

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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JOEL CARTER,

Plaintiff,

Case No. 1:13-CV-0807

v.

HON. ROBERT J. JONKER

JAMIE AYALA, et al.,

Defendants.

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**OPINION AND ORDER**  
**RE REPORT AND RECOMMENDATION**

The matter before the Court is the Magistrate Judge's Report and Recommendation (docket no. 57), recommending that the Defendants' motion for summary judgment (docket no. 33) and the Plaintiff's motion for summary judgment (docket no. 40) both be denied. The Defendant has filed a set of Objections to the Magistrate Judge's Report and Recommendation (docket no. 58).

**I. STANDARD OF REVIEW**

Under the Federal Rules of Civil Procedure, where a party has objected to portions of a Report and Recommendation, “[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified.”<sup>12</sup>

WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge, the Report and Recommendation itself, and the Defendants' Objections to the Magistrate's Report and Recommendation. After its review, the Court approves and adopts the Magistrate Judge's Report and Recommendation.

This case involves Plaintiff Carter, who is in custody; Defendant Ayala, a psychiatrist with the MDOC; and Defendant Davis, a psychologist with MDOC. Plaintiff Carter suffers from multiple sclerosis as well as a psychosis disorder due to his medical condition. Plaintiff refused mental health treatment, and, according to Plaintiff, the Defendants changed his mental-health diagnosis from "psychosis disorder" to "anxiety disorder" as a means of retaliating against him for refusing the treatment. Due to this change in diagnosis, Plaintiff lost eligibility for other mental health programs, and was placed into segregation for an extended period of time, which caused him mental anguish. In his Complaint, Plaintiff

alleged a First Amendment retaliation claim and an Eighth Amendment deliberate indifference claim.

The Report and Recommendation carefully reviews the record and examines the relevant law, and recommends that both motions be denied. The Court finds the Magistrate Judge's Report and Recommendation to be well-reasoned and thorough, and accordingly adopts its conclusion.

## II. DEFENDANTS' OBJECTIONS

### *A. Objection No. 1: Fourteenth Amendment Claim*

Defendants state that the Magistrate Judge erred by injecting an unpled Fourteenth Amendment claim into this case. The Magistrate Judge noted that Plaintiff's Eighth Amendment claim, which alleged deliberate indifference to his medical needs, was intertwined with an implicit Fourteenth Amendment claim concerning the Plaintiff's right to refuse medical treatment. The Magistrate Judge therefore concluded that this claim needed further development, and that Defendants' summary judgment motion should be denied.

The Court agrees with the Magistrate Judge. Plaintiff is proceeding pro se. It is well established that "pro se complaints are held to even less stringent standards than formal pleadings drafted by lawyers." *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987) (internal quotation marks omitted). Because a pro se complaint is construed even more

liberally than a typical complaint, *see Alexander v. N. Bureau of Prisons*, 419 F. App'x 544, 545 (6th Cir. 2011), the Court is required to look at pro se pleading with a fair degree of leeway. Plaintiff's facts as pleaded clearly implicate a Fourteenth Amendment right to refuse medical treatment claim; Defendants even admit that the Complaint refers to this right. (Docket no. 58, Def. Obj. at 3, PageID # 353.) The Court is required to acknowledge this claim, and cannot ignore it. Accordingly, Defendants' objection is overruled.

***B. Objection #2: Qualified-Immunity Burden***

Defendant Davis also objects that the Magistrate Judge misapplied the burden for establishing qualified immunity. Defendant Davis states that he was not required to affirmatively prove qualified immunity, and rather that Plaintiff was required to provide more argumentation regarding qualified immunity.

Defendants' argument falls flat. First, while Defendants are indeed not required to affirmatively prove qualified immunity, it is still the Defendants' motion for summary judgment, and the Court must read all inferences in favor of the Plaintiff. *See, e.g., Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680–85 (6th Cir. 2013) (denying Eighth Amendment qualified-immunity claim where the facts as pled established a plausible case for relief). And second, again, "pro se complaints are held to even less stringent standards than formal pleadings drafted by lawyers." *Kent*, 821 F.2d at 1223 (internal quotation marks omitted). Because pro se complaints are construed even more liberally than typical complaints, *see*

*Alexander*, 419 F. App'x at 545, the Court must examine pro se pleading with a fair degree of leeway. Accordingly, Defendants' objection is overruled.

### III. CONCLUSION

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (docket no. 57), is accepted; Defendants' motion for summary judgment (docket no. 33) is **DENIED**, and Plaintiff's motion for summary judgment (docket no. 40) is **DENIED**.

**IT IS SO ORDERED.**

Dated: May 26, 2015

/s/ Robert J. Jonker

ROBERT J. JONKER

UNITED STATES DISTRICT JUDGE

## APPENDIX B

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JOEL MARCEL CARTER,

Plaintiff,

Case No. 1:13-cv-807

Hon. Robert J. Jonker

v.

JAMIE AYALA and  
ROBERT DAVIS,

Defendants.

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**REPORT AND RECOMMENDATION**

This is a *pro se* civil rights action brought by a state prisoner at a Michigan Department of Corrections (MDOC) facility pursuant to 42 U.S.C. § 1983. This matter is now before the Court on defendant Robert Davis' motion for summary judgment (docket no. 33) and plaintiff's "Motion for summary judgment and response to defendant Davis' motion for summary judgment" (docket no. 40).<sup>1</sup>

**I. Plaintiff's complaint**

Plaintiff's complaint is directed at two defendants, psychiatrist Dr. Jamie Ayala ("Dr. Ayala"), and psychologist Mr. Robert Davis ("Mr. Davis"). Compl. at ¶ 7 (docket no. 1). Plaintiff's complaint includes the following allegations. Defendants were employed by the State of Michigan as mental health officials at Ionia Correctional Facility (ICF), were "employees, agents

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<sup>1</sup> Plaintiff's motion for summary judgment and opposition appear directed at defendant Davis, much as plaintiff's previously filed motion for summary judgment and opposition were directed at defendant Dr. Ayala. *See Motion and Opposition* (docket no. 30). For that reason, the Court construes plaintiff's present motion for summary judgment as directed against defendant Davis. The Court notes that Dr. Ayala filed a response to plaintiff's present motion (*see* docket no. 45) which pointed out that plaintiff's arguments regarding the doctor were addressed in a Report and Recommendation (docket no. 44).

and/or representatives" of the MDOC, and performed duties "as medical and corrections officials acting pursuant to and under the color of law." *Id.* at ¶ 7-8.

Plaintiff suffers from multiple sclerosis. *Id.* at ¶ 9. In 2009, while housed at the Marquette Branch Prison (MBP), he was diagnosed with "Psychosis disorder due to medical condition." *Id.* at ¶ 10. Upon plaintiff's transfer to ICF, his assigned case manager and psychologist, Mr. Davis, notified plaintiff that due to his major mental disorder (MMD), plaintiff could not be subjected to long-term segregation "and that [p]laintiff would be 'appealed' back into the 'Secure Status Outpatient Treatment Program,' ('SSOTP') for mental health treatment." *Id.* at ¶ 11. According to plaintiff,

The SSOTP is a mental program designed for the therapeutic management and care of prisoners who are placed in segregation who suffer from a major mental disability, which may preclude adequate adjustment in segregation and assist towards the goal of managing these prisoners in general population. (See MDOC Policy Directive 04.06.182).

*Id.* at ¶ 11.<sup>2</sup>

Plaintiff was admitted into "the mental health program" at ICF. *Id.* at ¶ 12. However, he refused treatment "in fear of his health and safety of officers" who worked with the

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<sup>2</sup> MDOC Policy Directive 04.06.182 ¶ D provides as follows:

Prisoners with a mental disability ordinarily should not be housed in segregation if the disability may preclude adequate adjustment in segregation. The Department has more appropriate mental health care settings which are designed for the therapeutic management and care of these prisoners; for example, inpatient psychiatric hospitalization, Residential Treatment Programs (RTPs) including the Adaptive Skills Residential Program (ASRP), and the Secure Status Outpatient Treatment Program (SSOTP). Some prisoners with mental disabilities, however, cannot be managed outside of a segregation unit without presenting a serious threat to their own safety or the safety of staff or other prisoners. While in segregation, such prisoners must be closely followed by the institution Outpatient Mental Health Team (OPMHT) or a QMHP to ensure their mental health needs are continuing to be met.

mentally ill prisoners in the SSOTP unit. *Id.* Plaintiff was asked to enter the program on two subsequent occasions, but refused to participate. *Id.* On July 27, 2010, Mr. Davis went to plaintiff's cell and told plaintiff that "if your [sic] not going to consent to participate in SSOTP, I'll be sure that you see the doctor." *Id.* at ¶ 13. Plaintiff responded that "I have a constitutional right to refuse treatment, you don't care about my safety, I told you officers are going to jump me over there again." *Id.* Shortly after Mr. Davis left plaintiff's cell door, Dr. Ayala approached the cell and stated that Davis "referred me to re-evaluate you." *Id.* at ¶ 14. Plaintiff's meeting with Dr. Ayala "lasted less than three minutes." *Id.* After the meeting, Dr. Ayala changed plaintiff's diagnosis to an anxiety disorder "with no explanation of why he was discontinuing Plaintiff's prescribed treatment and therapy for his Psychosis Disorder." *Id.* By changing plaintiff's diagnosis, Dr. Ayala "made [p]laintiff ineligible for mental health therapy, and subjected [p]laintiff to punitive detention and administrative segregation." *Id.*

