

This case also highlights the limitations of evaluations conducted by record review alone, although such review is routine for several types of forensic evaluations, including malpractice claims and the assessment of testamentary capacity. At the same time, guidelines published by both the American Academy of Psychiatry and the Law and the American Psychological Association reflect a strong preference for in-person examinations whenever feasible. These guidelines are in place to protect those being evaluated because contemporaneous data, including behavioral, speech, and tonal observations, as well as the ability of the individual to participate in the evaluation, are believed to provide the most accurate information, particularly in situations in which mental state is variable. While perhaps not always feasible, in-person evaluation is particularly relevant in situations involving a legal threat to a person's life and liberty interests when the issue of psychosis is also raised, given the dynamic nature of mental state in these cases.

In conclusion, Mr. Panetti's competency to be executed requires a thorough, contemporaneous, preferably in-person mental health evaluation at the time that the court is considering the question of his competency to be executed. His long history of severe and persistent mental illness, coupled with 10 years in solitary confinement, make this timely evaluation all the more necessary to protect Mr. Panetti's due process rights.

Deliberate Indifference to Prisoners' Psychiatric Needs

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Dismissal of an Inmate's Allegation That He Was Denied Psychiatric Care Is Reversed Because His Needs Were Determined to Be Serious

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In *DePaola v. Clarke*, 884 F. 3d 481 (4th Cir. 2018), the Fourth Circuit Court of Appeals partially reversed a Virginia district court's decision to dismiss

Eric DePaola's lawsuit alleging deliberate indifference by 15 officials at the Red Onion State Prison. Mr. DePaola alleged that he was denied treatment for serious mental and physical needs while being housed in solitary confinement. The appeals court reversed the district court's finding that Mr. DePaola had failed to provide sufficient evidence to suggest that certain prison officials knew about his mental health needs and repeatedly failed to provide care.

Facts of the Case

Mr. DePaola entered the Virginia Department of Corrections (VDOC) in 2004 when he was 17 years old. He alleged that, from the time he was six years old, he received in- and outpatient mental health care, including medications for symptoms of attention-deficit hyperactivity disorder (ADHD), depression, hallucinations, and psychomotor agitation. A court-ordered psychological evaluation completed during Mr. DePaola's criminal case concluded that he had a major mental illness ("incipient bipolar disorder") and recommended that he receive "ongoing mental health treatment" (*DePaola*, p 484). In 2007, Mr. DePaola was transferred to Red Onion State Prison and was held in solitary confinement continuously after that time. Mr. DePaola alleged that he experienced significant psychiatric problems, including depression, at Red Onion but was repeatedly denied access to mental health care. For example, he attempted suicide in 2010 and was held in five-point restraints for approximately 24 hours. Soon thereafter, he became suicidal again and refused to eat. Mr. DePaola alleged that, ultimately, he was not permitted to speak with a mental health professional at all while incarcerated at Red Onion. In addition, he stated that he developed physical health problems, including irritable bowel syndrome and a rash that resulted in scarring on his genitals, for which he did not receive adequate treatment.

In July 2015, Mr. DePaola filed a *pro se* complaint under 42 U.S.C. § 1983 (2008) against 15 VDOC officials, alleging that his Eighth Amendment rights were violated by the prison's deliberate indifference to his mental and physical health problems. The VDOC officials filed multiple motions to dismiss Mr. DePaola's suit. The district court granted these motions, finding that Virginia's two-year statute of limitations for personal injury claims had expired. In addition, the district court concluded that Mr. DePaola failed to sufficiently allege that the named

defendants were deliberately indifferent to his serious mental or physical health needs. The district court found that some of Mr. DePaola's alleged symptoms (e.g., a "trance-like feeling" and staying in bed for "days at a time") were "an expected consequence of being housed in segregation" and thus did not constitute a serious need (*DePaola v. Clarke*, No. 7:15CV00403, 2016 U.S. Dist. LEXIS 131948 (E.D. Va. Sep. 27, 2016), p 12).

Mr. DePaola appealed the district court's decision to the Fourth Circuit and was appointed counsel. He argued that, given the more liberal filing standards for *pro se* plaintiffs, he had adequately alleged Eighth Amendment violations and deliberate indifference to his mental and physical needs. Furthermore, he argued that the court should apply the "continuing violation" doctrine to his claims. He stated that, because the VDOC officials had repeatedly denied him necessary treatment up until the filing of the lawsuit, the claims were not barred by Virginia's two-year statute of limitations. In contrast, the VDOC officials argued that the district court's ruling and reasoning were correct.

Ruling and Reasoning

In reaching its decision, the appeals court first considered the threshold that a *pro se* litigant must reach to sufficiently state a claim under 42 U.S.C. § 1983. The court noted that prisoners have a right to adequate health care, including care for mental illness, under the Eighth Amendment. To move forward with a claim under 42 U.S.C. § 1983, the court concluded that a prisoner must demonstrate two things: first, that he had a serious medical need, and second, that prison officials knowingly disregarded that need and the substantial risk it posed. The court defined a serious medical need as a condition "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" (*DePaola*, p 486, quoting *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202 (4th Cir. 2017)).

