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

MUMIA ABU-JAMAL		
	:	
Plaintiff,	:	**Case No. 15-Cv-00967 (RDM)(KM)**
	:	
v.	:	
	:	**Judge Robert D. Mariani**
JOHN KERESTES, Former Superintendent State Correctional Institution Mahanoy	:	**Magistrate Judge Karoline Mehalchick**
Theresa DelBalso, Superintendent State Correctional Institution Mahanoy		**ELECTRONICALLY FILED**
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.		

PLAINTIFF'S POST-HEARING MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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I. STATEMENT OF FACTS[1]

The Hearing

Joseph Harris, M.D. testified as an expert in the diagnosis and treatment of hepatitis C. Harris: V1 110. Chronic, or "active", hepatitis C is characterized by the presence of the virus in the bloodstream, known as a "viral load". The plaintiff, Mumia Abu-Jamal, has a viral load and, therefore, chronic hepatitis C. Harris: V1, 112, 138.[2] Inflammation caused by the virus can lead to scarring, known as fibrosis, and extreme scarring, known as cirrhosis, both of which affect liver functioning. Harris: V1 111-112. At least twenty percent of chronic hepatitis C patients will develop cirrhosis, and between 2 and 7% of them per year will develop liver cancer.

Chronic hepatitis C often causes complications outside of the liver, including anemia and diabetes. Harris: V1 112-113, 117. Between 20-40% of chronic hepatitis C patients have cutaneous (skin) manifestations of the disease. Among them are the relatively rare conditions of lichen planus and necrolytic acral erythema (NAE), and more common ones such as psoriasis, eczema and pruritus (persistent itching). Harris: V1, 114-115, 137, Plaintiff's Ex. 8, p. 1 and Plaintiff's Ex. 10.

There are now anti-viral drugs that have a 90-95% cure rate and few, if any,

[1] Pursuant to Fed.R.Civ.P. 25(d) the caption has been amended to reflect the substitution of Theresa DelBalso, Supt. of SCI Mahanoy and Andre Norris, Acting Director of DOC health Services both of whom are being sued in their official capacities only.

[2] "V1" refers to the proceedings on December 8, 2015, "V2" to December 22, 2015 and "V3" to December 23, 2015.

side effects. These drugs have become the standard of care in the medical community and their availability has eliminated "active surveillance" as a treatment strategy. Harris: V1, 119-121. So sweeping is the change that the most recent guidelines of the American Association for the Study of Liver Diseases (AASLD), a body that the Center for Disease Control looks to for establishing the standard of care, now recommends that everyone with chronic hepatitis C be treated irrespective of disease stage or prognosis for progression. Harris: V2, 5-6, referencing Plaintiff's Ex. 18, AASLD guidelines, and Plaintiff's 17, CDC 2013 report on Hepatitis C, p. 5.

Mr. Abu-Jamal learned he had tested positive for the hepatitis C antibody in 2012. Abu-Jamal: V1 47. There was no follow-up testing. *Id.*

In the summer of 2014, Mr. Abu-Jamal began experiencing a pruritic rash. By late summer it had become severe, affecting his sleep patterns and causing fatigue. Abu-Jamal: V1, 49-50; Plaintiff's Ex. 1, p. A3. He also began losing weight. Dr. Suzanne Ross: V2, 119; Dr. Johanna Fernandez: V2, 135. Treatment with steroids and an immunosuppressant accomplished nothing. The rash spread to over 70% of his body. Plaintiff's Ex. 1, p. A4-A7.

By March 2015, the rash covered Mr. Abu-Jamal's face, thighs, and trunk. His skin was hyper-pigmented (dark), itched, looked like that of an elephant and was scaly Abu-Jamal: V1 54, Ross: V2, 121; Fernandez: V2, 136; Photos: Plaintiff's Ex. 6, 7. His weight decreased from 270 to 184. Abu-Jamal: V1, 61. He experienced pain when walking, and extreme fatigue that affected him physically and mentally. *Id.* at 58.

Medical personnel ordered a sonogram on March 16, 2015. The report found an "echogenic liver", suggestive of "some sort of hepatic parenchymal disorder". Plaintiff's Ex. 1, p. A17. That finding is suggestive of liver damage consistent with inflammation associated with hepatitis C. Harris: V1, 130.

Unbeknownst to Mr. Abu-Jamal he was also experiencing a dangerous rise in blood sugar levels. On March 6, 2015 it had risen to 419. Plaintiff's Ex. 1, p. A10. This led to his collapse on March 30, 2015, and being rushed to Schuylkill Medical Center where his blood sugar was found to be 507. Abu-Jamal, V1 59-61, Plaintiff's Ex. 1, p. A18, A20-A21. For several days he experienced mental confusion and suffered from such extreme weakness that he could not even move from bed to toilet. Abu-Jamal: V1, 63-64. He was now housed in the prison infirmary and, at medical staff's direction, used a wheelchair whenever he left. Abu-Jamal: V1 65. Blood work showed persistent anemia. Plaintiff's Ex. 1, p. A25, A26, A29 and A41.