Approximately two months later, on September 22, 2010, Mr. Davis told plaintiff that, according to Dr. Ayala, plaintiff "was ineligible for the mental health program because he refused treatment, not because he [Dr. Ayala] downgraded Plaintiff's diagnosis." *Id.* at ¶ 15. Mr. Davis later stated that plaintiff was ineligible for both reasons "but more because you were admitted to the SSOTP and you refused to go several times." *Id.*

On September 23, 2010, plaintiff asked Dr. Ayala if he could change plaintiff's diagnosis back to the original psychosis disorder. *Id.* at ¶ 16. Plaintiff promised Dr. Ayala that he would be compliant with treatment and attend SSOTP therapy, because he needed to be provided with proper treatment for his psychosis and released from segregation." *Id.* According to plaintiff,

Defendant AYALA then stated that, the reason he changed Plaintiff's diagnosis was because of Plaintiff's "previous non-compliance" with SSOTP

therapy, and that “if your Case Manager agree [sic] to give you a second chance in the SSOTP, I’ll be glad to re-consider a more favorable diagnosis.” Plaintiff replied “your [sic] the Psychiatrist, you make the diagnosis not my psychologist.” Defendant AYALA stated that Defendant DAVIS recommended re-evaluation and that Plaintiff should develope [sic] a better relationship with his psychologist if he want [sic] a favorable diagnosis that will make him eligible for the program.

*Id.*

Plaintiff notified Mr. Davis “numerous times that he will be compliant with treatment and that he was ready to leave segregation because segregation exacerbated the symptoms of his mental illness” and Davis “repeatedly promised that he was going to speak to Dr. Ayala and have Plaintiff’s diagnosis corrected.” *Id.* at ¶ 17. However, neither Mr. Davis nor Dr. Ayala corrected “their unlawful actions.” *Id.*

Approximately eight months later, in May 2011, plaintiff experienced an exacerbation of his multiple sclerosis and severe symptoms of his psychosis. *Id.* at ¶ 18. On May 29, 2011, plaintiff attempted to commit suicide. *Id.* Dr. Thomas Henry, a psychiatrist, found that plaintiff’s “clinical status was worsening” and that plaintiff “suffered from paranoia, delusions, and suicidal behavior, along with sleeping and eating problems.” *Id.* Dr. Henry diagnosed plaintiff with a psychosis disorder and recommended that he enter a residential treatment program “for intensive mental health treatment.” *Id.* On June 16, 2011, plaintiff was transferred to an inpatient mental health facility and released from segregation. *Id.*

According to plaintiff, defendants’ act of downgrading his diagnosis based on his refusal to enter a mental health program caused him to be subjected to segregation for 11 months, to suffer severe mental anguish and emotional pain, and to suffer a substantial risk of harm to his mental health. *Id.* at ¶ 19.

Plaintiff's complaint has alleged two causes of action. In Count 1, plaintiff alleged that defendants retaliated against him in violation of the First Amendment. Specifically,

At all times relevant, pursuant to the 1st Amendment of the United States Constitution, and clearly established law, Plaintiff had a right to engage in constitutionally protected conduct when refusing mental health treatment, and not be subjected to retaliation. Plaintiff suffered an adverse action when Defendants AYALA and DAVIS intentionally downgraded Plaintiff's diagnosis for the sole purpose [sic] to deny him prescribed treatment and subject him to segregation.

*Id.* at ¶ 25.

In Count 2, plaintiff alleged that defendants were deliberately indifferent to his serious medical needs in violation of the 8th Amendment. Specifically, plaintiff alleged that:

At all times relevant, pursuant to the 8th Amendment of the United States Constitution, and clearly established law, Plaintiff had a right not to be subjected [sic] cruel and unusual punishment. Defendants AYALA and DAVIS acted with deliberate indifference when denying Plaintiff already prescribed treatment, when they intentionally switched Plaintiff's diagnosis. Defendants AYALA and DAVIS knew Plaintiff was suffering from a "Psychosis Disorder["]], knew they were intentionally misdiagnosing Plaintiff, and knew their treatment was otherwise grossly inadequate but proceeded with treatment anyway when treating Plaintiff for an "Anxiety Disorder." Defendants AYALA and DAVIS knew that housing Plaintiff in segregation would increase his risk of relapse and/or exacerbate the symptoms of his mental illness.

*Id.* at ¶ 27. Plaintiff seeks monetary damages and declaratory relief. *Id.* at p. 9.

## II. Count 1

In addressing Dr. Ayala's dispositive motion, the Court dismissed plaintiff's retaliation claim (Count 1) for failure to state a claim pursuant to 28 U.S.C. § 1915(2)(B)(2)(ii). *See* Opinion and Order re Report and Recommendation (docket no. 48). This ruling applied to both defendants named in Count 1. However, to dispel any possible misunderstanding by the parties, Count 1 also failed to state a claim for relief against defendant Davis. *See Id.*; Report and Recommendation (docket no. 44).

### III. The parties' motions for summary judgment

#### A. Legal standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 further provides that a party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

In *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995), the court set forth the parties' burden of proof in deciding a motion for summary judgment:

The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. The mere existence of a scintilla of evidence to support plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

*Copeland*, 57 F.3d at 478-79 (citations omitted). "In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). However, the court is not bound to blindly adopt a non-moving party's version of the facts. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury

could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

**B. Count 2 (Eighth Amendment claim)**

Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, which confers a private federal right of action against any person who, acting under color of state law, deprives an individual of any right, privilege or immunity secured by the Constitution or federal laws. *Burnett v. Grattan*, 468 U.S. 42, 45 n. 2 (1984); *Stack v. Killian*, 96 F.3d 159, 161 (6th Cir.1996). To state a § 1983 claim, a plaintiff must allege two elements: (1) a deprivation of rights secured by the Constitution and laws of the United States, and (2) that the defendant deprived him of this federal right under color of law. *Jones v. Duncan*, 840 F.2d 359, 360-61 (6th Cir. 1988); 42 U.S.C. § 1983.

It is well established that an inmate has a cause of action under § 1983 against prison officials for “deliberate indifference” to his serious medical needs, since the same constitutes cruel and unusual punishment proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). A viable Eighth Amendment claim consists of an objective and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A court considering a prisoner’s Eighth Amendment claim must ask both if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation and if the officials acted with a sufficiently culpable state of mind. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). The objective component requires the infliction of serious pain or failure to treat a serious medical condition. *Id.* at 8-9. “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’” *Id.* at 9.

The subjective component requires that the defendant act with deliberate indifference to an inmate's health or safety. *See Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991). To establish the subjective component, the plaintiff must show that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. Mere negligence in diagnosing or treating a medical condition does not constitute an Eighth Amendment violation. *Id.* at 835. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

### **C. Plaintiff's claim against defendant Davis**

Both plaintiff and defendant Davis filed affidavits in this matter setting forth plaintiff's treatment history. Some of the background facts are not disputed. In 2009, a psychiatrist diagnosed plaintiff with psychosis disorder due to a medical condition (multiple sclerosis). Carter Aff. at ¶ 2 (docket no. 41-1); Davis Aff. at ¶ 4 (docket no. 34-2). Plaintiff was transferred to ICF in December 2009. Carter Aff. at ¶ 3. Defendant Davis was a clinical social worker (LMSW) assigned as plaintiff's case manager at ICF. *Id.* ; Davis Aff. at ¶¶ 1, 5. Plaintiff was treated at ICF for about one year, until his transfer to another correctional facility in January 2011. Davis Aff. at ¶ 5.

The controversy began in April 2010, when, according to plaintiff, he was placed in segregation after a corrections officer assaulted him and charged plaintiff with a misconduct for assault. Carter Aff. at ¶ 4. Davis advised plaintiff that he could not be housed in segregation and would be placed in SSOTP because of his mental health diagnosis. *Id.* Plaintiff was admitted to

SSOTP in May 2010. *Id.* When plaintiff was asked to move to the mental health unit, plaintiff told Davis that “[he] refused treatment because [he] was scared of the officers who worked around mentally ill prisoners in the SSOTP unit, including the officer who assaulted [him].” *Id.* at ¶ 5. Plaintiff was asked to enter the mental health program in June 2010 and July 2010, but refused because he feared for his health and safety. *Id.* at ¶ 6.

