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

MUMIA ABU-JAMAL

Plaintiff,

v.

JOHN WETZEL, Secretary, Department of Corrections,

Joseph Silva, DOC Director of Bureau of Health Care Services

Paul Noel, BHCS Chief of Clinical Services,

BHCS Assistant Medical Director,

BHCS Infection Control Coordinator,

Correct Care Solutions representative,

Correct Care Solutions,

Treating Physician, SCI Mahanoy

Defendants.

Case No. 16-Civ. 2000

Judge Robert D. Mariani

JURY TRIAL DEMANDED

ELECTRONICALLY FILED

PLAINTIFF'S BRIEF IN OPPOSITION
TO DOC DEFENDANTS MOTION FOR STAY

STATEMENT OF FACTS

The instant action was filed on September 30, 2016. The Plaintiff, Mumia Abu Jamal, suffers from chronic hepatitis C. The complaint alleges, *inter alia*, that he is being denied his right to adequate health care as guaranteed by the Eighth Amendment due to the DOC defendants' refusal to provide him with direct acting anti-viral medication ("DAA") that would cure the disease. On October 5, 2016, Plaintiff filed a motion for a preliminary injunction. Doc. 8. The motion papers included the transcripts and exhibits presented to the Court in the related case *Abu Jamal v. Kerestes*, 15 Civ. 967, as well as other declarations and exhibits. Doc. 8, Ex. 1-18. The DOC defendants filed opposition papers on November 8, 2016. Doc. 18. On December 1, 2016, this Court held a telephone conference wherein all parties stated that they saw no need to present additional evidence or have an evidentiary hearing. Doc. 21.

On January 3, 2017, this Court issued an Opinion granting plaintiff's motion. Doc. 23. In a contemporaneously issued order, Doc. 24, it enjoined the DOC defendants from enforcing its hepatitis C protocol with respect to the Plaintiff. It additionally ordered that Plaintiff be seen by a supervising physician within 14 days of the order, January 17, 2017. If the physician found no medical contraindications for treatment, treatment with the DAAs must commence within 7 days thereafter.

On January 12, 2017, the DOC defendants filed a motion to stay this Court's January 3, 2017 order. Doc. 30. The notice of motion seeks a stay pending determination of a contemporaneously filed motion for reconsideration filed as Doc. 29. But it appears to suggest that a stay be issued until determination of any appeal.[1] Accordingly, the legal standards for both will be set forth and then addressed simultaneously. For the reasons set forth *infra*., this Court should deny the DOC defendants' motion for a stay in all respects.

LEGAL ARGUMENT

THE STAY SHOULD BE DENIED

"[T]he standard for obtaining a stay pending appeal [and, in this case, a motion for reconsideration] is essentially the same as that for obtaining a preliminary injunction". *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services*, 2013 WL 1277419 at *1 (3d Cir. 2013) citing *Kos Pharml, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). The applicant for a stay must establish the following four factors: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, 2) whether the applicant will be irreparably harmed absent a stay, 3) whether issuance

[1] The Notice of Motion states that the Defendants seek a stay "pending disposition of the Department Defendants' motion to amend or, in the alternative, for reconsideration." (Doc. 30, p. 1). But in their argument they state that they have a "strong likelihood of success on the merits on reconsideration or on appeal." (Doc. 30, p. 2)

of the stay will substantially injure the other parties interested in the proceeding and 4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *See also Republic of Philippines v. Westinghouse Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). It is the law in the Third Circuit that an applicant's failure to establish any one of the *Hilton* factors results in the denial of a stay. *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services,* 2013 WL 1277419 at *1 citing *Nutra Sweet Co. v. Vit-Mar Enter., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

a. Likelihood of Success

To satisfy this first factor, the DOC defendants must demonstrate "a likelihood that [they] will ultimately prevail on the merits of the appeal". *Florida Businessmen v. Free Enterprise of City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981). As one court has observed,

> The bar is particularly high where, as here, the movant is seeking immediate relief from a preliminary injunction granted after an evidentiary hearing. In such a case the movant is effectively asking the court to negate the preliminary injunction that it just granted.

