

THE PROMISE OF *PORTER*? *PORTER V. CLARKE* AND ITS POTENTIAL IMPACT ON SOLITARY CONFINEMENT LITIGATION

Mary Marshall*

INTRODUCTION

On May 3, 2019, the Fourth Circuit became the first federal court of appeals to hold that the indefinite solitary confinement of people on death row violates the Eighth Amendment.¹ The case, *Porter v. Clarke*, was praised as a step forward for the rights of those held on death row, as well as a major victory in the battle against solitary confinement.² Prior to *Porter*, several courts, including the Supreme Court, had found that prolonged solitary confinement can violate the Due Process Clause of the Fourteenth Amendment. However, none had held that such treatment violated the Eighth Amendment, much less for people incarcerated on death row.³

This Comment argues that while the reasoning in *Porter* is legally and scientifically sound, other circuits are unlikely to adopt its holding. Part I outlines the decision and explains how the facts of the case are similar to conditions on death row in several other circuits. Part II then argues that idiosyncrasies of the litigation in *Porter*, as well as recent Supreme Court death penalty jurisprudence, make the case untenable for use in other circuits. Finally, Part III contends that, despite the hurdles discussed in Part II, the decision is not totally toothless outside of the Fourth Circuit. Using two case studies of similar litigation, that Part argues that the *Porter* decision should be used as a tool for encouraging settlement or voluntary changes in death row conditions elsewhere.

* J.D. Candidate 2020, Columbia Law School. The author would like to thank Oluwatumise Asebiomo, Ben Covington, Stephen Piotrkowski, Thea Raymond-Sidel, Angel Valle, and the staff of the *Columbia Law Review* for their outstanding editorial support.

1. See *Porter v. Clarke*, 923 F.3d 348, 353 (4th Cir. 2019).

2. See, e.g., Federal Appeals Court Upholds Ban on Unconstitutional Conditions on Virginia's Death Row, Death Penalty Info. Ctr. (May 9, 2019), <https://deathpenaltyinfo.org/news/federal-appeals-court-upholds-ban-on-unconstitutional-conditions-on-virginia-death-row> [<https://perma.cc/4RWY-4693>].

3. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 229–30 (2005); *Sealey v. Giltner*, 197 F.3d 578, 587 (2d Cir. 1999). Because they are condemned to die, people on death row are often afforded the fewest constitutional protections when it comes to the conditions of their confinement. See *infra* notes 37–41 and accompanying text.

I. THE PROMISE OF *PORTER*? WHY OTHER CIRCUITS MIGHT ADOPT THE DECISION

This Part provides background on the *Porter* decision and explains how its reasoning is in line with Eighth Amendment precedent. Section I.A overviews the case and its reasoning. Section I.B then explains how conditions on Virginia's death row are similar to conditions on many death rows across the country. Finally, Section I.C examines the legal and scientific strengths of the decision, arguing that it could be adopted elsewhere.

A. *The Case*

Porter was a Section 1983 action brought by three people incarcerated on Virginia's death row. The case alleged that conditions of confinement on the row violated the Eighth Amendment's prohibition on cruel and unusual punishment.⁴ At the time the suit was filed, people held on Virginia's death row were confined alone to their cells for upwards of twenty-three hours a day.⁵ Their cells were lit day and night and were no larger than the size of a parking space. They were allowed noncontact visits with family on the weekends, only gaining the chance for contact visits when they were "approaching 'death.'"⁶ When they were allowed out of their cells, people incarcerated on death row were not given any congregate time with each other.⁷ In essence, their lives were spent totally alone.

Plaintiffs argued that these conditions violated the Eighth Amendment because they created a "substantial risk of serious psychological and emotional harm and that State Defendants were deliberately indifferent to that risk."⁸ This test, established in the 1994 Supreme Court case *Farmer v. Brennan*, is the governing standard for establishing that conditions of confinement violate the Eighth Amendment.⁹

Relying on the testimony of psychology experts as well as the growing literature on solitary confinement, the *Porter* court determined that conditions on Virginia's death row created a substantial risk of future harm. Conditions like those on death row, the court determined, lead to "psychological deterioration," including increased anxiety, depression, and problems with concentration, memory, and impulse control.¹⁰ The court also concluded that the harmful effects of solitary confinement were so well known that Defendants must have been aware of them, yet chose to use

4. *Porter*, 923 F.3d at 353–55.

