

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX, ss.

No. SJC-11057

EDMUND LACHANCE, JR.,

Plaintiff-Appellee

v.

COMMISSIONER OF CORRECTION & OTHERS,

Defendants-Appellants,

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT FOR
ESSEX COUNTY DENYING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ON GROUNDS OF QUALIFIED IMMUNITY

BRIEF AND ARGUMENT FOR AMICI ON BEHALF OF
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INTRODUCTION

This case arises from the decision of Massachusetts prison officials to confine plaintiff Edmund LaChance to long-term "segregation" – in effect, solitary confinement – without affording him the procedural protections mandated by the Massachusetts and federal constitutions, by prison regulations, and by this Court's clear precedent.

It has now been twenty years since this Court stated that the procedural protections afforded by the regulations governing Departmental Segregation Units (the DSU regulations) "reflect the understanding that commitment of a resident to a segregation unit results in a significant reduction of that resident's liberties" and held that damages for failure to provide those protections are available under 42 U.S.C. § 1983. *Hoffer v. Commissioner of Correction*, 412 Mass. 450, 455 (1992). Ten years have passed since the Court held that these due process protections apply when a prison "segregat[es] . . . a prisoner in near solitary confinement, for no specified period," no matter how corrections officials label that segregation. *Haverty v. Commissioner of Correction*, 437 Mass. 737, 756 (2002). Those

protections include the rights to a hearing, a written referral summary, and representation at the hearing. 103 CMR 421.00 *et seq.* Under *Haverty*, those safeguards must be afforded to anyone placed in a facility "substantially similar" to a Departmental Segregation Unit. 437 Mass. at 747.

And yet, in 2006, Department of Correction officials placed LaChance in segregated confinement under conditions which the Superior Court found to be "substantially similar" to confinement in a Departmental Segregation Unit, without affording him the protections set out in the DSU regulations. The segregation, which ultimately lasted over 10 months, occurred in the Special Management Unit (SMU) of a maximum-security prison in Shirley, Massachusetts. In the SMU, LaChance faced near-total isolation, severe restrictions on personal property, and the denial of programming and other prison privileges. These conditions amounted to solitary confinement, an extreme deprivation well known to cause psychological and physiological harm to human beings.

What is more, LaChance's SMU segregation was indefinite. Rather than specify when it would actually end, prison officials told LaChance that his

segregation was "pending" administrative actions – there were several – that were to occur at various unknown points in the future.

LaChance brought this action for declaratory and injunctive relief and also sought damages against the individual defendants under the Massachusetts Civil Rights Act, G.L. c. 12, §§H-I ("the MCRA"), and under 42 U.S.C. § 1983. The Superior Court granted partial summary judgment for LaChance, declaring that the defendants violated his federal and state constitutional rights to due process. Addressing the damage claims, the court granted summary judgment for the defendants on LaChance's MCRA claims but denied their motion for summary judgment on qualified immunity grounds. With respect to qualified immunity, the court found that LaChance had a clearly established federal constitutional right to due process and that, in 2006, a reasonable official would have known that LaChance could not be placed in the SMU without affording him that process because the SMU was clearly substantially similar to the segregation units addressed by this Court's 2002 decision in *Haverty*.

Enforcement of the constitutional standards which have been recognized by this Court is appropriate not only because officials of the Department of Correction have long been on notice of the applicable law. There is now substantial empirical evidence, set out below, supporting the Court's view of the harm resulting from solitary confinement as well as the ineffectiveness of long-term segregation as a correctional tool. Indeed, these factors have led to increasing scrutiny and regulation of solitary confinement by courts, legislatures, and departments of correction in other jurisdictions.

It is therefore crucial that the protections mandated by *Haverty* be enforced. *Haverty* sought to assure that the severe and harmful sanction of solitary confinement will be imposed only after the prisoner is afforded due process. The defendants' qualified immunity defense, if allowed, would permit the Department of Correction, as it has attempted in the past, to eliminate by definition the restrictions which the Constitution requires and which this Court has carefully put in place. In short, the defense proceeds as if *Haverty* had never been decided and the harms of solitary confinement do not exist.

STATEMENT OF INTEREST

The amici organizations have extensive experience litigating cases challenging the constitutionality of prisoners' conditions of confinement, including segregation and isolation. Amici have substantial experience concerning: (a) disciplinary and administrative segregation regimes; (b) the effects of solitary confinement, including in segregation units; and (c) efforts to reform segregation practices in the United States.

The **American Civil Liberties Union (ACLU)** is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation (NPP) was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The ACLU-NPP has decades of experience in complex prisoners' rights class action suits and since 1990 has represented prisoners in five cases before the U.S. Supreme Court. Courts across the country have repeatedly recognized the special expertise of the ACLU-NPP in conditions of confinement cases. See

Plyler v. Evatt, 902 F.2d 273, 278 (4th Cir. 1990); *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Knop v. Johnson*, 712 F. Supp. 571, 583 (W.D. Mich. 1989); *Lightfoot v. Walker*, 619 F. Supp. 1481, 1487 (S.D. Ill. 1985), *aff'd*, 826 F.2d 516, 522 (7th Cir. 1987); *Ramos v. Lamm*, 539 F. Supp. 730, 750 (D. Colo. 1982), *remanded*, 713 F.2d 546 (10th Cir. 1983). Much of NPP's litigation has focused on conditions in solitary confinement in administrative segregation units, supermax institutions and more conventional prisons, including cases such as *Gates v. Cook*, 385 F.3d 503 (5th Cir. 2004); *Jones'El v. Berge*, 164 F.Supp.2d 1096 (W.D. Wis. 2001), 172 F.Supp.2d 1128 (W.D. Wis. 2001), 374 F.3d 541 (7th Cir. 2004); *Presley v. Epps*, No. 4:05 Civ. 148 (N.D. Miss. Nov. 18, 2007); and most recently, Complaint, *Parsons v. Ryan*, No. CV-2:12-CV-00601-NVW-MEA (D. Ariz. March 22, 2012).

The **American Civil Liberties Union of Massachusetts (ACLUM)**, an affiliate of ACLU, is a statewide membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and of the United States. ACLUM has a longstanding commitment to the protection of the rights of prisoners and has

appeared in numerous cases in this Court involving prison issues, providing direct representation of prisoners as well as participating as amicus curiae. ACLUM lawyers represented the plaintiffs in *Torres v. Commissioner of Correction*, 427 Mass. 611 (1998), in which the Court was asked to consider the psychological effects of long-term solitary confinement.

This case is critical for the hundreds of men and women who are subject to solitary confinement, or comparable confinement, every year in the Massachusetts Department of Correction. For these individuals the harms and risks of solitary are very real, regardless of the label appended to their confinement. The DSU regulations represent critical protections against the abusive over-use of solitary confinement in Massachusetts.