On July 27, 2010, Davis told plaintiff “if your [sic] not going to consent to participate in the SSOTP, I’ll be sure that you see the doctor.” *Id.* at ¶ 7. Plaintiff told Davis, “I have a right to refuse treatment.” *Id.* Plaintiff also told Davis that the officers at the program might “jump him” as they did before. *Id.* About four hours later, the psychiatrist, Dr. Ayala, came to plaintiff’s cell door and stated that Davis referred him to “re-evaluate” plaintiff. *Id.* at ¶ 8. Plaintiff stated that the evaluation lasted three minutes, that without explanation Dr. Ayala changed plaintiff’s diagnosis from “psychosis disorder” to “anxiety disorder”; and that Dr. Ayala discontinued plaintiff’s psychotropic medications of Abilify and Amitriptyline. *Id.*

Dr. Ayala’s change of treatment made plaintiff ineligible for mental health therapy and subjected plaintiff to segregation for initially refusing mental health treatment. *Id.* at ¶ 8. Plaintiff attributes the change in treatment to *both* Dr. Ayala and Mr. Davis, stating that the treatment caused him mental anguish, severe depression, increased paranoia, delusions and hallucinations. *Id.* Plaintiff also referred to the change in treatment as “the denial of appropriate treatment.” *Id.*

Plaintiff provides no facts for the period of July 27, 2010 until September 22, 2010, when plaintiff notified Davis that “Dr. Ayala told me that I was ineligible to be released from segregation and receive therapy because I refused treatment not because he changed my diagnosis.”

*Id.* at ¶ 10. Davis responded that plaintiff was ineligible for “both [reasons] but more because you were admitted to the SSOTP and you refused to go several times.” *Id.*

On September 23, 2010, plaintiff asked Dr. Ayala if he could change plaintiff’s diagnosis. *Id.* at ¶ 11. “Ayala stated that the reason he changed my diagnosis was based on my ‘previous non-compliance’ with SSOTP therapy,” and that “if your Case Manager agree [sic] to give you a second chance in the SSOTP, I’ll be glad to re-consider a more favorable diagnosis.” *Id.* Dr. Ayala then advised plaintiff, “to develope [sic] a better relationship with Davis if I want a favorable diagnosis.” *Id.* Plaintiff promised Dr. Ayala that he would be compliant with treatment. *Id.* at ¶ 11. Plaintiff stated that he tried to develop a relationship with Davis as directed by Dr. Ayala, and repeatedly promised Davis that he would be compliant with treatment. *Id.* According to plaintiff, “Davis repeatedly promised me that he will have Ayala correct my diagnosis.” *Id.* However, “[a]t no time did Davis and Ayala correct their unlawful actions and exercise their appropriate medical judgment.” *Id.*

In May 2011, after he transferred out of ICF, plaintiff experienced inflammation from the multiple sclerosis and severe symptoms of psychosis, including auditory and visual hallucinations. *Id.* at ¶ 13. On May 29, 2011, plaintiff attempted to commit suicide by hanging. *Id.* On June 1, 2011, Dr. Henry found that plaintiff’s clinical status was worsening, that he suffered from paranoia, delusions, hallucinations, suicidal behavior, sleeping problems and eating problems. *Id.* at ¶ 14. Dr. Henry diagnosed plaintiff with Psychosis Disorder and recommended that plaintiff be admitted into a residential treatment program. *Id.* On June 16, 2011, plaintiff was transferred to an inpatient mental health treatment facility and later released from segregation. *Id.*

Defendant Davis addressed the time frame of May 2010 through December 2010 as follows:

6. On May 25, 2010, inmate Carter requested to go back to the SSOTP Program. However, on June 4, 2010 inmate Carter stated he did not want to go. On June 10, he refused to be moved to the program site. But then on July 1, inmate Carter stated he did want to go to the program. On July 10 he again stated he was willing to go to the program. On July 14, inmate Carter again verbalized willingness to go to the program, but wanted to wait until after his store items were delivered. A medical record note on July 20, 2010 indicates that the plan was to move inmate Carter to the SSOTP program the following day, on July 21. When seen by me later in the day on July 20, inmate Carter was ambivalent about going to the SSOTP program. Inmate Carter's main focus during this time frame was to get himself a television despite knowing that he was not eligible for one because he had an extended period of "LOP" due to misconduct violations.

7. Inmate Carter was seen by the team Psychiatrist on July 27, 2010. This was in follow up to a medication change by the Physician's Assistant on July 20. I may have informed inmate Carter that the Psychiatrist would come see him, but the visit was not related to his refusal to participate in the program and this was not communicated nor implied to inmate Carter. At that time it appeared that inmate Carter would enter the program voluntarily.

8. Inmate Carter was seen by me on September 22, 2010. His prior refusal was noted, but this was not offered as a reason for the diagnosis change. Diagnoses are neither ""downgraded" nor "upgraded." Diagnoses are changed periodically on many patients due to clinical presentation. I did not state the diagnosis was changed due to non-compliance.

9. Inmate Carter continued to be seen weekly in segregation (as per policy) and documented such in the medical record, which is the primary mechanism for communicating with other health and mental health professional staff. Inmate Carter's compliance with treatment is included in this documentation. I did not, and would not, "promise to speak with the Psychiatrist and have the diagnosis corrected" as it was not considered to be incorrect. The Psychiatrist saw inmate Carter on December 15, 2010 and did not change the diagnosis at that time.

Davis Aff. at ¶¶ 6-9.

Defendant Davis seeks summary judgment on the basis that he "was not directly responsible for the Plaintiff's diagnosis." Defendant's Brief at p. ID# 163. However, Davis does

not elucidate on either the evidence or legal arguments which support this claim. Davis' contention that he was not "directly" responsible for the diagnosis suggests, if not implies, that Davis had some responsibility for the diagnosis. While Davis points out that plaintiff had a significant amount of mental health treatment, plaintiff's level of treatment is not at issue in this lawsuit. Rather, the issue before the Court is whether defendant Davis was deliberately indifferent to plaintiff's serious medical needs, including his need for psychotropic medication. While this Court takes judicial notice that Davis is not a doctor licensed to prescribe medication, Davis has not clearly addressed what role, if any, he had in Dr. Ayala's decision to eliminate plaintiff's psychotropic medication. Defendant Davis' cryptic arguments that "[p]laintiff was seeking to use a mental health diagnosis as a 'get out of segregation' card" and that "plaintiff was put in administrative segregation due to the numerous misconducts he received, not because of any actions or inactions by Defendant Davis" does not address the issue. Based on this record, genuine issues of material fact exist with respect to defendant Davis' involvement in plaintiff's treatment, including the treatment which plaintiff received and the treatment which plaintiff refused.

Furthermore, the alleged Eighth Amendment violation is intertwined with plaintiff's right to refuse medical treatment, a right which arises from the Due Process Clause of the Fourteenth Amendment. *See, e.g., Washington v. Harper*, 494 U.S. 210, 221-2, 229 (1990) (recognizing that a prison inmate with a serious mental illness has a constitutionally-protected liberty interest in avoiding the unwanted administration of antipsychotic drugs and concluding that an inmate "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment"); *Noble v. Schmitt*, 87 F.3d 157, 161 (6th Cir. 1996) ("[t]he Supreme Court has held that individuals in state custody enjoy protectable

liberty interests to be free from bodily restraint, and to refuse medical treatment such as the administration of antipsychotic drugs"). Defendant Davis does not address how plaintiff's right to refuse treatment affects his Eighth Amendment claim. *See Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 685 (7th Cir. 2012) ("[w]here, as in this case, a doctor's obligation to address his patient's serious medical needs conflicts with the patient's right to refuse treatment, the proper resolution of the conflict implicates the physician's medical judgment"). This legal issue requires further development. Accordingly, both parties' motions for summary judgment should be denied.

#### **D. Qualified immunity**

Davis contends that he is entitled to summary judgment on grounds of qualified immunity.

Under the doctrine of qualified immunity, government officials performing discretionary functions are shielded from civil liability unless their conduct violates clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Thus, a defendant is entitled to qualified immunity on summary judgment unless the facts, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (2009).

*Bishop v. Hackel*, 636 F.3d 757, 765 (6th Cir 2011). The Court may exercise its sound discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

While Davis claims that he is entitled to qualified immunity, he failed to develop or articulate a rationale to support this claim. Davis contends that he is entitled to qualified immunity "because there is insufficient evidence that he violated clearly established law," that plaintiff "has not supported his allegations with sufficient evidence," and that "[e]ven when the facts are viewed

in a light most favorable to Plaintiff, the actions or inactions of Defendant Davis were not objectively unreasonable.” Defendant’s Brief at pp. ID## 164, 166. As discussed, plaintiff’s claim involves aspects of both an Eighth Amendment deliberate indifference claim and a Fourteenth Amendment right to refuse treatment claim. However, Davis does not identify the constitutional rights at issue or which of his “actions or inactions” are relevant to plaintiff’s claim. Davis’ cursory argument falls far short of establishing qualified immunity under the standard announced in *Bishop*, 636 F.3d at 765. A court need not make the lawyer’s case by scouring the party’s various submissions to piece together appropriate arguments. *Little v. Cox’s Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995). “[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in a most skeletal way, leaving the court to . . . put flesh on its bones.” *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997). Moreover, Davis’ claim of qualified immunity should be denied on factual grounds because genuine issues of material fact exist with respect to plaintiff’s claims. Accordingly, defendant Davis’ qualified immunity claim should be denied.

