UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. _____

ALLEN BRASH,	)
	)
Plaintiff,	)
	)
v.	)
	)
WEXFORD HEALTH SOURCES, INC., a Florida corporation, DAVID ROWE, and MICHAEL MOORE, in his official capacity as Secretary of the Florida Department of Corrections,	)
	)
Defendants.	)
	)

MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW

Plaintiff, through undersigned counsel, moves this Court, pursuant to Rule 65, Federal Rules of Civil Procedure, for a preliminary injunction ordering defendants to immediately send plaintiff to a Gastroenterologist to reinstitute medication for Hepatitis C.

In support of this Motion, Plaintiff relies upon his Verified Complaint, the Declarations of Dr. Bennet Cecil and Dr. Richard Stone, and his medical records. Each of the items upon which plaintiff relies is being filed simultaneously with this Motion.

Plaintiff contends that absent injunctive relief he will continue to be denied a Gastroenterologist consult and will continue to be denied the medication necessary to combat Hepati-

tis C, that he will suffer irreparable injury up to and including liver cancer and premature death, that there is a substantial likelihood that he will ultimately prevail on the merits, that there is a greater injustice to him if the injunction is denied than harm to defendants if it is granted, and that granting the requested relief will not disserve the public interest.

A prompt hearing is requested to put an end to the defendants' unlawful conduct. Filed with this Motion are a Request for a Prompt Hearing and a proposed Writ of *Habeas Corpus ad Testificandum* requiring the Florida Department of Corrections to produce the plaintiff at a prompt hearing to be scheduled by the Court.

STATEMENT OF FACTS

Plaintiff, Allen Brash, is a prisoner in the custody of the Florida Department of Corrections, currently confined at Okeechobee Correctional Institution. Verified Complaint, ¶ 6. Defendant, Wexford Health Resources, Inc., (hereinafter Wexford) is a Florida corporation operating under color of state law under contract with the Florida Department of Corrections to provide medical and health care services to the inmates confined at Okeechobee Correctional Institution. Verified Complaint, ¶ 7. Defendant, David Rowe, is Vice President and Chief Medical Director for defendant Wexford Health Sources, Inc. Verified Complaint, ¶ 8. As Chief Medical Director, defendant Rowe makes policy under color of state law for defendant Wexford by determining who is allowed to receive medical care recommended by

defendant Wexford's prison doctors. Id. Defendant Moore as Secretary of the Florida Department of Corrections is responsible for the medical care of all inmates. Verified Complaint, ¶ 9.

Mr. Brash came into the custody of the Florida Department of Corrections in 1987. Verified Complaint, ¶ 10. Mr. Brash has Hepatitis C and is in the second stage of cirrhosis, a condition which can be caused by the Hepatitis C virus (HCV). Dr. Cecil's Declaration, ¶ 3. If Hepatitis C is left untreated, it may lead to cirrhosis of the liver, cancer of the liver, and death. Id.

Until December 2001, Mr. Brash was housed at Union Correctional Institution under the care of Dr. Shah, a Gastroenterologist at the North Florida Reception Center employed by the Florida Department of Corrections. Verified Complaint, ¶ 12. Dr. Shah treated the plaintiff with Interferon with Ribaviron. Id.

A hepatitis patient is deemed cured when his viral load falls to zero. Although Mr. Brash responded favorably to treatment, the treatment did not eliminate the virus completely, his viral counts fell to less than 600IU/ml. Dr. Cecil's Declaration, ¶ 4. At the end of the 11 month treatment period, in August 2001, Dr. Shah charted that the plaintiff should be checked after 6 months for a liver profile and presumably be restarted on a treatment regimen for Hepatitis C. Verified Complaint, ¶ 13 and Medical Records. On October 10, 2001, Dr. Shah charted that Mr. Brash should be scheduled to see a Gastroenterologist by December 10, 2001. Id. Before Mr. Brash could

see a Gastroenterologist, Mr. Brash was transferred to Okeechobee Correctional Institution. Verified Complaint, ¶ 13.

