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

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

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. Preliminary Statement

The plaintiff Mumia Abu Jamal has been diagnosed with chronic hepatitis C. That disease has manifested itself in variety of ailments including a persistent, pruritic skin condition, Type II diabetes and anemia. There now exists an anti-viral medication that would both cure his hepatitis C and likely cure the extrahepatic conditions it has caused. Although repeatedly requested to do so, the DOC defendants have refused to provide that medication to Mr. Abu Jamal. It is for that reason that plaintiff filed a motion on August 24, 2015 for a preliminary injunction that would require that the DOC defendants treat him with this necessary medication (Dkts. 23-27). On September 10, 2015, the DOC filed papers opposing preliminary injunctive relief on failure to exhaust grounds and on the merits (Dkt. 38). On September 18, 2015, nine days before plaintiff's reply papers were due, Magistrate

Judge Mehalchick issued Report and Recommendation recommending that the motion be denied (Dkt 39). For the following reasons, the Report and Recommendation should be rejected in its entirety and the motion for a preliminary injunction granted.

II. Objection 1:

The Magistrate Judge Abused Her Discretion by Issuing a Report and Recommendation that Deprived Plaintiff of His Right to File a Reply Brief Under the Local Rules

The Defendants' opposition papers were filed on September 10, 2015. The Magistrate issued her report and recommendation eight days later, on September 18. Dkt. 39. Under the local rules for the Middle District of Pennsylvania, plaintiff had until September 27 to file a reply brief. *See* M.D. Pa. L.R. 7.7 , Fed. R. Civ. P. 6(d) and Standing Order 05-6. As a consequence, plaintiff was deprived of the opportunity to controvert the evidence and arguments set forth in the Defendants' opposition. The premature ruling constitutes an abuse of discretion and necessitates rejecting the Magistrate's report and recommendation in its entirety. *Pearson v. Prison Health Service*, 519 Fed. Appx. 79, 81-82 (3d Cir. 2013); *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1147 (10th Cir. 2006).

III. Objection 2:

A Preliminary Injunction Is Warranted On The Merits.

i. Plaintiff Abu Jamal Is Suffering Injury And Faces The Immediate Threat Of Additional Irreparable Injury.

Magistrate Judge Mehalchick found preliminary injunctive relief to be unwarranted because plaintiff Abu Jamal, though suffering from a serious disease, is not confronted with "immediate" irreparable injury. Report and Recommendation p. 5-7. The Report contains virtually no discussion of the medical evidence presented in plaintiff's motion.

The Magistrate Judge applied an exceedingly narrow definition of what constitutes "immediate" irreparable injury. In *Helling v. McKinney*, 509 U.S. 25 (1993), the Supreme Court held that the Eighth Amendment "protects against future harm" as well as current harm:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. In *Hutto v. Finney*, 437 U.S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease.. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed…

509 U.S. at 33. Likewise, Mr. Abu Jamal should not have to wait until his disease

progresses to fibrosis or even cirrhosis (assuming arguendo that it has not progressed already) to gain access to treatment that would cure him now. "It would be odd", said the Supreme Court in *Helling* "to deny an injunction to inmates who plainly proved an unsafe, life threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*

In any event, the record overwhelmingly demonstrates that there is not merely the "threat" of immediate irreparable injury to Mr. Abu Jamal. He is now suffering irreparable injury due the defendants' refusal to treat his hepatitis C infection.

The following facts are not in dispute: 1) the plaintiff Mumia Abu Jamal suffers from a serious disease, hepatitis C; 2) the infection is "active", meaning it is chronic and could to lead to severe complications, including death, if it is not treated; 3) for over a year Mr. Abu Jamal has suffered from a persistent pruritic rash that has sometimes covered 70% of his body; 4) Mr. Abu-Jamal has been anemic for at least eight months and he has been diagnosed with "anemia of chronic disease"; 5) in February and March of 2015, Mr. Abu Jamal developed Type II diabetes, a condition that led to an episode of diabetic shock on March 30, 2015; 6) extrahepatic symptoms, including skin rashes, anemia and diabetes can be secondary to and caused by an active hepatitis C infection; 7) a sonogram in March 2015 and a CT scan in May 2015 showed evidence of liver damage; 8) there exists direct-acting anti-viral medication which, if administered to Mr. Abu Jamal, would have a 90-95% chance of curing his hepatitis C infection; 9) the DOC defendants have refused to treat Mr. Abu Jamal

with the anti-viral medication.

