

No. 18-6367

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL CARTER, *Petitioner*

v.

JAIME AYALA and ROBERT DAVIS, *Respondents*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

RUTLEDGE, MANION, RABAUT,
TERRY & THOMAS, P.C.

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QUESTIONS PRESENTED

1. An Eighth Amendment claim for “deliberate indifference” requires a showing by Plaintiff that there exists an objectively serious medical need and that the Defendant had the requisite knowledge of the risk of harm in Plaintiff’s health and disregarded that risk. Has Petitioner established a violation of the Eighth Amendment where it is clear that Petitioner was provided mental health treatment by healthcare personnel?
2. A First Amendment claim for retaliation requires an action in retaliation for protected action. Here, Petitioner alleges his psychiatric diagnosis was changed in retaliation. Has Petitioner stated a First Amendment claim for retaliation?

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1254(1), Petitioner appeals an order of the Court of Appeals for the Sixth Circuit, which was entered on January 3, 2018. (RE 20-1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Joel Carter (“Carter”), a prisoner confined to the Michigan Department of Corrections, brought a *pro se* civil rights suit pursuant to 42 U.S.C. § 1983, alleging that Respondents were deliberately indifferent to his medical needs in violation of the Eighth Amendment and that they retaliated against him in violation of the First Amendment. (Complaint, RE 1, Page ID# 8). Carter seeks review of a judgment of the Court of Appeals that affirmed the District Court’s judgment holding that he failed to establish either claim. (01/03/2018, Order of the Court of Appeals, RE 20-1, Page 5; District Court Order Approving and Adopting Report and Recommendation, RE 133, Page ID# 890). Carter is suing psychiatrist, Dr. Jaime Ayala (“Dr. Ayala”), and social worker, Robert Davis (“Davis”). This Brief in Opposition is being filed on behalf of Respondent Dr. Ayala.

Carter alleges that Dr. Ayala changed his psychiatric diagnosis to render him ineligible for mental health treatment in Secure Status Outpatient Therapy Programming (“SSOTP”), in retaliation for his refusal to participate in the same. He asserted that changing his diagnosis relegated him to segregation, which resulted in an increase in his psychiatric symptoms and a suicide attempt. It is clear from the record that Carter was approved for the program but refused to partake. It is also clear that Carter’s stint in segregation stems not from his diagnosis, but from receiving multiple misconduct violations.

The District Court dismissed the First Amendment retaliation claim by Opinion and Order on September 17, 2014 (Opinion and Order Re: Report & Recommendation, RE 48, Page ID# 5), which accepted the Magistrate Judge's Report and Recommendation in part and reversed in part. (Report & Recommendation, RE 44, Page ID# 15). Dr. Ayala's motion on the issue of exhaustion, only, was denied. (Opinion and Order Re: Report & Recommendation, RE 48, Page ID# 5).

In the Report and Recommendation, the Magistrate construed Carter's First Amendment claim as a Due Process claim under the Fourteenth Amendment (Report & Recommendation, RE 44, Page ID# 6), which prohibits retaliation for refusing the forced administration of psychotic drugs. *See Washington v. Harper*, 494 U.S. 210, 221-222 (1990). Carter did not amend his Complaint in response, and the Magistrate would not sustain his First Amendment claim on Fourteenth Amendment grounds, and, accordingly, dismissed Count I pursuant to 28 U.S.C. § 1915 2(B)(2)(ii), failure to state a claim. (Report & Recommendation, RE 44, Page ID# 6).

The Court of Appeals affirmed the District Court and in so doing stated that "Carter's reliance on [*Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)] fails because refusal of treatment in a therapy program is not the equivalent to refusal of forced psychotropic medication and because he was in fact permitted to refuse to

participate in the therapy program.” (01/03/2018, Order of the Court of Appeals, RE 20-1, Page 3). The Court further held that Carter failed to present evidence establishing an egregious abuse of governmental power that shocks the conscious. (Order of the Court of Appeals, RE 20-1, Page 3).