Mr. Brash came under the care of defendant Wexford and its prison doctor, Dr. Bhadja, at Okeechobee Correctional Institution. Verified Complaint, ¶ 14. Another Gastroenterologist Consult was recommended for the plaintiff on January 23, 2002, this time by Dr. Bhadja. Id. The consult recommendation was denied by defendant David Rowe in corporate headquarters in Pittsburgh on January 28, 2002. Dr. Cecil's Declaration, ¶ 5. On January 30, 2002, Dr. Diaz, another Wexford prison doctor at Okeechobee Correctional Institution charted, "this patient [Mr. Brash] is a treatment failure. He should not be treated again. Follow up yearly for Hep C." Dr. Cecil's Declaration, ¶ 5.

Mr. Brash has not seen a Gastroenterologist after his medical care was assumed by defendants Wexford and Rowe from mid-December 2001 until the present despite the recommendations of three doctors, two of whom are employed by defendant Wexford and one by defendant Moore. Verified Complaint, ¶ 15.

Mr. Brash's condition is such that if he is not provided the FDA approved PEG Interferon with Ribavirin combination therapy, there is a 50%-50% chance that he will not survive another 10 years. Dr. Cecil's Declaration, ¶ 6.

Mr. Brash is a curable patient. Dr. Cecil's Declaration, ¶ 7. But since he has severe fibrosis, Mr. Brash needs treatment to prevent his premature death. Id. Cirrhosis, or a massive scarring of the liver, follows long-term infection from the

virus. Id. Cirrhosis leads to liver cancer or liver failure. Absent a transplant, death follows. Id.

Liver disease and especially end stage liver failure is a prolonged, and often gruesome, death. Id. As scar tissue replaces healthy cells, liver function starts to fail and a person may experience the following symptoms: exhaustion, fatigue, loss of appetite, nausea, weakness and weight loss. Id. These are usually early signs of liver failure which can lead to the complications of cirrhosis and end-stage liver disease. Id.

Mr. Brash's HCV virus will not be eradicated without treatment. Dr. Cecil's Declaration, ¶ 9. The acceptable treatment protocol available involves the use of interferon. Id. The goal of HCV therapy is permanent eradication of the virus in the serum. Id. Sustained virologic responses, the usual standard of successful therapy is defined as the absence of the HCV RNA in the serum during therapy and six months after the completion of therapy. Id. Sustained viral responders have a 97% chance of cure. Id. A patient who is cured will have a negative HCV-RNA for the rest of his or her life. Id.

In August 2001 the FDA approved the combination of Peginterferon and the nucleoside analogue Ribavirin for patients with chronic HCV infection. Dr. Cecil's Declaration, ¶ 10. This combination of Peginterferon plus Rebetol permits a sustained virologic response to approximately 40% in genotype 1 with higher rates in genotypes 2 and 3. Id. Mr. Brash is genotype 1. Id. The FDA approved Pegasys for treatment of HCV cirrhosis on

October 16, 2002. Id. Mr. Brash should start on Pegasys immediately. Id. Ribavirin should be added in January when the FDA approves it. Id. He should be treated for 18-24 months to prevent relapse when the treatment is completed. Id.

Since the approval of Pegylated interferon, its use has become the standard of care for treatment of HCV. Dr. Cecil's Declaration, ¶ 11. Pegylated Interferons are superior to ordinary Interferons. Id.

The chance of successful treatment is greater than 40% for Mr. Brash because he had a good response to interferon in the past. Dr. Cecil's Declaration, ¶ 12. He has an excellent chance of responding to Pegylated interferon. Id.

Unless Mr. Brash receives immediate treatment with Pegylated interferon and Ribaviron therapy, he will die a premature death due to liver failure or liver cancer. Dr. Cecil's Declaration, ¶ 13. If he is successfully treated, he has a normal life expectancy. Id.

In June 2002, Dr. Robert Smith, regional medical director for defendant Wexford in Miami recommended that Mr. Brash be restarted on PegIntron and Ribaviron therapy treatment. Medical Records. Mr. Brash was told that he could expect treatment to begin in 8 weeks. Verified Complaint, ¶ 21. In late June, Mr. Brash was informed that someone countered Dr. Smith's recommendation, and Mr. Brash would not be restarted on treatment as promised. Id.

