

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

JUAN RODRIGUEZ : CIVIL ACTION
: :
: :
v. : :
: :
: : No. 03-3675
JOSEPH V. SMITH, et al. :

MEMORANDUM

Padova, J.

March 16, 2006

Plaintiff, Juan Rodriguez, has brought this *pro se* civil rights action against supervisory and medical personnel at various federal and state correctional facilities for violations of his Eighth Amendment rights while incarcerated in these facilities. He also asserts state law claims for medical malpractice and intentional infliction of emotional distress. Before the Court are two Motions for Summary Judgment filed by the following groups of defendants: (1) Warden Joseph V. Smith and Dr. Karl Bernhard (the “Federal Defendants”); and (2) Stanley Stanish, M.D., Stanley Bohinski, D.O., Margaret Carrillo, M.D., and Kelly Gallagher, P.A. (the “Medical Defendants”).¹ For the reasons that follow, the Court grants both Motions.

I. BACKGROUND

In his Amended Complaints,² Plaintiff asserts claims against all defendants pursuant to both

¹There are two non-moving defendants in this action: Correctional Officer Briston of State Correctional Institution Camp Hill, and Medical Director Mrs. Conane of the Montgomery County Correctional Facility. Briston was served with Plaintiff’s Amended Complaints on 07/26/05 and has not answered. Conane was served with the First Amended Complaint on 9/18/2003. This Court entered default against her on 9/02/2005.

²In accordance with its Order of June 21, 2005 (Doc. No. 51), the Court considers the allegations in both Plaintiff’s First Amended Complaint (Doc. No. 7) and his Second Amended Complaint (Doc. No. 52).

42 U.S.C. § 1983 and Bivens v. Six Unnamed Federal Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), for deliberate indifference to Plaintiff's serious medical needs in violation of the Eighth Amendment (Counts I & IV). Plaintiff also asserts two state law claims: medical malpractice against Dr. Bernhard (Count II), and intentional infliction of emotional distress against all defendants (Count III). As the basis for these claims, Plaintiff alleges that he has two brain tumors for which the Defendants did not provide necessary and prescribed treatment. He seeks both damages and injunctive relief.

Juan Rodriguez, also known as Jose de Jesus, is a native of the Dominican Republic who has intermittently resided in the United States. (Pl. Dep. at 13, 15-17.) According to the evidence of record, Rodriguez suffers from a variety of medical complaints, including asthma, hypertension, chest pain, constipation, heartburn, scoliosis, arthritis, and Bell's Palsy (a form of facial paralysis resulting from nerve damage which affects the left side of his face). (See generally Progress Notes, Med. Defs.' Ex. C; Progress Notes, Med. Defs.' Ex. M.) He received a blow to his head in 1994 that fractured his skull. (Pl. Dep. at 24-25, 29.) Rodriguez has also complained of weakness on his left side, headaches, dizziness, and blurred vision since 1998 or 1999. (Pl. Dep. at 29-30, 33-34.) These conditions (and perhaps some of his other recurring complaints) are apparently the result of a pituitary tumor, which was diagnosed in 2003. (See 04/06/03 Evaluation by Dr. Sedor, Med. Defs.' Ex. E.) A 2001 CAT Scan also revealed a mass located on the right side of Plaintiff's head, which has been diagnosed as a normal feature (an "arachnoid granulation") requiring no treatment. (09/27/01 CAT Scan Evaluation, Med. Defs.' Ex. E; Expert Report at 1, Med. Defs.' Ex. N.)

Rodriguez has been incarcerated since February 19, 1999 (Pl. Dep. at 13), serving time in various county, state, and federal correctional facilities. He is currently housed at the State

Correctional Institution at Dallas (“SCI-Dallas”). Defendant Margaret Carrillo, M.D., was a physician at the Montgomery County Correctional Facility (“MCCF”) while Rodriguez was incarcerated there from 1999 to 2000. Defendant Joseph V. Smith was the warden of the Federal Detention Center in Philadelphia (“FDC-Philadelphia”) while Rodriguez was incarcerated there at various points from 2000 to 2001. Defendant Dr. Karl Bernhard was a physician at the Federal Medical Center in Devens, Massachusetts (“FMC-Devens”) who examined Rodriguez as part of a court-ordered medical evaluation in 2001. Defendants Stanley Bohinski, D.O., Stanley Stanish, M.D., and Kelly Gallagher, P.A., are and were members of the medical staff at SCI-Dallas during Rodriguez’s incarceration at that facility. Dr. Bohinski is a prison physician who had primary responsibility for Plaintiff’s care and who approved referrals and orders for his treatment. (Bohinski Verification ¶ 2; Stanish Verification ¶ 2; Progress Notes, Med. Defs.’ Ex. C.) Dr. Stanish is the Regional Medical Director for Prison Health Services, Inc., and had supervisory responsibilities over that company’s activities at several state prisons. (Stanish Verification ¶ 1.) He saw Plaintiff a few times for his chronic illnesses of asthma and hypertension, but had limited responsibility for his care. (Stanish Verification ¶ 2; Progress Notes, Med. Defs.’ Ex. C.) Gallagher, a Physician Assistant, attended to Rodriguez several times at sick call. (Id.)

A. MCCF

Rodriguez was incarcerated at MCCF for at least some of the months between February 1999 and May 2000. (02/22/99–05/31/00 Progress Notes, Med. Defs.’ Ex. M.) While there, he began to complain of headaches, decreasing and blurred vision, and various pains on his left side, including numbness in his left hand. (04/02/99, 05/04/99, 07/19/99, 07/21/99, & 03/04/00 Progress Notes, Med. Defs.’ Ex. M.) Dr. Carrillo was one of the treating physicians; she continually noted that

Rodriguez's Bell's Palsy did not show improvement, and diagnosed the numbness in Rodriguez's hand as carpal tunnel syndrome and the left shoulder pain as probable bursitis. (04/02/99 & 07/21/99 Progress Notes, Med. Defs.' Ex. M.) On March 7, 2000, when Plaintiff complained again of continued facial pain and heaviness in his left leg, she examined him and noted that there was no evidence of a stroke, diagnosed his condition as continuing effects from Bell's Palsy, and sent him to an ophthalmologist. (See 03/07/00 Progress Notes, Med. Defs.' Ex. M.) On April 11, 2000, Rodriguez requested an "MRI" (Magnetic Resonance Imaging Scan) for reassurance that he had not suffered a stroke, and Dr. Carrillo told her patient that she would consider it. (04/11/00 Progress Notes, Med. Defs.' Ex. M.)

Rodriguez spoke with the MCCF medical director, Mrs. Conane, who reported to him that Dr. Carrillo had denied that Plaintiff had a serious medical condition. (04/28/00 Letter to Warden Roth, 2d Am. Compl. Ex. A.) Rodriguez then wrote a letter to MCCF Warden Lawrence V. Roth, in which he stated that he had "not been examined in the proper way," and that Mrs. Conane refused the MRI because they do not perform MRIs on site. (Id.)

B. FDC-Philadelphia & FMC-Devens

Rodriguez was apparently transferred to FDC-Philadelphia in May or June of 2000. While at FDC Philadelphia, he complained about his symptoms of blurry and double vision and weakness and numbness in his legs. (2d Am. Compl. ¶ 17.) Rodriguez complained to his attorney in July 2000 that he was not receiving medical treatment for his left-side weakness and an ankle injury. (07/13/00 Letter from Juan Rodriguez to Sandra Burd, 2d Am. Compl. Ex. C.) He also spoke to Warden Smith about the pressure in his head and the faintness he was experiencing. (Pl. Dep. at 91.) In early 2001, Warden Smith promised to send Plaintiff to a specialist. (Id. at 94-95, 97.) A neurological

consult was ordered for Plaintiff's Bell's Palsy on February 2, 2001, but Plaintiff left FDC-Philadelphia before he was seen. (02/02/01 Consultation Sheet, Fed. Defs. Supp. Br. Ex. E.)

