15-35770

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISABILITY RIGHTS MONTANA, INC., on behalf of all prisoners with serious mental illness confined to the Montana State Prison
Plaintiff-Appellant,

v.

MIKE BATISTA, in his official capacity as Director of the Montana Department of Corrections, and LEROY KIRKEGARD, in his official capacity as Warden of the Montana State Prison,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Montana
(No. 2:15-cv-00022, Honorable Sam E. Haddon)

MOTION FOR LEAVE OF COURT TO FILE AN AMICUS BRIEF BY THE NATIONAL DISABILITY RIGHTS NETWORK AND TEN JURISDICTIONS' PROTECTION AND ADVOCACY AGENCIES IN SUPPORT OF APPELLANT DISABILITY RIGHTS MONTANA

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RULE 26.1 COMPLIANCE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, the National Disability Rights Network, Inc., states that it is a corporation organized under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company.

Each of the eight state and two territorial Protection and Advocacy organizations is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code, with no parent organization and no stock owned by a publicly owned company.

CIRCUIT RULE 29-3 COMPLIANCE STATEMENT

The National Disability Rights, Inc., states that it endeavored, before filing this motion, to obtain the consent of all parties to the filing of the proposed brief. Plaintiff-Appellant Disability Rights Montana consents to the filing of the proposed brief. Defendants-Appellees Mike Batista and Leroy Kirkegard oppose the filing of the proposed brief.

Pursuant to Federal Rule of Appellate Procedure 29(a)–(b), Amici National Disability Rights Network ("NDRN") and the Protection and Advocacy agencies ("P&As") of ten states and territories[1] hereby file this motion for an order authorizing them to file an amicus brief in support of Appellant Disability Rights Montana. A copy of Amici's proposed brief is attached as Exhibit A.

The National Disability Rights Network ("NDRN"), is the non-profit membership association of Protection and Advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A System. P&A agencies are authorized pursuant to various federal statutes to provide legal representation and related advocacy services to, and investigate abuse and neglect of, individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and

[1] These state and territory P&As are: Arizona Center for Disability Law, Disability Law Center of Alaska, Disability Rights California, DisAbility Rights Idaho, Disability Rights Oregon, Disability Rights Washington, Guam Legal Services Corporation – Disability Law Center, Hawaii Disability Rights Center, Nevada Disability Advocacy and Law Center, and Northern Marianas Protection and Advocacy Systems, Inc. Together, they comprise all of the state P&As in the Ninth Circuit except for Appellant, Disability Rights Montana.

are able to fully participate by exercising choice and self-determination, including the opportunity to secure and maintain competitive, integrated employment.

Each of the ten state and territory P&As on whose behalf this motion is filed is an independent non-profit designated under federal law as their respective state's P&A agency.

Amici's proposed brief will provide this Court with research-based findings regarding the risk of serious harms that prisoners with serious mental illness face when held in solitary confinement. It will describe the extensive investigations that experts in medicine, psychology, and the social sciences have conducted on this topic. The proposed brief will also discuss the statements of medical and professional organizations, federal courts, and executive officials and agencies, recognizing the risks that arise when prisoners with serious mental illness are held in solitary confinement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated: March 4, 2016

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BRIEF OF AMICI CURIAE NATIONAL DISABILITY RIGHTS NETWORK AND TEN JURISDICTIONS' PROTECTION AND ADVOCACY AGENCIES IN SUPPORT OF APPELLANT DISABILITY RIGHTS MONTANA

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DISCLOSURE STATEMENT

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IDENTITY AND INTEREST OF AMICI[1]

The National Disability Rights Network ("NDRN") is the non-profit membership association of Protection and Advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A System. P&A agencies are authorized pursuant to various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination, including the opportunity to secure and maintain competitive, integrated employment.

This brief is also filed on behalf of ten additional organizations: Arizona Center for Disability Law, Disability Law Center of Alaska, Disability Rights California, DisAbility Rights Idaho, Disability Rights Oregon, Disability Rights

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Washington, Guam Legal Services Corporation – Disability Law Center, Hawaii Disability Rights Center, Nevada Disability Advocacy and Law Center, and Northern Marianas Protection and Advocacy Systems, Inc. Each of these is an independent non-profit designated under federal law as the state's P&A agency.

SUMMARY OF ARGUMENT

I. Research shows that prisoners held in solitary confinement are at risk of serious, often long-lasting harm, including suicide. This risk is especially severe for individuals with serious mental illness.

A. Solitary confinement is the practice of confining an individual in a cell for 22 to 24 hours per day; it is characterized by extreme social isolation and often accompanied by limited environmental stimuli. The Montana Department of Corrections has a practice of holding prisoners with serious mental illness in solitary confinement.

B. Research from wide-ranging fields demonstrates that social isolation and sensory deprivation—the hallmarks of solitary confinement—can cause or exacerbate a range of serious psychological and physiological harms. Researchers have observed a host of psychological symptoms among prisoners subjected to solitary confinement: anxiety, panic, insomnia, chronic depression, paranoia, hallucinations, confusion, memory loss, cognitive difficulties,

hypersensitivity, and perceptual distortions. Researchers have also observed physical symptoms including headaches, chronic fatigue, heart palpitations, and reduced electrical activity in the brain "characteristic of stupor and delirium."