Defendant David Rowe rejected Dr. Robert Smith's recommendation that the plaintiff receive PegIntron with Ribaviron treatment for Hepatitis C. Medical Records.

Plaintiff has used the established inmate grievance process seeking treatment for Hepatitis C, albeit without success. Verified Complaint, ¶ 23. Mr. Brash's attorneys and his sister have has also written personal letters to defendants requesting reconsideration that treatment be restarted without success. Id.

Defendants Wexford, Rowe, and Moore have refused to approve Mr. Brash's need for a consult with a Gastroenterologist and appropriate medication for the treatment of Hepatitis C for non-medical reasons just to save money. Verified Complaint, ¶ 24.

Despite the recommendations of three doctors that Mr. Brash have a Gastroenterologist consult, recommendations which were endorsed by two of the defendant Wexford's own doctors, and despite the recommendation of Wexford's own regional medical director Dr. Richard Smith of Miami that Mr. Brash be restarted on medication, defendant Rowe, the official at Wexford charged with the duty of determining whether consults and medical regimens should be approved, rejected the recommendation. Mr. Brash's prior history, as well as the opinions of Drs. Cecil and Stone, all point to a clear indication that this court order a Gastroenterologist consult and that the plaintiff be restarted on medication.

ARGUMENT

Plaintiff seeks a preliminary injunction to require the defendants to approve a Gastroenterologist consult and to immediately restart him on a medication regimen for his Hepatitis C. A preliminary injunction should issue if the plaintiff successfully demonstrates:

(1) a substantial likelihood that he will ultimately prevail on the merits;

(2) that he will suffer irreparable injury if the injunction is not issued;

(3) that the threatened harm to the plaintiff outweighs the potential harm to the opposing party; and

(4) that the injunction, if issued, would not be adverse to the public interest.

Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1561-62 (11th Cir. 1989), aff'd, 498 U.S. 479 (1991); Shatel Corp. v. Maota Lumber and Yacht Corp., 697 F.2d 1352, 1354-1355 (11th Cir. 1983); Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974). The entry or denial of a preliminary injunction is a decision within the discretion of the trial court. Haitian Refugee Center, Inc. v. Nelson, 872 F.2d at 1561.

There is a substantial likelihood of success on the merits. Refusal to approve the recommended consult with a Gastroenterologist and a medication regimen for Hepatitis C leads to potentially irremediable injury, namely liver failure and a premature death. No remedy at law can adequately compensate plaintiff for the loss of his liver caused by the refusal of defendants Wexford and Rowe to approve consult recommended by three prison doctors, and to restart him on a mediation regimen recommended by defendant Wexford's medical regional director. Only injunctive relief can provide a meaningful remedy for the plaintiff.

A. A SUBSTANTIAL LIKELIHOOD EXISTS THAT PLAINTIFF WILL PREVAIL ON THE MERITS

To prevail, plaintiff must establish that one or more of the defendants were deliberately indifferent to a serious medical need. A medical need is serious if it "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Duran v. Anaya, 642 F. Supp. 510, 524 (D.N.M. 1986). See also, Johnson v. Busbee, 953 F.2d 349, 351 (8th Cir. 1991); Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 208 (1st Cir. 1990). "The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment" supports a finding of seriousness. McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992). Twice, recommendations for a Gastroenterlogist consult have been rejected, and the recommendation that the plaintiff be restarted on a medication regimen has also been rejected.

A medical need is serious if absent treatment there is a risk of long-term or permanent injury. Greason v. Kemp, 891 F.2d 829, 836 (11th Cir. 1990). The risk here is even more grievous. If left untreated, plaintiff's Hepatitis C will cause Mr. Brash's liver to not function and, unless he gets a transplant, he will die prematurely.