By Order dated April 5, 2001, Judge Fullam, who was presiding over a federal criminal action brought against Rodriguez in the United States District Court for the Eastern District of Pennsylvania, committed Rodriguez to FMC-Devens "for a complete medical and psychological evaluation and report." (04/05/01 Order, Fed. Defs. Supp. Br. Ex. D.) On May 8, 2001, while at FMC-Devens, Rodriguez was seen by Dr. Bernhard for a general physical evaluation. (Bernhard Decl. ¶¶ 5-6, Fed. Defs. Supp. Br. Ex. F.) According to Dr. Bernhard, Rodriguez did not complain of or exhibit signs of headaches or vision problems. (Id. ¶ 6.) Rodriguez had, however, submitted an inmate request one week prior to his appointment in which he complained of pain on the left side of his face and neck. (Id. Attachment 4.) Dr. Bernhard also noted a facial droop consistent with Plaintiff's chronic, unresolved Bell's Palsy. (Id.) Plaintiff states that his evaluation was completed in five minutes, and that, when Plaintiff complained that he was not feeling well, Dr. Bernhard responded that everything was fine and to get some sleep. (Pl. Dep. at 109-10.) Dr. Bernhard states his typical appointments are thirty to forty-five minutes long. (Bernhard Decl. ¶ 7.)

Rodriguez was transferred back to FDC-Philadelphia some time before June 7, 2001, when he made a request to health services for treatment for the headaches he was experiencing on the left side of his head, his chest pains, his stomach problems, and other issues. (06/07/01 Letter from Juan Rodriguez to FDC-Philadelphia Health Service, 2d Am. Compl. Ex. E.) He was transferred out of federal custody on June 21, 2001 (Darrin Howard Certification ¶ 2), and arrived at State Correctional Institution Graterford ("SCI-Graterford") on June 22, 2001. (Pa. Dep't Corrections Moves Report, Med. Defs.' Ex. G.) The Federal Bureau of Prisons records do not show that Plaintiff made any

administrative remedy requests during his time in federal custody (from September 14, 1999 to June 21, 2001). (Darrin Howard Certification ¶¶ 2, 8, 11.)

C. SCI-Camp Hill

Rodriguez arrived at SCI-Camp Hill on or about June 28, 2001. (See Pa. Dep't Corrections Moves Report, Med. Defs.' Ex. G.) In September 2001, a CAT scan was taken of his brain and Rodriguez was told that everything was fine. (2d Am. Compl. ¶ 17; Pl. Dep. at 37.) The report from the CAT scan stated that Rodriguez had a clinical history of left-sided weakness and left-sided headaches. (09/27/01 CAT Scan Evaluation, Med. Defs.' Ex. E.) In her evaluation, Dr. Schaffer of Smith Radiology reported a "lucent defect with central calcification in the right occipital lobe" of Rodriguez's head. (Id.) Dr. Schaffer surmised that the defect could represent a "lytic lesion" or a "choleostoma or dermoid cyst." (Id.)

D. SCI-Dallas

Rodriguez was transferred to SCI-Dallas on February 6, 2002. (See Pa. Dep't Corrections Moves Report, Med. Defs.' Ex. G.) He was a frequent visitor to "sick call" at the institution because of his various medical complaints. On February 11, 2002, Rodriguez complained of a lack of mobility and requested bottom bunk status, which was granted. (02/11/02 Progress Notes, Med. Defs.' Ex. C.) On February 21, 2002, he complained of blurred vision and foot pain; Dr. Bohinski approved P.A. Cheryl Wisniewski's order for x-rays of Rodriguez's foot and ankle and an optometry exam.³ (02/21/02 Progress Notes, Med. Defs.' Ex. C; 02/21/02 Physician's Orders, Med. Defs.' Ex. D.) On February 25, 2002, Rodriguez reported to sick call, where P.A. Gallagher checked his vital

³Unless otherwise noted, Wisniewski's work and recommendations were approved by Dr. Bohinski. At SCI-Dallas, Physician Assistants worked under the supervision of the physicians who were required to review and approve their treatment decisions. (See Gallagher Verification ¶ 3.)

signs and renewed his medications.⁴ (02/25/02 Progress Notes, Med. Defs.' Ex. C;) He requested single cell status, but Gallagher said there was no medical indication for such status. (Id.) On March 4, 2002, Rodriguez complained of chest pain, shortness of breath, and left arm pain. (03/04/02 Progress Notes, Med. Defs' Ex. C.) P.A. Wisniewski assessed the symptoms as probable costochondritis (Id.) She apparently ordered an EKG. (03/04/02 Physician's Orders, Med. Defs.' Ex. D.) On March 14, 2002, Rodriguez complained to P.A. Wisniewski of feeling lightheaded and nauseated; the assessment was an upper respiratory infection. (03/14/02 Progress Notes, Med. Defs' Ex. C.) On March 27, 2002, Rodriguez again complained of chest/back pain, and an x-ray was ordered. (03/27/02 Progress Notes, Med. Defs.' Ex. C; 03/27/02 Physician's Orders, Med. Defs' Ex. D.) Around this time, Rodriguez filed a request form reporting that P.A. Gallagher had twice refused to address his medical issues after he explained the nature of the problem. (04/08/02 Inmate Request Form, 1st Am. Compl. Exs.) However, P.A. Gallagher did see Rodriguez on April 8, 2002, for his complaints of congestion in his head; she diagnosed him with an upper respiratory infection and ordered renewal of his medications. (04/08/02 Progress Notes, Med. Defs.' Ex. C; 04/08/02 Physician's Orders, Med. Defs.' Ex. D.)

On April 23, 2002, Rodriguez reported to sick call with a spinning feeling that he had experienced for three days, throbbing pain in the back of his head and blurry lines in his vision. (04/23/02 Progress Notes, Med. Defs.' Ex. C.) P.A. Wisniewski did a cranial nerve neurological exam, gave him medication for vertigo, and told him to report back to sick call if his conditions did not cease or worsened. (Id.; 04/23/02 Physician's Orders, Med. Defs.' Ex. D.)

On May 7, 2002, Rodriguez reported to sick call and was seen by Defendant P.A. Kelly

⁴Unless otherwise noted, Gallagher's work was approved by Dr. Bohinski.

Gallagher. (05/07/02 Progress Notes, Med. Defs.' Ex. C.) He complained of frequent urination, swollen legs, difficulty breathing through his nose, stomach discomfort, cough, and other complaints. (Id.) Gallagher ruled out a urinary tract infection, noted a history of gastritis, and prescribed diagnostic testing and medication. (Id.; 05/07/02 Physician's Orders, Med. Defs.' Ex D.) On May 14, 2002, Rodriguez reported to sick call with a burning sensation in his left thigh; P.A. Wisniewski determined that his Bell's Palsy affected his left side. (05/14/02 Progress Notes, Med. Defs.' Ex. C.) On June 5, 2002, Rodriguez reported to sick call and insisted on seeing a doctor. (06/05/02 Progress Notes, Med. Defs.' Ex. C.) He was complaining of back pain on his left side. (Id.) Dr. Bohinski saw him, and recommended an updated x-ray. (Id.) The x-rays showed mild scoliosis and degenerative changes, which were considered "unremarkable." (06/10/02 Progress Notes, Med. Defs.' Ex. C.)

