IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

REIYN KEOHANE,

Plaintiff,

v.

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Defendant.

CASE NO. 4:16-cv-511

MEMORANDUM IN SUPPORT OF FDOC'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff's complaint focuses almost entirely on requested hormone therapy. Since September, 2016, however, FDOC has provided hormone therapy, as well as mental health counseling, for plaintiff's gender dysphoria. And, plaintiff recently received a medical pass to wear a bra.

Despite this ongoing treatment, plaintiff contends that FDOC's refusal to allow an exception to its generally applicable hair length policy, or to allow plaintiff panties or access to makeup amounts to an Eighth Amendment

violation. Plaintiff's own medical team has determined that these wishes are not tied to a serious medical need or any imminent risk of serious harm.

No case holds that a prison's failure to meet a prisoner's hairstyle or clothing demands violates the Eighth Amendment. Eleventh Circuit precedent does not require prison officials to administer a particular course of treatment for inmates diagnosed with gender dysphoria. Plaintiff's mere disagreement with the extent of medical treatment provided by prison physicians does not amount to an Eighth Amendment violation.

Further, FDOC's hair-length and clothing policies are supported by sound penological concerns. Uniformity in hair length and a refusal to make individualized grooming and clothing exceptions are necessary for the safe and secure administration of FDOC's facilities. There is no record evidence or legal reason for plaintiff's personal desires, unmoored to any risk of serious medical harm, to override FDOC's generally applicable policies. FDOC's motion for summary judgment should be granted.

STATEMENT OF UNDISPUTED FACTS

1. In September 2013, plaintiff was charged with attempted second degree murder for stabbing plaintiff's female roommate in the neck and

stomach, causing "life threatening injuries." *See* Fort Myers Police Department Probable Cause Statement (Sept. 23, 2013) (doc. 23-1). Plaintiff was apprehended after fleeing the crime scene on a moped where plaintiff was found "armed with two knives and a loaded AR15 magazine in his pocket." *Id.* Plaintiff pled guilty to the crime charged, and was sentenced to fifteen (15) years in prison, which plaintiff began serving in July 2014 (doc. 3-1 ¶ 9). Plaintiff is currently in the custody of the Florida Department of Corrections ("FDOC") (doc. 3-1 ¶ 2).

2. Plaintiff is a biological male who was diagnosed with gender dysphoria in 2010, prior to incarceration. Compl. ¶ 28.

A. Gender Dysphoria Generally

3. Gender Dysphoria is the "medical diagnosis for the incongruence between one's gender identity and one's sex assigned at birth." *Id.* ¶ 15.

4. Thus, although plaintiff's "external anatomy" is that of a male, plaintiff's "internal sense" is that plaintiff is a woman. *Id.* ¶¶ 11, 13.

5. The WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("Standards of Care") provide

guidance for health professionals to assist individuals with gender dysphoria. (doc. 3-16).

6. The Standards of Care provide the following treatment options for gender dysphoria: (1) changes in gender expression and role; (2) hormone therapy; (3) surgery; and (4) psychotherapy. *Id.* The Standards of Care do not require or prohibit any particular treatment but state that the "particular course of medical treatment" should "var[y] based on the individualized needs of the person." (doc. 3-16). In addition, the Standards of Care "are intended to be flexible in order to meet the diverse health care needs of transsexual, transgender, and gender-nonconforming people. *Id.*

B. Plaintiff's Treatment of Gender Dysphoria

1. <u>Mental Health and Psychological Counseling</u>

7. Plaintiff's gender dysphoria has been treated with an "individualized service plan" of mental-health care. Compl. ¶ 55; *see also id.* ¶ 35 (listing the "numerous DOC medical and mental-health officials" who have evaluated plaintiff during plaintiff's imprisonment); Dep. Excerpts of Andre Rivero-Guevara, Exhibit "A" to Evidentiary Submission, pp. 53-54; 55:1-3; *See* Decl. of Marlene

Hernandez, M.D., C.C.H.P. (doc. 24-1), ¶¶ 2, 4-5; Decl. of Dr. Jose Santeiro (doc. 44-1 ¶¶ 4-11); [1]

8. Plaintiff's gender dysphoria has been treated with mental-health counseling. *See* doc. 44-2 ¶ 3; doc. 44-1¶¶ 6, 10; Dep. Excerpts of Jose Santeiro, Exhibit "B" to Evidentiary Submission, pp. 13-16.

2. Hormone Therapy

9. Plaintiff filed administrative grievances and appeals asserting that this mental-health care is insufficient treatment, and that plaintiff instead needs hormone therapy, in accordance with the "prescription [plaintiff had] when [plaintiff] was arrested." Compl. ¶ 37; *see also id.* ¶¶ 47, 53, 56, 57, 65, 66, 76, 79.

10. In plaintiff's grievances, plaintiff has asserted that "[t]o deny" hormone therapy "is to cause depression and suicidal tendencies, which [plaintiff] must face on a daily basis." *Id.* ¶ 53.

