No. 22-693

IN THE

Supreme Court of the United States

MICHAEL JOHNSON,

Petitioner,

v.

SUSAN PRENTICE, ET AL.,

Respondents.

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

BRIEF OF FORMER CORRECTIONS EXECUTIVES MARTIN F. HORN, SCOTT FRAKES, STEVE J. MARTIN, RON MCANDREW, RICHARD MORGAN, DAN PACHOLKE, EMMITT SPARKMAN, PHIL STANLEY, ELDON VAIL, AND ROGER WERHOLTZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL OF THE SEVENTH CIRCUIT

LAURA L. ROVNER
Counsel of Record
MEREDITH B. ESSER
AURORA L. RANDOLPH
STUDENT LAW OFFICE | CIVIL RIGHTS CLINIC
UNIVERSITY OF DENVER COLLEGE OF LAW
2255 E. Evans Avenue, Suite 335
Denver, CO 80208
Tel: (303)-871-6441
lrovner@law.du.edu

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae are former corrections executives, each with extensive experience managing prison systems who have seen the severe harm that prolonged solitary confinement can cause to incarcerated people—especially those with serious mental illness (SMI) who are denied access to regular exercise.[1] These troubling conditions of confinement—in essence, 24/7 lockdown in solitary confinement due to the restriction on exercise—deteriorate the mental health of the individuals subjected to them and perpetuate their confinement in harsher and more restrictive conditions, compounding these negative impacts. *Amici* are concerned that the Seventh Circuit's decision trivializes the harm this cycle of deprivation causes to both the incarcerated person and the safe, secure, and orderly operation of prisons more broadly.

Amici assert that this 24/7 solitary confinement is contrary to best penological interests and practices. Additionally, *amici* express concern that holding people with SMI in 24/7 solitary confinement risks exacerbating their underlying conditions, creating a pernicious cycle of disciplinary sanctions and increasingly restrictive solitary confinement.

Amici also address the misguided belief that prisons have no viable alternative for ensuring

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[1] No counsel for a party authored this brief in whole or in part. No persons made monetary contributions to its preparation or submission in support of this brief. *Amici* have provided notice to all represented parties at least ten days prior to the due date for this brief pursuant to Supreme Court Rule 37(a)(2).

security. *Amici* describe how 24/7 solitary confinement has proven dangerous and ineffective, whereas alternative prison management methods have successfully eliminated prolonged solitary confinement and decreased prison violence. *Amici* submit that exercise deprivation exacerbates the well-known negative effects of solitary confinement without benefiting prison administration. *Amici* provide the Court with evidence from across the country that eliminating such extreme forms of solitary confinement in favor of alternative prison management methods leads to safer prisons and communities.

Amici are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of Corrections and Probation for seven years. Horn has also served as Executive Director of the New York State Sentencing Commission.

Scott Frakes worked in the Washington State Department of Corrections for 32 years and spent an additional eight years as the Director of the Nebraska Department of Correctional Services. Under his leadership, Nebraska Department of Corrections eliminated the use of disciplinary segregation in 2016.

Steve J. Martin has worked as a correctional officer, probation and parole officer, and prosecutor during his more than forty-four years in the criminal justice field. He is the former General Counsel/Chief of Staff of the Texas prison system and has served gubernatorial appointments in Texas on both a

sentencing commission and a council for incarcerated people with SMI. He coauthored a book on Texas prisons (*Texas Prisons, The Walls Came Tumbling Down*, Texas Monthly Press, 1987), and has written numerous articles on criminal justice issues. He has served as an adjunct/visiting faculty member and as a visiting scholar at seven different universities, including the University of Texas School of Law and Queens University, Belfast.

Ron McAndrew served as the Warden of Florida State Prison. He oversaw death row and the operation of executions. He is a contributing author to *Death Penalty and the Victims*, a special publication by the United Nations. He also wrote numerous articles on the death penalty in both the United States and France. Since retirement, he has operated a private consulting business.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board of the Washington State Coalition to Abolish the Death Penalty since 2012.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections. During his thirty-three-year career as a Correctional Officer, he worked in one of the first intensive management units (IMUs) in Washington State. Twenty-five years later, he led the effort to limit the use of IMUs, reducing system-wide violence by over thirty percent. That work is described in *More than Emptying Beds: A Systems Approach to Segregation Reform*.