The pruritic skin rash continued unabated. The skin remained dark, dry, itchy and flaky. Plaintiff's Ex. 1, p. A31-A40; Ross: V2, 123; Fernandez: V2, 136-137. A May 4, 2015 skin biopsy termed the condition "psoriasform dermatitis", a finding consistent with NAE as well as psoriasis caused by hepatitis C. Harris: V1, 129; Plaintiff's Ex. 1, p. A80-A81. On May 12, 2015 Mr. Abu-Jamal's lower extremities erupted in a painful "field of blisters". Abu-Jamal V1, 67. He was taken to Geisinger Medical Center. At Geisinger, Mr. Abu-Jamal received what he described as the "4 x 4 treatment": his entire body, from ankles to neck, was covered in triamcinolone cream

and then wrapped in gauze every four hours. Abu-Jamal: V1 70. These treatments temporarily suppressed the rash. *Id*.. No one at Geisinger ruled out hepatitis C as the underlying cause of the skin condition, and in fact recommended that he be considered for hepatitis C treatment. Plaintiff's Ex. 1, p. A59 and A60. Despite a battery of tests, no cause was uncovered for the persistent anemia resulting in a diagnosis of "anemia of chronic disease". Plaintiff's Ex. 1, p. A47-A73.[3]

A May 18, 2015 CT scan conducted at Geisinger strongly suggests that hepatitis C is the "chronic disease" causing the anemia as it indicated some level of liver damage. The radiologist's report determined that the "overall appearance of the liver is irregular. Correlate for cirrhosis." Plaintiff's Ex. 1, p. A74. This finding means that Mr. Abu-Jamal has at least some degree of fibrosis, i.e. liver scarring, if not cirrhosis itself. Harris: V1 131. No follow-up blood work was conducted. The abnormally low hemoglobin counts continued throughout the summer of 2015, another sign that the anemia is secondary to hepatitis C. Harris: V1, 117; Plaintiff's Exhibit 1, p. A105, A108, A111. The itchy rash returned to its previous level of severity. Abu-Jamal: V1, 76-77; Plaintiff's Ex. 1, p. A84-A87, A96-A97, A99-A100; Ross: V2, 125; Fernandez: V2, 140.

Dr. Harris first saw Mr. Abu-Jamal on July 18, 2015. Mr. Abu-Jamal was in "obvious distress", had lesions on his skin, a hyper pigmented rash, oozing fissures on

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[3] These tests included two lymph node biopsies, a colonoscopy, endoscopy, daily blood tests and, on June 23, 2015, a bone marrow biopsy.

his skin, foot swelling and onychomycosis on his feet and toes. Harris V1, 134-135; Plaintiff's Ex. 7. Dr. Harris's opined that the rash is likely NAE, a relatively rare skin disorder that afflicts people of African descent and is almost always a manifestation of hepatitis C. Harris V1 136. It is a rash that is indistinguishable from psoriasis in appearance and histology. It is likely under-diagnosed.[4] While the symptoms wax and wane, it is only cured by treating the underlying hepatitis C. (Harris: V1 137, 143).

Dr. Harris emphasized, however, that his opinion that the skin condition is a manifestation of hepatitis C is not contingent upon it being NAE. It could be psoriasis and the even more common pruritus, both of which are manifestations of the disease. *Id.*. Indeed, as many as 40% of people with chronic hepatitis C suffer from a variety of skin conditions, including psoriasis, pruritus and the less common NAE. Harris: V1 115; V2 12; Plaintiff's Exhibit 8, 10 and 24.

DOC finally performed a hepatitis C workup on Mr. Abu-Jamal in August 2015, confirming chronic hepatitis C. Harris: V1, 138. His low viral load is insignificant since its size has no relationship to the severity or progression of the disease. Harris: V1, 138-139.

Dr. Harris acknowledged that Mr. Abu-Jamal's skin condition had improved in the two months prior to the December 2015 hearing. Harris: V1 144. But it has not

[4] Dr. Harris described a study in Philadelphia where 5 out of 300, or 1.7 % of hepatitis C patients had NAE. Harris: V2, 11, referencing Plaintiff's Exhibit 23. If true, nationwide that would amount to 20,000 cases of NAE in the United States. Harris: V2 28.

"resolved" as it is still present and causes itching. Abu-Jamal, V1, 81, 86; Harris: V1, 144, V2, 34. That the condition has not resolved in 18 months and after potent and continuous treatment "speaks strongly for either necrolytic acral erythema or some condition that's predicated on the hepatitis C that's not going to get better without treatment for the hepatitis C." Harris: V1 145, V2 32; See also Plaintiff's Exhibit 24 stating that the way to treat cutaneous manifestations of hepatitis C is to treat the hepatitis C. Dr. Harris 's opinion was echoed by other hepatitis C experts with whom he had consulted prior to testifying. They told him "treat the hepatitis C and the rash will go away". Harris V1, 145; V2 36-38.

Dr. Ramon Gadea, an infectious disease specialist and DOC medical consultant, agreed with Dr. Harris. He consulted with Mr. Abu-Jamal on several occasions. During his last consultation on September 9, 2015, he opined that the skin condition could very well be secondary to the hepatitis C. Plaintiff's Ex. 1, A110. He recommended that hepatitis C treatment be considered if a rheumatology consult ruled out psoriatic arthritis. That condition was ruled out, but hepatitis C treatment was not initiated. Harris: V1, 142, referencing Plaintiff's Ex. 1, p. A160.