On June 18, 2002, Rodriguez again reported pain on his left side in his back and foot, and stated to an unspecified member of the medical staff that he thinks he suffered a stroke in 1999. (06/18/2002 Progress Notes, Med. Defs.' Ex. C.) Rodriguez does not deny that he saw Dr. Stanish for assessment of his chronic conditions (asthma and hypertension) on June 28, 2002. (06/28/02 Progress Notes, Med. Defs.' Ex. C; Pl. Dep. at 45-47.) Dr. Stanish noted Rodriguez's facial palsy and back pain as well as his significant weight gain over the preceding year. (Id.) He informed patient that there may be a correlation between his other physical problems and the weight gain. (Id.) Rodriguez subsequently filed a grievance stating that Dr. Stanish had refused to treat him for six months. (07/19/02 Official Inmate Grievance, 1st Am. Compl. Exs.) In his grievance, Rodriguez complained that he had suffered a stroke which paralyzed the left side of his body. (Id.) He admitted that "before my arrest . . . I received extensive care and treatment," and that "[w]hen I was arrested,

at Montgomery County my treatment continued.” (Id.) However, “while within the DOC I have not received injury-related care and treatment”; “the type of medication I am taking isn't working”; and “[f]or the last six months Dr. Stanish has been harassing me and refusing to treatment [sic] me.” (Id.)

On August 5, 2002, P.A. Gallagher again saw Rodriguez in sick call and renewed his prescriptions for Zantac (for digestive problems) and Tylenol. (08/05/02 Progress Notes, Med. Defs.’ Ex. C; 08/05/02 Physician’s Orders, Med. Defs.’ Ex. D.) On August 26, 2002, Rodriguez was seen again by Gallagher when he reported to sick call with complaints of heartburn, nausea, vomiting and mid-sternal pain. (08/26/02 Progress Notes, Med. Defs.’ Ex. C.) Gallagher ordered an increase in Zantac, Tylenol, and analgesic balm for pain. (08/26/02 Physician’s Orders, Med. Defs.’ Ex. D.) Rodriguez did not return to sick call until October 25, 2002, to ask questions about his arthritis and to report continued heartburn. (10/25/02 Progress Notes, Med. Defs.’ Ex. C.)

On November 20, 2002, Rodriguez submitted a written request to Dr. Bohinski of SCI-Dallas in which he complained that "I've been denied the opportunity to see and speak with you to explain that the medication you prescribed for me is not working at all for my medical problem." (11/20/02 Inmate Request Form, 1st Am. Compl. Exs..) On November 22, 2002, Dr. Bohinski advised Rodriguez in writing that he should "[b]ring [the written request form] to sick call and the PA's can refer you to me." (Id.) On November 25, 2002, Rodriguez submitted an official inmate grievance to Burnett, in which he complained that, when "I gave [Kelly Gallagher] the inmate request [form] as I was instructed to do by Mr. Bohinski, . . . [h]er response was send him a request slip now get your ass out of here before I call a[n] officer to take you out." (11/25/02 Official Grievance, 1st Am. Compl. Ex.) Rodriguez did see Dr. Bohinski on November 27, 2002. (11/27/02 Progress Notes,

Med. Defs.' Ex. C.) He complained having to pay the inmate co-pay, but also expressed concerns that his medication wasn't working. (Id.) He was experiencing abdominal discomfort, and Dr. Bohinski noted that Rodriguez was probably using nicotine products (his commissary purchases included tobacco products), which could irritate his stomach. (Id.) Dr. Bohinski ordered "stool cards" to test for blood in Rodriguez's stools, all of which came back "negative." (11/27/02 Physician's Orders, Med. Defs.' Ex. D; 12/13/02 Progress Notes, Med. Defs.' Ex. C.)

Rodriguez was seen by P.A. Gallagher on sick call on December 16, 2002, complaining that he was in pain and wanted his scoliosis fixed. (12/16/02 Progress Notes, Med Defs.' Ex. C.) Gallagher explained that arthritis is not curable, and that his scoliosis did not require a brace. (Id.) She renewed his medication for hypertension and advised weight loss and exercise. (Id.)⁵

On December 23, 2002, Dr. Akberzie of the medical staff saw Rodriguez in the chronic illness clinic for his asthma and hypertension. (12/23/02 Progress Notes, Med. Defs.' Ex. C.) On December 31, 2002, Rodriguez came to sick call complaining of congestion and was seen by P.A. Wisniewski. (12/31/02 Progress Notes, Med. Defs.' Ex. C.)⁶ On January 24, 2003, Rodriguez was again seen by Wisniewski. (01/24/03 Progress Notes, Med. Defs.' Ex. C.) This time he complained of a lightheaded feeling, neck pain, and blurred vision. (Id.) Dr. Bohinski approved a referral to an optometrist, who noted that Rodriguez had already been seen in March 2002 and there had been no change since that time; he said that Rodriguez did not "seem willing to accept the fact he needs glasses." (01/24/03 Consultation Record, Med. Defs.' Ex. E.) On February 21, 2003, Rodriguez reported to sick call complaining of abdominal pain and irritated eyes. (02/21/03 Progress Notes,

⁵Dr. Akberzie approved Gallagher's work.

⁶Dr. Akberzie approved Wisniewski's work.

Med. Defs.' Ex. C.) On March 13, he reported to sick call complaining of pain in his neck and back. (03/13/03 Progress Notes, Med. Defs.' Ex. C.) He was seen and evaluated by a Physician Assistant both times. On March 20, 2003, Dr. Salomon of SCI-Dallas examined Rodriguez for his chronic care complaints and told him that the September 2001 CAT scan had revealed that Rodriguez had a fifteen millimeter mass on the right side of his brain. (1st Am. Compl. ¶ 8; 03/20/03 Progress Notes, Med. Defs.' Ex. C.) Dr. Salomon was apparently the first one to point out the findings of the CAT Scan report to Rodriguez. Dr. Salomon ordered an MRI, which revealed that Rodriguez had two masses behind his right eye. (03/24/03 Progress Notes, Med. Defs.' Ex. C; 03/25/03 Consultation Record, Med. Defs.' Ex. E; 04/10/03 MRI Evaluation, Med. Defs.' Ex. E) One was said to be a pituitary mass 15 millimeters in size; the other mass was classified as a temporal occipital calvarial lesion, 17 millimeters in size. (04/10/03 MRI Evaluation, Med. Defs.' Ex. E; 04/14/03 Consultation Record, Med. Defs.' Ex. E.) The calvarial lesion represents the "lucent defect" noted in the CAT Scan Report of September 2001. (04/10/03 MRI Evaluation, Med. Defs.' Ex. E.) The April 10, 2003 MRI evaluation stated that the abnormality in the right occipital calvarium suggests a "prominent venous lake or vascular structure such as calvarial hemangioma rather than a lytic or metastatic lesion." (Id.) Peter J. Snyder, M.D., states that this condition is benign, has no clinical implications, and requires no treatment. (Expert Report at 1, Med. Defs.' Ex. N.) The MRI evaluation noted that the pituitary mass was likely an adenoma. (Id.) A pituitary adenoma is a benign tumor of the pituitary gland, which is located in the middle of the head, below the brain. (Expert Report at 1-2, Med. Defs.' Ex. N.) This condition is separate from the calvarial lesion noted in the earlier CAT Scan report. (Id. at 1.)

After the MRI, Dr. Bohinski approved a referral of Rodriguez to Dr. Sedor, a neurosurgeon.