#### IV. Recommendation

For the reasons set forth above, I respectfully recommend that plaintiff’s allegation of First Amendment retaliation set forth in Count 1 be **DISMISSED** for failure to state a claim pursuant to 28 U.S.C. § 1915(2)(B)(2)(ii).

I further recommend that defendant Davis' motion for summary judgment (docket no. 33) and plaintiff's motion for summary judgment (docket no. 40) be **DENIED**.

Dated: March 30, 2015

/s/ Hugh W. Brenneman, Jr.

HUGH W. BRENNEMAN, JR.  
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the Court within fourteen (14) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

## APPENDIX C

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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JOEL MARCEL CARTER,

Plaintiff,

Case No. 1:13-cv-0807

v.

HON. ROBERT J. JONKER

JAMIE AYALA and ROBERT DAVIS,

Defendants.

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**ORDER APPROVING AND ADOPTING  
REPORT AND RECOMMENDATION**

The Court has reviewed the Magistrate Judge's Report and Recommendation (ECF No. 130) and Plaintiff's Objections to the Report and Recommendation (ECF No. 131). Under the Federal Rules of Civil Procedure, where a party has objected to portions of a Report and Recommendation, “[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified.” 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge, the

Report and Recommendation itself, the Plaintiff's Objections to the Magistrate's Report and Recommendation. After its review, the Court approves and adopts Magistrate Judge Kent's Report and Recommendation as amplified in this Order.

Plaintiff Carter suffers from multiple sclerosis and psychosis. Plaintiff's complaint raised three related claims under 42 U.S.C. § 1983 against two defendants: psychiatrist Dr. Jamie Ayala ("Dr. Ayala") and social worker Mr. Robert Davis ("Mr. Davis"). Plaintiff's claim alleging First Amendment retaliation has previously been dismissed by this Court because Plaintiff did not engage in conduct protected by the First Amendment (ECF No. 48). Plaintiff's remaining claims are for Eighth Amendment deliberate indifference and Fourteenth Amendment right to refuse medical treatment.

The Report and Recommendation carefully reviews the record and examines the relevant law, and recommends that defendants' motions for summary judgment (ECF Nos. 94, 109) be granted; that Plaintiff's supplemental motion for summary judgment (ECF No. 122) be denied; and that this action be dismissed. The Court finds the Magistrate Judge's Report and Recommendation to be well-reasoned and thorough, and accordingly adopts its conclusion.

### **PLAINTIFF'S OBJECTIONS**

Plaintiff raises four objections, all of which lack merit. First, Plaintiff claims the Magistrate Judge failed to apply the correct standard of review, and in particular failed to draw factual inferences in his favor as the non-moving party. He is incorrect. The Court finds that the Magistrate Judge applied the correct standard of review, fairly and liberally construed Plaintiff's claims, and correctly found that Plaintiff's claims do not warrant relief under the applicable law.

Second, Plaintiff asserts that the Magistrate Judge “ignore[d] and disregard[ed]” his claims against Dr. Ayala by refusing to evaluate and accept his proffered evidence (ECF No. 131, PageID.876-878). The Court, however, finds that the Magistrate Judge’s Report and Recommendation carefully and thoroughly examines the extensive medical record in this case; details each occasion Dr. Ayala treated Plaintiff; and adequately addresses each of Plaintiff’s claims in this regard (ECF No. 130, PageID.863-871). Plaintiff’s objection fails to identify any issue the Magistrate Judge got wrong. Accordingly, Plaintiff’s objection is overruled.

Third, Plaintiff claims that the Magistrate Judge’s Report and Recommendation fails to address his “law of the case” argument with regard to Defendant Davis. Specifically, Plaintiff claims that this Court previously found that “a genuine issue of fact remains with regard to Davis” and that finding controls disposition of Defendant Davis’s motion for summary judgment in this case also (ECF No. 131, PageID.880). Plaintiff’s objection is meritless. This Court’s prior Order only found that Defendant failed to meet his qualified immunity burden at an earlier stage of the case (ECF No. 60, PageID.362). Defendants’ current motions raise the different issue of whether Plaintiff has identified sufficient facts supporting Eighth and Fourteenth Amendment claims. Moreover, nothing in the “law of the case” doctrine, or otherwise, prevents a District Court from revisiting and changing earlier decisions in the case. Accordingly, this objection is overruled.

Plaintiff’s final objection concerns the Magistrate Judge’s finding that Plaintiff failed to raise a cognizable claim under the Fourteenth Amendment because he was not forced to undergo medical treatment against his will. Plaintiff does not object to this finding *per se*, but instead argues that the Fourteenth Amendment claim at issue is not whether he was forced to undergo medical treatment, but whether he was retaliated against for refusing to undergo medical treatment. Plaintiff’s objection

misses the point. Plaintiff's First Amendment retaliation claim has already been dismissed by this Court in its very first Order (ECF No. 48, PageID.301) and is therefore no longer at issue. Accordingly, nothing in Plaintiff's objections changes the fundamental analysis.

## **CONCLUSION**

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (ECF No. 130), is adopted.

**IT IS FURTHER ORDERED** that Defendant Ayala and Davis's Motions for Summary Judgment (ECF No. 94, 109) are **GRANTED**, and Plaintiff Carter's Supplemental Motion for Summary Judgment (ECF No. 122) is **DENIED**.

This case is **DISMISSED**.

**IT IS SO ORDERED.**

Dated: March 30, 2017

/s/ Robert J. Jonker  
ROBERT J. JONKER  
UNITED STATES DISTRICT JUDGE

## APPENDIX D

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JOEL MARCEL CARTER,

Plaintiff,

Case No. 1:13-cv-807

Hon. Robert J. Jonker

v.

JAMIE AYALA and  
ROBERT DAVIS,

Defendants.

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**REPORT AND RECOMMENDATION**

This is a *pro se* civil rights action brought by a state prisoner at a Michigan Department of Corrections (MDOC) facility pursuant to 42 U.S.C. § 1983. This matter is now before the Court on defendant Dr. Jamie Ayala's motion for summary judgment (docket no. 94), defendant Robert Davis' motion for summary judgment (docket no. 109), and plaintiff's "Supplemental Motion for summary judgement and response to defendants Davis and Ayala's motion for summary judgment" (docket no. 122).

**I. Plaintiff's complaint**

Plaintiff's complaint is directed at two defendants, psychiatrist Dr. Jamie Ayala ("Dr. Ayala") and social worker Mr. Robert Davis ("Mr. Davis"), both of whom worked at the Ionia Correctional Facility (ICF). Compl. (docket no. 1 at PageID.2-3).<sup>1</sup> Plaintiff suffers from multiple sclerosis. *Id.* at PageID.3. In 2009, while housed at the Marquette Branch Prison (MBP), he was diagnosed with "Psychosis disorder due to medical condition." *Id.* Upon plaintiff's transfer to ICF,

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<sup>1</sup> Plaintiff erroneously refers to Mr. Davis as a psychologist rather than a social worker.

his assigned case manager, Mr. Davis, notified plaintiff that due to his major mental disorder, plaintiff could not be subjected to long-term segregation “and that [p]laintiff would be ‘appealed’ back into the ‘Secure Status Outpatient Treatment Program,’ (‘SSOTP’) for mental health treatment.” *Id.* at ¶ 11.

By way of background, the MDOC Policy Directives regarding mentally disabled prisoners in segregation provide that:

Prisoners with a mental disability ordinarily should not be housed in segregation if the disability may preclude adequate adjustment in segregation. The Department has more appropriate mental health care settings which are designed for the therapeutic management and care of these prisoners; for example, inpatient psychiatric hospitalization, Residential Treatment Programs (RTPs) including the Adaptive Skills Residential Program (ASRP), and the Secure Status Outpatient Treatment Program (SSOTP). Some prisoners with mental disabilities, however, cannot be managed outside of a segregation unit without presenting a serious threat to their own safety or the safety of staff or other prisoners. While in segregation, such prisoners must be closely followed by the institution Outpatient Mental Health Team (OPMHT) or a QMHP to ensure their mental health needs are continuing to be met.

MDOC Policy Directive 04.06.182 ¶D. The MDOC has summarized outpatient treatment programs, such as SSOTP as follows:

The Outpatient Mental Health Program (OPMHT) provides mental health treatment to prisoners with a mental disability and/or behavioral disorder that reside in general population. This includes services through a Secure Status Outpatient Treatment Program (SSOTP) which provides a safe and secure alternative treatment option to prisoners with a serious mental disability who, because of behavioral issues which present a risk to the custody and security of the facility, would otherwise be in Administrative Segregation.