Notwithstanding the foregoing, the Magistrate Judge accepted without question the assertions of DOC Chief of Clinical Services Dr. Paul Noel, who submitted a declaration in opposition to plaintiff's motion. Reliance on Dr. Noel was seriously misplaced.

Dr. Noel acknowledged that Mr. Abu Jamal has suffered from a pruritic, persistent rash, that led to a hospitalization. *See* Declaration of Paul Noel ¶¶ 11-15 (hereafter "Noel Dec."). He asserts, however, that an unidentified "infectious disease specialist" has determined that the skin condition is "not secondary to the hepatitis C." Noel Dec. ¶ 10. The failure to identify the specialist is significant for the following reason. Mr. Abu Jamal has been seen by one infectious disease specialist, Dr. Ramon Gadea. On or about September 9, 2015 Dr. Gadea told Mr. Abu Jamal that he was going to recommend that Mr. Abu Jamal be treated for hepatitis C and that the skin condition was likely secondary to that disease. Reply Declaration of Mumia Abu-Jamal, dated September 16, 2015 "Abu-Jamal Reply Dec.".

Dr. Noel does not dispute that the Type II diabetes now afflicting Mr. Abu Jamal can also be caused by hepatitis C. He simply states that Mr. Abu Jamal's blood sugar is being checked and is "well controlled." Noel Dec. ¶ 22. He makes no mention of the persistent anemia. Finally, he opines that given Mr. Abu Jamal's relatively low "current" viral load and "current" platelet count, he could be stable for years. *Id.*

Submitted with these objections is a Reply Declaration of Joseph Harris, M.D. who reviewed the Noel Declaration and attached records. Dr. Harris has concluded, *inter alia*, that Dr. Noel's opinions are simply wrong and that the medical treatment being given to Mr. Abu-Jamal falls below accepted medical standards.

As Dr. Harris explains, Dr. Noel's reasoning is undercut by the fact that viral load, platelet count and the allegedly normal September 2015 sonogram are not reliable indicators of disease progression. More importantly, all are irrelevant to whether the extrahepatic symptoms (skin condition, anemia and diabetes) are secondary to hepatitis C:

> The presence of any viral load, especially over a long period of time, results in chronic inflammation as the body tries to fight the virus. This chronic inflammation manifests itself in many ways including, as with Mr. Abu Jamal, through a skin condition, anemia and adult onset [Type II] diabetes.

Harris Reply Dec. ¶ 14.

> [While] platelet count can be an indicator (among many others) of liver damage, it is not an indicator of whether extrahepatic symptoms, such as, in Mr. Abu Jamal's case, the skin condition, anemia and diabetes, are secondary to an active hepatitis C infection.

Id. at ¶ 16. With respect to the allegedly "normal" sonogram, Dr. Harris notes:

> the extent of liver damage has little correlation to whether the severe extra-hepatic symptoms being experienced by Mr. Abu Jamal are secondary to his active hepatitis C infection.

Id. at ¶ 19. Moreover, Dr. Harris personally examined Mr. Abu Jamal's skin and determined that the condition was neither "eczema" nor "psoriasis" but rather Necrolytic

Acral Erythema (NAE), a condition peculiar to dark-skinned people that virtually always occurs in the presence of an active hepatitis C infection. *Id.* at ¶ 12.

The indicators relied upon by Dr. Noel are not even reliable in assessing liver damage. *Id.* at ¶¶ 15-17. The presence of a viral load tells practitioners whether the infection is "active". The size of the viral load says nothing about disease progression or the extent of liver damage. *Id.* The interpretation of the September 2015 "normal" sonogram is at odds with a March 2015 liver sonogram and a May 2015 CT scan of the same organ that found significant irregularities in the liver. *Id.* at ¶¶ 17-18 referencing Dkt. 24, Boyle Dec. Ex. A, p. 17 and 74.

