NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2205

GREGORY BROWN,
Appellant

v.

CLINICAL DIRECTOR ELLEN MACE-LIEBSON;
ASSOCIATE WARDEN CYNTHIA ENTZEL

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-14-cv-00623)
District Judge: Honorable Malachy E. Mannion

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 8, 2019
Before: MCKEE, COWEN and RENDELL, Circuit Judges

(Opinion filed: July 9, 2019)

OPINION*

PER CURIAM

Pro se appellant Gregory Brown, a federal prisoner proceeding in forma pauperis, appeals from the District Court's order entering summary judgment against him. Brown

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

also appeals from several other orders that the District Court entered during the course of the litigation. For the reasons discussed below, we will affirm.

I.

Because we write primarily for the parties, we will recite only the facts necessary for our discussion. In June 2013, Brown injured his back while lifting weights at FCI-Schuylkill, where he was incarcerated. Since then, Brown has experienced severe pain, numbness, and swelling in his back, hip, knee, shin, and foot. On July 2, 2013, Brown was examined by Physician's Assistant ("PA") Lingenfelter, who prescribed pain medication and the use of a muscle rub. About a week later, Brown was examined by PA Rush, who noted a possible lumbar strain and recommended stretching and rest for four to six weeks. On July 19, 2013, Brown was examined during sick call. He asked to be evaluated by a physician and to have an MRI scheduled. On July 23, Brown was again examined by PA Rush, who provided pain medication and ordered an X-ray of Brown's spine.

On July 29, 2013, Brown submitted an inmate request to the defendants, Clinical Director Ellen Mace-Liebson and Associate Warden Cynthia Entzel. Brown requested to be examined by a physician, but Dr. Mace-Liebson responded that Brown had to first complete the course of evaluation with his assigned providers. In August 2013, Brown approached Entzel on multiple occasions to discuss his medical care. Entzel responded that she had emailed Dr. Mace-Liebson and that she was looking into the issue, but that Dr. Mace-Liebson was away at the moment.

On August 16, 2013, PA Rush examined Brown, ordered an X-ray of Brown's knee, and discussed possible treatment options, including the use of oral steroids, until Brown could be evaluated by Dr. Mace-Liebson. On September 3, 2013, Brown was scheduled to see Dr. Mace-Liebson, but she was not at work that day. On September 17, 2013, Brown was examined by Dr. Mace-Liebson. She informed Brown that an MRI was not clinically indicated and that Brown should continue with conservative treatments such as rest and stretching.

In October 2013, Brown sent another inmate request to Dr. Mace-Liebson. Brown restated his medical issues and requested an MRI. Dr. Mace-Liebson responded that Brown's concerns should be handled through his sick call provider, who would refer him to a physician if necessary. In December 2013, Brown sent an inmate request to Entzel. Brown requested an MRI and wrote that he believed that Dr. Mace-Liebson may have been retaliating against him for filing grievances about his medical care. Entzel responded that, based on Dr. Mace-Liebson's medical examination and expertise, an MRI was not indicated at that time.

On January 14, 2014, Brown was again examined by Dr. Mace-Liebson. She told Brown that an MRI was still not clinically indicated. That was Brown's last examination by Dr. Mace-Liebson, as he was transferred from FCI-Schuylkill to FCI-Edgefield on August 25, 2014. Before his transfer, Brown was examined by other FCI-Schuylkill medical staff on February 6, 2014, and on July 15, 2014. Brown was again

recommended conservative treatments, including rest, weight loss, and stretching exercises.

In February 2015, after his transfer and while incarcerated at FCI-Edgefield, Brown had his first MRI. Based on that MRI, doctors treating Brown determined that his back was stable and that surgery was not recommended. They provided Brown with epidural steroid injections, which Brown acknowledges were similar to the oral steroids that he was offered at FCI-Schuylkill. Brown had a second MRI in February 2016. In September 2016, an orthopedic surgeon determined that Brown's symptoms were not improving from the course of conservative treatment, and that surgery might be indicated. Brown had a third MRI and a consult with the West Virginia University Department of Neurosurgery in early 2017. No surgery was scheduled or recommended at that time.

In April 2014, before he was transferred from FCI-Schuylkill, Brown filed a complaint in the District Court against Entzel and Dr. Mace-Liebson, raising Eighth Amendment claims pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). The District Court dismissed the claims against Entzel but permitted the claims against Dr. Mace-Liebson to proceed. Brown then filed an array of discovery motions, as well as a motion to recuse the District Judge, a motion to appoint an expert, and several motions for appointment of counsel.

In a thorough opinion addressing Brown's discovery motions, the District Court reviewed the written discovery in this case. The District Court determined that Dr. Mace-Liebson provided adequate responses to all 25 interrogatories that had been properly

served by Brown, and that Dr. Mace-Liebson provided adequate responses to most, but not all, of Brown's document requests. Thus, the District Court granted Brown's motion to compel, in part, and ordered Dr. Mace-Liebson to provide further responses regarding her work schedule and any grievances that resulted in discipline against her. The District Court denied, without prejudice, Brown's motion to conduct depositions, as he failed to identify a deposition officer pursuant to Federal Rules of Civil Procedure 30 and 31. The District Court denied Brown's motion for recusal based on the District Judge's prior service as an Assistant United States Attorney. The District Court also denied Brown's motions for appointment of counsel.