On Carter’s only remaining Eighth Amendment claim, he alleged that Defendants “acted” with deliberate indifference when they intentionally switched his diagnosis to deny him access to SSOTP. (Complaint, RE 1, Page ID # 8-9). The Court of Appeals found that Carter received consistent mental health treatment, despite changes in his diagnosis. (01/03/2018, Order of the Court of Appeals, RE 20-1, Page 4).

Carter was treated by a mental health team, including Davis; Dr. Ayala, a psychologist; and nursing staff. (Exhibit 1 to Defendant Ayala’s Motion for Summary Judgment, Affidavit of Robert Davis, RE 94-2, Page ID# 1, ¶1; and Exhibit 2 to Defendant Ayala’s Motion for Summary Judgment, Affidavit of Jaime Ayala, M.D., RE: 94-3, Page ID# 2, ¶3) (submitted under seal). Dr. Ayala would provide a diagnosis for Carter and Davis would help implement the requisite treatment protocol. (Exhibit 2 to Defendant Ayala’s Motion for Summary Judgment, RE 94-3, Page ID# 2, ¶4) (submitted under seal).

As alleged in paragraphs 10 and 11 of the Complaint, Carter was diagnosed with “psychotic disorder due to medical condition” (multiple sclerosis) on January

23, 2009. This diagnosis corresponds to the time period from October 26, 2005, until November 23, 2009, when Carter was seen approximately 25 times by professional staff and medically deemed not in need of treatment. (Exhibit 1 to Defendant Ayala's Motion for Summary Judgment, RE 94-2, Page ID# 1-2, ¶4) (submitted under seal). When Carter was admitted to the corrections mental health program, he was transferred to the Ionia Correctional Facility and assigned to the mental health management team, which included Davis and Dr. Ayala.

A review of the record clearly demonstrates Carter's propensity to be given misconduct violations for various actions. Carter was classified to segregation in mid-January 2010, because of a misconduct violation. He participated in SSOTP for about two months without progressing through the program due to repeated misconduct tickets. By May 2010, he had requested to go back to the SSOTP program, however, when he was instructed to attend group sessions, he refused to go to the program on June 4, June 10, July 10, July 14, and July 20, 2010. (Exhibit 1 to Defendant Ayala's Motion for Summary Judgment, RE 94-2, Page ID# 2, ¶6) (submitted under seal).

Carter was seen by the team psychiatrist Ayala on July 27, 2010. This was in follow-up to a medication change by the physician's assistant on July 20, 2010. Carter alleges that his diagnosis was changed to "anxiety disorder" due to his non-compliance with the program. (Complaint, RE 1, Page ID# 4-5, ¶-15). Carter next

alleges that on September 22, 2010, Davis informed him that Ayala previously told Davis that Carter was ineligible for SSOTP because he had refused treatment. In paragraph 15 of his Complaint, Carter further alleges that the following day, September 23, 2010, Dr. Ayala approached Carter about the change in diagnosis, citing the reason for changing his diagnosis as being Carter's non-compliance with therapy.

Essentially, Carter's Eighth Amendment claim is based on the alleged downgrading of his diagnosis, which made him ineligible for SSOTP and caused him to remain in segregation which caused him mental anguish. Diagnoses are neither "downgraded" nor "upgraded;" rather diagnoses are changed periodically on patients due to clinical presentation. Even after the change of diagnosis, Carter continued to be seen weekly in segregation, which is documented in the medical record. Carter had refused to participate in the SSOTP, so he was not enrolled in it.

Carter's diagnosis was next reviewed on December 15, 2010, which remained anxiety disorder. In January 2011, Carter was transferred to the Marquette Branch Prison. (Exhibit 3 to Defendant Ayala's Motion for Summary Disposition, Deposition of Joel Carter, RE 94-4, Page ID# 32) (submitted under seal). At the Marquette Branch Prison, Carter was evaluated by psychiatrist Henry. (Exhibit 3 to Defendant Ayala's Motion for Summary Disposition, Deposition of Joel Carter, RE 94-4, Page ID# 33) (filed under seal). Dr. Henry did not change his

diagnosis at that time. In May 2011, Carter attempted suicide. (Exhibit 3 to Defendant Ayala's Motion for Summary Disposition, Deposition of Joel Carter, RE 94-4, Page ID #34-37) (filed under seal). Obviously, with an escalation to a suicide attempt, Carter's mental health status had changed, and therefore, a new diagnosis may be appropriate.