Solitary confinement has been linked to an increased risk of suicide, both during and following the period of incarceration. One analysis found that roughly half of all prison suicides took place among the 2-8% of prisoners housed in solitary confinement. Solitary confinement also exacerbates the risk of other self-harming behaviors, including suicide attempts, suicidal ideation, and self-mutilation.

Prisoners with serious mental illness are particularly vulnerable to the harms of solitary confinement. Not only are mental health services curtailed in these settings but, perversely, a disproportionate number of prisoners with mental illness make up the population in solitary confinement. Many prisoners with serious mental illness are at heightened risk of clinical deterioration.

II. In recognition of these harms, the use of solitary confinement for those with serious mental illness has been widely condemned.

A. Leading national medical, mental health, legal, and human-rights organizations formally oppose prolonged solitary confinement, particularly for prisoners with mental illness.

B. Federal and state courts, along with the U.S. Department of Justice, have consistently found that holding prisoners with serious mental illness in prolonged solitary confinement can violate the Eighth Amendment.

C. Recent settlements concerning practices in Indiana, Arizona, Illinois, and Massachusetts have led to significant limits on the use of solitary confinement for prisoners with serious mental illness.

ARGUMENT

I. The Physical and Social Isolation of Solitary Confinement Risks Inflicting Severe Psychological Harm, Especially on Prisoners with Serious Mental Illness

Prisoners held in solitary confinement in Montana are subjected to conditions that are widely understood to risk causing severe, long-lasting harm. Social isolation and sensory deprivation—the hallmarks of solitary confinement—can cause or exacerbate a range of serious psychological and physiological conditions. For those with serious mental illness, the risks are especially acute.

A. Solitary Confinement, as Used in the Housing of Prisoners with Serious Mental Illness in the Montana State Prison, Imposes Social Isolation and Sensory Deprivation

While the specific terminology and conditions may differ across jurisdictions, the term "solitary confinement" describes a specific set of conditions. The U.S. Department of Justice ("DOJ") has defined solitary confinement as "the state of being confined to one's cell for approximately 22 to 24 hours per day or more, alone or with other prisoners, that limits contact with others."[2] Courts have defined solitary confinement similarly.[3]

Experts in medicine, psychology, and the social sciences have also used similar definitions. They describe conditions in which prisoners rarely leave their cells and in which "socially and psychologically meaningful contact is reduced to a minimum."[4] Even when limited activity or interaction may be possible—such as shouting between cells, or being escorted to an exercise area by a guard— "the

[2] Letter from Thomas E. Perez, U.S. Dep't of Justice & David J. Hickton, U.S. Att'y, W.D. Penn., to Governor Tom Corbett ("Perez Letter") at 5 (May 31, 2013), http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf.

[3] *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (deciding a due process claim involving "solitary confinement" for 23 hours each day); *Hinojosa v. Davey*, 803 F.3d 412, 415 (9th Cir. 2015) (describing a facility "in which prisoners are kept in solitary confinement for over 22 hours a day").

[4] "[I]ndividuals . . . are confined in their cells for around twenty-three hours each day (typically twenty-two to twenty-four hours)." Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 448–49 (2006).

available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are not typically empathetic."[5]

Individuals with serious mental illness are routinely held in solitary confinement in the Montana State Prison (the "State Prison"). An adult has serious mental illness, according to the federal government's definition, if

> currently or at any time during the past year, [she has] a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet diagnostic criteria specified within the Diagnostic and Statistical Manual of Mental Disorders . . . that has resulted in functional impairment which substantially interferes with or limits one or more major life activities. . . . All of these disorders have episodic, recurrent, or persistent features; however, they vary in terms of severity and disabling effects.

58 Fed. Reg. 29,422, 29,425 (May 20, 1993).[6] Though Montana's prisoners with serious mental illness are housed in several different areas of the prison, each with a different label, several of those units share essential qualities: prisoners are locked alone in a cell for 22 to 24 hours every day and their opportunities for human contact are severely curtailed.

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[5] *Id.*

[6] While the federal definition refers to the version of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") that was used in 1993—DSM-III-R—professionals now use the diagnostic criteria in the most recent version: DSM 5. *See* NIH, *Serious Mental Illness ("SMI") Among U.S. Adults*, http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (last visited Mar. 2, 2016) (referring to the criteria in DSM IV, which was in use until 2012).

Within the Montana Department of Corrections ("MDOC"), disciplinary segregation is known as "The Hole," Compl., R. 1, ¶ 55, and represents a particularly extreme form of solitary confinement. Prisoners, including some with serious mental illness, remain alone in their cells for 24 hours a day. *Id.* They have no recreation, no visitors, no phone access, no access to religious services, and no treatment programs. *Id.* They may leave their cells only for three ten-minute showers each week. *Id.* The windows of some cells in The Hole have been blacked out. *Id.* MDOC limits some prisoners' stimulation even further: in addition to complete isolation, those on "behavior management plans" have no clothes other than a suicide smock, no possessions, and no running water. *Id.* ¶ 61.