The court also considered how to apply the "continuing violation" doctrine in a prison litigation case brought under 42 U.S.C. § 1983. The court noted that, ordinarily, a personal injury suit in Virginia must be brought within two years from when the harm to the plaintiff occurs. However, when the harm occurs repeatedly, the "continuing violation" principle allows a claim to be brought within two

years from when the harm stopped, not from when it began. Although the Fourth Circuit Court of Appeals had not previously applied this principle of tort law to prison litigation brought under 42 U.S.C. § 1983, it noted that the Second and Third Circuit appellate courts had done so. The Fourth Circuit court concluded that, for prisoners alleging inadequate medical care, the statute of limitations does not run out until two years after the date, if any, that adequate treatment was provided. The court reasoned that, because Mr. DePaola continued to experience psychiatric symptoms and had not yet received mental health treatment at the time of the lawsuit filing, he could assert a claim that his rights under the Eighth Amendment were violated within the previous two years.

The court also concluded that Mr. DePaola had sufficiently alleged deliberate indifference to serious mental health needs by six of the 15 VDOC officials named in his lawsuit. Mr. DePaola asserted that the officials had been given adequate notice of his serious mental health needs since at least May 2010, following his first suicide attempt, and they had repeatedly failed to provide mental health treatment. The court held that this claim was sufficient to allege deliberate indifference, and therefore his suit against the six individuals who knew about Mr. DePaola's problems should not have been dismissed by the district court.

However, the court found that Mr. DePaola did not adequately demonstrate that the other nine defendants in his lawsuit had actual knowledge of his serious mental health needs. The court also concluded that Mr. DePaola did not sufficiently communicate serious physical health needs to any VDOC officials, and he therefore did not state a claim regarding deliberate indifference to physical needs. Thus, the appeals court reversed the district court's dismissal of Mr. DePaola's allegations that six of the 15 VDOC officials were deliberately indifferent to his serious mental health needs but affirmed the district court's decisions regarding the other nine VDOC officials and the claims regarding physical health needs. The case was remanded to the district court for further proceedings.

Discussion

This case raises important questions about which mental health symptoms are serious enough to warrant treatment in prison. The court noted that Mr. DePaola should have been provided treatment following his suicide attempt because his symptoms at

that point were clearly observable. From a mental health professional's perspective, this definition may set the bar for necessary treatment too high, leaving open the question of whether less overt symptoms would also be considered serious by the court. For example, if Mr. DePaola had expressed suicidal ideation without making an attempt, would the court have found his allegation of deliberate indifference sufficient to move forward with the suit? Furthermore, if suicide had been prevented (e.g., by using safe rooms or restraints) without providing treatment for the underlying mental illness, would the prison officials still be deliberately indifferent? Based on the court's decision in *DePaola*, these important questions remain unanswered.

The court's assessment of Mr. DePaola's symptoms that developed while in solitary confinement is also interesting. The district court initially dismissed Mr. DePaola's allegations, reasoning that some of his mental health symptoms (e.g., staying in bed for days on end) were expected behaviors in segregation and thus did not represent a serious medical need. The appellate court did not specifically address this issue, remaining silent on whether symptoms resulting from solitary confinement were serious enough to require medical attention. From a psychiatric standpoint, although research is mixed on whether segregation can cause *de novo* mental illness, most mental health organizations agree that prisoners in that setting are at risk of deteriorating mental health and should be monitored closely (Kapoor R: Taking the solitary confinement debate out of isolation. *J Am Acad Psychiatry Law* 42:2–6, 2014). It follows, then, that ignoring psychiatric symptoms that arise in solitary confinement or misinterpreting them as a normal consequence of segregation could result in a failure to provide adequate health care. In *DePaola*, however, the Fourth Circuit chose not to address the issue directly.

A Duty to Protect Without a Clearly Communicated Threat?

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When a Patient Does Not Directly Communicate a Threat, a Psychiatrist May Still Have a Duty to Protect If a Threat is Conveyed Through Other Sources

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In *Rodriguez v. Catholic Health Initiatives*, 899 N.W.2d 227 (Neb. 2017), the Nebraska Supreme Court ruled that the district court erred in finding that the psychiatric facility owed no duty to warn or protect in a case in which threats were communicated indirectly, rather than by the patient directly, to his mental health providers. This ruling may create ambiguity for mental health providers in knowing when they have a duty toward third parties.

Facts of the Case

Between June and August 2013, the Omaha Police Department (OPD) responded to Ms. Melissa Rodriguez's assault, battery, and false imprisonment complaints against Mr. Mikael Loyd on numerous occasions. On August 7, Mr. Loyd was formally charged with misdemeanor assault and battery, and a warrant for his arrest was issued. On August 8, Mr. Loyd voluntarily met with the Omaha police. During this meeting, he expressed to the police a desire to kill his mother. The police deemed Mr. Loyd dangerous, placed him under emergency protective custody, and transferred him to the Lasting Hope psychiatric facility.

Nebraska law requires individuals in emergency protective custody to undergo a mental health evaluation within 36 hours of being admitted to a mental health facility and to be released unless assessed as mentally ill and dangerous to self or others (Neb. Rev. Stat. Ann. § 71–919 (2013)). Mr. Loyd was evaluated at Lasting Hope on August 11 by a psychiatrist from the University of Nebraska Medical Center (UNMC). He was assessed as not dangerous but was not discharged from the facility. During his hospitalization, Mr. Loyd made multiple phone calls to Ms. Rodriguez, and on August 12 he called the OPD to turn himself in on his outstanding arrest warrant. When police officers arrived at Lasting Hope, the staff refused to release Mr. Loyd into their custody on the grounds that his emergency protective hold was still in effect. On August 14, Mr. Loyd left Lasting Hope and killed Ms. Rodriguez. Later that day, he returned to the facility, where he was arrested two days later and charged with murder.