5. See *id.* at 354.

6. See *id.* (quoting Joint Appendix at 997, *Porter*, 923 F.3d 348 (No. 18-6257)).

7. See *id.*

8. See *id.* at 364 (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

9. See Fred Cohen, *Death Row Solitary Confinement and Constitutional Considerations in Living on Death Row: The Psychology of Waiting to Die* 93, 98 (Hans Toch, James R. Acker & Vincent Martin Bonventre eds., 2018).

10. See *Porter*, 923 F.3d at 356.

solitary confinement anyway. As such, they demonstrated a “deliberate indifference” to the risk of harm, in violation of the Eighth Amendment.¹¹

B. *Death Row in Other States*

Unfortunately, the conditions on Virginia’s death row are not unique. Nearly two-thirds of states with the death penalty hold incarcerated people alone in their cells for more than twenty hours a day.¹² According to a nationwide study conducted by the ACLU, the majority of death row cells are about the size of an average bathroom.¹³ People incarcerated on death row receive food and medical attention through a slot in their door, and they rarely have access to natural light.¹⁴ On top of this, they are not given access to congregating exercise or religious activities and are almost never allowed to touch their loved ones.¹⁵

Unsurprisingly, these conditions frequently lead to mental deterioration. Along with suffering from the symptoms the court discussed in *Porter*, including anxiety and loss of mental acuity, people incarcerated on death row are also at an increased risk of self-harm and suicide.¹⁶ While some of the deleterious effects come from the psychological impact of waiting to die, there is no doubt that solitary confinement on death rows across America exacerbates mental health problems.¹⁷ Indeed, the European Court of Human Rights has refused to allow Britain to extradite people to the United States to face a death sentence, not because of the punishment, but because of the harmful psychological effects of living for years on death row in America.¹⁸

C. *Legal and Scientific Validity of the Porter Decision*

Along with factual similarities to death row conditions across America, *Porter* has significant legal and scientific backing that might lead other circuits to adopt its holding and reasoning. As early as 1890, the Supreme Court noted that solitary confinement inflicts excruciating pain on incarcerated

11. See *id.* at 361.

12. See Gabriella Robles, *Condemned to Death—and Solitary Confinement*, The Marshall Project (July 23, 2017), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> [<https://perma.cc/HK4U-PQLY>].

13. ACLU, *A Death Before Dying: Solitary Confinement on Death Row 4* (2013), <https://www.aclu.org/report/death-dying-solitary-confinement-death-row?redirect=death-dying-solitary-confinement-death-row-report> [<https://perma.cc/WS7Z-3SHN>].

14. See *id.* at 2, 4.

15. Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 *Ohio St. L.J.* 525, 538 (2016).

16. ACLU, *supra* note 13, at 6–7 (“It is not unusual for prisoners in solitary confinement to compulsively cut their flesh, repeatedly smash their heads against walls, swallow razors and other harmful objects, or attempt to hang themselves.”).

17. See Amy Smith, *Not Waiving but Drowning, The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 *B.U. Pub. Int. L.J.* 237, 242, 249–50 (2008).

18. *Soering v. United Kingdom*, 161 *Eur. Ct. H.R. (ser. A)* at 38 (1989).

people.¹⁹ In the modern era, courts are increasingly skeptical of the legality of prolonged solitary confinement. For example, while the Supreme Court has not held that solitary confinement violates the Eighth Amendment, it has held that prolonged social isolation, absent sufficient review processes, can violate the Due Process clause of the Fourteenth Amendment.²⁰ Several Supreme Court Justices have indicated they believe solitary confinement of people incarcerated on death row may violate the Eighth Amendment.²¹ At least one lower federal court has found that solitary confinement of people whose death sentences had been declared unconstitutional by a state court violates the Eighth Amendment,²² and a claim that the use of prolonged isolation in Florida prisons violates the Eighth Amendment has passed the motion to dismiss stage.²³

The decision in *Porter* also has significant scientific backing. Numerous psychological studies have demonstrated the deleterious effects of solitary confinement on mental health. A 2003 survey of psychological literature on solitary confinement found that “there is not a single published study of solitary or supermax-like confinement in which non-voluntary confinement lasted for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects.”²⁴ Since then, additional studies have only confirmed that solitary confinement can lead to delusions, hallucinations, anxiety, and other serious mental illness.²⁵ There is also evidence that prolonged solitary confinement can have serious physical effects on the

19. In re *Medley*, 134 U.S. 160, 168 (1890) (“A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide.”). *Medley* was decided under the Ex Post Facto Clause of the Constitution, rather than the Eighth Amendment. As such, while the Court condemned solitary confinement in the decision, it did not address whether the punishment was constitutional. *Id.* at 174.

