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Declined to Extend by [Barrett v. Livingston County, New York](#), W.D.N.Y.,
March 7, 2019

316 F.3d 178
United States Court of Appeals,
Second Circuit.

[Willie SMITH](#), Plaintiff–Appellant,
v.
Nurse [CARPENTER](#), Superintendent
Wilkinson, Superintendent at Pharsalia
Corr. Facility, Defendants–Appellees.

Docket No. 01–0294.

Argued: Oct. 7, 2002.

Decided: Jan. 14, 2003.

Synopsis

Prison inmate brought § 1983 action against prison officials for alleged deliberate indifference to his serious medical needs in violation of the Eighth Amendment by depriving him of essential HIV medication. The United States District Court for the Northern District of New York Norman A. [Mordue](#), J., entered judgment denying inmate's motion for new trial following verdict for prison officials. Inmate appealed. The Court of Appeals, [Straub](#), Circuit Judge, held that: (1) proper focus of prisoner's claim was on particular risks attributed to his missed HIV medication, rather than on his HIV-positive status alone, in evaluating whether he demonstrated a serious medical need as required to establish an Eighth Amendment violation, and (2) jury was free to consider absence of concrete medical injury to prisoner as relevant factor in determining whether alleged deprivation of his HIV medication for several days on two occasions was sufficiently serious to satisfy the objective serious medical need standard.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] **Federal Courts** [New Trial, Rehearing, or Reconsideration](#)

The Court of Appeals reviews the denial of a motion for a new trial for abuse of discretion. [Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.](#)

[4 Cases that cite this headnote](#)

[2] **Federal Civil Procedure** [Verdict or Findings Contrary to Law or Evidence](#)

Generally, a motion for a new trial should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice. [Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.](#)

[29 Cases that cite this headnote](#)

[3] **Sentencing and Punishment** [Medical care and treatment](#)

In order to establish an Eighth Amendment § 1983 claim arising out of inadequate medical care, a prisoner must prove deliberate indifference to his serious medical needs, a standard which incorporates both objective and subjective elements; the objective medical need element measures the severity of the alleged deprivation, while the subjective deliberate indifference element ensures that the defendant prison official acted with a sufficiently culpable state of mind. [U.S.C.A. Const.Amend. 8](#); [42 U.S.C.A. § 1983](#).

[888 Cases that cite this headnote](#)


[4] **Sentencing and Punishment** [Medical care and treatment](#)

Not every lapse in prison medical care will rise to the level of an Eighth Amendment violation. [U.S.C.A. Const.Amend. 8](#).

[275 Cases that cite this headnote](#)



[5] **Sentencing and Punishment** [Medical care and treatment](#)

A prisoner must demonstrate more than an inadvertent failure of prison officials to provide adequate medical care to successfully establish Eighth Amendment liability under [§ 1983](#).

U.S.C.A. Const.Amend. 8;  42 U.S.C.A. § 1983.



[70 Cases that cite this headnote](#)

[6] **Sentencing and Punishment**  [Medical care and treatment](#)

A prison official acts with the “deliberate indifference” to a prisoner's serious medical needs as required to successfully establish Eighth Amendment liability under  § 1983 when that official knows of and disregards an excessive risk to inmate health or safety, a state of mind equivalent to the familiar standard of recklessness as used in criminal law. U.S.C.A. Const.Amend. 8;  42 U.S.C.A. § 1983.

[222 Cases that cite this headnote](#)



[7] **Sentencing and Punishment**  [Medical care and treatment](#)

There is no need to distinguish between a prisoner's underlying serious medical condition and the circumstances of his serious medical need when the prisoner alleges, in a  § 1983 deliberate indifference to serious medical needs claim against prison officials, that prison officials failed to provide general treatment for his medical condition, but where the prisoner is receiving appropriate on-going treatment for his condition and brings a narrower denial of medical care claim based on a temporary delay or interruption in treatment, the serious medical need inquiry can properly take into account the severity of the temporary deprivation alleged by the prisoner. U.S.C.A. Const.Amend. 8;  42 U.S.C.A. § 1983.

[1087 Cases that cite this headnote](#)



[8] **Prisons**  [Particular Conditions and Treatments](#)

Sentencing and Punishment  [Medical care and treatment](#)

Proper focus of prisoner's  § 1983 deliberate indifference to serious medical needs claim against prison officials was on particular risks attributed to his missed HIV medication, rather than on his HIV-positive status alone, in evaluating whether he demonstrated a serious medical need as required to establish an Eighth Amendment violation when he was twice deprived of his HIV medication for several days, once due to delay in refilling his prescriptions and once due to confiscation of his medicine in a random search of his living quarters. U.S.C.A. Const.Amend. 8;  42 U.S.C.A. § 1983.

[114 Cases that cite this headnote](#)

[9] **Sentencing and Punishment**  [Conditions of Confinement](#)

An Eighth Amendment  § 1983 claim may be based on a defendant's conduct in exposing an inmate to an unreasonable risk of future harm rather than on actual physical injury. U.S.C.A. Const.Amend. 8;  42 U.S.C.A. § 1983.


[29 Cases that cite this headnote](#)

[10] **Prisons**  [Health and Medical Care](#)

Prison officials may not ignore a prisoner's medical condition that is very likely to cause serious illness and needless suffering in the future, even if the prisoner has no serious current symptoms. U.S.C.A. Const.Amend. 8.

[32 Cases that cite this headnote](#)

[11] **Civil Rights**  [Trial in general](#)
Sentencing and Punishment  [Medical care and treatment](#)

Jury was free to consider absence of concrete medical injury to prisoner as relevant factor in determining whether alleged deprivation of his HIV medication for several days on two occasions was sufficiently serious to satisfy the objective serious medical need standard for a deliberate indifference to serious medical needs claim under  § 1983, absent any evidence that

the alleged deprivation resulted in permanent or on-going harm to his health, or any evidence explaining why the absence of actual physical injury was not relevant in assessing severity of his medical need, and in view of credible medical testimony suggesting that the prisoner was not exposed to an unreasonable risk of future harm due to the periods of missed HIV medication.

U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

649 Cases that cite this headnote

Attorneys and Law Firms

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Marcus J. Mastracco, Assistant Solicitor General (Eliot Spitzer, Attorney General of the State of New York; Nancy A. Spiegel, Assistant Solicitor General, on the brief), Albany, N.Y., for Defendants–Appellees.

Before: WALKER, Chief Judge, CARDAMONE and STRAUB, Circuit Judges.

Opinion

STRAUB, Circuit Judge.

Plaintiff-appellant Willie Smith (“Smith”) appeals from a judgment of the United States District Court for the Northern District of New York (Norman A. Mordue, Judge), denying his motion for a new trial following a jury verdict in favor of the defendant prison officials, Colleen Carpenter (“Carpenter”) and James Wilkinson (“Wilkinson”). Smith filed suit under 42 U.S.C. § 1983 alleging that the defendants violated the Eighth Amendment’s *181 prohibition against cruel and unusual punishment by depriving him of HIV medication while he was incarcerated at the Camp Pharsalia Correctional Facility (“Camp Pharsalia”). At trial, Smith presented evidence that he had been deprived of HIV medication on two separate occasions for several days at a time. The jury returned with a verdict for the defendants after determining that Smith had not proven, by a preponderance of the evidence, that he suffered from an objectively “serious medical need.” The District Court

denied Smith’s motion for a new trial, noting that the jury’s verdict was supported by medical testimony indicating that Smith suffered no adverse medical effects from the missed medication. On appeal, Smith argues that the District Court misapplied the relevant Eighth Amendment standard in denying his request for a new trial by concluding that the jury was entitled to consider evidence regarding the absence of actual medical injury. We hold that such evidence may be considered as a relevant factor in assessing whether an alleged denial of medical care is sufficiently serious to establish a claim under the Eighth Amendment and therefore affirm.

BACKGROUND

In April 1999, Smith filed suit against the defendants seeking damages under 42 U.S.C. § 1983. Smith contends that the defendants¹ acted with deliberate indifference to his serious medical needs in violation of the Eighth Amendment by depriving him of essential HIV medication on two separate occasions while he was incarcerated at Camp Pharsalia, despite his repeated requests for the medication.

A. Trial

In October 2001, a jury trial was held on Smith’s denial of medical care claim. At trial, Smith testified that physicians with the New York State Department of Correctional Services (“DOCS”) had prescribed a drug-therapy regimen to treat his HIV which included a combination of three drugs, Saquinavir mesylate (“Saquinavir”), Combivir, and Bactrim.² Smith also testified that the defendants failed to provide him with these prescription drugs on two different occasions during his incarceration at Camp Pharsalia. The first episode occurred in October 1998 due to a delay in refilling Smith’s prescriptions after his existing medication ran out. As a result, Smith missed taking his scheduled doses of Saquinavir and Bactrim for seven days. The second episode occurred in January 1999 after Smith’s HIV medication was confiscated during a random search of his living quarters. Smith testified that he was only provided with replacement medication five days later after he was transferred to the Oneida Correctional Facility.