(04/14/03 Progress Notes, Med. Defs.' Ex. C.) Dr. Sedor diagnosed the pituitary mass as a pituitary macroadenoma. (04/16/03 Evaluation by Dr. Sedor, Med. Defs.' Ex. E.)⁷ He recommended an endocrine evaluation, a visual acuity and fields test, and a CAT scan of the sinuses, all of which were ordered by Dr. Bohinski. (Id.; 04/24/03 Physician's Orders, Med. Defs.' Ex. D.) Dr. Bohinski also spoke with Rodriguez about the diagnosis. (04/29/03 Progress Notes, Med. Defs.' Ex. C.) The CAT Scan of the sinuses indicated chronic inflammatory process and showed the pituitary mass. (04/28/2003 CAT Scan Evaluation, Med. Defs.' Ex. E.) On May 15, 2003, endocrinologist Dr. Recaredo Berbano diagnosed Rodriguez with a pituitary tumor of 15 millimeters, as well as hematoma of the brain. (05/15/2003 Evaluation by Dr. Berbano, Med. Defs.' Ex. E.) He recommended a follow-up with Dr. Sedor, a study of pituitary function, and several blood tests to measure hormones controlled by the pituitary gland. (Id.; Expert Report at 1, Med. Defs.' Ex. N.) On July 8, 2003, P.A. John F. Cain reviewed Rodriguez's blood tests and noted a high prolactin level of 840 ng/ml. (07/08/03 Progress Notes, Med. Defs.' Ex. C.) Normal prolactin levels range from 3.0-14.7 ng/ml. (Expert Report at 1, Med. Defs.' Ex. N.) P.A. Cain indicated that he faxed the reports to "the appropriate surgeon." (07/08/03 Progress Notes, Med. Defs.' Ex. C.) Rodriguez's visual acuity was reported to be 20/20, with normal pupils and optic nerve. (04/29/03 Consultation Record, Med. Defs.' Ex. E.) Rodriguez's visual fields were checked by an ophthalmologist on August 5, 2003. (08/05/03 Consultation Record, Med. Defs.' Ex. E.)

⁷Symptoms from pituitary adenomas may include impotence, visual loss, osteoporosis, headache, decreased libido, cold intolerance, excessive perspiration, decreased appetite, vision impairment, blurriness, blindness, excessive thirst and frequent urination, growth failure, nausea, dry skin, constipation, fatigue, high or low blood pressure, high sodium in the blood, and frequent urination. Massachusetts General Hospital, The Neuroendocrine Clinical Center and Pituitary Tumor Center, Pituitary Tumor Symptoms, at <http://pituitary.mg.harvard.edu/pitysympt.htm> (last updated Jan. 4, 2006).

Rodriguez was again examined by Dr. Sedor on or about June 25, 2003. Rodriguez states that Dr. Sedor advised him that the only solution for his tumors was surgery. (11/10/03 Letter from Leonilda Rodriguez to Judge Fullam, 2d Am. Compl. Ex. B.) Dr. Bohinski noted in Rodriguez's progress chart that he received a verbal report that Rodriguez's condition may require surgery, but that Dr. Sedor's office needed more data. (06/26/03 Progress Notes, Med. Defs.' Ex. C.) P.A. Wisniewski noted on August 5, 2003, that they were awaiting information from Dr. Sedor's office to determine the next step in the treatment of Rodriguez's pituitary adenoma; Dr. Bohinski had calls placed to the endocrinologists and the neurosurgeon to assess the treatment options. (08/05/03 Progress Notes, Med. Defs.' Ex. C.) He spoke with Dr. Berbano, the endocrinologist, two days later. (08/07/03 Progress Notes, Med. Defs.' Ex. C.) According to Dr. Bohinski's notes, Dr. Berbano determined that the pituitary adenoma was a prolactinoma, which results in an overproduction of the hormone prolactin, and that Rodriguez did not suffer from Cushing's Disease. (Id.) The noted treatment plan was "medical management," and Rodriguez was given information regarding the course of treatment. (Id.) Dr. Bohinski prescribed the drug "Dostinex," as recommended by Dr. Berbano, and requested further evaluation of hormone levels in the blood. (Id.; 08/07/03 Physician's Orders, Med. Defs.' Ex. D.) He also placed another call to Dr. Sedor. (08/07/03 Progress Notes, Med. Defs.' Ex. C.) When Rodriguez asked about the option of surgery for treatment of his condition, Dr. Bohinski explained that he had not yet received a final recommendation from Dr. Sedor; he had another call placed to Dr. Sedor's office. (08/20/03 Progress Notes, Med. Defs.' Ex. C.)

On September 2, 2003, Rodriguez complained to P.A. John Cain about side-effects from the Dostinex, including shortness of breath and dizziness. (09/02/03 Progress Notes, Med. Defs.' Ex.

C.) P.A. Cain made a note that Rodriguez should be referred to Dr. Bohinski (09/02/03 Physician's Orders, Med. Defs.' Ex. D), but it appears that Rodriguez did not see Dr. Bohinski that week. He saw Dr. Stanish in the Chronic Care Clinic on September 18, 2003, who noted that Rodriguez's asthma and hypertension were "controlled" and that there had been no recent episodes of shortness of breath. (09/08/03 Progress Notes, Med. Defs.' Ex. C.) Dr. Stanish prescribed tylenol. (09/08/03 Physician's Orders, Med. Defs.' Ex. D.) Rodriguez's mother wrote a letter to Judge Fullam in which she reported that Dr. Stanish told Rodriguez that Dr. Sedor only recommended surgery because he is a surgeon. (11/10/03 Letter from Leonilda Rodriguez to Judge Fullam, 2d Am. Compl. Ex. B.)

Bohinski ordered additional blood testing; on or about October 19, 2003, Rodriguez's lab results were faxed to the endocrinologist. (10/19/03 Physician's Orders, Med. Defs.' Ex. D.) Rodriguez had a follow-up visit with Dr. Berbano, the endocrinologist, on November 5, 2003. (11/05/03 Progress Notes, Med. Defs.' Ex. C.) Subsequent to the visit, a prolactin level check was performed, the results of which were reviewed by Dr. Bohinski and faxed to Dr. Berbano; Rodriguez's prolactin level was down to 97.4. (11/12/03 Progress Notes, Med. Defs.' Ex. C; 11/12/03 Physician's Orders, Med. Defs.' Ex. D.) Based on a phone consultation with the endocrinologist, Dr. Stanish ordered continued administration of the same dosage of Dostinex and a test for prolactin levels in two months. (11/13/03 Progress Notes, Med. Defs.' Ex. C; 11/13/03 Physician's Orders, Med. Defs.' ex. D.) The follow-up prolactin levels do not appear to have been performed until May 2004. (See 06/04/04 Progress Notes, Med. Defs.' Ex. C; 05/14/04 Lab Report, Med. Defs.' Ex. E.)

In the following months, Rodriguez continued to complain of pain and congestion in the left side of his face, as well as dizziness. (See, e.g., 01/23/04 & 5/10/04 Progress Notes, Med. Defs.' Ex.

C.) However, Dr. Stanish said that in his January 2004 appointment at the chronic illness clinic, Rodriguez denied any medical issues. (03/23/04 Progress Notes, Med. Defs.' Ex. C.) In his prior December 2003 visit to the chronic illness clinic, Rodriguez had told Dr. Stanish that he was "very worried" about his tumor. (12/30/03 Progress Notes, Med. Defs.' Ex. C.) Dr. Stanish noted that Rodriguez was being treated in accordance with the instructions from the endocrinologist's office. (Id.)

Lab tests in May 2004 revealed that Rodriguez's prolactin level had decreased to 23.5, but that it was still above the normal range. (05/14/04 Lab Report, Med. Defs.' Ex. E.) Rodriguez continued to complain of headaches; at the chronic illness clinic, Dr. Stanish noted that Rodriguez's pituitary gland was under treatment, that he would continue to take Dostinex, and that he had an upcoming appointment with the endocrinologist. (06/04/04 Progress Notes, Med. Defs.' Ex. C.)