20. See *Wilkinson v. Austin*, 545 U.S. 209, 220–21 (2005). As the court in *Porter* noted, the conditions at issue in *Wilkinson* were less harsh than those on Virginia’s death row. See *Porter v. Clarke*, 923 F.3d 348, 359–60 (4th Cir. 2019).

21. *Apodaca v. Raemisch*, 139 S. Ct. 5, 8 (2018) (Sotomayor, J., respecting the denial of certiorari); *Glossip v. Gross*, 135 S. Ct. 2726, 2775–77 (2015) (Breyer, J., dissenting, joined by Ginsburg, J.); *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

22. *Reynolds v. Arnone*, 402 F. Supp. 3d 3, 23 (D. Conn. 2019).

23. *Harvard v. Inch*, 411 F. Supp. 3d 1220, 1231 (N.D. Fla. 2019).

24. See Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 132 (2003).

25. See, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 *Wash. U. J.L. & Pol’y* 325, 335–36 (2006); Craig Haney, *Restricting the Use of Solitary Confinement*, 1 *Ann. Rev. Criminology* 285, 288–94 (2018) [hereinafter Haney, *Restricting*]. Only one study published in the last twenty years has questioned the validity of these findings. It has been routinely criticized and rejected for its flawed modeling and experimentation by psychologists and statisticians alike. See Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 *Crime & Just.* 365, 369–70 (2018); Haney, *Restricting*, *supra*, at 295.

body, and that people who spend more than a short stint in solitary confinement are at higher risk of mortality from various diseases.²⁶

Indeed, the evidence of the ills of solitary confinement is so overwhelming that the practice has been condemned by government officials, including corrections administrators. The Department of Justice recommends that solitary confinement, or “restrictive housing,” should be used rarely and subject to constraints, including regular review and a requirement that each use serves a specific penological purpose.²⁷ The Association of State Correctional Administrators has also condemned long-term use of solitary confinement. The group labeled it a “grave problem in the United States” and called on corrections officials across the United States to work to reduce their use of restrictive housing, especially for prolonged periods of time.²⁸

Porter appears to have great promise for lawyers and activists who want to see the end of prolonged solitary confinement of people on death row. The death row conditions in the case are materially similar to those of death rows elsewhere in the country. Both Supreme Court Justices and lower courts have expressed concern with the use of solitary confinement in prisons. What’s more, there is general agreement among scientists that prolonged solitary confinement poses a serious risk of future harm to incarcerated people. The holding that conditions on Virginia’s death row violated the Eighth Amendment was entirely reasonable. Despite this, the decision is unlikely to be the bellwether advocates hope for.

II. A HOLLOW HOPE? WHY OTHER CIRCUITS ARE UNLIKELY TO ADOPT *PORTER*

This Part explores two reasons why other circuits are unlikely to follow the *Porter* decision. The first, discussed in section II.A, arises from within the litigation itself: In *Porter*, Defendants did not make any argument about a legitimate penological interest in maintaining solitary confinement on death row. As section II.A will argue, this is unlikely to be repeated elsewhere. Section II.B then explores several recent Supreme Court decisions and argues that they represent a growing hostility on the Court towards the claims of people incarcerated on death row. In tandem, these issues may prove fatal to *Porter*’s chances of adoption across the country.

26. Christopher Wildeman & Lars H. Anderson, Solitary Confinement Placement and Post-Release Mortality Risk Among Formerly Incarcerated Individuals: A Population-Based Study, *Lancet Pub. Health*, Feb. 2020, at 107, 107.

27. See DOJ, Report and Recommendations Concerning the Use of Restrictive Housing 1, 99 (2016), <https://www.justice.gov/archives/dag/file/815551/download> [<https://perma.cc/57EU-R3RY>].

28. See Ass’n of State Corr. Adm’rs & Arthur Liman Pub. Interest Program, Yale Law Sch., Aiming to Reduce Time-In-Cell 1 (2016), <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducetic.pdf> [<https://perma.cc/PQ4A-R8AD>].