In addition to the different treatment options based on diagnosis, Carter also alleges retaliation and cruel and unusual punishment as it relates to his placement in segregation as opposed to the general population. However, as he admits himself, his placement in segregation was not due to his mental health status or treatment but because of the misconduct tickets he received at the Ionia Correctional Facility. (Exhibit 3 to Defendant Ayala's Motion for Summary Disposition, Deposition of Joel Carter, RE 94-4, Page ID# 69). Prior to the hanging incident, a different psychiatrist, Dr. Henry, had given Carter a diagnosis of "mental disorder due to medical condition (MS) and O.C.D.", he did not change his diagnosis. (Exhibit 1 to Defendant Ayala's Motion for Summary Disposition, Affidavit of Robert Davis, RE 94-2, Page ID# 3-4, ¶10) (submitted under seal). Following the attempted suicide, the diagnosis was re-evaluated on June 1, 2011 by Dr. Henry, and he was referred to the Residential Treatment Program. (Exhibit 1 to Defendant Ayala's Motion for Summary Disposition, Affidavit of Robert Davis, RE 94-2, Page ID# 3-4, ¶10) (submitted under seal).

Carter's segregation history at the ICF was the result of his misconduct. Carter was classified to segregation on or about January 10, 2010, and was released on or about March 18, 2010, for participation in the SSOTP program. He was reclassified to segregation in May 2010 for a misconduct violation wholly separate from his participation in the mental health program. He was transferred out of Ionia in early January 2011. Therefore, Carter spent a total of seven months in segregation. During this time, he received 43+ misconduct tickets, the vast majority of the tickets were sexual misconducts, including one staff assault. (Exhibit 1 to Defendant Ayala's Motion for Summary Disposition, Affidavit of Robert Davis, RE 94-2, Page ID# 4, ¶11) (submitted under seal).

It is clear that Carter was in segregation as a result of tickets and not his placement or non-placement in the SSOTP program or his mental health diagnosis. During his time in segregation he was seen weekly by the mental health staff and would have been assessed on a monthly basis by administration to determine whether it would be appropriate for release into the GP by the Security Classification Committee (SCC).

At no time did Dr. Ayala retaliate against Carter and change his diagnosis to one that would disqualify him for SSOTP program and cause him to be put into segregation. Carter is responsible for his stay in segregation.

REASONS TO DENY THE PETITION

Carter's petition should be denied. The decision below is a straightforward interpretation of the facts and their application to the law underlying Carter's claims. Moreover, Carter has not identified any customary basis for granting certiorari such as case law from a court of appeals that conflicts with the decision below.

Supreme Court Rule 10 states that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Carter's contends that that the Sixth Circuit's interpretation of the facts conflict with this Court's precedent in *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Washington v. Glucksberg*, 521 U.S. 702 (1997); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1987). Thus, Carter's petition patently asserts that the asserted error consists of erroneous factual findings and the misapplication of a properly stated rule of law.

I. THE SIXTH CIRCUIT CORRECTLY CONCLUDED BASED ON THIS COURT'S PRECEDENT THAT PETITIONER'S CLAIMS ARE WITHOUT MERIT.

a. Petitioner's First Amendment Retaliation Claim is without Merit.

Carter has failed to establish the first element of First Amendment retaliation against Respondent Dr. Ayala because he failed to establish that he engaged in

conduct protected by the First Amendment. The conduct alleged protected by Carter is “refusal to enter a mental health program.” The right to refuse medical treatment falls under the Due Process Clause of the Fourteenth Amendment. *Washington v. Glucksberg*, 521 U.S. 702, 719-721 (1997).