Rodriguez had more visual fields testing done at the behest of Dr. Bohinski after complaining of continued vision problems on May 27, 2004. (05/27/04 Progress Notes, Med. Defs.' Ex. C.) His visual fields were normal but another MRI was recommended. (06/22/04 Consultation Record, Med. Defs.' Ex. E.) Dr. Bohinski had already noted that a repeat MRI would be performed in August. (05/27/04 Progress Notes, Med. Defs.' Ex. C.) The MRI was conducted on September 3, 2004. (09/02/04 Progress Notes, Med. Defs.' Ex. C; 09/03/04 MRI Evaluation, Med. Defs.' Ex. E.) The MRI report noted that the right occipital calvarium was unchanged, and "almost certainly" represented a normal structure. (09/03/04 MRI Evaluation, Med. Defs.' Ex. E.) As for the pituitary mass, the report noted that "there is a normally enhancing pituitary in the central/right portion of the fossa" that was "not significantly different than the prior exam." (Id.) However, while the MRI report noted "no acute findings," it did state that the relatively decreased enhancement was "highly

suspicious.” (Id.) Upon review of the MRI report, Dr. Bohinski had a call placed to the endocrinologists’ office. (09/13/04 Progress Notes, Med. Defs.’ Ex. C.) Rodriguez was still complaining of blurred vision. (09/29/04 Progress Notes, Med. Defs.’ Ex. C.) Another doctor in the chronic illness clinic explained to Rodriguez that, although he was experiencing blurred vision, both of the masses in his brain are “old and unchanged.” (Id.)

By October 4, 2004, Rodriguez’s prolactin level was within normal range. (See 10/20/04 Lab Report at 2, Med. Defs.’ Ex. E.) On November 12, 2004, Rodriguez saw Dr. Berbano. Rodriguez states that Dr. Berbano informed Rodriguez that Drs. Bohinski and Stanish were wrong in assuming that Dostinex would eliminate his tumors. (12/14/04 Letter from Leonilda Rodriguez to Judge Fullam, 2d Am. Compl. Ex. B.) According to Rodriguez, Dr. Berbano said that Dr. Stanish told him to continue prescribing Dostinex to treat Rodriguez’s tumors because Rodriguez was scheduled to be released from SCI-Dallas in February 2006. (Id.) According to the consultation record, however, Dr. Berbano reported to Dr. Bohinski that the prolactin level was stable, and recommended continued medication with Dostinex, a yearly follow-up, and updated studies. (11/12/04 Progress Notes, Med. Defs.’ Ex. C; 11/12/04 Consultation Record, Med. Defs.’ Ex. E.)

Currently, Rodriguez complains of blurry vision, headaches, and pain in his left side. While he states that the “pains come and go,” (Pl. Dep. at 61), they have not gone away, and he does not notice a difference since his treatment with Dostinex. (Id. at 62.) Dr. Bohinski, who has primary responsibility for Plaintiff’s care (Stanish Verification ¶ 2), states that medical management was the treatment decision; the use of the prescription drug Dostinex is an appropriate first step in the treatment of the production of prolactin prior to attempting surgical intervention. (Bohinski Verification ¶¶ 15-17.)

II. LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate an absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is “material” if it may affect the outcome of the matter pursuant to the underlying law. Id. An issue is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

III. EIGHTH AMENDMENT CLAIM

In Counts I and IV of his Amended Complaints, Plaintiff Rodriguez has asserted claims against all moving Defendants, alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that inadequate medical care may constitute a violation of the Cruel and Unusual Punishments Clause when prison officials manifest “deliberate indifference

to the serious medical needs of prisoners”).⁸ Plaintiff asserts two claims of deliberate indifference: (1) the named Defendants ignored his complaints and either failed to diagnose a brain tumor or knew of the tumor and withheld the information and necessary treatment; and (2) in the time period since Plaintiff’s condition was diagnosed in February 2003, the Medical Defendants at SCI-Dallas have provided ineffective treatment and knowingly withheld recommended surgery.

A. The Federal Defendants

The Federal Defendants move for summary judgment on Plaintiff’s Eighth Amendment Bivens claim on the ground that Plaintiff has failed to exhaust available administrative remedies as required by the Prison Litigation Reform Act of 1995 (the “PLRA”). The PLRA provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).⁹ The Federal Defendants bear the burden of proving that Plaintiff failed to exhaust his administrative remedies. See Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002).

⁸It appears from the record that Plaintiff may have been a pretrial detainee while in custody at MCCF, FDC-Philadelphia, and FMC-Devens. His claims against Carrillo, Smith, and Bernhard thus may not fall “within the ambit of the Eighth Amendment.” Boring v. Kozakiewicz, 833 F.2d 468, 471 (3d Cir. 1987). However, pretrial detainees “are entitled to the protections of the Due Process Clause.” Id. The Third Circuit has applied the Eighth Amendment’s “deliberate indifference” standard in cases involving a pretrial detainee’s allegations of inadequate medical care in violation of the Due Process Clause. See, e.g., Natale v. Camden County Corr. Facility, 318 F.3d 575, 581 (3d Cir. 2003); Boring, 833 F.2d at 472. Because the standard does not vary, and for ease of reference, the Court analyzes all of Plaintiff’s claims under the Eighth Amendment.

⁹Pretrial detainees are included in the definition of “prisoner.” See 42 U.S.C. § 1997e(h) (“As used in this section, the term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”)

The Federal Bureau of Prisons regulations provide for an inmate grievance procedure, which first requires the inmate to file a formal administrative remedy request. See 28 C.F.R. § 542.14(c). If the inmate is not satisfied with the outcome of his request, there are two tiers of appeals: first to the Regional Director, and then to the Bureau of Prisons’ General Counsel. See 28 C.F.R. § 542.15(a). There is no dispute that these procedures were available to Plaintiff. Plaintiff admits that he has not followed the obligatory procedure, but argues that he has exhibited “substantial compliance” with the administrative remedy scheme by making a substantial showing of going through the proper channels to get attention for his medical problems.¹⁰

The United States Court of Appeals for the Third Circuit (the “Third Circuit”) has noted that “compliance with the administrative remedy scheme will be satisfactory if it is substantial.” Nyhuis v. Reno, 204 F.3d 65, 77-78 (3d Cir. 2000). Plaintiff points out that he wrote and spoke to various people regarding his complaint of inadequate medical care: Warden Smith, the federal judge presiding over his criminal case, and his own attorney. Even if Plaintiff’s communications with Warden Smith could be found to constitute a formal administrative remedy request, Plaintiff does not contend that he attempted to make a second or third-step appeal within the federal prison system; he instead wrote letters to people outside. Although the Third Circuit has not elaborated on the definition of substantial compliance, it has held that a prisoner who filed an untimely second-step

¹⁰Plaintiff also argues that the administrative remedy scheme does not provide a remedy for his constitutional claims, and that claims of inadequate medical care are not normal prison conditions such that the PLRA exhaustion requirement is inapplicable. Plaintiff’s arguments misstate the law. First, “[e]ven where the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.” Spruill, 372 F.3d at 227 (citing Porter v. Nussle, 534 U.S. 516, 524 (2002)). Second, a prisoner’s claim of deliberate indifference to serious medical need constitutes an action regarding prison conditions such that the prisoner must exhaust administrative remedies under the PLRA before commencing suit. See id. (applying the PLRA administrative exhaustion requirement to a § 1983 action alleging deliberate indifference to medical needs).

appeal did not substantially comply with the administrative remedy scheme. Ahmed v. Dragovich, 297 F.201, 209 (3d Cir. 2002) (holding that it would be futile for a prisoner to amend his complaint to include that he filed an untimely appeal of his initial grievance). Given that Plaintiff filed no appeal, let alone a timely one, he cannot be in substantial compliance with the PLRA. The Court concludes that there is no evidence that Plaintiff has fulfilled the administrative exhaustion requirement and that the Federal Defendants are consequently entitled to judgment as a matter of law. Accordingly, the Court grants the Federal Defendants' Motion with respect to Plaintiff's Eighth Amendment claim in Counts I and IV.¹¹