Even outside of The Hole, individuals with serious mental illness are housed in solitary confinement. In other areas, prisoners are locked in single cells for 23 to 24 hours a day. *Id.* ¶¶ 52–54. Outdoor exercise time is limited to one hour per day, five days a week, alone in a small caged area. *Id.* In inclement weather or if a prisoner is ill, this minimal out-of-cell time is often forfeited. *Id.* Even in the least restrictive form of administrative segregation in the State Prison, prisoners receive no exercise time two days per week; on the other five days, these individuals get an hour alone in the outdoor cage—again, subject to cancellation—and an hour alone in a dayroom adjoining their cells. *Id.* ¶ 52. Mental-health treatment is limited to a

weekly visit from a mental-health technician, generally lasting a few minutes or less, at the cell door rather than in private. *Id.* at ¶ 51.

These various forms of imprisonment, collectively termed "Locked Housing," *id.* ¶ 45, all fall squarely within the definition of solitary confinement—and all impose risks of severe, long-term harm to those with serious mental illness.

B. The Devastating Cognitive and Mental-Health Effects of Solitary Confinement Are Well Documented in Medical and Social-Science Research

In 1890, the U.S. Supreme Court recognized the "terror and peculiar mark of infamy" of solitary confinement, even for prisoners sentenced to death: "A considerable number of the prisoners fell, after even a short [period of solitary] confinement, into a semi-fatuous condition . . . . [O]thers became violently insane; others, still, committed suicide." *In re Medley*, 134 U.S. 160, 170, 168 (1890). In recent decades, medical and social-science researchers have endeavored to confirm these observations, and have demonstrated that solitary confinement can lead to or exacerbate mental illness and psychological deterioration.

1. Solitary Confinement Has Been Shown to Cause a Host of Adverse Physiological and Psychological Symptoms

Experts have repeatedly observed long-lasting psychological harms among prisoners held in solitary confinement,[7] including a "constellation of symptoms

[7] *See* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinq., 124, 130 (2003).

occurring together and with a characteristic course over time."[8] Conditions associated with solitary confinement can be broad-ranging and severe.[9] Anxiety, panic, and insomnia are widely reported.[10] Many prisoners in solitary confinement suffer chronic depression, paranoia, hallucinations, confusion, memory loss, cognitive difficulties, hypersensitivity, and perceptual distortions.[11] A significant number experience irrational rage and violent fantasies.[12] Solitary confinement is also linked to a number of physical symptoms, including persistent headaches, chronic fatigue, and heart palpitations.[13]

The physiological effects of solitary confinement include observable changes in brain activity. Consistent with studies examining the impact of solitary

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[8] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y 325, 337 (2006); *see also id.* at 338 ("By now the potentially catastrophic effects of restricted environmental stimulation have been the subject of voluminous medical literature."); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 Denver U. L. Rev. 1, 36 (2012) ("[M]odern case studies and descriptive accounts provided by mental health staff employed at modern supermax settings have consistently reported the same adverse symptoms.").

[9] *See generally* Jeffrey Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry L. 104 (2010).

[10] Haney, *Mental Health Issues*, 49 Crime & Delinq. at 127; Grassian, *Psychiatric Effects*, 22 Wash U. J. L. & Pol'y at 352–53.

[11] Haney, *Mental Health Issues*, 49 Crime & Delinq. at 127.

[12] *Id.*

[13] *Id.*

confinement on prisoners of war,[14] American researchers have observed a decline in brain function after only seven days in solitary confinement, as measured by an electroencephalography ("EEG") curve.[15] EEG records spontaneous electrical activity in the brain and is used to diagnose a number of brain conditions. It tracks the form of brain waves over time, as well as responses to stimuli such as light.[16] A seminal study demonstrated that "the EEG frequency decreased most markedly" after just four days, and prisoners' brain activity started to show signs of "adaptation to isolation."[17] In other words, the study indicated that brain activity quickly shuts down to cope with the conditions, making the prisoners, as a later

[14] *See, e.g.*, A. Vrca et al., *Visual Evoked Potentials in Relation to Factors of Imprisonment in Detention Camps*, 109 Int. J. Legal Med. 114, 114–15 (1996) (finding solitary confinement to be a significant factor affecting brain activity among prisoners of war released from detention camps in the former Yugoslavia, with greater observed impact than electro-shock torture).

[15] *See* Grassian, *Pyschiatric Effects*, 22 Wash. U. J. L. & Pol'y at 331 ("[E]ven a few days of solitary confinement will predictably shift the electronencephalogram (EEG) pattern."). *See also* Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. Abnormal Psychol. 54, 57–58 (1972) (reporting that "a slowing in EEG frequency occurs during solitary confinement of prisoners").