*See (Frequently Asked Questions) (“Health Care - The Rights of Prisoners to Physical and Mental Health Care”).*<sup>2</sup>

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<sup>2</sup> Available at [http://www.michigan.gov/corrections/0,4551,7-119-9741\\_12798-208246--,00.html](http://www.michigan.gov/corrections/0,4551,7-119-9741_12798-208246--,00.html).

Plaintiff was admitted into the mental health program at ICF, but refused treatment. *Id.* at PageID.4. According to plaintiff, he feared the officers who worked with the mentally ill prisoners in the SSOTP unit. *Id.* Later, plaintiff was asked to enter SSOTP on two more occasions, but refused to participate. *Id.* Plaintiff's claims are based on incidents which occurred in July and September 2010.

On July 27, 2010, Mr. Davis went to plaintiff's cell and told plaintiff that if he was not going to consent to participate in SSOTP, then "I'll be sure that you see the doctor." *Id.* When plaintiff stated that he had "a constitutional right to refuse treatment," Mr. Davis left plaintiff's cell and Dr. Ayala came over stating that Davis "referred me to re-evaluate you." *Id.* Plaintiff's meeting with Dr. Ayala "lasted less than three minutes." *Id.* After the meeting, Dr. Ayala changed plaintiff's diagnosis to an anxiety disorder "with no explanation of why he was discontinuing Plaintiff's prescribed treatment and therapy for his Psychosis Disorder." *Id.* According to plaintiff, by changing his diagnosis, Dr. Ayala "made [p]laintiff ineligible for mental health therapy, and subjected [p]laintiff to punitive detention and administrative segregation." *Id.*

On September 22, 2010, Mr. Davis told plaintiff that, according to Dr. Ayala, plaintiff "was ineligible for the mental health program because he refused treatment, not because he [Dr. Ayala] downgraded Plaintiff's diagnosis." *Id.* at PageID.4-5. Mr. Davis later stated that plaintiff was ineligible for both reasons "but more because you were admitted to the SSOTP and you refused to go several times." *Id.* The next day, plaintiff asked Dr. Ayala if the doctor could change his diagnosis back to the original psychosis disorder. *Id.* at PageID.5. Plaintiff promised Dr. Ayala that he would be compliant with treatment and attend SSOTP therapy, because he needed to be provided with proper treatment for his psychosis and released from segregation." *Id.* According to plaintiff,

Defendant AYALA then stated that, the reason he changed Plaintiff's diagnosis was because of Plaintiff's "previous non-compliance" with SSOTP therapy, and that "if your Case Manager agree [sic] to give you a second chance in the SSOTP, I'll be glad to re-consider a more favorable diagnosis." Plaintiff replied "your [sic] the Psychiatrist, you make the diagnosis not my psychologist." Defendant AYALA stated that Defendant DAVIS recommended re-evaluation and that Plaintiff should develope [sic] a better relationship with his psychologist if he want [sic] a favorable diagnosis that will make him eligible for the program.

*Id.*

Plaintiff notified Mr. Davis "numerous times that he will be compliant with treatment and that he was ready to leave segregation because segregation exacerbated the symptoms of his mental illness" and Davis "repeatedly promised that he was going to speak to Dr. Ayala and have Plaintiff's diagnosis corrected." *Id.* at PageID.5-6. However, neither Mr. Davis nor Dr. Ayala corrected "their unlawful actions." *Id.*

Plaintiff does not allege when he transferred from ICF. However, at his deposition, plaintiff testified that he was transferred to MBP in January 2011. Carter Dep. (docket no. 113-3, PageID.752). Approximately four months after his transfer, plaintiff experienced an exacerbation of his multiple sclerosis and severe symptoms of his psychosis. Compl. at PageID.6. On May 29, 2011, plaintiff attempted to commit suicide. *Id.* Dr. Thomas Henry, a psychiatrist, found that plaintiff's "clinical status was worsening" and that plaintiff "suffered from paranoia, delusions, and suicidal behavior, along with sleeping and eating problems." *Id.* Dr. Henry diagnosed plaintiff with a psychosis disorder and recommended that he enter a residential treatment program "for intensive mental health treatment." *Id.* On June 16, 2011, plaintiff was transferred to an inpatient mental health facility and released from segregation. *Id.*

According to plaintiff, Dr. Ayala and Mr. Davis “intentionally downgraded” his diagnosis based on his refusal to enter a mental health program. *Id.* This “downgrade” caused him to be subjected to segregation for 11 months “solely because of Plaintiff’s initial refusal to participate in the SSOTP.” *Id.* By being subjected to segregation, plaintiff suffered severe mental anguish and emotional pain, which “created a substantial risk of harm to his mental health.” *Id.* at PageID.6-7.

Plaintiff’s complaint contained two constitutional claims. In Count 1, plaintiff alleged that defendants retaliated against him:

At all times relevant, pursuant to the 1st Amendment of the United States Constitution, and clearly established law, Plaintiff had a right to engage in constitutionally protected conduct when refusing mental health treatment, and not be subjected to retaliation. Plaintiff suffered an adverse action when Defendants AYALA and DAVIS intentionally downgraded Plaintiff’s diagnosis for the sole purpose [sic] to deny him prescribed treatment and subject him to segregation.

*Id.* at PageID.7-8.

In Count 2, plaintiff alleged that defendants were deliberately indifferent to his serious medical needs:

At all times relevant, pursuant to the 8th Amendment of the United States Constitution, and clearly established law, Plaintiff had a right not to be subjected [sic] cruel and unusual punishment. Defendants AYALA and DAVIS acted with deliberate indifference when denying Plaintiff already prescribed treatment, when they intentionally switched Plaintiff’s diagnosis. Defendants AYALA and DAVIS knew Plaintiff was suffering from a “Psychosis Disorder[”], knew they were intentionally misdiagnosing Plaintiff, and knew their treatment was otherwise grossly inadequate but proceeded with treatment anyway when treating Plaintiff for an “Anxiety Disorder.” Defendants AYALA and DAVIS knew that housing Plaintiff in segregation would increase his risk of relapse and/or exacerbate the symptoms of his mental illness.

*Id.* at PageID.8-9. Plaintiff seeks monetary damages and declaratory relief. *Id.* at PageID.9

The Court dismissed plaintiff's First Amendment retaliation claim on the merits and allowed the case to proceed on plaintiff's Eighth Amendment claim. *See* Opinion and Order re Report and Recommendation (R&R) (docket no. 48). In denying motions for summary judgment filed by Mr. Davis and plaintiff, the Court noted that plaintiff's Eighth Amendment claim implicated a Fourteenth Amendment right to refuse medical treatment which the Court could not ignore, and allowed plaintiff to further develop this claim. *See* Opinion and Order re R&R (docket no. 60, PageID.361-362). Discovery has closed. The Court will now review the parties' motions for summary judgment with respect to plaintiff's Eighth Amendment claim alleged in Count II and the Fourteenth Amendment implicated in his complaint.

## **II. Motions for summary judgment**

### **A. Legal standard**

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 further provides that a party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

In *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995), the court set forth the parties' burden of proof in a motion for summary judgment:

The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. The mere existence of a scintilla of evidence to support plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

*Copeland*, 57 F.3d at 478-79 (citations omitted). "In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). However, the Court is not bound to blindly adopt a non-moving party's version of the facts. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

**B. Plaintiff's "Supplemental Motion for summary judgement and response to defendants Davis and Ayala's motion for summary judgment" (docket no. 122)**

Pursuant to the case management order (docket no. 72), all pretrial motions were due by no later than March 14, 2016. Dr. Ayala filed his motion for summary judgment on that date and the Court granted Mr. Davis an extension of time to file his motion for summary judgment. Plaintiff did not file a timely motion for summary judgment nor did he request an extension of time. However, because it appeared that plaintiff did not understand the Court's procedure for responding to dispositive motions, he was granted an extension to file a response. Order (docket no. 118,

PageID.805-806). Plaintiff filed a short response, which included a “supplemental” motion for summary judgment, in which plaintiff sought to “adopt[] and incorporate[] his original summary judgment motion [docket no. 40], word for word and paragraph by paragraph.” Plaintiff’s Supplemental Motion (docket no. 122, PageID.823). Plaintiff’s “supplemental motion” for summary judgment is untimely and simply incorporates his previous summary judgment motion which the Court denied. *See Opinion and Order re R&R* (docket no. 60). Accordingly, plaintiff’s attempt to re-submit this motion for summary judgment as a “supplemental” motion should be denied. The Court will address plaintiff’s “response” in conjunction with defendants’ motions.

### **C. Plaintiffs’ Eighth Amendment claim**

Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, which “provides a civil cause of action for individuals who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of state law.” *Smith v. City of Salem, Ohio*, 378 F.3d 566, 576 (6th Cir. 2004). To state a § 1983 claim, a plaintiff must allege two elements: (1) a deprivation of rights secured by the Constitution and laws of the United States, and (2) that the defendant deprived him of this federal right under color of law. *Jones v. Duncan*, 840 F.2d 359, 360-61 (6th Cir. 1988); 42 U.S.C. § 1983.

