

Case No. 19-35017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,

v.

CORIZON, INC., et al.,
Defendants-Appellants

and

IDAHO DEPARTMENT OF CORRECTIONS, et al.,
Defendants-Appellants

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

**DEFENDANTS-APPELLANTS' RESPONSE TO
PLAINTIFF-APPELLEE'S MOTION TO PARTIALLY LIFT STAY**

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INTRODUCTION

By and through her motion to partially lift the stay, Plaintiff now seeks to circumvent Defendants' due process right to appeal and force Defendants to provide her permanent, irreversible medical treatment (electrolysis) as part of a Gender Confirmation Surgery ("GCS"). Indeed, the central issue raised in Defendants' appeal is that Plaintiff has failed to establish that she is entitled to the very medical care that her Motion to Partially Lift would effectively grant her. Defendants' appeal raises serious legal questions that justify the stay which is currently in effect—serious legal questions that Plaintiffs' briefing either conflates with Defendants' previous appeal or ignores completely. Moreover, Defendants will suffer irreparable injury if the stay is lifted. Defendants have a live appeal about the medical need for GCS. Lifting the stay will violate Defendants' due process right to appellate review of the need for pre-operative treatment that could only be considered "necessary" as part of a GCS. These facts, alone, justify a continued stay under the applicable legal analysis.

Additionally, however, the record shows that Plaintiff will not suffer substantial injury if the stay is lifted. Plaintiff's need for GCS is not immediate, and Plaintiff has indicated numerous times that she will not attempt further self-castration now that she is aware that doing so would impact her surgical outcome. Lastly, the public has a strong interest in the Defendants' ability to exercise their due

process rights. To fully litigate an important constitutional issue vastly outweighs the public's interest in Plaintiff undergoing permanent hair removal treatments. For all of the above reasons, Plaintiff's motion should be denied.

LEGAL STANDARD

It is proper for an appellate Court to stay enforcement of an order for the purpose of allowing the Court sufficient time to review "serious legal questions" about the order that have been raised on appeal. *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761 (1949). This is because "the whole idea [behind a stay] is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits. *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011)(quoting *Nken* 566 U.S. at. While the Supreme Court has indicated that the propriety of a stay must be assessed on a case-specific factual basis, it has outlined four factors that a court should consider in ruling on a motion to stay: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761, (2009). A court's role is to balance the equities of these factors, although it is clear that the first two factors are the most critical. *Id.* At 426.

Orders to stay are a less coercive use of court authority than “the extraordinary remedy of injunction, by which a court directs the conduct of a party with the backing of its full coercive powers.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Because stays are less coercive and disruptive than injunctions, the Ninth Circuit applies a “flexible approach” to the stay factors in order to ensure that stays fulfill their role of allowing courts sufficient time to consider the merits of underlying claim prior to issuing rulings that carry permanent and irreversible effects on the rights of the parties. See *Nken*, 129 S.Ct. at 1757 (“The whole idea is to hold the matter in abeyance because the appellate courts lacks sufficient time to decide the merits.”).

ARGUMENT

A. **Defendants’ Petition for Rehearing *En Banc* Presents Serious Legal Questions and is Likely to Succeed on its Merits.**

The first “stay factor” considered by the Court is whether the stay applicant has made a strong showing that it is likely to succeed on the merits. Importantly, an applicant “need not demonstrate that it is more likely than not that [it] will win on the merits” in order to satisfy this first factor. *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). Instead, the applicant must demonstrate a “substantial case on the merits,” by showing either a “probability of success on the merits or that serious legal questions are raised.” *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011). A “probability of success on the merits” only requires an applicant to show a

“reasonable probability” or “fair prospect of success” on the merits. *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010). Even if an applicant cannot demonstrate a “probability of success on the merits,” it still satisfies the first factor by showing the existence of serious legal questions. *Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019). The Ninth Circuit acknowledges that a more stringent standard would essentially force the parties to litigate the merits of a claim, in depth, for the limited purpose of seeking a stay. *Id.* In turn, courts would be forced to “attempt[] to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and arguments,” which would “defeat the purpose of a stay, which is to give the reviewing court the time to act responsibly rather than doling out justice on the fly.” *Id.* (quoting *Nken*, 129 S. Ct. at 1757).