A. *Defendants' Waiver of Legitimate Penological Interest*

The lower court in *Porter* did not consider the Defendant's penological interest in holding people on death row in solitary confinement.²⁹ On appeal, the Defendants did not argue that any legitimate penological interest existed. Instead, they argued that the conditions on death row did not violate the Eighth Amendment, based on expert testimony and Fourth Circuit precedent.³⁰ As a result, the court considered the legitimate penological interest argument waived.³¹

For decades, the Supreme Court has emphasized that courts should exercise deference to prison officials in carrying out their duties.³² This deference is due to the expertise of prison officials, as well as the considerable safety issues they encounter each day.³³ Since prison officials need wide discretion to complete their duties, they are allowed to infringe on the constitutional rights of incarcerated people as long as their actions are "reasonably related to a legitimate penological interest."³⁴

Prison officials use a number of "legitimate penological interests" to justify use of solitary confinement on death row. Correction officers argue that those on death row are more likely to attempt to escape because they are under a death sentence. They therefore need to be held in stricter conditions.³⁵ Another common justification for holding people on death row in solitary confinement is that they have "nothing left to lose." Because they have been sentenced to death, so the argument goes, there is nothing stopping those on death row from lashing out against prison officials and each other.³⁶ The law affords no greater punishment than death, and it only imposes it—in theory—on those who have committed the "worst of the worst crimes."³⁷ Once that punishment has been levied, incarcerated people must be restricted from contact with others or they will kill again. Given how common these justifications are, it is odd that the Defendants

29. See *Porter v. Clarke*, 290 F. Supp. 3d 518 (E.D. Va. 2018).

30. See *Porter v. Clarke*, 923 F.3d 348, 357–58 (4th Cir. 2019).

31. See *id.* at 363.

32. See, e.g., *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977).

33. *Florence*, 566 U.S. at 326.

34. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

35. See, e.g., Conn. Dep't of Corr., Connecticut Department of Correction Objective Classification Manual Rev. 4/12, at 20 (2012), <https://portal.ct.gov/-/media/DOC/Pdf/PDFReport/ClassificationManualLibraryCopypdf.pdf> [<https://perma.cc/4FRK-LDX7>].

36. Cohen, *supra* note 9, at 104.

37. See William Glaberson, *On a Reinvented Death Row, the Prisoners Can Only Wait*, N.Y. Times (June 4, 2002), <https://www.nytimes.com/2002/06/04/nyregion/on-a-reinvented-death-row-the-prisoners-can-only-wait.html> [<https://perma.cc/H2UU-W9V7>] (quoting the New York State Department of Correctional Services spokesperson discussing death row stating, "These are people who have been convicted of especially heinous murders and who have nothing to lose by attacking each other, themselves or, worse, our staff"); Robles, *supra* note 12.

in *Porter* elected not to argue legitimate penological interest before the court of appeals. Defendants in other states would probably not do the same.

It is possible, as the court in *Porter* hypothesized,³⁸ that Defendants waived this argument because they realized there is no legitimate penological interest in holding people on death row in solitary confinement. States that have moved people sentenced to death into general population have found that they tend to behave as well or better than those who are not under a death sentence.³⁹ In Missouri, a study showed that death-sentenced persons had a far lower rate of violent misconduct—about eighty percent lower—than those who were parole eligible at the same facility.⁴⁰ There is also evidence that holding people in solitary confinement has negative impacts on corrections officers, countering the justification that solitary increases the safety and wellbeing of those who work at prisons.⁴¹

Despite this evidence, it seems unlikely that prison officials will waive legitimate penological interest arguments in other Eighth Amendment cases.⁴² If officials do raise these arguments, courts will almost certainly defer to them. Every prison conditions case to make it to the Supreme Court in recent years has included an analysis of legitimate penological interest.⁴³ The Prison Litigation Reform Act, which governs suits filed by incarcerated people, states that judges must give “substantial weight to any adverse impact on . . . the operation of the criminal justice system” when granting relief to incarcerated persons.⁴⁴ This heavy emphasis on penological interest is likely why several advocates have chosen to attack solitary under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment.⁴⁵ Indeed, the *Porter* court went out of its way to say that the lower court’s failure to address Defendants’ legitimate penological interest was an error, and even stated that it believed “that a legitimate penological justification could support prolonged detention of an inmate in segregated or solitary confinement . . . even though such conditions

38. See *Porter v. Clarke*, 923 F.3d 348, 363 (4th Cir. 2019).

39. *McLeod*, supra note 15, at 548; *Robles*, supra note 12.

