. 9). The earlier recommendation for treatment prioritization has been abandoned as not medically justifiable. PSMF ¶ 63, 65, 66; Harris V2, 6; Cowan: V3, 24-25; Noel: V3, 154. The AASLD guidelines recommending treatment for all constitute the medical standard of care for the treatment of hepatitis C. PSMF ¶¶ 58-59; Harris: V1, 123-124; Plaintiff's Ex. 17, p. 6. As of March, 2016 the Department for Veterans Affairs has also abandoned prioritization and has begun treating everyone with chronic hepatitis C irrespective of fibrosis stage. (PSMF ¶ 66; Pl. Appendix., Ex. 5).[7]

That Mr. Abu-Jamal is suffering from chronic hepatitis C is undisputed. PSMF ¶ 87, 89. The defendants concede that he likely has, at a minimum, Stage 2 fibrosis. PSMF ¶ 98; DSMF, ¶ 98. Based upon his most recent HALT score, there is also a 42% chance that he has already progressed to cirrhosis. PSMF ¶ 103, DSMF ¶ 103 The defendants know that if Mr. Abu-Jamal's hepatitis C were treated it would

[6] For the convenience of the Court, the October 2015 AASLD Guidelines are also included in Plaintiff's Appendix in opposition to the instant motion as Exhibit 9.

[7] This Court can take judicial notice of the facts contained in the Department of Veterans' Affairs press release. Fed.R.Evid. 201(b)(2).

terminate the infection, end the ongoing inflammation and scarring of his liver, and prevent further progression of the disease to decompensated cirrhosis, liver cancer and death. Cowan: V3, 22-23. Treatment would also cure the extrahepatic manifestations of the disease. PSMF ¶¶ 105-107; Harris V2, 151-152. The defendants' experts have admitted that there is no medical reason for denying Mr. Abu-Jamal treatment with the direct-acting anti-viral medications. PSMF ¶¶ 65-66; Noel, V3, 154; Cowan: V3, 68. These admissions belie the DOC defendants' argument on this motion for summary judgment, that Mr. Abu-Jamal is being treated in accordance with the standard of care in the community. It is money not medicine that dictates who will be treated and not be treated with direct acting anti-viral medications. PSMF ¶ 65; Cowan: V3, 77.

Denial of a life-saving treatment with no medical justification is the definition of "deliberate indifference". *Farmer,* 511 U.S. at 837 (knowledge of and disregard of an excessive risk to inmate health and safety constitutes deliberate indifference.) See also *Estelle*, 429 U.S. at 104; *Durmer v. O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993); *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987); *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999). Likewise, deviation from the accepted standard of care for treating an illness without medical justification constitutes evidence of deliberate indifference to serious medical needs. *Roe v. Elyea,* 631 F.3d 843, 862-63 (7th Cir. 2011) ("a substantial departure from accepted professional judgment, practice, or standards" without medical justification is deliberate

indifference); *De'lonta v. Johnson*, 708 F.3d 520, 525-26 (4th Cir. 2013) (failure to provide care consistent with prevailing standard states a claim under the Eighth Amendment); *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (treatment that deviates from professional standards may amount to deliberate indifference). *Cf BE and AR v. Teeter,* 2016 WL 3033500 (W.D. Wash 2016)(granting preliminary injunction requiring State of Washington to provide hepatitis C direct-acting anti-virals to Medicaid recipients on ground that such treatment is medically necessary).[8]

It is for this reason that the DOC hepatitis C protocol, on its face, does not comport with the Eighth Amendment.[9] As Dr. Noel stunningly admitted at the December 2015 hearing, only those who have deteriorated to decompensated cirrhosis with esophageal varices (bleeding) are referred for treatment with the anti-viral drugs. A person must be at imminent risk of death or, in Dr. Noel's words, a "catastrophe" before being treated. PSMF ¶ 69; Noel, V3, 112, 128. Even those with decompensated cirrhosis but no varices are not treated. They are simply seen by a medical professional every month. PSMF ¶ 69; Noel: V3, 109; Protocol: Dkt 150-7, p. 4. The protocol sets forth no plans for providing the cure to those, such as Mr. Abu-Jamal who have significant fibrosis or even early stage cirrhosis. Noel: V3, 128-129. It

[8] The *Teeter* decision is included in Pl. Appendix as Exhibit 8.

[9] Because discovery has not commenced, plaintiff has not had the opportunity to depose those responsible for the development of the protocol and/or learn how the protocol has worked in practice. Should this Court find the existence of the protocol at all determinative, it should deny and/or defer determination of this motion for summary judgment until there has been discovery. See Fed.R.Civ.P. 56(d) declaration Appendix Ex. 1, ¶¶ 21-23.

also does not take in to account those, like Mr. Abu-Jamal, who are suffering from debilitating extra-hepatic manifestations of hepatitis C such as his skin condition, anemia, fatigue and, most likely, adult-onset diabetes. Those inmates are relegated to suffer from their extrahepatic conditions until such time as they are on the verge of death from portal hypertension. This is well below the standard of care in any community. Harris Declaration 8/5/16 ¶¶ 13-17, Pl. Appendix, Ex. 3.