11. Plaintiff asserts that the requests for hormone therapy were denied under FDOC's "freeze-frame policy," under which "[i]nmates who have undergone treatment for [Gender Dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department." *Id.* ¶¶ 55, 85.

[1] References in this memorandum to attachments not already in the record correspond to the exhibits as labeled and filed in FDOC's Evidentiary Submission, filed contemporaneously herewith.

12. Dr. Hernandez, who at the time oversaw the provision of medical care at plaintiff's prison, recommended that plaintiff be referred to an outside endocrinologist, Dr. Eugenio Angueira-Serrano, for treatment. (doc. 24-1 ¶¶ 2, 4-5). Dr. Angueira-Serrano prescribed hormone therapy to plaintiff on September 2, 2016. Endocrinologist Medical Records, Exhibit "C" to Evidentiary Submission; Dep. Excerpts of Dr. Eugenio Angueira-Serrano, Exhibit "D" to Evidentiary Submission, pp. 25-27.

13. Since September 2, 2016, plaintiff has been receiving the hormone therapy, which is monitored by Dr. Angueira-Serrano. Ex. C; *see* doc. 24-1 ¶¶ 2, 4-5.

14. The specific hormones were prescribed by Dr. Angueira-Serrano, and will be provided to plaintiff for as long as plaintiff's treatment team believes the hormones are medically necessary to treat plaintiff's gender dysphoria. doc. 44-1 ¶ 7 ("The specific hormones, however, should be provided by, and under the supervision of, a medical doctor, and for as long as the medical doctor believes the hormones are medically necessary to treat plaintiff's gender dysphoria."); doc. 44-1 ¶ 7; Decl. of Thomas E. Reimers, doc. 44-2 ¶ 5; Dep. Excerpts of Rule 30(b)(6) Dep., Exhibit "E" to Evidentiary Submission, pp. 161-64.

15. On April 6, 2017, plaintiff was being transferred to a FDOC facility near Tallahassee in compliance with the Court's writ issued in connection with mediation (doc. 96), and was processed through the South Florida Reception Center ("SRFC"). Dep. Excerpts of Reiyn Keohane, Exhibit "F" to Evidentiary Submission, pp. 113:23-25; 114:1-4; Dept. of Corrections Incident Reports, Exhibit "G" to Evidentiary Submission.

16. While at SFRC, plaintiff's medical records could not be located, thereby causing plaintiff to miss several days of hormone medication. Ex. F, p. 70; 10-15; Ex. G.

17. While there, plaintiff attempted to commit suicide on two different occasions, on April 8, 2017, and April 10, 2017.[2]

18. On April 9, 2017, the staff obtained plaintiff's medication but could not provide the medication because the medical records had not yet arrived. Ex. G.

19. Upon receiving the medical records, on April 10, 2017, the staff provided plaintiff with the prescribed medication. Ex. F, p. 70; 10-15; Ex. G.

[2] For purposes of summary judgment only, FDOC accepts the characterization of events contained in plaintiff's affidavit (doc. 105-1). FDOC reserves the right to question this characterization at trial, if necessary.

20. Plaintiff has continuously received the proper medication since leaving SFRC, and plaintiff has made clear on several occasions to various members of the medical team that the hormone therapy and mental health counseling helps with gender dysphoria issues and overall mood. Ex. F, pp. 70; 10-15; 73-74; Dep. Excerpts of Arnise Johnson, Exhibit "H" to Evidentiary Submission, pp. 94:13-25; 95:1-3; 97:22-25; 98:1-4; 108:8-17; Ex. D, pp. 43:7-12; 46:24-25; 47: 1-4; 48:22-25; 49:1-6.

21. Plaintiff has no suicidal ideation when the prescribed medication is timely delivered. Ex. F, pp. 85: 9-12, 25; 86:1-3; Ex. A, p. 70:12-14.

22. FDOC will continue to provide the treatment it is now providing—hormone therapy and mental-health counseling—as long as its medical professionals continue to believe that those treatments are necessary. doc. 44-1 ¶¶ 9-11; doc. 44-2 ¶¶ 4-5.

3. Hair Length Exception, Female Undergarments, and Makeup

23. Plaintiff has also demanded to be able to wear "female underwear" and "grow[] her hair" in female styles. Compl. ¶¶ 36, 66.

24. In response to plaintiff's physical developments caused by the hormone therapy, plaintiff was provided a female bra on May 2, 2017. Grievance Appeal Denial, Exhibit "I" to Evidentiary Submission.

25. Plaintiff's requests to wear female underwear and makeup and to grow hair longer than allowed have been denied under FDOC policies. Fla. Admin. Code r. 33-602.101 provides that "[i]nmates shall at all times wear ... regulation clothing," which for male inmates includes "under shorts" and for female inmates includes "panties" and a "bra or athletic bra." 33-602.101(2). Rule 33-602.101 further provides that "[m]ale inmates shall have their hair cut short to medium uniform length at all times with no part of the ear or collar covered." *Id.* at 33-602.101(4).