Beginning in September, 2015 Mr. Abu-Jamal was administered Procrit for the anemia. While his counts improved, they are still below the normal range, meaning he still has "anemia of chronic disease". Harris: V1, 146, V2 44-45. Platelet count, Dr. Harris explained, is a "poor man's guide" to what is happening in the liver. Harris: V1, 148. Bloodwork performed in October 2015, November 2015 and December 2015

revealed an abnormally low platelet count Harris: V1, 149, Plaintiff's Ex. 1, p. A121-A122, A124 and A126. That the count was low for three consecutive months is indicative of "significant fibrosis" and disease progression. Harris: V1, 150, V2 53. Based upon the bloodwork, the March 2015 liver sonogram and the May 2015 liver CT scan, Dr. Harris estimated that Mr. Abu-Jamal has stage 2-2.5 fibrosis on the metavir scale, a stage consistent with significant liver scarring. Harris: V2, 21-22. There is no medical justification for failing to treat Mr. Abu-Jamal's hepatitis C. Harris: V2, 152. If he is not treated it is likely that his disease will progress to cirrhosis (if it hasn't already) and be life-threatening. Harris: V1, 151-152.

Stephen Schleicher, M.D., is a contract dermatologist for the Department of Corrections who has consulted with the plaintiff. As he admitted, he knows little about hepatitis C treatment. Schleicher: V2, 112. He did not know what constitutes an "active" hepatitis C infection or the relationship between a low platelet count and liver damage. Schleicher: V2, 111-112. Dr. Schleicher has never heard of the AASLD. He was therefore neither surprised nor not surprised that their guidelines now call for treatment for everyone with an active hepatitis C infection. "It's beyond my expertise", he testified. Schleicher: V2, 112.

According to Dr. Schleicher, Mr. Abu-Jamal is suffering from "a cross between psoriasis and eczema". Schleicher: V2, 70. Notwithstanding his admitted lack of knowledge about hepatitis C, Dr. Schleicher opined that there is only a 20% chance that Mr. Abu-Jamal's hybrid condition was caused by hepatitis C. Schleicher: V2, 80.

However, he did not dispute the fact that in up to 40% of hepatitis C patients the disease manifests itself in skin conditions, including pruritus, psoriasis and NAE. Schleicher: V2, 81-82. Pruritus' has been one of the plaintiff's most frequent complaints. Schleicher: V2 82. Dr. Schleicher agreed that at one point the rash covered 70% of Mr. Abu-Jamal's body and had not responded to traditional treatments. As of December 2015, it had improved, however, it is still present on his thighs and buttocks and will likely intensify again. Schleicher: V2, 72, 83, 102, 103.

When confronted, Dr. Schleicher did not agree with studies from reliable medical journals linking psoriasis and hepatitis C. He agreed, however, that pruritus is a common complaint of hepatitis C sufferers. Schleicher: V2: 79, 84. And he also agreed that as more testing is done there are more psoriasis patients who are found to have hepatitis C. "Before, we didn't test [for hepatitis C]. But that is required now." Schleicher, V2, 79.

Jay Cowan, M.D. is a paid consultant for Correct Care Solutions, the contract medical provider for the DOC. Cowan: V3, 4. He is a member of their hepatitis C review committee, which decides whether inmates afflicted with the disease will receive treatment. Cowan: V3, 4-5. Dr. Cowan testified that an APRI score is a tool used to estimate the level of liver damage. It is derived from a formula that utilizes platelet count and AST level. Cowan: V2, 205. Mr. Abu-Jamal' most recent scores were .392 and .423. Cowan: V2, 209. That places him in the category of "unlikely cirrhosis, significant fibrosis possible". Cowan: V2, 211. The APRI test, however, is

not reliable. At scores less than 2 it has a "sensitivity" of only 37%, meaning that it will identify only 37% of people who actually have the disease. Cowan: V3, 36.

The size of the viral load does not correlate to disease progression or liver damage. Cowan: V3, 38. Low platelets are, however, a sign of disease progression. For the months of October 2015, November 2015 and December 2015, Mr. Abu-Jamal's platelet count has been consistently below the normal range. Cowan: V3, 41.

Dr. Cowan acknowledged that Mr. Abu-Jamal's liver has been damaged/scarred. In his opinion, Mr. Abu-Jamal would fall on level F2 of the metavir scale with F0 being no fibrosis and F4 being cirrhosis. Cowan: V2, 75. Dr. Cowan came to the F2 opinion without being made aware of the May 15, 2015 liver CT scan. The report of the scan noted that the overall appearance of Mr. Abu-Jamal's liver was "irregular" and advised personnel to "correlate for cirrhosis". Plaintiff's Ex.1, p. and A74. One sign of cirrhosis, as opposed to fibrosis is, according to Dr. Cowan, a "distortion of the liver architecture". Cowan: V2, 201. When made aware of the report at the hearing, Dr. Cowan admitted that "it is concerning". Cowan: V3, 61).