[16] *See Health Library: Electronencephalogram (EEG)*, Johns Hopkins Medicine, http://www.hopkinsmedicine.org/healthlibrary/test_procedures/neurological/electroencephalogram_eeg_92,P07655/ (last visited Mar. 3, 2016).

[17] Gendreau, *Changes in EEG Alpha Frequency*, 79 J. Abnormal Psychol. at 57.

study reported, "incapable of maintaining an adequate state of alertness and attention to the environment."[18]

Indeed, the changes observed in the brain function of persons in solitary confinement are "characteristic of stupor and delirium."[19] A slowing of brain rhythm is associated with delirium, which combines both a disturbance of consciousness (reduced environmental awareness) and a decline in cognition or perception.[20] Stupor, also detectable by EEG, describes a state in which "only vigorous and repeated stimuli will arouse the individual, and when left undisturbed, the patient will immediately lapse back to the unresponsive state."[21]

The psychological trauma, physical symptoms, and depressed functioning associated with solitary confinement are not fleeting, but tend to stagnate or worsen as prisoners remain isolated,[22] and can persist "long after the release from

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[18] Grassian, *Pyschiatric Effects*, 22 Wash. U. J. L. & Pol'y at 330.

[19] *Id.* at 331.

[20] *See* Ondria C. Gleason, M.D., *Delirium*, 67 Am. Family Physician 1027, 1029–30 (Mar 1, 2003).

[21] Suzie C. Tindall, *Level of Consciousness*, *in* Clinical Methods (H. Kenneth Walker, et al. eds., 1990).

[22] *See* Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. Times (Aug. 3, 2015), http://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html?_r=0 (describing psychologist and corrections expert Craig Haney's observations from multiple visits to California's Pelican Bay supermax prison over some 20 years); *see also* Haney, *Mental Health Issues*, 49 Crime & Delinq. at 132–37.

isolation."[23] As a report by the U.N. Secretary-General recently observed, "lasting personality changes often leave individuals formerly held in solitary confinement socially impoverished and withdrawn, subtly angry, and fearful when forced into social interaction."[24] Predictably, this inhibits these individuals' reintroduction into society.[25]

Experts have observed that these harms are "strikingly consistent" among prisoners.[26] As a group of psychologists and psychiatrists told the U.S. Supreme Court in a 2005 amicus brief, "no study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects."[27]

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[23] U.N. Secretary-General, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("U.N. Interim Report") at 18, U.N. Doc. A/66/268 (Aug. 5, 2011).

[24] *Id.*

[25] *Id.*; Jesenia Pizarro & Vanja Stenius, *Supermax Prisons – Their Rise, Current Practices, and Effect on Inmates*, 84 Prison J. 248, 261 (2004) ("It is probable that inmates who have spent prolonged periods in solitary confinement have a more difficult time adjusting to life outside of prison, especially given the potential for the development or exacerbation of psychological problems.").

[26] Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1450 (1983).

[27] Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209, No. 04-495, 2005 WL 539137, at *4 (Mar. 3, 2005). One report, published in 2010 by the Colorado Department of Corrections and based on a study of one of the Department's own facilities, concluded that, contrary to the results of myriad other studies, long-term administrative segregation was not "extremely detrimental to

Similar effects have been recognized outside the prison context. U.S. Senator John McCain, who endured beatings, extreme medical neglect, and the intentional re-breaking of his arm as a prisoner of war in Vietnam, described solitary confinement as the worst torture he experienced: "[Solitary] crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."[28] And a 2011 report for NASA detailed the "prolonged stress consequences" of long-term sensory deprivation.[29]

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inmates." Maureen L. O'Keefe et al., *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, Colorado Dep't of Corrections (2010), http://solitarywatch.com/wp-content/uploads/2010/11/adseg-report-final1.pdf. This report has been widely criticized for its flawed methodology. For example, Dr. Stuart Grassian found that the self-report rating scales used in the study had not been validated as a means of assessing psychiatric status in prisoners, and that the authors of the study ignored data that contradicted their conclusions. *See* Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement* (2010). Of equal importance, in the years since the study was published, the Colorado Department of Corrections has become a leader in reforming and severely limiting solitary confinement, including dramatically "reduc[ing] the number of major mentally ill in [the state's] administrative segregation area" from fifty to four individuals as of February 2014. *See* Testimony of Rick Raemisch, Executive Director, Colorado Dept. of Corrections, Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences, Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights (Feb. 25, 2014).

[28] John McCain, *Faith of My Fathers: A Family Memoir* 206 (2000); *see also* Smith, *The Effects of Solitary Confinement* , 34 Crime & Just. at 498 (describing studies documenting feelings of overwhelming "uncertainty" among soldiers returning from Vietnam).

