

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

MUMIA ABU JAMAL,

Plaintiff,

-against-

Case No. 15-CV-00967

JOHN KERESTES, et al.,

Defendants.

PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY

Plaintiff, through undersigned counsel, moves for the expedited and limited discovery for the purposes of obtaining plaintiff's medical records from August 15, 2015 through the present, and taking the depositions of two non-party employees of the Department of Corrections (DOC), Drs. Ramon Gadea and Paul Noel, so as to facilitate this court's resolution of the factual and legal issues presented in plaintiff's motion for preliminary injunction. Plaintiff's argument in support of this motion, as well as the relevant facts, are contained in the memorandum, declarations, and exhibits filed with this motion.

Dated: October 23, 2015

/s/ Bret D. Grote

Bret D. Grote

PA I.D. No. 317273

Abolitionist Law Center

P.O. Box 8654

Pittsburgh, PA 15221

Telephone: (412) 654-9070

bretgrote@abolitionistlawcenter.org

/s/ Robert J. Boyle

Robert J. Boyle

277 Broadway

Suite 1501

New York, N.Y. 10007

(212) 431-0229

Rjboyle55@gmail.com

NYS ID# 1772094

Pro Hac Vice

Counsel for Plaintiff

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

MUMIA ABU-JAMAL	:	Case No. 15-Cv-00967
	:	(RDM)(KM)
Plaintiff,	:	
	:	Judge Robert D. Mariani
v.	:	
	:	Magistrate Judge Karoline
JOHN KERESTES, et al.	:	Mehalchick
	:	
Defendants.	:	ELECTRONICALLY FILED

CERTIFICATION

Pursuant to Local Rule of Civil Procedure 7.1, undersigned counsel for Plaintiff Mumia Abu-Jamal hereby certify that they sought concurrence from DOC counsel in the foregoing motion and she did not concur.

Dated: October 23, 2015

/s/ Bret D. Grote

Bret D. Grote
PA I.D. No. 317273
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221
Telephone: (412) 654-9070
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**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE
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MUMIA ABU-JAMAL

Plaintiff,

v.

JOHN KERESTES, et al.

Defendants.

: Case No. 15-Cv-00967

: (RDM)(KM)

:

: Judge Robert D. Mariani

:

: Magistrate Judge Karoline

: Mehalchick

:

: ELECTRONICALLY FILED

AND NOW, this _____ day of October 2015, upon consideration of the foregoing motion, it is hereby ordered that Plaintiff Mumia Abu-Jamal's Motion for Expedited Discovery is GRANTED.

BY THE COURT:

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Plaintiff's Motion for Expedited Discovery upon each defendant in the following manner:

Service Via ECF:

For Defendants Kerestes, Oppman, Lisiak, Khanum, Saxon, and Steinhart:

Laura Neal, Esquire
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
lneal@pa.gov

Fore Defendant Geisinger Medical Center:

Jack Dempsey, Esquire
Myers, Brier & Kelly, LLP
425 Spruce Street, Suite 200
Scranton, Pennsylvania 18503
jdempsey@mbklaw.com

/s/ Bret D. Grote

Bret D. Grote
PA I.D. No. 317273
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221
Telephone: (412) 654-9070
bretgrote@abolitionistlawcenter.org

/s/ Robert J. Boyle

Robert J. Boyle
277 Broadway
Suite 1501
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Counsel for Plaintiff

Dated: October 23, 2015

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MUMIA ABU JAMAL,

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JOHN KERESTES, et al.,

Defendants.

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR EXPEDITED DISCOVERY**

I. Statement of Facts

The facts supporting this motion are set forth in the accompanying declaration of Robert J. Boyle dated October 21, 2015 and the Exhibits attached thereto. Briefly, in the DOC defendants' September 10, 2015 opposition to plaintiff's preliminary injunction motion, DOC Dr. Paul Noel stated, *inter alia* that an "infectious disease specialist" had determined that Mr. Abu Jamal's skin condition was not secondary to his hepatitis C. (Declaration of Dr. Paul Noel attached as Exhibit 4 to Boyle Declaration). One day earlier, on September 9, 2015, Dr. Ramon Gadea, an infectious disease specialist working under contract with the DOC told Mr. Abu Jamal that he believed that it was likely that the skin condition was secondary to the hepatitis

C and that he was going to recommend, in writing, that Mr. Abu Jamal be treated with the anti-viral medications.(Declaration of Mumia Abu Jamal ¶¶ 3-5 attached as Exhibit 6 to Boyle Declaration).

