

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

CASE NO. 2:20-cv-00007

**CLASS PLAINTIFFS' MOTION FOR LEAVE TO
FILE NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to Local Civil Rule 11(c)(1), and as supplemental authority in support of Class Plaintiffs' Response to Defendants' Objections to Report and Recommendation, Oct. 2, 2020, ECF No. 75, Class Plaintiffs respectfully move for leave to file notice of the Second Circuit's decision in *Reynolds v. Quiros*, 990 F.3d 286 (2d Cir. Mar. 11, 2021) and of the District of Maryland's decision in *Skinner v. Liller*, No. 8:17-cv-3262, 2021 U.S. Dist. LEXIS 52261 (D. Md. Mar. 19, 2021). For the Court's convenience, the *Reynolds* decision is attached hereto as Exhibit A and the *Skinner* decision is attached hereto as Exhibit B.

Equal Protection: With respect to Class Plaintiffs' Equal Protection Clause claim, Defendants argue that the Magistrate Judge wrongly concluded the Complaint adequately alleges that "the vague and overbroad criteria for placement into either the IM or SM Pathways has resulted in prisoners with similar criminal and prison disciplinary histories being treated differently." Report and Recommendation ("R&R"), Sept. 4, 2020, ECF No. 70, *referring to* Compl. ¶¶ 139, 143-144; *see* Defs.' Obj. R&R at 16, Sept. 18, 2020, ECF No. 73 (arguing that

Class Plaintiffs “fail to allege specific facts showing that they were treated differently from similarly situated inmates”).

The Second Circuit’s decision in *Reynolds* upheld an Equal Protection Clause claim based on allegations similar to those in the Complaint here. *Reynolds*, 330 F.3d at 291. Reynolds alleged that the Connecticut Department of Corrections placed him in restrictive housing while allowing two other prisoners—whose criminal histories bore a “high degree of similarity” to that of Reynolds, but who engaged in more serious prison misconduct—to remain in the general population. *Id.* at 300-301. Affirming summary judgment in Reynolds’ favor, the Second Circuit concluded that he was similarly situated to the other two prisoners and that the Department offered no rational basis “as to why Reynolds [was] treated differently.” *Id.* at 301. As the R&R found, Class Plaintiffs adequately allege that VDOC policy allows staff to place some prisoners on the IM Pathway (i.e., permanent solitary confinement) even though they have criminal and disciplinary records that are similar to prisoners in the general population or SM Pathway (R&R at 30, 75), and that this discriminatory treatment serves no “legitimate penological purpose” (*id.* at 75-76). *Reynolds* shows that the Magistrate Judge was right to recommend denying Defendants’ motion to dismiss the Equal Protection Clause claim.

Eighth Amendment: Defendants argue that the R&R wrongly concluded that Class Plaintiffs have adequately stated a claim “that the conditions of [their] indefinite and long-term solitary confinement has violated their right to be free from cruel and unusual punishment under the Eighth Amendment.” R&R at 76; *see* Defs.’ Obj. R&R 20 (arguing that the Magistrate Judge “erred in finding *Porter v. Clarke* . . . dispositive”). Put simply, Defendants contend that because Class Plaintiffs’ conditions of confinement are not identical to those alleged in the Fourth Circuit’s 2019 published decision in *Porter v. Clarke*, the R&R should have instead applied the Fourth

Circuit's 1999 opinion in *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999). Defs.' Obj. R&R 19. However, in *Skinner*, the U.S. District Court for the District of Maryland found that a prisoner's alleged conditions of confinement were sufficient to state an Eighth Amendment claim under *Porter* and were "comparable" even though "certain conditions in *Porter* . . . may have been more restrictive." *Skinner*, 2021 U.S. Dist. LEXIS 52261 at *21.

Skinner alleged that "he was subjected to 'extreme isolation' and 'sensory deprivation' because he received only one hour of recreation, five days a week," "only three 15-minute showers per week, was patted down and restrained whenever he was allowed to exit his cell, and remained in his cell 24 hours per day on days without recreation or a shower." *Id.* at *8. The plaintiff alleged that these conditions resulted in "adverse mental health consequences, including significant anxiety, 'hyper response to external stimuli,' increased perceptual distortions, insomnia, and self-destructive outbursts." *Id.* at *9. In fact, Class Plaintiffs' alleged conditions of confinement and resulting harms are more severe than those alleged in *Skinner* and *Porter*. Compl. ¶¶ 94-95, 108-09, 197-98, 245. Accordingly, *Skinner* demonstrates that Defendants' objections to the R&R must fail.

Dated: June 11, 2021

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2021, I electronically filed the foregoing Motion for Leave to File Notice of Supplemental Authority with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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