Here, Defendants’ Petition for Rehearing *en banc* raises “serious legal questions” that satisfy the first “stay factor,” including: (1) whether the panel’s August 23, 2019 decision violates Defendants’ Seventh Amendment right to trial by jury in direct contravention of existing precedent from the Ninth Circuit and other Circuit Courts of Appeal; (2) whether the panel’s interpretation of “deliberate indifference” under the Eighth Amendment substantially and impermissibly deviates from the U.S. Supreme Court’s interpretation; and (3) whether the panel has improperly applied the Prison Litigation Reform Act (“PLRA”). Defendants

contend the law and facts are clear that they were improperly denied their right to a jury trial and there are significant circuit court splits on the deliberate indifference and PLRA legal issues. These are undoubtedly “serious legal questions” with far reaching consequences, and Defendants can demonstrate a “reasonable probability” or “fair prospect of success” on the merits of these legal issues on appeal.¹ That being said, the existence of these serious legal questions, alone, satisfies the first factor.

Plaintiff has taken the position that Defendants “cannot satisfy” the first factor because they “did not succeed on the merits of their appeal.” This argument misses the point. The applicable inquiry is forward looking—whether there remain serious legal questions to decide or the applicant has a probability of success on the merits. Plaintiff cannot prevail under the applicable standard, so she implies a novel and unsupported standard: a stay should be lifted once the stay applicant receives a dis-favorable decision that is still appropriately and timely being appealed. Plaintiff points to no authority in support of this standard—there is none. Instead, Plaintiff’s briefing ignores the substance of the Petition for Rehearing *en banc* and obfuscates the applicable legal standard, which has been set forth clearly and unambiguously in binding precedent: Defendants are entitled to a stay if they can point to “serious legal

¹These arguments are set forth in detail in Defendant’s Petition for Rehearing *En Banc*.

questions” or they can demonstrate a “fair prospect of success.” Defendants have done both.

B. Defendants will suffer irreparable injury if the stay is lifted because they currently appeal the constitutional right to a jury trial on the issue of whether Plaintiff is entitled to any GCS-related medical treatment.

The second “stay factor” requires courts to assess whether the applicant will suffer irreparable injury if the stay is not granted. *Nken* 556 U.S. 418, 434. It is well-established that the deprivation of constitutional rights “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In fact, this Court’s August 23, 2019 Order explicitly adopted this principle into the law of the case. P. 73 (citing *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008)(“Unlike monetary injures, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm,”), *rev’d and remanded on other grounds*, 562 U.S. 134 (2011)). Defendants now exercise their constitutionally protected due process right to further appeal and review of the merits of the Court’s August 23, 2019 Opinion.

Specifically, Defendants currently appeal whether Plaintiff is entitled GCS treatment of any kind, including electrolysis, and whether their Seventh Amendment right to jury trial has been violated. Plaintiff now seeks to “end around” Defendants’ due process rights by seeking an order obligating Defendants to provide the same GCS treatment that is centrally at issue in Defendants’ appeal. To the extent that the

Court orders any such GCS treatments, including electrolysis, Defendants' constitutional right to appeal those treatments will be irreparably destroyed. Further, an order allowing permanent hair removal would erode, if not destroy, Defendants' constitutional right to a jury trial.

Plaintiff, by and through her motion, seeks irreversible medical treatments that are part of GCS treatment, rather than mere pre-surgical consultation or formality. The proposed electrolysis is a substantive, permanent, and irreversible preoperative procedure for GCS. Although Plaintiff's need for electrolysis was not addressed in Plaintiff's Motion for Preliminary Injunction,² the issue of whether Plaintiff is entitled to a substantive, permanent, and irreversible GCS surgery is currently on appeal. In contrast, the pre-surgical consultation that Plaintiff previously attended (allowed by this Court under a slight modification of the stay) did not involve substantive, permanent medical treatments.³ On the other hand, if this Court enters an order effectively requiring Defendants to provide substantive and irreversible GCS treatments (i.e., electrolysis), the Court will diminish Defendants' right to appeal the foregoing serious legal questions to the extent that any treatment is provided. This violates Defendants' right to due process.

²Significantly, in the District Court, Plaintiff has never addressed that the specific, permanent and irreversible electrolysis procedure was medically necessary for Plaintiff and never established she was entitled to it under the Eighth Amendment.

³Defendants do not waive their previous argument in opposition of Plaintiff's request for a modification of the stay to allow for a consult with the GCS surgeon.