The hallmark of deliberate indifference is knowledge of the need for care and the intentional refusal to provide that care. Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985). In the instant matter, each defendant is fully aware of plaintiff's need. Yet, with full knowledge, for a period of

nearly a year, defendants have failed and refused to provide necessary treatment. During this period of time, plaintiff's condition has steadily worsened.

Deliberate indifference can be evidenced in many ways. Where prison doctors and other prison officials ignore the recommendations of specialists, they can be found to be guilty of deliberate indifference. Harris v. Coweta County, 21 F.3d 388 (11th Cir. 1994), superseding 5 F.3d 507 (11th Cir. 1993)(failure to follow doctor's recommendation of a nerve conduction study); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to return patient to VA hospital for treatment for Agent Orange exposure). See also, Durmer v. O'Carroll, 991 F.2d 64 (3d Cir. 1993)(failure to provide prescribed physical therapy); Ellis v. Butler, 890 F.2d 1001 (8th Cir. 1989)(cancellation of appointment with knee specialist); Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991)(failure to act on an outside doctor's recommendation of immediate hospitalization); Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990)(failure of prison system's chief physician to ensure that a recommended transfer to a cardiology unit was carried out); Johnson v. Bowers, 884 F.2d 1053 (8th Cir. 1989) (failure to provide corrective surgery recommended by a prison doctor provides basis for injunctive relief even where jury finds no deliberate indifference on damages claim); Payne v. Lynaugh, 843 F.2d 177 (5th Cir. 1988)(failure to transfer prisoner to facility with oxygen equipment required for his emphysema); Lafaut v. Smith, 834 F.2d 389 (4th Cir. 1987)(failure to provide

rehabilitation therapy despite the recommendation of an orthopedic specialist); Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d 404 (9th Cir. 1985)(denial of knee surgery despite the repeated recommendations of physicians).

If prison officials send prisoners with special needs to outside specialists, they are obliged to carry out the specialists' orders. Hamilton v. Endell, 981 F.2d 1063, 1066 (9th Cir. 1992)(disregard of ear surgeon's direction not to transfer prisoner by airplane could constitute deliberate indifference); Washington v. Dugger, 860 F.2d at 1019-21 (failure to carry out recommendations of Veterans Administration hospital staff for prisoner exposed to Agent Orange could constitute deliberate indifference); Martinez v. Mancusi, 443 F.2d 921, 923-25 (2d Cir. 1970) (removal of surgical patient from hospital against doctor's orders could constitute deliberate indifference), cert. denied, 401 U.S. 983 (1971).

Defendants Wexford and Rowe have adopted the head in the sand approach: despite being under state contract to provide inmates with medical care, they are not doing so. As the Supreme Court held in Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1981, 128 L.Ed.2d 811 (1994):

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inferences from circumstantial evidence . . . and a factfinder may conclude

> that a prison official knew of a substantial risk from the very fact that the risk was obvious.

One Florida Department of Corrections doctor and two of defendant Wexford's own doctors have recommended that the plaintiff see a gastroenterologist and resume treatment for Hepatitis C.

Delaying treatment for a known, potentially fatal problem provides a foundation for a court to find deliberate indifference. Brown v. Hughes, 894 F.2d 1533 (11th Cir. 1990), cert. denied, 496 U.S. 928, 110 S.Ct. 2624, 110 L.Ed.2d 645 (1990) ("a deliberate delay on the order of hours in providing care for a serious and painful broken foot is sufficient to state a constitutional claim"); Carswell v. Bay County, 854 F.2d 454 (11th Cir. 1988) (failure of physician's assistant to notify jail doctor of medical problems).

When defendant Wexford's Regional Medical Director in Miami, Dr. Smith, ordered that the plaintiff resume treatment, his recommendation was countermanded by defendant Wexford's Vice President and Chief Medical Director in Pittsburgh, defendant Rowe, for financial, not medical reasons. Since several of the defendants' doctors have opined that treatment be resumed for the plaintiff, it is a fair inference that the only reason he has not been given the treatment is monetary. Failing to provide necessary medical care for non-medical reasons is, as the cases hold, deliberate indifference. Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985). Moreover, cost is not a defense. Hamm v. Dekalb County, 774 F.2d 1567, 1573 (11th Cir. 1985); Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977), rev'd on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). And see, Mitchell v. Untreiner, 421 F.Supp. 886, 896 (N.D. Fla. 1976) ("It can be succinctly stated that `[l]ack of funds is not an acceptable excuse for unconstitutional conditions of incarceration.'").