Neither plaintiff nor counsel have medical records generated after approximately August 15, 2015. Defense counsel has declined to produce any additional records until such time as there is a Fed.R.Civ.P. 26(f) conference. The factual basis for Dr. Noel's – and the defendants' – decision not to treat plaintiff Abu-Jamal with the new anti-viral medications is critical to a determination of the motion for a preliminary injunction. Accordingly, the instant motion requests that medical records from August 15, 2015 to the present be produced and that the plaintiff be permitted to depose non-party witnesses Paul Noel, M.D. and Ramon Gadea, M.D.

II. Legal Argument

Statement of Questions Involved

Question: Should the Court order limited discovery consisting of requiring production of recent medical records and the depositions of two non-party witnesses on the ground that the request is reasonable and relevant to the pending motion for a preliminary injunction?

Suggested Answer: Yes.

Generally, “[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Fed.R.Civ.P. 26(d)(1). However, courts have broad discretion to manage the discovery process and can expedite or otherwise alter the timing and sequence of discovery. *Id.* While the United States Court of

Appeals for the Third Circuit has not yet adopted a uniform standard for Fed.R.Civ.P. 26(d) requests, *See Kone Corp. v. Thyssenkrupp USA, Inc.*, 2011 WL 4478477 (D.Del. 2011), the “prevailing” approach is to apply a “good cause” or “reasonableness” standard. *Wiluna Holdings v. Does 1-50*, 2013 WL 1336792*2 (E.D. Pa 2013). Under that approach, a court “must weigh the need for discovery at an early juncture in the litigation against the breadth of the discovery requests and the prejudice to the responding party[.]” *Id.* (quoting *Kone* 2011 WL 4478477). Among the factors considered are the timing and context of the discovery requests, the scope and purpose of the requests and the nature of the burden to the responding party. *Id.* “Good cause” is usually found where “the plaintiff’s need for the expedited discovery, in consideration of the administration of justice, outweighs the possible prejudice or hardship to the defendant.” *Malibu Media LLA v. John Doe*, 2015 WL 3795948*2 (M.D. Pa. 2015) (citing *Leone v. Towanda Borough*, 2012 WL 1125938*2 (M.D. Pa. 2012)).

Plaintiff’s requests satisfy the foregoing standard. The request for the medical records is directly relevant to the pending preliminary injunction motion. Dr. Noel stated in his declaration that an “infectious disease specialist” determined that the skin condition was not secondary to the hepatitis C. Yet in none of the medical records produced to plaintiff and/or this Court does an infectious disease specialist note that opinion. Moreover, Dr. Ramon Gadea, the only infectious disease specialist with whom plaintiff has consulted, told plaintiff Abu Jamal on September 9, 2015 that he believed that the skin condition was likely a manifestation of the hepatitis C and that

he would be recommending, in writing, that he be treated with the hepatitis C anti-viral medication. Upon information and belief his notes and recommendations would be maintained in Mr. Abu-Jamal's medical file.

Production of the records would not be a hardship for the defendants. First, they are readily available and copies of them are likely in the possession of DOC counsel and will likely be produced at some point in this litigation. Second, they are documents that Mr. Abu Jamal and counsel have a right to review under Pennsylvania law. 42 Pa.C.S.A. § 6155(b)(1). But DOC counsel has stated that the medical records will not be produced pursuant to Pennsylvania's medical records law while this litigation is pending. This position has resulted in a *de facto* denial to Mr. Abu Jamal's counsel of his medical records: counsel cannot get them through the medical records law due to opposing counsel's refusal to comply with Mr. Abu-Jamal's request during this litigation, and counsel cannot get them in this litigation, according to the DOC defendants, until a Rule 26(f) conference. In the meantime, plaintiff is being denied access to evidence that has a direct bearing on his motion for a preliminary injunction.

The depositions of Dr. Gadea and Dr. Noel are also necessary. Dr. Noel has represented to this Court that the infectious disease specialist determined that the skin condition is not secondary to the hepatitis C. Dr. Noel does not set forth the identity of that specialist nor the bases for his or her opinion. The only infectious disease specialist seen by Mr. Abu Jamal, Dr. Ramon Gadea, has said the opposite: that the skin condition is likely secondary to the hepatitis C. Dr. Noel should testify under

oath and disclose with whom he spoke and what exactly he was told. At the same time Dr. Gadea should testify about his evaluations of Mr. Abu Jamal, his conversations with Dr. Noel, and his September 9, 2015 conversation with Mr. Abu Jamal.

