EXPERT REPORT OF BHUSHAN S. AGHARKAR, M.D., D.F.A.P.A. , 2017 MISC. FILINGS LEXIS 12692

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Case No. 2:15cv1845

March 21, 2017

Reporter
2017 MISC. FILINGS LEXIS 12692 *

Shari Ferreira v. Joseph M. Arpaio, et al.

Expert Name: Bhushan S. Agharkar, , M.D., D.F.A.P.A.

Text

[*1] March 21, 2017

Joel B. Robbins,
Robbins & Curtin, P.L.L.C.
301 East Bethany Home Road Suite B-100
Phoenix, Arizona 85012

Re: Ferreira v. Arpaio

Dear Mr. Robbins:

Enclosed is my report concerning my opinions in rebuttal to the report dated February 7, 2017, by Dr. Joseph V. Penn with regard to the mental heath care conditions of Mr. Daughtry and Bates. The opinions expressed in my report represent my professional opinions to a reasonable degree of psychiatric certainty, based upon my clinical interviews with Mr. Bates and review of relevant records provided by you.

A copy of this report is being sent only to you.

Summary of Qualifications

My name is Bhushan S. Agharkar, M.D. I have been licensed to practice medicine in Georgia since 2002. I am a psychiatrist in private practice with Comprehensive Psychiatric Services of Atlanta. I am an Assistant Professor of Psychiatry at Morehouse School of Medicine and a Clinical Assistant Professor with the Emory University School of Medicine. I earned my Doctor of Medicine degree from the State University of New York Health Science Center at Syracuse, and completed my residency at Emory University School of Medicine **[*2]** Department of Psychiatry and Behavioral Sciences where I was Chief Resident, as well as a Forensic Psychiatry Fellowship. I hold dual board certification as a Diplomatc of Adult Psychiatry (AP) and Forensic Psychiatry (FP) of the American Board of Psychiatry and Neurology (ABPN). I am also a Distinguished Fellow of the American Psychiatric Association. My curriculum vita is attached.

Sources of Information:

I conducted face-to-face clinical interviews of Mr. Bates at the 4th Avenue Jail in Phoenix, Arizona, on November 30, 2016, and January 3, 2017, for approximately 1 hour each time. I have also reviewed documentary evidence in this case, attached as an index.

I was asked by you to specifically address the opinions in Dr. Penn's report that:

1. "There was no evidence of deliberate indifference to Mr. Daughtry's and/or Mr. Bates' mental health needs or identification and prevention from Bates' impulsive assaultive and homicidal act."

2. "It is my professional opinion that Dr. Alvarez and other medical, nursing, psychiatric, and mental health staff were not deliberately indifferent to Mr. Daughtry's and/or Mr. Bates' medical or mental health needs."

3. "I find no evidence **[*3]** to support any impairments in Bates and Daughtry's ability to perform normal activities of daily living or to provide for their own care or protection while he was detained on multiple occasions at the Maricopa County. During the current and prior detentions both was generally able to communicate and interact with Maricopa County custody and health care staff in an appropriate manner."

4. "Both Bates and Daughtry demonstrated a past ability to communicate their needs, concerns, and problems to custody staff and correctional health care staff. Both were able to do this without incident or engaging in behavioral dyscontrol, self-harm, or violent and homicidal acts."

Assessment:

A comprehensive history and timeline of the events have been extensively covered in various reports to this point and will not be repeated here for brevity. On July 9, 2014, Mr. Ryan Bates assaulted and caused the death of Mr. Zachary Daughtry. Mr. Daughtry's mother, Shari Ferreira, filed suit against Maricopa County alleging wrongful death. As numerous medical records demonstrate, both Mr. Daughtry and Mr. Bates exhibited signs and symptoms of major mental illness in the months leading up to the day **[*4]** they were housed together in the same cell, yet neither received mental health treatment for same.

I interviewed Mr. Bates twice for the purposes of his February 8, 2017 Rule 11 hearing, at which he was adjudicated incompetent to stand trial, which was also stipulated to by the Prosecution. He had been through Rule 11 proceedings twice before. On September 21, 2016, Mr. Bates was found to be persistently or acutely disabled as a result of a mental disorder and was mandated to Court Ordered Treatment. Medical records continue to document his significant psychotic symptoms including hallucinations, delusions, and disorganized thoughts and behaviors.

My evaluation of him is similarly consistent and it is clear he suffers from Schizophrenia or possibly Schizoaffective Disorder. Mr. Bates was actively psychotic during our interviews and I observed him responding to internal stimuli. He repeatedly asked me if I could hear the voices he did and wanted us to be silent so we could listen together for them. He made several overtures to convince me what he was hearing was real and that he had a number of unusual experiences he could not explain, such as being abducted by aliens and being **[*5]** punished by them for not destroying the world. He appeared genuinely distressed by these symptoms. Mr. Bates also discussed how he was part-owner of Circle K and was therefore owed a great deal of money by them. He exhibited hallucinations, delusions, and disorganized thinking which clearly met the diagnosis for Schizophrenia and was consistent with his medical records.