This is not a case of simple disagreement among medical professionals. Dr. Noel's conclusions lack factual support. Skin disease, anemia and sudden onset diabetes can all be manifestations of a chronic hepatitis C infection. Mr. Abu Jamal does have an active, chronic, hepatitis C infection. Other causes of the extrahepatic symptoms have been ruled out. Thus, Dr. Harris can confidently conclude that these other symptoms are, in fact, caused by the hepatitis C and would be cured if Mr. Abu Jamal was given the available anti-viral medications.

A preliminary injunction is warranted where the moving party makes a "clear showing of immediate irreparable injury or a presently existing actual threat." *Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994). The undisputed existence of an active hepatitis C infection and the severe extrahepatic symptoms linked to it are the very types of harm that justify preliminary injunctive relief. *Helling*, 509 U.S. at 35.

(Immediate irreparable harm can be shown where the defendants, acting with deliberate indifference, "exposed [the movant] to …an unreasonable risk of serious damage to his future health.").

Mr. Abu Jamal is suffering harm now. The harms will only increase and will likely become life threatening if he is not treated. *See* Dkt. 26 Harris Dec. ¶ 69; Harris Reply Dec. ¶ 26 That finding satisfies the " immediate irreparable harm" requirement for preliminary injunctive relief. *Farman v. Walker*, 593 F.Supp.2d 1000, 1012 (C.D.Ill. 2009). (preliminary injunction issued where plaintiff showed that current level of treatment "would significantly decrease the quality as well as the quantity of the plaintiff's life.").

Iseley v. Dragovich, 90 F.Appx. 577 (3d Cir. 2004), relied upon by the Magistrate Judge is inapposite. Report and Recommendation, p. 7. In *Iseley*, the plaintiff sought interferon treatment for his hepatitis C. Prison doctors denied the treatment on the ground that his disease had not progressed. In affirming the lower court's grant of summary judgment, the Third Circuit stressed that "Iseley provided no material evidence to dispute th[e] fact" that his disease had not progressed. *Id.* at 581. Contrary to *Iseley*, the record herein is replete with evidence that Mr. Abu Jamal's disease has progressed.

Barndt v. Pennsylvania Department of Corrections, 2010 WL 4791685 *6 (M.D. Pa. 2010), is also distinguishable. In *Barndt*, it was not disputed as a factual matter that the prison had been providing some treatment for the prisoner's hepatitis C. Here, the

Department of Corrections is providing no treatment for Mr. Abu Jamal's hepatitis C.

Iseley and *Barndt* are distinguishable for an addition reason. Since the time both cases were decided, there has been a sea change in treatment for hepatitis C. The new direct-acting anti-viral drugs, on the other hand, are 90-95% successful and have virtually no side effects. Harris Dec. ¶¶ 22-25. The American Association for the Study of Liver Disease (AASLD) now recommends that everyone with an active hepatitis C infection be treated and that priority be given to those, like Mr. Abu Jamal, who are symptomatic. Harris Dec. ¶ 26, referencing Boyle Dec. Ex. B. The AASLD's recommendations have been adopted by the United States Bureau of Prisons. Boyle Dec. Ex. E. Finally, the *Barndt* court stressed that the plaintiff was being treated in accordance with the then-existing hepatitis C interferon-based treatment protocol. The DOC defendants make no such claim here because they have no protocol for treatment with the new anti-viral medications.

ii. Plaintiff Has Established Deliberate Indifference

Deliberate indifference may be established where, as here, prison officials 1) deny reasonable requests for medical treatment and such denial exposes the inmate to undue suffering or the threat of tangible physical injury, 2) intentionally refuse to provide needed medical care, 3) delay necessary medical care for non-medical reasons, or 4) opt for an easier and less efficacious treatment of the inmate's illness. *Monmouth County Cor. Inst Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987). Mr. Abu Jamal has requested, and been denied treatment for hepatitis C. As a result he has been

exposed to the "undue suffering" of a pruritic skin condition, Type II diabetes, one episode of diabetic shock and fatigue. *Id.* Instead of providing a medication that they know will cure the disease and end his suffering, the DOC defendants have opted for "active surveillance", a far less efficacious course that literally involves no treatment at all. *Id.* Mr. Abu-Jamal will continue to suffer unless he is treated. In addition, the risks of additional injury that the Magistrate Judge agrees are "severe". Report and Recommendation, p. 6.