40. *McLeod*, supra note 15, at 548.

41. *Up the Ridge* (Appalshop 2006) (documenting the impact working in a supermax prison had on residents of a small Virginia town); Yale Visual Law Project, *The Worst of the Worst: Portrait of a Supermax Prison* at 7:59–8:45, Vimeo (Dec. 3, 2012), <https://vimeo.com/54826024> (on file with the *Columbia Law Review*) (documenting violence that occurs in a Supermax and partially attributing it to the effects of solitary confinement).

42. See, e.g., *Harvard v. Inch*, 411 F. Supp. 3d 1220, 1238–40 (N.D. Fla. 2019); *Reynolds v. Arnone*, 402 F. Supp. 3d 3, 21–23 (D. Conn. 2019).

43. See, e.g., *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012).

44. 18 U.S.C. § 3626 (2012).

45. See *Cohen*, supra note 9, at 115. Indeed, in a previous case challenging conditions on Virginia’s death row, the court dismissed the plaintiff’s Eighth Amendment claim but allowed his Fourteenth Amendment claim to proceed. See Memorandum Opinion and Order, *Prieto v. Clarke*, 1:12-cv-01199 (E.D. Va. Nov. 2, 2012) (on file with the *Columbia Law Review*).

create an objective risk of serious emotional and psychological harm.”⁴⁶ The hurdle of legitimate penological interest is not insurmountable, but it does make other circuits much less likely to adopt the reasoning of *Porter*.

B. *What Bucklew v. Precythe Means for People Incarcerated on Death Row Housed in Solitary Confinement*

Along with overcoming the hurdle of legitimate penological interest, advocates who wish to see *Porter* adopted in other circuits must contend with increasing hostility toward the claims of people incarcerated on death row at the Supreme Court. Not only will this hostility make other circuits less likely to be sympathetic to the claims of those on death row, but it also increases the chances of the Court overturning a *Porter*-like decision if it is appealed and granted certiorari.

In April 2019, the Court handed down its first major death penalty decision since Justice Kavanaugh was confirmed.⁴⁷ This decision, *Bucklew v. Precythe*,⁴⁸ was issued a little more than a month before the Fourth Circuit issued *Porter*. In it, the Court held that the petitioner, Russell Bucklew, did not have a right to be executed by nitrogen hypoxia, despite considerable evidence that traditional methods of execution would cause him substantial pain because he suffered from a rare medical condition.⁴⁹ While a method of execution case may not seem relevant to someone on death row challenging their placement in solitary confinement, *Bucklew* represents the Court’s growing skepticism of litigation by people incarcerated on death row.

Bucklew was the culmination of a series of decisions that indicate people incarcerated on death row will have a more difficult time winning Supreme Court cases now that Justice Kennedy has stepped down. The first case, *Madison v. Alabama*, asked the Court to consider whether it was constitutional to execute someone who could no longer remember the crime for which they were sentenced to death.⁵⁰ In *Madison*, the Court held that the Eighth Amendment does not per se prohibit a state from executing a person who cannot remember their crime, but does prohibit execution of someone who cannot rationally understand the reasons for

46. *Porter v. Clarke*, 923 F.3d 348, 363 (4th Cir. 2019).

47. See Amy Howe, Opinion Analysis: Divided Court Rejects Lethal-Injection Challenge by Inmate with Rare Medical Condition, SCOTUSblog (Apr. 1, 2019), <https://www.scotusblog.com/2019/04/opinion-analysis-divided-court-rejects-lethal-injection-challenge-by-inmate-with-rare-medical-condition/> [https://perma.cc/TSE2-6NZ8].

48. 139 S. Ct. 1112 (2019).

49. *Id.* at 1133.