Under the protocol only 50 of the estimated 5426 inmates with chronic hepatitis C (.9%) have or are receiving treatment. DSMF ¶¶ 72, 86; Noel ¶ 3a. Its purported "active surveillance" practice squarely in the realm of those "worst cases" that "may actually produce physical torture or a lingering death[.]" *Estelle*, 429 U.S. at 103. Adherence to a policy for non-medical reasons such as cost is not a constitutionally valid basis for denying care. *Natale*, 318 F.3d at 582-83; *Roe*, 631 F.3d at 862-63; *Colwell v. Bannister*, 763 F.3d 1060, 1068-69 (9th Cir. 2014).

Further undercutting the efficacy of the protocol is that it was based, in part on what had been used by the Veterans Administration (DSMF ¶ 81, V3, p. 110). That agency has now abandoned prioritization and treats all chronic hepatitis C patients irrespective of fibrosis stage. Plaintiff's Appendix, Ex. 5.

This case does not represent a medical disagreement between two courses of treatment. Although the defendants' continue to press this argument, even their own experts have stated that there is no medical justification for denying Mr. Abu-Jamal the anti-viral drugs. PSMF ¶ 106. Moreover, none of the palliative measures

administered to Mr. Abu-Jamal will cure his hepatitis C. Thus, the "choice", if it can be said there is one, is between curing a deadly disease and not curing it. It is a "choice" between ending the suffering of those, like Mr. Abu-Jamal who are experiencing debilitating complications, or continuing their suffering.

i. Because Plaintiff's Disease Is Progressing And He Has Suffered And, If Denied Treatment, Will Suffer More Liver Damage And Other Severe Symptoms, Defendants' Refusal To Treat The Hepatitis C Amounts To Deliberate Indifference.

The defendants' incorrectly assert that plaintiff's Eighth Amendment claim hinges upon the trier of fact concluding, as argued in subdivision i, that only "treatment for all", as recommended under the current AASLD guidelines would comport with the Eighth Amendment. That is not true. There is ample evidence in the record from which a reasonable fact-finder could conclude that Mr. Abu-Jamal's health has deteriorated to such an extent that the defendants' refusal to treat his hepatitis C infection constitutes deliberate indifferent to a serious medical need.

a. Liver Damage

Mr. Abu-Jamal's hepatitis C is progressing. It has already caused extensive liver damage and may quickly become life threatening. He has at least a fibrosis level of 2-2.5, meaning he has significant liver scarring. PSMF ¶ 98; Harris: V2, 22; Cowan: V2, 75; Noel: V3, 123. The presence of existing fibrosis of any level is a "strong risk factor" for further disease progression. PSMF ¶ 102; Plaintiff's Exhibit 18, p. 11. His platelet levels have been low for seven consecutive months, also a sign of disease

progression. PSMF ¶ 94 Harris: V1, 149; Cowan: V3, 41; Noel: V3, 147; Lab Reports: Plaintiff's App., Ex. 6, p. 41, 44, 45, 46, 47 48, 49 50.; Harris Declaration, 8/4/16 ¶¶ 4-7, Plaintiff's Appendix, Ex. 3).[10] His most recent HALT score determined that there is a 42 % chance that his disease has already progressed to cirrhosis. PSMF ¶¶ 100, 103. The HALT score is independent of a March 2015 sonogram and a May 2015 CT scan that both showed abnormalities consistent with present cirrhosis. PSMF ¶ 91; Plaintiff's Ex. 1, p. A17, A74; Harris: V1, 131, Cowan V2, 75.

Cirrhosis has many life-threatening complications, including portal hypertension, liver failure and, in nearly 20% of cases, progression to incurable hepatocellular carcinoma, i.e. liver cancer. PSMF ¶ 22; Plaintiff's Ex. 13, p. 1. Treatment with anti-viral medications, on the other hand, would cure the disease and reduce the risk of further progression or harm to the liver to almost zero. Cowan: V3, 22-24. Accordingly, Dr. Harris testified, Mr. Abu-Jamal should be treated now. Any delay, he explained, would be medically unacceptable as it would further harm Mr. Abu-Jamal's health and even place him at risk of death. PSMF ¶ 105; Harris V1, 151-152. Exposure to such a risk violates the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. at 837 (deliberate indifference shown where prison officials know of and disregard an excessive risk to inmate health or safety); *Helling v. McKinney*, 509 U.S. 25,

[10] Lab Reports from approximately January 2015 to April 2016 are included in Exhibit 6 to Plaintiff's Appendix. These reports have been numbered by hand in the lower center of each page.

35 (1993). (Eighth Amendment violated where inmate will be "exposed [] to…an unreasonable risk of serious damage to his future health.").

The defendants argue that Mr. Abu-Jamal does not have cirrhosis or a more severe case of fibrosis and that his disease is not progressing rapidly. They base this argument, in part, on his APRI score. That calculation placed him in the "unlikely cirrhosis, significant fibrosis possible" category. Cowan: V2, 211. But that test is unreliable as it identifies only 37% of those who have the disease. PSMF ¶¶ 33, 99-100). In any event, even Dr. Cowan estimated that Mr. Abu-Jamal had a fibrosis level of 2. That places him at higher risk for disease progression PSMF ¶ 102; Plaintiff's Exhibit 18, p. 11. Under the July 2015 AASLD guidelines, which incorporated prioritization, Mr. Abu-Jamal would fall into the "high priority" treatment category. PSMF ¶ 106.