Moreover, what constitutes "deliberate indifference" depends on "evolving standards of decency that mark that mark the progress of a maturing society." *Estelle v. Gamble* 429 U.S. 97, 102 (1976). A denial of medical care that results in "unnecessary suffering in prison is inconsistent with contemporary standards of decency." *Phillips v. Michigan Department of Corrections*, 731 F.Supp, 792, 799 (W.D. Mich. 1990), *grant of preliminary injunction affirmed* 932 F.2d 969 (6th Cir. 1991). Thus, "information on the availability of new treatments bears directly on what levels of care are currently reasonable" under the Eighth Amendment. *Edwards v. Alabama Department of Corrections*, 81 F.Supp.2d 1242, 1250 (D.Ala. 2008) (holding that refusing to treat prisoners with newer, more effective HIV medications could constitute deliberate indifference despite prior court ruling that found treatment with older drugs adequate); *Gammett v. Idaho Board of Corrections*, 2007 WL 186896 (D.Idaho 2007) (ordering prison to provide hormone therapy to transgender inmate finding chosen course of treatment to be "medically unacceptable under the circumstances").

The "active surveillance" approach utilized by the DOC defendants herein, while arguably sufficient when the only available hepatitis C treatment consisted of the interferon cocktail, constitutes "deliberate indifference" now because there is a drug available that can cure the disease with few, if any side effects. Of course, as Dr. Harris opines, given the severity of Mr. Abu Jamal's symptoms, he falls in the highest priority for treatment and would be offered hepatitis C treatment even under the former interferon-based treatment regimen.

Defendants were and are certainly aware of the new norm for treating hepatitis C. In addition to this litigation, a class action lawsuit was filed raising this issue in June 2015. See *Chimenti v. Department of Corrections*, 15 Civ. 3333 (E.D. Pa. filed June 12, 2015). In addition, the new treatment protocol has been the subject of growing interest in society, as prison systems have been reluctant to provide this treatment on account of the costs of the medication.[1] Of course, deprivation of treatment for reasons of cost, constitutes deliberate indifference under the Eighth Amendment. *Rouse v. Plantier*, 182, F.3d 192, 197 (3d Cir. 1999); *Aquino v. Naji*, 2010 WL 4116872 at *1 (W.D. Pa. 2010) (citing *Rouse*).

The Magistrate Judge opined that a preliminary injunction would be harmful to

[1] "White House Is Pressed to Help Widen Access to Hepatitis C Drugs via Medicaid," Robert Pear, New York Times, Aug. 25, 2015, accessed at http://www.nytimes.com/2015/08/26/us/wider-reach-is-sought-for-new-hepatitis-c-treatments.html?_r=0; "Prisoners Sue Massachusetts for Withholding Hepatitis C Drugs," Peter Loftus, The Wall Street Journal, June 11, 2015, accessed at http://blogs.wsj.com/pharmalot/2015/06/11/prisoners-sue-massachusetts-for-withholding-hepatitis-c-drugs/; "Minnesota prison inmates sue to gain access to costly hepatitis C medications," Christopher Snowbeck, May 26, 2015.

the defendants' interests because it was only on July 31, 2015 that it was learned that Mr. Abu Jamal's hepatitis C infection was "active". Judicial intervention "would deny Defendants an opportunity to treat Abu-Jamal's hepatitis C in accordance with their own protocols." Report and Recommendation, p. 7. There are several fatal flaws to the Court's reasoning. First, the DOC does not have a protocol for treating inmates with active hepatitis C infections. No protocol exists in the record in this case. Second, the defendants are not treating Mr. Abu Jamal's hepatitis C. They are simply monitoring his condition and occasionally administering palliative measures such as Vaseline and creams for the skin condition. Simple monitoring without administering an available medication that would cure the disease provides no more treatment than it would to monitor the progression of a patient with cancer without administering available chemotherapy.

