

SIXTH CIRCUIT REVIEW

Rationing Treatment in Prisons Implies Some Will Be Without: Prisons Should Not Be Able to Escape Constitutional Violations by Blaming Costs

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The Sixth Circuit in *Atkins v. Parker* wrestled with the question of whether or not to agree with a lower court's judgement holding that Tennessee's scheme for rationing hepatitis C drugs to prisoners was constitutional under the Eighth Amendment. No. 19-6243 (6th Cir. Aug. 24, 2020).¹

In 2019, roughly twenty-three percent of Tennessee's 21,000 inmate population had hepatitis C. *Id.* at 3.² This [contagious virus](#) worsens over time and can lead to serious liver issues, and even death.³ Between seventy-five and eighty-five percent of infected people do not spontaneously recover within the first six months, proceeding to the "chronic" stage. *Atkins*, No. 19-6243, at 2.⁴ Here, the virus progressively scars the liver. *Id.*⁵ Between twenty and forty percent of people at this stage develop cirrhosis and four percent develop liver cancer. *Id.*⁶ There is no vaccine, so doctors were stuck treating the virus with drugs called interferons, but this form of treatment had little success. *Id.*⁷ But good news arrived in 2011 with the newly FDA approved [antivirals](#) which, for most patients, stopped hepatitis C in its tracks and vanished the virus completely within a few months.⁸ Here comes the bad news . . . the antiviral treatment is not free, in fact, it's quite costly at around \$17,000 per prisoner.⁹

To combat the high price of treatment, the Tennessee Department of Corrections (the Department) implemented a new policy to ration the treatment.

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¹ *Atkins v. Parker*, No. 19-6243 (6th Cir. Aug. 24, 2020) [<https://perma.cc/95CT-UZ28>].

² *Id.* at 3.

³ *Hepatitis C Questions and Answers for the Public*, CDC, <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> [<https://perma.cc/QWD8-5CXX>].

⁴ *Atkins*, No. 19-6243, at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Travis Loller, *6th Circuit: OK to ration hepatitis C treatment to prisoners*, ABC NEWS, <https://abcnews.go.com/Health/wireStory/6th-circuit-ration-hepatitis-treatment-prisoners-72598674> [<https://perma.cc/5LE3-SBNY>].

⁹ *Id.*

As of 2019, every inmate is tested and evaluated to determine the extent of their living scarring, and accordingly, their course of treatment. *Atkins*, No. 19-6243, at 3.¹⁰ Using these determinations, an advisory committee decides who is to be treated with the antivirals. The committee favors the sickest inmates as they are “at higher risk for complications of disease progression and may require more urgent consideration for treatment,” but does stress that the determinations are patient-specific and reassessed periodically. *Id.* at 4 (internal quotations omitted).¹¹

The question here is whether the conduct of the Department is a violation of the Eighth Amendment. The [Eighth Amendment](#) states “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹² Specifically, here, the Appellants claim that by not providing the antivirals to all infected inmates, the Department violated the “cruel and unusual punishment” clause of the Eighth Amendment.

At trial, the plaintiff’s expert, Dr. Zhiqiang Yao, stated that “the ‘best practice’ [and standard of care] is to treat chronic hepatitis C with direct-acting antivirals ‘as early as possible’ or ‘in a timely manner,’ regardless of the extent of scarring on a patient’s liver.” *Atkins*, No. 19-6243, at 5.¹³ He conceded that the guidance was “under that standard of care” as it gave priority to the antivirals on a patient-specific basis and also added that this “approach was ‘understandable’ given the Department’s limited resources.” *Id.*¹⁴

Dr. Kenneth Williams, the medical director for the Department, stated they had used all money budgeted to them for hepatitis C antivirals and claimed to consistently seek budget increases for treatments. *Id.* at 6.¹⁵ They used every penny and estimated that based on the prior year’s budget, they’d be able to treat all inmates with advanced liver scarring. *Id.*¹⁶

The district court found that the Department’s guidance of prioritizing the sickest patients for treatment met their constitutional obligations. *Id.*¹⁷ The plaintiffs appealed on the belief that “Williams’s failure to provide direct-acting antivirals to every infected inmate amounted to deliberate indifference in violation of the Eighth Amendment.” *Id.* at 7.¹⁸ This claim requires an objective and a subjective component both be met. *Atkins*, No. 19-6243, at 7.¹⁹ There must be objective proof that the plaintiffs had a “sufficiently serious medical need.”

¹⁰ *Atkins*, No. 19-6243, at 3.

¹¹ *Id.* at 4 (internal quotations omitted).

¹² *Constitution of the United States*, CONSTITUTION ANNOTATED, <https://constitution.congress.gov/constitution/amendment-8/#:~:text=Excessive%20bail%20shall%20not%20be,cruel%20and%20unusual%20punishments%20inflicted> [<https://perma.cc/3NK4-N6FZ>].

¹³ *Atkins*, No. 19-6243, at 5.