26. While plaintiff argues that long hair is medically necessary for plaintiff's own treatment of gender dysphoria, as plaintiff agrees, one can wear a "feminine" hairstyle without having hair longer than the "ear or collar." Ex. F., pp. 127-30.

27. Plaintiff's medical team at FDOC does not believe that permitting plaintiff to grow longer hair or wear female clothing within the male prison facility are medically necessary for the treatment of plaintiff's gender dysphoria at this

time. doc. 44-1 ¶¶ 9-11; Ex. A, pp. 29:16-25; 68: 17-25; 69:1-6; 70:7-25; 71:1-25; 72:1-6; 79: 21-25: 80:1-4: 83:8-25; Ex. H, pp. 94:13-25; 95:1-3; 97:22-25; 98:1-4; 105:20-23; 108:8-17; Ex. D., pp. 23: 4-15; 43:7-12; 46:24-25; 47: 1-4; 48:22-25; 49:1-6; Ex. B, pp. 12-16; 90-94; 97-100.

28. FDOC's retained medical expert, Dr. Stephen B. Levine, also believes that long hair and access to makeup are not medically necessary for the treatment of plaintiff's gender dysphoria. Expert Report, Dr. Stephen Levine (doc. 105-4); Dep. Excerpts of Dr. Stephen Levine, Exhibit "J" to Evidentiary Submission, pp. 51:12-18; 69-72; 85-93; 100-01.

29. Plaintiff's medical team at FDOC, based on their evaluations with plaintiff and their clinical judgments, do not believe that plaintiff, at this time, is at a substantial risk for self-harm or severe psychological pain in being required to comply with the FDOC's policies on hair and grooming standards. doc. 44-1 ¶¶ 9-11; Ex. A, pp. 29:16-25; 68: 17-25; 69:1-6; 70:7-25; 71:1-25; 72:1-6; 79: 21-25: 80:1-4: 83:8-25; Ex. H, pp. 94:13-25; 95:1-3; 97:22-25; 98:1-4; 105:20-23; 108:8-17; Ex. D., pp. 23: 4-15; 43:7-12; 46:24-25; 47: 1-4; 48:22-25; 49:1-6; Ex. B, pp. 12-16; 90-94; 97-100.

30. At this time, plaintiff's medical team at FDOC believes that plaintiff's current treatment regimen of hormone therapy and mental health counseling suffices to address plaintiff's gender dysphoria and is adequate as a medical matter to treat plaintiff. doc. 44-1 ¶¶ 9-11; Ex. A, pp. 29:16-25; 68: 17-25; 69:1-6; 70:7-25; 71:1-25; 72:1-6; 79: 21-25: 80:1-4: 83:8-25; Ex. H, pp. 94:13-25; 95:1-3; 97:22-25; 98:1-4; 105:20-23; 108:8-17; Ex. D., pp. 23: 4-15; 43:7-12; 46:24-25; 47: 1-4; 48:22-25; 49:1-6; Ex. B, pp. 12-16; 90-94; 97-100.

31. Plaintiff's retained medical experts state that it is medically necessary for plaintiff to be able to access makeup, wear female undergarments, and grow long hair, even though incarcerated. Expert Report of Dr. George R. Brown (doc. 105-2); Expert Report of Dr. Ryan N. Gorton (doc. 105-3). Dr. Gorton refers to the "choice" that plaintiff should be allowed to make concerning hair as the crux of the medical necessity analysis. Dep. Excerpts of Dr. Ryan N. Gorton, Exhibit "K" to Evidentiary Submission, pp. 106-117.

32. FDOC's policies regarding hair length and uniform grooming policies are premised on the obligation "to secure safety and security in prisons; and to ensure that they are operated effectively and efficiently." Expert Report, James R. Upchurch, Exhibit "L" to Evidentiary Submission, at 7; *see also* Dep. Excerpts of

James R. Upchurch, Exhibit "M" to Evidentiary Submission, pp. 46-47; 61-62; 93-95; 109-13; 119-21; Decl. of Wes Kirkland (doc. 23-2); Dep. Excerpts of Wes Kirkland Dep., Exhibit "N" to Evidentiary Submission, pp. 23-29; 34-35.

33. Plaintiff's retained security expert, based on his experience in California, states that allowing plaintiff to present as female "does not threaten prison security." Expert Report, Richard Subia, Exhibit "O" to Evidentiary Submission.

LEGAL ARGUMENT

A. FDOC has not been deliberately indifferent to plaintiff's gender dysphoria.

Many women have short hair, just as other women do not wear makeup. Despite these obvious and observable phenomena, plaintiff claims here that FDOC's refusal to allow an exception to its generally-applicable hair length and grooming standards constitutes a violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.