Mr. Abu-Jamal's risk of progression would be reduced to almost zero if he was offered the anti-viral medication. Cowan: V3, 22-24. He also acknowledged that early treatment, i.e. treatment before progression to cirrhosis, has numerous health benefits to the patient and society. Cowan: V3 25-28. These are among the many reasons that the AASLD has now issued guidelines stating that everyone should be treated with the anti-virals. Cowan: V2, 212; Plaintiff's Ex. 18: AASLD Guidelines. But those

guidelines, Dr. Cowan asserted, represent the standard of care in the community. In correctional healthcare the standard is "risk stratification". Cowan: V2, 214. But even under the July 2015 AASLD guidelines, which recommended prioritization, Mr. Abu Jamal would be in the "high priority" category for treatment. Cowan: V3, 81, referencing Plaintiff's Ex. 2, p. 5.

Dr. Cowan testified that he does not "believe" that Hepatitis C is the cause of Mr. Abu-Jamal's skin condition as NAE is very rare and is inconsistent with Mr. Abu-Jamal's skin biopsy. Cowan: V2, 217, V3, 45. But when confronted, Dr. Cowan would neither comment upon nor could he refute studies indicating that under a microscope NAE resembles psoriasis. Cowan: V3, 49, referencing Plaintiff Ex. 28. He further admitted that psoriasis (which was Dr. Schleicher's diagnosis) and pruritus can be associated with hepatitis C. Cowan: V3, 45. In addition Dr. Cowan mistakenly believed that it had totally resolved. Cowan: V3, 51. Nor was he aware of the fact that Dr. Gadea, plaintiff's treating infectious disease specialist, had opined that his skin condition could be secondary to hepatitis C and recommended hepatitis C treatment to address it. Cowan: V3, 53; Plaintiff's Exhibit 1, p. A110.

Dr. Cowan admitted that hepatitis C caused anemia. But he attributed Mr. Abu-Jamal's anemia to the drug cyclosporine which was administered for a very short time in early 2015. Cowan: V2, 218, V3, 56, 58. He could not explain why the hemoglobin levels continued to drop for months after the cyclosporine was discontinued. Cowan: V3, 58. The treatment for "anemia of chronic disease", he

agreed, is, as Dr. Harris testified, to treat the chronic disease. *Id.*.

Dr. Cowan testified that in prison, it is resources, not medicine, that determines treatment decisions. Cowan: V3, 77. If he had a patient with chronic hepatitis C of any fibrosis level who had insurance or otherwise had the resources to pay for the anti-viral drugs, he would not hesitate to recommend treatment. Cowan: V3, 68.

Dr. Paul Noel is the Chief of Clinical Services for the DOC. He, too, sits on the DOC's hepatitis C review committee. Noel: V3, 129.

Noel was instrumental in developing the DOC's current hepatitis C protocol. Under it, only those with esophageal varices, i.e portal hypertension, are treated. Noel: V3, 105. Esophageal varices are a product of end-stage or decompensated cirrhosis. Due to scarring, blood is backflowed from the liver creating a risk that blood vessels would burst and, in Dr. Noel's words, create a "catastrophe". If an inmate has advanced fibrosis or less-than-end-stage cirrhosis they are not referred for treatment, but are instead evaluated every six months. Noel: V3, 106, 129. DOC protocol does not use the treatment prioritization levels adopted by the Federal Bureau of Prisons Noel: V3, 128. Of the 6000 inmates in the DOC estimated to have chronic hepatitis C, the DOC is currently treating 5. Noel: V3, 103, 130.

Inmates are initially evaluated through the use of two formulas based upon blood work results, the APRI and HALT scores. The HALT formula provides the probability of whether the patient currently has cirrhosis. If an inmate has a 60% or higher chance of having cirrhosis, they are referred for further evaluation. Noel: V3,

110. Utilizing Mr. Abu-Jamal's most recent platelet level, a less-than-normal 134000, the HALT calculation determined that there is a 63% chance that Mr. Abu-Jamal currently has cirrhosis. Noel: V3, 120, 123. But Mr. Abu-Jamal was not referred for further evaluation. It was the committee's opinion that the HALT score overestimated the chance that he has cirrhosis because he had an APRI score of .4. Noel: V3, 109, 118, 120. Dr. Noel acknowledged that the APRI is wrong half of the time (Noel, V3, 115). In Noel's opinion, Mr. Abu-Jamal is in fibrosis level 2, a stage that is still consistent with significant liver scarring. Noel: V3, 123.