Emmitt Sparkman is the former Deputy Commissioner of Institutions for the Mississippi Department of Corrections. His adult and juvenile corrections career spans over 43 years working in correctional facilities and community corrections. He has held line and management positions in the states of Texas, Kentucky, and Mississippi. While serving as the Mississippi Department of Corrections Deputy Commissioner, he was instrumental in implementing reforms to reduce the use of restrictive housing. Mr. Sparkman has participated in assessments of administrative segregation practices in the Colorado, Illinois, New Mexico, Maryland, Oklahoma, South Carolina, and the Federal correctional system. He is currently a consultant for jail and prison operations.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. His 42-year career in corrections includes terms as director of correctional institutions, regional administrator, probation officer, and youth correctional officer. Lately he has been a consultant for jail operations.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented an intensive treatment program for people in prison with SMI and a step-down program for people held in long term solitary confinement.

Roger Werholtz served the Kansas Department of Corrections for 28 years – eight of those years as the Secretary of Corrections. During that time, he has supervised all three divisions of the Kansas

Department of Corrections: Community and Field Services; Programs and Staff Development; and Facilities Management. He also has experience in community mental health, child protective services and substance abuse treatment and prevention, and has served as a graduate level instructor in the University of Kansas School of Social Welfare.

SUMMARY OF ARGUMENT

Prolonged solitary confinement causes severe psychological and physical harm, and is a costly, ineffective form of punishment. People with serious mental illness (SMI) are even more vulnerable to the harms associated with solitary confinement, such as suicide, self-mutilation, and psychosis, because solitary confinement intensifies underlying mental health conditions. That exacerbation frequently results in more "behavioral issues," which, in turn, can lead to further sanctions. In the Seventh Circuit, these sanctions can include the deprivation of exercise on top of prolonged solitary confinement – essentially 24/7 solitary confinement. Depriving a person with SMI of exercise while in solitary confinement lacks penological justification because it strips the person of a tool for self-management of symptoms and exacerbates mental health issues. These conditions create a dangerous and self-reinforcing cycle where subsequent, foreseeable manifestations of SMI are then punished with further prolonged solitary confinement with extreme restrictions.

This cycle not only harms the incarcerated person, it also threatens the safety of prison systems, correctional officers, and communities beyond prison walls. The disruption that results from this long-term

24/7 solitary confinement increases the likelihood that incidents requiring a use of force will occur and impacts the safety of communities by decreasing rehabilitation opportunities and increasing the likelihood of rearrest after release, particularly for violent crimes.

Notably, a variety of alternatives to prolonged 24/7 solitary confinement exist, and prison systems that utilize these alternatives are less costly and safer for incarcerated people and correctional officials alike. Many states have limited or eliminated the use of prolonged solitary confinement, and, as a result, have seen a reduction in disruptive incidents. Prison systems that seek to address the underlying causes of behavioral infractions, like the treatment of SMI and access to regular programming, including regular exercise, are safer for both the people they incarcerate and those whom they employ.

ARGUMENT

I. Using 24/7 solitary confinement to punish the manifestations of SMI is an ineffective penological strategy that leads to a cycle of further prolonged and ineffective solitary confinement.

Solitary confinement is a type of restrictive housing where incarcerated people are locked in their cells "for the vast majority of the day, typically 22 hours or more."[2] Unlike those in general population who are typically able to eat, recreate, and program with others throughout the day, people in solitary confinement are isolated in cells but are generally allowed one hour of exercise on most days of the week in areas outside of their cells.[3] Even for those who do not have underlying SMI, the conditions imposed by solitary confinement cause physical and psychological deterioration.[4]

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[2] U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing: Executive Summary*, 3-6 (Jan. 2016) (*Report and Recommendations*).

[3] Sharon Shalev, *A Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, 1, 2 n.2 (2008); PERFORMANCE-BASED STANDARDS AND EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS, 5-ACI-4B-24 (Am. Corr. Inst. Mar. 2021) (ACA Standards).

[4] *See generally* Craig Haney, *The Science of Solitary: Expanding the Harmlessness Narrative*, 115 NW. U. L. REV. 211, 219 n.25 (2020) (collecting studies about the harm of solitary confinement).

