responsibility (i.e., lack of penal responsibility) and diminished capacity (i.e., EMED). *Lavoie* highlights the nuances with which courts grapple regarding what data can be admitted or excluded to support or refute mental health defenses; it is an example of the struggles that occur when mental health and the law intersect. Clinicians gather a variety of data to form opinions, including data on violence history and psychiatric illness. Following rules of evidence, the courts have different guidelines on when they permit certain evidence, such as prior bad acts. Lack of penal responsibility and EMED assessments are uniquely challenging for clinicians in that they involve looking at a historical event and attempting to determine a defendant's mental state at that time. Clinicians are trained to look for historical data and patterns of acting, which undoubtedly includes historical acts of similar (and even prior bad) behavior.

Additionally, *Lavoie* demonstrates the challenges inherent in differentiating which acts are the result of mental illness versus extreme emotional disturbance. One such challenge involves the definition of extreme disturbance. In *Lavoie*, the court did not find it necessary to clearly define EMED and instructed the jury to understand the plain meaning of the phrase. This type of instruction poses a challenge to evaluators tasked with answering a legal question when the question is not well defined. EMED is already complicated to assess, given that evaluators must consider how an underlying mental illness, personality disorder, or lack thereof interacts with a specific situation to affect a defendant's mental state; absent a clearly articulated definition of EMED, this becomes even more challenging. The *Lavoie* case is a good example of the difficulties in using clinical information to answer a question about a legal construct. An additional consideration highlighted by this case is the selection and weighing of relevant data in coming to a forensic opinion. Historical data aids an evaluator in coming to a diagnosis and understanding the defendant's motivations and thought patterns at the time of the offense. In *Lavoie*, the court noted that evidence of past violence may be admissible to rebut an insanity defense; however, the court also cited *Morishige* to show that when such evidence was admissible, it was to dispute a diagnosis and not to demonstrate propensity for such acts. Thus, this case also underscores the importance of clinicians' understanding of how to use the data they obtain to answer a temporally bound legal question.

Cruel and Unusual Confinement on Virginia's Death Row

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Virginia's Death Row Solitary Confinement Conditions Created a Substantial Risk of Serious Psychological and Emotional Harm

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Key words: solitary confinement; death row; psychological harm

In *Porter v. Clarke,* 923 F.3d 348 (4th Cir. 2019), Virginia death row inmates claimed that the conditions of their confinement on death row constituted cruel and unusual punishment. The district court granted summary judgment to the plaintiffs. The U. S. Court of Appeals for the Fourth Circuit affirmed, ruling that the conditions on death row created substantial risk of serious psychological and emotional harm and the state defendants were deliberately indifferent to that risk.

Facts of the Case

Death row inmates Thomas Porter, Anthony Juniper, and Mark Lawlor (the plaintiffs) filed a lawsuit against Harold Clarke (Director of the Virginia House of Corrections) and David Zook (Warden of Virginia's Sussex I State Prison), collectively referred to as "state defendants" for the purpose of this article, challenging their conditions of confinement. The plaintiffs put forth evidence that on death row at Sussex I State Prison in Virginia, death row inmates were housed in separate, constantly illuminated 71-square-foot cells (i.e., the size of half a parking space). They were allowed one hour of outdoor recreation five days a week in small wire-meshed enclosures without use of exercise equipment. Other than to

perform institutional jobs, death row inmates were not permitted to leave their cells. Due to these restrictions, death row inmates spent between 23 and 24 hours a day in their cells. In November 2014, plaintiffs filed a lawsuit against the state defendants, alleging that then-existing conditions of confinement on Virginia's death row were cruel and unusual in violation of the Eighth Amendment and asked the court to prohibit these death row procedures.

On February 21, 2018, the district court sided with the plaintiffs on their Eighth Amendment claim. The district court ruled that there was undisputed evidence the conditions of confinement on Virginia's death row (most notably the inmates' prolonged periods of isolation) created a significant risk of substantial psychological or emotional harm and that the state defendants were deliberately indifferent to that risk of harm. The district court then prohibited the conditions under the Prison Litigation Reform Act, 18 U.S.C. 3626 (1997), which was necessary because there was a clear danger of recurrent violation. The state defendants appealed, arguing that the district court erred in awarding summary judgment to the plaintiffs on their Eighth Amendment claim and granting injunctive relief.

Ruling and Reasoning

The U.S. Court of Appeals for the Fourth Circuit relied on a large body of social science evidence recognizing the adverse consequences of prolonged solitary confinement on inmates' mental health. The Fourth Circuit noted that the U.S. Supreme Court had recognized these effects of prolonged solitary confinement more than a century ago (*In re Medley*, 134 U.S. 160 (1890)). The court acknowledged that, in recent years, advances in psychology and empirical methods allowed researchers to better understand the nature and severity of the effects of solitary confinement. The court described numerous studies that reported adverse effects such as psychotic symptoms, depression, suicidal ideation, anxiety, mood lability, aggression, impulse control difficulties, reduced concentration, psychosomatic symptoms, nightmares, and others. In fact, they cited the leading survey of the literature on this topic that found there was not a single study of non-voluntary solitary confinement lasting more than 10 days that failed to result in negative psychological effects (referencing *Haney C: Mental health issues in long-term solitary and "supermax" confinement. Crime & Delinq 49:124-156, 2003*). The state defendants did not offer evidence to refute the plaintiffs' expert evidence. Accordingly, the court agreed that the conditions on Virginia's death row posed a substantial risk of serious psychological and emotional harm.