In opposition to Mr. Abu-Jamal's motion for a preliminary injunction, Dr. Noel executed an affidavit, filed by the defense counsel, setting forth, *inter alia*, the reasons why Mr. Abu-Jamal's hepatitis C need not be treated at this time. Plaintiff's Ex. 32. One of the reasons asserted in the affidavit, and repeated in the defendants' memorandum of law, was that Mr. Abu-Jamal's viral load was relatively low. Plaintiff's Ex. 2, ¶ 21, Defendants' Memorandum of Law in Opposition to Preliminary Injunction Motion, p. 13. When shown his affidavit, Dr. Noel declared "I did not sign that document". Noel, V3, 135. Rather, he swore that he signed another one, the whereabouts of which were unknown. Noel: V3, 135-136. In the version he said he signed, paragraph 21 was removed at his request because it is wrong. Noel, V3, 137. Viral load, he testified, has no correlation with disease progression. Noel, V3, 143. Dr. Noel brought the matter to the attention of counsel <u>before</u> he executed his affidavit in September 2015. Noel, V3, 142-143. When asked to explain how an

affidavit that the witness told counsel contained false information and refused to sign came to be filed, counsel stated as follows:

> Your Honor, I think – I talked to Dr. Noel about that, and as best as I can understand, it was a probably a clerical error, on my part, I discussed it with Dr. Noel, and he agreed that the number was correct and that, generally, the overall assertion was not incorrect, and the overall impact of it was inconsequential.
>
> THE COURT: Why is it still in the document, if he disavowed it, at the time he signed it?
>
> [DEFENSE COUNSEL]: Your Honor, I don't know what to say, Your Honor. I had submitted this, and there was no – I did not believe there was any reason to bring what appeared to be an inconsequential error, due to a clerical mishap, to the Court's attention.

V3, 138.

The Noel affidavit contained other material inaccuracies. For example, Dr. Noel asserted that an "infectious disease specialist" had "determined" that Mr. Abu-Jamal's skin condition was not secondary to his hepatitis C. Plaintiff's Ex. 32, ¶¶ 9-10. At the hearing Dr. Noel agreed that the infectious disease specialist to whom he referred was Dr. Ramon Gadea. Noel: V3, 148. Yet, Dr. Gadea came to the opposite conclusion, opining on September 9, 2015 that the skin condition could be secondary to the hepatitis C. Noel: V3, 149 referencing Plaintiff's Ex. 1, p. A110.

Dr. Noel admitted that there was no medical reason why Mr. Abu-Jamal's hepatitis C should not be treated now. Noel: V3, 154. The only consequence of treating him would be moving him up on the list of inmates considered for treatment.

I. Legal Argument

THE STANDARDS FOR A PRELIMINARY INJUNCTION HAVE BEEN MET

A. It Is Likely That Plaintiff Will Succeed In Showing Deliberate Indifference To A Serious Medical Need

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) (Finding hepatitis C is a serious medical need because it "can be chronic, debilitating and deforming"); *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) ("The defendants wisely do not deny that [HIV and hepatitis C are] serious medical needs.").

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)). Deliberate

indifference has been established here in in the following ways. First, the defendants have deviated from the standard of care by refusing to provide an available, safe, and effective cure for Mr. Abu-Jamal's hepatitis C. Second, and alternatively, they know that Mr. Abu-Jamal has suffered from and is suffering from serious complications of the disease and, if not treated, will almost certainly face life-threatening complications. Instead of curing the disease, the defendants have opted for "active surveillance" and palliative measures that they know are ineffective.

1. 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. 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. 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. This represents an actual risk of liver cancer of between 11% and 20%. Plaintiff's Ex. 13, p. 1.

In 2014, drugs known as Direct-Acting Anti-Viral medications have been 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. treatment before advanced fibrosis) affords numerous other health benefits. Harris: V1, 118-121; Cowan: V3, 22-27; Plaintiff's Ex. 18, AASLD guidelines, p. 2-4, describing benefits of early treatment.

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. Harris, V2, 5-6; Plaintiff's Ex. 18. The earlier recommendation for treatment prioritization has been abandoned as not medically justifiable. Harris V2, 6; Cowan: V3, 24-25. The AASLD guidelines recommending treatment for all constitute the medical standard of care for the treatment of hepatitis C. Harris: V1, 123-124; Plaintiff's Ex. 17, p. 6, Report of Center for Disease Control stating that the new anti-viral drugs "are now the standard of care for HCV treatment in the United States" and referring readers to the AASLD guidelines for further information.

That Mr. Abu-Jamal is suffering from chronic hepatitis C is undisputed. The defendants concede that he likely has, at a minimum, Stage 2 fibrosis. There is also a 63% chance that he has already progressed to cirrhosis. Noel: V3, 59-61, 75, 120-21, 123, 146-47. The defendants know that if Mr. Abu-Jamal's hepatitis C were treated it would 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. And, as Dr. Noel candidly admitted, there is *no*

medical reason for denying Mr. Abu-Jamal treatment with the direct-acting anti-viral medications. "I can think of no medical contraindications at this time [for withholding treatment]" he testified. Noel, V3, 154. His sentiment was echoed by Dr. Cowan who testified on cross examination that if he had a private patient with good insurance or sufficient resources, he too, would recommend treatment with the anti-viral medications. Cowan: V3, 68. That testimony belies his testimony on direct that Mr. Abu-Jamal is being treated in accordance with standards applicable to the community at large. Cowan: V3, 32. In the prison context, he acknowledged, it is resources (money) that dictates who will be treated and not be treated. 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). In this case, the defendants themselves acknowledge that there is no medical justification for continuing to deny Mr. Abu-Jamal a medication with a 90-95% cure rate that is now the standard of care for treating – and curing – hepatitis C. Their conduct amounts to deliberate indifference in violation of the Eighth Amendment.