B. PLAINTIFF WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF

Defendants persist in refusing to approve plaintiff for treatment despite numerous inmate grievances, letters to the officials from the plaintiff's sister, and formal efforts of undersigned counsel. Absent intervention of the court, it is sure that plaintiff will continue to suffer from this progressive disease which, at some point — assuming that point has not been already reached, may become irreversible. No after-the-fact monetary remedy can cure plaintiff's injury. Money damages will not make the plaintiff whole if he eventually loses his liver and dies prematurely.

By refusing to approve the necessary treatment, as recommended by qualified specialists, defendants are guilty of deliberate indifference to plaintiff's serious medical needs. Where a deprivation of constitutional rights is involved, many courts hold that no further showing of irreparable harm is necessary. Here, however, plaintiff's injury is concrete and real. Absent injunctive relief, he has no way to obtain medical care that several specialists have deemed necessary. Instead, he will continue to suffer pain and discomfort, and the risk of significant permanent injury and eventually death, if relief is not provided by this Court.

C. THE HARM TO THE PLAINTIFF FAR OUTWEIGHS ANY HARM WHICH THE INJUNCTION MAY CAUSE

The harm to plaintiff is clear. On the other hand, defendants can show no legally recognizable harm whatsoever to themselves or others if they are required to take steps necessary to

provide plaintiff with treatment for Hepatitis C. That it may cost money to provide treatment is not the type of harm which would counsel against the granting of a preliminary injunction. Indeed, to permit defendants to defend against the granting of a preliminary injunction by arguing the relatively minimal cost here involved is to legitimatize their unconstitutional conduct.

Plaintiff has no adequate remedy at law. He has suffered and will continue to suffer irreparable injury absent injunctive relief. On the other hand, providing the necessary care will not harm defendants.

D. HARM TO DEFENDANTS OR THE PUBLIC GENERALLY

There simply can be no question of any harm to the defendants or the public by insuring that the defendants comply with the mandates of the Eighth Amendment. To the contrary, it is in the public's interest that our officials not believe themselves to be above the laws. As the late U.S. District Court Judge Charles Scott stated:

> A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser.

Costello v. Wainwright, 397 F.Supp. 20, 38 (M.D. Fla. 1975) (footnotes omitted).

CONCLUSION

Overall, there is a substantial likelihood that plaintiff will prevail on the merits; that he will continue to suffer irreparable injury if an injunction is denied; that granting the

injunction is unlikely to cause injury to others; and that the public interest can only be advanced by granting the injunction.

Plaintiff is without funds. There are no financial consequences to defendants should the issuance of a preliminary injunction later be reversed. Therefore, plaintiff requests that no bond for security be required. Orantes-Hernandez v. Smith, 541 F.Supp. 351, 385-86 n.42 (C.D. Cal. 1982).

Wherefore, for the foregoing reasons, plaintiff respectfully requests that this Court:

1. Promptly schedule a hearing;

2. Issue a writ of *habeas corpus ad testificandum* requiring the Warden at Okeechobee Correctional Institution to produce plaintiff at the hearing;

3. Issue a Preliminary Injunction ordering defendants to forthwith send plaintiff to a consult with a qualified gastroenterologist to reinstitute medication for his Hepatitis C;

4. Waive the posting of a bond for security; and

5. Grant such other relief as may be equitable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document has been furnished to Mitchel Chusid, Esq., Ritter Chusid Bivona & Cohen, L.L.P., 7000 West Palmetto park Road, Suite 305, Boca Raton, Florida 33433, counsel for the defendants Wexford and Rowe, and Louis Vargas, Esq., General Counsel, Florida Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500, counsel for defendant Moore by First Class U.S. Mail on December 6, 2002.

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By: Randall C. Berg, Jr., Esq.

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