Amici are concerned that, if these protections are not seen as "clearly established" for purposes of qualified immunity, prisoners in the Commonwealth will see an increase in the frequency, duration, and harshness of solitary confinement. At a time when other states and courts have intervened to reduce and regulate solitary confinement, a reversal of the lower

court's decision in this case will constitute a giant step backward for both the prisoners in the Commonwealth's custody and the community at large.

While LaChance's brief presents compelling arguments in support of the holding below, amici write separately to provide the Court with the benefit of their expertise litigating these issues and working with prisoners and prison administrators.

ARGUMENT

The defendants' claim of qualified immunity should be rejected. Qualified immunity is available only to government officials who have not violated clearly established rights. Here, this Court's precedents clearly established by 2006 that LaChance, due to his indefinite segregation in the SMU, was owed the protections of the DSU regulations. Yet he did not receive those protections. Extending qualified immunity to the defendants would therefore mark a significant retrenchment from this Court's decisions in *Haverty* and other cases.

Granting qualified immunity in this case would also lead, inexorably, to the undue use of solitary confinement in Massachusetts prisons. As shown below, solitary confinement visits substantial costs on the

public and on prisoners, and for those reasons it is in nationwide decline. Thus, turning back from *Haverty* would not only deny justice for LaChance, it would mark a setback for everyone in the Commonwealth who has a stake in the healthy functioning of the prison system.

I. DEFENDANTS WERE PROPERLY DENIED QUALIFIED IMMUNITY BECAUSE THEY HELD LACHANCE IN CONDITIONS EQUIVALENT TO SOLITARY CONFINEMENT FOR OVER TEN MONTHS WITHOUT APPROPRIATE PROCESS.

The Superior Court's denial of qualified immunity rests on a finding that LaChance's SMU confinement was clearly equivalent to confinement in a Departmental Segregation Unit and, accordingly, that LaChance was clearly owed DSU regulatory protection. That ruling simply followed Supreme Judicial Court precedent in *Haverty*, 437 Mass. 737, and the long line of authority supporting application of the DSU regulations to solitary confinement settings. See *Longval v. Commissioner of Corr.*, 404 Mass. 325, 328-30 (1989); *Martino v. Hogan*, 37 Mass. App. Ct. 710, 721 (1994).

As this Court noted in *Haverty*, the "label" is irrelevant when determining the application of the DSU regulations. 437 Mass. at 759-60. Instead, *Haverty* emphasizes two factors: (1) whether the segregation

is in solitary confinement; (2) and whether the confinement was for no specified period of time. *Id.* at 756-57. It is therefore irrelevant that LaChance was held in a unit labeled "SMU" and told that he was "awaiting action." What matters is whether LaChance was isolated for a period of time that was not specified in advance.

That is precisely what happened. As the Superior Court found, LaChance was isolated in a cell for 23 hours a day. His daily hour of "recreation" was in a "cage-like structure" exposed to heat and cold. He was allowed only limited, non-contact visits, both his personal property and canteen privileges were extremely limited, and any movement from his cell involved shackles, handcuffs, and a two-guard escort. Finally, notwithstanding the defendants' claim that LaChance's segregation was always "pending" some administrative action, the Superior Court correctly noted that the length of LaChance's segregation was not specified in advance. Accordingly, and consistent with *Haverty*, the lower court held that LaChance's circumstances in the SMU were "substantially similar" to the confinement the DSU regulations were designed to address, and therefore those regulations should

have governed LaChance's confinement in the SMU. *LaChance v. Clark*, No. 06-CV-1246-C, Memorandum of Decision and Order on Parties' Cross-Motions for Summary Judgment, at 3-4, 8 (Ma. Sup. Ct. April 10, 2010).

The conditions LaChance encountered at the SMU were not only "substantially similar" to conditions in the DSU, they exactly meet the definition of solitary confinement. While solitary confinement settings vary, they generally involve locking a prisoner alone in a cell for 22-23 hours or more a day, under conditions of extreme social isolation, enforced idleness, and deprivation of virtually all meaningful environmental stimulation. Restrictions on property; severe constraints on visitation; and the inability to participate in group activities, including eating with others, are typical of solitary confinement regimes.¹ Human contact is generally restricted to brief interactions with corrections officers and occasional encounters with healthcare providers or attorneys.²

¹ Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners*, 48 J. OF OFFENDER REHABILITATION 529, 532 (2009); Leena Kurki and Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME AND JUSTICE 385, 388-89 (2001).

² See Kurki & Morris, *supra* note 1.

Visits are very limited and almost all human contact occurs while the prisoner is in restraints and behind some sort of barrier.³ Prisoners are typically placed in solitary confinement for indefinite periods, and may remain there for weeks, months, or years.⁴

The stated purpose of solitary confinement or segregation housing is often to confine prisoners who are believed to have violated prison rules or who pose threats to others. It is also sometimes used to confine prisoners who are perceived as vulnerable, such as youths, the elderly, the medically frail, or individuals identified as lesbian, gay, bisexual or transgender.⁵ In U.S. prisons and jails such confinement goes by many names whether it occurs in a so-called "supermax prison," a high security prison, or a separate unit within a conventional prison. In some systems solitary confinement will be called disciplinary segregation, administrative segregation, control units, security housing units (SHU), special management units (SMU), or simply "the hole". Recognizing the common characteristics of this type of

³ *Id.*

⁴ DANIEL P. MEARS, URBAN INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS ii, 40 (2006).

⁵ *See, e.g.*, CHASE RIVELAND, NATIONAL INSTITUTE OF CORRECTIONS, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1-2 (2009); Mears, *supra* note 4, at 5-6.

confinement, the American Bar Association set forth the following definition in its Standards on the Treatment of Prisoners:

The term "segregated housing" means housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action. "Segregated housing" includes restriction of a prisoner to the prisoner's assigned living quarters.⁶

The term "long-term segregated housing" means segregated housing that is expected to extend or does extend for a period of time exceeding 30 days.⁷

Under this Court's cases, the ABA's Standards, and generally accepted correctional definitions, LaChance's stay in the SMU subjected him to ten months of solitary confinement. In fact, that confinement was over ten times longer than the ABA's threshold definition for "long-term segregated housing." Particularly because it was indefinite and lengthy, that confinement clearly required the defendants to give LaChance the procedural safeguards established by the DSU regulations and mandated by this Court's jurisprudence. Yet that did not happen.

⁶ ABA Crim. Just. Standards on the Treatment of Prisoners, Standard 23-1.0(r) (2010), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html. ("ABA Standards").

⁷ ABA Standards, *supra* note 6, Standard 23-1.0(o).