[29] *See* Diana Arias & Christian Otto, *Defining the Scope of Sensory Deprivation for Long Duration Space Missions NASA*, at 6, 11 (2011), http://www.medirelax.com/v2/wp-content/uploads/2013/11/F.-Scope-of-Sensory-

2. Prisoners Held in Solitary Confinement, Especially Those with Mental Illness, Are at Increased Risk of Suicide

The psychological toll of solitary confinement has been linked to an increased risk of suicide during incarceration, and sometimes after release. Studies have found this correlation across the country, with one analysis finding that roughly half of all prison suicides took place among the 2-8% of prisoners housed in solitary confinement.[30] Observed suicide rates in some states have been significantly higher; in 2004, for example, 73% of all suicides in California prisons occurred in isolation units.[31]

Solitary confinement also elevates the risk of other self-harming behaviors, including suicide attempts, suicidal ideation, and self-mutilation. A 2014 study published in the American Journal of Public Health found that, "[a]lthough only 7.3% of admissions [to the New York City jail system] included any solitary confinement, 53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-

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Deprivation-for-Long-Duration-Space-Missions.pdf (finding that the effects of isolation can lead to "detrimental neurological changes in the human brain [and] manifest in maladaptive behaviors and disorders," a host of physical harms, reduced brain activity and functioning).

[30] *See* Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 Just. Q. 232 (2006); Bruce Way et al., *Factors Related to Suicide in New York State Prisons*, 28 Int'l J. of L. & Psychiatry 207 (2005); Raymond F. Patterson & Kerry Hughes, *Review of Completed Suicides in the California Department of Corrections and Rehabilitation, 1999 to 2004*, 59 Psychiatric Servs. 676 (2008).

[31] *See* Expert Report of Craig Haney 45-46 n.119, *Coleman v. Schwarzenegger*, No. Civ S 90-0520 LKK-JFM P, 2008 WL 8697735 (ED. Cal 2010).

harm occurred within this group."[32] Detainees in solitary confinement were also nearly seven times more likely to harm themselves than those in general population.[33] Experts have observed that it "is not unusual for prisoners in solitary confinement to swallow razors, smash their heads into walls, compulsively cut their flesh, and try to hang themselves."[34]

Correctional mental-health experts have observed that this disproportionate risk of self-harm among those in solitary confinement likely owes to the fact that solitary confinement places the most vulnerable prisoners at the gravest risk—that "the more psychologically troubled inmates have less control over their behavior, and the system's response to their unacceptable behaviors is to punish them with isolation. The troubled inmate then psychologically deteriorates in segregation."[35]

3. Prisoners with Serious Mental Illness Are Particularly Vulnerable to These Physiological and Psychological Harms

Indeed, the many risks inherent in solitary confinement, including the risk of suicide, are especially pronounced for prisoners with serious mental illness. As an initial matter, experts have repeatedly observed that prisoners with mental illness

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[32] Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 442, 442 (2014).

[33] *See id.* at 442–47 (2014).

[34] Brief of Amici Curiae Correctional Experts in Support of Appellee 27, *Prieto v. Clarke*, Nos. 13-8021, 14-6226 (4th Cir. June 4, 2014), https://www.aclu.org/legal-document/prieto-v-clarke-et-al-amicus-brief.

[35] Grassian & Kupers, *The Colorado Study*, 13 Correctional Mental Health Rep. at 9.

tend to be placed in solitary confinement at higher rates than those with no diagnosis or symptoms of mental illness. Often, placement in solitary confinement is the result of behavior that is symptomatic of a prisoner's illness. As the Correctional Association of New York found, "mentally disordered inmates have greater difficulty conforming to strict correctional regimens . . . and are more likely to accumulate tickets and end up in disciplinary confinement."[36] The Bureau of Justice Statistics has reported that a significantly higher percentage of state prisoners with mental illness had been charged with a rule violation compared to those without a mental illness.[37] These data suggest that prisoners in need of better psychiatric care are being punished and deteriorating further due to behavior they cannot control.

Once in solitary confinement, prisoners with mental illness are particularly vulnerable. As correctional psychiatric experts explained in a 2006 report:

> There is general consensus among clinicians that placement of inmates with serious mental illnesses in [long-term segregation] is contraindicated because many of these inmates' psychiatric conditions will clinically deteriorate or not improve. In other words, many inmates with serious mental illnesses are harmed

[36] Correctional Ass'n of New York, *Mental Health in the House of Corrections: A Study of Mental Health Care in New York State Prisons* 48 (2004), http://www.correctionalassociation.org/wp-content/uploads/2004/06/Mental-Health.pdf.

[37] *See* Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics: U.S. Department of Justice (July 1999).

> when placed in a supermax setting, especially if they are not given access to necessary psychological and psychiatric care.[38]

Recognizing these findings, in 2013, the Society of Correctional Physicians concluded that individuals with certain diagnoses, including depression, were especially vulnerable to the psychological harms associated with solitary confinement.[39] Other physical and psychological risks are also heightened for prisoners with mental illness who are held in solitary confinement. For example, one report on conditions in Indiana supermax prisons notes that many prisoners with mental illness are particularly vulnerable to abuse.[40] Additionally, court cases and case studies have brought to light the excessive use of force by facility staff against prisoners in solitary confinement.[41]

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[38] Jeffrey Metzner, MD, & Joel Dvoskin, PhD, ABPP, *An Overview of Correctional Psychiatry*, 29 Psychiatric Clinics of N. Am. 761, 763 (2006).