B. The Medical Defendants

The Medical Defendants move for summary judgment on Plaintiff's Eighth Amendment Claim on the ground that Plaintiff has presented no evidence that he has serious medical needs or that they were deliberately indifferent to his medical needs. "Deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Estelle, 429 U.S. at 104. In order to prove a violation of the Eighth Amendment, Plaintiff must first demonstrate that his medical need is serious, that is, his condition 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. Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987). The Medical Defendants argue that Plaintiff has not presented evidence that his pituitary adenoma constitutes a serious medical need. The Court finds, however, that a pituitary adenoma is a serious medical need, given that it has

¹¹Having thus resolved the Federal Defendants' Motion on the grounds of administrative exhaustion, the Court need not address the additional arguments raised by these Defendants in their supplemental brief.

been diagnosed by an endocrinologist as requiring treatment. The Medical Defendants also point out that the other mass in Plaintiff's head, which has been identified as an abnormality in the right occipital calvarium, does not require treatment. The Court agrees that there is no genuine dispute in the record that the abnormality is a benign condition that requires no treatment, and therefore does not qualify as a serious medical need.¹²

The Medical Defendants also argue that there is no evidence that they were deliberately indifferent to his serious medical needs. Monmouth County, 834 F.2d at 346. The standard for deliberate indifference "focuses on what the official actually knew," Singletary v. Pa. Dep't of Corrections, 266 F.3d 186, 193 n.2 (3d Cir. 2004); in order to be liable, the official must "know[] of and disregard 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). Deliberate indifference constitutes more than negligence, malpractice, or disagreement over the proper course of medical treatment. Spruill v. Gillis, 372 F.3d 218, 235 (3d Cir. 2004).

1. Dr. Carrillo

Plaintiff alleges that Dr. Carrillo was deliberately indifferent to his serious medical need because she failed to examine him properly and did not order an MRI of his brain despite his exhibition of nerve damage and weakness on his left side. However, the failure to diagnose properly or to order proper diagnostic tests, without more, does not rise to the level of a constitutional violation. See Estelle, 429 U.S. at 107 ("[T]he question whether an X-ray or additional diagnostic

¹²Plaintiff asserts that both masses are "brain tumors" that require surgical intervention, but has not presented any evidence to support his assertion.

techniques or forms of treatment is indicated is a classic example for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.”) The evidence of record shows that Dr. Carrillo attempted to diagnose Plaintiff’s pain and vision problems. There is no evidence that she refused to see Plaintiff to evaluate his conditions. See Spruill v. Gillis, 372 F.3d 218, 237 (3d Cir. 2004) (holding that a consistent and intentional refusal to provide treatment may constitute deliberate indifference). There is also no evidence that she knew that Plaintiff was suffering from a serious medical need in the form of a pituitary tumor. Although Plaintiff wished to have an MRI to determine whether he had experienced a stroke, Plaintiff’s own statements reveal that it was the medical director, and not Dr. Carrillo, who decided that he should not have an MRI. Plaintiff has made no other allegations or submitted any evidence in support of his claim of a culpable state of mind. Accordingly, the Court finds that Plaintiff has not submitted any evidence showing that Dr. Carrillo was deliberately indifferent to Plaintiff’s serious medical needs. The Court further finds that she is entitled to judgment as a matter of law on Plaintiff’s Eighth Amendment claim against her.

2. Dr. Bohinski, Dr. Stanish, & P.A. Gallagher

Plaintiff claims that the Medical Defendants of SCI-Dallas (Dr. Bohinski, Dr. Stanish, and P.A. Gallagher) were deliberately indifferent to his serious medical needs prior to his 2003 discovery of the pituitary adenoma because they knew or should have known that he was suffering from tumors and needed a specialist, and that Dr. Stanish and P.A. Gallagher at times refused him treatment. Dr. Bohinski, Dr. Stanish, and P.A. Gallagher argue that there is no evidence that they knew that Plaintiff had a pituitary adenoma, that they provided what they believed to be appropriate treatment,

and that their failure to diagnose his condition does not constitute deliberate indifference.¹³ Dr. Stanish and P.A. Gallagher also contend that they never refused to provide medical care to Plaintiff.

An intentional refusal to provide diagnostic care that prison doctors know is needed constitutes deliberate indifference. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703-04 (11th Cir. 1985). In support of his claim that these Defendants exhibited deliberate indifference, Plaintiff points out that the 2001 CAT Scan Evaluation revealing the abnormality behind Plaintiff's eye was presumably available to his treating physicians. The evidence shows, however, that the 2001 CAT Scan did not reveal Plaintiff's pituitary tumor. Further, there is significant evidence in Plaintiff's records that the treating physicians were not aware of this report or its significance. P.A. Wisniewski checked Plaintiff's neurological signs at least once, in April 2002, and did not find any indications of neurological problems. Dr. Bohinski signed off on Wisniewski's treatment of Plaintiff; both P.A. Gallagher and Dr. Stanish had this information available to them each time they treated Plaintiff. Dr. Bohinski approved x-rays to determine the cause of Plaintiff's pain and approved a referral to an optometrist to check his vision. Based on this evidence that P.A. Gallagher and Dr. Bohinski were attempting to treat and diagnose Plaintiff's vision problems and pain by conducting x-rays and sending him to an optometrist, the Court finds that there is no basis for an inference that the

¹³Dr. Bohinski and P.A. Gallagher also argue that Plaintiff has not exhausted his administrative remedies with respect to his claims against them because, although he filed initial grievances against them, he did not follow the appropriate procedures to appeal those grievances. See Spruill v. Gillis, 372 F.3d 218, The Court notes, however, that Plaintiff did file a grievance on July 19, 2002, in which he complained that the entire medical staff was not providing him the appropriate medical care, and he pursued this grievance with the appropriate appeals. (See Med. Defs.' Ex. F.) Although Plaintiff mentioned Dr. Stanish in particular in the grievance, it is clear that his grievance was directed at the medical staff in general. Accordingly, the Court determines that there is at least a genuine issue of material fact as to whether Plaintiff has exhausted his administrative remedies, and turns to the merits of Plaintiff's claims against Defendants Bohinski and Gallagher.

Defendants of SCI-Dallas knew he was suffering from a pituitary tumor or similar condition requiring diagnostic treatment. Without evidence of such knowledge, the acts and omissions of these Defendants amount to a continued misdiagnosis of Plaintiff's symptoms, not deliberate indifference to his serious medical needs. See Estelle, 429 U.S. at 105-06 (holding that claims of negligence in diagnosing or treating a medical condition cannot establish a claim of medical mistreatment under the Eighth Amendment); Johnson v. Stempler, No. Civ. A. 00-711, 2005 WL 119575, at *4 (E.D. Pa. Jan. 20, 2005) (holding that plaintiff could not recover on theory of deliberate indifference where defendants administered some treatment for the pain and there was no evidence of any misconduct other than misdiagnosis).

Plaintiff also claims that Dr. Stanish refused to treat Plaintiff and that P.A. Gallagher refused to allow Plaintiff to see a doctor on specific occasions. An intentional and knowing refusal to provide needed medical care for a serious medical condition may establish deliberate indifference. Monmouth County, 834 F.2d at 346. However, Plaintiff does not deny that he was seen by Dr. Stanish for his asthma and hypertension shortly before he complained that Dr. Stanish refused to treat him. (Pl. Dep. at 42-46.) The evidence before the Court makes it clear that Plaintiff was seen by Dr. Stanish, but that he was upset that Dr. Stanish was not giving him the care Plaintiff felt he needed and was dismissive of his complaint that he had suffered a stroke. Thus, Plaintiff does not deny that Dr. Stanish provided some medical care. Complaints that a doctor's medical care was inadequate, without more, cannot form the basis for an Eighth Amendment claim. See, e.g., Stackhouse v. Marks, 556 F. Supp. 388, 389 (M.D. Pa. 1982) (holding that no Eighth Amendment claim was stated where prisoner complained that the type of treatment defendants provided was not adequate).