Indeed, LaChance's segregation violated his constitutional right to due process of law. See *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995); *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). The Superior Court correctly held that LaChance's rights were violated under *Sandin* because conditions in the SMU imposed an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." Opinion at 10-12 (RA 623-626) (quoting *Sandin*, 515 U.S. at 484). The segregated confinement that LaChance suffered was, in its harshness and duration, equivalent to confinement that has elsewhere been held to require due process protections. See *Wilkinson*, 545 U.S. at 223-24 (conditions in Ohio supermax constituted atypical and significant hardship "under any plausible baseline" due to the "severe limitations on all human contact," the indefinite duration of segregation, and the disqualification of an otherwise eligible prisoner for parole consideration); *Westefer v. Snyder*, 725 F.Supp.2d 735, 769 (S.D. Ill. 2010) (placement at Tamms supermax in Illinois requires procedural due process under *Wilkinson* due to atypical and significant hardship caused by drastic limitations on human

contact, indefinite duration of confinement, and limitations on ability to accrue good time credit); *Lee v. Coughlin*, 26 F.Supp.2d 615, 637 (S.D.N.Y. 1998) (376 days served in isolated segregation was atypical and significant compared with the treatment of prisoners generally; "[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies.").

The defendants' failure to give LaChance the protections of the DSU regulations violated principles long enshrined in the U.S. Constitution, the Massachusetts Declaration of Rights, and the Department of Correction's own regulations. These protections ensure that the extreme hardship of segregation is not imposed without justification. It is vital that the Court enforce them.

II. SOLITARY CONFINEMENT IS COSTLY AND JEOPARDIZES PUBLIC SAFETY.

The procedural protections mandated by this Court's cases on segregated confinement are crucially important because segregated confinement is fraught with costs. Despite its use in U.S. prisons and jails, there is little evidence or research about the goals, impacts or relative cost-effectiveness of using

solitary confinement as a corrections tool.⁸ In fact, there is little evidence that solitary confinement, supermax institutions or administrative segregation units significantly reduce prison violence or deter future crimes.⁹

A 2006 study found that opening a supermax prison or special housing unit (SHU) had no effect on prisoner-on-prisoner violence in Arizona, Illinois and Minnesota.¹⁰ The same study found that creating such isolation prisons had only limited impact on prisoner-on-staff violence in Illinois, none in Minnesota, and actually increased violence in Arizona.¹¹ A similar study in California found that supermax or administrative segregation prisons had increased, rather than decreased, overall violence in the prison system.¹²

Some proponents of solitary confinement assert that isolating "the worst of the worst" creates a safer general population environment where prisoners will have greater freedom and access to educational

⁸ Mears, *supra* note 4, at 1-2.

⁹ Kurki & Morris, *supra* note 1, at 391.

¹⁰ Chad S. Briggs, et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1341-42 (2006).

¹¹ *Id.* at 1365-66.

¹² KERAMET REITER, INST. FOR THE STUDY OF SOC. CHANGE, PAROLE, SNITCH, OR DIE: CALIFORNIA'S SUPERMAX PRISONS & PRISONERS, 1987-2007, 44-46 (2010).

and vocational programs.¹³ Others defend solitary confinement as a general deterrent of disruptive behavior throughout the prison system.¹⁴ However there is only anecdotal support for these beliefs.¹⁵ Indeed, some researchers have concluded that more severe restrictions imposed on prisoners in solitary confinement increase levels of violence and other behavioral and management problems within prison systems.¹⁶ And contrary to the assumption that a few "worst of the worst" prisoners cause violence in prisons, researchers have shown that prison violence is most often related to the way prisoners are treated and how prisons have been managed and staffed.¹⁷

Although there is little empirical evidence that solitary confinement is an effective prison management tool, there is ample evidence that it is the most costly form of incarceration. Supermax prisons and segregation units are considerably more costly to build and operate, sometimes costing two or three

¹³ Kurki & Morris, *supra* note 1, at 391.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See H. MILLER & G. YOUNG, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?* 7 CRIMINAL BEHAVIOUR AND MENTAL HEALTH 85 (1997).

¹⁷ Kurki & Morris, *supra* note 1, at 416-17.

times as much as conventional facilities.¹⁸ Staffing costs are much higher - prisoners are usually required to be escorted by two or more officers any time they leave their cells, and work that in other prisons would be performed by prisoners (such as cooking and cleaning) must be done by paid staff. Solitary confinement therefore represents an enormous investment of public resources.

In fact, the extraordinary costs of solitary confinement are well documented. For example, a 2007 estimate from Arizona put the annual cost of holding a prisoner in solitary confinement at approximately \$50,000 compared to only about \$20,000 for the average prisoner.¹⁹ In Maryland, the cost of housing a prisoner in the state's segregation units is on average three times greater than in a general population facility; in Ohio it is twice as much and in Texas the costs are 45% greater.²⁰ In Connecticut the cost of solitary is nearly twice as much as the

¹⁸ CAROLINE ISAACS & MATTHEW LOWEN, AM. FRIENDS SERV. COMM., BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA'S PRISONS AND JAILS 14 (2007); Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUSTICE Q. 233, 260 (2006).

¹⁹ ISAACS & LOWEN, *supra* note 18, at 4.

²⁰ DANIEL P. MEARS, *supra* note 4, at 20, 26, 33.

average daily expenditure per prisoner;²¹ and in Illinois it is three times the statewide average.²²

Not only is there little evidence that the enormous outlay of resources for these units makes prisons safer, there is growing concern that such facilities are actually detrimental to public safety. A blue ribbon commission chaired by the Hon. John J. Gibbons and Nicholas de B. Katzenbach raised concerns regarding the over-use of solitary confinement, particularly the practice of releasing prisoners directly from segregation settings to the community.²³ One study of prisoners held in solitary confinement noted that such conditions may "severely impair . . . the prisoner's capacity to reintegrate into the broader community upon release from imprisonment."²⁴

²¹ Connecticut Department of Correction: Average Daily Expenditure Per Inmate, *available at* <http://www.ct.gov/doc/cwp/view.asp?a=1505&q=265600>.

²² Steve Mills, *Quinn's Prison Plan Causes Stir*, CHICAGO TRIBUNE, February 23, 2012, *available at* http://articles.chicagotribune.com/2012-02-23/news/ct-met-illinois-state-budget-prisons-20120223_1_super-max-maximum-security-prison-maximum-security-inmates; Dave McKinney, *Quinn Closes Super-max Downstate Tamms Prison*, LAKE COUNTY NEWS-SUN, February 21, 2012, *available at* <http://newssun.suntimes.com/10790998-417/quinn-close-super-max-downstate-tamms-prison.html>.

²³ COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *CONFRONTING CONFINEMENT* 55 (2006), *available at* http://www.vera.org/download?file=2845/Confronting_Confinement.pdf.

²⁴ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 333 (2006).