[39] *Position Statement on Restricted Housing of Mentally Ill Inmates*, Am. College of Correctional Physicians, http://societyofcorrectionalphysicians.org/resources/position-statements/restricted-housing-of-mentally-ill-inmates (last visited Mar. 3, 2016).

[40] *See* Jamie Fellner, *Cold Storage: Super-Maximum Security Confinement in Indiana, Human Rights Watch* (1997), https://www.hrw.org/reports/1997/usind/.

[41] *See, e.g.*, *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010) (affirming a judgment for plaintiffs in an action alleging that the overuse of chemical agents on prisoners with mental illness constituted an Eighth Amendment violation); Order, *Coleman v. Brown*, No. 2:90-cv-00520-LKK-DAD (E.D. Cal. Apr. 10, 2014), ECF No. 5131 (ordering reforms in California prisons where extensive video evidence documented officers using pepper spray on prisoners with mental illness who had committed minor rule violations such as refusing to come to their cell doors); Caroline Isaacs & Matthew Lowen, *Buried Alive: Solitary Confinement In Arizona's Prisons And Jails* 14 (May 2007). Moreover, courts have repeatedly held

II. Medical and Professional Organizations, State and Federal Courts, and Federal Leaders and Agencies Have Recognized the Harms of Solitary Confinement for Prisoners with Serious Mental Illness

The psychological harms of solitary confinement are widely recognized by the medical, correctional, and legal institutions that have confronted these harms in practice.

A. Professional Medical, Mental-Health, Corrections, and Legal Organizations, as Well as the International Human-Rights Community, Have Issued Formal Policy Statements Opposing Long-Term Solitary Confinement, Especially for Prisoners with Mental Illness

Supported by the literature and first-hand clinical experiences, leading national medical and mental-health organizations officially oppose long-term solitary confinement for prisoners with mental illness. In 2013, the Society of Correctional Physicians issued a position statement against "prolonged segregation of inmates with serious mental illness, with rare exceptions," and recommended active mental-health housing and programming, not disciplinary segregation, as "appropriate" responses to infractions by prisoners with mental illness.[42]

The American Psychiatric Association likewise calls on correctional facilities to "maximize access to clinically indicated programming and recreation" and to avoid "prolonged segregation"—longer than three to four weeks—for adult

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that holding prisoners with serious mental illness in solitary confinement can rise to the level of an Eighth Amendment violation. *See infra* note 62.

[42] *Position Statement on Restricted Housing of Mentally Ill Inmates*, Am. College of Correctional Physicians.

prisoners with serious mental illness "due to the potential for harm."[43] The National Alliance on Mental Illness ("NAMI") also opposes the use of solitary confinement for adolescents with mental illness.[44]

Moreover, the American Public Health Association ("APHA") calls for certain vulnerable prisoners, including those with serious mental illness, to be categorically excluded from solitary confinement.[45] The APHA expresses particular concern for these prisoners because "[i]n some cases [they] are punished with solitary for behavior that is a product of serious mental illness."[46] The APHA also outlines many public-health harms of solitary confinement—noting, for example, that clinical consultations at the cell door are inadequate, access to inpatient psychiatric treatment and group therapy are severely restricted, and life-

[43] American Psychiatric Ass'n, *Position Statement on Segregation of Prisoners with Mental Illness*, http://library.psych.org/dbtw-wpd/exec/dbtwpub.dll?TN=PolicyFinder&SN=All&RF=Short&DF=Long&QY=Findall&AC=QBE_QUERY (last visited Mar. 3, 2016).

[44] *See, e.g.*, *Juvenile Justice*, National Alliance on Mental Illness http://www.nami.org/Learn-More/Mental-Health-Public-Policy/Juvenile-Justice (last visited Feb. 11, 2016).

[45] *See* American Public Health Ass'n, *Solitary Confinement as a Public Health Issue* (2013), http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue.

[46] *Id.*

threatening medical or psychiatric emergencies are more likely to go undetected.[47] These barriers create "substantial risks that [prisoner] health will deteriorate."[48]

Consensus in opposition to placing prisoners with serious mental illness in solitary confinement also extends to other professionals. The American Bar Association's Criminal Justice Standards on the Treatment of Prisoners, approved in 2010, call on correctional facilities to refrain from housing prisoners with serious mental illness "in settings that may exacerbate their mental illness or suicide risk, particularly in settings involving sensory deprivation or isolation."[49] The Standards also generally advocate against "[c]onditions of extreme isolation . . . regardless of the reasons for a prisoner's separation from the general population."[50]

In a 2006 report, the Commission on Safety and Abuse in America's Prisons, a 20-member body that includes prison administrators, prisoner-rights advocates, and members of the religious community, called for an end to conditions of isolation in U.S. prisons and for the protection of prisoners with

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[47] *Id.*

[48] *Id.*

[49] American Bar Ass'n, *Treatment of Prisoners*, Standard 23-6.11 Services for prisoners with mental disabilities (3d ed. 2010), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf.