As part of my evaluation of Mr. Bates, I administered several neurocognitive screenings. Due to his psychosis and difficulty tracking our conversation over time, I elected to stop each interview after an hour as it was clear continuing on would not be fruitful. While I was not able to conduct as many screenings as I would have preferred, he demonstrated difficulty with verbal fluency and memory tasks. For example, when asked to name all the animals he could think of in one minute, he could only name 10. The general cutoff is 18. He also had great difficulty recalling details from a short story after 15 minutes. There were other screenings that Mr. Bates answered correctly, including "bait" questions that I imbedded in our interviews such as "How many legs does a dog have?" and "What are the colors of the United States **[*6]** flag?" His correctly answering these questions in conjunction with my behavioral observations during our interviews indicated to me that Mr. Bates was not malingering his difficulties.

Unfortunately, Mr. Bates was not given psychiatric medications nor afforded appropriate psychiatric treatment prior to the incident in 2014. He was noted to be bizarre and paranoid at times and staff were aware he had been diagnosed with Schizoaffective Disorder in the past. He was observed to be hallucinating at times. He complained

that there were cameras built into his eyes and ears and described ideas of reference. These types of symptoms continued until he was eventually involuntarily committed for treatment in 2016 and while some symptoms have improved with medication, he remains psychotic to this day.

Mr. Daughtry's medical records show a similar pattern of bizarre and psychotic symptoms. He too was found incompetent to proceed in a Rule 11 evaluation. Mr. Daughtry reported auditory hallucinations and odd behaviors. There were several incidents where he was unresponsive to questioning and was confused. He even showered with his clothes on at one point and made several suicide attempts while **[*7]** incarcerated. He masturbated openly in front of staff and would not desist when asked. Mr. Daughtry had multiple instances noted where he would stare off into space and not respond to redirection. His hygiene and cell condition were noted to be poor. While the jail psychiatrist thought Mr. Daughtry may be malingering, he also described him as an "enigma" and wondered if he had organic brain damage from illicit drug use.

On July 9, 2014, Mr. Bates was acting confused and talked about "Junior." A guard indicated he was in a "daze." According to inmates, Mr. Bates refused to go into the cell with Mr. Daughtry but was told by staff that the only way he could be removed was to "fight." Within approximately 20 minutes, Mr. Daughtry was assaulted and Mr. Bates was removed from the cell without incident.

Opinions:

It is abundantly clear from a review of the relevant medical records that both Mr. Daughtry and Mr. Bates exhibited signs and symptoms of serious mental illness. Not only did they report them, but they were observed by staff to be actively psychotic. Inexplicably, neither of them were offered psychiatric medication intervention prior to the July 9, 2014 assault. While accurate **[*8]** long-term predictions of future dangerousness are not possible, psychosis in the short-term is a well-known risk factor for violence toward self or others. It is therefore imperative to take appropriate steps to medicate and treat psychotic individuals to mitigate this risk. Although at times medical staff may have felt either individual was malingering or had a "drug-induced" state, continued time in an incarcerated, observed setting clearly demonstrated that these symptoms persisted and were not exculpatory to any specific behavior or rule violation. It would be incumbent on staff to appropriately manage such individuals to reduce their risk of harm to themselves or others. This would include medication, frequent mental health contact, and housing considerations, at a minimum. While I have not personally examined Mr. Daughtry, I did evaluate Mr. Bates and can attest to his significant and debilitating psychotic mental illness. That my examinations occurred after 2014 do not negate that he suffered with this mental illness at the time of the incident as my review of the medical records confirm similar symptomatology as my clinical observations. When possible, face-to-face clinical **[*9]** interviews are important to informing one's forensic opinions as it allows an examiner to ask their own questions and directly observe the examinee's behaviors. This is especially important when considering malingering because oftentimes malingerers do not know the more subtle signs of mental illness, such as cognitive deficits, thought disorganization, negative symptoms, responding to internal stimuli, etc., and instead simply endorse mental health symptoms rather than behaviors. Dr. Penn conducted no such evaluation of Mr. Bates and is therefore lacking a critical piece of data. He is thus limited by the documentation in the record and has to rely upon the training and experience of those who came in contact with Mr. Daughtry and Bates, which can vary widely. Additionally, like Dr. Jaffe, Dr. Penn did not administer any measures of effort to Mr. Daughtry or Bates and any opinions that they were malingering are limited as a result. Without performing a personal examination where effort can be assessed, it is inappropriate to conclusively state that either individual was malingering and frankly, is irrelevant because the diagnosis of malingering does not rule out the presence of psychosis **[*10]** at the time of the incident.