Moreover, Plaintiff's motion lacks an evidentiary basis in the record. The letter from the GCS surgeon's office staff, attached in support of Plaintiff's motion to modify the stay, is not in the form of a declaration or affidavit and does not establish foundation or any appropriate context for the note. Moreover, it is not even dated. Such would not be admissible in District Court and, therefore, should not be admissible and considered by this Court of Appeals. Moreover, this is not a letter that has been produced in the underlying District Court action. In fact, Plaintiff had never shared this letter with Defense counsel before they filed the motion. It is simply inappropriate for Plaintiff to present new information to the Court of Appeals that is not part of the record (and would be inadmissible) in the underlying litigation.

Additionally, Plaintiff's motion seeks an order that is impermissibly broad. Plaintiff goes so far as to seek an order that would require Defendants to provide "all pre-surgical treatments and any related corollary appointments or consultations necessary for GCS." Dkt. Entry 101-1, p. 13-14. Plaintiff has failed to come forward with any evidence as to what other specific pre-surgical treatment or consultations are medically necessary, let alone urgent, or that such is appropriate under Eighth Amendment "deliberate indifference" analysis. This fails to satisfy the PLRA's requirement that relief be "narrowly drawn" and "extend no further than necessary."

Even assuming, *arguendo*, that GCS is medically necessary, it is not clear whether electrolysis would be required—another substantive legal issue that would

be cast aside in the event that Plaintiff's motion was granted. Plaintiff's pre-surgical consultation identified two separate types of vaginoplasty surgery options (See Declaration of Dylan A. Eaton, Exhibit A.)^{4 5 6} In the event that GCS is ultimately deemed medically necessary, there has been no finding regarding which specific vaginoplasty surgery might be required to satisfy the minimum standards under the Eighth Amendment. The issues of which particular surgery is required or the necessity of electrolysis are substantive legal issues on which no party has presented evidence or argument in depth, especially at the District Court level.

C. Plaintiff is Unlikely to Suffer Substantial Injury.

Plaintiff claims that continuing to stay pre-surgical appointments might delay surgery for a few months. Ms. Edmo further argues that a delay will cause her substantial injury because she is at a high risk for self-castration and suicide.

⁴Defendants acknowledge that the attached surgical consult note, as presented as an exhibit to counsel's declaration, would also likely be inadmissible in District Court. However, to the extent the Circuit Court considers the surgeon staff's note attached to Plaintiff's counsel's declaration in support of Plaintiff's Motion to Partially Lift Stay, the surgeon's April 2019 consult letter should also be considered for the reasons stated herein because it adds context to difficult and unresolved issues at the District Court level.

⁵As Defendants have previously argued, Gender Confirmation Surgery is a very broad term that can include breast augmentation, voice box alterations, orchiectomy (removal of the testicles), and vaginoplasty. Moreover, as the consult note shows, there are a number of different vaginoplasty opinions.

⁶Notably, the surgeon's April 2019 consult note states that electrolysis would last 6-9 months. Such clearly indicates that the GCS surgery (i.e. a vaginoplasty) is not urgent or emergent.

However, as Defendants have repeatedly argued, Plaintiff's claims regarding self-castration and suicide are suspect. Plaintiff affirmatively testified that she would not attempt self-castration again because "I need to keep as much tissue down there [as possible] for surgery to be successful." (ER 596, 614). In addition, Plaintiff's only prior suicide attempts took place in 2010 and 2011, for reasons unrelated to her gender dysphoria. (ER 601-606, 871-879, 881-906, 3217).

Moreover, the history of this case illustrates that a delay of a few months will not cause substantial harm to Plaintiff. Plaintiff waited nearly two years after Dr. Eliason's 2016 evaluation before moving for the present injunction. And now it has been sixteen months since Plaintiff filed that motion. Consequently, Plaintiff has failed to show that waiting a few additional months will cause substantial harm.

D. The Public Interest Favors a Complete Stay of the Injunction.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 685 F.3d 990, 1002 (9th Cir. 2012). Plaintiff argues that the public interest does not favor a stay because failing to provide gender confirmation surgery violates her Eighth Amendment rights. However, Defendants argued in their petition for rehearing en banc that the district court violated their constitutional rights to a jury trial when it converted the hearing to a trial on the merits and issued a permanent injunction. (Dkt. 99 at 7-12). Consequently, a stay of the entire injunction is necessary to protect Defendants'

constitutional rights to a jury trial. Thus, the public interest in preserving the parties' constitutional is actually neutral.