It is well established that an inmate has a cause of action under § 1983 against prison officials for “deliberate indifference” to his serious medical needs, since the same constitutes cruel and unusual punishment proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). Here, the gist of plaintiff’s Eighth Amendment claim is that Dr. Ayala and Mr. Davis “switched” plaintiff’s diagnosis from “psychosis [sic] disorder” to “anxiety disorder,” with the

knowledge that housing plaintiff in segregation “would increase his risk of relapse and/or exacerbate the symptoms of his mental illness.”

A viable Eighth Amendment claim consists of an objective and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A court considering a prisoner’s Eighth Amendment claim must ask both if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation and if the officials acted with a sufficiently culpable state of mind. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). The objective component requires the infliction of serious pain or failure to treat a serious medical condition. *Id.* at 8-9. “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’” *Id.* at 9.

The subjective component requires that the defendant act with deliberate indifference to an inmate’s health or safety. *See Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991). To establish the subjective component, the plaintiff must show that “the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837. Mere negligence in diagnosing or treating a medical condition does not constitute an Eighth Amendment violation. *Id.* at 835. “It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

### **1. Plaintiff’s medical history**

On January 23, 2009, per the diagnosis of psychiatrist Dr. Patel, plaintiff was treated for a psychotic disorder due to a medical condition (multiple sclerosis). Dr. Ayala Aff. (docket no.

113-2, PageID.741). In a psychiatric examination on November 23, 2009 at MBP, Dr. Patel noted that plaintiff had no history of mental health treatment prior to his incarceration in 2002 or since that time. Dr. Patel Examination (docket no. 110-2, PageID.627). In this regard, the doctor noted that as of 2007, plaintiff had a history of 55 sexual misconducts. *Id.* In November 2009 plaintiff reported having hallucinations. *Id.* At that time, plaintiff was diagnosed with a psychotic disorder due to multiple sclerosis with hallucinations and antisocial personality disorder. *Id.* at PageID.633. Dr. Patel concluded that plaintiff was in need of outpatient mental health treatment. *Id.*

A few weeks later, plaintiff arrived at ICF. Segregation/Admission Case Management Note (Dec. 8, 2009) (docket no. 110-2). During his initial interview with a caseworker, plaintiff reported, among other things, “that he was chosen to speak with the gods,” one of whom “informed him of future events.” *Id.* Plaintiff made comments during the interview indicating to the case manager that she “could have an inappropriate relationship with him without fear of retribution.” *Id.* The case manager was unsure if she could have a therapeutic relationship with plaintiff “due to his preoccupation with sexual acting out.” *Id.* The next day, plaintiff underwent a suicide risk evaluation with the case manager. His current suicide risk level was rated as low, with the additional comment that “Psychotic symptoms appear to be exaggerated.” *See Evaluation of Suicide Risk* (docket no. 110-2, PageID.635-636).<sup>3</sup>

While plaintiff was incarcerated at ICF, Dr. Ayala was the psychiatrist who performed evaluations on patients and conducted medication reviews. Dr. Ayala Aff. at PageID.741. According to Dr. Ayala’s affidavit, he evaluated plaintiff four times: February 23, 2010; July 27, 2010; September 23, 2010; and December 15, 2010. Dr. Ayala Aff. (docket no. 113-2, PageID.741-

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<sup>3</sup> The Court notes that Mr. Davis became plaintiff’s case manager.

742).<sup>4</sup> During the relevant time period, plaintiff was being treated for mental illness through a social worker (i.e., Mr. Davis) and a psychologist, and had been in SSOTP for one month. *Id.* Dr. Ayala opined that plaintiff's mental illness contributed to his repeated episodes of public masturbation which resulted in the misconduct tickets, including a ticket in January 2010 which caused plaintiff to be placed in segregation. *Id.*

During the first evaluation on February 23, 2010, Dr. Ayala noted that plaintiff's present illness included diagnoses of: psychotic disorder due to multiple sclerosis - with hallucinations; antisocial personality disorder; and problems related to interaction with legal system. Medical Record (docket no. 113-4, PageID.767). The doctor noted that plaintiff "prefers to avoid answering simple questions as to his symptoms" and "[i]f left on his own he becomes obsessed with his medical jargon and is difficult to re-direct." *Id.* The doctor did not consider plaintiff's reports of visual hallucinations to be valid (i.e., "he tries very hard to describe them in minute detail and becomes dramatic as if 'on stage'"). *Id.* Nevertheless, the doctor stated that he would "keep an eye on them" because visual hallucinations are common in multiple sclerosis cases with malignant, rapid progression. *Id.* In evaluating plaintiff's mental status, the doctor noted that, "The patient is not exhibiting signs of psychosis. The patient is exhibiting signs of mania." *Id.* at PageID.768.

In May 2010, plaintiff requested to go back to SSOTP, but he refused to attend meetings from June 4 through July 20, 2010. Dr. Ayala Aff. at PageID.741.

Mr. Davis' note from July 20, 2010 states that plaintiff "was quite demanding about getting a TV and accused staff [including Davis] of not wanting to help him as they are refusing to

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<sup>4</sup> The copy of the affidavit submitted by Dr. Ayala's counsel was barely legible. Counsel is advised that the Court does not consider documents which it cannot read.

let him have a TV despite the fact that he has several years of sanctions and in spite of the fact that he has a pending sexual misconduct.” Medical Note (docket no. 110-2, PageID.679). Mr. Davis noted that “Custody will attempt to move him to SSOTP tomorrow, 7/21/10, and he was strongly encouraged to go.” *Id.*

That same day, a physician’s assistant (PA) adjusted plaintiff’s medication. *Id.* at PageID.742. At that time, the PA noted that while plaintiff had a psychosis diagnosis secondary to multiple sclerosis lesions, but that plaintiff “is not exhibiting signs of psychosis.” Medical Notes (docket no. 110-2, PageID.680). The PA also noted that information from the case manager revealed that plaintiff had OCD traits (e.g., washing his hands 5 times per hour, twelve hours a day) and discussed with the team psychiatrist of the possibility that plaintiff “is suffering from pre-psychotic brain malfunction.” *Id.* The PA was authorized to begin a trial prescription of Abilify, noting that “some studies reveal improvement with psychoses, obsessive compulsive behaviors, and anxieties associated with parkinsons and Alzheimer’s diseases”). *Id.*

On the morning of July 27, 2010, Mr. Davis noted that plaintiff was seen by him for about five minutes. Medical Note (docket no. 110-2, PageID.684). Plaintiff denied suicidal ideation but had not consented to participate in the SSOTP program. *Id.*

Some hours later, Dr. Ayala evaluated plaintiff and based on his clinical evaluation and medical opinion, determined that plaintiff no longer met the criteria for psychosis disorder. Ayala Aff. at PageID.742. *Id.* Rather, plaintiff’s diagnosis was changed to obsessive compulsive disorder (OCD), mental disorder due to general medical condition, and antisocial personality disorder. *Id.* In his psychiatric evaluation, Dr. Ayala noted that plaintiff was referred to update his diagnostic profile to include new data of Multiple Sclerosis progression, reactivation of OCD and

to formulate an opinion as to the role of his neurological impairment (“‘organicity’ in his psychiatric symptoms: cause vs. effect”). Psychiatric Evaluation (docket no. 110-2, PageID.685). The examination lasted 60 minutes. *Id.* at PageID.686. At that time, the doctor’s clinical assessment changed to: anxiety disorder with obsessive compulsive symptoms due to general medical condition; multiple sclerosis; antisocial personality disorder; obsessive-compulsive personality disorder; and multiple sclerosis. *Id.* at PageID.686.

Mr. Davis performed a routine segregation visit with plaintiff on September 22, 2010. At that time, plaintiff disagreed with his diagnosis, “especially as his current diagnosis makes him ineligible for the SSOTP.” Medical Record (docket no. 110-2, PageID.702). Mr. Davis “pointed out to him that he had been admitted to SSOTP recently and he refused to go several times.” *Id.*

On September 23, 2010, Dr. Ayala performed an “Annual Psych Med Check.” Medical Records (docket no. 113-4, PageID.769). At this time, plaintiff’s main concern was his ineligibility for the SSOTP portion of the program. *Id.* After reviewing Mr. Davis’ progress notes, Dr. Ayala noted that plaintiff’s ineligibility for SSOTP was due “in part at least, on his previous non-compliance, rather than solely due to a recent change of diagnosis as he claims.” *Id.* The doctor noted that plaintiff was functioning “at a rather concrete level of intellect, becomes easily confused, but calmer and more re-directable overall.” *Id.* Plaintiff was not as obsessively preoccupied and “allows two-way conversations better than before.” *Id.* The doctor stated:

I re-directed him to discuss his wish to return to the SSOTP with his CM [case manager] and if both come to the conclusion that it is worthwhile and possible as a second chance. I’ll be glad to reassess and re-consider a more favorable diagnostic re-formulation. In principle – regardless of internal directives – it is my clinical opinion that individuals with a degenerative neurological condition with poor prognosis such as MS, plus criminality and mental illness to boot, are generally in need of more intensive services, regardless of the label assigned to them.