Smith also explained that it is important to maintain strict compliance with his drug regimen in order to prevent deterioration of his immune system and to slow the progression of his HIV infection, a condition that can

ultimately lead to death.³ *182 Although **Smith** testified that he suffered temporary itching, severe headaches, as well as stress due to the missed medication, he did not introduce evidence that his **HIV infection** or overall health worsened as a result of the two isolated episodes of missed medication.

At trial, the defendants conceded that it is important for HIV patients to follow a regular drug regimen. Defendants sought to demonstrate, however, that the alleged episodes of missed medication did not subject **Smith** to a serious risk of harm and presented evidence to counter **Smith's** allegations of medical injury. Defendants' medical expert, Dr. Marshall Trabout, a regional medical director for the DOCS, testified that **Smith's** reported symptoms of itching and headaches were likely side effects of the medications themselves and would not have been caused by the lack of HIV medication. Dr. Trabout agreed that missing HIV medication can be potentially harmful in some circumstances, possibly leading to viral mutation and drug resistance. However, based on a review of **Smith's** medical records, Dr. Trabout concluded that **Smith** had not developed any drug resistance because of the alleged interruptions in drug treatment and that **Smith's viral load** had actually improved during his incarceration.⁴ Dr. Trabout also testified that, in his opinion, **Smith** had received very good HIV care at Camp Pharsalia and that **Smith** had suffered no adverse effects to his health as a result of missing his HIV medication for the brief periods of time at issue.

B. Jury Verdict

After the close of evidence, the District Court instructed the jury that **Smith** had to demonstrate by a preponderance of the evidence that he suffered from a "serious medical need" in order to prevail on his Eighth Amendment claim. Tracking **Smith's** proposed jury instructions, the District Court charged the jury as follows:

The term 'serious medical need' means a condition of urgency, one that might produce extreme pain, degeneration or death. In other words, it is a condition presenting a substantial risk of harm. It is not disputed in this case that plaintiff suffers from the HIV virus. If you find that plaintiff's condition did

not amount to a serious medical need, then you must find for the defendants Conversely, if you find that plaintiff's condition constituted a serious medical need, you must then consider whether he has demonstrated by a preponderance of the evidence that defendants knew of that condition and disregarded it.⁵

The special verdict sheet that was jointly prepared by the parties mirrored the jury charge. The first question on the verdict sheet asked: "Has plaintiff proven by a preponderance of the evidence that he suffered from a serious medical need, yes or no.... If your answer ... is no, stop, have the foreperson sign and date the verdict sheet and inform the marshal that you have reached a verdict."⁶ The jury returned with a verdict for the defendants, *183 answering "no" to this critical threshold question.

C. Motion for a New Trial

Following the jury's verdict, **Smith** moved for a new trial on the grounds that: (1) there was insufficient evidence to support the jury's verdict, (2) the verdict was against the weight of the evidence, (3) the jury ignored the District Court's instructions, and (4) the verdict could not stand as a matter of law. The District Court denied the motion for a new trial, rejecting **Smith's** argument that his HIV-positive status automatically constituted a "serious medical need" for Eighth Amendment purposes. The District Court found that there was sufficient evidence to support the jury's verdict based on Dr. Trabout's testimony that "although plaintiff was HIV-positive, he suffered no adverse effects from missing his prescriptions for the short periods of time in question." The District Court further explained that the jury could have concluded, consistent with the evidence presented at trial, that **Smith** had failed to demonstrate that his health had been placed in substantial jeopardy due to the brief interruptions in his HIV medication.

Smith now appeals, arguing that the District Court applied the wrong Eighth Amendment standard in denying his motion for a new trial.⁷ **Smith** contends that the District Court erroneously considered evidence of *actual harm* in assessing the jury's finding of no serious medical need when he was only required to establish a *potential* for serious future injury

in order to state an Eighth Amendment denial of medical care claim. **Smith** also argues that evidence pointing to an absence of adverse medical effects is only potentially relevant in analyzing questions of deliberate indifference or causation—not as part of the initial serious medical need inquiry.

DISCUSSION

A. Standard of Review

[1] [2] We review the district court's decision to deny a motion for a new trial pursuant to Fed.R.Civ.P. 59 for abuse of discretion. See **New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.**, 295 F.3d 232, 248 (2d Cir.2002). Generally, a motion for a new trial “should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.” **Atkins v. New York City**, 143 F.3d 100, 102 (2d Cir.1998) (quoting **Lightfoot v. Union Carbide Corp.**, 110 F.3d 898, 911 (2d Cir.1997)). In this case, we need only determine whether the District Court abused its discretion by applying an incorrect legal standard in evaluating the jury's verdict. See **Gasperini v. Center for Humanities, Inc.**, 149 F.3d 137, 141–42 (2d Cir.1998) (a district court abuses its discretion when its decision to deny a motion for a new trial “results from an erroneous view of the law”).

B. Eighth Amendment Standard

[3] “In order to establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove ‘deliberate indifference to [his] serious medical needs.’ ” **Chance v. Armstrong**, 143 F.3d 698, 702 (2d Cir.1998) (quoting **Estelle v. Gamble**, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). This standard incorporates both objective and subjective elements. The objective “medical need” element measures the severity of *184 the alleged deprivation, while the subjective “deliberate indifference” element ensures that the defendant prison official acted with a sufficiently culpable state of mind. See *id.*; **Hathaway v. Coughlin**, 99 F.3d 550, 553 (2d Cir.1996).

[4] [5] [6] Because the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law, not every lapse in prison medical care will rise to the level of a constitutional violation. See

Estelle, 429 U.S. at 105–06, 97 S.Ct. 285; **Snipes v. DeTella**, 95 F.3d 586, 590–91, (7th Cir.1996), *cert. denied*, 519 U.S. 1126, 117 S.Ct. 980, 136 L.Ed.2d 863 (1997). In **Estelle v. Gamble**, the Supreme Court explained that the Eighth Amendment's prohibition on cruel and unusual punishments encompasses the deliberate failure to treat “a prisoner's *serious* illness or injury” resulting in the infliction of unnecessary pain and suffering. **Estelle**, 429 U.S. at 105, 97 S.Ct. 285 (emphasis added). “Because society does not expect that prisoners will have unqualified access to health care,” a prisoner must first make this threshold showing of serious illness or injury in order to state an Eighth Amendment claim for denial of medical care. **Hudson v. McMillian**, 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); see also **Chance**, 143 F.3d at 702 (not all claims of inadequate medical care are “constitutionally cognizable”). Similarly, a prisoner must demonstrate more than “an inadvertent failure to provide adequate medical care” by prison officials to successfully establish Eighth Amendment liability. See, e.g., **Estelle**, 429 U.S. at 105–06, 97 S.Ct. 285 (noting that mere negligence in diagnosis or treatment is insufficient to state a valid Eighth Amendment claim and emphasizing that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner”). “An official acts with the requisite deliberate indifference when that official ‘knows of and disregards an excessive risk to inmate health or safety,’ ” **Chance**, 143 F.3d at 702 (quoting **Farmer v. Brennan**, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)), a state of mind “equivalent to the familiar standard of ‘recklessness’ as used in criminal law.” **Phelps v. Kapnolas**, 308 F.3d 180, 186 (2d Cir.2002) (per curiam).

In this case, the jury rejected **Smith's** Eighth Amendment claim for failure to show an objectively serious medical need, and did not reach the question of the defendants' state of mind. Because only the severity of the alleged denial of care is at issue, we therefore need not address whether the evidence also establishes deliberate indifference on the part of the defendants. Although the relevant “serious medical need” standard is well established by our prior decisions, we find it worthwhile to clarify this standard in light of the unique facts and procedural posture of this case.

In a typical Eighth Amendment denial of medical care case, the prisoner is challenging the defendants' failure

to provide adequate medical care to treat the prisoner's medical condition.⁸ In this case, however, *185 **Smith** does not complain about the general level of HIV treatment that he received while incarcerated at Camp Pharsalia. Instead, **Smith's** Eighth Amendment claim is based solely on interruptions in the provision of HIV medication prescribed by DOCS doctors as part of his overall HIV treatment. This case is also procedurally unique, as the serious medical need question was submitted to the jury for factual determination. In several prior decisions, we have examined the relevant record to determine whether a prisoner presented a viable jury question on the issue of serious medical need. *See, e.g., Brock*, 315 F.3d at 160 (motion for summary judgment); *Chance*, 143 F.3d at 702–703 (motion to dismiss); *Hathaway v. Coughlin*, 37 F.3d 63, 67 (2d Cir.1994) (motion for directed verdict). We have never had occasion, however, to consider what factors the jury may consider when asked to actually determine whether the prisoner's asserted medical need is sufficiently serious to trigger Eighth Amendment concerns. We therefore address **Smith's** “adverse effects” argument with these considerations in mind.