Moreover, the public interest favors a stay when the injunction interferes with a state's administration of its prisons. In cases involving governmental action, "the public interest is a factor to be strongly considered." *Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983). Courts defer to a state's political branches in identifying and protecting the public interest. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996). This deference is particularly acute when it involves a state's administration of its own prisons. As the Supreme Court has recognized:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner v. Safley, 482 U.S. 78, 84–85 (1987). Thus, the public interest favors a stay because the injunction would interfere with the State of Idaho's administration of its prisons.

This 7th day of October, 2019.

s/ Dylan A. Eaton

Dylan A. Eaton, ISB #7686

s/ Brady J. Hall

Brady J. Hall, ISB #7873

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 7, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Dylan A. Eaton

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IDAHO DEPARTMENT OF CORRECTIONS, et al.,
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On Appeal from Orders of the United States District Court
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**DECLARATION OF DYLAN A. EATON IN SUPPORT OF DEFENDANTS-
APPELLANTS' RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO
PARTIALLY LIFT STAY**

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Appellants Corizon, Inc., Scott
Eliason, Murray Young, and
Catherine Whinnery*

I, Dylan A. Eaton, declare as follows:

1. I am over 18 years of age. I make this declaration based upon my own personal knowledge, and can testify as to the truth of the statements contained herein if called upon as a witness at the trial of this action.

2. Attached hereto as Exhibit A is a true and correct copy of a consult note by Geoffrey D. Stiller, M.D. (a Gender Confirmation Surgery (“GCS”) surgeon), dated April 2019, regarding his consult with Plaintiff Edmo regarding GCS surgical options.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 7, 2019.

/s/ Dylan A. Eaton
Dylan A. Eaton

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 7, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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EXHIBIT A

Apr. 24. 2019 11:39AM

PALOUSE SURGEONS MOSCOW

Case: 19-35017, 10/07/2019, ID: 11457133, DktEntry: 103-3, Page 2 of 5

No. 8582 P. 6



2400 West A Street Suite 101 Moscow, ID 83843-4902
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April 24, 2019
Page 1
Office Visit

Mason Dean Meeks Edmo

Male DOB: [REDACTED]

35429

Ins: Corizon Health Inc.

04/12/2019 - Office Visit: MTF GRS Consult

Provider: Geoffrey D Stiller

Location of Care: Palouse Surgeons

Joseph Starrs, PA-C

Reviewed all

J 4/24/19

Visit Type: Follow-up

Primary Provider: Geoffrey D Stiller

History of Present Illness:

PCP: Dr. Albiso

Endocrinologist: same

Counselor: multiple

Support: unknown

Pt presents to discuss options for GRS.

Pt is a transgender female whose preferred pronouns are "she, her, hers." She resides at Idaho State Correctional Facility. She has sued to allow transitioning both medically and surgically. She has been granted this by the court. She is here to discuss surgical options.

Pt has known of her transgender status since she was a young teenager. Pt has been on hormones since 08/2012. After 6 months she began to find clarity. Pt has been suffering from gender dysphoria for over 10 years. She has also felt different, but was raised on a reservation and had to hide it. Has always felt like her brain is female but her body is not. Puberty was very difficult for her when her body began masculinizing. Diagnosed with depression at age 18 and began treatment. She began to get into drag shows at age 21. She has been in the prison system since age 22. She was presenting in her gender since then, although she was oppressed for many years in prison. She has seen about 8 different mental health providers since beginning her court process. They have all been supportive per the patient. She is expecting to be moved to a female correctional center after surgery. She is hoping for the correct female anatomy.

She has had suicide attempts before transitioning. While incarcerated she did attempt to self castrate requiring operative repair.

Past Medical History:

Reviewed and updated today:

Gender Identity Disorder

Depression

Hepatitis C

Past Surgical History:

Reviewed and updated today:

Laparoscopic Cholecystectomy

Scrotal exploration and closure

Family History



2400 West A Street Suite 101 Moscow, ID 83843-4902
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April 24, 2019
Page 2
Office Visit

Mason Dean Meeks Edmo

Male DOB: [REDACTED] 35429

Ins: Corizon Health Inc.