Finally, the observation that Mr. Abu-Jamal's hepatitis C was only "revealed" to the Defendants on July 31, 2015 ignores the 14-month old, on-going struggle of Mr. Abu-Jamal to get adequate medical treatment. He tested positive for the hepatitis C antibody in 2012, over three years ago but there was no follow-up. In August 2014, over one year ago, his skin rash developed and eventually covered 70% of his body. His blood sugar rose to abnormal levels in February and March of 2015 yet was not treated by DOC medical staff. That directly led to diabetic shock on March 30, 2015. The anemia was first noted in January 2015 and continues to this day.

It was only due to Mr. Abu-Jamal's own persistence that the DOC performed a

viral load test. The May 18, 2015 discharge summary from Geisinger Medical Center recommended a full hepatitis C work-up *See* Dkt. 24, Boyle Dec. Ex. A, p. 59-61). On June 19, 2015, counsel sent a letter to DOC requesting that the test be done. It was not until July 31, 2015, after another letter from counsel enclosing Dr. Harris' report that a viral load test was finally done *See* Letters from counsel, *See* Dkt. 24 Boyle Dec., Ex. C.

A preliminary injunction is warranted where the record establishes that the defendant breached the constitutional principle "at the time suit was filed and…that they will continue to do so…" for the remainder of the litigation. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994). The defendants have refused and continue to refuse to treat Mr. Abu Jamal's hepatitis C and he is suffering because of it. This is a harm that cannot be addressed monetarily. It is the DOC defendants' stated position that they will not provide hepatitis C treatment. Absent preliminary relief Mr. Abu Jamal will continue to suffer from the symptoms he is experiencing and his health will deteriorate. A preliminary injunction is the only means through which his rights can be vindicated.

Objection 3:

Plaintiff Has Exhausted Administrative Remedies Regarding His Medical Care Claims

i. Plaintiff has complied with all procedural requirements.

The purpose of the PLRA's exhaustion requirement is to "allow[] prison

officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court." *Jones v. Bock*, 549 U.S. 199, 204 (2007). "Compliance with prison grievance procedures is . . . all that is required" to exhaust administrative remedies. *Id.* at 218; *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). Failure to exhaust administrative remedies is an affirmative defense that must be pled and proven by defendants. *Jones,* 549 U.S. at 216; *Brown v. Croak*, 312 F.3d 109, 111 (3d Cir. 2002).

The Magistrate Judge recommended that the instant motion be denied without prejudice because it was "uncontroverted" that the claim has not been administratively exhausted because Mr. Abu Jamal's final appeal remained pending (Report and Recommendation, p. 5). That determination should be rejected for two reasons. First, the final appeal is no longer pending. On or about September 29, 2015, Mr. Abu-Jamal received a final rejection from DOC Chief Grievance Officer Dorina Varner on September 29, 2015. Declaration of Bret Grote ¶ 19 (hereafter "Grote Dec."). Second, that the grievance was "pending" at the time the instant motion was filed is not a fact that is "uncontroverted". The failure-to-exhaust argument was raised by the Defendants in their opposition papers. The Report and Recommendation was issued without permitting plaintiff to file a reply brief as he is entitled to under the local rules. M.D. Pa. L.R. 7.7. That evidence, which was present before the Magistrate Judge in connection with plaintiff's motion to amend, is being presented in connection with this Statement of Objections.