Plaintiff also alleges that P.A. Gallagher kicked him out of the examination room and refused to let him see a doctor. P.A. Gallagher denies that she ever refused to let Plaintiff see a doctor for medical treatment, although she once refused to let him see a doctor to complain about sick call charges to Plaintiff's account. (Gallagher Verification ¶ 20.) There is substantial evidence before the Court that P.A. Gallagher treated Plaintiff numerous times at sick call for his various symptoms. There is no evidence that she knew of Plaintiff's need for medical care on the particular days he claims that she refused to let him see a doctor, nor that he needed to see a physician as opposed to a physician's assistant. Accordingly, the Court finds that Plaintiff has failed to submit evidence which would establish a genuine issue of material fact as to whether Dr. Stanish and P.A. Gallagher knowingly refused to provide needed medical care.

Plaintiff next claims that the SCI-Dallas medical staff have exhibited deliberate indifference to his pituitary adenoma since it was diagnosed in April 2003 by continuing in a course of ineffective treatment and failing to send him to a neurosurgeon for surgical removal of his tumors. Specifically, he claims that Dr. Sedor, the outside neurosurgeon, has recommended surgery as necessary to treat Plaintiff's condition, and that the decision of the SCI-Dallas medical staff to treat Plaintiff's pituitary adenoma with Dostinex is thus evidence of deliberate indifference. Dr. Bohinski, Dr. Stanish, and P.A. Gallagher argue that Plaintiff has not presented any evidence that shows that he is receiving inadequate medical care for his pituitary tumor, let alone that they have exhibited deliberate indifference to his serious medical need.

A prison doctor's choice of an ineffective course of treatment in contravention of another physician's explicit orders or the choice of an "easier and less efficacious treatment" may establish deliberate indifference. See White v. Napoleon, 897 F.2d 103, 110-11 (3d Cir. 1990) (relying on

Martinez v. Mancusi, 443, F.2d 921 (2d Cir. 1970), to hold that an intentional refusal to provide prescribed treatment may show deliberate indifference where a failure to follow another physician's orders counteracted previous treatment or caused a worsening of plaintiff's condition); West v. Keve, 571 F.2d 158,162 (3d Cir. 1978) (holding that a physician's choice of an "easier and less efficacious treatment" may show deliberate indifference). The physician's choice of an "easier and less efficacious treatment" may result in an inference of deliberate indifference when the treatment is questionably appropriate. See, e.g., id. (finding a genuine issue of material fact as to whether the failure to administer anything but aspirin for post-operative pain constituted an "easier and less efficacious treatment" evidencing deliberate indifference); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (holding that a prison physician's choice to cut off his patient's ear rather than treat the wound may constitute deliberate indifference, assuming there were no proven medical reasons for doing so).

There is no evidence that Dr. Bohinski, Dr. Stanish, and P.A. Gallagher are failing to follow a physician's explicit orders or that surgery is medically necessary. While there is some evidence that Dr. Sedor preliminarily recommended surgery, Dr. Bohinski, who is primarily responsible for Plaintiff's medical care, has chosen to first attempt the less invasive method of medical management with Dostinex as prescribed by the endocrinologist. The evidence before the Court shows that Dr. Stanish and P.A. Gallagher have followed these recommendations, and there is no evidence that they have interfered in Plaintiff's treatment. Moreover, there is no evidence to show that the choice of treatment is inappropriate, ineffective or harmful.¹⁴ Dr. Bohinski, Dr. Stanish, and P.A. Gallagher

¹⁴Plaintiff has submitted evidence that Dr. Berbano told him that the Dostinex would not eliminate his tumors, and that Dr. Sedor told him that the solution for his tumors was surgery. The medical significance of these statements in the context of Plaintiff's treatment is unclear. In any

have, to the extent of their roles in Plaintiff's treatment, chosen and followed a method of treatment that has reduced Plaintiff's prolactin levels; they have continued to monitor his vision and the size of his tumor through diagnostic tests and imaging. Dr. Bohinski has made these test results available to Dr. Sedor and to Dr. Berbano, the outside endocrinologist. At the most, Plaintiff has presented a case of differing opinions of medical professionals. A disagreement between physicians about the proper course of medical care, or a plaintiff's own disagreement with a doctor's professional judgment as to the proper course of treatment, cannot support a claim for a violation of the Eighth Amendment. Napoleon, 897 F.2d at 110 (3d Cir. 1990). "[A]s long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights." Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990). As the Third Circuit has noted, "[t]here may . . . be several acceptable ways to treat an illness." Napoleon, 897 F.2d at 110.

The evidence before the Court establishes that Dr. Bohinski has used his medical judgment in initially prescribing a more conservative form of treatment for Plaintiff's pituitary adenoma and has not inexplicably refused to follow another physician's explicit orders to the effect of worsening Plaintiff's condition or counteracting previous treatment. The evidence also establishes that Dr. Stanish and P.A. Gallagher have consistently followed Dr. Bohinski's recommended course of treatment in the use of their medical judgment. There is no evidence that Plaintiff is being harmed by their course of treatment, let alone that they are deliberately indifferent to a risk that harm could arise. The Court thus finds that Plaintiff has failed to make out a claim of deliberate indifference to

event, these statements are hearsay and would not be admissible at trial. Evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir.1999) (citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir.1993)).

his serious medical need. Accordingly, the Court grants the Medical Defendants' Motion with respect to Plaintiff's Eighth Amendment Claim.

IV. STATE LAW CLAIMS

In Count II of his Amended Complaints, Plaintiff has asserted a claim for medical malpractice against Dr. Bernhard alleging that his treatment of Plaintiff fell below the standard of reasonable medical care.¹⁵ In Count III of his Amended Complaints, Plaintiff has asserted a claim for intentional infliction of emotional distress against all named Defendants, alleging that they intentionally or recklessly inflicted emotional distress upon him by failing to treat his brain tumor and failing to inform him of his condition.

A. The Medical Defendants: Intentional Infliction of Emotional Distress

The Medical Defendants move for summary judgment on Plaintiff's claim for intentional infliction of emotional distress on the grounds that Plaintiff has not submitted any evidence of the required elements of the claim as to Dr. Bohinski, Dr. Stanish, and P.A. Gallagher, and that the statute of limitations bars Plaintiff's claim for intentional infliction of emotional distress against Dr. Carrillo.

1. Dr. Bohinski, Dr. Stanish, & P.A. Gallagher

Although there is some question as to whether Pennsylvania law supports a cause of action for intentional infliction of emotional distress, the courts have nonetheless held that in order for a plaintiff to prevail on such a claim, he must prove that the defendant engaged in intentional, outrageous, or extreme conduct which caused severe emotional distress to the plaintiff, resulting in

¹⁵Plaintiff's medical malpractice claims against the remaining medical Defendants were dismissed by Order of this Court on June 21, 2005. See Rodriguez v. Smith, No. Civ. A. 03-3675, 2005 WL 1484591 (E.D. Pa. June 21, 2005).

some type of physical harm. Swisher v. Pitz, 868 A.2d 1228, 1230 (Pa. Super. Ct. 2005) (citing, *inter alia*, Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998), and Fewell v. Besner, 664 A.2d 577, 582 (Pa. Super. Ct. 1995)).

