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SCHALLER, J., dissenting. The majority affirms the habeas court's oral ruling in which it determined that the respondent, the commissioner of correction, acted with deliberate indifference to the medical needs of the petitioner, William Faraday, in refusing to arrange the medical evaluation sought by the petitioner. I respectfully disagree because I believe that the court's findings and conclusions were unsupported by any evidence.

In order to grant habeas relief to a prisoner on the basis of deliberate indifference to inmate health or safety, the petitioner bears the burden of establishing both aspects of his claim. *Fuller v. Commissioner of Correction*, 75 Conn. App. 133, 136, 815 A.2d 208 (2003). First, the deprivation must be sufficiently serious such that the petitioner is denied the minimal civilized measure of life's necessities. *Id.* Second, the official must be shown to be culpable, that is, deliberately indifferent to health or safety. *Id.*, 137. The majority has appropriately cited *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), for the proposition that “[d]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment.” (Citation omitted; internal quotation marks omitted.) *Id.*, 104. A refusal to assent to an inmate's medical request, however, does not necessarily constitute “deliberate indifference,” nor does every medical need amount to a “serious medical need.” To the contrary, the term “serious medical need” refers specifically to “a condition of urgency . . . that may produce death, degeneration, or extreme pain”; (internal quotation marks omitted) *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996); and the term “deliberate indifference” has been interpreted to require conduct equaling criminal recklessness. *Hemmings v. Gorczyk*, 134 F.3d 104, 108 (2d Cir. 1998). Deliberate indifference, therefore, clearly does not contemplate good faith differences of opinion that cause officials to deny medical procedures or consultations. See *Estelle v. Gamble*, *supra*, 105–106 (“inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind’ ”); *Swindell v. Supple*, No. 02-3182, 2005 WL 267725, *8 (S.D.N.Y. 2005) (“A medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment. . . . Nor is a denial of consultation with a specialist in itself an act of medical indifference.” [Citations omitted; internal quotation marks omitted]).

On appeal, the respondent argues that the court made no finding of a “serious” deprivation and that, in fact, no such finding could be made on the basis of the

evidence that was presented. The respondent further argues that even if the court had made a finding in 2003 that the petitioner's back pain constituted a serious medical condition, no evidence was presented to the court in 2005, nearly two years later, that the condition or the pain had persisted. The respondent also argues that the petitioner failed to offer any evidence to establish deliberate indifference. I am persuaded on all scores.

At the first hearing before the court, held in 2003, the petitioner testified, but did not present any witnesses nor did he present any medical evidence. He sought a magnetic resonance imaging procedure (MRI), a surgery, a pass for a second pillow and a foam pad for his bed. As the majority notes, the petitioner attached a statement to his verified habeas petition, which he filed in 2002. All the allegations and claims made in the petition, however, were three years out of date by the time of the 2005 hearing. Moreover, the court had denied relief to the petitioner on the basis of the very same verified petition, including the attached statement. The respondent presented testimony by Edward Blanchette, the clinical director for the department of correction who was board certified in internal medicine and infectious disease. Although Blanchette acknowledged that the petitioner had degenerative joint disease in his back, which caused intermittent pain, he testified that the petitioner's condition could be managed effectively, as it had been in the past, with muscle relaxants and pain medication. Blanchette testified that neither an MRI procedure nor a surgical consultation was necessary. Because the pain was intermittent, surgery would not be appropriate. The court ruled orally in favor of the respondent, denying the petitioner's requests, apparently on the basis of Blanchette's testimony. One month later, the petitioner filed a motion for reargument, claiming that he had "new information or evidence" The new evidence turned out to be a 1992 computed tomography (CT) scan. Following a proceeding in federal court, the department of correction had an MRI procedure performed on the petitioner's back. The procedure confirmed the degenerative disk disease and found no evidence of any disc extrusion, thus confirming Blanchette's opinion. Thereafter, the court ordered a new hearing.

At the second evidentiary hearing, which was held in February, 2005, nearly two years after the first hearing, the petitioner presented several items of evidence.¹ One item consisted of the results of the 1992 CT scan that had been performed on him nearly thirteen years prior to the hearing; a second item consisted of the results of the October, 2003 MRI procedure performed on him approximately sixteen months prior. The petitioner offered no testimony, much less expert medical testimony. Significantly, no evidence was presented as to the petitioner's medical condition at the time of the

second hearing. The respondent produced an affidavit of its medical expert, Blanchette, who had testified at length at the petitioner's first habeas hearing before the same court. Blanchette's sworn statement indicated that the October, 2003 procedure confirmed his earlier testimony that the petitioner was not a surgical candidate. Blanchette also explained the efforts that the respondent had engaged in to locate the 1992 CT scan.

Undeterred by the lack of evidence supporting the petitioner's claim, the court, while acknowledging that it was "not an expert" and that it did "not have the testimony or an affidavit from a neurologist or a neurosurgeon," offered its own "common sense" analysis of the petitioner's condition on the basis of the earlier hearing testimony, on which it originally had denied relief, and the outdated diagnostic exhibits. While discounting Blanchette's testimony, on which it had relied before, because Blanchette was not a specialist in neurology or neurosurgery and had not done a "hands on" physical examination, the court relied instead on *its own medical conclusions* concerning the petitioner's condition. Although failing to find a "serious medical condition" in specific terms, and lacking evidentiary support for any such finding, the court nonetheless decided that the respondent's refusal to comply with the petitioner's request for a surgical consultation constituted deliberate indifference to the petitioner's medical needs and ordered a consultation with a neurologist or neurosurgeon. The court cited no evidence of deliberate indifference, nor could it because none was offered, in reaching its conclusion. The sole evidence of the way the respondent had managed this situation was Blanchette's earlier testimony that neither surgery nor further evaluations were medically appropriate. Nonetheless, the court volunteered its personal opinion that the respondent was displaying "rigidity" by refusing to authorize a consultation. Reaching even further outside the record in this case, the court bolstered its speculation by stating that it had "seen this rigidity before in the case of Gregory Thomas versus respondent," an unrelated case concerning sex offender classification.

Because my examination of the record of this case reveals no evidence whatsoever supporting the court's findings and conclusions concerning the petitioner's medical condition in 2005 and no evidence whatsoever supporting its determination of deliberate indifference on the part of the respondent, I respectfully dissent from the majority opinion. The habeas court was not entitled to substitute its own speculation for the lack of any evidence to support its conclusions. I respectfully submit that the actions of the habeas court, in determining that the petitioner had a serious medical condition and that the respondent was culpable, on the basis of its personal views, without a shred of evidence in support, and in reliance on an entirely extraneous matter, was improper and should be reversed.

For the foregoing reasons, I respectfully dissent.

¹ The petitioner entered into evidence (1) the results of a November 13, 1992 CT scan of his back; (2) a March 27, 2000 diagnostic radiological report about his spine; (3) a utilization review report from the utilization management unit of the University of Connecticut; (4) a summary of the October 15, 2003 MRI procedure; and (5) an April 16, 2003 hearing transcript.