In September 2017, the District Court granted summary judgment in favor of Dr. Mace-Liebson. Brown then filed a motion for reconsideration, which he supplemented with evidence showing that he had recently been scheduled for back surgery. The District Court denied the motion for reconsideration in May 2018. This appeal ensued.

II.

We have jurisdiction under 28 U.S.C. § 1291. "We review district court decisions regarding both summary judgment and dismissal for failure to state a claim under the same de novo standard of review." Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 826 (3d Cir. 2011) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Summary judgment is proper where,

viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Kaucher v. County of Bucks, 455 F.3d 418, 422–23 (3d Cir. 2006). "We generally review the District Court's denial of reconsideration for abuse of discretion. However, to the extent that the denial of reconsideration is predicated on an issue of law, such an issue is reviewed de novo; to the extent that the District Court's disposition of the reconsideration motion is based upon a factual finding, it is reviewed for clear error." Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999) (citations omitted). We may affirm on any basis supported by the record. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

III.

To succeed on an Eighth Amendment medical needs claim, "a plaintiff must make (1) a subjective showing that 'the defendants were deliberately indifferent to [his or her] medical needs' and (2) an objective showing that 'those needs were serious.'" Pearson v. Prison Health Serv., 850 F.3d 526, 534 (3d Cir. 2017) (alteration in original) (quoting Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999)).[1] Prison officials can "act deliberately indifferent to a prisoner's serious medical needs by 'intentionally denying or

[1] The parties do not dispute that Brown's medical needs were serious. See Atkinson v. Taylor, 316 F.3d 257, 266 (3d Cir. 2003) ("this Court has defined a medical need as serious if it has been diagnosed by a physician as requiring treatment").

delaying access to medical care or interfering with the treatment once prescribed.'" Id. (quoting Estelle v. Gamble, 429 U.S. 97, 104–05 (1976)). But "mere disagreement as to the proper medical treatment" is insufficient to support an Eighth Amendment claim. Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987). Thus, "when medical care is provided, we presume that the treatment of a prisoner is proper absent evidence that it violates professional standards of care." Pearson, 850 F.3d at 535 (citing Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990) ("[I]t is well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights.")).

Here, the District Court's dismissal of the claims against Entzel was proper. A non-medical prison official is not charged with deliberate indifference for withholding adequate medical care from a prisoner being treated by medical personnel "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner." Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004). Although Brown alleged that he filed grievances with Entzel and complained to her regarding his request for an MRI, Brown also alleged that Entzel reviewed the issue and deferred to the medical staff's professional judgment. Brown failed to allege that Entzel, operating in her supervisory capacity as the Associate Warden, had any reason to believe that the prison doctors or their assistants were mistreating Brown.[2]

[2] The District Court did not err in denying leave to amend. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002). Brown has waived any argument that his

We also agree with the District Court's determination that Dr. Mace-Liebson was entitled to summary judgment because Brown produced no evidence that would support a finding that she acted with deliberate indifference. The undisputed facts show that Dr. Mace-Liebson consistently exercised her professional judgment during the course of Brown's treatment at FCI-Schuylkill in 2013 and 2014. Brown's core arguments—that Dr. Mace-Liebson should have provided him an MRI or surgery sooner—constitute "mere disagreement as to the proper medical treatment." Lanzaro, 834 F.2d at 346. The facts in the record regarding Brown's treatment at FCI-Schuylkill and after he left FCI-Schuylkill do not suggest that Mace-Liebson delayed or denied any treatment for non-medical reasons, or that she otherwise exposed Brown to undue suffering, as other physicians pursued a similar course of conservative treatment for years after Brown left Dr. Mace-Liebson's care. Nor did Brown marshal any evidence showing that Dr. Mace-Liebson "so deviated from professional standards of care that it amounted to deliberate indifference." Pearson, 850 F.3d at 541 (quotation marks and citation omitted).[3]

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complaint raised a retaliation claim under the First Amendment. United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005) (issues not raised on appeal are waived).

[3] The District Court did not abuse its discretion in denying: (1) Brown's motion for leave to file a sur-reply in opposition to the motion for summary judgment; or (2) Brown's motion to strike two declarations filed in support of Dr. Mace-Liebson's motion for summary judgment. See generally Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 276 (3d Cir. 2001); In re Fine Paper Antitrust Litig., 685 F.2d 810, 817 (3d Cir. 1982). Brown did not show that his proposed sur-reply would have raised any new evidence or meritorious argument, nor did he establish any grounds to strike the declarations.

The District Court properly denied Brown's motion for reconsideration of the District Court's order granting summary judgment to Mace-Liebson, as Brown failed to establish "at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Cafe, 176 F.3d at 677. While Brown sought to present new evidence regarding his planned surgery, in order to secure relief, Brown had to show that the evidence "(1) [was] material and not merely cumulative, (2) could not have been discovered previously through the exercise of reasonable diligence and (3) would probably have changed the outcome" of the District Court's decision. Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 264 F.3d 302, 309–10 (3d Cir. 2001).