50. See *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019) (citing *Panetti v. Quarterman*, 551 U.S. 930, 958–59 (2007); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986)) (stating that the principle in *Ford* and *Panetti* that “an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence” was dispositive of the case at bar).

their execution.⁵¹ It expanded protections no further than what previously existed under *Ford v. Wainwright* and *Panetti v. Quarterman*.⁵²

While *Madison* indicated that a post-Kennedy Court would not be particularly expansive when it came to the rights of death-sentenced petitioners, it perhaps also indicated that the Court would not roll back protections for those on death row. However, in February of 2019, the Court issued an order lifting a stay of execution that many anti-death penalty advocates viewed as cause for concern. In that case, *Dunn v. Ray*, Dominique Ray requested a stay of execution so he could challenge an Alabama practice denying him the right to have an imam present at his execution.⁵³ After the Eleventh Circuit granted the stay, a five-to-four majority of the Court chose to let the execution go forward.⁵⁴ In lifting the stay, the majority cited the “last-minute nature” of [Mr.] Ray’s request.⁵⁵ Justice Kagan, in dissent, argued that Mr. Ray had filed as soon as he knew about the issue, so the Court was denying him the only recourse he had to vindicate his rights.⁵⁶ After this decision, lawyers for death-sentenced people began to worry that the Court would use late filings, which are often necessary in death litigation, as an excuse to dismiss otherwise meritorious cases.⁵⁷ *Bucklew* confirmed that this was the least of their worries.

Bucklew is laden with hostility toward death sentenced litigants. In the opinion, Justice Gorsuch notes that prior to the litigation before the Court, Missouri was unable to execute people because anti-death penalty advocates lobbied companies to stop supplying execution drugs.⁵⁸ He then goes on to insinuate that Mr. Bucklew filed “yet another” lawsuit—the one before them—only because that tactic failed, not because the chosen method of execution would cause him an excruciating death.⁵⁹ After holding that Mr. Bucklew’s claim failed on the merits, Justice Gorsuch concludes the opinion by reemphasizing his distaste for the litigation tactics in this case, as well as his belief that the people of Missouri, as well as Mr.

51. See *id.* at 722.

52. See *id.* at 730.

53. *Ray v. Comm’r, Ala. Dep’t of Corr.*, 915 F.3d 689, 692–93 (11th Cir. 2019).

54. *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019).

55. *Id.* (internal quotation marks omitted) (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)).

56. See *id.* at 662 (Kagan, J., dissenting from grant of application to vacate stay).

57. See Leah Litman, *Something is Rotten in States’ Execution Protocols and Capital Litigation at SCOTUS, Take Care* (Apr. 15, 2019), <https://takecareblog.com/blog/something-is-rotten-in-states-execution-protocols-and-capital-litigation-at-scotus> [<https://perma.cc/2LUY-YBDX>].

58. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1120 (2019).

59. See *id.* (“Things came to a head in 2014. With its new protocol in place and the necessary drugs now available, the State scheduled Mr. Bucklew’s execution for May 21. But 12 days before the execution Mr. Bucklew filed yet another lawsuit, the one now before us.”).

Bucklew's victims, deserve to see him put to a speedy death, regardless of what pain that death may entail.⁶⁰

While it is tempting to chalk these decisions up to a hostility toward cases that delay executions, it is hard not to see them as also representing the current Court's general disfavor of death-sentenced litigants. Indeed, it takes some denial of the humanity of these litigants to be able to disregard their pain and suffering simply because of the timing of their lawsuits. It is as though the Court is predisposed to seeing their claims as frivolous because of their sentences. While challenges to death row conditions may not delay execution, it still seems unlikely that the Court will look sympathetically on the plight of those on death row. Had *Bucklew* been issued a year, rather than a month, earlier than the decision in *Porter*, the Fourth Circuit might have viewed lawsuits from people incarcerated on death row with greater skepticism.

This section has argued that while *Porter* was legally sound and grounded in strong scientific research, it is unlikely that other circuit courts will adopt its reasoning because the plaintiffs' success in the case was so dependent on the defendants' waiver of legitimate penological interest. The growing hostility of the Supreme Court toward death row litigants will only make other circuits more hesitant to declare prolonged solitary confinement on death row unconstitutional. Moreover, if other circuits do adopt the decision, it would only increase the opportunities for defendants to appeal to the Supreme Court, which seems likely to reverse. This does not, however, mean that *Porter* cannot be used on behalf of those on death row in other circuits. To be successful, advocates for people incarcerated on death row should view *Porter* as a tool for pushing settlement and voluntary changes, rather than as a final decision on the merits that they should aim to replicate in their own circuits.