The pervasive use of solitary confinement means that thousands of prisoners are now returning to the community after spending months or years in isolation. This means that society must face the huge problem of re-socializing individuals who are poorly prepared to return safely to the community.

In most systems, prisoners in solitary confinement are released directly to the community. In California, for example, nearly 40% of segregated prisoners are released directly to the community without first transitioning to lower security units.²⁵ Colorado also releases about 40% of its supermax population directly to the community.²⁶ Mental health experts have noted the problems with direct release from isolation to the community and called for prerelease programs to help prisoners held in solitary confinement transition to the community more safely.²⁷

Although there is not yet comprehensive national research comparing recidivism rates for prisoners released directly from solitary with those released

²⁵ REITER, *supra* note 12, at 2.

²⁶ MAUREEN L. O'KEEFE, CO. DEPT. OF CORRECTIONS, ANALYSIS OF COLORADO'S ADMINISTRATIVE SEGREGATION 23 (2005), available at <http://www.doc.state.co.us/sites/default/files/opa/AdSegReport.pdf>.

²⁷ Terry Kupers, *What To Do with the Survivors? Coping with the Long-term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005 (August 2008).

from general population, preliminary research in California suggests that the rates of return to prison are at least 20% higher for solitary confinement prisoners.²⁸ Similarly in Colorado, two-thirds of prisoners in solitary confinement who were released directly to the community returned to prison within three years, but prisoners who transitioned from solitary confinement into the general prison population before community re-entry experienced a six percent reduction in their comparative recidivism rate for the same period.²⁹

A 2001 study found that 92% of Connecticut prisoners who had been held at the state's supermax prison were rearrested within three years of release, while only 66% of prisoners who had not been held in administrative segregation were rearrested in the same time period.³⁰ These findings are consistent with a recent study in Washington State that tracked 8,000 former prisoners upon release to the community. The study found that not only were those who came from segregation housing more likely to commit new offenses upon release, they were also more likely to commit

²⁸ REITER, *supra* note 12, at 50.

²⁹ O'KEEFE, *supra* note 26, at 25.

³⁰ LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE, RECIDIVISM IN CONNECTICUT 41 (2001).

violent crimes. Significantly, it was prisoners released directly from segregation who had much higher recidivism rates compared to individuals who spent time in a normal prison setting before return to the community (64% compared with 41%).³¹ This finding suggests a direct link between recidivism and the extreme living conditions in segregation.³²

Thus any argument that correctional management requires the freedom to hold prisoners in segregation without demonstrated cause is entirely unfounded. By requiring that segregation be justified, the DSU regulations serve correctional goals of rehabilitation and prison safety, as well as saving taxpayer dollars.

III. THE HARMS OF SOLITARY CONFINEMENT ARE WELL KNOWN.

In addition to wreaking financial havoc, solitary confinement harms human beings. Extensive scientific research demonstrates that the deprivation of human contact and other environmental stimulation can have

³¹ COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* note 23, at 55.

³² *Id.* Notably, the Governor's Commission on Corrections Reform in Massachusetts has previously underscored the lack of re-entry programming for prisoners in segregation and its potential impacts on public safety. See COMMONWEALTH OF MASSACHUSETTS GOVERNOR'S COMMISSION ON CORRECTIONS REFORM, STRENGTHENING PUBLIC SAFETY, INCREASING ACCOUNTABILITY, AND INSTITUTING FISCAL RESPONSIBILITY IN THE DEPARTMENT OF CORRECTION, FINAL REPORT 33 (June 2004), available at http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf.

disastrous consequences. Indeed there is a broad consensus among mental health experts that long-term solitary confinement is psychologically harmful.³³

These damaging effects have long been known and were addressed by the United States Supreme Court more than a century ago:

The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell . . . so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. 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; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890) (describing solitary confinement as practiced in the early years of the United States). The court concluded that

³³ See, e.g., Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AMERICAN JOURNAL OF PSYCHIATRY 1450 (1983); R. Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOCIAL JUSTICE 8 (1988); S.L. Brodsky and F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REPORTS 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124 (2003); H. Miller and G. Young, *supra* note 16; H. Toch, *Mosaic of Despair: Human Breakdown in Prison*, Washington DC: American Psychological Association (1992).

solitary confinement is "an infamous punishment." *Id.* at 169.³⁴

Modern courts have reiterated these consequences of solitary confinement. In 1988, the Seventh Circuit observed that "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988). In *Davenport*, the court recognized that "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant)" ³⁵

³⁴ In 1842, Charles Dickens reported on the use of solitary confinement in American prisons:

I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers . . . there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.

Charles Dickens, *AMERICAN NOTES* 146 (Fromm Int'l 1985) (1842).

³⁵ *Davenport*, 844 F.2d at 1316, citing S. Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *AM. J. PSYCHIATRY* 1450-54 (1983). Other courts have made similar observations. See, e.g., *Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000) ("it is well accepted that conditions such as those present in the SMU II . . . can cause psychological decompensation to the point that individuals may

In *Jones 'El v. Berge*, a Wisconsin federal court found that solitary confinement is

known to cause severe psychiatric morbidity, disability, suffering and mortality [even among those] who have no history of serious mental illness and who are not prone to psychiatric decompensation. . . . The extremely isolating conditions in supermaximum confinement cause [Segregated Housing Unit] syndrome in relatively healthy prisoners who have histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally severe. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.

Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001). In *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995), the court detailed the effects of the Security Housing Unit (SHU) of California's Pelican Bay State Prison, where prisoners were isolated in windowless cells for 22 1/2 hours a

become incompetent"); *Comer v. Stewart*, 215 F.3d 910, 915 (9th Cir. 2000) ("we and other courts have recognized that prison conditions remarkably similar to [SMU II] can adversely affect a person's mental health"); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) ("[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies"); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) ("[the notion that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) ("many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in SHU"); *Bono v. Saxbe*, 450 F. Supp. 934, 946 (E.D. Ill. 1978) ("[p]laintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit"), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980).

day. The court concluded that, for prisoners "at a particularly high risk for suffering very serious or severe injury to their mental health," including those who were "already mentally ill, as well as persons with borderline personality disorders," placement in the SHU was "the mental equivalent of putting an asthmatic in a place with little air to breathe." *Id.* at 1265. The court concluded that, for these prisoners, the use of solitary confinement violated evolving standards of decency:

subjecting individuals to conditions that are "very likely" to render them psychotic or otherwise exacerbate a serious mental illness cannot be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. A risk this grave - this shocking and indecent - simply has no place in civilized society.

Id. at 1266.