Ultimately, Brown failed to show that the new evidence was material and that it would have changed the outcome of the District Court's decision. The fact that physicians recommended surgery[4] in late 2017—several years after Brown left Dr. Mace-Liebson's care—is insufficient to create a genuine dispute of material fact regarding Dr.

[4] On appeal, Brown asserts that he had surgery in 2018. Brown has not filed a motion to supplement the record on appeal, but even if he had, that evidence would not change our analysis. See generally Burton v. Teleflex Inc., 707 F.3d 417, 435 (3d Cir. 2013).

Mace-Liebson's deliberate indifference. Thus, the District Court properly denied the motion for reconsideration.[5]

IV.

The District Court did not abuse its discretion in ruling on the remaining issues that Brown has challenged on appeal, including, first, Brown's motion for recusal. See United States v. Di Pasquale, 864 F.2d 271, 278 (3d Cir. 1988). Pursuant to 28 U.S.C. § 455(b)(3), a judge must disqualify himself "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." With regard to a judge who formerly served in the United States Attorney's Office, we have stated that, "absent a *specific showing* that that judge was previously involved with a case while in the U.S. Attorney's office that he or she is later assigned to preside over as a judge, § 455(b)(3) does not mandate recusal." Di Pasquale, 864 F.2d at 279 (emphasis in original). Brown has offered no evidence indicating the District Judge's involvement with Brown's case during the Judge's employment as an Assistant United States Attorney over twenty years ago. Nor did Brown establish that a reasonable person would conclude that the District Judge's impartiality might be

[5] Brown also argued that the District Court's denial of Dr. Mace-Liebson's motion to dismiss was the "law of the case" and prevented a grant of summary judgment in her favor. That argument is meritless. See United States ex rel. Petratos v. Genentech Inc., 855 F.3d 481, 493 (3d Cir. 2017).

questioned based on his prior employment as an Assistant United States Attorney. See generally Liteky v. United States, 510 U.S. 540, 555 (1994).

Second, the District Court did not abuse its discretion in denying Brown's motions for appointment of counsel. See Tabron v. Grace, 6 F.3d 147, 158 (3d Cir. 1993). The District Court identified the appropriate considerations and properly concluded that it was unnecessary to appoint counsel, as Brown had been adeptly litigating his case. See id. at 155–58.

Finally, the District Court did not abuse its discretion in making its discovery rulings. See Anderson v. Wachovia Mortg. Corp., 621 F.3d 261, 281 (3d Cir. 2010) ("We review a district court's discovery orders for abuse of discretion, and will not disturb such an order absent a showing of actual and substantial prejudice."). The District Court thoroughly considered the various discovery issues and properly granted Brown's motion to compel in part.[6] The District Court's denial of Brown's motion to take depositions was also proper, as Brown failed to identify, or pay the costs for, a deposition officer. See Fed. R. Civ. P. 31, 32. Brown was not entitled to take depositions or to retain an expert at the government's expense. See Tabron, 6 F.3d at 158–59.

[6] The District Court did not abuse its discretion in denying Brown's subsequent motion to compel and for sanctions. Dr. Mace-Liebson complied with the District Court's order granting the original motion to compel, as she produced additional documents, including her time sheets, and she provided a response that no grievances against her have ever been substantiated.

Brown has not shown that he was denied any discovery that could have advanced his claims. See Anderson, 621 F.3d at 281.

Accordingly, we will affirm the judgment of the District Court.[7]

[7] Brown's "Motion to Schedule Case for Disposition" is denied as unnecessary. As the Appellees have not filed a brief, we decide this appeal without considering any briefing from them.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2205

GREGORY BROWN,
Appellant

v.

CLINICAL DIRECTOR ELLEN MACE-LIEBSON;
ASSOCIATE WARDEN CYNTHIA ENTZEL

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-14-cv-00623)
District Judge: Honorable Malachy E. Mannion

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 8, 2019
Before: MCKEE, COWEN and RENDELL, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on July 8, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 16, 2018, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 9, 2019

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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July 9, 2019

Gregory Brown
Talladega FCI
Box PMB 1000
Talladega, AL 35160

RE: Gregory Brown v. Ellen Mace-Liebson, et al
Case Number: 18-2205
District Court Case Number: 3-14-cv-00623

ENTRY OF JUDGMENT

Today, **July 09, 2019** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.

Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: Timothy McIntyre
Timothy McIntyre, Case Manager
267-299-4953

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY BROWN,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-14-623
	:	
ELLEN MACE-LIEBSON, et al.,	:	(Judge Kosik)
	:	
Defendants	:	

MEMORANDUM

Plaintiff, Gregory Brown ("Brown"), is currently confined at the Federal Correctional Institute at Edgefield, South Carolina. The matter proceeds on an amended Bivens[1] complaint filed pursuant to 28 U.S.C. § 1331. Brown claims Defendants were deliberately indifferent to his serious medical needs while housed at the Federal Correctional Institution at Schuylkill ("FCI-Schuylkill"), Pennsylvania. . Pending is Defendants' motion to dismiss and for summary judgment[2]

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[1] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Bivens stands for the proposition that "a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." Butz v. Economou, 438 U.S. 478, 504 (1978).