The reasonableness, *vel non*, of Dr. Noel's determination not to treat Mr. Abu Jamal with the anti-viral medication is crucial to the motion for injunctive relief. Taking their depositions will result in no hardship to the defendants. Dr. Noel is employed by the DOC. Dr. Gadea is, upon information and belief, also employed by the DOC. Their depositions might narrow and focus the factual issues presented in this motion and those that would need to be resolved at an evidentiary hearing in open court. Accordingly, judicial economy would be served if the depositions take place.

CONCLUSION

WHEREFORE, this Court should issue an order 1) granting leave to serve a document request for plaintiff's medical records and requiring production of the same within seven days 2) authorizing service of subpoenas for the non-party depositions of Paul Noel, M.D. and Ramon Gadea, M.D. and requiring that those depositions be conducted within 21 days and 3) granting such other and further relief as this Court deems just and proper.

Dated: October 23, 2015

Respectfully submitted

/s/ Bret D. Grote

Bret D. Grote

PA I.D. No. 317273

Abolitionist Law Center

P.O. Box 8654

Pittsburgh, PA 15221

Telephone: (412) 654-9070

[bretgrote@abolitionistlawcenter.
.org](mailto:bretgrote@abolitionistlawcenter.org)

/s/ Robert J. Boyle

Robert J. Boyle

277 Broadway

Suite 1501

New York, N.Y. 10007

(212) 431-0229

Rjboyle55@gmail.com

NYS ID# 1772094

Pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Plaintiff's Memorandum of Law in Support of Motion for Expedited Discovery upon each defendant in the following manner:

Service Via ECF:

For Defendants Kerestes, Oppman, Lisiak, Khanum, Saxon, and Steinhart:

Laura Neal, Esquire
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
lneal@pa.gov

Fore Defendant Geisinger Medical Center:

Jack Dempsey, Esquire
Myers, Brier & Kelly, LLP
425 Spruce Street, Suite 200
Scranton, Pennsylvania 18503
jdempsey@mbklaw.com

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-against-

Case No. 15-CV-00967

JOHN KERESTES, et al.,

Defendants.

DECLARATION OF ROBERT J. BOYLE

ROBERT J. BOYLE hereby declares pursuant to 28 U.S.C. §1746 that the following is true and correct:

1. I am an attorney duly admitted to practice in the State of New York and have been admitted *pro hac vice* to this Court. Along with Bret Grote, Esq., I represent the plaintiff Mumia Abu Jamal.
2. This declaration is respectfully submitted in support of the instant motion for limited discovery.
3. Plaintiff seeks an order 1) requiring production of all of plaintiff's medical records generated from August 15, 2015 to the present, including but not limited to any document bearing the recommendations and/or opinions of an Infectious Disease specialist, including but not limited to Dr. Ramon Gadea; 2) granting authorization, pursuant to Fed.R.Civ.P. 45 to take the

depositions of two non-party witnesses, to wit, Dr. Ramon Gadea and Dr. Paul Noel.

4. The proposed document request is attached hereto as Exhibit 1. The deposition notices for Drs. Gadea and Noel are attached as Exhibits 2 and 3 respectively.¹
5. The reasons for this request are as follows. Currently pending before this Court is plaintiff's motion for a preliminary injunction as well as his Statement of Objections to Magistrate Judge Karoline Mehalchick's September 18, 2015 Report and Recommendation. That motion requests, *inter alia*, an order requiring that the defendants treat plaintiff's active hepatitis C infection with the latest direct acting anti-viral medication.
6. In support of the motion, plaintiff submitted the declaration of Joseph Harris, M.D. Dr. Harris reviewed Mr. Abu Jamal's medical records, met with him at the SCI Mahanoy visiting room and consulted with other experts in the field.
7. It is Dr. Harris' opinion and the opinion of the physicians with whom he has consulted that Mr. Abu Jamal should immediately be treated with the anti-viral medications. He bases his opinion on two factors. First, the development of the new treatment has changed the landscape of hepatitis C

¹ Should this motion be granted Drs. Noel and Gadea would have to be served with Rule 45 subpoenas as both are non-parties.

treatment so that it is now standard that everyone with an active infection, like Mr. Abu-Jamal, be treated.

