

No. 19-5171

**In The
Supreme Court of the United States**

VICTOR HUGO SALDAÑO,
Petitioner,

v.

LORI DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE (INSTITUTIONAL DIVISION),
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**BRIEF OF THE RUTHERFORD INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF
THE PETITIONER**

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
Counsel for Amicus Curiae

QUESTION PRESENTED

Did the Fifth Circuit contravene this Court's precedent in *Buck v. Davis*, 137 S. Ct. 759 (2017) when it denied a certificate of appealability on whether the Texas future-dangerousness special issue fails on vagueness grounds as applied to Mr. Saldaño, as a statute incapable of reasoned application to him in an unbiased and principled manner?

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INTEREST OF *AMICUS CURIAE*¹

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 37-year history, including *Snyder v. Phelps*, 562 U.S. 443 (2011)², and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free from the dehumanizing effects and psychological harms associated with prolonged exposure to solitary confinement.

¹ *Amicus* certifies that counsel of record for all parties received notice at least ten days before the due date of the *Amicus's* intention to file this brief. The parties have consented to the filing of this *amicus* brief in communications on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

² *See Snyder*, 562 U.S. at 448 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

While the Petition presents an issue of considerable constitutional importance, *Amicus* writes separately to inform the Court of its concerns with the indiscriminate and prolonged use of solitary confinement in prisons across the country – including at the Polunsky Unit, where Petitioner has been held for two decades. *Amicus* submits this brief to expand upon the Petition’s description of the conditions under which Petitioner and tens of thousands of other individuals are confined.

Amicus contends that given the harms associated with the prolonged use of solitary confinement, this case is an excellent vehicle for the Court to provide badly needed guidance to lower courts across the country regarding when and in what circumstances the government may condemn individuals to prolonged terms of solitary confinement.

ARGUMENT

I. Solitary Confinement Has Such Significant Adverse Effects That Its Indiscriminate Use Violates the Eighth Amendment

The Eighth Amendment prohibits infliction of “cruel and unusual punishments.” U.S. Const. amend. VIII. One of the “essential principle[s]” of the Eighth Amendment is that “the State must respect the human attributes even of those who have committed serious crimes.” *Graham v. Florida*, 560 U.S. 48, 59 (2010). “[A] prisoner is not wholly stripped of constitutional protections when he is

imprisoned for crime” because “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.” *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Accordingly, against this backdrop and the evolving understanding of the harms associated with prolonged solitary confinement, the indiscriminate use of the practice raises Eighth Amendment concerns, even for inmates who have committed capital crimes. *See Porter v. Clarke*, 923 F.3d 348, 355 (4th Cir. 2019) (“Whether an inmate’s conditions of confinement amount to ‘cruel and unusual punishment’ must be measured against ‘the evolving standards of decency that mark the progress of a maturing society.’” (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976))).

Generally speaking, solitary confinement refers to the segregation of a prisoner alone in a cell for twenty-two to twenty-four hours a day without meaningful social interaction or positive environmental stimulation. Prisoners in solitary confinement are rarely allowed contact visits and are denied opportunities to participate in group activities or socialize. What limited recreation time is available is typically spent alone in caged-in or cement-walled areas. Such conditions remain in effect at the Polunsky Unit in Livingston, Texas, where Petitioner has been confined for two decades. Unfortunately, such conditions are not limited to those on death row in Texas. According to a 2015 report,

[t]he Texas Department of Criminal Justice (TDCJ) confines 4.4 percent of its prison population in solitary confinement. Texas locks more people in solitary-confinement cells

than twelve states house in their entire prison system. On average, prisoners remain in solitary confinement for almost four years; over one hundred Texas prisoners have spent more than twenty years in solitary confinement.

A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas, American Civil Liberties Union of Texas, at 2 (Feb. 2015), https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf.

In 1999, Texas reintroduced the practice of mandatory solitary confinement for every individual, including Petitioner, convicted of capital murder following an escape attempt at the Ellis Unit, the facility where death row inmates had previously been housed. The change represented what the president of the largest union of Texas correctional officers referred to as a “knee jerk reaction regarding the administration of Texas death row inmates.” Letter from Lance Lowry, President Local 3807 AFSCME Texas Correctional Employees (Jan. 20, 2014), *available at* <https://www.texasobserver.org/texas-prison-guard-union-calls-curtailement-solitary-confinement-death-row/>.