[2] Because Defendants filed this motion as a combined motion to dismiss and motion for summary judgment prior to the issuance of any scheduling order, and because the court entered an order staying discovery and denying Plaintiff's discovery motions without prejudice to refile (Doc. 54), the instant motion will be

(Doc. 29).

I. Allegations in Amended Complaint

Defendants in this matter are FCI-Schuylkill employees Ellen Mace-Liebson, Clinical Director, and Cynthia Entzel, Associate Warden. Brown alleges that he was weight-lifting on July 2, 2013, when he experienced pain in his lower left back and was unable to straighten his left leg. With the assistance of a cane, he walked to Health Services where he complained of back pain, a burning sensation in his left shin and problems with his knee. Brown sought medical attention, but claims he was not examined and told to purchase medication at the commissary. He states that he had no money.

On July 8, 2013, Brown again reported to sick call with the same complaints and difficulty walking. He reported to sick call the following day with the same complaints, along with swelling and muscle spasms in his thigh area. (Doc. 15 at 3.) On this occasion, a physician's assistant thought Brown's problem was "disk related" and "affecting his nerves." (Id.) Brown again returned to sick call on July 19, 2013, still complaining of lower left back pain and numbness/swelling in his left shin area. He requested to be seen by Defendant, Dr. Mace-Liebson, and to have an MRI

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addressed only as one to dismiss, and Plaintiff given the opportunity to conduct discovery in an attempt to oppose any summary judgment motion filed by Defendant Mace-Liebson. An appropriate summary judgment motion may be filed after Plaintiff has been afforded the opportunity to conduct discovery with respect to his Eighth Amendment claims against Mace-Liebson.

scheduled. He did not wish to be seen by a physician's assistant. Rather, he requested to be placed on the call-out list. (Id. at 4.)

On July 23, 2013, Brown returned to sick call for the fifth time. He filled out a form indicating he was triaged multiple times already, but was never given a diagnosis. He requested that an evaluation be performed by Defendant Mace-Liebson. On July 29, 2013, Brown hand-delivered an Inmate Request to Defendant Entzel seeking intervention. Defendant Mace-Liebson responded thereto, and informed Brown that he had been triaged on three (3) occasions and evaluated on a fourth (4th) occasion, and that he had not completed his work-up or the expected course of treatment. He was also informed that a further evaluation was not required at that time, and that he was to complete the course of evaluation with his assigned provider. (Id.)

Brown went to sick call again on July 30, 2013. On the sick call form, he listed the same complaints, but also stated he had a swollen knee and extreme discomfort in his left hip and thigh area. (Id. at 5.) Again, he requested to be seen by a physician. A physician's assistant responded in writing stating that Brown had been referred for an x-ray and diagnostic studies, and had been educated with respect to exam findings, including diagnosis, prognosis, treatment and follow-up. He was also informed that he would be seen by a physician's assistant at a future call-out. (Id. at 5.)

The first week of August, Brown approached Defendant Entzel asking if Entzel

was aware of Mace-Liebson's response to his inmate request directed to Entzel. Brown told Entzel that Mace-Liebson was either misinformed or deliberately misrepresenting the events. Brown also told Entzel that he had not yet been evaluated, and only received clinical encounters. Brown admits that he was given an x-ray on August 6, 2013.

On August 16, 2013, Brown submitted a request to Entzel documenting his conversation with him on August 3, 2013. In particular, Brown said he approached Entzel outside the Chow Hall, and asked Entzel if he made any inquiries on Brown's behalf regarding the continued refusal to schedule him for an examination by Defendant Mace-Liebson for the problems he was enduring. According to Brown, Entzel said he emailed Mace-Liebson and was looking into it, but that Mace-Liebson was away. In light of the foregoing, Brown asked why he was scheduled to be seen by a PA on August 16, 2013.

On August 16, 2013, Brown was scheduled to see his assigned primary care provider - a physician's assistant. Brown informed the PA that he thought he had a herniated disk and damage to his sciatica nerve, and therefore wanted to be seen by Mace-Liebson. The PA said he would submit the request, but told Brown to purchase Capsaicin Cream from the commissary. Another x-ray was performed at some later point. Brown alleges he was scheduled to be seen by Mace-Liebson on September 3, 2013, but Mace-Liebson was not at work that day. He was subsequently evaluated by

Mace-Liebson on September 16, 2013. He received chiropractic realignment and an order allowing his mattress to be placed on the floor. (Id. at 7.)

Brown emailed an Inmate Request to Mace-Liebson on October 22, 2013, restating his problems, seeking a cure and requesting an MRI. (Id.) He admits to having chiropractic measures performed by Mace-Liebson on September 16, 2013, and being told that over-the-counter medications might help the pain. On October 30, 2013, Mace-Liebson responded telling Brown to take the matter up with his provider through sick call. Brown sent back a message stating that he thought Mace-Liebson, as Clinical Director, was the appropriate person to treat him since he had a continuing problem. (Doc. 15 at 8.) On November 7, 2013, Mace-Liebson sent Brown a message stating that Brown's sick call provider would refer him if necessary.