The Supreme Court has repeatedly held that the Due Process Clause affords individuals in state custody the right to be free from bodily restraint, and to refuse medical treatment such as the forced administration of antipsychotic drugs. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990) and *Washington v. Harper*, 494 U.S. 210, 221-222 (1990). Thus, “Plaintiff has failed to allege a necessary element of a retaliation claim under the First Amendment...[h]e cannot stretch this claim to encompass rights found in the Due Process Clause of the Fourteenth Amendment.” *Carter v. Ayala*, 2014 WL4660320 (W.D. Mich. 2014). Therefore, the decision of the lower courts to dismiss for failure to state a claim should be upheld.

b. Petitioner’s Retaliation Claim Lacks Merit Under the Due Process Clause of the Fourteenth Amendment.

Carter’s retaliation claim still lacks merit even assuming he plead a Due Process violation. To state a successful retaliation claim under the Fourteenth Amendment, Carter must establish an “egregious abuse of governmental power or behavior that shocks the conscience,” in response to his refusal to partake in the SSOTP program. *See Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000), and

see also Graham v. Connor, 490 U.S. 386, 393 (1989). Carter claims that Dr. Ayala changed his diagnosis in retaliation for his refusal to participate in SSOTP, but he has not identified any case law, in any circuit, much less this Court, indicating that a change in diagnosis meets such a gross abuse of power standard. Furthermore, his claim is bereft of evidentiary support and stands as conclusory.

The facts establish that Carter's voluntary refusal to partake in SSOTP and his propensity to receive misconduct violations, as opposed to a change in his diagnosis, were substantial factors in bringing about his stint in segregation and ineligibility for SSOTP. Moreover, as the Sixth Circuit stated, "Carter's diagnoses, including the recent one of psychosis disorder, changed frequently depending on his symptoms and the opinions of medical staff." *Carter v. Ayala*, 2018 WL 2086044 (6th Cir. 2018). The fact that Carter received psychiatric care on a consistent basis, even while in segregation, undermines his attempt at claiming an egregious abuse of governmental power that shocks the conscience.

c. Petitioner's Eighth Amendment Deliberate Indifference Claim is without Merit.

Carter alleges deliberate indifference to his mental health needs in violation of the Eighth Amendment. (Complaint, Count II, RE 1, Page ID# 8-9). This Court held in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), that to state a claim for deliberate indifference, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only

such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.” The clause prohibits conduct by prison officials that involves the “unnecessary and wanton infliction of pain.” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

The Supreme Court has explicitly “rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of the objectively inhumane prison conditions.” *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). A violation of the Eighth Amendment can be “manifested by prison doctors and their response to prisoners’ needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribe.” *Estelle*, 429 U.S. at 104. If pain is not formally meted out as punishment, then some mental ailment must be contributed to the inflicting official. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991). The mental ailment in a condition-of-confinement case is “deliberate indifference.” *Farmer*, 511 U.S. at 834.

A plaintiff raising an Eighth Amendment claim regarding medical care and treatment must establish something more than mere negligence or a lack of ordinary due care. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). It is only the “deliberate indifference to serious medical needs of prisoners,” which constitutes the “unnecessary and wanton infliction of pain prescribed by the Eighth

Amendment.” *Estelle*, 429 U.S. at 104. Thus, a plaintiff must allege that the defendants “kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837. The subjective component, “deliberate indifference,” requires that a plaintiff show that defendant possessed “a sufficiently culpable state of mind.” *Farmer*, 511 U.S. at 834.

The denial of medical treatment satisfies the deliberate indifference standard, only if significant harm or injury is shown. *Jackson v. Illinois Medi-Care, Inc.*, 300 F.3d 760, 765 (7th Cir. 2002). To satisfy the objective component, the condition itself must be “sufficiently serious.” *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). A “serious” medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention. *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997). A condition is objectively serious if failure to treat it could result in further significant injury or unnecessary and wanton infliction of pain. *Gutierrez*, 111 F.3d at 1373.

In this case, Carter was evaluated by Dr. Henry on two occasions after he was transferred to Marquette, following Dr. Ayala’s re-evaluation and change in diagnosis from psychosis disorder to anxiety disorder. Dr. Henry did not change the diagnosis until May 2011 when Carter’s mental health picture changed and he attempted suicide. The fact that two psychiatrists evaluated Carter and both agreed

the diagnosis of an anxiety disorder and no psychosis disorder is the only evidence of Carter's true medical needs during the relevant time period of June 2010 through May 2011. Carter, sets forth no factual support for the worsening of his condition because he was not in the SSOTP. He still received regularly scheduled treatment during the entire period without incident until May 2011. Even then he was not injured in his suicide attempt. He had spent this time in segregation because of his misconduct tickets. Carter did not set forth anything which would create a genuine issue of material fact on the objective component of an Eighth Amendment claim. Carter's petition must fail for this reason.