HR Staffing Consultants LLC, v. Upstream Healthcare Management of New Jersey, LLC, 2015 WL 3561618 at *2 (D.N.J. 2015). Once in the Court of Appeals, the DOC defendants would have to overcome a standard of review that would strongly favor the plaintiff:

> We employ a tripartite standard of review for preliminary injunctions. We review the District Court's findings of fact for clear error. Legal conclusions are assessed *de novo.* The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion.

Geneva College v. Secretary U.S. Dept. of Health and Human Services, 778 F.3d 422, 434-35 (3d Cir. 2015) (internal citations omitted). *See also United States v. Price,* 688 F.2d 204, 210 (3d Cir. 1982) ("Order granting preliminary injunction must be affirmed unless [court] has abused its discretion, committed an obvious error in applying the law, or made a serious mistake in considering the proof.").

To prevail on a motion to amend and/or for reconsideration the DOC defendants would have to show "(1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the court granted the motion []; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice." *Howard Hess Dental Laboratories, Inc. v. Dentsply Intern, Inc.*, 602 F.3d 237, 251 (3d Cir. 2010). A motion to amend and/or for reconsideration is not a tool to re-litigate and reargue issues which have already been considered and disposed of by the court. *Sherwood v. Beard,* 2012 WL 4018023*4 (M.D. Pa. 2012) (citing *Dodge v. Susquehana Univ.*, 796 F.Supp. 829, 830 (M.D. Pa. 1992)).

In its motion for a stay the DOC defendants address the "likelihood of success" factor, and indeed, all other factors, in bare-bones, conclusory terms. Doc.

30, p. 2. Assuming *arguendo* that they sought to incorporate in their stay motion the arguments asserted in their motion to amend and/or for reconsideration, Doc. 29, they nonetheless fall far short of showing that they would prevail on appeal and/or in a motion for reconsideration.

1. This Court's Factual Findings Are Supported by The Record.

The DOC defendants complain that the November 2016 DOC hepatitis C protocol does not "bar" inmates from receiving DAA medication and ask that this Court amend its opinion accordingly (Doc. 29, ¶¶ 10-11). However, that is exactly what the protocol does. As this Court stated, citing the protocol, if an inmate is determined to have a fibrosis level of F0, F1 or F2, the protocol instructs the committee

> to order monitoring but not treatment with DAA medications. Thus, those with mild or moderate fibrosis have no chance of receiving DAA medications – the standard of care – and the protocol requires their hepatitis C to worsen before they will be considered for treatment.

(Opinion, p. 32). If monitoring and not treatment is ordered for an inmate with hepatitis C whose condition has not worsened to vast fibrosis or cirrhosis, that inmate is "barred" from receiving DAA medications. It is that policy that renders the protocol below the standard of care and violative of the Eighth Amendment. Indeed, even in Dr. Noel's most recent, and untimely, declaration, he does not dispute that under the current protocol only those with cirrhosis and vast fibrosis

are even considered to be eligible for treatment. Noel Dec. January 12, 2017, ¶¶ 2-4.[2]

In this case, the Plaintiff Mumia Abu Jamal has been "barred" from receiving DAA medications through enforcement of the current DOC protocol. It is conceded that he has chronic hepatitis C and that his liver has been damaged. But, according to Dr. Noel, he has been excluded (i.e. "barred") from hepatitis C treatment, not for medical reasons, but because his condition has not deteriorated into cirrhosis. Opinion, p. 64, Finding of Fact 64, citing to Noel testimony, December 23, 2015, at 121: 8-11. This continues to be the DOC defendant's position under the "new protocol". Noel Declaration January 12, 2017 ¶¶ 7-10

[2] The DOC defendants request that this Court supplement the record with the January 12, 2017 Declaration of Paul Noel, M.D. that is attached to their motion for reconsideration. That request should be denied. As the Third Circuit has held:

> [N]ew evidence for reconsideration purposes does not refer to evidence that a party obtains or submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not submit to the court because that evidence was previously unavailable.