8. Second, because Mr. Abu Jamal has extra-hepatic manifestations of the hepatitis C, most notably his persistent, itchy skin rash, unexplained anemia, and sudden-onset diabetes, Mr. Abu Jamal falls within the highest category for treatment.
9. In papers dated September 10, 2015, the defendants opposed plaintiff's motion. In support of their position, they filed the declaration of Paul Noel, M.D. Dr. Noel identified himself as the Chief of Clinical Services of the Department of Corrections Bureau of Healthcare Services. A copy of Dr. Noel's Declaration is attached hereto as Exhibit 4.
10. Dr. Noel states that treatment is not currently required. With respect to the skin condition, Dr. Noel states:

Mr. Abu Jamal's skin condition has also been evaluated by his consulting infectious disease specialist to determine whether his eczema might be a secondary condition of his Hepatitis C.

The infectious disease specialist has determined that Mr. Abu Jamal's eczema is not secondary to his Hepatitis C.

Declaration of Paul Noel, M.D. Ex. 4, ¶¶ 9-10

11. Dr. Noel does not identify the infectious disease specialist. However, it is presumably Dr. Ramon Gadea, the only infectious disease specialist with

whom Mr. Abu Jamal has consulted. (See Consultation Record attached hereto as Exhibit 5).

12. In none of the medical records produced to plaintiff to date is there any writing wherein Dr. Gadea, or any other infectious disease specialist, expresses the opinion that the skin condition is not secondary to hepatitis C. In fact, Dr. Gadea has expressed the opposite opinion, i.e. that the skin condition is likely a manifestation of hepatitis C.
13. On September 9, 2015, one day before the defendants filed their opposition to the preliminary injunction motion, Mr. Abu-Jamal had a video conference with Dr. Gadea. Dr. Khanum of SCI Mahanoy was present during that conference. See Declaration of Mumia Abu Jamal attached hereto as Exhibit 6.
14. Dr. Gadea told Mr. Abu Jamal that he was going to recommend that he be treated with the hepatitis C anti-viral medications. He told Mr. Abu-Jamal that he would be making that recommendation because other causes for the skin condition had been ruled out making it likely that it was a manifestation of the hepatitis C. See Exhibit 6 ¶¶ 3-5.
15. The foregoing contradiction necessitates limited discovery. The DOC defendants have represented to this Court that injunctive relief requiring treatment with anti-virals is unnecessary because their infectious disease specialist had concluded that the skin condition is not secondary to the

hepatitis C and that the disease had not progressed. Dr. Ramon Gadea, the only infectious disease specialist with whom there has been a consultation, told Mr. Abu-Jamal the exact opposite: that he should be treated with anti-virals because his skin condition was likely being caused by the hepatitis C and that he would be writing a recommendation to that effect.

16. In her Report and Recommendation, the Magistrate Judge relied on Dr. Noel's representation when recommending that the motion be denied on its merits. Yet Dr. Noel's opinions may totally lack a factual foundation. Dr. Gadea told Mr. Abu-Jamal that hepatitis C had not been ruled out as a cause for the skin condition. Depositions of both Dr. Gadea and Dr. Noel are critical to determining what, in fact, Dr. Gadea's opinion is and what, if anything, he said to Dr. Noel.
17. An order requiring production of medical records is also necessary. While the DOC has produced medical records since the filing of this lawsuit, they have now stated that any further production must await a Rule 26(f) conference. At the same time they have declined to produce records pursuant to 42 Pa.C.S.A. § 6155(b)(1), citing this lawsuit. Thus while the defendants and their counsel have total access to Mr. Abu-Jamal's medical records, Mr. Abu-Jamal and his counsel do not.

WHEREFORE, for all the foregoing reasons this Court should issue an order:

- a. Authorizing Service of the Document request attached as Exhibit 1 and requiring that the medical records be produced to plaintiff's counsel within ten days;
- b. Authorizing service of Fed.R.Civ.P. 45 subpoenas to take the depositions of Ramon Gadea, M.D. and Paul Noel, M.D. and further ordering that said depositions be conducted within 21 days.
- c. Granting such other and further relief as this Court deems just and proper.

Dated: October 21, 2015

Robert J. Boyle _____
ROBERT J. BOYLE
277 Broadway
Suite 1501
New York, N.Y. 10007
(212) 431-0229
NY Bar #1772094
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Declaration of Robert J. Boyle and the Exhibits attached thereto in Support of Motion for Expedited Discovery upon each defendant in the following manner:

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