*Id.* The doctor diagnosed plaintiff with OCD, mental disorder due to general medical condition, and antisocial personality disorder. *Id.* The doctor also consolidated plaintiff from three antidepressants into two, hoping to find one that was most effective for the patient. *Id.* at PageID.770. Finally, the doctor recorded plaintiff's mental status as follows, "The patient is exhibiting signs of psychosis. No signs of mania." *Id.* at PageID.769.

Dr. Ayala re-evaluated plaintiff on December 15, 2010, and his diagnosis remained the same. *Id.* at PageID.780. The doctor noted that plaintiff had moderate improvement on his new medication, and that he was not exhibiting signs of psychosis or mania. *Id.* In his affidavit, Dr. Ayala explained:

It is [sic] generally accepted psychiatric principle that an individual's psychiatric diagnosis may change over time with or without treatment. Inmate Carter's diagnosis did exactly that. His change in diagnosis did not change the quality of treatment he would receive only the type of treatment. He was maintained on his medications and his regular visits with social workers and psychologists, the only difference being that he was not enrolled in the SSOTP. . .

Ayala Aff. at PageID.742. Dr. Ayala denied that he changed plaintiff's diagnosis in retaliation for him not attending the SSOTP group sessions. *Id.* at PageID.743.

In January 2011, plaintiff was transferred to MBP. Carter Dep. (docket no. 113-3, PageID.752). On January 21, 2011, plaintiff was under the care of a different physician with the same clinical assessment (i.e., OCD, mental disorder due to medical condition, and antisocial personality disorder). Medical Records at PageID.782-784. An examination by an RN on January 25, 2011, included the same diagnoses. *Id.* at PageID.785-787. On May 28, 2011, more than four months after his transfer to MBP, plaintiff threatened, and then attempted, to hang himself. Clinical Progress Note (docket no. 41-1, PageID.242). The next day, an RN noted that plaintiff was unstable,

complaining of increasing multiple sclerosis symptoms. Mental Health Services Referral (docket no. 41-1, PageID.243). At a psychiatric evaluation on June 1, 2011, Thomas Henry, M.D., noted that plaintiff had the three chronic problems as diagnosed by Dr. Ayala (OCD, mental disorder due to medical condition, and antisocial personality disorder). *Id.* at PageID.244. After reviewing plaintiff's medical history, the doctor speculated that plaintiff's decline was associated with either poor medication compliance or exacerbation of his underlying medical illness. *Id.* at PageID.245. Dr. Henry noted that plaintiff had increased symptoms over the past week, which included suicidal behavior, seemingly associated with increased thought disturbance and psychosis. *Id.* For these reasons, Dr. Henry added a clinical assessment of psychotic disorder NOS. *Id.*

Plaintiff raised two matters in his response to defendants' motions for summary judgment which relate to his medical record. First, plaintiff points out that Mr. Davis previously stipulated that “‘psychotic disorder due to general medical condition’ (Axis I code 293.81) is on the 2004 list titled ‘Major Mental Disorders.’” *See* Davis Response to request (docket no. 122-1, PageID.835). Plaintiff contends that this list is used by prison social workers because prisoners who suffer from mental disorders on this list “are appealed out of segregation” and “placed in general population’s therapeutic program called the Secure Status Outpatient Treatment Program.” Plaintiff’s Response (docket no. 122 at PageID.826). Plaintiff contends that this stipulation is relevant to his lawsuit because it shows that his condition was “downgraded” from psychotic disorder and that he was placed in punitive segregation. *Id.* at PageID.825-826.

Second, plaintiff points out that after his suicide attempt, another psychiatrist, Dr. Surjit Dinsa, found that plaintiff’s inappropriate sexual behavior were “symptoms of mania.” *Id.* at PageID.825. In his response, plaintiff “stipulates that he exhibited inappropriate sexual behavior”

while he was placed in segregation. Plaintiff also submitted Dr. Dinsa's records from July 19, 2011, in which the doctor found that plaintiff suffered from mental disorder due to general medical condition, anti-social personality disorder, OCD, and psychotic disorder NOS. Medical Record (docket no. 122-1, PageID.831). Finally, Dr. Dinsa characterized plaintiff's sexual misconduct as follows:

Mr. Carter engages in inappropriate [sic] and excessive mastrubation [sic]. He has dsone [sic] this for years and received misconduct tickets. [N]o other signs and symptoms of mania / hypomania.

*Id.* at PageID.832.

## **2. Plaintiff's claim against Dr. Ayala**

The record reflects that Dr. Ayala evaluated plaintiff on four occasions. Contrary to plaintiff's claims, the medical record does not reflect that Dr. Ayala "switched" or "downgraded" his diagnosis to keep him in segregation. The extensive medical record in this case indicates that plaintiff has been under constant treatment, including a re-evaluation of his mental condition on July 27, 2010. The record reflects that this re-evaluation, which plaintiff apparently contends was an intentional misdiagnosis intended to keep him in segregation, arose from the recommendation of the PA who was concerned about plaintiff's OCD symptoms and the relationship of those symptoms to "pre-psychotic brain malfunction." In addition, plaintiff's claim regarding the incidents of July 27, 2010 are unsupported by his own medical records. In his complaint, plaintiff alleged that "[s]hortly after DAVIS left Plaintiff's cell door, Defendant AYALA approached Plaintiff's cell and stated that DAVIS 'referred me to re-evaluate you,'" that the meeting with Dr. Ayala lasted "less than three minutes", and that Dr. Ayala changed plaintiff's diagnosis to "anxiety disorder" with no explanation. The medical record reflects that Mr. Davis met with plaintiff at 7:54 a.m. for about five minutes, that

Dr. Ayala did not meet with plaintiff until four hours later (12:03 p.m.), that Dr. Ayala met with plaintiff for about an hour, and that the purpose of the evaluation was to review new data regarding plaintiff's multiple sclerosis progression and the reactivation of plaintiff's OCD. Medical Records (docket no. 110-2, PageID.684-686).

“[W]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.” *Graham ex rel. Estate of Graham v. County of Washtenaw*, 358 F.3d 377, 385 (6th Cir. 2004), quoting *Westlake*, 537 F.2d at 860 n. 5. The fact that plaintiff disagreed with Dr. Ayala's diagnosis does not raise a constitutional issue. *See Owens v. Hutchinson*, 79 Fed. Appx. 159, 161 (6th Cir. 2003) (“[a] patient's disagreement with his physicians over the proper medical treatment alleges no more than a medical malpractice claim, which is a tort actionable in state court, but is not cognizable as a federal constitutional claim”). Even if the doctor had misdiagnosed plaintiff, this would be negligence, not deliberate indifference to a serious medical need. *See Farmer*, 511 U.S. at 835. Plaintiff's contention that his new diagnosis of anxiety disorder prevented him from attending SSOTP is a red herring; as discussed, plaintiff repeatedly refused to attend SSOTP before Dr. Ayala changed the diagnosis. Finally, plaintiff has not demonstrated that Dr. Ayala was responsible for his attempted suicide in May 2011. Dr. Ayala last saw plaintiff in December 2010. When plaintiff attempted suicide, he was incarcerated at a different correctional facility and under the care of a different psychiatrist for about four months. Plaintiff has failed to demonstrate that Dr. Ayala was deliberately indifferent to his serious medical needs in 2010. For these reasons, Dr. Ayala's motion for summary judgment should be granted with respect to the Eighth Amendment claim.

### **3. Plaintiff's claim against Mr. Davis**

Mr. Davis is a Licensed Master Social Worker, employed as a Clinical Social Worker at ICF. Davis Aff. (docket no. 110-2, PageID.622). In his affidavit, Mr. Davis explained his role in providing plaintiff's mental health care:

My involvement in mental-health care is providing case management conducted through monthly, weekly, or on-demand sessions of varying length, depending on the patient and the need at any given time. I record my observations in the electronic medical record. Dr. Ayala or another provider might rely on those records to get a picture of how a patient is doing over time - trend watching - and that could factor into a diagnosis given. That's the extent of my involvement - making the notes of my observations over time. I do not and did not request that any person change plaintiff's diagnosis.

*Id.* at PageID.623.

Mr. Davis' role as an observer is borne out in the medical records. While Dr. Ayala and the PA reviewed the case manager's notes regarding plaintiff's behavior, it was Dr. Ayala and the PA who diagnosed and medicated plaintiff. Because Mr. Davis did not (and as a licensed social worker could not) change plaintiff's diagnosis or medication, Davis cannot be liable for violating plaintiff's Eighth Amendment rights for "switching" the diagnosis. "Personal involvement is necessary to establish section 1983 liability." *Murphy v. Grenier*, 406 Fed.Appx. 972, 974 (6th Cir. 2011). "It is axiomatic that the liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions." *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999). Accordingly, Mr. Davis should be granted summary judgment with respect to the Eighth Amendment claim.