Numerous other courts have made similar findings. *See, e.g., Koch v. Lewis*, 216 F. Supp. 2d 994, 1001 (D. Ariz. 2001) (experts agreed that extended isolation causes "heightened psychological stressors and creates a risk for mental deterioration"); *Baraldini v. Meese*, 691 F. Supp. 432, 446-47 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological

effects of segregation), *rev'd on other grounds sub nom. Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989). The harmful levels of isolation cited in *Madrid, Jones 'El*, and numerous other opinions are nearly identical to those the lower court found LaChance endured during his segregation in the SMU. See § I, at 10-11.

Extensive scientific research has consistently shown that solitary confinement is painful, stressful and psychologically harmful.³⁶ Such outcomes are well

³⁶ A study by a psychiatrist in several isolation units in California noted that the "madness" he witnessed in prisoners was a "partially functional and adaptive" response to extreme conditions where isolated prisoners "become so desperate for relief that they would set their mattresses afire. . . burst out in a frenzied rage of aimless destruction, tearing their sinks and toilets from the walls, ripping their clothing and bedding, and destroying their few personal possessions in order to alleviate the numbing sense of deadness or non-being and to escape the torture of their own thoughts and despair." Frank Rundle, *The Roots of Violence at Soledad*, in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 167 (Erik Olin Wright, ed., 1973). A small-scale study in Maine of prisoners held indefinitely in long-term isolation found similar aberrant behavior where almost every prisoner had attempted suicide and prisoners often acted in seemingly irrational ways - smashing their heads against the concrete walls, destroying their beds and light fixtures. Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 *CAL. WESTERN L. REV.* 265-296 (1977). In a larger, more systematic study of hundreds of prisoners subject to long-term isolation, psychologist Hans Toch noted what he termed "isolation panic" among prisoners in solitary confinement which included: rage, panic, loss of control and breakdowns, psychological regression, and a build-up of physiological and psychic tension that led to incidents of self-mutilation. Hans Toch, *MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISONS* 54 (Aldine Publishing Co., Chicago 1975). A thorough psychiatric assessment of prisoners kept in isolation in Massachusetts found similar "strikingly consistent" symptoms, including massive anxiety, perceptual disturbances such as hallucinations, cognitive difficulties, memory lapses, and thought disturbances

known by mental health practitioners in the corrections field as a California prison psychiatrist told Human Rights Watch in 2002: "It's a standard psychiatric concept, if you put people in isolation, they will go insane. . . . Most people in isolation will fall apart."³⁷

Prisoners exhibit a variety of negative physiological and psychological reactions to solitary confinement including: negative attitudes and affect;³⁸ insomnia;³⁹ anxiety;⁴⁰ panic;⁴¹ withdrawal;⁴²

such as paranoia, aggressive fantasies and impulse control problems. Grassian, *supra* note 33, at 1450-1454. See also Stuart Grassian and N. Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J. L. & PSYCHIATRY 49-65 (1986). A study in a "state-of-the-art" supermax by psychologist Craig Haney used a random sample of prisoners in order to find prevalence rates of psychological reactions to long-term isolation. Dr. Haney's research found extraordinarily high rates of psychological trauma. More than four out of five prisoners suffered from anxiety and nervousness, headaches, troubled sleep, lethargy or chronic tiredness. Over fifty percent complained of nightmares, heart palpitations, and fear of impending nervous breakdowns, while a similar percentage reported specific psychopathologic effects of isolation, such as obsessive ruminations, confused thought processes, irrational anger and social withdrawal. Over half also reported violent fantasies, emotional flatness, mood swings, chronic depression, and overall deterioration. Nearly half had suffered hallucinations, perceptual distortions, and a quarter of all prisoners had experienced suicidal ideation. Haney, *supra* note 33, at 127.

³⁷ HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 149 n. 513 (2003).

³⁸ See Michael Bauer, Stefan Priebe, Bettina Haring & Kerstin Adamczak, *Long-Term Mental Sequelae of Political Imprisonment in East Germany*, 181 J. NERVOUS & MENTAL DISEASE 257-262 (1993) (study of persons who had spent at least six weeks in political imprisonment that included solitary confinement); Korn, *supra* note 33, at 8-19; Richard Korn, *Follow-up Report on the Effects of Confinement in the High Security Unit at Lexington*, 15 SOCIAL JUSTICE 20-29 (1988) (studies of women federal prisoners subjected to "small group isolation"); Ida Koch, *Mental and Social Sequelae*

hypersensitivity to stimuli;⁴³ ruminations;⁴⁴ cognitive dysfunction;⁴⁵ hallucinations;⁴⁶ loss of control;⁴⁷ irritability, aggression and rage;⁴⁸ paranoia;⁴⁹

of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark, in THE EXPANSION OF EUROPEAN PRISON SYSTEMS, WORKING PAPERS IN EUROPEAN CRIMINOLOGY NO. 7 119 (Bill Rolston & Mike Tomlinson eds. 1986); Miller & Young, *supra* note 16, at 85-94; Peter Suedfeld, Carmenza Ramirez, John Deaton, & Gloria Baker-Brown, *Reactions and Attributes of Prisoners in Solitary Confinement*, 9 CRIMINAL JUSTICE & BEHAVIOR 303-340 (1982).

³⁹ See Bauer et al., *supra* note 38; Brodsky & Scogin, *supra* note 33, at 267-280 (study of protective custody where conditions of isolation and restricted movement parallel many of those that exist in most supermaxes); Haney, *supra* note 33 (study of supermax found extraordinarily high rates of symptoms of psychological trauma); Koch, *supra* note 38; Korn, *supra* note 33.

⁴⁰ See Henrik Andersen, Dorte Sestoft, Tommy Lillebaek, Gorm Babrielsen, & Ralf Hemmingsen, *A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement*, 26 INT'L J. L. & PSYCHIATRY 165-177 (2003); Brodsky & Scogin, *supra* note 33; Grassian, *supra* note 33; Grassian & Friedman, *supra* note 36; Haney, *supra* note 33; Koch, *supra* note 38; Korn, *supra* note 33; Toch, *supra* note 33; Richard Walters, John Callagan & Albert Newman, *Effect of Solitary Confinement on Prisoners*, 119 AM. J. PSYCHIATRY 771-773 (1963).

⁴¹ See Toch, *supra* note 33.

⁴² See Bruno M. Cormier & Paul J. Williams, *Excessive Deprivation of Liberty*, 11 CANADIAN PSYCHIATRIC ASSOC. J. 470-484 (1966); Haney, *supra* note 33; Miller & Young, *supra* note 16; G. Scott & M. Gendreau, *Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison*, 14 CANADIAN PSYCHIATRIC ASSOC. J. 337-341 (1969); Toch, *supra* note 33.

⁴³ See Grassian, *supra* note 33; Haney, *supra* note 33.

⁴⁴ See Brodsky & Scogin, *supra* note 33; Haney, *supra* note 33; Korn, *supra* note 33; Miller & Young, *supra* note 16.