It is well established, however, that restrictions on a prisoner's hair, clothing, or grooming standards are not sufficiently serious deprivations to trigger Eighth Amendment protections. The Eighth Amendment requires that prison

officials provide "humane conditions" and adequate health care to inmates. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). It does not, however, "mandate comfortable prisons." *Id*. (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

Clearly, prison conditions may not "involve the wanton and unnecessary infliction of pain." *Rhodes*, 452 U.S. at 347. However, because "[l]awful incarceration" by necessity "brings about the necessary withdrawal or limitation of many privileges or rights," the State is not required to make prisoners as comfortable as they would be outside prison. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (internal quotation marks omitted); *see also Harris v. Thigpen*, 941 F.2d 1495, 1511 at n.24 (11th Cir. 1991) ("[N]othing in the Eighth Amendment … requires that [prisoners] be housed in a manner most pleasing to them.") (internal quotation marks omitted).

To sustain an Eighth Amendment claim for failure to provide adequate health care, an inmate must show that prison officials "acted with deliberate indifference to serious medical needs." *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011). The case law is clear that gender dysphoria constitutes a serious medical need. *Id*. at 555. To be "deliberately indifferent" to such a need, a plaintiff must establish that a defendant "(1) had subjective knowledge of a risk of

serious harm, (2) disregarded that risk, and (3) did so by conduct that was more than mere negligence." *Kothman v. Rosario*, 558 F. App'x 907, 910 (11th Cir. 2014). The alleged deprivation of the plaintiff's rights must be so "objectively, sufficiently serious" that it amounts to "the denial of the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (internal quotation marks omitted). In such a situation, a prison official must "know[] of and disregard[] an excessive risk to inmate health or safety"; that is, he or she "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference." *Id*. at 837.

Thus, a prisoner must establish that the defendant official was "informed" or otherwise actually knew that, without the sought-after treatment, the prisoner would be placed at substantial risk of suffering serious harm. *See, e.g.*, *Chatham v. Adcock*, 334 F. App'x 281, 289 (11th Cir. 2009). Although a risk of purely psychological harm potentially may suffice, that harm must be "severe," *Wilson v. Silcox*, 151 F. Supp. 2d 1345 (N.D. Fla. 2001); akin to the harm caused by a "guard placing a revolver in [an] inmate's mouth and threatening to blow [the] prisoner's head off." *Hudson v. McMillan*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (citing this as an example of the kind of "infliction[] of psychological

harm—without corresponding physical harm—that might prove to be cruel and unusual punishment").

Here, the record is clear that FDOC, and its medical professionals, continue to treat plaintiff's gender dysphoria. Plaintiff receives the sought-after hormone medication, as well as individualized counseling with licensed health care professionals. doc. 24-1¶ 5; doc. 44-1¶¶ 6, 10; Ex. B, pp. 13-16. Recently, a medical pass was issued allowing plaintiff to wear a bra. Ex. I. Given these undisputed facts, it is remarkable that plaintiff persists in alleging an Eighth Amendment violation.

Indeed, only plaintiff's retained experts claim that long hair and access to make-up are medically necessary. doc. 105-2; doc. 105-3. In *Campbell v. Sikes*, however, the Eleventh Circuit recognized that, although a plaintiff's expert's testimony may be relevant for the objective prong of an Eighth Amendment claim (whether the sought-after treatment is medically necessary), such testimony is irrelevant to the subjective element because it cannot show that the defendant actually knows that the "present course of treatment" is inadequate. 169 F.3d 1353, 1370-72 (11th Cir. 1999). The Eleventh Circuit has explained further that, "[n]othing in our case law would derive a constitutional deprivation from a prison

physician's failure to subordinate his own professional judgment to that of another doctor." *Bismark v. Fisher*, 213 F. App'x 892, 896-97 (11th Cir. 2007).

Moreover, when evaluating whether prison officials have been deliberately indifferent to a medical need, their concerns and policies regarding security should be included in that determination. *Kosilek v. Spencer*, 774 F.3d 63, 83-84 (1st Cir. 2014). Such officials are granted "[w]ide-ranging deference" in creating rules to ensure overall prison safety. *Id*. (citing *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)). Thus, if a certain type of care is denied because of "legitimate concerns" regarding safety and security, that denial may not constitute deliberate indifference. *Id*.

Both Wes Kirkland (doc. 23-2) and James Upchurch (Ex. L) have cogently expressed the rationale for FDOC's grooming policies, and the serious problems associated with granting exceptions and providing unequal treatment to particular inmates. Ex. M, pp. 46-47; 61-62; 93-95; 109-13; 119-21; Ex. N, pp. 23-29; 34-35. Such exceptions pose significant security risks to the institutional safety FDOC is charged with ensuring. *Id*.