C. Serious Medical Need

Smith urges the Court to focus on his HIV-positive status as the serious medical need at issue, arguing that he has demonstrated a serious medical need, because it is undisputed that the failure to treat HIV can result in fatal injury. *See, e.g., Montgomery v. Pinchak*, 294 F.3d 492, 500 (3rd Cir.2002) (prisoner diagnosed with HIV has demonstrated a serious medical need for Eighth Amendment purposes). We do not argue with the proposition that HIV is a serious medical condition that requires medical treatment. However, **Smith** does not contend that the defendants ignored his HIV infection by generally failing to provide appropriate treatment, conduct which may well violate the Eighth Amendment. Rather, it is undisputed that **Smith** was receiving HIV medication and other necessary medical care for his condition. His lawsuit only challenges the defendants' failure to provide him with prescription HIV medication during a seven-day period in October 1998 and a five-day period in January 1999. Accordingly, this case is conceptually different from the ordinary denial of medical care case, because **Smith's** claim is based on short-term interruptions in the otherwise adequate treatment which he was receiving for his underlying medical condition.

[7] Because “[t]he objective component of an Eighth Amendment claim is ... [necessarily] contextual” and fact-specific, *Hudson*, 503 U.S. at 8, 112 S.Ct. 995, the serious medical need inquiry must be tailored to the specific circumstances of each case. When the basis for a prisoner's Eighth Amendment claim is a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged *delay* or *interruption* in treatment rather than the prisoner's *underlying medical condition* alone in analyzing whether the alleged deprivation is, in “objective terms, sufficiently serious,” to support an Eighth Amendment claim. *Chance*, 143 F.3d at 702. There is no need to distinguish between a prisoner's underlying “serious medical condition” and the circumstances *186 of his “serious medical need” when the prisoner alleges that prison officials have failed to provide general treatment for his medical condition.⁹ In a case like this, however, where the prisoner is receiving appropriate on-going treatment for his condition, but, instead brings a narrower denial of medical care claim based on a temporary delay or interruption in treatment, the serious medical need inquiry can properly take into account the severity of the temporary deprivation alleged by the prisoner.¹⁰ *See Estelle*, 429 U.S. at 106, 97 S.Ct. 285 (“In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”); *Montgomery*, 294 F.3d at 499 (to establish an Eighth Amendment claim based on the denial of medical care, “[f]irst, [the] plaintiff must make an ‘objective’ showing that the *deprivation* was ‘sufficiently serious,’ or that the result of defendant's denial was sufficiently serious”) (emphasis added); *cf. Hudson*, 503 U.S. at 8, 112 S.Ct. 995 (in evaluating an Eighth Amendment claim, courts should consider “if the alleged wrongdoing was objectively ‘harmful enough’ to establish a constitutional violation”).

[8] As we noted in *Chance*, it's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes. *Chance*, 143 F.3d at 702–03; *cf. Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1188–89 (11th Cir.1994) (explaining that the seriousness of a delay in medical treatment may be decided “by reference to the *effect* of delay in treatment.... [c]onsequently, delay in medical treatment must be interpreted in the context of the

seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for delay”) (emphasis in original). For example, the failure to provide treatment for an otherwise insignificant wound may violate the Eighth Amendment if the wound develops signs of infection, creating a substantial risk of injury in the absence of appropriate medical treatment. See [Chance](#), 143 F.3d at 702. Such risks may be absent, however, although an inmate suffers from an admittedly serious medical condition such as HIV, where the alleged lapses in treatment are minor and inconsequential. Cf. [Evans v. Bonner](#), 196 F.Supp.2d 252, 256 (E.D.N.Y.2002) (holding that untimely provision of medication to HIV-positive inmate *187 did not cause sufficiently serious injury to give rise to an Eighth Amendment violation). We therefore conclude, given the facts of this case and the nature of [Smith's](#) claim, that the District Court properly focused on the particular risks attributable to the missed HIV medication, rather than on [Smith's](#) HIV-positive status alone, in evaluating the jury's finding that [Smith](#) failed to demonstrate a serious medical need.¹¹

D. Consideration of Adverse Effects

We further agree that the jury was entitled to consider the absence of adverse medical effects in evaluating the objective sufficiency of [Smith's](#) Eighth Amendment claim. We have previously explained that a serious medical need “exists where ‘the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.’ ” [Harrison v. Barkley](#), 219 F.3d 132, 136 (2d Cir.2000) (quoting [Chance](#), 143 F.3d at 702). As the Seventh Circuit noted in [Gutierrez v. Peters](#), 111 F.3d 1364 (7th Cir.1997), given the fact-specific nature of Eighth Amendment denial of medical care claims, it is difficult to formulate a precise standard of “ ‘seriousness’ ... that is adequately sensitive (in the sense of capturing those medical conditions properly within the realm of Eighth Amendment concern) yet appropriately specific (*i.e.*, excluding those conditions that are not).” [Id.](#) at 1372; see also [Hudson](#), 503 U.S. at 8, 112 S.Ct. 995 (noting the objective component of Eighth Amendment claims is sensitive to contemporary standards of decency and accordingly “admits of few absolute limitations”); [Brock](#), 315 F.3d at 162 (“There is no settled, precise metric to guide a court in its estimation of the seriousness of a prisoner's medical condition.”).

Just as the relevant “medical need” can only be identified in relation to the specific factual context of each case, the severity of the alleged denial of medical care should be analyzed with regard to all relevant facts and circumstances.

See [Chance](#), 143 F.3d at 702–03 (emphasizing that different factors may determine whether a given medical condition is sufficiently serious to raise Eighth Amendment concerns). The absence of adverse medical effects or demonstrable physical injury is one such factor that may be used to gauge the severity of the medical need at issue. See [Hill](#), 40 F.3d at 1188–89; [Gaudreault v. Municipality of Salem](#), 923 F.2d 203, 208–09 (1st Cir.1990), cert. denied, 500 U.S. 956, 111 S.Ct. 2266, 114 L.Ed.2d 718 (1991); [Monmouth County Corr. Inst. Inmates v. Lanzaro](#), 834 F.2d 326, 347 (3rd Cir.1987), cert. denied, 486 U.S. 1006, 108 S.Ct. 1731, 100 L.Ed.2d 195 (1988). Indeed, in most cases, the actual medical consequences that flow from the alleged denial of care will be highly relevant to the question of whether the denial of treatment subjected the prisoner to a significant risk of serious harm.¹²

*188 [9] [10] [Smith](#) correctly argues that an Eighth Amendment claim may be based on a defendant's conduct in exposing an inmate to an unreasonable risk of future harm and that actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation. See [Helling v. McKinney](#), 509 U.S. 25, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (the potential future health risk caused by exposure to second hand smoke may form the basis for relief under the Eighth Amendment); cf. [White v. Napoleon](#), 897 F.2d 103, 111 (3rd Cir.1990) (prisoner need not allege that his medical condition worsened in order to state a viable Eighth Amendment claim for denial of medical care). As the Supreme Court recognized in [Helling](#), prison officials may not ignore medical conditions that are “very likely to cause serious illness and needless suffering” in the future even if the prisoner has “no serious current symptoms.” [Helling](#), 509 U.S. at 33, 113 S.Ct. 2475. Yet, although demonstrable adverse medical effects may not be required under the Eighth Amendment,¹³ the absence of present physical injury will often be probative in assessing the risk of future harm. Cf. [Hudson](#), 503 U.S. at 7, 112 S.Ct. 995 (while serious injury is not required to bring an Eighth Amendment excessive force claim, “[t]he absence of serious injury is ... [still] relevant to the Eighth Amendment inquiry”).

Because we are not reviewing the sufficiency of **Smith's** pleadings, or even evaluating whether the evidence presented by **Smith** raises a jury question on his Eighth Amendment claim,¹⁴ we are not asked to determine whether adverse medical effects are required, as a threshold matter, to state a viable Eighth Amendment claim. Instead, the only question before us is whether the District Court properly held, based on the facts of this case, that the jury was entitled to weigh the absence of adverse effects in evaluating the objective sufficiency of **Smith's** claim.

[11] Turning to the evidence presented at trial, we discern no reason to limit the jury's inquiry in the manner which **Smith** suggests. We note that more than twenty-one months elapsed between the alleged deprivation of HIV medication and trial. Although **Smith** suffered from an admittedly serious underlying condition, he presented no evidence that the two alleged episodes of missed medication resulted in permanent or on-going harm to his health, nor did he present any evidence explaining why the absence of actual physical injury was not a relevant factor in assessing the *189 severity of his medical need.¹⁵ Moreover, the defendants presented credible medical testimony suggesting that **Smith**

had not been exposed to an unreasonable risk of future harm due to the periods of missed HIV medication. Under these circumstances, the jury was free to consider the absence of concrete medical injury as one of the relevant factors in determining whether the asserted deprivation of medical care was sufficiently serious to establish a claim under the Eighth Amendment. We therefore find no error in the District Court's decision to deny **Smith's** motion for a new trial.

CONCLUSION

In conclusion, we hold that the District Court properly determined that the jury could consider evidence regarding the absence of adverse medical effects in evaluating whether the alleged denial of medical care satisfies the objective Eighth Amendment serious medical need standard. Accordingly, the judgment of the District Court denying plaintiff's motion for a new trial is AFFIRMED.