- 1) Uncle - Alcoholism - Entered on 4/16/2019
 - 2) Aunt - Alcoholism - Entered on 4/16/2019
 - 3) Sister - Alcoholism - Entered on 4/16/2019
 - 4) Brother - Alcoholism - Entered on 4/16/2019
 - 5) Father - Alcoholism - Entered on 4/16/2019
 - 6) Mother - Hypertension - Entered on 4/16/2019
 - 7) Mother - Alcoholism - Entered on 4/16/2019
- resident of Idaho Correctional Facility

Medications prior to today's visit:

- SPIRONOLACTONE TABLET (SPIRONOLACTONE TABS)
- DOCUSATE SODIUM TABLET (DOCUSATE SODIUM TABS)
- VENLAFAXINE HCL TABLET (VENLAFAXINE HCL TABS)
- ESTRADIOL TABLET (ESTRADIOL TABS)
- FINASTERIDE TABLET (FINASTERIDE TABS)

Review of Systems

General

Denies fever, anorexia and weight loss.

GI

Denies abdominal pain, nausea, vomiting, diarrhea, constipation, change in bowel habits, melena, hematochezia, jaundice, gas/bloating, indigestion/heartburn, dysphagia and odynophagia.

Breast

Denies left breast lump, right breast lump, nipple discharge, bloody discharge from nipple, breast pain, abnormal mammogram and breast enlargement.

CV

Denies chest pains, palpitations, syncope and peripheral edema.

Resp

Denies cough, shortness of breath, hemoptysis, wheezing and pleuritic chest pain.

Vascular

Denies varicose veins, leg swelling, leg redness, leg coolness, pain in legs with walking, resting leg pain, pain at night in legs and blue toe(s).

GU

Denies dysuria, hematuria, discharge, urinary frequency, urinary hesitancy, nocturia, incontinence and erectile dysfunction.

Apr. 24. 2019 11:40AM

PALOUSE SURGEONS MOSCOW

No. 8582 P. 8



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April 24, 2019
 Page 3
 Office Visit

Mason Dean Meeks Edmo

Male DOB: [REDACTED] 35429

Ins: Corizon Health Inc.

Derm

Denies suspicious lesions, new skin lesions, changing mole(s), rash, itching and history of skin cancer.

Neuro

Denies paralysis, paresthesias, seizures and frequent headaches.

Psych

Denies depression, anxiety, memory loss, suicidal ideation, hallucinations, paranoia, phobia and confusion.

Endo

Denies cold intolerance, heat intolerance, polydipsia, polyphagia, polyuria and unusual weight change.

Heme

Denies abnormal bruising, bleeding and enlarged lymph nodes.

MS

Denies back pain, sciatica and arthritis.

Physical Exam

General:

well developed, well nourished, in no acute distress

Head:

normocephalic and atraumatic

Eyes:

PERRL/EOM intact; conjunctiva and sclera clear

Neck:

no masses, thyromegaly, or abnormal cervical nodes

Lungs:

clear bilaterally to A & P

Heart:

regular rate and rhythm, S1, S2 without murmurs, rubs, gallops, or clicks

Genitalia:

normal male, testes descended bilaterally without masses, no hernias noted, uncircumcised, 3 inch flaccid penis

Extremities:

no clubbing, cyanosis, edema, or deformity noted

Neurologic:

no focal deficits, CN II-XII grossly intact

Cervical Nodes:

no significant adenopathy

Psych:



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April 24, 2019
Page 4
Office Visit

Mason Dean Meeks Edmo

Male DOB: [REDACTED]

35429

Ins: Corizon Health Inc.

alert and cooperative; normal mood and affect; normal attention span and concentration

Assessment

New Problems:

Gender identity disorder (ICD-302.6) (ICD10-F64.9)

Transgender Female

GRS- pt unsure if she desires a penile inversion with scrotal grafts or colovaginoplasty

Plan

Discussed pros and cons of penile inversion technique. Discussed pros and cons of colovaginoplasty.
Discussed use of dilators and other maintenance inside correctional facility.
Discussed average depth of about 5 inches, use of scrotal skin grafts if desired. Hair removal needed if
desires penile inversion with scrotal skin grafts- would take 9 mo to 1 yr
Discussed stimulation of clitoris and prostate post operatively.
Discussed procedure in detail, hospital stay, length of surgery etc.
Discussed risks of complications; wounds, loss of grafts, etc.
Recommended hair removal of scrotum for grafts.
If pt desires colovaginoplasty, the first stage can be completed with hair removal then 6 mo later would
preceed with a colonic interposition.
We did not receive any recent mental health records. Will need a letter of support from 2 separate mental
health providers showing the patient meets WPATH criteria. Will also need a letter of support from her
prescribing physician.

New Orders:

99204 New office out pt services Comp, Mod MDM 45min [CPT-99204]

]

Electronically signed by Geoffrey D Stiller on 04/16/2019 at 3:35 PM
