

**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**

**Christopher Oppman, former DOC
Director of Bureau of Health Care
Services,**

**Joseph Silva, DOC Director, Bureau of
Health Care Services,**

Dr. John Lisiak, SCI Mahanoy

Dr. Shaista Khanum, SCI Mahanoy

**Scott Saxon, Physician’s Assistant, SCI
Mahanoy**

**Corrections Health Care Administrator
John Steinhart, SCI Mahanoy**

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: **Case No. 15-Cv-00967**
: **(RDM)(KM)**
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: **Judge Robert D. Mariani**
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:
: **Magistrate Judge Karoline**
: **Mehalchick**

ELECTRONICALLY FILED

**REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION
OF ORDER DENYING PRELIMINARY INJUNCTION**

Introduction

In their opposition brief, Doc. 201, the DOC defendants do not dispute the critical facts that make reconsideration procedurally appropriate. First, they do not dispute that at no time during the litigation of the preliminary injunction motion did the DOC official capacity defendants¹ argue that their offices lacked the requisite connection to the claimed Eighth Amendment violations and/or that they lacked the authority to implement an injunction. Second, they do not address the new evidence submitted by plaintiff - unavailable during the pendency of the preliminary injunction motion - that defendant Steinhart, in his capacity as SCI Mahanoy's Health Care Administrator, denied plaintiff's grievance that seeks hepatitis C treatment. Doc. 200-1. Third, while the defendants assert that this motion is somehow untimely, they ignore the fact that this litigation is in an early stage and, more importantly, that the Eighth Amendment violation is an ongoing one.

The DOC Defendants continue to litigate this case as if Fed.R.Civ.P. 25(d) does not exist. They argue that the Director of the DOC's Bureau of Health Care Services cannot implement an injunction because defendant Oppman "is no longer in the position identified by plaintiff." Doc. 201, p. 5. That, of course, is irrelevant.

¹ Plaintiff's Brief in support contains a typographical error on page 2. The motion to file the first amended complaint that added Bureau of Health Services Director Oppman in his individual and official capacity was filed on August 3, 2015, not August 3, 2016. Doc. 21. After receiving leave of court that complaint was filed on November 24, 2015. Doc. 57.

For injunctive relief purposes, this lawsuit is against the office of the Director of the Bureau of Health Care Services. The claims against that office did not abate when defendant Oppman left that position. Fed.R.Civ.P. 25(d). According to the DOC's website the Director of the Bureau of Health Care Services is the person ultimately responsible for the delivery of health care services within the DOC and could, therefore, implement the terms of any injunction.²

Likewise, the claims for injunctive relief at the facility level are not against defendants Kerestes and Steinhart personally. Rather, they are against the office of the Superintendent of SCI Mahanoy and the office of its Health Care Administrator.

Because they cannot meaningfully address the foregoing, much of the DOC's brief consists of an untimely attack on this Court's determination that the DOC's hepatitis C protocol does not comply with the Eighth Amendment. That position only underscores the need for injunctive relief.

I. LEGAL ARGUMENT

Question One: Should this Court reconsider its decision denying Plaintiff's Motion for a Preliminary Injunction and hold that the proper official capacity parties are being sued?

Suggested Answer: Yes.

Question Two: Alternatively, should this Court forthwith grant Plaintiff's pending motion to file a Third Amended Complaint adding Dr. Paul Noel, BHCS Chief of Clinical Services and DOC Secretary John Wetzel as defendants in their official capacities and grant the preliminary injunction motion?

²

<http://www.cor.pa.gov/About%20Us/Pages/Executive%20Staff.aspx#.V9BRUJgrKM8>.

Suggested Answer: Yes.

Question Three: Should this Court grant the DOC's untimely request that it reconsider the merits of its Eighth Amendment findings?

Suggested Answer: No.

1. Defendants' Ignore Controlling Case Law Defining A Sufficient "Connection" To The Constitutional Violation For Purposes of Issuing Injunctive Relief

"Personal involvement" by an official in either an unconstitutional act or in formulating an unconstitutional policy is not a necessary prerequisite for issuing prospective injunctive relief to that official. *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014); *Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988); *Chester v. Beard*, 657 F.Supp.2d 534, 545 (M.D.Pa. 2009); *Davidson v. Scully*, 148 F.Supp.2d 249, 254 (S.D.N.Y. 2001). A general law or a specific act or regulation may be sufficient under *Ex Parte Young* to provide the required "connection" to the constitutional violation. 209 U.S. 123, 157 (1908).