The Grievance Is Exhausted Due to the Failure of the DOC to Comply With Its Own Deadlines

The federal courts have been unanimous in recognizing that either an indefinite delay in responding to grievances or a failure to respond within the deadlines required by the prison system's own grievance policy renders those remedies unavailable for purposes of the exhaustion requirement. *Brown v. Valoff*, 422 F.3d 926, 942 n.18 (9th Cir. 2005) ("Delay in responding to a grievance, *particularly a time-sensitive one*, may demonstrate that no administrative process is in fact available) (emphasis added); *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) ("exhaustion may be achieved in situations where prison officials fail to timely advance the inmate's grievance"); *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 996 (6th Cir. 2004) ("administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance"); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (recognizing "that the failure to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable"); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (failure to respond to grievances renders those remedies unavailable "because we refuse to interpret the PLRA 'so narrowly as to . . . permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances.'" (quoting *Goodman v. Carter*, 2001 WL 755137 *3 (N.D.Ill. 2001)); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (failure to respond to grievance renders remedy unavailable); *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir.

1998) (remedies exhausted when time limit for response is reached). The foregoing holdings make sense. It is, after all, the prison system itself that drafts grievance procedures, including deadlines for filing and adjudication. Failure by an inmate to follow those procedures is often the first line of defense used by prison authorities in cases arising under 42 U.S.C. § 1983. It is only equitable, therefore, that the prison system complies with its own rules.

This foregoing line of cases demonstrates that Mr. Abu-Jamal has properly exhausted his administrative remedies. Submitted with this Statement of Objections is the Declaration of Bret Grote, Esq. that traces the chronology of the grievance procedure utilized herein and the failure of the DOC to comply with its own procedures.

DOC procedures require that an initial response be provided to the grievant within 15 working days. Grote Dec. referencing Ex.1 DC-ADM 804 § 1(C)(5)(g)). A response to an initial appeal to the facility manager must also be provided within 15 working days *Id* at § 2(A)(2)(d)(1). A determination of the final appeal to the Secretary's Office must be provided within 30 working days *Id.* at § 2(B)(2)(a)(1). The DOC may obtain extensions of those deadlines. But an inmate must be notified in writing that such an extension was requested and granted *See* Grote Dec. ¶ 3 referencing provisions authorizing extension requests.

Mr. Abu Jamal's initial grievance was submitted on April 12, 2015 and marked "received" on April 13, 2015 (Grote Dec., Ex. 2, Grievance Documents at 1-2). The

denial was not provided to Mr. Abu Jamal until Tuesday May 5, 2015. Abu-Jamal Exhaustion Dec. ¶¶ 2-3, 5-6. May 5 is 16 working days after receipt and, therefore, one day beyond the deadline for a response (Grote Dec. ¶ 8). Mr. Abu Jamal submitted his intermediate appeal of the grievance denial on May 19, 2015 (Grote Dec. ¶ 10; Abu Jamal Exhaustion Dec. ¶ 5).[2] He did not receive a response until June 15, 2015 or 18 working days after the appeal was received by Mahanoy staff (Abu Jamal Exhaustion Dec. ¶ 6). This is 3 days beyond the DOC's deadline.

Mr. Abu-Jamal placed the final appeal in the mail on June 25, 2015. It was marked "received" by Central Office on July 6, 2015. Grote Dec. ¶ 13; Abu Jamal Exhaustion Dec. ¶ 7. It was not until August 19, 2015 that Mr. Abu Jamal received a "notice of referral" indicating that the grievance would be referred indefinitely to the DOC's Bureau of Health Care Services. Grote Dec. ¶ 14; Abu Jamal Exhaustion Dec. ¶ 8; Grote Dec. ¶ 14; Exhibit 2, Grievance Documents at 9. That notice was provided to Mr. Abu Jamal 39 working days after the appeal was mailed and 32 working days after it was received by the Central Office. If either date is used, the determination was still untimely.

At no point in the administrative grievance process did the DOC notify Mr. Abu Jamal in writing that they had sought, and received an extension of time to respond.

[2] Between May 12, 2015 and May 19, 2015 Mr. Abu Jamal was an in-patient at Geisinger Medical Center and had no access to materials that would have enabled him to file an appeal (Abu Jamal Exhaustion Dec. ¶ 4).