¹⁴ *Id.*

¹⁵ *Id.* at 6.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Atkins*, No. 19-6243, at 7.

See *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018).²⁰ On top of that, there must be subjective proof that Williams understood the substantial risk that hepatitis C posed to all infected inmates, yet consciously disregarded this risk. See *id.* at 738.²¹

All three circuit judges presiding over this case decided that the objective component was met: the plaintiffs clearly had a “sufficiently serious medical need.” *Atkins*, No. 19-6243, at 7.²² Furthermore, all three judges decided that part of the subjective component was also met: Williams clearly understood the risk that hepatitis C posed to the inmates. *Id.*²³ The 2-1 split decision rested on the question of whether or not Williams alone “so recklessly ignored the risk” of hepatitis C, in designing and implementing the 2019 guidance, that he was deliberately indifferent to the risk.” See *Rhinehart*, 894 F.3d at 738.²⁴

Circuit Judges Kethledge and Murphy, the majority, held Dr. Williams did not recklessly ignore the risk in his 2019 guidance. *Atkins*, No. 19-6243, at 8.²⁵ His guidance required evaluation, monitoring, and continuous care efforts for every infected inmate; he obtained diagnostic equipment to measure liver scarring; he established a committee to make and revise individualized decisions of proper treatment; he revised prioritization criteria to give the sickest inmates better access to treatment; and he claimed to have sought budget increases for treatment. *Id.* at 7–8.²⁶ The majority felt that this clearly showed the opposite of indifference to the risk hepatitis C posed to infected inmates. *Id.* at 8.²⁷ He could not spend money that his budget did not have at its disposal. To this point, the plaintiffs suggest that he violated the Constitution by not petitioning Congress for more money. *Id.*²⁸ The majority here disagrees and points to the fact that Williams consistently sought and received yearly budget increases. *Id.*²⁹ The majority also finds no legitimate ground to obligate a state medical official to lobby the legislature for additional funds, and by not doing so, violating the Eighth Amendment. *Id.*³⁰ The Sixth Circuit affirmed the lower court’s decision with a 2-1 majority.³¹

The sole dissenter, Circuit Judge Gilman, believes Dr. William’s rationing scheme fails to consider the substantial risk of serious harm to infected inmates.

²⁰ See *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) [<https://perma.cc/4D5L-HKZV>].

²¹ See *id.* at 738.

²² *Atkins*, No. 19-6243, at 7.

²³ *Id.*

²⁴ See *Rhinehart*, 894 F.3d at 738.

²⁵ *Atkins*, No. 19-6243, at 8.

²⁶ *Id.* at 7–8.

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Travis Loller, *6th Circuit: OK to ration hepatitis C treatment to prisoners*, ABC NEWS, <https://abcnews.go.com/Health/wireStory/6th-circuit-ration-hepatitis-treatment-prisoners-72598674> [<https://perma.cc/5LE3-SBNY>].

Atkins, No. 19-6243, at 15 (Gilman, J., dissenting).³² Judge Gilman points out that, although Dr. Yao used a system of prioritization and rationing care for hepatitis C patients while working for the Veterans' Administration (VA), Dr. Yao had since testified that "data began to show the benefits of early treatment and the long-term risks of delay" which caused the VA to stop this practice. *Id.* at 9–10.³³ This data comes from [HCV Guidance: Recommendations for Testing, Managing, and Treating Hepatitis C](#).³⁴ This document, which most medical providers follow, has since removed prioritization tables from its guidelines.³⁵ The dissent follows the *HPV Guidance* in saying chronic hepatitis C patients need to be treated as soon as possible, as delaying such treatment causes the "substantial risk of serious harm" consistently recognized from an Eighth Amendment standpoint. *Atkins*, No. 19-6243, at 10 (Gilman, J., dissenting).³⁶ Therefore, rationing schemes should be abandoned, because yes, not all chronic patients are severely sick, but by the time they start becoming clearly sick and able to be prioritized, the risk of liver-related death has already increased "two-to-five fold as compared to treating the infection at an earlier stage." *Id.* at 10–11.³⁷ Death is not the sole harm in delaying treatment: "depression, fatigue, sore muscles, joint pain, kidney injury, diabetes or glucose intolerance, certain types of rashes or autoimmune diseases, lymphoma and leukemia are all potential effects." *Id.* at 11 (internal quotations omitted).³⁸ The dissent argues these conditions should not be suffered by anyone if a treatment is available within the scope of the Eighth Amendment. Judge Gilman further contends Dr. Williams never *actually* requested enough funding to treat every chronic hepatitis C inmate even though he acknowledged the Department's commissioner never turned him down when asking for additional antiviral money. *Id.* at 14.³⁹

Judge Gilman stated, "officials may not . . . refuse to treat a patient who has a serious medical need . . . merely to avoid paying a bill." *Id.* at 15.⁴⁰ Simply not having proper funding does not excuse an Eighth Amendment violation. *Id.*⁴¹ There are a number of cases that the dissent points to including the Supreme Court case of [Watson v. City of Memphis](#), where the Court held you cannot excuse a constitutional violation based on cost. 373 U.S. 526, 537

³² *Atkins*, No. 19-6243, at 15 (Gilman, J., dissenting).