Hess Dental Laboratories v. Dentsply International, 602 F.3d 237, 252 (3d Cir. 2010). With respect to Dr. Noel's assertions concerning the number of inmates treated in 2016 and the number he "anticipates" treating in 2017, (Noel Dec. ¶¶ 2-4), there is nothing in the record to suggest that the information was "unavailable" to the DOC defendants when they responded to Plaintiff's motion, during the conference on December 1, 2016 when they were asked whether they would rest on the existing record and/or before this Court's January 3, 2017 ruling. Supplementation at this point would prejudice Plaintiff as he would be denied the opportunity to contest the unsupported factual assertions contained therein. In any event, Noel's assertions do not address, let alone remedy, the constitutional defect in the DOC's protocol. Treatment remains unavailable to the Plaintiff, thereby allowing his disease to progress.

("Based on the foregoing, it remains my opinion that Mr. Abu Jamal does not have a high probability of cirrhosis")[3]. The Court's finding would not be disturbed on appeal.

The DOC defendants' second factual objection is nothing more than a quibble over language. They complain that this Court erred when it stated, citing the American Association for the Study of Liver Disease (AASLD) guidelines, that a substantial delay in DAA treatment would "likely" decrease the efficacy of anti-viral treatment when the AASLD report states that delay "may decrease the benefit of SVR." Doc. 29, ¶ 13.[4] Such a disagreement does not amount to a "clearly erroneous" finding. Dr. Cowan, the DOC defendants' own expert, admitted that failure to treat hepatitis C at any fibrosis level poses serious health risks and that early treatment has substantial benefits to both the patient and society. Cowan: V2, 212; V3, 25-28, See also AASLD Guidelines, Ex. 9, p. 3 ("initiating therapy in patients with lower stage fibrosis augments the benefits of SVR"). Denial of treatment presents the patient with a significantly higher risk of developing liver cancer and other diseases, such as Type II diabetes. Harris Dec., Doc. 8, Ex. 12, ¶¶ 10-11. Dr. Cowan admitted that of those who progress to cirrhosis, 2% to 7% of

[3] Of course, a recent HALT-C calculation is that there is a 60% chance that Plaintiff currently has cirrhosis, certainly a "high probability" (Noel Dec. Ex. A, p. 2).

[4] The DOC defendants' papers are confusing in that they do not cite the page numbers in this Court's Opinion that contain the language to which they object. Plaintiff's citations to the Opinion are his best guess as to what language the DOC defendants want changed.

them per year progress to liver cancer. Cowan: Dec. 23, 2015, p. 21. This represents an overall progression rate to liver cancer of 19%, not 2-7% as stated by the defendants. Doc. 8, Ex. 5, p. 1.

The DOC defendants falsely assert, again, that "clear and undisputed evidence was presented that damage to the liver is not considered irreversible until an individual reaches the late stages of cirrhosis." Doc. 29, p. 6 ¶ 16. No such "clear" evidence was presented. Dr. Cowan testified that if an individual is in the early stages of "fibrosis", it is "thought" that liver damage can be reversed. Cowan, Dec. 22, 2015, p. 78. There was no testimony by Dr. Cowan or anyone else that once a patient has advanced to cirrhosis, liver damage can be reversed. The DOC defendants' repeated misrepresentation of Dr. Cowan's testimony in this regard borders on the disingenuous. Moreover, Cowan's testimony was disputed. Dr. Harris swore that even after a successful course of treatment "many" hepatitis C patients do not experience reversal of liver damage. Harris Dec. Doc. 8, Ex. 12 ¶ 9.

Thus, it is true, as this Court found, that delay in treatment will "prolong the suffering of those who have been diagnosed with hepatitis C, and allow the progression of the disease to accelerate so that it presents a greater threat of cirrhosis, hepatocellular carcinoma and death of the inmate with such disease." Opinion, p. 21, Conclusion of Law 6.

That is certainly true for Mumia Abu Jamal. Plaintiff has chronic hepatitis C. His liver is damaged and scarred. Fibrosis at any level is, according to the AASLD "a strong risk factor for future disease progression." Doc. 8, Ex. 9, p. 11 His platelet levels, another key sign of disease progression, have now been below normal for 15 months. Harris Dec. Doc. 8, Ex. 12 ¶¶ 5-7. His HALT-C score is at 60 meaning that there is a 60% chance that he currently has cirrhosis. Noel Dec. Jan 12, 2017, Ex. A. His APRI score had risen, in 2016 to over .5. *Id*. His skin condition has not resolved and remains pruritic. Thus, it flies in the face of reality for the DOC defendants to assert that "no evidence", Doc 29, ¶¶ 17-21, was presented that Plaintiff is at risk for disease progression and continued suffering.