⁴⁵ See Brodsky & Scogin, *supra* note 33; Grassian, *supra* note 33; Haney, *supra* note 33; Koch, *supra* note 38; Korn, *supra* note 33; Miller & Young, *supra* note 16; Peter Suedfeld & Chunilal Roy, *Using Social Isolation to Change the Behavior of Disruptive Inmates*, 19 INTERNATIONAL JOURNAL OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 90-99 (1975).

⁴⁶ See Brodsky & Scogin, *supra* note 33; Grassian, *supra* note 33; Haney, *supra* note 33; Koch, *supra* note 38; Korn, *supra* note 33; Suedfeld & Roy, *supra* note 45.

⁴⁷ See Grassian, *supra* note 33; Haney, *supra* note 33; Suedfeld & Roy, *supra* note 45; Toch, *supra* note 33.

⁴⁸ See Rundle, *supra* note 36 (some prisoners at Soledad's isolated confinement "adjustment center" set fires in order to get out of their cells, others entered a frenzied rage destroying cell and personal property); Bauer et al., *supra* note 38; Brodsky &

hopelessness;⁵⁰ lethargy;⁵¹ depression;⁵² a sense of impending emotional breakdown;⁵³ self-mutilation;⁵⁴ suicidal ideation and behavior;⁵⁵ and lower levels of brain function, including a decline in EEG activity.⁵⁶ EEG changes were observed after only seven days of solitary confinement - far less than the ten months of isolation endured by LaChance.⁵⁷

Scogin, *supra* note 33; Cormier & Williams, *supra* note 42; Grassian, *supra* note 33; Haney, *supra* note 33; Koch, *supra* note 38; Miller & Young, *supra* note 16; Suedfeld, Ramirez, Deaton, & Baker-Brown, *supra* note 38; Toch, *supra* note 33.

⁴⁹ See Cormier & Williams, *supra* note 42; Grassian, *supra* note 33.

⁵⁰ See Haney, *supra* note 33.

⁵¹ See Brodsky & Scogin, *supra* note 33; Haney, *supra* note 33; Koch, *supra* note 38; Scott & Gendreau, *supra* note 42; Suedfeld and Roy, *supra* note 45.

⁵² See Andersen, et al., *supra* note 40; Brodsky & Scogin, *supra* note 33; Haney, *supra* note 33; Korn, *supra* note 33.

⁵³ See Brodsky & Scogin, *supra* note 33; Grassian, *supra* note 33; Haney, *supra* note 33; Koch, *supra* note 38; Korn, *supra* note 33; Toch, *supra* note 33.

⁵⁴ See Thomas B. Benjamin and Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison*, 9 CLEARINGHOUSE REVIEW 83-90 (1975); Benjamin & Lux, *supra* note 36 (one prisoner nearly died from loss of blood after cutting himself with his broken light bulb, another swallowed glass, and a number of prisoners attempted hanging - several successfully); Grassian, *supra* note 33; Toch, *supra* note 33 (psychologist Hans Toch concluded that "isolation panic" was a serious problem among prisoners in solitary confinement producing symptoms of rage, panic, loss of control and breakdowns, psychological regression, a build-up of physiological and psychic tension that led to incidents of self-mutilation).

⁵⁵ See Benjamin & Lux, *supra* note 36; Cormier & Williams, *supra* note 42; Grassian, *supra* note 33; Haney, *supra* note 33.

⁵⁶ Paul Gendreau, N.L. Freedman, and G.J.S. Wilde, *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 JOURNAL OF ABNORMAL PSYCHOLOGY 54, 57-58 (1972).

⁵⁷ *Id.*; see also Grassian, *supra* note 24 at 325, 331 ("even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern [of the brain] toward an abnormal pattern characteristic of stupor and delirium.")

Medical research has also demonstrated that solitary confinement impairs brain functioning even *after* release. In a 1992 study of prisoners of war released from detention camps in the former Yugoslavia, scientists found that the two factors that had the most significant effect on brain activity were solitary confinement and physical trauma to the head resulting in loss of consciousness. Less significant factors included torture by electric shock and extreme cold.⁵⁸

The evidence that solitary confinement harms human beings is remarkably uniform. In a 2005 submission to the United States Supreme Court, a group of psychologists and psychiatrists explained that “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.” *Wilkinson v. Austin*, No. 04-495, Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, 2005 WL

⁵⁸ A. Vrca, V. Bozиков, Z. Brzovic, R. Fuchs, M. Malinar, *Visual Evoked Potentials in Relation to Factors of Imprisonment in Detention Camps*, 109 INT. J. LEGAL MED. 114-115 (1996). Notably, the prisoners in these experiments had all been subject to solitary confinement for six months. *Id.*

539137, at *4 (March 3, 2005).⁵⁹ That consistency, the amici noted, was "striking." *Id.* at *23. See also Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History of the Literature*, 34 CRIME & JUSTICE 441 (2006).

The damage done by solitary confinement is illustrated all too well by the prevalence of suicides in isolation housing units. On average, 50% of completed suicides by prisoners occur among the 2-8% of prisoners who are housed in solitary confinement.⁶⁰ Massachusetts solitary confinement units are no exception. Numerous incidents of suicide and self-mutilation in segregation housing within the Massachusetts Department of Correction are detailed in a federal lawsuit, *DLC v. Department of Correction*, filed in 2007. See Complaint, *DLC v. Department of Correction*, Civil Action No. 07-10463, (D. Mass.), available at

⁵⁹ In *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005), a unanimous court concluded that the conditions in Ohio's supermax facility, the Ohio State Penitentiary (OSP), gave rise to a liberty interest in avoiding them: "we are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline."

⁶⁰Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REPORT 1, 9 (May/June 2011). See also Jennifer R. Wynn and Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 516 (2004) (A study of isolated confinement in New York prisons).

<http://www.centerforpublicrep.org/images/stories/docs/Complaint-FINAL.pdf> ("DLC Complaint").⁶¹ Once subjected to solitary confinement, many prisoners deteriorate dramatically. It is not unusual to find segregated prisoners who swallow razors and other objects, smash their heads into walls, compulsively cut their flesh, try to hang themselves, and otherwise attempt to harm themselves.⁶²

The overwhelming evidence that solitary confinement harms individuals, its great human and fiscal costs, the lack of empirical evidence that solitary confinement lowers prison violence, and the growing evidence that it negatively affects public safety by increasing recidivism, call for a different response. Below amici discuss the specific solutions that courts, state legislatures and government agencies around the country have developed as humane,

⁶¹For example, a twenty-two year old prisoner subjected to segregation committed suicide by hanging after staff failed to deliver his medication; and a twenty-six year old mentally ill and mentally retarded man committed suicide after two weeks in segregation when staff failed to do hourly checks. DLC Complaint ¶¶ 42, 43. Another prisoner attempted to kill himself multiple times while in the segregation unit, at one point trying to strangle himself with the breathing machine he used for sleep apnea and eating mechanical parts. DLC Complaint ¶ 44.