Thus, an official can be enjoined if he or she has the authority to order a subordinate to carry out an injunction, in this case, requiring that medication be administered to plaintiff. *Colwell*, 763 F.3d at 1070; *Koehl v. Dalsheim*, 85 F.3d 86, 89 (2d Cir. 1996); *Chester*, 657 F.Supp.2d at 545; *Project Release v. Prevost*, 463 F.Supp. 1033, 1037 (E.D.N.Y. 1978). Likewise, a subordinate can be enjoined from carrying out the orders of a superior official. *Woods v. Wright*, 334 F.2d 369, 374 (5th Cir. 1964) (citing *State of Colorado v. Toll*, 268 U.S. 230 (1925)); *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

The DOC defendants neither address nor attempt to distinguish any of the foregoing principles and/or the cases applying them. Instead, they cite a recent Third Circuit case, *Parkell v. Danberg*, 2016 WL 4375620 (3d Cir. 2016) for the general proposition that an official must be able to carry out an injunction's terms. Doc. 201, p. 4. *Parkell*, however, is persuasive, if not controlling authority for a finding in this case that the DOC Director of the Bureau of Health Care Services (now defendant Joseph Silva) is an appropriate party for injunctive relief. In *Parkell*, the inmate argued that his Fourth Amendment rights were violated through, *inter alia*, an informal policy of strip searches at his facility. He sued, among others, the Commissioner of the Delaware Department of Corrections (DOC), Danberg. At his deposition, the Commissioner testified that while he was generally familiar with policies within the DOC, he disclaimed knowledge of the policy at issue. The Third Circuit affirmed dismissal of the claims against the Commissioner for money damages finding insufficient personal involvement. At that same time, however, it rejected Danberg's argument that he was too far removed from the claimed Fourth Amendment constitutional violation to carry out a prospective injunction. "At the very least", the Court held, "Commissioner Danberg or a successor could appropriately respond to injunctive relief." *Parkell*, 2016 WL 4375620 *10. Clearly, if the Commissioner of the Delaware DOC can carry out an injunction against an informal policy of which he is unaware, the Director of the DOC Bureau of Health Care Services can, upon receipt of an injunction, overrule a *de jure* policy of his own office that is implemented by a

committee on which three of the Director's subordinates sit. Doc. 200 at 7-10 referencing PI Hearing, Pl. Ex.30 p. 7). As argued *supra*, the Director of the Bureau of Health Care Services is responsible the delivery of health care services and, under *Parkell*, "could appropriately respond to injunctive relief." *Id.* Similarly, the SCI Mahanoy Superintendent (now defendant DelBalso) can enforce an injunction requiring SCI Mahanoy medical staff to provide plaintiff with the direct-acting antivirals. Doc. 200 at 10-12. Finally, the SCI Mahanoy Health Care Administrator (now defendant Steinhart), who is responsible for the administration of *all* medical services at SCI Mahanoy, may be enjoined from enforcing the DOC's unconstitutional hepatitis C protocol and order that hepatitis C medication be administered to Mr. Abu-Jamal. Doc. 200 at 12-13 referencing PI hearing V.2, 168).

Scott v. DiGuglielmo, 615 F.Supp.2d 368, 373 (E.D. Pa. 2009), also cited by the DOC defendants, is completely inapposite. In that case, the defendant had been transferred to another prison. The existing defendants, all of whom were officials at his prior prison, had no authority to carry out the terms of an injunction at the new one. That issue is not present here. Mr. Abu-Jamal remains at SCI Mahanoy. Moreover, the system-wide Director of the Bureau of Health Care Services, defendant Silva, could carry out an injunction in any DOC facility as he is responsible for the delivery of all medical services within the DOC.

The current official capacity defendants, the Director of the Bureau of Health Care Services, the Superintendent of SCI Mahanoy, and SCI Mahanoy's Health Care

Administrator can properly respond to an injunction. This Court's contrary determination should be reversed and an injunction should issue.

2. Alternatively, this Court Should Grant Plaintiff's Pending Motion to Amend and Grant Plaintiff Relief

As argued in our brief in support of this motion for reconsideration, in the event that this Court adheres to its prior determination regarding what party or parties are required for it to issue the injunction sought by plaintiff, it is respectfully requested that this Court grant Plaintiff's motion for leave to file a third amended complaint that seeks to add Secretary Wetzel and Dr. Noel as defendants. Docs. 179-180. That motion is *sub judice*. Under relevant case law, including *Parkell, supra.*, both could carry out the terms of any injunction. The motion to amend should be granted and the requested injunction should issue.

3. This Court Should Not Reconsider Its Determination The DOC Hepatitis C Protocol Violates The Eighth Amendment.

The DOC defendants argue that reconsideration is inappropriate because this Court erred when it found that its hepatitis C treatment policy violates the Eighth Amendment. Doc. 201, p. 7-13. That argument is, in essence, the DOC's own motion for reconsideration. As that "motion" was not filed within 14 days of this Court's August 31, 2016 order, it should be denied as untimely. L.R. 7.10.

Should this Court consider the motion at all, it should be denied. The defendants simply repeat factual and legal arguments that have already been

considered and rejected by the Court. Accordingly, they are not appropriately raised on a motion for reconsideration. *Max's Seafood Café ex rel Lou-Ann Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Finally, should this Court consider the merits, plaintiff respectfully relies upon this Court's August 31, 2016 opinion, his own briefs, and the record developed during the course of the preliminary injunction motion.

CONCLUSION

WHEREFORE, this Court should issue an order 1) granting reconsideration, 2) granting Plaintiff's motion for a preliminary injunction, and 3) granting such other and further relief as this Court deems just and proper.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Reply Brief in Support Plaintiff's Motion For Reconsideration upon each defendant in the following manner:

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