Both the initial grievance denial from defendant Steinhart and the denial of Mr. Abu-Jamal's appeal by defendant Kerestes were received by the plaintiff after the 15 working day time limit for responses mandated by DOC regulations. Grote Dec. ¶ 3, Ex. 1, DC-ADM§§ 1(C)(5)(g), 2(A)(2)(d)(1). The "Notice of Referral" was given to Mr. Abu-Jamal on August 19, 2015, 39 days after the filing of the final appeal (or 32 days after its receipt). This was nine days (or two days if the receipt date is used) beyond the statutory deadline for determining such appeals. The September 29, 2015 formal denial of the grievance is itself untimely as it cannot re-set the clock to make the August 19, 2015 "Notice of Referral" timely. Nothing in the DOC's grievance procedures would authorize such an action.

Mr. Abu-Jamal has fully complied with each step in the DOC grievance procedure. It is the DOC that has failed to comply. The exhaustion requirement of § 1997e(a) requires nothing more from plaintiff. *Jones*, 549 U.S. at 218; *Woodford*, 548 U.S. at 90-91.

The subject matter of plaintiff's grievance addressed the entirety of his medical care

The Magistrate Judge mischaracterized the substance of the grievance as one that "involved the treatment of Abu-Jamal's diabetes" (Report and Recommendation, p. 4). In fact, the grievance addressed the entirety of his medical care.

"As long as there is a shared factual basis between the two, perfect overlap between the grievance and a complaint is not required by the PLRA." *Jackson v. Ivens*,

244 Fed.Appx. 508, 513 (3d Cir. 2007) (citing *Woodford*, 126 S.Ct. at 2388).(inmate's § 1983 complaint alleged that prison officials had unreasonably delayed a biopsy arose out of grievance complaining that a "culture" was not performed).

Mr. Abu-Jamal's grievance of April 12 and administrative appeals arise from the same set of facts that form the basis of the amended complaint. Throughout the grievance process, Mr. Abu-Jamal challenged the failure of prison medical staff to properly treat his hyperglycemia, perform diagnostic testing so as to determine and treat the underlying cause(s) of his health problems, including but not limited to his skin condition. Grote Dec. Ex. 2, Grievance Documents at 1-2, 4, 6-8. Defendants Steinhart and Kerestes understood that they concerned the totality of health care as each responded in language explicitly referring to the entirety of his medical issues and the overall adequacy of care provided by medical staff. *Id.* at 3, 5.

In the amended complaint, Mr. Abu-Jamal claims, *inter alia* that the defendants' failure to diagnose and then treat his active hepatitis C infection has led to Type II diabetes, the skin condition and the anemia. *See* Plaintiff's Motion for Leave to Amend, Ex. A, Amended Complaint, Dkt. 21. The complaint has more focus on the hepatitis C only because Mr. Abu-Jamal now knows that the active, untreated hepatitis C is almost certainly the underlying cause of the diabetes and skin condition that were addressed in the grievance. *See* Declaration of Dr. Joseph Harris, Dkt. 26. Accordingly, the issues raised in the grievances share the requisite factual basis with the claims in his proposed amended complaint. *Jackson*, 244 Fed.Appx. at 513.

j. Conclusion

For the foregoing reasons it is respectfully requested that this court issue an order rejecting the Magistrate Judge's Report and Recommendation in its entirety and granting plaintiff preliminary injunctive relief in the form of treatment for his hepatitis C that is in line with the medical standard of care. In the alternative, plaintiff requests an evidentiary hearing after limited and expedited discovery.

Respectfully submitted,

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DATED: October 7, 2015

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(2)

I hereby certify that Plaintiff's Objections to Magistrate's Report and Recommendation meets the requirements of Local Rule 7.8(b)(2) requiring that any brief longer than 15 pages does not exceed 5,000 words. Plaintiff's brief is 4,968 words inclusive of footnotes as calculated by the word count function of Microsoft Word 365.

/s/ Bret D. Grote
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Plaintiff's Objections to Magistrate's Report and Recommendation upon each defendant in the following manner:

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