All Citations

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Footnotes

- 1 Defendant Wilkinson is the Superintendent of Camp Pharsalia, and defendant **Carpenter** is the registered nurse responsible for overseeing the medical needs of all Camp Pharsalia inmates.
- 2 **Smith** was diagnosed with HIV when he entered the New York state correctional system in 1995.
- 3 To establish the importance of taking his medication on a consistent basis, **Smith** introduced into evidence a pamphlet entitled "Drug Holidays," included in the packaging for the drug Combivir, which warns patients against skipping doses of Combivir. The pamphlet states that missing medication can lead to viral mutation and drug resistance, potentially endangering the patient's health. **Smith** also testified that one of the doctors who treated him while he was incarcerated at Camp Pharsalia told him not to take "drug holidays."
- 4 "Viral load" refers to the amount of HIV in a patient's bloodstream.
- 5 **Smith** did not object to the jury charge or the verdict sheet, nor did he request a more specific jury instruction barring the jury from considering "adverse effects" in considering if an objectively serious medical need existed.
- 6 The remaining questions on the verdict sheet related to deliberate indifference, causation, and damages.
- 7 **Smith** also argued on appeal that the jury's verdict was supported by insufficient evidence. As **Smith's** counsel withdrew this second claim of error during oral argument, we focus on his first claim of legal error.
- 8 Notably, our prior decisions primarily discuss the serious medical need standard in the context of prisoners who claim that they failed to receive any treatment for their asserted medical condition. See [Brock v. Wright](#), 315 F.3d 158 (2d Cir.2003) (failure to treat painful facial keloid); [Harrison v. Barkley](#), 219 F.3d 132,

136–37 (2d Cir.2000) (refusal to treat cavity at risk of “acute infections, debilitating pain and tooth loss” unless prisoner consented to extraction of another diseased tooth); [Chance](#), 143 F.3d at 702 (untreated dental problems that resulted in chronic pain for a period of six months resulting in tooth degeneration); [Hemmings v. Gorczyk](#), 134 F.3d 104, 106–07 (2d Cir.1998) (per curiam) (failure to treat ruptured Achilles tendon which resulted in swelling and pain); [Koehl v. Dalsheim](#), 85 F.3d 86, 87–88 (2d Cir.1996) (confiscation of prescription eyeglasses necessary to correct serious vision problem and subsequent denial of medical treatment resulting in loss of vision in one eye); [Hathaway v. Coughlin](#), 37 F.3d 63, 64–65, 67 (2d Cir.1994) (failure to remove broken hip pins from prisoner's hip for over three years despite prisoner's complaints of persistent pain), % lcert. denied, 513 U.S. 1154, 115 S.Ct. 1108, 130 L.Ed.2d 1074 (1995).

9 Indeed, we have sometimes used these terms interchangeably in analyzing denial of medical care claims under the Eighth Amendment. See, e.g., [Brock](#), 315 F.3d at 162; [Harrison](#), 219 F.3d at 136–37.

10 In *Montgomery*, the Third Circuit held that HIV is a life-threatening condition that meets the serious medical need standard under the Eighth Amendment. [Montgomery](#), 294 F.3d at 500. However, *Montgomery* also acknowledged that the effect of denying treatment is relevant to the serious medical need inquiry. See *id.* The plaintiff in *Montgomery* alleged that prison officials refused to provide him with necessary HIV medication for a ten month period and that his white blood cell count dropped to a dangerously low level by the end of this period. See *id.* at 495. It was in this context, where neither party disputed whether the serious medical need standard had been met, that the Third Circuit determined that the objective Eighth Amendment standard had been satisfied. Thus, *Montgomery* is not a case about a temporary delay or interruption in care. As we recognized in *Harrison*, when medical treatment is denied for a prolonged period of time, or when a degenerative medical condition is neglected over sufficient time, the alleged deprivation of care can no longer be characterized as “delayed treatment” but may properly be viewed as a “refusal” to provide medical treatment. [Harrison](#), 219 F.3d at 137.

11 We note that the language of the “serious medical need” jury instruction may have been somewhat confusing, as it appears to conflate **Smith's** underlying HIV infection with the specific risk of harm caused by the brief interruptions in his medication. However, **Smith** is not appealing on the basis of the jury instruction. Moreover, as the evidence presented at trial focused on the potential effects of the missed medication, the District Court's interpretation of the jury's verdict is reasonable and in accordance with the trial testimony.

12 To some extent, the subjective deliberate indifference inquiry may overlap with the objective serious medical need determination. Similar evidence, including evidence of adverse effects, may be relevant to both components. See [DesRosiers v. Moran](#), 949 F.2d 15, 18–19 (1st Cir.1990). However, this does not suggest, as **Smith** argues, that evidence of adverse effects must be limited to the deliberate indifference inquiry.

13 This may be especially true where a prisoner seeks injunctive relief to prevent future harm from the denial of medical care. As the Supreme Court has noted, “It would be odd to deny an injunction to inmates ... on the ground that nothing yet had happened to them.” [Helling](#), 509 U.S. at 33, 113 S.Ct. 2475. However, **Smith** is not seeking injunctive relief in this case.

14 We do not mean to suggest that **Smith's** claim would not have survived a motion to dismiss or motion for summary judgment. Cf. [Gutierrez](#), 111 F.3d at 1372 n. 7 (cautioning that “the ‘seriousness’ determination [in Eighth Amendment denial of medical care cases] will often be ill-suited for resolution at the pleading stage and will have to await summary judgment proceedings, at which point a fully developed medical record will inform the court as to the nature of the inmate's condition”). In this case, however, at **Smith's** own request, the serious medical need question was submitted to the jury, whose factual findings are entitled to substantial deference. See [United States v. Rea](#), 958 F.2d 1206, 1221–22 (2d Cir.1992) (“Matters of ...

choice between competing inferences, the credibility of the witnesses, and the weight of the evidence are within the province of the jury, and we are not entitled to second-guess the jury's assessments.").

- 15 Our holding is based on the specific evidence presented in this case. We do not intend to set forth a *per se* rule designed to be uniformly applicable in all denial of medication cases. Other prisoners may be able to present medical evidence indicating that interruptions in the provision of prescription medication significantly increase the risk for medical injury, even in the absence of present, detectable adverse effects.

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Declined to Extend by [Balbin v. Concepcion](#), S.D.Fla., September 26, 2019

219 F.3d 132
United States Court of Appeals,
Second Circuit.

Duane HARRISON, Plaintiff–Appellant,

v.

Wayne BARKLEY, Superintendent of Riverview
Correctional Facility; Dr. Robert Hoehn, Dentist
at Riverview Correctional Facility; Tammy Bechaz,
Inmate Grievance Supervisor; and Sylvia Laguna,
Inmate Grievance Director, Defendants–Appellees.

Docket No. 97–2286

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Argued Dec. 17, 1999

|

Decided July 17, 2000

Synopsis

Inmate brought § 1983 action alleging that prison officials' refusal to treat cavity in one tooth unless he consented to extraction of another tooth, which was also diseased but which he nevertheless wished to keep, violated his rights under Eighth and Fourteenth Amendments. The United States District Court for the Northern District of New York, [Rosemary S. Pooler](#), J., dismissed complaint on ground that defendants enjoyed qualified immunity. Inmate appealed. The Court of Appeals, [Jacobs](#), Circuit Judge, held that: (1) defendants' alleged refusal to treat inmate's tooth cavity would constitute deliberate indifference to serious medical need under Eighth Amendment, and (2) defendants were not entitled to qualified immunity.

Reversed and remanded.

[Meskill](#), Circuit Judge, filed dissenting opinion.**Procedural Posture(s):** On Appeal; Motion to Dismiss.

West Headnotes (8)

[1] **Sentencing and Punishment** Medical care and treatment

For purpose of Eighth Amendment claim for deliberate indifference to medical needs, inmate has “serious medical condition” where failure to treat inmate's condition could result in further significant injury or unnecessary and wanton infliction of pain. [U.S.C.A. Const.Amend. 8.](#)

[698 Cases that cite this headnote](#)

[2] **Sentencing and Punishment** Medical care and treatment

Inmate's tooth cavity, which prison officials allegedly refused to treat for nearly a year unless he consented to extraction of another tooth which he wished to keep, was “serious medical condition,” for Eighth Amendment purposes, because cavity would degenerate with increasingly serious implications if neglected over sufficient time, and inmate had few teeth to spare. [U.S.C.A. Const.Amend. 8.](#)

[155 Cases that cite this headnote](#)

[3] **Sentencing and Punishment** Medical care and treatment

To establish deliberate indifference to serious medical need, as required to state claim under § 1983 for deprivation of medical treatment in violation of Eighth Amendment, inmate must prove that prison official knew of and disregarded inmate's serious medical needs; “deliberate indifference” will exist when official knows that inmate faces substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. [U.S.C.A. Const.Amend. 8.](#)

[652 Cases that cite this headnote](#)

[4] **Sentencing and Punishment** Medical care and treatment

Prison officials' alleged refusal to treat inmate's tooth cavity for nearly a year unless he consented to extraction of another tooth which he wished to keep would amount to “deliberate indifference” on part of prison officials, in violation of Eighth Amendment. [U.S.C.A. Const.Amend. 8.](#)

[101 Cases that cite this headnote](#)

- [5] **Civil Rights** 🔑 Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Federal Civil Procedure 🔑 Civil rights cases in general

Government officials enjoy qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known, and are entitled to summary judgment if, when looking at evidence in light most favorable to, and drawing all inferences most favorable to, plaintiff, it was objectively reasonable for defendants to believe that their conduct or actions did not violate established federally protected right.