2. Because Chronic Hepatitis C Is The Cause Of Damage To The Plaintiff's Liver And The Cause of Other Severe Symptoms, Refusal To Treat And Cure The Disease Constitutes Deliberate Indifference.

To find that the plaintiff has demonstrated a likelihood of success on the merits, it is not necessary that this Court conclude, as argued in subdivision 1, that the defendant's refusal to implement the AASLD guidelines alone constitutes deliberate indifference. In this case, because the chronic hepatitis C has caused and is causing extensive liver damage, a debilitating skin condition, persistent anemia and, most likely, Type II diabetes, the defendants' refusal to administer the anti-viral medication constitutes deliberate indifference to a serious medical need.

Liver Damage

All of the medical experts who testified at the hearing were in agreement on the following material points. First, plaintiff Mumia Abu-Jamal has chronic hepatitis C. Second, the disease has caused significant fibrosis, or scarring, to Mr. Abu Jamal's liver. On a scale of 0 to 4 with 4 being cirrhosis, Mr. Abu-Jamal is, at a minimum, in fibrosis level 2 or 2.5. Harris: V2, 22; Cowan: V2, 75; Noel: V3, 123. Third, 20-50% of

all chronic hepatitis C patients progress to cirrhosis, or severe scarring of the liver. Harris: V1, 111-112, 151; Noel, V3, 106, 129. Plaintiff's Ex. 13, p.1; Plaintiff's Ex. 16, p. 1. Fourth, cirrhosis has many life-threatening complications, including portal hypertension, liver failure and, in nearly 20% of cases, progression to hepatocellular carcinoma, i.e. liver cancer. *Id.* Fifth, utilizing a formula known as the HALT score, there is a 63% probability that Mr. Abu-Jamal currently has cirrhosis. Noel: V3, 120, 123. Sixth, Mr. Abu-Jamal's platelet count, a sign of disease progression, has been below normal for three consecutive months. Harris: V1, 149; Cowan: V3, 41; Noel: V3, 147; Plaintiff's Ex. 1, p. A121-A122. These undisputed facts plainly demonstrate that Mr. Abu-Jamal is seriously ill and, if not treated, will be "exposed [] to…an unreasonable risk of serious damage to his future health." *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

The defendants argue that Mr. Abu-Jamal does not have cirrhosis or a more severe case of fibrosis based, in part, on his APRI score. That calculation placed him in the "unlikely cirrhosis, significant fibrosis possible" category. Cowan: V2, 211. Even accepting Dr. Cowan's estimation, Mr. Abu-Jamal's liver is likely scarred placing him at risk for further deterioration. Moreover, as both Dr. Cowan and Dr. Noel admitted, the APRI score is not reliable. At lower scores, it will identify only 37% of those who have the disease, presenting the very real risk (as reflected in the HALT score), that his condition is far more serious. Cowan: V3, 36; Noel, V3, 115. Furthermore, Dr. Cowan formed his opinion without being made aware of a May 15,

2015 liver CT scan performed at Geisinger which found the liver's shape to be "irregular" and advised medical personnel to "correlate for cirrhosis". Plaintiff's Ex. 1, p. 74. Dr. Cowan himself defined cirrhosis as a "distortion of the liver architecture". As he admitted on cross examination, the report is "concerning" Cowan: V3, 61.

The credibility and reliability of the defendants' claims concerning the damage to Mr. Abu-Jamal's liver and overall disease progression should also be evaluated in light of the bizarre events that transpired during Dr. Noel's cross examination. Shown Plaintiff's Exhibit 32, his September 10, 2015 affidavit filed by defense counsel, Dr. Noel announced that it was not the document he signed. Noel: V3, 134-135. Exhibit 32, he told the court, contained a falsehood in paragraph 21, namely the assertion that Mr. Abu-Jamal's low viral load meant that his disease was not progressing. Dr. Noel swore that he disavowed that paragraph to defense counsel in September. Noel: V3, 138-142. That the defendants would file with the court an affidavit that they knew contained a false representation and then rely on it in their memorandum of law, justifies an adverse inference regarding the credibility of their claims about Mr. Abu-Jamal's health and their "treatment" of it. *Cf.* Fed.R.Civ.P. 37(c)(authorizing issue-related sanctions for failing to disclose and/or supplement an earlier response).[5]

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[5] Fed.R.Civ.P. 26(e) provides that a party that has responded to a discovery request must supplement that response in a timely manner if the party learns that in some material respect "the disclosure is incomplete or incorrect…". While not strictly a response to a discovery request, Dr. Noel's affidavit was filed by the defense and relied upon by them in opposing the instant motion. The defendants

Skin Condition

For nearly 18 months Mr. Abu-Jamal has been suffering from a severe, itchy, and painful rash that has sometimes covered 70% of his body. It has caused flaking of his skin and inability to sleep with resulting fatigue and a drop in energy level. While the symptoms have waxed and waned they have never disappeared. At the hearing, the evidence conclusively established that the condition is likely secondary to hepatitis C and would resolve if that disease is treated.