#### **D. Plaintiff’s Fourteenth Amendment claim**

As discussed, the Court broadly construed plaintiff’s *pro se* complaint to include a claim that defendants violated his right to refuse medical treatment arising from the Due Process Clause of the Fourteenth Amendment. *See, e.g., Washington v. Harper*, 494 U.S. 210, 221-2, 229 (1990) (recognizing that a prison inmate with a serious mental illness has a constitutionally-protected liberty interest in avoiding the unwanted administration of antipsychotic drugs and concluding that an inmate “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment”); *Noble v. Schmitt*, 87 F.3d 157, 161 (6th Cir.1996) (“[t]he Supreme Court has held that individuals in state custody enjoy protectable liberty interests to be free from bodily restraint, and to refuse medical treatment such as the administration of antipsychotic drugs”).

In his brief, Mr. Davis points out that plaintiff has failed to develop such a “right to refuse” claim. *See* Davis Brief (docket no. 110, PageID.619-620). During his deposition, plaintiff testified that he had a right to refuse treatment, which plaintiff defined as refusing to “go into SSOTP [sic].” Carter Dep. at PageID.748. In the Court’s opinion, a prisoner’s right to refuse to attend outpatient therapy does not rise to the level of a federal constitutional violation. The forced attendance at such therapy is not analogous to the substantial interference with a person’s liberty contemplated in *Washington* and *Noble*, e.g., “[t]he forcible injection of [antipsychotic] medication into a nonconsenting person’s body . . . to alter the chemical balance in a patient’s brain, leading to changes, intended to be beneficial, in his or her cognitive processes.” *See Washington*, 494 U.S. at 229. However, even if plaintiff had such a right to refuse to participate in SSOTP, there was no constitutional violation under this theory because plaintiff was not forced to attend SSOTP. On the

contrary, he refused to attend SSOTP. Accordingly, defendants should be granted summary judgment with respect to this claim.<sup>5</sup>

#### **IV. Recommendation**

For the reasons set forth above, I respectfully recommend that defendants' motions for summary judgment (docket nos. 94 and 109) be **GRANTED**, that plaintiff's supplemental motion for summary judgment (docket no. 122) be **DENIED**, and that this action be **DISMISSED**.

Dated: March 8, 2017

/s/ Ray Kent

RAY KENT

United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the Court within fourteen (14) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

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<sup>5</sup> Having concluded that defendants did not violate plaintiff's constitutional rights, it is unnecessary to address defendants' other grounds raised for summary judgment.

## APPENDIX E

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 17-1506

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JOEL CARTER,

Plaintiff-Appellant,

v.

JAMIE AYALA, Psychiatrist, et al.,

Defendants-Appellees.

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**FILED**

Jan 03, 2018

DEBORAH S. HUNT, Clerk

**ORDER**

Before: GUY, MOORE, and GILMAN, Circuit Judges.

Joel Carter, a Michigan state prisoner, moves for the appointment of counsel and appeals a district court judgment granting defendants' motion for summary judgment in a prisoner civil rights case that he filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Carter filed a complaint against a prison psychiatrist (Ayala) and a social worker (Davis), alleging that they had retaliated against him for exercising his First Amendment rights and had violated his Eighth Amendment right to appropriate medical care.

The record shows that Carter was originally diagnosed as suffering from a psychotic disorder in November 2009. He was incarcerated at the prison where defendants were employed from December 2009 to January 2011. In February 2010, the psychiatrist's notes show that Carter was not exhibiting signs of psychosis. In July 2010, the psychiatrist changed Carter's diagnosis from psychosis disorder to anxiety disorder with obsessive compulsive disorder. In

September, the psychiatrist found that Carter was exhibiting signs of psychosis, but in December, Ayala changed that finding again. Carter was seen at least weekly by the social worker and was receiving therapy and medications throughout this time. Carter alleged that some of his antipsychotic medications were stopped in July, but other records showed that he was receiving them at least from September to December. Carter was convicted of misconducts throughout this period, usually involving masturbating in front of female staff, and was therefore subject to segregation. However, he was told that his diagnosis of psychosis disorder would allow him to avoid segregation and instead be placed in Secure Status Outpatient Therapy Programming (SSOTP). Carter refused to participate in this program on several occasions prior to his July diagnosis change. After his diagnosis was changed, he was kept in segregation until his January 2011 transfer to another prison. His diagnosis remained unchanged at the new prison under the care of a new psychiatrist until he attempted suicide in May 2011. He was again diagnosed with psychosis disorder in June 2011. Carter alleged that defendants conspired to change his diagnosis in July 2010 in retaliation for his refusals to participate in the SSOTP and that they were aware that he would be at risk of deterioration of his mental condition in segregation.

Defendant Ayala filed a motion for summary judgment on the ground that Carter had not exhausted his administrative remedies. The district court denied that motion, but it sua sponte dismissed Carter's First Amendment retaliation claim because Carter had not alleged engaging in conduct protected by the First Amendment. Defendant Davis moved for summary judgment on qualified immunity grounds, which the district court also denied. However, the district court agreed to construe Carter's retaliation claim as having been filed under the Due Process Clause rather than the First Amendment. Carter moved for additional discovery of his entire medical record and the list of diagnoses that disqualified inmates from extended housing in segregation. The district court denied the motion, concluding that Carter could obtain his medical record directly from the Michigan Department of Corrections, rather than from defendant Ayala, who was no longer employed there. The district court also found that defendants' stipulation that psychosis was on the list of diagnoses that disqualified inmates from extended segregation was

sufficient for Carter's purposes, and the furnishing of other diagnoses on the list would pose a security risk because Carter could use the information to malinger in hopes of manipulating his housing assignment. Defendants filed new motions for summary judgment on the merits of Carter's claims. A magistrate judge recommended that the motions be granted, and the district court adopted this recommendation.

On appeal, Carter reasserts his Due Process and Eighth Amendment claims. He argues that the district court violated the law of the case by granting summary judgment after denying defendants' initial summary-judgment motions and that the court abused its discretion in denying his discovery requests.

Initially, Carter does not appear to argue that the district court erred in dismissing his claim that defendants retaliated against him for exercising his First Amendment rights. Even if the dismissal of this claim were under review, the district court correctly found that Carter had failed to allege that he engaged in conduct protected under the First Amendment, as required to state a claim of retaliation. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999).

We review the grant of summary judgment de novo. *Barker v. Goodrich*, 649 F.3d 428, 432 (6th Cir. 2011). Summary judgment is proper where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Griffin v. Hardrick*, 604 F.3d 949, 953 (6th Cir. 2010). Summary judgment is properly entered against a party who fails to establish the elements of his case. *Daniels v. Woodside*, 396 F.3d 730, 735 (6th Cir. 2005).

Although the Due Process Clause protects the right to refuse medical treatment, *see Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), Carter's reliance on this case fails because refusal of treatment in a therapy program is not equivalent to refusal of forced psychotropic medication and because he was in fact permitted to refuse to participate in the therapy program. To the extent that Carter attempted to state a claim that he was retaliated against for exercising his right, he failed to establish an egregious abuse of governmental power that shocks the conscience. *See Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000). He alleged, without further proof, that defendants changed his diagnosis in retaliation for his exercise of his right.

But the record showed that Carter's diagnoses, including the recent one of psychosis disorder, changed frequently depending on his symptoms and the opinions of the medical staff. The result of the change, Carter alleged, included his ineligibility for the SSOTP, which he had voluntarily refused to participate in on several occasions. He also alleged in some of his pleadings that his medication changed, but he never stated how long he was deprived of any medication or what deleterious effects resulted. He thus did not establish any egregious conduct by the defendants that shocks the conscience.

Carter also failed to establish an Eighth Amendment violation, which required showing that defendants knew of and disregarded an excessive risk to his health. *See Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc). Again, Carter's diagnoses changed throughout his confinement, but he received treatment for his mental health consistently. Carter cites to no authority which would require the psychiatrist to tailor his diagnosis to prevent Carter's placement in segregation in response to his misconduct convictions.

The specific arguments raised in Carter's brief are without merit. He argues that the law of the case prevented the district court from granting defendants' summary-judgment motions after their initial motions were denied. The law-of-the-case doctrine provides that a decision on an issue made by a court at one stage of a case should be given effect in successive stages. *United States v. Cunningham*, 679 F.3d 355, 376-77 (6th Cir. 2012). Here, the district court decided the issues of exhaustion of administrative remedies and qualified immunity and thus was not prevented from later deciding the merits of Carter's claims.

Carter also takes issue with the denial of his motions for additional discovery. No abuse of discretion is apparent here. *See Lanier v. Bryant*, 332 F.3d 999, 1006 (6th Cir. 2003). Carter could obtain his medical records from the Michigan Department of Corrections. His request for the list of diagnoses disqualifying inmates from lengthy housing in segregation was not necessary because his claims were without merit, even assuming the truth of his allegation that psychosis disorder was on the list and anxiety disorder was not.

No. 17-1506

- 5 -

Accordingly, we **DENY** all pending motions and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

  
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Deborah S. Hunt, Clerk

**Additional material  
from this filing is  
available in the  
Clerk's Office.**