[7 Cases that cite this headnote](#)

- [6] **Sentencing and Punishment** 🔑 Medical care and treatment

Mere malpractice of medicine in prison does not amount to Eighth Amendment violation. U.S.C.A. Const.Amend. 8.

[27 Cases that cite this headnote](#)

- [7] **Prisons** 🔑 Dental conditions and treatment
Sentencing and Punishment 🔑 Medical care and treatment

Prison dentist's alleged refusal to treat inmate's tooth cavity for nearly a year unless he consented to extraction of another tooth which he wished to keep was not mere medical malpractice and could amount to Eighth Amendment violation. U.S.C.A. Const.Amend. 8.

[90 Cases that cite this headnote](#)

- [8] **Civil Rights** 🔑 Prisons, jails, and their officers; parole and probation officers

Prison officials' alleged refusal to treat inmate's tooth cavity for nearly a year unless he consented to extraction of another tooth which he wished

to keep was not compelled by any policy adopted by Department of Correctional Services (DOCS), as would support assertion of qualified immunity. U.S.C.A. Const.Amend. 8.

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

*134 **Marlene Tuczinski**, Assistant Attorney General, Albany, N.Y. (**Eliot Spitzer**, Attorney General of the State of New York, **Peter H. Schiff**, Deputy Solicitor General, **Peter G. Crary**, Assistant Attorney General, on the brief) for Defendants–Appellees.


Nicomedes Sy Herrera, New York, N.Y. (**Charles E. Dorkey III**, **Todd L. Schleifstein**, Haythe & Curley, on the brief) for Plaintiff–Appellant.

Before: **MESKILL**, **JACOBS** and **LEVAL**, Circuit Judges.

Opinion

MESKILL, Circuit Judge, filed dissenting opinion.

JACOBS, Circuit Judge:

Plaintiff–Appellant Duane Harrison, a prison inmate whose teeth were few and bad, alleges that prison officials refused to treat a cavity in one tooth unless he consented to the extraction of another tooth, which was also diseased but which he nevertheless wished to keep. Harrison pleads that this conduct violated his rights under the Eighth and Fourteenth Amendments and seeks compensatory damages pursuant to  42 U.S.C. § 1983. The United States District Court for the Northern District of New York (Pooler, *J.*) granted summary judgment in favor of the defendants on the ground of qualified immunity, and entered final judgment dismissing the complaint. We hold that if the facts were as plaintiff alleged—that plaintiff sought treatment for a cavity and that the defendants refused all treatment not because he didn't need it but only because he refused consent to the extraction of another tooth—the defendants continued refusal to treat his tooth cavity constituted deliberate indifference to a serious medical need under the Eighth Amendment. Finding no grounds for qualified immunity on this record, the case is remanded for further proceedings consistent with this opinion.

BACKGROUND

Duane Harrison has only 14 of the normal complement of 32 teeth. He attributes his dental problems to a weakness for candy and other sweets.

The Dental Complaint. On June 31, 1994, while incarcerated at Riverview Correctional Facility (“Riverview”) in Ogdensburg, New York, Harrison filed a “Dental Request Slip” (as required by prison procedures) reporting that he had a cavity that “need[s] filling,” and asking to see a dentist. Riverview was unresponsive, so Harrison submitted two more requests—on August 24 and September 11, 1994—each time complaining of tooth pain. The September slip was politely urgent: “This is my 3rd request in a 3 month period. May I be called in.”

On September 15 (ten weeks after his initial request) Harrison was examined by Dr. Hoehn, a dentist employed at Riverview. Harrison reported his tooth pain and requested a filling. After examining Harrison, however, Hoehn refused to fill the cavity on ground that Harrison was also afflicted by an unrelated “carious non-restorable tooth,” and that prison regulations required the non-restorable tooth to be extracted before Harrison's cavity could be filled. Harrison did not want the non-restorable tooth pulled, because it was causing him no pain and because he considered that he had no teeth to spare. He asked therefore that the cavity be filled and that the non-restorable tooth be left in place. Hoehn refused, claiming that Riverview policy required the non-restorable tooth to go before the cavity could be filled.

The Administrative Proceedings. The next day, Harrison filed a complaint pursuant to Riverview's grievance procedures, requesting that his cavity be filled immediately *135 and alleging, *inter alia*, that Dr. Hoehn had refused to fill the cavity unless Harrison first agreed to an unwanted extraction. Riverview's Inmate Grievance Resolution Committee (the “IGRC”) denied Harrison's grievance. The inmate grievance supervisor, defendant Tommy Bechaz, submitted an investigative report on September 26, 1994, saying that Harrison's cavity could not be treated because Harrison “ha[d] a carious non-restorable tooth which needs to be extracted prior to further treatment.” On September 30, 1994, Harrison appealed the IGRC's decision to defendant Superintendent Wayne Barkley, who

upheld the decision claiming that “[i]t is the Dentist's policy to take care of the most serious dental problems first.”

On a final administrative appeal to the Central Office Review Committee (“CORC”), Harrison again asked to “have [the] cavity filled.” On October 26, 1993, defendant Sylvia Laguna, Acting Director of the Inmate Grievance Program of the CORC, denied the request on the same ground: “[i]t is the dentist's policy to take care of the most serious dental problems first” and that “in accordance with the Health Services Policy Manual an infection is considered a class 4 treatment priority and takes precedence over a routine cleaning, classified as a 2 in priority.” It is not clear why this order spoke of “routine cleaning” when Harrison's complaint unmistakably referred to a cavity.¹

The position of the defendants, as it appears from the present record, was that Harrison's cavity would not be treated unless and until he agreed to the unwanted extraction.

The State Court Proceeding. On December 6, 1994—five months after his initial request for an examination and after administrative appeals all had been exhausted—Harrison commenced an Article 78 proceeding in New York State Supreme Court. The proceeding was successful, and the court ordered that the cavity be filled. Harrison's cavity was filled on June 7, 1995, nearly a year after his first request.

The District Court Action. Harrison (*pro se*) filed a § 1983 complaint in district court on July 17, 1995, alleging that the defendants refused to treat his tooth cavity unless he first submitted to the extraction of a non-implicated tooth. Defendants moved for summary judgment on their qualified immunity defense, among other grounds. In opposition, Harrison submitted affidavits and memoranda, contending:

- (1) that he had “been subjected to endure unbearable pain and suffering since September of 1994” until June of 1995;
- (2) that his pain was “the result of the defendant[s] depriving plaintiff, intentionally, of adequate medical care”;
- (3) that Dr. Hoehn's refusal to fill his cavity “went against DOCS [Department of Correctional Services] policy”;
- (4) that he was not provided with pain medication and resorted to taking Advil and Tylenol which had been provided for “other ailments”; and

(5) that at the time of Dr. Hoehn's examination, the cavity "had plainly and clearly pierced the tooth enamel [and the] nerve ending [was] exposed."

The principal evidence submitted by the defendants was an affidavit from the dentist who ultimately filled Harrison's cavity, Dr. Mirza, who averred that Harrison's cavity was "not deep [and][n]o nerve was exposed," and that his examination and treatment of the patient revealed no indication that Harrison's tooth pain had been caused by the cavity—although he did allow that the cavity might be causing Harrison "slight sensitivity."

*136 The district court credited the findings of Magistrate Judge Scanlon, and granted summary judgment in favor of the defendants on the ground of qualified immunity, as follows:

Defendants are entitled to qualified immunity in this case because they demonstrated that the particular factual circumstances made it "objectively reasonable" for them to believe that their actions were lawful. The DOC's policy is to treat a prisoner's most serious medical condition first. Dr. Hoehn, based on his medical judgment, identified Harrison's most serious medical condition and recommended that action be taken to correct that problem. Harrison refused this medical advice. It is well established that a prisoner has no right to choose a specific form of medical treatment. Moreover, even if it was negligent of defendants to insist on treating Harrison's most serious medical need first, mere negligence in treatment does not support Harrison's claim that defendants violated his rights.

Harrison v. Barkley, No. 95–CV–964 (RSP/DS), op. at 6 (N.D.N.Y. April 11, 1997) (internal citations omitted). Harrison appeals.

We hold that the refusal to treat an inmate's tooth cavity unless the inmate consents to extraction of another diseased tooth constitutes a violation of the Eighth Amendment. Although a tooth cavity is not ordinarily deemed a serious medical condition, that is because the condition is readily treatable. Unless the cavity is treated, however, the tooth will degenerate, probably cause severe pain, and eventually require extraction and perhaps further extraordinary [invasive treatment](#). The present record allows the inference that for nearly a year, the defendants refused treatment unless Harrison consented to an unwanted extraction, and would have continued to do so indefinitely had they not been required by court order to give treatment. Assuming these facts to be true, as we must for purposes of this motion, the defendants are not entitled to qualified immunity.