Approximately a week later, Brown went to sick call for the seventh time and listed his problems. The PA, via institutional mail, told him he would be scheduled for an appointment with him, and that his next appointment with Defendant Mace-Liebson was in December. On November 21, 2013, Brown was evaluated by the PA and prescribed predisone. (Id.)

On December 23, 2013, Brown again sent Defendant Entzel an Inmate to Staff Request seeking his intervention to have Defendant Mace-Liebson order him an MRI. (Id. at 9.) The following day, Entzel responded telling Brown that an MRI would not be scheduled, since Brown failed to stop weightlifting and exercising as advised. On

this same date, Brown replied to Entzel that Defendant Mace-Liebson misinformed him, that he had not gone against the advice he was given, and that the MRI was needed. (Id. at 9.) Brown believed Mace-Liebson may be retaliating against him for filing grievances about his medical needs. He again requested that the matter be investigated.[3]

On January 24, 2014, Brown again went to sick call and said he had been there on at least seven (7) occasions since July 2, 2013, with the same complaints. He complained of pain and suffering without medication, and continuous attempts to have Mace-Liebson schedule an MRI. According to Brown, the x-rays revealed damage to his L-4 and L-5 lumbar region, and that he was suffering from sciatic nerve disorder. Yet, despite seven (7) sick call visits and two (2) requests to Entzel, Defendants failed to act to relieve his pain and suffering. (Id. at 10.) As such, he maintains that Defendants were deliberately indifferent to his serious medical needs. Brown seeks compensatory, punitive and injunctive relief.

II. Motion to Dismiss Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When ruling on a motion to dismiss under Rule 12(b)(6),

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[3] Although Brown mentions the word "retaliation," he asserts no facts in support of a retaliation claim and does not allege retaliation as a ground in the amended complaint. As such, retaliation will not be addressed.

the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187, 190 (3d Cir. 2009)(quoting Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)); see also Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007)(quoting Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005)).

Federal notice and pleading rules require the complaint to provide "the defendant notice of what the ... claim is and the grounds upon which it rests." Phillips, 515 F.3d at 232 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). To test the sufficiency of the complaint in the face of a Rule 12(b)(6) motion, the court must conduct a three-step inquiry. See Santiago v. Warminster Twp., 629 F.3d 121, 130-31 (3d Cir. 2010). In the first step, "the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'" Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1947, 173 L. Ed. 2d 868 (2009)). Next, the factual and legal elements of a claim should be separated; well-pleaded facts must be accepted as true, while mere legal conclusions may be disregarded. Id.; see also Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009). Once the well-pleaded factual allegations have been isolated, the court must determine whether they are sufficient to show a "plausible claim for relief." Ashcroft v. Iqbal, 556 U.S. 662,

129 S. Ct. at 1950, 173 L. Ed. 2d 868 (citing Twombly, 550 U.S. at 555 (requiring plaintiffs to allege facts sufficient to "raise a right to relief above the speculative level"). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. 662, 129 S. Ct. at 1949, 173 L.Ed.2d 868. When the complaint fails to present a prima facie case of liability, however, courts should generally grant leave to amend before dismissing a complaint unless any amendment would be futile. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116-17 (3d Cir. 2000).

III. Discussion

In his amended complaint, Brown alleges that Defendants violated the Eighth Amendment because they were deliberately indifferent to his serious medical need. Personal involvement in the alleged wrongdoing is necessary for the imposition of liability in a civil rights action. Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005); Sutton v. Rasheed, 323 F.3d 236, 249-50 (3d Cir. 2003). Brown cannot base his claims on the doctrine of respondeat superior. Plaintiff must demonstrate that each Defendant was personally involved in the alleged wrongful actions either by actual conduct, or knowledge of and acquiescence in the wrongful actions. Rode v. Dellarciprete, 845 F.2d 1195, 1207-08 (3d Cir. 1988). Thus, a mere linkage in the prison chain of command is not sufficient to demonstrate personal involvement.

Courts assess inadequate medical care claims under the familiar "deliberate indifference" test set forth in Estelle v. Gamble, 429 U.S. 97, 103-05 (1976). Under this standard, "evidence must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need." Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003(citing Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999)). A serious medical need is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987). For purposes of this Memorandum, the court will assume Brown had a serious medical need.

The "deliberate indifference" standard requires that the prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994); Natale, 318 F.3d at 582. The Third Circuit has found "deliberate indifference" in a variety of circumstances, including where: (1) "there was objective evidence that a plaintiff had a serious need for medical care, and prison officials ignored that evidence", and (2) "where necessary medical treatment is delayed for non-medical reasons." Natale, 318 F.3d at 582 (internal citations,

quotations, and brackets omitted). Deliberate indifference to a serious medical need involves the "unnecessary and wanton infliction of pain," Estelle, 429 U.S. at 104 and can also be evidenced by the denial of prescribed medical treatment, the denial of reasonable requests for treatment that results in suffering or risk of injury, Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993), or "persistent conduct in the face of resultant pain and risk of permanent injury," White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990).