State defendants argued that several other courts had upheld conditions of confinement similar to those on Virginia's death row, citing *Sweet v. South Carolina Department of Correction*, 529 F.2d 854 (4th Cir. 1975), and *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999). The court disagreed; the other cases did not draw on evidence about the serious risks of harm of solitary confinement, and one of the other cases involved inmates' placement in confinement because of their in-prison conduct. The court acknowledged the conflicting evidence as to whether these particular plaintiffs were in fact psychologically affected by confinement, but death row undisputedly created substantial risk of such harm.

The court also considered whether the state defendants acted with deliberate indifference, a requirement for inmates challenging their conditions of confinement. This standard may be satisfied if plaintiffs can prove by circumstantial evidence that a risk was so obvious that it had to have been known. The court affirmed that the state defendants acted with deliberate indifference, drawing on testimony by state defendants, Corrections Department procedures prohibiting prolonged confinement for non-death row inmates, and the extensive scholarly literature detailing the effects of confinement. The court acknowledged that legitimate penological considerations could justify the conditions on death row, but this did not change their ruling.

The state defendants argued that the district court's prohibition of the challenged death row conditions was wrongful because the conditions no longer existed and would not realistically recur. On August 6, 2015, a year after the original lawsuit was filed, the Corrections Department implemented new procedures to provide death row inmates with new privileges, such as additional recreation, contact visits, and time outside their cells. Despite these changes, however, the plaintiffs demonstrated that there existed a "cognizable danger of recurrent

violation" (*Porter*, p 365), as the state defendants repeatedly denied that the conditions actually violated the Eighth Amendment.

Discussion

In *Porter*, the court relied on a large body of social science research demonstrating the harmful psychological effects of prolonged solitary confinement. In fact, the state defendants did not present any evidence to the contrary. Many negative effects of solitary confinement have long been documented and have aided in judicial decision-making. The state defendants compared the current case to previous cases challenging confinement they deemed to be similar to theirs in an attempt to suggest that the specific plaintiffs in this case did not actually experience harm by the confinement. The Fourth Circuit's ruling stresses the recognition that prolonged confinement establishes a substantial risk of psychological and emotional harm to individuals. While these particular plaintiffs may not have suffered in the ways other inmates certainly have as a result of isolation, the court ruled that the general risk is sufficient to qualify as cruel and unusual punishment. Risk, in theory, is preventable, and the court took this preventive approach to mitigate the risk to death row inmates of psychological harm inherent in Virginia's solitary confinement procedures.

Overall, *Porter* illuminates the ways in which psychological research has led to real policy change that directly affects individuals' lives. While psychological science has been criticized for its lack of real-world impact, *Porter* demonstrates otherwise. In fact, the court found the psychological research so compelling that the case was decided on summary judgment, relying on the research for its merits instead of bringing the case to trial. In a broader context, *Porter* also serves as a reminder of the paradoxical nature of the death penalty: the court demonstrated concern about the welfare and psychological well-being of condemned inmates awaiting their executions. Although the court called solitary confinement on death row in this case cruel and unusual, it did not address here whether it is cruel and unusual for inmates to await their own executions or whether execution is, itself, cruel and unusual.

First and Eighth Amendment Rights for Persons in a Correctional Facility

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Representing Other Inmates Qualifies as Protected Conduct; Jail Clinicians' Failure to Respond Adequately to Suicidal Inmate Precludes Qualified Immunity and Allows Claim of Deliberate Indifference

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Key words: Eighth Amendment; First Amendment; protected conduct; qualified immunity

In *Berkshire v. Dahl*, 928 F.3d 520 (6th Cir. 2019), Randy Berkshire, a former inmate, claimed that he was subject to First Amendment retaliation when he was transferred from a jail mental health unit to general population and that, after transfer, his mental health condition was permitted to decompensate in violation of his Eighth Amendment rights. The Sixth Circuit Court of Appeals ruled that Mr. Berkshire advanced sufficient evidence that his First and Eighth Amendment rights were violated, and therefore the jail clinicians were not entitled to qualified immunity.

Facts of the Case

Mr. Berkshire had a history of mental health and legal problems dating back to childhood, and as an adult was diagnosed with bipolar disorder, obsessive compulsive disorder, and depression. He was incarcerated at the Macomb Correctional Facility in Michigan from 2001 to 2014 for second-degree home invasion. In July 2011, Mr. Berkshire was placed in the facility's Residential Treatment Program (RTP), which required a score less than 50 on the Global Assessment of Functioning (GAF) scale. In December 2011, Mr. Berkshire scored 48 on the GAF. In March 2012, he was elected by fellow residents in the RTP to serve as their Housing