The defendants falsely claim that liver damage is not irreversible until the late stages of cirrhosis (Dkt. 156, p. 25 citing DSMF ¶ 37). There is no record support for that claim. Dr. Cowan testified that liver damage is "thought" to be reversible in the early stages of fibrosis, not cirrhosis. PSMF ¶ 37 citing Cowan: V3, p. 78). Moreover, the defendants' claim is simply not true. Harris Declaration 8/4/16, ¶¶ 8-11.

Of course, this Court need not resolve these questions because, on this motion for summary judgment, this Court is not to weigh the evidence and decide which expert opinion is worthy of belief. Those determinations are reserved for the trier of fact. *Anderson,* 477 U.S. at 249. *Kannankeril v. Terminix International, Inc.*, 128 F.3d 802,

808 (3d Cir. 1997)(weight to be given expert testimony reserved for trier of fact); *In re Paoli RR Yard PCB Litigation*, 35 F.3d 717, 771, 778 (3d Cir. 1994)(contrary expert opinion that plaintiff's symptoms caused by PCBs sufficient to defeat summary judgment motion); *Ponzini v. Monroe County, et al*, 2015 WL 5123680 (M.D.Pa. 2015)(Mariani, J.); ("Questions about credibility and weight of expert testimony are also for the trier of facts since such testimony is ordinarily not conclusive." (quoting *Drysdal v. Woerth*, 153 F.Supp.2d 678, 689 (E.D. Pa. 2001); *Transcenic, Inc. v. Google, Inc.*, 2014 WL 7275835 (D.Del. 2014)("battle of the experts" not amenable to resolution on motion for summary judgment); *Ellison v. United States*, 753 F.Supp.2d 468, 491 (E.D.Pa. 2010)(medical malpractice case denying motion for summary judgment where expert opined that treatment fell below standard of care). Dr. Harris has opined that Mr. Abu-Jamal has, at a minimum, significant fibrosis, that his disease is progressing and that he is at risk of developing liver cancer and/or end stage liver disease. It is not disputed that the defendants have denied him a near certain cure. Given the foregoing, a reasonable fact-finder could conclude that their failure to provide it amounts to deliberate indifference in violation of the Eighth Amendment.

b. Skin Condition

Deliberate indifference has been additionally shown because Mr. Abu-Jamal is suffering from debilitating extra-hepatic manifestations of hepatitis C that would most likely be cured if the hepatitis C were treated. PSMF ¶¶ 42-43, 107, 162, 164; Harris V1, 135-136. This includes a severe skin condition.

A wide variety of skin conditions are common extrahepatic manifestations of hepatitis C. PSMF ¶ 38, 42; Harris: V1, 113; Schleicher: V2, 82, 90; Cowan: V2, 44-45; *see* Plaintiff's Exhibit 8, stating that 20-40% hepatitis C patients have cutaneous manifestations of the disease. These conditions include the relatively rare (outside of hepatitis C) conditions of cryoglobulinemia, lichen planus and necrolytic acral erythema (NAE). PSMF ¶ 38, 41-42; Harris: V1, 135-136; Cowan: V2, 217, V3, 43. Hepatitis C has also been found to be a cause of more common skin conditions such as psoriasis and pruritus. PSMF ¶¶ 41-42 118; Harris, V1, 116-11, 1297; Schleicher: V2, 81-84; Cowan: V3, 44; Plaintiff's Ex. 8. Plaintiff's Ex. 10.

Dr. Harris concluded that plaintiff's condition is likely NAE, a disease almost always associated with hepatitis C and which afflicts people of African descent. PSMF ¶¶ 42-43; 110; Harris V1, 135-136. It is similar in appearance to psoriasis and cannot be distinguished from that disease in histology. PSMF ¶ 42-43, 110; Harris: V1, 136; Plaintiff's Ex. 28. But even if the condition is common psoriasis and not NAE, it, too, is a manifestation of the hepatitis C. PSMF ¶¶ 107, 162, 164 Harris: V1,107, 119, 129, 135 137, 145; Plaintiff's Ex. 8, listing psoriasis and pruritus as common cutaneous manifestations of hepatitis C and Plaintiff's Ex. 10, identifying hepatitis C as an inducing factor in psoriasis. That the skin condition has not resolved after 18 months and treatment with such "big guns" as steroid creams, the immunosuppressant cyclosporine, thrice-weekly baths and thrice-weekly ultraviolet light treatments compels a conclusion that hepatitis C is the underlying cause. PSMF ¶¶ 110 162-164;

Harris: V1, 127-128, 143-145. It will only resolve if the hepatitis C was successfully treated. (Plaintiff's Ex. 24: "Many, if not all dermatological manifestations disappear when appropriate HCV treatment or viral clearance occurs"). Dr. Ramon Gadea, an infectious disease specialist hired by the DOC opined that Mr. Abu-Jamal's skin condition could be secondary to hepatitis C and that treatment be considered. Plaintiff's Ex. 1, p. A110. Failure to follow the recommendations of specialists or treating physicians such as Dr. Gadea is another fact by which deliberate indifference can be inferred. *Durmer*, 991 F.2d at 68; *White v. Napoleon*, 897 F.2d 103, 109-10 (3d Cir. 1990); *Hamilton v. Endell,* 981 F.2d 1062, 1067 (9th Cir. 1992); *Wakefield v. Thompson*, 177 F.3d 1160, 1165 (9th Cir. 1999).