[50] *Id.* at Standard 23-3.8 Segregated housing (2010).

mental illness by housing them in secure therapeutic units.[51] If unavoidable, the Commission recommended making segregation a last resort, with tightened admission criteria, and for as brief a period as possible.[52]

Various United Nations representatives and entities also condemn the use of solitary confinement for prisoners with mental illness. In 2011, the U.N. Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment issued a statement opposing solitary confinement as a possible act of torture under Article 16 of the Convention Against Torture, recommending the abolition of solitary confinement of any duration for persons with mental disabilities, and urging states to develop alternative disciplinary sanctions to replace solitary confinement.[53] In 2013, the Special Rapporteur specifically called on the United States to take "concrete steps to eliminate the use of prolonged and indefinite solitary confinement in U.S. prisons and detention facilities."[54] The U.N. Human Rights Committee, the monitoring

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[51] *See* John J. Gibbons, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* 52-61(2006), http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf.

[52] *Id.*

[53] *See* U.N. Interim Report.

[54] *US: Four decades in solitary confinement can only be described as torture – UN rights expert*, U.N. Human Rights Office of the High Commissioner (Oct. 7, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews. aspx?NewsID=13832.

body for the U.S.-ratified International Covenant on Civil and Political Rights ("ICCPR"), has long held the same position, recommending that the U.S. "impose strict limits on the use of solitary confinement, both pre-trial and following conviction, in the federal system [and] nationwide, and abolish the practice in respect of anyone under 18 and prisoners with serious mental illness."[55]

B. Justices of the Supreme Court, Representatives of the U.S. Department of Justice, and the President of the United States Have Recognized the Grave Harms of Solitary Confinement

Members of the judiciary—including the Supreme Court—in addition to DOJ and the President of the United States, have voiced serious concerns about solitary confinement, particularly as it harms mental health.

Justices Kennedy and Breyer both recently criticized the overuse of solitary confinement in American prisons, citing the mental-health risks and calling for an evaluation. In his concurrence in *Davis v. Ayala*, 135 S. Ct. 2187 (2015), Justice Kennedy recounted the plight of the estimated 25,000 U.S. prisoners currently serving their time in long-term solitary confinement—likely inside "a windowless cell no larger than a typical parking spot for 23 hours a day." *Id.* at 2208 (Kennedy, J. concurring). Based on his review of the literature, Justice Kennedy concluded that solitary confinement promises to "bring you to the edge of madness, perhaps

[55] Int'l Covenant on Civil and Political Rights, *Concluding observations on the fourth periodic report of the United States of America*, Adopted by the Committee at its 110th Session (March 10-28, 2014), CCPR/C/USA/CO/4 (April 23, 2014), http://www.state.gov/documents/organization/235641.pdf.

to madness itself," and tasked the legal and policymaking community with giving "[needed] consideration [to] the many issues solitary confinement presents" and the "terrible price" of "[y]ears on end of near-total isolation." *Id.* at 2208, 2210.

Similarly, in his dissenting opinion in *Glossip v. Gross*, Justice Breyer called the effects of solitary confinement "dehumanizing" and noted, citing studies by prominent correctional mental-health experts, that "solitary confinement produces numerous deleterious harms [after] even a few days." 135 S. Ct. 2726, 2765 (2015)

In 2016, DOJ released a report making a series of recommendations to the U.S. Bureau of Prisons ("BOP") relating to prisoners with serious mental illness aimed at limiting, to the point of eliminating, solitary confinement for such prisoners due to its potential for causing "serious, long-lasting harm."[56] These recommendations included expanding BOP's "network of residential mental health treatment programs . . . with the goal of building sufficient capacity to divert inmates with [serious mental illness] from all forms of restrictive housing . . . whenever it is clinically appropriate and feasible to do so" and increasing the regularity of mental health screenings to identify prisoners with serious mental illness.[57]

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[56] U.S. Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* 1 (Jan. 2016), http://www.justice.gov/restrictivehousing.

[57] *Id.* at 113–14.

In 2016, President Barack Obama announced a ban on solitary confinement for federal juvenile offenders and adopted a plan to reform the use of solitary confinement in all federal correctional facilities because of its "potential to lead to devastating, lasting psychological consequences . . . [including] depression, alienation, withdrawal, a reduced ability to interact with others and the potential for violent behavior."[58] In announcing the policy reforms, President Obama highlighted the acute risks of solitary confinement for prisoners with mental illness; he referenced studies showing that solitary confinement "can worsen existing mental illnesses and even trigger new ones," and pointed to the increased incidence of suicide.[59] Anchored by these studies and by DOJ's findings and recommendations on restrictive housing, President Obama concluded that "subject[ing] prisoners to unnecessary solitary confinement, knowing its effects . . . [is] an affront to our common humanity."[60]

C. Federal Courts, State Courts, and DOJ Have Held that Placing Individuals with Serious Mental Illness in Conditions of Solitary Confinement Is Cruel and Unusual Punishment in Violation of the Eighth Amendment