And, courts have routinely held that a prison's regulation of its inmates' hair length, clothing, and grooming standards does not violate the Eighth

Amendment. For instance, in *Hood v. Dep't of Children & Families*, 2014 WL 757914 (M.D. Fla. Feb. 26, 2014), the plaintiff, a transgender woman, alleged that she was constitutionally entitled to wear "female clothing" in accordance with the same WPATH Standards of Care relied on here. *Id.* at *2; *see also* Compl. ¶¶ 19–24. The civil commitment center, citing its policy prohibiting residents from wearing female clothing, took the position that any such clothing found in the plaintiff's possession would be considered "contraband," and filed a motion to dismiss. *Hood*, *supra* at *1–2. The court granted the motion and dismissed the complaint, finding

> no ... authority indicating that a transgender person has the right to choose the clothing worn while confined or that the facility is constitutionally obligated to purchase all the clothing and feminine products requested. In fact, generally, federal courts have held the opposite. *See, e.g.*, *Murray v. United States Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997) (transsexual prisoner not entitled to wear clothing of his choice and prison officials do not violate the Constitution simply because the clothing is not aesthetically pleasing); *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (noting that provision of female clothing to transsexual prisoner would be unduly burdensome for prison official and would make little fiscal sense); *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142 (N.D. Ill. 1995) ("Neither the Equal Protection Clause nor the First Amendment arguably accord [Plaintiff] the right of access to women's clothing while confined in a state prison.").

Id. at *8. The cases collected in *Hood* are merely a partial list. *See Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1208–09 (5th Cir. 2015) (rejecting prisoner's Eighth Amendment claim that he was entitled to an injunction instructing the defendant "to provide him with ... brassieres"); *Smith v. Hayman*, 2010 WL 948822 at *13 (D.N.J. Feb. 19, 2010) ("Prison authorities must have the discretion to decide what clothing will be tolerated in a male prison and the denial of female clothing and cosmetics is not a constitutional violation."); *Long v. Nix*, 877 F. Supp. 1358, 1361, 1366 (S.D. Iowa 1995) (finding no Eighth Amendment violation where "[h]undreds of times, [the plaintiff] ha[d] asked for, and prison officials had denied, permission to receive and wear women's clothing and make-up").

The law is equally clear that the Eighth Amendment does not require that prisoners be permitted to wear any particular hairstyle. Courts around the country and in this Circuit have held that "limits on hair length" do not constitute denials of "'the minimal civilized measures of life's necessities.'" *LaBranch v. Terhune*, 192 F. App'x 653, 653–54 (9th Cir. 2006) (quoting *Farmer*, 511 U.S. at 834); *see also DeBlasio v. Johnson*, 128 F. Supp. 2d 315, 325–26 (E.D. Va. 2000) (prison's hair restrictions were "part and parcel of" "the ordinary discomfort accompanying

prison life" (internal quotation marks omitted)), *aff'd*, 13 F. App'x 96 (4th Cir. 2001); *Larkin v. Reynolds*, 39 F.3d 1192, 1994 WL 624355 at *2 (10th Cir. 1994) (Table) ("forced compliance with the" prison's "grooming code" was not "unnecessary and wanton infliction of pain" illegal under the Eighth Amendment); *Blake v. Pryse*, 444 F.2d 218, 219 (8th Cir. 1971) (hair-length requirement, "however annoying it may be to petitioner personally, does not deprive him of any federal or civil constitutional right"); *Taylor v. Gandy*, 2012 WL 6062058 at *4 (S.D. Ala. Nov. 15, 2012) (a prisoner's "disagreement with the" prison's haircut policy "fails to demonstrate that Defendants acted with deliberate indifference"); *Casey v. Hall*, 2011 WL 5583941 at *3 (M.D. Fla. Nov. 16, 2011) (requirement that plaintiff "shave his hair" "is not a 'serious' or 'extreme' condition, or one that violates 'contemporary standards of decency'").

This holds true even as to transgender plaintiffs. In *Murray v. U.S. Bureau of Prisons*, the Sixth Circuit considered a claim by a transgender prisoner that the prison's failure to continue to provide her "hair and skin products that she claim[ed were] necessary for her to maintain a feminine appearance" violated the Eighth Amendment. 106 F.3d 401 (Table), 1997 WL 34677, at *2 (6th Cir. 1997). The

Sixth Circuit had little difficulty determining that the claim failed, explaining that "[c]osmetic products are not among the minimal civilized measure of life's necessities." *Id.*

The rationale behind this overwhelming caselaw is simple: "restrictions placed on [a prisoner's] choice of haircut," or choice of undergarments, simply "do no present the type of deprivation of life's necessities that rise to an Eighth Amendment violation." *Casey*, 2011 WL 5583941 at *3 (citing *Chandler v. Crosby*, 379 F.3d 1278, 1298 (11th Cir. 2004)). Plaintiff is receiving the hormone therapy, individualized mental health counseling, and bra deemed medically necessary. Ex. I; doc. 44-1 ¶¶ 9-11; Ex. A, pp. 29:16-25; 68: 17-25; 69:1-6; 70:7-25; 71:1-25; 72:1-6; 79: 21-25: 80:1-4: 83:8-25; Ex. H, pp. 94:13-25; 95:1-3; 97:22-25; 98:1-4; 105: 20-23; 108:8-17; Ex. D., pp. 23: 4-15; 43:7-12; 46:24-25; 47: 1-4; 48:22-25; 49:1-6; Ex. B, pp. 12-16; 90-94; 97-100. While plaintiff might be more comfortable also having the hairstyle or clothing of plaintiff's choice, plaintiff's inability to wear long hair and female undergarments is justified by legitimate penological concerns,[3] and therefore is