That a wide variety of skin conditions are a relatively common extrahepatic manifestation of hepatitis C was not a subject of serious dispute. 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). 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 (itching). Harris, V1, 116-117; Schleicher: V2, 81-84; Cowan: V3, 44; Plaintiff's Ex. 8: listing psoriasis and pruritus as two "commonly encountered dermatological disorders" linked with hepatitis C; Plaintiff's Ex. 10, Journal of Dermatology stating hepatitis C "can be an inducing factor for psoriasis".

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knew as early as September 2015 that it contained materially incorrect information. Yet they made no effort to correct that information either before this Court or Magistrate Judge Mehalachick.

Dr. Harris concluded that the condition is likely NAE, a disease almost always associated with hepatitis C and which afflicts people of African descent. Harris V1, 135-136. It is similar in appearance to psoriasis and cannot be distinguished from that disease in histology. Harris: V1, 136; Plaintiff's Ex. 28: "Necrolytic acral erythema is best defined clinically as a histopathological entity that often closely resembles psoriasis.". Accordingly, Dr. Schleicher's and Dr. Cowan's unsupported assertions that the condition cannot be NAE because the skin biopsy that termed the condition "psoriasisform dermatitis" is simply wrong. Under a microscope NAE resembles psoriasis. *Id.*

Drs. Schleicher and Cowan additionally asserted that the condition is not NAE because that condition is rare. Schleicher: V2, 79; Cowan: V3, 45. But, as Dr. Harris pointed out, NAE, while rare, is under-diagnosed. This was illustrated by a Philadelphia study where 5 out of 300 hepatitis C patients had NAE. Plaintiff's Ex. 23. NAE can only be eliminated if the underlying disease – hepatitis C – is treated and eliminated. Harris: V1, 137.

But even if the condition is common psoriasis and not NAE, it, too, is a manifestation of the hepatitis C. Harris: V1, 137: 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 although improved, 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. 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. Schleicher, of course, disagreed. But he 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. Moreover, he was unaware that Dr. Ramon Gadea, an infectious disease specialist hired by the DOC had opined that Mr. Abu-Jamal's skin condition could be secondary to hepatitis C and that treatment be considered. Shown Dr. Gadea's report at the hearing, Dr. Schleicher read it and said he agreed with Dr. Gadea's conclusion. Schleicher: V2, 100 referencing Plaintiff's Ex. 1, p. A110. Yet hepatitis C treatment has not been initiated. 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).

Anemia

Anemia is a common complication of chronic hepatitis C. 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 anemia's cause. Thus, it was diagnosed as "anemia of chronic disease". 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 bloodwork has improved. But they have never returned to the normal range. According to Dr. Harris, 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". Harris V1, 146, V2, 44-45.

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. Dr. Cowan was grasping at straws. On cross-examination he was unable to explain why hemoglobin levels continued to decrease long after cyclosporine was discontinued. Cowan: V3, 58.

Diabetes

Type II diabetes is an extrahepatic manifestation of hepatitis C. 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. Abu-Jamal: V1, 59-60; Plaintiff's Ex. 1, p. A18, A20-A21. In recent months, glucose levels have been within normal range as have other diabetes markers. Dr. Harris testified that Mr. Abu-Jamal could be in a "honeymoon period" and that the diabetes could reassert itself. Harris, V2, p. 148. He would not rule out it being secondary to the hepatitis C *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.

The foregoing conditions pose an "excessive risk to [Mr. Abu-Jamal's] health" due to an intentional refusal by the defendants to treat their source and, accordingly, constitute deliberate indifference to his serious medical needs. *Farmer*, 511 U.S. at 837; *see also Natale*, 318 F.3d at 582 (defendants must be "aware of facts from which the inference could be drawn that a substantial risk of harm exists, and . . . draw the inference" (quoting *Farmer*)).

This is not a case involving a mere dispute between medical professionals. First, there is but one recognized way to treat hepatitis C – that is, with the direct-acting antiviral medications that have the 90-95% cure rate. Second, under the Eighth Amendment the intentional provision of inferior or less efficacious treatment for non-medical reasons constitutes deliberate indifference. 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). That is the case here. Assuming arguendo that "active surveillance" of Mr. Abu-Jamal's liver functions and palliative measures applied to his skin can be termed "treatment", they are knowingly less effective than providing a medication that will insure that his disease does not progress further and that will cure the extrahepatic manifestations of it. Indeed, the defendants approach is akin to denying an effective

form of chemotherapy to a stage 2 cancer patient until the condition progresses to stage 3 or 4. And as the defendants admit, there is no medical justification for denying treatment. Noel: V3, 68, 154.

That the DOC has a new interim protocol that purportedly identifies the sickest inmates does not render their refusal to treat Mr. Abu-Jamal constitutional. As Dr. Noel stunningly admitted at the hearing, under the new protocol only those who have deteriorated to decompensated cirrhosis with esophageal varices (bleeding) are referred for treatment. In other words, a person must be in imminent risk of a "catastrophe" (Dr. Noel's words). 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. Noel: V3, 109. The protocol sets forth no plans for treating those, such as Mr. Abu-Jamal who have significant fibrosis or even non-advanced cirrhosis. Noel: V3, 128-129 This "protocol" has resulted in only 5 of the estimated 6000 inmates with hepatitis C (0.08%) receiving treatment. That the DOC protocol not only allows but *affirmatively requires* deterioration to advanced cirrhosis *and* esophageal varices prior to initiating treatment places its 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 administrative convenience or 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).