⁶² See generally J. Metzner & J. Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY LAW 104-108 (2010).

therapeutic alternatives to the use of solitary confinement.

IV. THE NEGATIVE EFFECTS OF SOLITARY CONFINEMENT HAVE LED COURTS, LEGISLATURES, AND CORRECTIONAL ADMINISTRATORS TO IMPOSE GREATER REGULATION OF SOLITARY CONFINEMENT SETTINGS.

A growing number of states have taken steps, either independently or because of litigation, to regulate the use of solitary confinement for both disciplinary and non-disciplinary reasons.⁶³ These

⁶³ In addition to the growing national recognition that solitary confinement raises serious legal and policy concerns, human rights experts around the world have also criticized the use of long-term solitary confinement in the United States as a violation of international human rights law and standards. See, e.g., Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. CONST. L. 115, 122-25 (2008); Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 98 (2005). In a groundbreaking global study on solitary confinement, presented last year to the United Nations General Assembly, the U.N. Special Rapporteur on Torture called on all countries to ban the practice, except in very exceptional circumstances, as a last resort, and for as short a time as possible. The Special Rapporteur concluded that solitary confinement is a harsh measure that may cause serious psychological and physiological adverse effects. He found that solitary confinement can amount to cruel, inhuman or degrading treatment or punishment and even torture. He recommended both the prohibition of solitary confinement and the implementation of alternative disciplinary sanctions. He also called for increased safeguards from abusive and prolonged solitary confinement, the universal prohibition of solitary confinement exceeding 15 days, and the discontinuance of solitary confinement for juveniles and mentally disabled persons. *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, delivered to the General Assembly, U.N. Doc. A/66/268 (Aug. 5, 2011).

The U.N. Committee Against Torture, the official body established pursuant to the Convention Against Torture - a treaty ratified by the United States - has also recommended that the practice of long-term solitary confinement be abolished altogether. See, e.g., U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark*, ¶ 14, U.N. Doc. CAT/C/DNK/CO/5 (July 16,

steps toward greater regulation have been taken for several reasons, including the human and fiscal costs of solitary confinement, concern for public safety, and the lack of empirical evidence to support the practice. As a recent *New York Times* article explains, these measures represent an “about face” from the routine use of solitary confinement. Erica Goode, *Rethinking Solitary Confinement: States Ease Isolation, Saving Money, Lives and Inmate Sanity*, N.Y. TIMES, March 11, 2012, at A1, A18.

Some states have already undertaken substantial reforms of their solitary confinement practices. In March 2011, the Maine Department of Corrections recommended tighter controls on the use of special management units (SMUs). Due to subsequent reforms, the SMU population was cut by over fifty percent; expanded access to programming and social stimulation for prisoners was implemented; and personal approval

2007). When the same Committee reviewed practices in the United States, it expressed grave concerns over the extremely harsh regime imposed on prisoners in “super-maximum” prisons. The Committee specifically noted the prolonged isolation prisoners are subject to and the effect such treatment has on their mental health, and recommended that “[t]he State party should review the regime imposed on [prisoners] in ‘supermaximum prisons,’ in particular the practice of prolonged isolation.” See U.N. Comm. Against Torture, 36th Session, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: United States of America*, U.N. Doc. CAT/C/USA/CO/2, at ¶ 36 (May 18, 2006).

of the Commissioner of Corrections is now required to place a prisoner in the SMU for longer than 72 hours.⁶⁴

Over the last few years, Mississippi has also revolutionized its use of solitary confinement. In the process, the state reduced the segregation population of one institution from 1000 to 150 and eventually closed the entire unit.⁶⁵ Prison officials estimate that diverting prisoners from solitary confinement under Mississippi's new model saves about \$8 million annually.⁶⁶ At the same time, changes in the management of the solitary confinement population reduced violence levels by 70%.⁶⁷

Several state legislatures, including those in Colorado, Michigan, Illinois, New Mexico, Virginia and Texas, have recently initiated similar reforms.

In 2011, the Colorado Legislature required a review of administrative segregation and reclassification efforts for prisoners with mental

⁶⁴ Lance Tapley, *Reform Comes to the Supermax*, PORTLAND PHOENIX, May 25, 2011, available at <http://portland.thephoenix.com/news/121171-reform-comes-to-the-supermax/>.

⁶⁵ Terry A. Kupers, et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAV. 1037, 1041 (2009); John Buntin, *Exodus: How America's Reddest State - And Its Most Notorious Prison - Became a Model of Corrections Reform*, 23 GOVERNING 20, 27 (2010).

⁶⁶ Transcript of Proceedings at 8, *Presley v. Epps*, No. 4:05-CV-00148-JAD (N.D. Miss. Aug. 2, 2010).

⁶⁷ Kupers et al., *supra* note 65, at 1043.

illness or developmental disabilities.⁶⁸ At the same time, the Colorado Department of Corrections (CDOC) identified administrative segregation reform as a management priority and made a formal request to the National Institute of Corrections, U.S. Department of Justice, for an external review and analysis of its administrative segregation operations. As a result of the reforms implemented through this process in the last few months, CDOC has reduced its administrative segregation population by 36.9%.⁶⁹

After taking these steps to reduce the use of administrative segregation, the CDOC recently announced the closure of a 316-bed administrative segregation facility, which is projected to save the state \$4.5 million in Fiscal Year 2012-13 and \$13.6 million in Fiscal Year 2013-14.⁷⁰

Correctional leaders in Michigan have recently reformed administrative segregation practices through

⁶⁸ S. B. 176, 68th Gen. Assem., Reg. Sess. (Colo., 2011).

⁶⁹ COLORADO DEPARTMENT OF CORRECTIONS, REPORT ON IMPLEMENTATION OF ADMINISTRATIVE SEGREGATION PLAN 1-2 (2012), available at <https://www.aclu.org/prisoners-rights/report-co-docs-implementation-administrative-segregation-plan>; see also Denise Maes, *Guest Column: Solitary Confinement Reform is Welcome Sign of Progress*, COLORADO SPRINGS GAZETTE, Jan. 27, 2012, available at www.gazette.com/common/printer/view.php?db=colgazette&id=132524

⁷⁰ News Release, Department of Corrections, *The Department of Corrections Announces the Closure of Colorado State Penitentiary II* (March 19, 2012), available at <http://www.doc.state.co.us/sites/default/files/Press%20release%20CSP%20II%20close%20%20Feb%201%202013.pdf>.

incentive programs that have reduced the length of stays in isolation, the number of prisoners subject to administrative segregation, and the number of incidents of violence and other misconduct. Reduction in segregation has produced better prisoner outcomes at less cost; segregation in Michigan costs nearly double what the state typically pays to incarcerate each prisoner.⁷¹

In New Mexico the state legislature mandated a study on solitary confinement's impact on prisoners, its effectiveness as a prison management tool, and its costs.⁷² The Lieutenant Governor of Texas similarly commissioned a study on the use of administrative segregation in the Texas Department of Criminal Justice, including the reasons for its use, its impact on public safety and prisoner mental health, possible alternative prison management strategies, and the need for greater reentry programming for the population.⁷³ The Virginia Senate passed a joint resolution mandating a legislative study on alternative practices

⁷¹ Jeff Gerritt, *Pilot Program in UP Tests Alternatives to Traditional Prison Segregation*, DETROIT FREE PRESS, January 1, 2012, available at www.frep.com/fdcp/?unique=1326226266727.