Relying on Drs. Cowan and Schleicher, the defendants argue that the skin condition is neither NAE nor a manifestation of hepatitis C. Those contrary opinions, however, raise issues of fact. On this motion for summary judgment, any inferences must be drawn in plaintiff's favor. *Anderson.* 477 U.S. at 249. [11]

c. Anemia

Anemia is a common complication of chronic hepatitis C. PSMF ¶ 179; Harris: V1, 112-113, 117; Cowan: V3, 56. Mr. Abu-Jamal has been anemic for at least one year. A "million dollar workup" at Geisinger Medical Center did not uncover the

[11] Dr. Schleicher admitted that he knows nothing about the treatment of hepatitis C. He did not even know what constituted an "active" hepatitis C infection. He is unfamiliar with the AASLD and that body's recommendation that all chronic hepatitis C patients be treated. Schleicher: V2, 112.

anemia's cause. Thus, it was diagnosed as "anemia of chronic disease". PSMF ¶¶ 178-179; Harris, V1, 117, 146; Plaintiff's Ex. 1, p. A47-A63. The anemia has been treated with a series of Procrit injections and Mr. Abu-Jamal's hemoglobin level, while improved, remains below the normal range. That the hemoglobin has not returned to normal range even with Procrit only reinforces the conclusion that hepatitis C is the "chronic disease" causing the "anemia of chronic disease". PSMF ¶¶ 182-183, 186-187; Harris V1, 146, V2, 44-45; Harris Declaration 8/4/16 ¶ 7, Pl. App. Ex. 3).

Dr. Cowan opined that the anemia was not caused by hepatitis C, instead theorizing that a short course of cyclosporine administered in early 2015 caused it. Cowan: V2, 218. But on cross-examination he was unable to explain why hemoglobin levels continued to decrease long after cyclosporine was discontinued. Cowan: V3, 58. In any event, on this motion for summary judgment, any conflict about the cause of plaintiff's anemia must be resolved in plaintiff's favor. *Id.*

d. Diabetes

Type II diabetes is an extrahepatic manifestation of hepatitis C. PSMF ¶¶ 44, 173 Harris, V1, 112; Plaintiff's Ex. 18, p. 6. Between January 2015 and June 2015, Mr. Abu-Jamal's glucose levels were often abnormal and, in March 2015, rose to 507. This precipitated his collapse and emergency treatment at the hospital. PSMF ¶¶ 169-170; Abu-Jamal: V1, 59-60; Plaintiff's Ex. 1, p. A18, A20-A21. While glucose levels and other diabetes markers have recently been within normal range that could be due to a "honeymoon period" PSMF ¶¶ 174-176. As secondary to hepatitis C, the

hyperglycemia and/or diabetes could reassert itself. *Id.* Should that be the case, successful treatment for the hepatitis C would result in significant improvement, if not resolution of the Type II diabetes. Plaintiff's Ex. 18, p. 6.

A reasonable fact-finder could conclude that this is not a case involving a mere dispute between medical professionals. Plaintiff's hepatitis C is not being treated. There is now but one recognized way to treat hepatitis C – with direct-acting antiviral medications that have the 90-95% cure rate. In Mr. Abu-Jamal's case the disease has caused and is causing significant liver damage, is progressing, and is placing Mr. Abu-Jamal's very life in jeopardy. Providing readily available medication would prevent further deterioration of his liver, cure the disease's other complications and alleviate his suffering. Indeed the defendants' experts themselves admit that there is no medical justification for refusing to administer the anti-viral medication. PSMF ¶ 65 citing Cowan: V3, p. 68; Noel: V3, 154. It is money, not medical opinion, that is dictating the situation. *Id.* Thus, there cannot be a reasonable "dispute between medical professionals" where the other side of the dispute can offer no medical justification for its position.

But even if "active surveillance" and palliative measures for the skin condition can be deemed "treatment", they do not satisfy the Eighth Amendment. The provision of some "treatment" will not allow a defendant to evade liability if that treatment is knowingly less effective. *Durmer*, 991 F.2d at 69; *White*, 897 F.2d at 109-11; *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978); *Parkell v. Markell*, 622 Fed. App'x.

136, 141 (3d Cir. 2015). [12] Active surveillance, phototherapy sessions, baths and vaseline are knowingly less effective than providing a medication that will insure that Mr. Abu-Jamal's liver will not deteriorate further and his skin condition resolve. Given the foregoing, a reasonable fact-finder could therefore conclude that the defendants have been and are being deliberately indifferent to a serious medical need.