The housing conditions at the Polunsky Unit include “total segregation of individuals who are confined to their cells for twenty-two to twenty-four hours per day, with a complete prohibition on recreating or eating with other inmates.” *Designed to Break You: Human Rights Violations on Texas’ Death Row*, The University of Texas School of Law Human Rights Clinic, at 5 (Apr. 2017),

<https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>. Accordingly, “[e]very individual on Texas’s death row thus spends approximately 23 hours a day in complete isolation for the entire duration of their sentence, which, on average, last more than a decade.” *Id.*³ It is no surprise that the Polunsky Unit has been described as “[t]he most lethal [death row] anywhere in the democratic world.” *Id.* at 8 (citation omitted). As one report has noted, “[p]articular conditions of relevance include mandatory solitary confinement, a total ban on contact visits with both attorneys and friends and family, substandard physical and psychological health care, and a lack of access to sufficient religious services.” *Id.* at 5. *See also Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial of stay of execution) (stating that evidence demonstrated that the petitioner, an inmate held on Texas’s death row, “ha[d] developed symptoms long associated with solitary confinement, namely severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty”). Suicide is five times more likely among inmates in solitary confinement in Texas than in the general prison population and self-harm is eight times more likely than in the community outside prison. *A Solitary Failure*, at 10. It is thus no surprise that after eight years on death row at the Polunsky Unit, Petitioner “fell into an abyss of mental illness and decay” by the time he was re-sentenced in 2004. Pet’r’s Br. 13.

³ As of December 2016, 242 individuals were confined on Texas’s death row. *Designed to Break You*, at 8.

Under such conditions as those to which Petitioner was subject, inmates “soon become incapable of maintaining an adequate state of alertness and attention,” so that within days their brain scans show “abnormal pattern[s] characteristic of stupor and delirium.” Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol’y 325, 330-31 (2006). These conditions of confinement pose severe risks because “psychological stressors such as isolation can be as clinically distressing as physical torture.” Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psych. & L. 104, 104 (2010). Research shows that solitary confinement “exacerbates . . . mental illness and too often results in suicide.” Terry A. Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment’s Sake?*, The Routledge Handbook for International Crime and Justice Studies 213, 213 (Bruce A. Arrigo & Heather Y. Bersot eds. 2014).⁴

⁴ Scientific studies are virtually unanimous that solitary confinement imposes severe psychological strain. See, e.g., Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol’y at 354 (“The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning”); John F. Cockrell, *Solitary Confinement: The Law Today and the Way Forward*, 37 L. & Psychol. Rev. 211, 213 (2013) (“Given the symptoms associated with solitary confinement, the word ‘torture’ may not be an inappropriate description of the conditions imposed.”).

In fact, on average, 50% of completed inmate suicides occur in the 2-8% of prisoners housed in solitary confinement. Stuart Grassian & Terry Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, Correctional Mental Health Rep., May/June 2011 at 1, 9. A study from California noted that “46% of completed suicides occurred in single cells in administrative segregation or secure housing units and 12% occurred in mental health crisis beds,” which led the authors to conclude that “the conditions of deprivation in locked units and higher-security housing were a common stressor shared by many of the prisoners who committed suicide.” Raymond F. Patterson & Kerry Hughes, *Review of Completed Suicides in the California Department of Corrections and Rehabilitation, 1999 to 2004*, 59 *Psychiatric Services* 676, 678 (2008).⁵

Put simply, as the Fourth Circuit recently recognized, “there is *not a single published study* of solitary or supermax-like confinement in which nonvoluntary confinement lasted for longer than 10 days, where participants were unable to terminate

⁵ These concerns are particularly acute given that approximately one-third of isolated prisoners have mental illnesses. In 2012, the American Psychiatric Association issued a position statement that “[p]rolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential harm to such inmates.” Position Statement on Segregation of Prisoners with Mental Illness, American Psychiatric Association (Dec. 2012), *available at* <https://www.psychiatry.org/filelibrary/about-apa/organization-documents-policies/policies/position-2012-prisoner-segregation.pdf>

their isolation at will, *that failed to result in negative psychological effects.*” *Porter*, 923 F.3d at 356 (citing Craig Hanley, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinquency* 124, 132 (2003)). *See also* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 *U. Pa. J. Const. L.* 115, 118 (2008) (“No study of the effects of solitary . . . that lasted longer than 60 days failed to find evidence of negative psychological effects.”). None of this should come as a surprise. “[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.” *Davis v. Ayala*, 135 *S. Ct.* 2187, 2210 (2015) (Kennedy, J., concurring).