⁷² H. Mem. 62, 50th Leg., 1st Sess. (N.M. 2011).

⁷³ Press Release, Office of the Lieutenant Governor, *Lt. Governor Dewhurst Issues Select Interim Charges Relating to Transportation, Homeland Security and Criminal Justice* (Jan. 13, 2012), available at <http://www.ltgov.state.tx.us/prview.php?id=337>.

to limit the use of solitary confinement, cost savings associated with limiting its use, and the impact of solitary confinement on prisoners with mental illness, as well as alternatives to segregation for such prisoners.⁷⁴ Recently, the Governor of Illinois announced a proposal to close the state's notorious supermax prison, Tamms Correctional Center. The closure of Tamms will reportedly save \$21.6 million in the upcoming fiscal year and \$26.6 million annually thereafter.⁷⁵

Correctional leaders in Massachusetts have also taken steps towards significant reform of segregation units. At the Special Management Unit at Hampden County Correctional Facility, for example, reforms include changes to the classification scheme to limit the numbers in segregation, weekly meetings to develop corrective action plans for each prisoner, more programming, increased exercise and socialization opportunities, reduced sentences for good behavior, and step-down programs in general population. Hampden

⁷⁴ S. J. Res. 93, 2012 Leg., Reg. Sess. (Va. 2012).

⁷⁵ Steve Mills, *Quinn's Prison Plan Causes Stir*, CHICAGO TRIBUNE, February 23, 2012, available at <http://www.chicagotribune.com/news/local/ct-met-illinois-state-budget-prisons-20120223,0,3394133.story>; Dave McKinney and Andrew Maloney, *Gov. Pat Quinn: Close super-max downstate Tamms prison*, CHICAGO SUN TIMES, February 22, 2012, available at <http://www.suntimes.com/news/politics/10785648-418/gov-pat-quinn-close-super-max-downstate-tamms-prison.html>.

County's reforms have resulted in fewer prisoners in segregation with no increase in violence in the general population and fewer incidents in segregation.⁷⁶

New standards adopted by the American Bar Association (ABA) aim to ensure that solitary confinement is only used when justified. Most important, for purposes of this case, the Standards require that prisoners receive adequate and meaningful process before being placed or retained in segregation. ABA Criminal Justice Standards on the Treatment of Prisoners 23-2.9 (2010), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html. The ABA Standards represent a consensus view

⁷⁶ RICHARD MCCARTHY, NATIONAL INSTITUTE OF CORRECTIONS, DEPARTMENT IMPLEMENTS INNOVATIVE IMPROVEMENTS TO DISCIPLINARY SEGREGATION UNIT (2011), *available at* <http://nicic.gov/Library/025243>. *See also* Anaridis Rodriguez, *Hampden County Correctional Ahead of the Curve*, WWLP-22 NEWS, Feb. 23, 2012, *available at* <http://www.wwlp.com/dpp/news/local/hampden/hampden-county-correctional-ahead-of-the-curve>. Notably, the Hampden County Sheriff's Department responsible for these reforms has been singled out as an entity engaged in best practices that reduce recidivism. LEN ENGEL, CRIME AND JUSTICE INSTITUTE, PRIORITIES & PUBLIC SAFETY: REENTRY AND THE RISING COSTS OF OUR CORRECTIONS SYSTEM 22 (2009), *available at* <http://cjinstitute.org/publications/correctionscosts>.

of representatives from of all segments of the criminal justice system.⁷⁷

CONCLUSION

Defendants held LaChance in indefinite solitary confinement for over ten months without the procedural protections required by the DSU regulations. Their actions violated LaChance's rights and this Court's clearly established precedent, and undermined the important protections embodied in the DSU regulations. These protections were critical for LaChance, as they are critical for all prisoners held in the custody of the Department of Correction, due to the severe harm inflicted by solitary confinement settings. The human and fiscal costs of solitary confinement are

⁷⁷ The Standards further state that segregation should be brief and rarely last more than one year (23-2.6; 23-5.5). The Standards also require: segregation for protective reasons should take place in the least restrictive setting possible (23-2.6, 23-5.5); policies to decrease extreme isolation by allowing for in-cell programming, supervised out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material (23-3.7, 23-3.8); policies to decrease sensory deprivation by limiting the use of auditory isolation, deprivation of light and reasonable darkness, punitive diets, etc. (23-3.7, 23-3.8); policies that allow prisoners to gradually gain more privileges and be subjected to fewer restrictions, even if they continue to require physical separation (23-2.9); and careful monitoring of prisoners in segregation for mental health deterioration and appropriate action if deterioration occurs (23-6.11). Another key provision is the requirement that correctional systems refrain from placing prisoners with serious mental illness in what is an anti-therapeutic environment; instead they must maintain appropriate, secure mental health housing for such prisoners (23-2.8, 23-6.11).

increasingly recognized in states and jurisdictions around the country where efforts to regulate solitary confinement and limit its use are expanding. The DSU regulations represent the State of Massachusetts' important effort in this regard. Their current application under the law should not be weakened by this Court.

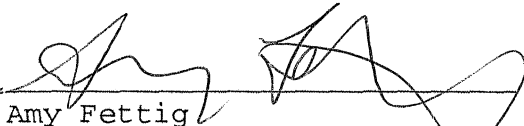
For the foregoing reasons, the Superior Court's holding should be affirmed.

March 29, 2012

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing BRIEF AND ARGUMENT FOR AMICI ON BEHALF OF PLAINTIFF-APPELLEE was furnished through UPS to the following on March 29, 2012:

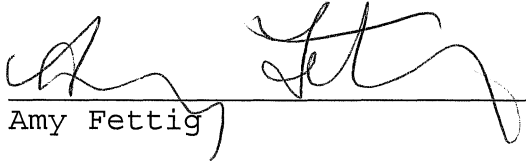
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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I, Amy Fettig, certify that this brief conforms with the rules of court that pertain to the filing of briefs.



Amy Fettig