II. Qualified Immunity – Eighth and Fourteenth Amendments[13]

A defendant is not entitled to qualified immunity if plaintiff's facts 1) "make out a violation of a constitutional right," and 2) "the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 815-816 (2009). A right is clearly established when its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)

[12] The cases cited on pages 25-26 of the defendants' memorandum (Dkt. 156) are readily distinguishable Each of the inmate plaintiffs in those cases litigated them *pro se*. None of the decisions were preceded by an evidentiary hearing. The cases are distinguishable in additional ways. In *Harrell, Shabazz*, and *Colon*, the plaintiffs did not claim that they were presently experiencing any physical manifestations of the hepatitis C. In *Taylor*, the court characterized the medical evidence presented by the *pro se* plaintiff as "limited" and there was no evidence that he was suffering from extra-hepatic manifestations of the disease. *Taylor*, 2016 WL 1364287*3-4. The *Dulak* court relied on a record developed between 2011 and 2013 and affidavits from doctors stating that the then "current" treatment (interferon) was not low risk and was ineffective. *Dulak*, 2015 U.S. Dist. LEXIS 131291 *6-7.[12] The DOC defendants point out that the *Shabazz* court noted that simple monitoring was consistent with accepted medical practices. Dkt. 122, p. 7. Of course, that court did not have before it the current recommendation of the AASLD that everyone be treated irrespective of disease progression. PI Hearing Plaintiff's Exhibit 18, p. 1.

[13] Defendants also state that they are seeking qualified immunity on plaintiff's first amendment claims although they offer no arguments in support of this. The issue is moot, however, as plaintiff is not seeking damages for his first amendment claims, and thus the qualified immunity doctrine is not applicable.

(internal quotation and citation omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12 [1985]; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). There need not be precedent involving "fundamentally similar" facts to the case at issue holding the government's conduct unlawful. *Hope*, 536 U.S. at 740-41; *United States v. Lanier,* 520 U.S. 259, 268 (1997). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful[.]'" *Id.* at 270-71 see also *Schneyder v. Smith*, 653 F.3d 313, 329 (3d Cir. 2011). "The salient question is whether the state of the law and the time of the incident provided 'fair warning' to the defendants that their alleged conduct was unconstitutional. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014). When making a qualified immunity determination on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-movant, even where, as here, the movant's argument is limited to the "clearly established" prong. *Tolan v, Cotton*, 134 S.Ct. at 1866.

The standard for assessing medical care claims under the Eighth Amendment, discussed *supra* at p. 2, has been clearly established for 40 years. Deliberate indifference to a serious medical need "requires proof that the official 'knows of and disregards an excessive risk to inmate health or safety.'" *Natale*, 318 F.3d at 582.

This is not a "general" standard, especially when applied to the specific context of Mr. Abu-Jamal's case. *Brosseau v. Haugen*, 543 U.S. 194, 195, 198 (2004)(inquiry as to whether conduct violated clearly established law must be made "in light of the specific context of the case" and "construing facts…in a light most favorable to [the nonmovant]"). Defendants know that Mr. Abu-Jamal has suffered from and is suffering from serious complications of hepatitis C. His disease is progressing and if left untreated, will become life-threatening. PSMF ¶¶ 105, 107. Even the defendants' experts acknowledge that there is no medical justification for refusing to give him the anti-viral medications. PSMF ¶ 106. Instead of curing the disease with a readily available drug the defendants have opted for "active surveillance" and ineffective palliative measures. This refusal to provide a known cure has placed Mr. Abu-Jamal at an "excessive risk" to health and safety. *Natale*, 318 F.3d at 582. The palliative measures that have been administered do not constitute treatment as they are knowingly less effective that a cure. *Durmer*, 991 F.2d at 69; *White*, 897 F.2d at 109-11; *West*, 571 F.2d at 162; *Parkell*, 622 Fed. App'x. at 141.

Defendants argue that qualified immunity applies because some courts that have considered the issue have found no Eighth Amendment violation. (Dkt. 156, p. 27-28). However, as reiterated most recently in *Tolan*, *supra*., at 1866, a determination of whether a right is "clearly established" is a fact intensive one. All of the cases cited by the defendants were brought by *pro* se inmates. In none of them was there an evidentiary hearing that included extensive testimony about the plaintiff's physical condition and/or the opinion of a medical expert. Contrary to those cases, there is ample evidence before this Court that Mr. Abu-Jamal's disease is progressing that he is suffering from severe extrahepatic manifestations of the disease and that denial of immediate treatment could place his life in jeopardy. PSMF ¶¶ 105-107. On this motion for summary judgment those facts must be accepted as true. *Tolan*, *supra*. The right not to be exposed to an unreasonable risk to serious damage to future health has long been clearly established. *Helling v. McKinney*, 509 U.S. at 35. *See also Farmer v. Brennan*, 511 U.S. at 837.

III. Plaintiff Exhausted All Medical Care Claims for Relief

On two prior occasions, this Court has recognized that Mr. Abu-Jamal has complied with the letter and the purpose of the exhaustion of administrative remedies requirement for all of his medical care claims. V1 at 36-37 (holding that "exhaustion [of medical care and hepatitis C claims] has occurred in this case"); *Abu-Jamal v. Kerestes*, 2016 WL 3456935 *5 ("Court finds that Plaintiff's Grievance Number 561400

was sufficient to give prison officials and the Medical Defendants adequate notice of his claims."). The defendants now seek to re-litigate the exhaustion issue under a new theory. They assert that notwithstanding that the grievance placed the DOC on notice that Mr. Abu-Jamal was challenging the DOC's failure to provide adequate medical care and requested a treatment plan, his claim for money damages is not exhausted because that form of relief was not specifically stated in his grievance. (Def't. Memorandum p. 8-9). For the following reasons, the defendants' argument should be rejected.