[3] For example, the Eleventh Circuit has recently recognized that requiring prisoners to maintain short hair can (1) prevent prisoners from easily changing their appearances upon escape; (2) prevent prisoners from using long hair "to conceal weapons and contraband"; (3) address "hygiene ... concerns"; and (4) promote[] order and discipline while removing a physical

merely among the "significant restrictions, inherent in prison life, on rights and privileges free citizens take for granted." *McKune v. Lile*, 536 U.S. 24, 40 (2002).

B. No FDOC official is subjectively aware that refusing to provide an exception to uniform grooming standards subjects plaintiff to a wanton risk of serious harm.

Because the Cruel and Unusual Punishments Clause applies only to *punishment*, "a claim of deliberate indifference requires proof of more than gross negligence." *Townsend v. Jefferson Cnty.*, 601 F.3d 1152, 1158 (11th Cir. 2010). As stressed previously, to be "deliberately indifferent," the prison official must subjectively "know[] of and disregard[] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Again, to establish an Eighth Amendment violation, a prisoner must establish that the defendant official was "informed" or otherwise *actually knew* that, without the sought-after treatment, the prisoner would be placed at substantial risk.

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characteristic that inmates can use to form gangs." *Knight v. Thompson*, 797 F.3d 934, 944–45 (11th Cir. 2015). Further, other courts have explained that permitting a transgender prisoner housed with men to dress as a woman and wear longer hair than otherwise permitted at the prison "could pose a security risk to [her] safety and the safety of others," *Smith v. Hayman*, 2010 WL 9488822 at *13 (D.N.J. Feb. 19, 2010), primarily by creating "an increased risk of sexual assault." *Arnold v. Wilson*, 2014 WL 7345755 at *3, 7 (E.D. Va. Dec. 23, 2014).

Here, there is no evidence, much less substantial evidence, that any FDOC individual *actually knew* that disallowing female underwear, makeup, or hair past the ear or collar subjects plaintiff to a wanton and substantial risk of serious harm. The complaint alleges that plaintiff has engaged in genital mutilation, has attempted suicide, and has thoughts of "self-harm and suicide." Compl. ¶¶ 37, 49, 59. But plaintiff has repeatedly tied the potential for self-harm to requests for *hormone therapy*, not requests to wear female underwear and grow long hair. *Id.* ¶¶ 37 ("I need my hormone therapy resumed. ... Without it I consider self-harm and suicide every single day."); Ex. F, pp. 85: 9-12, 25; 86:1-3.

Plaintiff explained that the suicide attempts on April 8, 2017, and April 10, 2017, were a result of the staff's failure to provide the prescribed medication for three days. *Id*. at p. 70; 10-15; 85: 9-12, 25; 86:1-3; Ex. G. Since again receiving the proper medication plaintiff's overall mood and mental health has improved. *Id.* at pp. 70; 10-15; 73-74.

In addition, plaintiff's medical team has testified that in their clinical judgment, they do not believe that plaintiff, at this time, is at a substantial risk for self-harm or severe psychological pain in being required to comply with the FDOC's policies on hair and grooming standards. doc. 44-1 ¶¶ 9-11; Ex. A, pp.

29:16-25; 68: 17-25; 69:1-6; 70:7-25; 71:1-25; 72:1-6; 79: 21-25: 80:1-4: 83:8-25; Ex. H, pp. 94:13-25; 95:1-3; 97:22-25; 98:1-4; 105: 20-23; 108:8-17; Ex. D., pp. 23: 4-15; 43:7-12; 46:24-25; 47: 1-4; 48:22-25; 49:1-6; Ex. B, pp. 12-16; 90-94; 97-100. FDOC's retained medical expert, Dr. Levine, also does not believe that plaintiff is at a substantial risk for self-harm or severe psychological pain in being required to comply with the FDOC's policies on hair and grooming standards. doc. 105-4; Ex. J, pp. pp. 51:12-18; 69-72; 85-93; 100-01.[4]

There is simply no evidence that any FDOC official had *subjective knowledge* that, even if plaintiff were provided with hormone therapy and mental health counseling, there would *still* be a substantial risk of serious harm because plaintiff was precluded from being able to wear makeup or grow long hair. This fact alone compels the entry of summary judgment.