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[58] Barack Obama, *Why we must rethink solitary confinement*, Wash. Post (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

[59] *Id.*

[60] *Id.*

Numerous federal and state courts have held that solitary confinement for individuals with serious mental illness violates the Eighth Amendment's prohibition against cruel and unusual punishment.[61] A pattern of recent settlements underscores courts' and state administrators' growing recognition of the need to

[61] *See*, *e.g.*, *Indiana Protection & Advocacy Services Comm'n v. Commissioner*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012) (holding that the practice of placing prisoners with serious mental illness in segregation constituted cruel and unusual treatment in violation of the Eighth Amendment); *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1101–02 (W.D. Wis. 2001) (granting a preliminary injunction requiring the removal of prisoners with serious mental illness from supermax prison); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001) ("Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320–21 (E.D. Cal. 1995) ("[D]efendants' present policies and practices with respect to housing of [prisoners with serious mental disorders] in administrative segregation and in segregated housing units violate the Eighth Amendment rights of class members."); *Madrid v. Gomez,* 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995) (finding unconstitutional the holding of prisoners with mental illness or those at a high risk for suffering injury to mental health in "Security Housing Unit"); *Casey v. Lewis*, 834 F. Supp. 1477, 1549–50 (D. Ariz. 1993) (finding Eighth Amendment violation where, "[d]espite their knowledge of the harm," officials "routinely" assigned prisoners with serious mental illness to segregation); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that an Eighth Amendment claim had been stated where prison officials failed to screen out from segregation "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there"); *T.R. v. S.C. Dept. of Corrections*, C/A No. 2005-CP-40-2925 (S.C. Ct. Comm. Pleas 5th J. Cir. Jan. 8, 2014) (finding major deficiencies in treatment of prisoners with mental illness, including solitary confinement, and ordering defendants to submit a remedial plan).

reform policies and procedures related to solitary confinement of prisoners with serious mental illness.[62]

Likewise, in active litigation as well as in-depth investigations, DOJ has found the conditions and practice of solitary confinement to violate the constitutional rights of prisoners with serious mental illness.[63]

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[62] *See, e.g.*, *Indiana Protection and Advocacy Services Commission v. Commissioner*, *Indiana Department of Correction*, Case No. 1:08-cv-01317-TWP-MJD (S.D. Ind. filed Jan. 27, 2016) (if approved, prohibiting, with some exceptions, the confinement of prisoners with serious mental illness in solitary confinement, including individuals who entered solitary with less than severe mental illness but whose mental health has deteriorated due to restrictive status housing or protective custody); *Ashoor Rasho v. Director John R. Baldwin*, Case No: 1:07-cv-01298-MMM (filed Jan. 21, 2016) (if approved, obligating the Illinois Department of Corrections to minimize the duration and impact of solitary confinement on prisoners with serious mental illness through consistent review and input by mental health staff, continued access to mental health-promoting services, and revision of the basis for which such prisoners will be punished with segregation time or ejected from a treatment program, among other provisions); *Parsons v. Ryan*, Case No. 2:12-cv-00601-DJH (D. Ariz. Oct. 14, 2014) (obligating the Arizona Department of Corrections to allow prisoners with serious mental illness in solitary confinement to have more mental health treatment and a minimum of 19 hours a week outside of their cells); and *Disability Law Center, Inc. v. Massachusetts Department of Correction*, Case No. 07-cv-10463-MLW (D. Mass. Apr. 12, 2012) (providing systemic reforms to the practice of holding prisoners with serious mental illness in long-term segregation, creating specialized secure therapeutic units, excluding prisoners with serious mental illness from segregation altogether under certain circumstances, and implementing programming and out of cell time).

[63] *See* Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div. & David J. Hickton, U.S. Att'y, U.S. Att'y's Office, W.D. Penn. to Tom Corbett, Gov. of Pennsylvania (Feb. 24, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/02/25/pdoc_finding_2-24-14.pdf (finding, after a system-wide investigation, that state prisons across Pennsylvania "use[ ] solitary confinement in ways that violate the rights of

CONCLUSION

For the foregoing reasons, and the reasons cited in Plaintiff-Appellant's merits brief, this Court should vacate the judgment below and remand this matter for further proceedings.

Respectfully submitted,

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prisoners with SMI/ID," citing "conditions that are often unjustifiably harsh," and detailing a number of other Eighth Amendment violations stemming from the practice of holding prisoners with serious mental illness in solitary confinement); Perez Letter (finding that the manner in which the Pennsylvania State Correctional Institution at Cresson uses isolation on prisoners with serious mental illness violates the Eighth Amendment); Response of the United States of America to Defendants' Motion in Limine No. 4: To Exclude the Statement of Interest 2-5, *Coleman v. Brown*, Case No. 2:90-cv-0520 LKK DAD PC (E.D. Cal. Nov. 12, 2013), ECF No. 4919 (summarizing the federal government's position on the applicability of the Eighth Amendment to the placement of prisoners with serious mental illness in solitary confinement for prolonged periods of time).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,434 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

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