Discussion




We review *de novo* the grant of summary judgment, applying the same standard employed by the district court to determine whether summary judgment is appropriate. See [Sayers v. Rochester Tel. Corp. Supplemental Management Pension Plan](#), 7 [F.3d](#) 1091, 1094 (2d Cir.1993). Here, we must determine whether there existed genuine issues of material fact as to the merits of Harrison's Eighth Amendment claim and whether the defendants were entitled to judgment as a matter of law on the ground of qualified immunity. See [Fed.R.Civ.P. 56\(e\)](#); [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). All ambiguities and all reasonable inferences must be drawn against the defendants. See [Coach Leatherware Co. v. AnnTaylor, Inc.](#), 933 F.2d 162, 166–67 (2d Cir.1991).


A. Eighth Amendment

To state a claim under [§ 1983](#) for deprivation of medical treatment in violation of the Eighth Amendment, a plaintiff must show that the defendant acted with "deliberate indifference to serious medical needs." [Estelle v. Gamble](#), 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); [Chance v. Armstrong](#), 143 [F.3d](#) 698, 702 (2d Cir.1998). The record here raises genuine issues of fact concerning both need and indifference.


1. Serious Medical Need

[1] A serious medical condition exists where “the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.”





 *Chance*, 143 F.3d at 702 (quoting  *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir.1997)) (internal quotation marks omitted). In *Chance*, we held that dental conditions (like other medical conditions) vary in severity and that a decision to leave a condition untreated will *137 be constitutional or not depending on the facts of the particular case. Thus, a prisoner with a hang-nail has no constitutional right to treatment, but if prison officials deliberately ignore an infected gash, “the failure to provide appropriate treatment might well violate the Eighth Amendment.”  *Chance*, 143 F.3d at 702 (citations omitted).



[2] Ordinarily, a tooth cavity is not a serious medical condition, but that is at least in part because a cavity is so easily treatable. Absent intense pain or other exigency, the treatment of a cavity (in or out of prison) can safely be delayed by the dentist's schedule or the patient's dread or neglect, can be subject to triage or the management of care, can be mitigated or repaired temporarily, and can be coordinated with other related conditions that need to be treated together. Nevertheless, a tooth cavity is a degenerative condition, and if it is left untreated indefinitely, it is likely to produce agony and to require more invasive and painful treatments, such as root canal therapy or extraction. See 1993 Public Health Reports 1993, U.S. Department of Health and Human Services, Pub. No. 108: 657–672, *Toward Improving the Oral Health of Americans: an Overview of Oral Health Status and Care Delivery* 3 (“Dental caries is a progressive disease process. Unless restorative treatment is provided, the carious lesion will continue to destroy the tooth, eventually resulting in pain, acute infection, and costly treatment to restore the tooth or have it removed.”); e.g., Edwina Kidd and Sally Joyston–Bechal, *Essentials of Dental Caries: The disease and its management* 45 (1997) (“[T]he ‘point of no return’ [for a carious lesion] where we can no longer hope for arrest is when a cavity is present....”). Consequently, because a tooth cavity will degenerate with increasingly serious implications if neglected over sufficient time, it presents a “serious medical need” within the meaning of our case law. See  *Chance*, 143 F.3d at 702–03. In this case, moreover, a risk that might ultimately lead to the unnecessary loss of an easily repairable

tooth was particularly serious because the plaintiff had so few teeth to spare.

This is *not* a case of *delayed* treatment as the dissent suggests. Defendants' conduct on this record can be construed as: (1) a flat refusal of medical treatment for a condition that if left untreated is serious and painful; or (2) a conditional refusal of such treatment, subject to Harrison's consent to undergo an unwanted medical procedure that would deprive him of a body part he wished to keep. Either way, a reasonable jury could find that Harrison was *refused treatment* of a degenerative condition that tends to cause acute infections, debilitating pain and **tooth loss** if left untreated. On these facts, we find that Harrison was suffering from a sufficiently serious condition as defined in this Circuit. See  *Chance*, 143 F.3d at 702 (defining as “serious” conditions that “a reasonable doctor or patient would find important and worthy of comment or treatment” (internal quotation marks omitted)).²

2. Deliberate Indifference

[3] To establish deliberate indifference, the plaintiff must prove that “the prison official knew of and disregarded the plaintiff's serious medical needs.”  *Chance*, 143 F.3d at 703 (citing  *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Deliberate indifference will exist when an official “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”  *Farmer*, 511 U.S. at 847, 114 S.Ct. 1970; see also  *138 *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1994) (“Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm.”).

[4] Harrison has adduced evidence to show (1) that his cavity was left untreated for one year and (2) that it would have remained untreated indefinitely or permanently absent (a) court-ordered treatment or (b) Harrison's consent to extraction of the non-implicated tooth. District courts in this Circuit have ruled that a one-year delay in treating a cavity can evidence deliberate indifference on the part of prison officials, see  *Dean v. Coughlin*, 623 F.Supp. 392, 402–403 (S.D.N.Y.1985); see also  *Williams v. Scully*, 552 F.Supp. 431, 432 (S.D.N.Y.1982) (finding a material issue of

fact as to deliberate indifference after an inmate was made to wait five and a half months for refilling of a cavity, resulting in infection and [loss of the tooth](#)), and we have reversed a grant of summary judgment “where there is an underlying dispute as to whether legitimate medical claims were deliberately disregarded as punishment ... *or for other invalid reasons.*” [Archer v. Dutcher](#), 733 F.2d 14, 17 (2d Cir.1984) (emphasis added); *see, e.g.*, [Dean](#), 623 F.Supp. at 403–404 (“Even if prison officials give inmates access to treatment, they may still be deliberately indifferent to inmates' needs if they fail to provide prescribed treatment.”). It follows that (1) outright refusal of any treatment for a degenerative condition that tends to cause acute infection and pain if left untreated *and* (2) imposition of a seriously unreasonable condition on such treatment, both constitute deliberate indifference on the part of prison officials.

A rational jury could find that the named defendants in this case were deliberately indifferent to Harrison's serious medical needs. The affidavit of Dr. Mirza, who filled Harrison's tooth (a year after Harrison's consultation with Dr. Hoehn), minimizes the extent of decay and raises a doubt as to Harrison's claim that his suffering was attributable to the untreated cavity (which, in Dr. Mirza's judgment would have produced no more than a sensitivity). Dr. Hoehn accounts for his decision to refuse treatment of the cavity on the basis that the non-restorable tooth was potentially “life threatening.” But Hoehn first mentions this finding after the state court ordered that the cavity be filled; it was not recorded in a contemporary notation, and it is not confirmed by the Mirza affidavit. Moreover, none of the named defendants present evidence suggesting that they *ever* intended to treat Harrison's cavity absent his consent to the unwanted extraction. On the whole, the defendants' evidence does not foreclose a genuine issue of fact on this material issue.

B. Qualified Immunity

[5] The defendants enjoy qualified immunity from Harrison's suit if their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” [Harlow v. Fitzgerald](#), 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and are entitled to summary judgment if when “looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiff[],” it was objectively reasonable for the defendants to believe that their conduct or actions did not violate an established

federally protected right, *see* [Robison v. Via](#), 821 F.2d 913, 921 (2d Cir.1987) (quoting [Halperin v. Kissinger](#), 807 F.2d 180, 189 (D.C.Cir.1986) (Scalia, *Circuit Justice*) (internal quotation marks omitted)).

In ruling that the defendants enjoy qualified immunity, the district court made three points: (1) that mere negligence is not a violation of an Eighth Amendment right; (2) that the defendants followed departmental treatment prioritization policy; and (3) that prison inmates have “no right to choose a specific form of medical treatment.” We are unpersuaded that any of these points compel a finding that the defendants are qualifiedly immune on this record. The defendants might ultimately *139 be entitled to qualified immunity if the basic facts alleged by Harrison prove to be different—if for example Harrison had no cavity or if the defendants did not know he had one—but as far as this motion for summary judgment is concerned, the district should have denied it.

[6] [7] (1) We agree that the mere malpractice of medicine in prison does not amount to an Eighth Amendment violation.

See [Estelle](#), 429 U.S. at 107, 97 S.Ct. 285; [Hathaway](#), 37 F.3d at 66. This principle may cover a delay in treatment based on a bad diagnosis or erroneous calculus of risks and costs, or a mistaken decision not to treat based on an erroneous view that the condition is benign or trivial or hopeless, or that treatment is unreliable, or that the cure is as risky or painful or bad as the malady. *See, e.g.*, [Estelle](#), 429 U.S. at 105–106, 97 S.Ct. 285 (holding that “inadvertent failure to provide adequate medical care” or “negligen[ce] in diagnosing or treating a medical condition” does not constitute deliberate indifference on the part of prison officials). In this case, Dr. Hoehn can plausibly assert that he had his patient's best interest at heart; but his decision (once Harrison elected to keep the non-implicated tooth) was to adamantly refuse treatment of a properly diagnosed condition that was progressively degenerative, potentially dangerous and painful, and that could be treated easily and without risk. Consciously disregarding an inmate's legitimate medical needs is not “mere medical malpractice.” [Hathaway v. Coughlin](#), 99 F.3d 550, 553 (2d Cir.1996) (internal quotation marks omitted).