With regard to the subjective component, Carter must show that Dr. Ayala possessed a sufficiently culpable state of mind in allegedly changing the diagnosis to deprive him of the appropriate and sufficient medical care. The subjective component requires a showing that prisoner officials knew of, and acted with deliberate indifference to, an inmate's health or safety. *Seiter*, 501 U.S. at 302-03. To demonstrate such "deliberate indifference," a plaintiff must demonstrate treatment tantamount to an intent to punish. *Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988), *cert. denied*, 489 U.S. 1068 (1989).

The Eighth Amendment prohibits deliberate indifference to medical needs, not inadequate treatment. "Where 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 the state tort law.” *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976). This is exactly what Carter is asking this Court to do.

“‘A medial decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment,’ and ‘at most... it is medical malpractice.’” *Durham v. Nu’Man*, 97 F.3d 862, 869 (6th Cir 1996) (quoting *Estelle*, 429 U.S. at 107). Further, even a mistaken belief that a situation is not serious does not amount to deliberate indifference. *See Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986).

Here, Carter’s main dispute is over his diagnosis. A disagreement over the proper diagnosis is insufficient to establish an Eighth Amendment claim. A disagreement between an inmate and medical personnel regarding diagnosis in the course of treatment does not implicate the Eighth Amendment. *Lewis v. Angelone*, 926 F. Supp. 69, 73 (W.D. Va. 1996). Questions of medical judgment, particularly those sponsored by an interested party with admittedly no training or expertise in the field, are not subject to judicial review. *Russell v. Sheffer*, 528 F.2d 318 (4th Cir. 1975). Carter admits he has no training to self-diagnose. (Exhibit 3 to Defendant Ayala’s Motion for Summary Disposition, Deposition of Joel Carter, RE 94-4, Page ID # 15) (submitted under seal). While Carter unfortunately suffers from mental illness, neither his symptoms nor concerns were disregarded by Dr.

Ayala, nor was his diagnosis changed without the clinical support of two examining psychiatrists, Dr. Ayala and Dr. Henry, with Dr. Henry's last exam just days before the suicide attempt. It was only until his mental illness changed after a suicide attempt that the psychosis disorder was reinstated. It is interesting to note that Carter is not currently under a diagnosis of psychosis disorder. (Exhibit 3 to Defendant Ayala's Motion for Summary Disposition, Deposition of Joel Carter, RE 94-4, Page ID # 72) (submitted under seal).

In *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982), this Court decided that with regard to medical treatment, "The Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made..." Professional judgments must be accepted by the courts:

... the decision, if made by a professional is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. *Youngberg*, 457 U.S. at 323.

It was clear on the record that Carter's Complaint and his testimony in deposition, as well as his psychiatric and psychological evaluations, that his illness was assessed, monitored and treated by medical providers at ICF, including Dr. Ayala, and that it was his own refusal to participate in the SSOTP program which precluded him from receiving that as treatment. His segregation was caused by his

misconduct tickets which would have occurred regardless of his diagnosis and treatment plan. What Carter is actually arguing is that he should be able to diagnosis himself and choose the treatment that he receives so that he receives “better” treatment in the prison location of his choosing.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

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Dated: November 15, 2018

DESIGNATION OF RELEVANT DISTRICT AND SIXTH CIRCUIT COURT DOCUMENTS

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94-2	Affidavit of Robert Davis (Exhibit 1 to Defendant's Motion for Summary Judgment)	Filed Under Seal
94-3	Affidavit of Jaime Ayala, M.D. (Exhibit 2 to Defendant's Motion for Summary Judgment)	Filed Under Seal
94-4	Deposition of Joel Carter (Exhibit 3 to Defendant's Motion for Summary Judgment)	Filed Under Seal
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