In the example of Mr. Bates, there were obvious signs and symptoms of psychotic mental illness prior to the incident in 2014, on the actual day of the alleged crime, continued symptoms afterward which remain to this day, and some improvement in psychosis with antipsychotic medication treatment. In fact, treaters had to petition the court to involuntarily medicate him in 2016 for being gravely disabled. The balance of this evidence clearly goes to a serious and persistent mental illness rather than malingering. While there have been notations in his medical record concerning the possibility of symptom exaggeration and "rule out" malingering, neither of these are actual diagnoses, only concerns. Psychiatric symptoms wax and wane in intensity and persons with psychotic mental illness are often inconsistent in their symptom presentation. In fact, on July 9, 2014, he was noted to be acting

bizarrely in court and was not diagnosed with malingering at that time by the RN who evaluated him. Mr. Bates said that he had taken "something" but no urine drug screen was performed. How he would have acquired an illegal substance on that day is unclear and his strange **[*11]** behavior is more likely attributable to his psychotic mental illness instead.

In Mr. Daughtry's case, he too had a lengthy history of psychosis. Prior to his incarceration, it is reported he was found in a trash compactor by police. He reported auditory hallucinations and exhibited speech latency while in the jail. There were several instances of his being placed on suicide watch. He exhibited bizarre behaviors like smearing feces in his cell and showering with his clothes on. As a result of his own behaviors, Mr. Daughtry was charged with trying to escape jail which would have exposed him to a much lengthier sentence than the charges he was initially arrested for. He was also placed in isolation, which is known to worsen psychosis.

Taken in total, it is clear that both Mr. Bates and Daughtry suffered from serious mental illness and not, as Dr. Penn posits, malingering. Both had lengthy histories of bizarre and psychotic behavior pre-dating the incident in 2014 and Mr. Bates continues to exhibit, and is treated for, psychotic symptoms to this day. I disagree with Dr. Penn's assertions that their behaviors were malingered and not a product of a major mental illness. Dr. Penn did **[*12]** not conduct a face-to-face interview with Mr. Bates to inform his opinion about him and it would be inappropriate to second guess the documentation in the medical records on this point as they did not make a conclusive diagnosis of malingering for either individuals. It is always preferable to have reviewed as many records as possible and it appears Dr. Penn was not given important medical records in this case that show Mr. Bates has been deemed gravely disabled and court-ordered to take psychiatric medications as he is unable to consent. These records are particularly relevant in this matter as it demonstrates the severity of Mr. Bates' mental illness and crucial to making as complete and accurate diagnosis as possible.

I have reviewed the Declaration from Marci Kratter, wherein she confirms she learned by calling various courts that her client was sent to court to determine his competency to receive treatment. Her declaration confirms the requirements for such referral require the county to take the position that (Title 36 requirements in Declaration). Therefore, the county has taken the position that Mr. Bates is clearly not malingering his mental illness, his mental illness **[*13]** is genuine and so severe he is or could be a harm to himself or others and he is need of immediate treatment and is not competent to comply. This is clearly based on the same psychotic behavior before the attack and therefore, the claim that Mr. Bates is malingering is illogical and contrary to the very position of the state and the experts.

It is therefore my opinion, to a reasonable degree of psychiatric certainty, that jail mental health staff demonstrated deliberate indifference to the mental health needs of Mr. Daughtry and Mr. Bates and failed to accurately identify and treat their psychiatric conditions. Both were vulnerable, unpredictable, and seriously mentally ill individuals. People with serious mental illness are prone to misinterpret stimuli (such as allegedly being told to "fight" in order to be removed from the cell) or believe it is a "command" to do something they would not ordinarily do. Both individuals exhibited disorganized, bizarre behaviors in the past and Mr. Bates was acting strangely on the day of the incident. These behaviors stem from major mental illnesses and as such, it was incumbent on staff, who was aware of their symptoms, to act in a protective **[*14]** manner to mitigate the risk of violence. They failed to do so.

As to Dr. Penn's conclusions that there were no impairments in Mr. Bates or Daughtry's ability to perform normal activities of daily living and were able to communicate their needs or problems without incident or engaging in behavioral dyscontrol while incarcerated, the record is replete with examples of problems in exactly these areas. It should first be recognized that assessment of "normal" activities of daily living in an incarcerated environment is very different than in the outside world because most of one's daily needs are automatically handled for you in jail. Mr. Bates and Daughtry did not have to concern themselves with locating food, shelter, clothing, etc., and therefore much less was required of them to get their needs met compared with an independent living situation. As described earlier, however, Mr. Daughtry still had difficulties with basic functioning in that his cell was often littered with trash, he wiped feces on the walls, urinated in his cell and masturbated in public. These behaviors indicated poor impulse control just as when he tried to "escape" by jumping on a fence outside the jail with **[*15]** no legitimate chance of success. Mr. Bates' psychotic impairments are similarly described throughout the medical record as discussed

earlier and such as when he walked into the office of a detention officer's asking "Where's Junior" on the day of the assault. As described to me and in the context it arises in the medical record, "Junior" is a hallucination.

If you have any questions about this report, I would be happy to answer them. Please feel free to telephone me at 404.939.6636.

Sincerely,

Bhushan S. Agharkar, M.D., D.F.A.P.A.
Distinguished Fellow, American Psychiatric Association
Diplomate, American Board of Psychiatry and Neurology, with Added Qualifications in Forensic Psychiatry

Appendix

[SEE LIST OF DOCUMENTS REVIEWED IN ORIGNAL]