[8] (2) The district court emphasized that Dr. Hoehn followed the policy adopted by the Department of Correctional Services (“DOCS”) “to treat a prisoner's most serious medical condition first.” The department has promulgated a prioritized treatment policy, but defendants

have not directed our attention to any policy that requires (or encourages) its dentists or doctors to refuse treatment of an inmate's lower-priority condition unless the inmate agrees to submit to an unwanted treatment of a condition assigned a higher priority. We need not decide therefore whether the defendants would be immune if their decisions had been compelled by departmental policy.

The sections of DOCS Health Services Policy Manual referenced by Dr. Hoehn at Harrison's examination, and by the other defendants at each level of Harrison's administrative appeal, classify dental treatment priorities as follows:



TREATMENT PRIORITIES—CLASSIFICATION

1. *Emergency Treatment (Class 4)*: Cessation of hemorrhage; immediate relief of pain; removal of oral infections that may endanger the health and welfare of the patient....
2. *Essential Treatment (Class 3)*: The early treatment of conditions of an urgent nature, including: restoration of teeth that are severely carious where lack of their restoration would soon lead to their extraction; extensive or advanced [periodontal disease](#); chronic pulpal or apical infection [etc.]
3. *Routine Treatment (Class 2)*: The treatment of conditions not of an urgent nature but requiring preventive or corrective measures, including routine restorations and/or [periodontal disease](#) not extensive or advanced.

The policy manual thus undertakes to establish the priority in which conditions will be treated; it does not require or contemplate the *denial* of treatment recognized to be needed, beneficial and feasible, or the denial of treatment for one condition if the patient elects to forgo treatment for another.

To the contrary, the policy manual elsewhere states that inmates should not be encouraged or coerced to accept unwanted treatment: “[m]ajor medical treatment *140 may be administered only on the basis of written informed consent”; “each patient with the mental capacity to make a judgment is entitled to refuse medical treatment”; “[a]ny decision made by a patient with capacity is to be respected unless that decision poses a danger to others.” Part I, section b, paragraphs 1 and 2 of Item 7.1 of the Manual (“Rights of Patients”). These statements confirm that the policy manual

is a rational prescription designed to insure that priority of treatment corresponds to the urgency of the medical needs. Nothing in the manual negates the prisoner-patient's right to refuse undesired treatment or authorizes prison officials to withhold medical treatment needed for one disease unless the patient consents to accept undesired treatment for another.

(3) Finally, the district court's ruling on qualified immunity relies on the principle “that a prisoner has no right to choose a specific form of medical treatment.” Maybe so, but the proper *course* of treatment is not at issue in this case. *Cf.*   *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir.1970) (“[A] prisoner's right is to medical care—not the type or scope of medical care which he personally desires.” (citation and internal quotation marks omitted)). It appears to be uncontested that the indicated treatment for the cavity was a filling, and that the indicated treatment for the non-restorable tooth was extraction. Harrison consented to treatment of one condition and not the other; he never insisted that either condition be treated in some way contrary to a dentist's recommendation.

* * * * *


In light of the foregoing, and accepting as true (as the court must on the defendants' motion for summary judgment) Harrison's allegations that he sought treatment from the defendants for a cavity, that he was refused treatment for nearly a year unless he consented to the extraction (which he refused) of another [decayed tooth](#), and that the ground for the defendants refusal was that the second [decayed tooth](#) represented a more urgent medical condition than the cavity for which he sought treatment, the defendants are not entitled to dismissal based on qualified immunity. The defendants' motion for summary judgment on this ground should have been denied.




CONCLUSION

For the reasons stated above, the district court's grant of summary judgment to the defendants is reversed. The case is remanded for further proceedings consistent with this opinion.

[MESKILL](#), Circuit Judge, dissenting:

The Eighth Amendment is violated when prison officials act with “deliberate indifference to serious medical needs.”

 *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Today, the Court holds that deliberate indifference to a [dental cavity](#) violates the Eighth Amendment. I respectfully disagree.

The standard governing Harrison's claim is well established. For Harrison to avoid summary judgment, he must show a material question of fact as to whether Dr. Hoehn or the other defendants acted with “deliberate indifference to [his] serious medical needs.”  *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir.1998) (quoting  *Estelle*, 429 U.S. at 104, 97 S.Ct. 285) (alteration in original). The standard includes subjective and objective components: “First, the alleged deprivation must be, in objective terms, sufficiently serious. Second, the defendant must act with a sufficiently culpable state of mind. An official acts with the requisite deliberate indifference when that 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.’ ” *Id.* (quoting  *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)) (other citations *141 and internal quotation marks omitted).

Harrison stated in an affidavit that he had been subjected to “unbearable pain and suffering since September of 1994, until the painful cavity was filled ... on June 7, 1995.” Assuming that this assertion creates a material issue of fact as to whether the deprivation was, objectively, “sufficiently serious,” it says nothing about whether the defendants knew that Harrison faced “a substantial risk of serious harm.” Indeed, there is no allegation, nor evidence of record, indicating that the defendants were aware of Harrison's “unbearable pain and suffering.”

On June 31[sic], 1994, Harrison filed a “Dental Request Slip” on which he checked the box “Need Filling.” He made no additional notations on the form. On August 24 he filed a second such slip, on which he wrote “tooth pain” next to the box marked “OTHER.” On September 11, he filed a third slip, again complaining of “tooth pain” next to the box marked “OTHER.”

On September 15, Harrison was seen by Dr. Hoehn. There is no indication that Harrison complained to Dr. Hoehn of “unbearable pain and suffering.” Dr. Hoehn refused to fill

Harrison's cavity (tooth # 26) because a different tooth (tooth # 18), although asymptomatic, presented the more serious and immediate medical need and required extraction. Nine months later, when Harrison's cavity was filled by Dr. Mirza, the dentist observed only “a small cavity” in tooth # 26 that “was not deep.” Dr. Mirza stated in an affidavit:

8. The tooth's dentin, or underlayer of sensitive calcified tissue was not exposed. No nerve was exposed by the cavity. There was no sign of visible decay.

9. While the patient may have experienced slight [sensitivity in this tooth](#), there was nothing revealed during my examination of the patient to indicate a condition in tooth # 26 which would produce tooth pain.

In other words, Dr. Hoehn would not have known from his examination of Harrison's teeth that Harrison was experiencing anything more than “slight [sensitivity](#)” in the tooth.¹

Dr. Hoehn noted in Harrison's record that Harrison refused treatment. On September 23, Dr. Hoehn added a memorandum explaining that Harrison “has a carious non-restorable tooth which needs to be extracted prior to further treatment.”

On September 16, Harrison filed a grievance complaining that “Dentist R. Hoehn refused to fill a cavity unless I allowed him to extract a tooth.” The complaint did not mention pain. The Inmate Grievance Resolution Committee denied Harrison's grievance, stating that it did not “have the power to ... over ride [sic] the decision of the Dentist.” The accompanying investigative report also echoed Dr. Hoehn's memorandum of September 23, informing Harrison, “You have a carious non-restorable tooth which needs to be extracted prior to further treatment.” Harrison appealed, first to the prison superintendent, and then to the Central Office Review Committee (CORC). Harrison did not complain of pain on either occasion, and both appeals *142 were denied. The superintendent, after repeating that “you have a carious non-restorable tooth which needs to be extracted prior to further dental treatment,” further explained, “It is the dentist's policy to take care of the most serious dental problems first.” The CORC additionally advised: “[I]n accordance with the Health Services Policy Manual an infection is considered a class 4 treatment priority and takes precedence over a routine cleaning [sic], classified as a 2 in priority.”

In sum, Dr. Hoehn knew at most that Harrison had a cavity, causing him “tooth pain.” It is not clear that the defendants other than Dr. Hoehn reviewed Harrison’s dental request slips during the course of his administrative appeals, and Harrison made no allegation and made no showing that they knew he was experiencing tooth pain. Nevertheless, the majority holds that, “because a tooth cavity will degenerate with increasingly serious implications if neglected over sufficient time, it presents a ‘serious medical need’ within the meaning of our case law.” Majority Op. at 137 (citation omitted). I do not believe that a mere cavity amounts to a “serious medical need.”

Indeed, the majority admits as much: “Ordinarily, a tooth cavity is not a serious medical condition.” See Majority Op. at 137. However, the majority then asserts that “a tooth cavity is a degenerative condition, and if it is left untreated indefinitely, it is likely to produce agony and to require more invasive and painful treatments, such as root canal therapy or extraction.” See Majority Op. at 137. The majority concludes that “a degenerative condition”—even if not ordinarily considered a serious medical condition—amounts to a serious medical condition if it “tends to cause acute infections, debilitating pain and [tooth loss](#) if left untreated.” See Majority Op. at 137–38. In short, the *Estelle* standard “deliberate indifference to serious medical needs” has metamorphosed to include “deliberate indifference to non-serious medical needs if they might become serious in the face of deliberate indifference.”