However, it is also clear that mere misdiagnosis of a condition or negligent treatment provided for a condition, is not actionable under the Eighth Amendment because medical malpractice standing alone is not a constitutional violation. Estelle, 429 U.S. at 106. Deliberate indifference is generally not found when some significant level of medical care has been offered to an inmate, see Gindraw v. Dendler, 967 F. Supp. 833, 836 (E.D. Pa. 1997), or where claims are based upon the level of professional care that an inmate has received, see Ham v. Greer, 269 F. App'x 149 (3d Cir. 2008). Furthermore, it is well-settled that an inmate's dissatisfaction with a course of medical treatment, standing alone, does not give rise to a viable Eighth Amendment claim. See Gause v. Diguglielmo, 339 F. App'x 132 (3d Cir. 2009); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979).

Prison officials, who are not physicians, cannot be considered deliberately indifferent simply because they failed to respond to the medical complaints of a

prisoner who was already being treated by medical personnel of the prison. Durmer v. O'Carroll, 991 F.2d 64, 69 (3d Cir. 1993). Absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference. Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004). Further, participation in the after-the-fact review of a grievance is not enough to establish personal involvement. See Rode, 845 F.2d at 1208 (finding the filing of a grievance is not enough to show the actual knowledge necessary for personal involvement).

In the instant case, Defendant Entzel was only operating in her supervisory capacity as the Associate Warden. Although Brown may have advised her verbally on one occasion, and in writing on two occasions, that he was not receiving the medical care he desired, and that he wanted to be seen by Defendant Mace-Liebson and have an MRI ordered, Entzel was aware that Brown was attending sick call and being provided treatment by the medical personnel at FCI-Schuylkill. Entzel was not medical personnel, and relied on the decisions being made with respect to Brown's care. Under Durmer, Entzel cannot be found to have the requisite personal knowledge, and therefore is subject to dismissal from this action.

Without passing judgment as to the ultimate success of Plaintiff's claims against Defendant Mace-Liebson, in construing the complaint in the light most

favorable to Brown, the court will allow said claims to proceed at this juncture. The court finds that Brown has at least alleged sufficient facts in the complaint to allow his claim against Mace-Liebson to proceed and to permit Brown to conduct discovery in an attempt to oppose any summary judgment motion refiled by Mace-Liebson. Discovery is permitted to take place between Brown and Defendant Mace-Liebson for three (3) months from the date of this Memorandum. At that point, the parties may file appropriate summary judgment motions within thirty (30) days. While the court understands that Defendant has already filed a request for summary judgment, Plaintiff has not been granted the opportunity to conduct discovery, even though in opposition he has submitted his affidavit and some documentary evidence. In fact, on several occasions he has filed requests to file addendums nunc pro tunc. These requests will be denied without prejudice at this time. (Docs. 66-68.) Brown can certainly use these documents in his efforts to oppose any summary judgment motion refiled by Mace-Liebson.[4] An appropriate order follows.

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[4] While the court originally stated it would consider the evidence offered by Brown in deciding Defendants' motion, the court referenced the motion as one to dismiss, or in the alternative, for summary judgment (emphasis added). Pending is Defendants' combined motion to dismiss and for summary judgment. The court finds it premature at this time to consider a request for the entry of summary judgment when Brown's request for discovery was originally denied without prejudice. As such, the exhibits attached to Document 53, as well as those submitted nunc pro tunc (Docs. 66-68) will not be considered at this time. Rather, Brown may submit them when opposing any summary judgment motion refiled by Defendant Mace-Liebson.

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY BROWN,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-14-623
	:	
ELLEN MACE-LIEBSON, et al.,	:	(Judge Kosik)
	:	
Defendants	:	

ORDER

AND NOW, THIS 15th DAY OF MARCH, 2016, in accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. The motion to dismiss and for summary judgment (Doc. 29) is **construed solely as a motion to dismiss and is granted in part and denied in part.** The motion is **granted only to the extent that** Defendant Entzel is dismissed from this action. All claims set forth in this action against Defendant Entzel are dismissed in their entirety. The motion is **denied in all other respects**. The matter will proceed against Defendant Mace-Liebson only.

2. Discovery is permitted to take place within the next three (3) months. Any summary judgment motion may be filed within thirty (30) days from the close of discovery.