1. The PLRA's Exhaustion Requirement Does Not Require A Demand For Money Damages.

The United States Supreme Court has held that under the PLRA "one 'exhausts' processes, not forms of relief." *Booth v. Churner*, 532 U.S. 731, 739 (2001); see also *Nyhuis v. Reno*, 204 F.3d 65, 75 (3d Cir. 2000) ("inmate-plaintiffs must exhaust all available administrative remedies" and "federal courts need not waste their time evaluating whether those remedies provide the [] prisoner with the relief he desires.").

In *Booth*, the U.S. Supreme Court addressed whether the administrative "remedy" that has to be exhausted under the PLRA meant "specific relief obtainable at the end of a process of seeking redress, or the process itself, the procedural avenue leading to some relief." 532 U.S. at 738. The Court concluded that it was the process that must be exhausted even where the specific relief that was requested, in that case money damages, was unavailable:

> The "available" "remed[y]" must be "exhausted" before a complaint under § 1983 may be entertained. While the modifier "available" requires the possibility of some relief for the action complained of (as the parties agree), the word "exhausted" has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered. It would, for example, be very strange usage to say that a prisoner must "exhaust" an administrative order reassigning an abusive guard before a prisoner could go to court and ask for something else; or to say (in States that award money damages administratively) that a prisoner must "exhaust" his damages award before going to court for more. How would he "exhaust" a transfer of personnel? Would he have to spend the money to "exhaust" the monetary relief given him? It makes no sense to demand that someone exhaust "such administrative [redress]" as is available; one "exhausts" processes, not forms of relief, and the statute provides that one must.

Id. at 738-39. With this analysis the Court held that "Congress has provided in § 1997e(a) that an inmate must exhaust *irrespective of the forms of relief sought and offered* through administrative agencies. *Id.* at 741, n.6 (emphasis added). Given the explicit holding on this issue by the Supreme Court, defendants' attempt to graft a novel, extra-textual requirement that a prisoner must exhaust all particular forms of relief later sought in litigation fails.

The defendants argue, contrary to *Booth*, that "remedy" means "specific relief obtainable at the end of a process of seeking redress." They do not argue that Mr. Abu-Jamal has not exhausted the process available or that the grievance was not rejected on the merits. They argue only that he did not exhaust a specific item of relief. Such an argument is foreclosed by *Booth*.

That the exhaustion requirement applies to "processes, not forms of relief" has ample precedent in the federal courts. *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir.

2004) (prisoner does not have to "demand particular relief") (internal citation omitted); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) ("no administrative system may demand that the prisoner specify each remedy later sought in litigation" under *Booth*); *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (adopting *Strong* standard recognizing that "[t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation); *Kikimura v. Osagie*, 461 F.3d 1269, 1283 (10th Cir. 2006) ("The reasoning of *Woodford* thus lends support to the approach followed by the Second and Seventh Circuits: that a grievance will satisfy the exhaustion requirement so long as it is not 'so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally.'") (quoting *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006); *Concepcion v. Morton*, 306 F.3d 1347, 1353-54 (3d Cir. 2002) ("Congress wanted the focus to be on the *availability* of an administrative remedy program") (emphasis in original); *Boyd v. U.S.*, 396 Fed. App'x. 793 795 (3d Cir. 2010) ("the bright-line rule of complete exhaustion applies regardless of 'whether [internal processes] provide the inmate-plaintiff with the relief ... [desired] in his federal action.') (quoting *Nyhuis*); *Jones v. Berge*, 172 F.Supp.2d 1128, 1134 (W.D.Wis. 2001) ("Any claim for relief that is within the scope of the pleadings may be litigated without further exhaustion."); *accord*, *Smith v. Buss*, 2011 WL 1118065 *9 (N.D.Ind. 2011); *Patel v. Federal Bureau of Prisons*, 2006 WL 1307733 *3 (E.D.Ark. 2006); *Sample v. Lappin*, 424 F.Supp.2d 187, 191 (D.D.C. 2006); *Lira v. Director of Corrections State of California*, 2002 WL 1034043 *4 (N.D.Cal.

2002)("defendants' argument that Lira did not exhaust his claim for monetary relief because he did not seek monetary relief in his administrative grievance is unpersuasive because the Supreme Court specifically rejected this construction of § 1997e(a) in *Booth*"), *reversed and remanded on other grounds*, 427 F.3d 1164 (9th Cir. 2005), *cert. denied*, 549 U.S. 1204 (2007).

Courts have also held that prisoners' damages claims are not barred for failure to ask for damages in the grievance process. *Buck v. Hartman*, 2013 WL 3421891 *3-4 (S.D.I. 2013); *Del Rio v. Morgado*, 2012 WL 2092401 *4 (C.D.Cal. 2012); *Lopez v. Adams*, 2009 WL 1575195 *2-3 (E.D.Cal. 2009), *report and recommendation adopted*, 2009 WL 2058540 (E.D.Cal. 2009); *Woodson v. Rodriguez*, 2009 WL 799403 *7 (N.D. Cal. 2009) (plaintiff need not have requested damages in order for defendants to have notice of the problems he raised); *Henderson v. Bettus* 2008 WL 899251 *4 (M.D.Fla. 2008); *Roberson v. McShan*, 2006 WL 2469368 *3 (S.D.Tex. 2006).