³³ *Id.* at 9–10.

³⁴ HCV Guidance: Recommendations for Testing, Managing, and Treating Hepatitis C (2019) <https://www.hcvguidelines.org/evaluate/when-whom> [<https://perma.cc/MBT8-2SMW>].

³⁵ *Id.*

³⁶ *Atkins*, No. 19-6243, at 10 (Gilman, J., dissenting).

³⁷ *Id.* at 10–11.

³⁸ *Id.* at 11 (internal quotations omitted).

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 15.

⁴¹ *Id.*

(1963).⁴² In *Watson*, the city of Memphis was mandated by *Brown v. Board of Education* to desegregate a local playground, but the city stated they needed to postpone due to budgetary concerns. *Id.*, citing *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).⁴³ The Court rejected the argument of the city saying, “it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.” *Id.*⁴⁴ Another Supreme Court case, *Brown v. Plata*, goes on to suggest that if resources will not allow the prisons to be in conformity with constitutional requirements, “the answer is to release or transfer prisoners rather than continuing to subject them to unconstitutional conditions.” *Atkins*, No. 19-6243, at 13, citing *Brown v. Plata*, 563 U.S. 493, 502 (2011).⁴⁵ The Eighth Circuit proposed a similar answer in *Finney v. Arkansas Bd. of Correction*, which additionally holds that a lack of resources isn’t an excuse to allow for the continuation of Eighth Amendment violations. 505 F.2d 194, 201 (8th Cir. 1974).⁴⁶

Judge Gilman’s use of two cases from the Seventh Circuit demonstrate a split between the Seventh and Sixth Circuits. In *Petties v. Carter*, the Seventh Circuit concluded “[w]hile the cost of treatment is a factor in determining what constitutes adequate, minimum-level care, medical personnel cannot simply resort to an easier course of treatment that they know is ineffective.” 836 F.3d 722, 730 (7th Cir. 2016).⁴⁷ Applying this proposition to *Atkins*, Dr. Williams and the Department need to provide all chronic-level inmates with the antivirals, regardless of cost, as there is no other truly effective treatment. Additionally, in *Stafford v. Carter* the District Court for the Southern District of Indiana held that the Eighth Amendment had been violated when Indiana inmates in the chronic stage of hepatitis C had been denied treatment. No. 1:17-CV-00289-JMS-MJD, at 43 (S.D. Ind. Sept. 13, 2018).⁴⁸ The prison officials in *Stafford* based their rationing scheme and prioritization on individualized treatment concerns and explicitly said cost played no factor. *Id.* at 13–14.⁴⁹ Judge Gilman points out that applying this to *Atkins* would mean an Eighth Amendment violation had occurred, unless Dr. Williams and the Department are making the argument that “what has been held to be cruel and unusual in Indiana is not cruel

⁴² *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) [<https://perma.cc/T9VF-RHP8>].

⁴³ *Id.*, citing *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) [<https://perma.cc/8A89-NXBY>].

⁴⁴ *Id.*

⁴⁵ *Atkins*, No. 19-6243, at 13, citing *Brown v. Plata*, 563 U.S. 493, 502 (2011) [<https://perma.cc/M4YB-M52H>].

⁴⁶ *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974) [<https://perma.cc/S5RF-W34V>].

⁴⁷ *Petties v. Carter*, 836 F.3d 722, 730 (7th Cir. 2016) [<https://perma.cc/7X53-PUN4>].

⁴⁸ *Stafford v. Carter*, No. 1:17-CV-00289-JMS-MJD, at 43 (S.D. Ind. Sept. 13, 2018) [<https://perma.cc/7SMQ-GWXX>].

⁴⁹ *Id.* at 13–14.

and unusual in Tennessee.” *Atkins*, No. 19-6243, at 14.⁵⁰ Clearly an absurd result.

Although Dr. Williams did the best with what resources he was given, there was still a deliberate indifference on the part of the Department as a whole to the risks facing the infected inmates. By looking at the very nature of a prison, it is clear that inmates cannot obtain means to get treatment on their own. They are left to rely on the Department. *Darrah v. Krisher* points out that cost may be considered by prison officials for choosing a less expensive treatment. 865 F.3d 361, 372 (6th Cir. 2017).⁵¹ But if the only effective treatment is the antivirals, you are violating the Eighth Amendment by not providing that treatment. There are two solutions: lobby for necessary funding you need from the state legislature or transfer some lower-level inmates into alternative programs like house-arrest or probation. A violation of the Eighth Amendment due to a lack of resources, is still a violation of the Eighth Amendment.

⁵⁰ *Atkins*, No. 19-6243, at 14.

⁵¹ *Darrah v. Krisher*, 865 F.3d 361, 372 (6th Cir. 2017) [<https://perma.cc/J34B-42UC>].