3. Plaintiff's requests to submit addendums (Docs. 66-68) are **denied without prejudice**.

s/Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

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

GREGORY BROWN,	:	**CIVIL NO. 3:14-CV-623**
	:	
Plaintiff,	:	**(Judge Kosik)**
	:	
v.	:	
	:	**(Magistrate Judge Carlson)**
CLINICAL DIR. MACE-LIEBSON, et al.,	:	
	:	
	:	
Defendants.	:	

REPORT AND RECOMMENDATION[1]

I. Factual Background

This case is a federal prisoner *pro se* civil rights lawsuit. Currently, there is a motion to dismiss, or in the alternative, for summary judgment pending in this case. (Doc. 29.) The plaintiff has opposed this motion, and in connection with that opposition has also filed motion for an order directing greater law library access. (Doc. 47.) Since the current, potentially dispositive motion has been fully briefed by the parties, and there is no other immediate matter pending in this case which would

[1]The parties are advised that, pursuant to 28 U.S.C. § 636, the district court has orally referred the above-captioned case to the undersigned for pre-trial management, resolution of non-dispositive motions, and preparation of reports and recommendations on potentially dispositive matters.

require additional or unusual law library access, it is not entirely clear why the plaintiff seeks this relief at present. In any event, the defendants have opposed this motion, which would call upon the Court to regulate the details of prison administration as it relates to scheduling Brown's access to the prison law. Because the motion seeks some form of mandatory relief from prison officials we will treat this motion as a motion for preliminary injunction. Construed in this fashion, for the reasons set forth below, it is recommended that the motion be denied.

II. Discussion

A. Brown is Not Entitled to a Preliminary Injunction Governing Law Library Access

This Court has an obligation to carefully assess inmate *pro se* pleadings, like those filed here, which seek extraordinary, or emergency relief, in the form of preliminary injunctions. Such requests for immediate injunctive relief are governed by Rule 65 of the Federal Rules of Civil Procedure and are judged against exacting legal standards. As the United States Court of Appeals for the Third Circuit has explained: "Four factors govern a district court's decision whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief, (3) whether granting preliminary relief will result in even greater harm

to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994) (quoting SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1985)). See also Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 170-71 (3d Cir.2001); Emile v. SCI-Pittsburgh, No. 04-974, 2006 WL 2773261, *6 (W.D.Pa. Sept. 24, 2006)(denying inmate preliminary injunction).

A preliminary injunction is not granted as a matter of right. Kerschner v. Mazurkewicz, 670 F.2d 440, 443 (3d Cir. 1982)(affirming denial of prisoner motion for preliminary injunction seeking greater access to legal materials). It is an extraordinary remedy. Given the extraordinary nature of this form of relief, a motion for preliminary injunction places precise burdens on the moving party. As a threshold matter, "it is a movant's burden to show that the "preliminary injunction must be the only way of protecting the plaintiff from harm." Emile, 2006 WL 2773261, at * 6 (quoting Campbell Soup Co. v. ConAgra, Inc., 977 F .2d 86, 91 (3d Cir.1992)). Thus, when considering such requests, courts are cautioned that:

> "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis deleted). Furthermore, the Court must recognize that an "[i]njunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case." Plain Dealer Publishing Co. v. Cleveland Typographical Union # 53, 520 F.2d

> 1220, 1230 (6th Cir.1975), cert. denied, 428 U.S. 909 (1977). As a corollary to the principle that preliminary injunctions should issue only in a clear and plain case, the Court of Appeals for the Third Circuit has observed that "upon an application for a preliminary injunction to doubt is to deny." Madison Square Garden Corp. v. Braddock, 90 F.2d 924, 927 (3d Cir.1937).

Emile, 2006 WL 2773261, at *6.

Accordingly, for an inmate to sustain his burden of proof that he is entitled to a preliminary injunction under Fed.R.Civ.P. 65, he must demonstrate both a reasonable likelihood of success on the merits, and that he will be irreparably harmed if the requested relief is not granted. Abu-Jamal v. Price, 154 F.3d 128, 133 (3d Cir. 1998); Kershner, 670 F.2d at 443. If the movant fails to carry his burden on either of these elements, the motion should be denied since a party seeking such relief must "demonstrate *both* a likelihood of success on the merits and the probability of irreparable harm if relief is not granted." Hohe v. Casey, 868 F.2d 69, 72 (3d Cir. 1989)(emphasis in original), (quoting Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987)).

In addition, with respect to the second benchmark standard for a preliminary injunction, whether the movant will be irreparably injured by denial of the relief, in this context it is clear that:

> Irreparable injury is established by showing that plaintiff will suffer harm that "cannot be redressed by a legal or an equitable remedy following trial." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801

> (3d Cir.1989) ("The preliminary injunction must be the only way of protecting the plaintiff from harm"). Plaintiff bears this burden of showing irreparable injury. Hohe v. Casey, 868 F.2d 69, 72 (3d Cir.), *cert. denied,* 493 U.S. 848, 110 S.Ct. 144, 107 L.Ed.2d 102 (1989). In fact, the plaintiff must show *immediate* irreparable injury, which is more than merely serious or substantial harm. ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir.1987). The case law provides some assistance in determining that injury which is irreparable under this standard. "The word irreparable connotes 'that which cannot be repaired, retrieved, put down again, atoned for ...'." Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir.1994) (citations omitted). Additionally, "the claimed injury cannot merely be possible, speculative or remote." Dice v. Clinicorp, Inc., 887 F.Supp. 803, 809 (W.D.Pa.1995). An injunction is not issued "simply to eliminate the possibility of a remote future injury ..." Acierno, 40 F.3d at 655 (citation omitted).