Eleventh Circuit case law "has provided guidance concerning the distinction between" actionable "deliberate indifference" and inactionable conduct that does not rise above the level of "gross negligence." *See Farrow v. West*, 320 F.3d 1235,

[4] To be sure, plaintiff's experts claim that any current well-being is due to plaintiff's expectation of prevailing in the lawsuit, and, if plaintiff does not prevail completely, plaintiff may decompensate. doc. 105-2; doc. 105-3. *But see Kosilek v. Spencer*, 774 F.3d 63, 94 (1st Cir. 2014) (recognizing the "unacceptable precedent" that would be established in dealing with future threats of suicide by inmates to force the prison authorities to comply with the prisoners' particular demands and noting that "such threats are not uncommon in prison settings and require firm rejection by the authorities").

1246 (11th Cir. 2003). For instance, the cases have made clear that "an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." *Id.*

But that a plaintiff is entitled to *some* treatment for his serious medical needs does not mean that he is "entitled to treatment of his choice," *Hood*, *supra* at *9 (M.D. Fla. Feb. 18, 2015); or even that the treatment must rise above a level that would constitute "medical malpractice" under state tort law. *See, e.g.*, *Chatham*, 334 F. App'x at 287– 88. Instead, so long as the prison provides the plaintiff with at least *some* treatment, and that treatment is not "so cursory as to" in reality "amount to no treatment at all," the Eleventh Circuit has held again and again that the low bar of deliberate indifference is satisfied. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (internal quotation marks omitted); *see also Carter v. Broward Cnty. Sheriff's Dep't Med. Dep't*, 558 F. App'x 919, 22 (11th Cir. 2014) ("A simple difference in medical opinion between the medical staff and an inmate as to the latter's diagnosis or course of treatment does not establish deliberate indifference."); *Loeber v. Andem*, 487 F. App'x 548, 549 (11th Cir. 2012) ("The Defendants did not ignore Plaintiff's ... condition; instead they chose an alternative treatment ... to address [it]."); *Leonard v. Dep't of Corr. Fla.*, 232 F. App'x 892,

894–95 (11th Cir. 2007) ("[A] difference of opinion between an inmate and prison medical staff does not—by itself—give rise to a claim under the Eighth Amendment.").

Courts have repeatedly applied these fundamental principles to the treatment of gender dysphoria. For instance, in *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), the plaintiff, a biologically male prisoner who had "engaged in various forms of mutilation of his sex organs," requested to be treated with estrogen to treat his gender dysphoria. *Id.* at 960. The prison instead prescribed "testosterone replacement therapy and mental health treatment," and the plaintiff sued. *Id*. The Tenth Circuit held that the failure to provide the plaintiff with his *preferred* treatment did not constitute deliberate indifference, because the prison had at least provided him with *some* treatment:

> While the medical community may disagree among themselves as to the best form of treatment for plaintiff's condition, the Department of Corrections made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs. The medical decision not to give plaintiff estrogen until further study does not represent cruel and unusual punishment. This case ... does not present a situation where there was a total failure to give medical attention. At most, plaintiff might have made a case for negligence or medical malpractice, but he could not have established a constitutional violation.

Id. at 963.

Similarly, in *Barnhill v. Cheery*, 2008 WL 759322 (M.D. Fla. Mar. 20, 2008), the plaintiff was a biological male who had been diagnosed with gender dysphoria, had been prescribed estrogen for 17 years before going to prison, and had been living as a female for 15 years before going to prison. *Id.* at *1–2. "[H]is female hormone treatments ceased" once he arrived in prison, and the prison instead put the plaintiff on a regimen of mental health counseling. *Id.* at 12. The plaintiff sued, alleging that the Eighth Amendment required the prison to continue his hormone therapy, but the court disagreed. The plaintiff's preference for hormone therapy over psychiatric care reflected "a simple difference in medical opinion" that "does not constitute deliberate indifference." *Id.* at *13 (internal quotation marks omitted). Thus, because the plaintiff had been receiving "mental health counseling for transsexualism," his "medical needs clearly ha[d] not been disregarded" within the meaning of the Eighth Amendment. *Id.* at *11.

If the prison's medical officials reasonably believe that the treatment rendered is "adequate as a medical matter," as is the case here, then there is no Eighth Amendment violation, because a prisoner "cannot establish deliberate

indifference based solely on his desire to receive some other kind of care." *Turner v. Solorzano*, 228 F. App'x 922, 924 (11th Cir. 2007); *see also Loeber v. Andem*, 487 F. App'x 548, 549 (11th Cir. 2012) ("Plaintiff's disagreement with the course of treatment employed fails to support an inference that Defendants acted with [deliberate indifference ..."). In other words, "a simple difference in medical opinion between the prison's medical staff and the inmate as to the ... course of treatment" simply cannot "support a claim of cruel and unusual punishment." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (collecting cases); *accord Carter v. Broward Cnty. Sheriff's Dep't Med. Dep't*, 558 F. App'x 919, 22 (11th Cir. 2014); *Leonard v. Dep't of Corr. Fla.*, 232 F. App'x 892, 894-95 (11th Cir. 2007).