2. No Error of Law Was Committed When the Court Concluded That 1) The Hepatitis C Protocol Violates The Standard of Care and 2) The DOC Is Acting With Deliberate Indifference To A Serious Medical Need.

A motion to amend and/or for reconsideration is not a tool to re-litigate and reargue issues that have already been considered and disposed of by the court. *Sherwood v. Beard*, 2012 WL 4018023 at*4 (M.D. Pa. 2012). The arguments asserted by the DOC defendants (Doc. 29, p. 7-10) are just that – a rehash of the legal arguments asserted, and rejected, previously. Issues of law do receive plenary review on appeal. But the DOC defendants do not and cannot argue that this Court applied an incorrect standard when determining that the hepatitis C protocol falls below the standard of care and/or that the DOC defendants have been

deliberately indifferent to Plaintiff's medical needs. Instead they challenge this Court's application of the law to the facts – facts that were developed at an extensive evidentiary hearing. Thus, on appeal the DOC defendants "will have to demonstrate that, in light of the law and factual findings, this Court nevertheless abused its broad discretion in awarding injunctive relief." *HR Staffing Consultants, LLC v. Butts*, 2015 WL 3561618 at *2 (D.N.J. 2015). That is a heavy burden and not one that the DOC defendants will likely surmount.

The DOC defendants acknowledge that treatment for all is the standard of care in the community. (Doc. 29, ¶ 22). It is therefore perplexing that they argue that this Court committed legal error when it, too, came to that conclusion. Their arguments on deliberate indifference, addressed in detail elsewhere warrant little further discussion. Enforcement of the DOC protocol constitutes deliberate indifference because, as this Court found, a hepatitis C patients' progression to vast fibrosis or cirrhosis, and the complications those conditions engender, is a pre-requisite for treatment with a drug that the DOC defendants know will almost certainly provide a cure. As this Court held, "outright refusal of any treatment for a degenerative condition that tends to cause acute infection and pain if left untreated and [] imposition of a seriously unreasonable condition on such treatment, both constitute deliberate indifference on the part of prison officials." Opinion, p. 34 (quoting *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir. 2000)). In this case, the

defendants know that Plaintiff has chronic hepatitis C, that his liver is significantly scarred, that his platelets have been low for 15 months and that he has a painful skin condition. Moreover, according to his latest HALT-C score, there is a 60% chance that he currently has cirrhosis. Noel Dec. Jan. 12, 2017 Ex. A. Their refusal to administer a drug that would cure the disease, eliminate his suffering and likely prevent further complications constitutes deliberate indifference.

The DOC defendants' assertion that this Court did not consider or give sufficient weight to cases the DOC defendants cited (Doc. 29, p. 9-10) is plainly wrong. *See* Opinion, p. 34-41. In any event, defendants' simple disagreement with this Court's analysis of case law is neither a basis for reconsideration nor a finding that they would succeed on an appeal. *Sherwood v. Beard*, 2012 WL 4018023 at *4.

b. The DOC Defendants Have Not Shown Irreparable Harm.

The DOC defendants appear to argue that they will be harmed because this Court failed to give "adequate weight" to the purported effect on the Commonwealth. Once again, such a disagreement is not a basis for reconsideration. *Id.* Nor is it "likely" that the argument would succeed on appeal. This Court's order does not "anticipate immediate treatment for all inmates with chronic HCV", as the DOC defendants assert. It applies to one person: the Plaintiff, Mumia Abu Jamal. As this Court stated: "As a result of the grant of this

injunction, Defendants will be required to treat Plaintiff with expensive medication." Opinion, p. 43, emphasis added. The defendants are not required to treat anyone else. This Court's legal and factual findings are not binding on any other court.

Moreover, at the December 2015 hearing in *Abu Jamal v. Kerestes*, the DOC defendants admitted that the only consequence of ordering immediate treatment for Mr. Abu Jamal would be that one other person would have to wait longer:

> THE COURT: My question is, is there a consequence flowing from giving Mr. Abu Jamal treatment now, with respect to others who are needing treatment?
>
> THE WITNESS: Other than his jumping line, whoever is lower down will have to wait longer.