A closer look at the DOC's administrative remedy processes further militates against adopting their position that, contrary to *Booth*, prisoners exhaust forms of relief, not processes. First, there are several other administrative remedy processes outlined in different DOC policies from the one governing inmate grievances, and in none of these policies or processes is an inmate required to request damages or any other relief provided by a court. See Ex. 12, DOC Policies: DC-ADM 006, DC-ADM 008, DC-ADM 801, DC-802, DC-803. Complaints regarding misconduct charges issued against a prisoner, sexual abuse, placement or retention in solitary confinement

(aka restricted housing/administrative custody), censorship of mail, or requests seeking an accommodation for a disability are all addressed outside of the grievance process outlined in DC-ADM 804, and none of these require a request for damages. This inconsistency underscores that the request for compensation is not a "critical procedural rule" necessary to facilitate merits review of a grievance. DOC personnel does not require notice of any request for compensation in order to investigate a claim. If that were the case for certain complaints, such as excessive force or denial of medical care, it would also be the case for others such as rape or sexual assault, denial of accommodation for a disability, or being subject to prolonged solitary confinement without a legitimate basis.

Second, adoption of defendants' position on this issue would lead to absurd results. For instance, DC-ADM 804 § 1.A.11.d states "If the inmate desires compensation or other legal relief normally available from a court, the inmate must request the specific relief sought in his/her initial grievance." If the use of word "must" were deemed sufficient to overturn *Booth*, it would mean that not only would Mr. Abu-Jamal have to refile a grievance requesting compensation, but he would also have to state whether he wanted declaratory relief, a preliminary injunction, a permanent injunction, the specific content of any injunction (consistent with the PLRA), whether he wanted punitive damages, class action relief, and even attorney fees. The purposes of the exhaustion requirement are not furthered by mandating that a prisoner state what relief he may seek in another forum, especially in circumstances

where the prisoner wants relief without having to go to court. Either he "must" request all of these specific items of relief if he is to seek them in court, or else this provision of the policy is not a "critical procedural rule" under *Woodford*. Given the foregoing, the three non-precedential cases from the Middle District of Pennsylvania relied on by defendants (Def't. Memorandum p. 9) are unavailing in light of the U.S. Supreme Court's holdings in *Booth* and *Woodford*. Defendants' latest exhaustion argument should be rejected.

2. By Rejecting The Grievance On It Merits, The Defendants Cannot Rely Upon A Purported Procedural Default.

Defendants do not – and cannot – argue that the purpose of the exhaustion requirement was not met in this case. The DOC was provided with the "opportunity to correct its own mistakes with respect to the programs it administers before it [was] haled into federal court." *Nyhuis*, 204 F.3d at 76 (quoting *McCarthy v. Madigan*, 503 U.S. 140 (1992); see also *Woodford v. Ngo*, 548 U.S. 81, 89 ("Exhaustion gives an agency 'an opportunity to correct its own mistakes'") (quoting *McCarthy*). The defendants herein were given "adequate notice of his [medical care] claims via the grievance process. *Abu-Jamal*, 2016 WL 3456935 *5. They rejected his grievance every step of the way on the purported basis that his medical care needs have been fully met, eschewing any opportunity to remedy, alter, correct, or otherwise provide relief to Mr. Abu-Jamal in any form. Mr. Abu-Jamal thus provided prison personnel with sufficient "opportunity to respond" to his complaints. Where, as here, a grievance is

resolved on the merits, prison officials may not rely on a purported procedural default. *Gates v. Cook*, 376 F.3d 323, 331 n.6 (5th Cir. 2004); *Spruill v. Gillis*, 372 F.3d 218, 234 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir., *cert. denied*, 537 U.S. 949 (2002). Mr. Abu-Jamal complied with the DOC's "deadlines and other critical procedural rules.". His grievance was addressed, and rejected, on its merits each step of the way. Dtk. 37-2, Ex. 2, Grievance Documents; Dkt. 43-1, Final Grievance Response. Mr. Abu-Jamal effected "substantial compliance" with the grievance procedure. *Nyhuis*, 204 F.3d at 77-78 ("compliance with the administrative remedy scheme will be satisfactory if it is substantial."). The DOC was given the "opportunity to correct its own mistakes" prior to being sued. *Woodford*, 548 U.S. at 89-91.

3. The Motion Should Be Denied Or Its Consideration Deferred Until The Conclusion Of Discovery.

The U.S. Supreme Court has held that a remedy is unavailable "if administrative officials have apparent authority, but decline ever to exercise it." *Ross v. Blake*, 136 S.Ct. 1850, 1859 (2016). Thus, "when the facts on the ground demonstrate that no such potential exists the inmate has no obligation to exhaust the remedy." Whether monetary damages are "available" for medical care claims in practice in the Pennsylvania DOC is a question of fact. For example, in his 35 years within the Department of Corrections, plaintiff Mumia Abu Jamal, is unaware of any

prisoner receiving compensation for a medical care claim through the grievance process. (Dec. of Mumia Abu Jamal sworn to August 4, 2016, ¶ 19, Pl. Appendix, Ex. 4). Plaintiff should be permitted to engage in discovery to learn whether, in fact, a damage remedy for medical care claims is truly "available".