This principle, "that courts should not second-guess the judgment of [the prison's] medical professionals as to a particular treatment's propriety" indisputably applies to cases involving gender dysphoria. *Kothmann v. Rosario*, 558 F. App'x 907, 910-11 (11th Cir. 2014); *see also Supre*, 792 F.2d at 963 (prison officials not required to provide hormone therapy to prisoner with gender dysphoria because they "made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiffs medical

needs"); *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7th Cir. 1987) ("[G]iven the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment.").

Thus, as the Middle District of Florida concluded in *Barnhill*, after canvassing the case law on Eighth Amendment claims by prisoners with gender dysphoria, "the majority of appellate courts" have held that if an inmate with gender dysphoria "is being provided some form of treatment deemed adequate by a physician, federal courts should defer to the informed judgment of the prison officials." *Barnhill, supra* at *12.

Here, it is undisputed that plaintiff is receiving appropriate medical care for gender dysphoria, and will continue to be treated. doc. 44-2 (Plaintiff "will continue to receive the prescribed hormone therapy, as well as mental health and psychological counseling, so long as the treating medical and mental health clinicians deem this treatment regime to be medically necessary"); doc. 44-1.¶ 7 ("The specific hormones, however, should be provided by, and under the supervision of, a medical doctor, and for as long as the medical doctor believes

the hormones are medically necessary to treat Plaintiff's gender dysphoria."). Thus, plaintiff's gender dysphoria is being treated, and the fact that plaintiff would prefer to *also* be permitted to access makeup and grow longer hair represents "a simple difference in medical opinion between the prison's medical staff and the inmate as to the course of treatment," which, in this Circuit, cannot, *as a matter of law*, "support a claim of cruel and unusual punishment." *Harris*, 941 F .2d at 1505.

Plaintiff's experts simply argue that dressing, grooming, and presenting oneself to others in accordance with one's gender identity is part of the treatment protocols under the WPATH Standards of Care. doc. 105-2; doc. 105-3. But the test under the Eighth Amendment is not whether the treatment provided is perfectly commensurate with the most up-to-date medical recommendations; it is, again, whether the treatment is "so cursory as to amount to no treatment at all." *McElligott*, 182 F.3d at 1255; *see also Harris v. Thigpen*, 941 F.2d at 1510 ("[I]t is not constitutionally required that [medical care provided to prisoners] be perfect, the best obtainable, or even very good."). Even with all inferences drawn in plaintiff's favor, there can be no serious contention that FDOC's substantial

treatment of plaintiff's gender dysphoria is tantamount to the wanton infliction of pain on plaintiff, or that it amounts "to no treatment at all."

Nor could plaintiff reasonably so contend. The WPATH Standards of Care do not even purport to constitute the *sine qua non* of proper medical treatment for gender dysphoria; instead, as plaintiff and plaintiff's own experts concede, the Standards provide that the "particular course of medical treatment" should "var[y] based on the individualized needs of the person." Compl. ¶ 24; *see also Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) ("The Standards of Care are intended to provide *flexible directions for the treatment* of [Gender Dysphoria]"; *accord, e.g., Kosilek v. Spencer*, 774 F.3d 63, 87 (1st Cir. 2014); *Arnold v. Wilson*, 2014 WL 7345755, at *9 (E.D. Va. Dec. 23, 2014) (prison officials not required to "rigidly follow WPATH standards").

Moreover, although "there is disagreement," both in the medical community and in the courts, as to "the proper treatment for" gender dysphoria, *Barnhill*, 2008 WL 759322 at *12, most "circuits that have considered the issue have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need." *Praylor*, 430 F.3d at 1209; *see also White v. Farrier*, 849 F.2d 322, 327 ("[I]nmates do not have a

constitutional right to hormone therapy."); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (prisoner with gender dysphoria "does not have a right to any particular type of treatment, such as estrogen therapy"); *Supre*, 792 F.2d at 963 ("The medical decision not to give plaintiff estrogen until further study does not represent cruel and unusual punishment.").

Accordingly, if not even hormone therapy is constitutionally required for transgender prisoners, it is inconceivable to think that a prison official (like FDOC here) who has *actually provided* the prisoner with hormone therapy (and continued mental health counseling) but has refused to, in addition, provide makeup or an exception from long-standing generally applicable hair length policies has acted with deliberate indifference toward the prisoner.

CONCLUSION

For at least the foregoing reasons, FDOC's Motion for Summary Judgment should be granted.

Respectfully submitted this 12th day of June, 2017.

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CERTIFICATION OF COMPLIANCE
PURSUANT TO LOCAL RULE 7.1

Pursuant to N.D. Fla. Local Rule 7.1, I hereby certify that this Brief in Support of Summary Judgment is in compliance with the Court's word limit. According to the word processing program used to prepare this pleading, the total number of words in the pleading, inclusive of headings, footnotes and quotations, and exclusive of the case style, signature block, and any certificate of service is 6,290.

CERTIFICATE OF SERVICE

I certify that on June 12, 2017, a copy of the foregoing was filed using the CM/ECF system which will send notice to all counsel of record.

/s/ Kirkland E. Reid
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