III. PORTER AS A TOOL FOR SETTLEMENT AND POLICY CHANGE

Although *Porter* is unlikely to be adopted and maintained as precedent across the country, this Part explores how the decision could still help improve the conditions of death row. Rather than thinking of a decision like *Porter* as the end goal, advocates have and should use it as evidence of the growing consensus against use of solitary confinement for those on death row. This Part examines two successful efforts to improve conditions of people on death row outside of the Fourth Circuit—one commenced prior to the *Porter* decision and one after. Both ended in voluntary settlement. Section III.A looks at a lawsuit to reform death row in Pennsylvania. Section III.B then explores similar efforts in Oklahoma that prompted reform without a lawsuit ever being filed. These case studies are a model for how advocates can achieve the outcome of *Porter* without the need for a final judgment on the merits.

60. See *id.* at 1133–34.

A. *Reforming Death Row in Pennsylvania: Reid v. Wetzel*

In January of 2018, a group of plaintiffs living on Pennsylvania's death row filed a class action lawsuit challenging their conditions under the Eighth and Fourteenth Amendments.⁶¹ Conditions on Pennsylvania's death row are similar to the conditions at issue in *Porter*. People on death row are kept alone in their cells for upwards of twenty-two hours a day.⁶² They are denied access to programming or congregate religious services.⁶³ They are only allowed outside to exercise alone in a small pen for no more than two hours. This happens only on weekdays. Like in Virginia, lights are constantly on in their cells. They are also denied contact visits.⁶⁴

Along with detailing these harsh conditions, the complaint in *Reid v. Wetzel* presents ample evidence of the growing consensus against solitary. It points to both the scientific and legal literature on the harms of solitary confinement, and notes that even the Pennsylvania Department of Corrections (DOC) acknowledges the harms of solitary confinement for incarcerated people who are not on death row.⁶⁵ Based on this, the plaintiffs argue that there is no legitimate penological interest served by housing people on death row in solitary for years on end.⁶⁶

In November 2019, six months after the decision in *Porter*, the Plaintiffs reached a settlement agreement with the Pennsylvania Department of Corrections to end solitary confinement on death row. The DOC agreed to create a general population unit for people on death row.⁶⁷ According to the agreement, people on death row will now be allowed to purchase goods from the commissary, get jobs within the prison, and have access to educational programming.⁶⁸ Their out-of-cell recreation time will increase nearly six-fold, from no more than eight hours a week to at least 42.5 hours a week.⁶⁹ The Department has also agreed to provide extra counseling for those held on death row as they transition from life in solitary to more congregate living.⁷⁰

While it is impossible to know exactly why the DOC chose to settle, it seems likely that a decision like *Porter* could only be used to the Plaintiff's advantage. The complaint was already laden with the writing on the wall that solitary cannot be justified, and a decision like *Porter* might have been

61. Class Action Complaint for Declaratory and Injunctive Relief at 1–2, *Reid v. Wetzel*, No. 1:18-cv-00176 (M.D. Pa. filed Jan. 25, 2018).

62. See *id.* at 9–10.

63. See *id.* at 11.

64. See *id.* at 10.

65. See *id.* at 22–23, 30.

66. See *id.* at 34.

67. See Settlement Agreement at 10, *Reid v. Wetzel*, No. 1:18-cv-00176 (M.D. Pa. Nov. 12, 2019).

68. See *id.* at 12–13.

69. See *id.*

70. See *id.* at 14–16.

the icing on the cake. While the DOC has maintained it was interested in making these changes prior to the lawsuit, it took them more than a year and a half to settle the case.⁷¹ Advocates in other jurisdictions might follow this example by using the settlement as a model for how death rows should be reformed and *Porter* as evidence that a court could force their hand if they do not settle voluntarily.

B. *Reforming Death Row in Oklahoma: Demand Letter on Behalf of Death-Sentenced Individuals*

On July 29, 2019, the ACLU of Oklahoma, along with other advocacy organizations, sent a demand letter to the interim head of the Oklahoma Department of Corrections asking him to reform the policy of keeping people on Oklahoma's death row in solitary confinement.⁷² The letter detailed conditions that followed the troubling pattern seen in *Porter* and *Reid*. People on Oklahoma's death row are incarcerated alone in their cells for over twenty-two hours a day. They are never allowed outside. Instead, they exercise alone for one hour five times a week in an indoor room.⁷³ Along with noting the ample research about the negative impacts these conditions have on a person's physical and mental health, the letter pointed to specific instances of self-harm and suicide on Oklahoma's death row. Disturbingly, the prison where death row is housed represents thirty-five percent of suicides in the Oklahoma prison system, despite housing only three percent of the incarcerated people.⁷⁴

The letter also discussed legal precedent that condemned prolonged solitary confinement. Since the letter was sent in July of 2019, the writers were able to cite to *Porter* for evidence of a federal court condemning solitary confinement of people on death row as a violation of the Eighth Amendment.⁷⁵ Had they sent the letter three months earlier, they would have been able to cite only precedent of how prolonged solitary confinement without due process violated the Fourteenth Amendment rights of incarcerated people who were *not* on death row.