It is shocking to the conscience that the DOC thinks it is acceptable to withhold medical care until one's liver has suffered irreversible damage accompanied by such severe damage to the blood vessels that the patient is literally at risk of bleeding to death. No matter whether such "active surveillance" is called treatment or not, it is a gross departure from medical ethics and constitutional requirements.

B. Mumia-Abu Jamal Has Suffered And Continues To Suffer Irreparable Harm And Absent An Injunction His Health Will Continue To Deteriorate.

The violation of a constitutional right in and of itself can constitute irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). As argued in subdivision "A"., Mr. Abu-Jamal has shown deliberate indifference to his serious medical need and, therefore, proven a violation of the Eighth Amendment. Accordingly, he has shown the likelihood of irreparable injury.

Should this Court not presume irreparable injury from the likelihood of success on the merits, the injunction is nonetheless warranted as plaintiff has proven irreparable harm. That requirement is satisfied where the plaintiff 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). *See also Helling*, 509 U.S. at 35 (actionable harm found where the defendants "exposed [the movant] to …an unreasonable risk of serious damage to his future health."). That is the case here.

By the simple fact that he has chronic hepatitis C, Mr. Abu-Jamal has a 20% to 50% chance of developing cirrhosis. Harris: V1, 111-112, 151; Noel, V3, 106, 129;

Plaintiff's Ex. 13, p.1. It is conceded that his liver is damaged, placing him in fibrosis level 2 or 2.5. Harris: V2, 22; Cowan: V2, 75; Noel: V3, 123. Moreover, according to the HALT score there is a 63% risk he has cirrhosis now. Noel: V3, 120, 123. As the inflammatory process continues, his liver is becoming more damaged. His platelet count, a key marker of disease progression, has been abnormally low for three straight months. Harris: V1, 149; Cowan: V3, 41; Noel: V3, 147; Plaintiff's Ex. 1, p. A121-A122. A relentless, pruritic skin condition, secondary his hepatitis C, causes constant hardship. Mr. Abu Jamal is chronically anemic and often sapped of energy. He has had a life-threatening episode of diabetes. These facts demonstrate that failure to treat Mr. Abu-Jamal will "expose[] him to…an unreasonable risk of serious damage to his future health." *Helling*, 509 U.S. at 35. What the court stated in *Farnam v. Walker*, 593 F.Supp.2d 1000, 1012 (C.D. Ill. 2009), is applicable here: "[t]he plaintiff is at risk of irreparable harm: the shortening of his life."

Refusal to treat the hepatitis C and thereby cure the skin condition causes Mr. Abu-Jamal harm on a daily basis. This Court heard Mr. Abu-Jamal describe the daily pain and suffering caused by the skin condition both when it was at its most severe and at other less-severe periods. His lower extremities were swollen, his arms felt like he was wearing a coat. He experienced loss of energy and memory, and pain in his feet. And always the incessant itching. Abu-Jamal V1, 51, 57-58, 76, 81. The skin condition is still present, the rash is present on his thighs and buttocks, and he has itching in many parts of his body. Abu-Jamal, V1, 81; Schleicher: V2, 72, 83, 102, 103,

testifying his condition will likely flare again. This is more than sufficient to establish immediate irreparable harm. *Rhea v. Washington Department of Corrections*, 2010 WL 3720223 (D. Wash. 2010) (unnecessary pain stemming from treatment delay established irreparable harm); *Farnam*, 593 F.Supp.2d at 1012 (irreparable harm shown where failure to treat would significantly decrease the quality and quantity of the plaintiff's life).

C. Treating Plaintiff's Hepatitis C Will Not Harm Defendants and Will Further the Public Interest

"There is the highest public interest in due observance of all constitutional guarantees." *United States v. Raines*, 362 U.S. 17, 27 (1960). In addition, "the public has a strong interest in the provision of constitutionally adequate health care to prisoners." *Flynn v. Doyle*, 630 F.Supp.2d 987, 993 (E.D. Wisc. 2009).

An injunction will not impose substantial burdens on the DOC. The only "adverse" consequence would be that Mr. Abu-Jamal would move up in line. If anything, curing Mr. Abu-Jamal's hepatitis C now will reduce future costs for his medical care by eliminating the source of his liver damage and extrahepatic symptoms.

Where, as here, plaintiff has demonstrated a likelihood of success on the merits as well as the prospect of irreparable injury and actual irreparable injury bald assertions that granting an injunction will place an insurmountable administrative or financial burden on defendants are insufficient to defeat a motion for preliminary injunction. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 643 F.Supp. 1217, 1228 (D.N.J.

1986), *affirmed* in *Monmouth*, 834 F.2d 326.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiff's motion for preliminary injunctive relief and order DOC defendants to treat his hepatitis C with the direct-acting antiviral medications.

Respectfully submitted,

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Dated: March 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Brief in Support of Plaintiff's Motion for Preliminary Injunction for Hepatitis C Treatment upon each defendant in the following manner:

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