Concerns about the use of solitary confinement are not limited to academics, mental health professionals, and the courts. In fact, in January 2014, Lance Lowry, the president of the largest Texas correctional officers union, wrote a letter “calling on the Texas Department of Criminal Justice to change the death row plan to positively impact both the correctional staff and offenders on Texas death row.” Letter from Lance Lowry, *supra* at 4. Mr. Lowry noted that a “[l]ack of visual or audio stimulation result[ed] in increased psychological incidents and results in costly crisis management” and proposed that inmates on death row “be housed 2 offenders to a cell” and be provided with work assignments. *Id.*

Despite the consensus, Craig Hanley, a psychologist at UC Santa Cruz who has spent decades studying the mental effects of solitary confinement, notes that “[t]he United States, in

many ways, is an outlier in the world. We really are the only country that resorts regularly, and on a long-term basis, to this form of punitive punishment.” *The Science of Solitary Confinement*, *The Smithsonian* (Feb. 19, 2014), <https://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/>.

In sum, the continued use of solitary confinement is in direct conflict with growing concerns from this Court and courts across the country. For example, Justice Kennedy noted that “[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators,” *Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring), while the Third Circuit recently concluded that “with the abundance of medical and psychological literature, the ‘dehumanizing effect’ of solitary confinement is firmly established,” *Williams v. Sec’y of Pa. Dep’t of Corrs.*, 848 F.3d 549, 567 (3d Cir. 2017).

II. The Conditions Under Which Petitioner and Thousands of Others Are Held Are Contrary to International Law

Similar to the accepted definition in the United States, under the Istanbul Statement on the Use and Effects of Solitary Confinement, solitary confinement is defined as “the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.” *The Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf.

The Inter-American Commission on Human Rights, an organ of the Organization of American States (of which the United States is a member), has developed clear standards for solitary confinement,

stating that solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived liberty or the personnel.

Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, available at <https://www.oas.org/en/iachr/mandate/Basics/principles-best-practices-protection-persons-deprived-liberty-americas.pdf>.

Given the growing (and indisputable) scientific evidence of the harms of solitary confinement, the practice has been discontinued in many countries. In fact, “[i]nternational law also supports the proposition that very lengthy, virtually permanent conditions of harsh solitary confinement constitute either torture or cruel, inhuman, and degrading treatment.” Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. at 122. In particular, the U.N. Standard Minimum Rules for the Treatment of Prisoners reflect “the general consensus of contemporary thought and the essential elements of the most adequate systems of today [and] set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.” *United Nations*

Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. E/CN.15/2015/L.6/Rev.1, preliminary observation 1, Rule 45 (May 21, 2015).

Accordingly, the solitary confinement conditions under which Petitioner and others are held not only violate the Eighth Amendment, but are also contrary to well-established international law standards.

III. Other States and the U.S. Department of Justice Have Recognized the Dangers Associated with Solitary Confinement and Amended Their Policies Accordingly

Until 1999, Texas housed its death row inmates at the Ellis Unit, where they lived in conditions similar to those of other inmates. Those inmates were able to work, receive education, eat with fellow inmates, and recreate together. *Designed to Break You*, at 13. Following an escape attempt in November 1998, however, TDCJ moved all male inmates on death row to mandatory solitary confinement at the Polunsky Unit. “The bulk of these inmates are held in solitary confinement based purely on their capital conviction, rather than for reasons related to discipline, security or crime.” *Id.* at 19.

While Texas has regressed, other states and the federal government have acknowledged the harms associated with solitary confinement and have acted accordingly. For example, according to a report by the Association of State Correctional Administrators at The Liman Center for Public Interest at Yale Law School, “in 2018, directors around the country are revisiting their rules on restrictive housing and, in

many instances, seeking to narrow the bases for entry, to increase time out-of-cell, and to expand opportunities for sociability.” *Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes*, at 18, The Liman Center for Public Interest at Yale Law School (Oct. 2018), *available at* https://law.yale.edu/system/files/documents/pdf/Liman/asca_liman_2018_workingtolimit.pdf. The same report concludes that

many correctional systems around the United States are seeking to lower the numbers of people in their cells for 22 hours or more on average for fifteen days or more and to alter the activities and opportunities for those held in restrictive housing. ***The reports from correctional officials reflect the national and international consensus that restrictive housing can impose grave harms on individuals confined***, on staff, and on the communities to which prisoners return.

Id. at 19 (emphasis added).