The demand letter appears to have been a success. Two months after the letter was sent, the Oklahoma Department of Corrections announced that it would move all "qualifying" people on death row to a different wing

71. See Samantha Melamed, *Pennsylvania Will No Longer Hold Death-Row Prisoners in Endless Solitary Confinement*, *Phila. Inquirer* (Nov. 18, 2019), <https://www.inquirer.com/news/pennsylvania/pennsylvania-death-row-solitary-confinement-capital-punishment-aclu-general-population-20191118.html> [<https://perma.cc/H24V-YN4P>].

72. Letter from Megan Lambert, Gallogly Legal Fellow, ACLU of Okla., to Scott Crow, Interim Dir., Okla. Dep't of Corr. 1, 18–19 (July 29, 2019), https://www.acluok.org/sites/default/files/field_documents/demand_letter_re_conditions_for_death-sentenced_people_incarcerated_at_h-unit.pdf [<https://perma.cc/73W8-EXFW>].

73. See *id.* at 2.

74. See *id.* at 3–4.

75. See *id.* at 11–12.

of the prison within thirty days.⁷⁶ In that wing, they are allowed to exercise outside, communicate with each other, and have regular access to natural light. The Department also plans to allow contact.⁷⁷ The letter is not as comprehensive as the Pennsylvania settlement agreement, but the quick response from the Department of Corrections indicates that it had a strong effect. It is hard to imagine that citing *Porter* did not play a role in that.

A skeptic might note that there are some areas of the country where prison officials will not settle as easily on these issues, and as a result litigation like *Porter* may be necessary. That may be true, but the examples of Oklahoma and Pennsylvania should still be cause for optimism. Pennsylvania has the fifth largest death row in the country. Oklahoma is third in overall executions since the death penalty was reinstated in 1976 and has executed a greater number of people relative to its population than the two states before it in the rankings.⁷⁸ If change can happen in these states without a judicial decision, then change can happen in states that are similarly committed to the death penalty without needing a circuit court to rule on the issue.

CONCLUSION

Porter was a landmark decision for many reasons. It vindicated the rights of some of the most marginalized people in society and acknowledged the growing scientific and legal consensus against the torturous conditions of solitary confinement. Unfortunately, the current legal climate, with its deference to prison officials and hostility toward people sentenced to death, makes it unlikely that other circuits will adopt the decision. That said, it is not entirely unhelpful to advocates outside of the Fourth Circuit. As efforts in Pennsylvania and Oklahoma show, evidence of the growing consensus of the harms of solitary can move the needle without a ruling on the merits from a federal court. *Porter* is another tool in the toolbox of those who are pushing corrections officials across the country to run a more humane and just prison system.

76. Letter from Scott Crow, Interim Dir., Okla. Dep't of Corr., to Megan Lambert, Gallogly Legal Fellow, ACLU of Okla. 1 (Sept. 26, 2019), https://drive.google.com/file/d/1E2CQylw_NBdD3PzrycsyzWECzTu52mSO/view [<https://perma.cc/VN4G-DE8C>]; see also Prisoners' Rights Groups Accuse Oklahoma of Unconstitutional Death-Row Conditions, Death Penalty Info. Ctr. (Aug. 8, 2019), <https://deathpenaltyinfo.org/news/prisoners-rights-groups-accuse-oklahoma-of-unconstitutional-death-row-conditions> [<https://perma.cc/2CH3-U68X>].

77. See Crow, *supra* note 76, at 1.

78. Death Penalty Info. Ctr., Facts About the Death Penalty 2–3 (2019), <https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf> [<https://perma.cc/B84H-FR69>]; State Execution Rates (Through 2015), Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/stories/state-execution-rates> [<https://perma.cc/N3PR-7EAB>] (last visited Feb. 2, 2020).