IV. Disputes of Material Fact and the Need for Discovery Preclude Summary Judgment on Plaintiff's First Amendment Claims.

In support of their pending Fed.R.Civ.P. 12(b)(6) motion defendants argued that plaintiff's allegations were insufficient to properly state an access to courts claim under the First Amendment. *See* Dkt. 89, Def. MTD Br. at 9. Plaintiff opposed that motion which remains *sub judice*. Defendants raise an identical argument as to these claims in their brief in support of their motion for summary judgment. Dkt. 156, Def. SJ Br. at 9-10.

When a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 428 U.S. 78, 89 (1987). See *Beard v. Banks*, 548 U.S. 521, 528 (2006) ("restrictive prison regulations are permissible if they are reasonably related to legitimate penological interests, and are not an exaggerated response to such objectives.") (internal citations and quotation marks omitted); *Monroe v. Beard*, 536 F.3d 198, 207 (3d Cir. 2008). The Third Circuit has repeatedly emphasized that the *Turner* inquiry is "fact-intensive" and requires "a contextual, record-sensitive analysis." *Ramirez v. Pugh*, 379 F.3d 122, 130 (3d Cir. 2004) (quoting *Wolf v. Ashcroft*, 297 F.3d 305, 310 (3d. Cir.

2002) (quoting *Dehart v. Horn*, 227 F. 3d 47, 59 n.8 (3d Cir. 2000) (en banc))). It is plaintiff's claim that the *de facto* regulation before the court here is a total prohibition of contact between plaintiff Abu-Jamal and his attorneys that is not reasonably related to a legitimate interest.

Given the fact-intensive inquiry that is necessary, plaintiff Abu-Jamal requests that this Court deny defendants' Motion for Summary Judgment as premature. Fed.R.Civ.P. 56(d). As noted *supra*., the Third Circuit has held that if discovery is incomplete "in any way material to a pending summary judgment motion," a district court "is justified in not granting [summary judgment]." *Doe v. Abington Friends Sch.,* 480 F.3d 252, 257 (3d Cir. 2007); *Shelton v. Bledsoe*, 775 F. 3d 554, 565-66 (3d Cir. 2015). In the instant matter, Plaintiff Abu-Jamal has not had an opportunity to conduct discovery necessary to conduct an analysis under the four *Turner* prongs. Plaintiff is entitled to take discovery from defendants as to these claims, including from defendant Kerestes. *See* Declaration of Bret Grote Dec., Pl. Appendix, Ex. 1 ¶ 13. Consideration of summary judgment at this stage is premature *See Anderson,* 477 U.S. 242 (2007).

Should this Court reach the merits, summary judgment should be denied. A prisoner has the right to petition a court over violations of constitutional rights. *Bounds v. Smith*, 430 U.S. 817, 817-818 (1977). A necessary corollary is the right to visit and consult with an attorney or the attorney's representative. *Procunier v. Martinez*, 416 U.S. 396, 420 (1974). That right has been denied here. Between May 12 and May

19, 2015, the defendants prohibited all communication between Mr. Abu-Jamal and his attorneys. Mr. Abu-Jamal's communication with his wife was unconstitutionally restricted without penological justification. *Cf. Overton v. Bazzeta*, 529 U.S. 126 (2003). (upholding restrictions on contact visitation after applying *Turner* factors.

The issue is not the duration of the harm plaintiff suffered, but the total prohibition of communication. The litany of cases defendants cite in support of this complete prohibition are factually dissimilar and do not encompass the complete prohibition of communication at issue herein. *See, e.g. Moore v. Lehman*, 940 F. Supp. 704, 710 (M.D. Pa. 1996). (no violation; other forms of communication available).

V. Defendant Kerestes Is Protected by Sovereign Immunity on Plaintiff's State Law Negligence Claim But Oppman is Not

Defendant Kerestes is immune as to the state law medical neglect claim, but only as to that claim. Defendant Oppman is not. Under Pennsylvania law "Acts of health care employees of Commonwealth agency medical facilities or institutions" are not protected by sovereign immunity. 42 Pa.C.S. § 8522(b)(2). Defendant Oppman was the "Director of the Bureau of Health Care Services for the DOC," and as such was "responsible for the delivery of all medical and dental services throughout the DOC." Dkt. 57 ¶ 3 and, unambiguously, a health care employee of a Commonwealth agency medical facility[y] or institution. 42 Pa.C.S. § 8522(b)(2).

VII. Defendant DelBalso Has Been Substituted for Defendant Kerestes

Federal Rule of Civil Procedure 25(d) provides for the automatic substitution of a public official who is a party in a lawsuit in his or her official capacity with that official's successor upon their leaving office. Accordingly, plaintiff's injunctive claims against defendant Kerestes are automatically continued against his successor defendant Theresa DelBalso. Judgment should not be entered as to any claim for injunctive relief.

CONCLUSION

For all the foregoing reasons, the DOC Defendants' motion for summary judgment should be denied.

Dated: August 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Brief in Opposition to DOC Defendants' Motion for Summary Judgment upon each defendant in the following manner:

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