

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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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

Unit Representative. In this role, he was tasked with helping draft grievances for other inmates and developing an agenda of resident complaints to review with the jail administration. Two days after Mr. Berkshire submitted an agenda to the RTP unit chief/psychologist, his GAF score was raised to 53 and he was subsequently transferred off the RTP unit and into general population. Mr. Berkshire put forth evidence of a notable lapse in documentation between the previous GAF score and the new score, which made Mr. Berkshire ineligible for RTP, and the RTP unit chief could not recall meeting with Mr. Berkshire or reviewing his record during this period.

Mr. Berkshire alleged that his mental health quickly deteriorated in general population. His treatment outside of the RTP was provided by different clinicians. During this time, he revealed a history of recent suicide attempts and expressed homicidal thoughts. He stopped his medications and refused meals, resulting in a medical hospitalization. He asked his treatment providers for transfer to the RTP or to a crisis stabilization unit, but his treatment team refused. Due to alleged threatening behavior, Mr. Berkshire was placed in segregation, where he again refused food and engaged in self-injury, culminating in an unsuccessful suicide attempt by hanging. On the night of his attempt, he was reportedly placed in physical restraints, denied restroom access, and spent hours laying in his own waste. After this episode, Mr. Berkshire was sent to the crisis stabilization unit.

#### Ruling and Reasoning

The Sixth Circuit first considered Mr. Berkshire's claim of First Amendment retaliation. A central question was whether Mr. Berkshire engaged in conduct protected by the First Amendment. The court ruled that Mr. Berkshire's conduct as the Housing Unit Representative was protected under the First Amendment because his fellow inmates had no reasonable alternative to voice their complaints absent his assistance, and Mr. Berkshire's agenda did not interfere with legitimate penological objectives. The court next addressed whether Mr. Berkshire had evidence of retaliation. The court found there was sufficient evidence to defeat qualified immunity. The RTP unit chief's actions (raising Mr. Berkshire's GAF score to 53, resulting in discharge from RTP) could be viewed as adverse and retaliatory in connection with Mr. Berkshire's protected conduct. The result was considered adverse because it led to fewer privileges and

more restrictions, and because there were foreseeable negative consequences from his transfer.

Citing *Muhammad v. Close*, 379 F.3d 413 (6th Cir. 2004) and *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999), the Sixth Circuit found that sufficient evidence existed at this stage that the motivation for this transfer was retaliatory as it occurred in close temporal relation to his submission of an agenda and in the absence of documentation or direct recall from the RTP unit chief about the rationale for the score change. Ultimately, the assessment resulted in Mr. Berkshire's transfer from the unit and removal from his position as Housing Unit Representative. The Sixth Circuit ruled that Mr. Berkshire met the standards outlined in *King v. Zamirara*, 68 F.3d 686 (6th Cir. 2012) which established that, to make a claim for First Amendment retaliation, a plaintiff must show he was engaged in protected conduct that became prohibited through an adverse action (retaliation) at least partially motivated by the conduct itself.

In assessing whether prison clinicians violated Mr. Berkshire's Eighth Amendment rights, which include the right to care for serious medical conditions, the Sixth Circuit cited *Estelle v. Gamble*, 429 U.S. 97 (1976), which found that the denial of medical treatment constitutes cruel and unusual punishment when deliberate and not just accidental or negligent. *Farmer v. Brennan*, 511 U.S. 825 (1994), further clarified this deliberate indifference as knowledge of a substantial risk of serious harm and conscious disregard of this risk by failing to take reasonable measures to prevent it. In the case of Mr. Berkshire, his clinicians acknowledged a serious medical need related to depression, psychosis, and suicidal ideation. After discharge from the RTP program, he showed signs of decompensation, including suicidal behaviors in the two weeks preceding the attempt. The court found that the jail clinicians had the ability to provide for a "thorough psychiatric evaluation to determine appropriate treatment" (*Berkshire*, p 527), namely through the Crisis Stabilization Program (CSP). There was sufficient evidence that his clinicians were aware of Mr. Berkshire's suicidal risk and rendered inadequate care. The record includes evidence of communications labeling Mr. Berkshire as "problematic" (*Berkshire*, p 526) and declining referral to CSP because a clinician "did not feel like doing all that paperwork" (*Berkshire*, p 527). Relying on *Comstock v. McCrary*, 273 F.3d 693 (6th Cir. 2001), the

Sixth Circuit recognized a prisoner's right to medical attention once his suicidal tendencies are known, and noted that failure to provide such attention in Mr. Berkshire's situation was consistent with deliberate indifference, thereby precluding staff's claim of qualified immunity.

#### Discussion

In *Berkshire*, the Sixth Circuit addressed the rights of prisoners to appropriate medical care, including psychiatric care, under the Eighth Amendment. The court also made clear that precautions taken for suicide risk do not permit correctional facilities to violate basic rights and accepted standards of psychiatric care. In both of these domains, the Sixth Circuit found that there was sufficient evidence to defeat the clinicians' defense of qualified immunity. Mr. Berkshire offered sufficient evidence that his constitutional rights were violated, including that the Macomb County facility failed to provide emergency mental health care and humane conditions during a restraint episode. The court emphasized evidence that Mr. Berkshire had clear signs of a worsening psychiatric crisis, yet clinicians did not undertake a thorough assessment nor did they refer him to a higher level of care. The Sixth Circuit found the slow and limited response to Mr. Berkshire's crisis was consistent with deliberate indifference and resulted in a forfeiture of qualified immunity. Simply put, the court of appeals indicated that the scale of the treatment must match the severity of the medical concerns to forestall a claim of deliberate indifference.

The *Berkshire* case also highlights the unique challenges of providing mental health care in a correctional setting. Excerpted correspondence from jail mental health staff raised the concern that countertransference may have adversely affected evaluation

and treatment decision-making. Clinicians in correctional settings must strike a balance between being vigilant for malingering with undertaking thorough risk assessments. Clinicians in these settings must be careful not to allow pressure from jail administration to compromise their role in providing appropriate care. This balance may be particularly difficult to maintain when clinicians are placed in administrative roles, as the unit chief was in this case. As in other practice settings, supervision and consultation are critically important in the correctional environment, especially in situations that raise ethics considerations. Although documentation standards differ among institutions, it is imperative that jail mental health staff carefully document the clinical rationale for critical decisions, especially those that result in a change in a prisoner's observation status or level of care.

While extreme measures, such as restraints, may be indicated to reduce a prisoner's risk of harming himself or others, mitigating this risk does not permit jail staff to violate protected rights, where legitimate penological safety interests are not at stake. This protection holds for basic necessities protected under the Eighth Amendment, such as access to a bathroom, but it also applies to more abstract concepts such as the First Amendment right to free speech. Mr. Berkshire participated in a governance structure sanctioned by the prison; the court of appeals found that prison officials may have retaliated by transferring him to general population, where he ultimately attempted suicide. There was no clear penological interest identified in the actions of prison officials aside from silencing concerns that were being solicited by the warden. While correctional facilities may restrict inmate behavior that interferes with legitimate penological objectives, they may not prohibit rightful measures to address grievances, which are protected by the First Amendment.