The majority’s misreading of *Estelle* ignores entirely the reason why denial of medical treatment is cognizable only with respect to serious medical needs: “[S]ociety does not expect that prisoners will have unqualified access to health care, [so] deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’” [Hudson v. McMillian](#), 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (citing [Estelle](#), 429 U.S. at 103–04, 97 S.Ct. 285). Society’s “evolving standards of decency,” *id.* at 8, [112 S.Ct. 995](#) (internal quotation marks omitted), do not require that a prisoner be entitled to treatment for a small cavity, having refused treatment for a different, life-threatening dental condition.

The Supreme Court’s decision in [Helling v. McKinney](#), 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), is not to the contrary. Although the Court recognized that exposure to second-hand tobacco smoke might “unreasonably endanger[]” a prisoner’s future health and that therefore an

Eighth Amendment violation could be proven, [id.](#) at 35, [113 S.Ct. 2475](#), the Court emphasized that it would still be necessary for the prisoner to prove that involuntary exposure to second-hand smoke was “contrary to current standards of decency.” *Id.* Thus, the Court in no way sanctioned the wholesale extension of *Estelle* adopted here.

Aside from my disagreement with the majority’s misreading of *Estelle*, I find the majority’s conclusion untenable as a matter of fact and reason. The majority asserts that a tooth cavity is a degenerative condition “likely” to produce agony and other serious consequences, so that the refusal to treat amounts to an Eighth Amendment violation. To support its view, the majority cites *Toward Improving the Oral Health of Americans*, a government report whose bias is evident from its title. Cf. [*143 Rhodes v. Chapman](#), 452 U.S. 337, 348 n. 13, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981) (observing that “opinions of experts ... simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question” (internal quotation marks omitted)). The majority’s view, however, has been characterized as “ignorant” by respected medical authority. See *Textbook of Cariology* 295 (Anders Thylstrup & Ole Fejerskov eds., 1986) (discussing hypothetical dentist who “is ignorant of current knowledge of dental caries and accordingly regards surgical treatment [such as filling of dental caries] as the most realistic way of stopping caries progression”). To the contrary, it may be perfectly reasonable for a dentist *not* to fill a cavity, especially where it is “not deep” and the dentin is not involved. See *id.* at 294 (“[I]t seems justified for the regular dental visitor to expect that dental health delivery as provided by the dentist in principle is aimed at control of caries progression without surgical treatment.”); see also Lloyd Baum *et al.*, *Textbook of Operative Dentistry* 15 (2d ed.1985) (noting that surgical intervention is usually required “*after* the enamel has been penetrated and dentin is involved” (emphasis added)).


I am also unmoved by the majority’s *ipse dixit* assertion that the risk here “was particularly serious because the plaintiff had few teeth to spare.” Majority Op. at 137. I suspect that dentistry cannot be reduced so easily to a numbers game, and that the medical significance of any given tooth depends heavily on the condition of the patient’s adjacent and opposing teeth and on the availability of dental prosthetics. To be sure, I am not an expert in the field of dentistry, and I assume that the proper treatment of dental caries is a debatable point among dentists of reason. But, as a consequence, I think it imprudent


for this Court to hold that the defendants can be liable for violating Harrison's Eighth Amendment rights, knowing only that Harrison's cavity was not filled promptly.


Even if this Court had a bevy of experts—which it does not now have—proclaiming in unison that “dental cavities degenerate and must be filled, or they are likely to produce agony,” I still would not agree with the majority's conclusion because it interferes unjustifiably with the prison dentist's judgment and decision-making.



The majority assumes a niggardly view of the dentist's role and the deference that courts owe to a treating dentist's medical judgment and decision-making. The majority assumes that Harrison has two separate dental problems and implies that they ought to have been addressed independently by Dr. Hoehn: “It appears to be uncontested that the indicated treatment for the cavity was a filling, and that the indicated treatment for the non-restorable tooth was extraction.” See Majority Op. at 140. However, a dentist should be allowed to formulate a patient's treatment plan based on the patient's overall dental health, not only on the health of individual teeth. See Robert B. Morris, *Strategies in Dental Diagnosis and Treatment Planning* 129 (1999) (basing treatment planning on the establishment of a “healthy oral environment”). Indeed, “[i]t is a careful and wise dentist who protects the oral health of his patients rather than serving only as a repairman for damaged teeth.” *Textbook of Operative Dentistry*, *supra*, at 1. “Even when a patient presents on an emergency basis for diagnosis and treatment of one problem tooth, treatment must be harmonized with the findings and needs of the total oral cavity and of the patient as a whole.” Norman K. Wood & Gerard Byrne, *Treatment Planning in Dentistry* 6, in 1 *Clark's Clinical Dentistry* (Jefferson F. Hardin ed., rev. ed.1996).

This is not an over-idealized, ivory tower view of the patient-dentist relationship that bears no application to the nitty gritty world of prison health care and the Eighth Amendment. To the contrary, it is rooted in the Eighth Amendment and the “deliberate indifference” standard itself. The *144 Eighth Amendment “bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”

 *Wilson v. Seiter*, 501 U.S. 294, 300, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). A prison health care provider simply does not have the requisite “mental element” to be guilty

of an Eighth Amendment violation when he or she acts, motivated by the best interests of the patient. In this case, Dr. Hoehn refused to treat a small cavity, motivated by a medically justified concern that a different dental condition was life threatening and required immediate treatment. Dr. Hoehn cannot be said to have disregarded “an excessive risk to inmate health or safety,” and consequently he is not guilty of deliberate indifference. See  *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970.²

Of course, a private patient has the right to reject a proposed plan of treatment and may demand that elective procedures be performed first, even before other, urgently needed procedures. After all, it is the patient's time and money that are at stake. See *Strategies in Dental Diagnosis and Treatment Planning*, *supra*, at 11–12. That calculus changes when the patient is a prisoner. In that case, the patient is entitled to basic medical care, but he has no right to dictate the “type or scope” of care that he receives.  *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir.1970) (internal quotation marks omitted). Dr. Hoehn examined Harrison and determined that Harrison's dental well-being required treatment of one tooth before the other. We ought not impose our understanding of sound dental practices over Dr. Hoehn's exercise of professional judgment.

For the foregoing reasons, I believe the defendants are entitled to summary judgment on Harrison's Eighth Amendment claim, and I would therefore affirm the district court. Also, as noted earlier, the majority's reading of *Estelle* is novel, inasmuch as it extends “serious medical needs” to include non-serious medical needs that are “likely” to degenerate and to result in pain or serious complications if left untreated. Defendants cannot be expected to foresee novel extensions of existing law. See  *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Therefore, it cannot be said that the defendants were violating Harrison's “clearly established constitutional rights,” see  *Weyant v. Okst*, 101 F.3d 845, 857 (2d Cir.1996). I would also affirm on the grounds that the defendants are entitled to qualified immunity.

All Citations

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Footnotes

- 1 Defendants' corollary argument that "all inmates sign interview slips saying they are in pain with the obvious attempt to leapfrog others who are patiently waiting," is not addressed to the issue on appeal. Prioritizing treatment out of administrative necessity is one thing; it is another thing to refuse treatment of a serious condition for that reason.
- 2 The dissent's discussion of the proper treatment for dental cavities has no bearing on the issue raised by Harrison's claim, which is not that he was refused a filling because another course was medically preferable, but rather that he was refused any treatment, based on the purported requirement of an administrative guideline that he first consent to the extraction of another tooth.
- 1 The majority disparages Dr. Mirza's affidavit without explanation, stating that it "minimizes the extent of decay" in tooth # 26. See Majority Op. at 138. The only evidence to the contrary, however, is an affidavit submitted by Harrison, in which he stated that "the cavity had plainly and clearly pierced the tooth enamel [sic]" and that "nerve ending[s] were exposed." Assuming that Harrison's self-diagnosis is competent and based on personal knowledge, which is highly unlikely, it is belied by his failure to complain of tooth pain through three levels of administrative appeals or during the course of the proceedings in state court. See *In re Harrison*, # 94-R-1722, at 3 (N.Y.Sup.Ct. May 31, 1995) ("Petitioner's submissions are silent with respect to pain."). In any event, as discussed later in this opinion, the majority does not base its decision on the severity of Harrison's cavity but on its mere existence.
- 2 The majority denies that Dr. Hoehn's medical judgment is at issue here, asserting instead that Harrison was denied treatment solely "based on the purported requirement of an administrative guideline that he first consent to the extraction of another tooth." Majority Op. at 137 n. 2; see also *id.* at 134 ("Hoehn refused, claiming that Riverview policy required the non-restorable tooth to go before the cavity could be filled."). However, the record is to the contrary. Dr. Hoehn never claimed that an administrative policy required denial of treatment; he only stated that Harrison "has a non-restorable tooth which needs to be extracted prior to further treatment." The Inmate Grievance Resolution Committee denied Harrison's grievance, stating that it did not "have the power to ... over ride [sic] *the decision of the Dentist* " (emphasis added), and the superintendent additionally observed that it was "the *dentist's* policy to take care of the most serious dental problems first" (emphasis added). To be sure, the CORC subsequently cited the Health Services Policy Manual, but to say that a dentist's medical judgment is *consistent* with an administrative policy is not to say that no medical judgment was ever involved. See also *In re Harrison*, # 94-R-1722, at 2 (referring to defendants' argument that "*the dentist's professional judgment was not inconsistent* with the Department's policy manual").