Noel: Dec. 23, 2015, p. 122. That is not "irreparable harm". Indeed, no one would have to wait longer if the DOC simply allocated the resources for the treatment of one (1) additional person, the Plaintiff Mumia Abu Jamal.

The defendants' argument on this point lays bare the constitutional defect in their refusal to treat Plaintiff. Their decision is not based on a medical judgment, but instead is rooted in a desire to not spend money on the medication. As this Court stated: "While the Court is sensitive to the realities of budgetary constraints and the difficult decisions prison officials must make, the economics of providing this medication cannot outweigh the Eighth Amendment's constitutional guarantee

of adequate medical care." Opinion, p. 43 (citing *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro,* 834 F.2d 326, 336-37 (3d Cir. 1987)).

c. Plaintiff Abu Jamal Will Suffer Harm If A Stay Is Granted

As this Court noted, Plaintiff has shown "a clear showing of immediate irreparable harm." if he is not provided with DAA medications. Opinion, p. 42. Hepatitis C is not a benign condition, as the DOC defendants seem to suggest. In the United States, it is responsible for more deaths than all other infectious diseases combined. CDC Report Doc. 8, Ex. 6.

With respect to the Plaintiff, it is not disputed that the disease has scarred and will continue to scar his liver. The fact that his liver is scarred at all places him at risk for "rapid" disease progression. Doc. 8, Ex. 9, p. 11. Based on his HALT-C score, there is a 60% chance of having cirrhosis now. Noel Dec. Jan. 12, 2017, Ex. A. He has unresolved anemia and a persistent skin condition. A further delay in treatment would pose an unacceptable risk that he would progress to cirrhosis (if he hasn't already), would continue to place him at higher risk of liver cancer, and prolong his suffering.

d. Public Interest Favors Plaintiff

Defendants do not argue that issuance of the injunction is contrary to the public interest, let alone proffer previously unavailable evidence or a change in controlling law that would alter the Court's decision. Accordingly, "[t]he public

'interest is particularly strong where the right to be vindicated derives from the United States Constitution.' *Johnson v. Wetzel,* __ F. Supp. 3d __, 2016 WL 5118149, at *11 (M.D. Pa. 2016)." Opinion, p. 43. Conversely, any delay in the injunction's implementation would be contrary to the public interest since it would continue an unnecessary violation of Plaintiff's right to medical care.

e. A Stay Is Not Necessary To Permit Compliance

The DOC defendants argue that the terms of this Court's order violate the PLRA and, alternatively, a delay is necessary to insure compliance. Both claims are specious. This Court concluded that Plaintiff is suffering irreparable harm due to the DOC defendants' failure to administer DAA medications. The only adequate remedy is the administration of those drugs. That is what this Court ordered. Additional "monitoring" would permit further disease progression.

Finally, Dr. Noel asserts that the order is impractical since because there must be a sonogram and blood work before treatment can begin. Dr. Noel is wrong. A liver sonogram is not required before the commencement of DAA treatment. See Declaration of Joseph Harris dated January 16, 2017 attached hereto as Exhibit 1, ¶¶ 9-11. Moreover, it is sufficient that there have been blood work within the last 12 weeks. Harris Dec. Ex. 1, ¶¶ 5-8 referening AASLD treatment Guidelines). Plaintiff's last bloodwork was in December 2016, well within that

period. *Id*. The DOC defendants' arguments are not medically based. They are simply being dilatory.

CONCLUSION

For the foregoing reasons this Court should deny DOC defendants' Motion to Stay the injunction granted on January 3, 2017.

Respectfully submitted,

/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

/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

Counsel for Plaintiff

CERTIFICATE OF SERVICE

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

Service Via Email and ECF:

For Defendants Wetzel, Noel, Silva, BHCS
Medical Director, BHCS Infection Control Coordinator:
Maria Macus, Esquire
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
mmacus@pa.gov

For Defendants Correct Care Solutions, CCS representative,
and Treating Physician, SCI Mahanoy
Samuel H. Foreman, Esquire
Caitlin Goodrich, Esquire
sforeman@wglaw.com
cgoodrich@wglaw.com

s/ Bret D. Grote
Bret D. Grote
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221

Dated: January 16, 2016