Colorado and Illinois, for example, have closed their supermax prisons, while the former – unlike Texas – has stopped automatically classifying prisoners sentenced to death to solitary confinement. The Executive Director of the Colorado Department of Corrections, Rick Raemisch, noted that it had adopted a new philosophy: “You can restrain, but you don’t have to isolate.” *Id.* at 3. Mr. Raemisch went on to report that solitary confinement is completely banned at the State’s mental health prisons, and stated that “assaults, self-harm, and suicides have decreased dramatically. Staff enjoy work more because prisoners are acting in a more

positive manner. It is quiet and safer. Safer facilities mean safer communities when they are released.” *Id.* at 4. In sum, Mr. Raemisch concluded that “[w]e are back on track with our mission of public safety.” *Id.*

Similarly, Henry Atencio, the director of the Idaho Department of Correction, and Keith Yordy, the warden of the Idaho State Correctional Institution, stated that the “Idaho Department of Correction made a decision to reform restrictive housing because it was the right thing to do for public and community safety,” and noted the “many benefits” of doing so. *Id.* at 5. Among these, it “encourages safe and humane practices for the prison population. Reform permits compliance with international and national law, as the United Nations has declared that being confined in a cell 23 hours a day for more than 15 days is considered torture.” *Id.*

In North Dakota, “[s]ince 2015, the North Dakota Departments of Corrections and Rehabilitation has maintained an approximately 60-70% reduction in the population of its Administrative Segregation Unit (renamed the Behavioral Intervention Unit or BIU) at the North Dakota State Penitentiary” and noted that “[t]he prevalence of negative behaviors by residents of the unit has also decreased dramatically” *Id.* at 8-9.

Inmates on Ohio’s death row are now housed in individual cells and each unit has a common area that includes tables and recreation equipment. *Designed to Break You*, at 13. The director of the Ohio Department of Rehabilitation and Correction said the state “can clearly report success in reducing

prisoners in restrictive housing” and reported a 45% reduction in the number of prisoners in solitary confinement generally, and noted that “in reality limited privilege housing units can be just as secure as a restrictive housing unit if the type/kind of prisoner needs such levels of supervision.” *Working to Limit Restrictive Housing*, at 11, 13.

In response to a legal challenge, Virginia has started to provide more humane conditions to individuals housed on death row. In *Porter*, several inmates challenged conditions on Virginia’s death row. *See* 923 F.3d at 368 (“The challenged conditions on Virginia’s death row deprived inmates of the basic human need for ‘meaningful social interaction and positive environmental stimulation.’” (citation omitted)). While the conditions there were in many respects similar to those at the Polunsky Unit, the inmates in Virginia were actually afforded greater freedoms, including being allowed to “keep a television and compact disc player in their cell and borrow approved publications and library materials to read. Additionally, inmates could request and use wireless telephones any day of the week between 8:00 a.m. and 9:30 p.m.” *Id.* at 354. Moreover, unlike the Polunsky Unit, inmates “were allowed out of their cells to perform institutional jobs.” *Id.* Even under these more relaxed conditions, the Fourth Circuit ruled that “the district court correctly held that, under the undisputed facts, the challenged conditions of confinement on Virginia’s death row created a ‘substantial risk’ of serious psychological and emotional harm.” *Id.* at 361. Accordingly, Virginia amended its conditions on death row, including:

(1) having “contact visitation with immediate family members one day per week for one and a half hours at a time”; (2) having “noncontact visitation on weekends and holidays with immediate family members and one approved non-family member”; (3) participating in in-pod recreation with a maximum of three other offenders seven days per week for a minimum of one hour per day; (4) participating in outdoor recreation five days per week for 90 minutes per day; and (5) showering seven days per week, for up to fifteen minutes.

Id. at 364 (citing *Porter v. Clarke*, 290 F. Supp. 3d 518, 524 (E.D. Va. 2018)). Significantly, “Virginia has not experienced, to date, any notable security incidents since it relaxed the challenged conditions on death row during the pendency of this litigation.” *Id.* at 363.

Likewise, the U.S. Department of Justice (“DOJ”) issued a report in January 2016 in which it stated that “as a matter of policy, **we believe strongly this practice should be used rarely, applied fairly, and subjected to reasonable constraints.**” U.S. Dep’t of Justice, Report and Recommendations Concerning the Use of Restrictive Housing, at 1 (Jan. 2016), available at <https://www.justice.gov/archives/dag/file/815551/download>. The DOJ went on to note that “[i]t is the responsibility of all governments to ensure that this practice is used only as necessary—and never as a default solution.” *Id.* at 2. In sum, in the four years prior to the release of the report, “the total number of inmates in the Bureau [of Prison]’s restrictive housing units has declined by nearly a quarter. . . . [T]he Bureau has also developed a range of progressive alternatives to restrictive housing—

and has done so while supporting and enhancing staff safety.” *Id.*

Accordingly, these developments show that there is an evolving standard of decency with respect to the use of solitary confinement in prisons in the United States. Given the State of Texas is unwilling to change the conditions under which it confines Petitioner and others, *Amicus* respectfully submits that this case presents an ideal opportunity for the Court to provide the necessary guidance regarding the prolonged and/or indiscriminate use of solitary confinement.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, the Court should grant the Petition.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, Virginia 22911
(434) 978-3888
Counsel for Amicus Curiae