Messner, 2009 WL 1406986, at *4 .

Furthermore, in assessing a motion for preliminary injunction, the court must also consider the possible harm to other interested parties if the relief is granted. Kershner, 670 F.2d at 443. In addition, a request for injunctive relief in the prison context must be viewed with great caution because of the intractable problems of prison administration. Goff v. Harper, 60 F.3d 518,520 (8th Cir. 1995). Finally, a party who seeks an injunction must show that the issuance of the injunctive relief would not be adverse to the public interest. Emile, 2006 WL 2773261, at * 6 (citing Dominion Video Satellite, Inc. v. Echostar Corp., 269 F.3d 1149, 1154 (10th Cir.2001)).

In the past, inmates have frequently sought preliminary injunctive relief compelling prison officials to take certain actions with respect to them during the pendency of a lawsuit. Yet, such, requests, while often made, are rarely embraced by the courts. Instead, courts have routinely held that prisoner-plaintiffs are not entitled to use a motion for preliminary injunction as a vehicle to compel prison officials to provide them with specific relief and services pending completion of their lawsuits. See, e.g., Messner v. Bunner, No. 07-112E, 2009 WL 1406986 (W.D.Pa. May 19, 2009)(denying inmate preliminary injunction); Brown v. Sobina, No. 08-128E, 2008 WL 4500482 (W.D.Pa. Oct. 7, 2008)(denying inmate preliminary injunction); Emile v. SCI-Pittsburgh, No. 04-974, 2006 WL 2773261, *6 (W.D.Pa. Sept. 24, 2006) (denying inmate preliminary injunction). This principle applies with particular force to an inmate's demand for broader access to the prison law library, or other special legal services while a lawsuit is pending. With respect to such requests, we note that inmates have in the past often invited federal courts to entertain preliminary injunctions directing their jailers to allow them greater access to legal materials. Yet, these requests, while frequently made, have rarely been embraced by the courts. See, e.g., Kershner v. Mazurkiewicz, supra; Edmonds v. Sobina, 296 F.App'x 214, 216 n. 3 (3d Cir. 2008); Barnes v. Quattlebaum, No. 08-2197, 2009 WL 678165 (D.S.C. March 12, 2009); Clay v. Sobina, No. 06-861, 2007 WL 950384 (W.D.Pa. March 26,

2007); Wesley v. Vaughn, No. 99-1228, 2001 WL 1391254 (E.D.Pa. Nov. 7, 2001). Given these cases rejecting similar requests for injunctive relief, it seems unlikely that Brown can prevail on the merits of this particular claim, and Brown has not satisfied the first element which must be shown to obtain a preliminary injunction, since he has not shown a reasonable probability of success on the merits. Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994)

Furthermore, while we do not in any way diminish Brown's complaints, we find that this inmate has not shown an immediate irreparable harm justifying a preliminary injunction. Brown has not shown an irreparable harm because his concerns about completing his legal research and responding to motions seem to have been fully satisfied in the current custodial setting with Brown's current law library access, since Brown has filed all of the pleadings required of him by this Court in a proper and timely fashion. Therefore, it also seems that Brown cannot satisfy the second element for securing injunctive relief in that he cannot show that he will be irreparably injured by denial of the relief. Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994)

Finally, we note that granting this preliminary injunction, which would effectively have the federal courts making *ad hoc*, and individual, decisions concerning the law library schedule for a single federal prisoner, could harm both the

defendants' and the public's interest. In this prison context, the defendants' interests and the public's interest in penological order could be adversely effected if the defendants were unable to place appropriate, reasonable limitations on Brown's movements within the prison and access to the law library.

Because Brown has not carried his burden of proving either a reasonable probability of ultimate success on the merits, or immediate and irreparable harm, and because granting the injunction could adversely effect the defendants' and the public's interests, these request for a preliminary injunction should be denied.

III. Recommendation

Accordingly, for the foregoing reasons, upon consideration of the motion for law library access, which we construe as a motion for preliminary injunction, (Doc. 47.) IT IS RECOMMENDED that the motion be DENIED. The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of

those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 22d day of September 2015.

S/MARTIN C. CARLSON
Martin C. Carlson
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2205

GREGORY BROWN,
Appellant

v.

CLINICAL DIRECTOR ELLEN MACE-LIEBSON;
ASSOCIATE WARDEN CYNTHIA ENTZEL

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 3-14-cv-00623)
Honorable Malachy E. Mannion, District Judge

SUR PETITION FOR REHEARING

BEFORE: SMITH, Chief Judge, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, COWEN and RENDELL, Circuit Judges

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The petition for rehearing filed by appellant, Gregory Brown, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service who are not disqualified not having voted for rehearing by the Court en banc, the petition for

rehearing by the panel and the Court en banc is denied. Judge Cowen's vote and Judge Rendell's vote are limited to denying rehearing before the original panel.

BY THE COURT:

s/ Robert E. Cowen
Circuit Judge

DATED: October 2, 2019
Lmr/cc: Gregory Brown

Additional material from this filing is available in the Clerk's Office.