In order for Plaintiff to prevail, he must prove intentional or reckless conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Lane v. Cole, 88 F. Supp.2d 402, 406 (E.D. Pa. 2000) (citing Hoy, 720 A.2d at 754). “It is for the court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.” Miller v. Hoffman, No. Civ. A. 97-7987, 1999 WL 415397, at *8 (E.D. Pa. June 22, 1999) (citing Restatement (Second) of Torts § 46 cmt. h). The Medical Defendants of SCI-Dallas argue that their conduct does not rise to this level as a matter of law. The Court has noted that a continuous, deliberate refusal to provide necessary treatment for a brain tumor, together with verbal abuse could support a claim of intentional infliction of emotional distress. See Rodriguez, 2005 WL 1484591, at *9 (citing Miller, 1999 WL 415397, at *9). However, the Court has already concluded that there is no evidence that the Defendants have continuously refused to provide needed medical treatment. Without such egregious conduct, Plaintiff’s testimony regarding the verbal abuse he received from Dr. Stanish and P.A. Gallagher on one or two occasions cannot be a basis for liability. “It is clear that ‘liability . . . does not extend to mere insults, threats, annoyances, petty oppressions, or other trivialities.’” Lane, 88 F. Supp. 2d at 406 (quoting Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 991 (Pa. 1987))). Plaintiff has stated that P.A. Gallagher told him to “get [his] ass out” of the sick call room, and that Dr. Stanish made comments about Plaintiff’s national origin and told him that he wouldn’t get better treatment at home. (Pl. Dep. at 46.) These insults do not

represent conduct that is “beyond all possible bounds of decency.” See, e.g., Coney v. Pepsi Cola Bottling Co., 1997 WL 299434, at *1 (E.D. Pa. May 29, 1997) (“[H]ighly provocative racial slurs and other discriminatory incidents do not amount to actionable outrageous conduct.”) Accordingly, the Court grants the Medical Defendants’ Motion with respect to Count III as against Dr. Bohinski, Dr. Stanish, and P.A. Gallagher.

2. Dr. Carrillo

Dr. Carrillo argues that the statute of limitations bars Plaintiff’s claim for intentional infliction of emotional distress. The Court agrees that the applicable statute of limitations for this claim is Pennsylvania’s two-year statute of limitations for actions sounding in tort. See 42 Pa. Cons. Stat. Ann. § 5524. Dr. Carrillo’s complained-of conduct took place, at the latest, in May of 2000, when she last treated Plaintiff; Plaintiff did not commence this action until June of 2003, over three years later. Accordingly, the Court grants the Medical Defendants’ Motion for Summary Judgment with respect to Count III as against Dr. Carrillo.

B. The Federal Defendants

The Federal Defendants move for summary judgment on Plaintiff’s state law claims against them on the ground that the Court lacks subject matter jurisdiction over these claims. They contend that because both Dr. Bernhard and Warden Smith were acting in the scope of their employment during the time of the alleged wrongful acts and omissions, the United States must be substituted as a defendant in this action. However, substitution would be futile because Plaintiff has not presented his claim to the government.

As the Supreme Court has explained,

When a federal employee is sued for a wrongful or negligent act, the

Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee “was acting within the scope of his office or employment at the time of the incident out of which the claim arose....” 28 U.S.C. § 2679(d)(1). Upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case then falls under the governance of the Federal Tort Claims Act (FTCA)

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 419-20 (1995). The Federal Tort Claims Act (the “FTCA”) is the “exclusive mode of recovery” for the state law tort of a federal employee committed while acting in the scope of his employment. United States v. Smith, 499 U.S. 160, 166 (1991) (citing 28 U.S.C. § 2679(b)(1)).

The Federal Defendants have submitted a certification of scope of employment from the Department of Justice. Plaintiff does not dispute that Dr. Bernhard and Warden Smith were acting within the scope of their employment. The Federal Defendants are immune from suit, even where application of the FTCA would preclude recovery. Accordingly, the Court has no jurisdiction over Plaintiff’s state law claims against Dr. Bernhard and Warden Smith in Counts II and III, and these claims must be dismissed. See Robinson v. United States, Nos. Civ. A. 92-4869, 92-6175, 1993 WL 74841, at *2-*3 (E.D. Pa. Mar. 15, 1993) (dismissing plaintiff’s personal injury action against a federal employee acting within the scope of his employment for lack of subject matter jurisdiction).

The Court is compelled to substitute the United States as a party to the action. However, the Federal Defendants argue that such substitution would be futile because Plaintiff has not followed the appropriate procedures for bringing a claim under the FTCA. A plaintiff bringing suit under the FTCA must first present his or her claim to the appropriate federal agency for review. 28 U.S.C. § 2675(a). Non-compliance with the presentment requirement “deprives a claimant of federal court

jurisdiction over his or her claim.” Tucker v. U.S. Postal Serv., 676 F.2d 954, 959 (3d Cir. 1982); see also Dugan v. Coastal Indus., Inc., 96 F. Supp. 2d 481, 485 (E.D. Pa. 2000) (dismissing loss of consortium claim pursuant to Rule 12(b)(1) for failure to exhaust administrative presentment requirement of the FTCA). The notice of claim must inform the agency of the circumstances of the injury and include a statement of damages. See Tucker, 676 F.2d at 958-59. Plaintiff has responded to the Federal Defendants’ arguments, but has submitted no evidence that he has presented any claim meeting these minimal requirements, although he did submit requests for medical treatment and for his medical records to the Federal Bureau of Prisons.¹⁶ The Court would be compelled to dismiss any claim against the United States for failure to meet the FTCA’s presentment requirement. Accordingly, the Court grants the Federal Defendants’ Motion for Summary Judgment with respect to Plaintiff’s state law claims in Counts II and III.

V. CONCLUSION

For the foregoing reasons, the Court grants the Federal Defendants’ Motion for Summary Judgment and the Medical Defendants’ Motion for Summary Judgment.¹⁷

An appropriate order follows.

¹⁶The fact that application of the FTCA precludes recovery in this matter does not alter the above analysis of the Federal Defendants’ immunity. See United States v. Smith, 499 U.S. 160 (1991) (holding that the Federal Employees Liability and Reform Act immunizes Government employees from suit even when exceptions to the FTCA preclude recovery).

¹⁷The following claims remain in this action: Plaintiff’s Eighth Amendment Claim in Count I against Correctional Officer Briston and MCCF Medical Director Mrs. Conane; Plaintiff’s Intentional Infliction of Emotional Distress Claim against Correctional Officer Briston and Mrs. Conane.

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

JUAN RODRIGUEZ : CIVIL ACTION
 :
 v. :
 :
 JOSEPH V. SMITH, et al. : No. 03-3675

ORDER

AND NOW, this 16th day of March, 2006, upon consideration of the Motion for Summary Judgment filed by Defendants Dr. Karl Bernhard and Joseph Smith (Doc. No. 73), the Motion for Summary Judgment filed by Defendants Stanley Stanish, M.D., Stanley Bohinski, D.O., Margaret Carrillo, M.D., and Kelly Gallagher, P.A. (Doc. No. 117), and all documents filed in connection therewith, **IT IS HEREBY ORDERED** as follows:

1. The Motion for Summary Judgment filed by Defendants Bernhard and Smith (Doc. No. 73) is **GRANTED**. **JUDGMENT** is hereby entered in favor of Defendants Bernhard and Smith and against Plaintiff.
2. The Motion for Summary Judgment filed by Defendants Stanish, Bohinski, Carrillo, and Gallagher (Doc. No. 117) is **GRANTED**. **JUDGMENT** is hereby entered in favor of Defendants Stanish, Bohinski, Carrillo, and Gallagher, and against Plaintiff.

BY THE COURT:

s/ John. R. Padova
John R. Padova, J.