For individuals with SMI, solitary confinement is acutely damaging.[5] Solitary confinement exacerbates symptoms of SMI, placing individuals at an increased risk of suicide and psychosis.[6] "For [people with SMI], placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe."[7] Moreover, people with SMI are overrepresented in solitary confinement populations. Having an SMI diagnosis increases a person's chances of being held in solitary by 170 percent.[8]

And imposing restrictions on a person in solitary confinement that additionally deprives them of exercise or any ability to step outside of their cell—*i.e.*, imprisoning them in unrelenting 24/7 solitary confinement—is even more likely to worsen SMI than other solitary confinement. Even in solitary confinement, many jurisdictions permit people to exercise for one hour per day, five days per week, some which allow access to weight-lifting or sports

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[5] Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY LAW 104, 104-05, (Mar. 2010).

[6] Dana G. Smith, *Neuroscientists Make a Case against Solitary Confinement*, SCIENTIFIC AMERICAN (Nov. 9, 2018), https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement/ (last visited Feb. 21, 2023).

[7] *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

[8] Sonja E. Siennick et al., *Revisiting and Unpacking the Mental Illness and Solitary Confinement Relationship,* 39 JUST. Q. 772, 772 (Feb. 2021), https://www.tandfonline.com/doi/full/10.1080/07418825.2020.1871501.

equipment. [9] Exercise has broad-ranging benefits for mental as well as physical health[10] and provides incarcerated people with a critical way to address tension, anger, and stress.[11] People in isolation use exercise to manage the mental strain of isolation.[12] Without this important outlet, the effects of solitary confinement, which already cause mental health to worsen, are compounded.[13] This deterioration leads to more disruptive behaviors and results in infractions that can result in further and harsher solitary confinement. In this way, the harm becomes cyclical and traps incarcerated people in prolonged and unending solitary confinement without access to rehabilitative programming vital to successfully reentering society after their release. Mr. Johnson's experience illustrates what can happen if this cycle is not interrupted.

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[9] Correctional Leaders Association & Liman Center for Public Interest Law at Yale Law School, *Time-in-Cell: A 2021 Snapshot of Restrictive Housing*, 15, 73 (2021), https://law.yale.edu/sites/default/files/area/center/liman/document/time_in_cell_2021.pdf.

[10] P. Callaghan, *Exercise: A Neglected Intervention in Mental Health Care*, 11(4) J. OF PSYCHIATRIC & MENTAL HEALTH NURSING, 476, 476-483 (July 2004), https://doi-org.du.idm.oclc.org/10.1111/j.1365-2850.2004.00751.x.

[11] Mallory A. Ambrose & Jeffrey W. Rosky, *Prisoners' Round: Examining the Literature on Recreation and Exercise in Correctional Facilities*, 2 INT'L J. CRIMINOLOGY & SOCIO. 362, 364 (2013).

[12] Justin D. Strong et al., *The Body in Isolation: The Physical Health Impacts of Incarceration in Solitary Confinement*, 15 PLOS ONE 1, 9 (Oct. 9, 2020).

[13] *See* Ambrose & Rosky, *supra* note 11, at 364.

a. Prolonged solitary confinement is harmful.

People in solitary confinement are confined to small, locked cells for twenty-two to twenty-four hours per day.[14] They are "given only extremely limited or no opportunities for direct and normal social contact with other persons . . . and afforded extremely limited, if any, access to meaningful programming of any kind."[15] They are only allowed to leave their cells for brief exercise periods (also alone) or other limited purposes, such as legal calls or urgent medical needs.[16] When allowed out of their cells, they are almost always "shackled at the wrists, waist, and legs, and escorted by one or more correctional officers."[17]

It is now widely recognized that people without mental illness who are held in prolonged solitary confinement—even where there is access to exercise—suffer extensive harms, including, "anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors."[18] Solitary confinement also leads to psychosis, neurological damage, depression, memory loss, paranoia, cognitive decline, heart disease, concentration loss, and the creation and exacerbation of other mental health challenges and medical conditions.[19] Some studies

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[14] *Report and Recommendations, supra* note 2, at 3 (Jan. 2016).
[15] Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 286 (2018).
[16] *Report and Recommendations, supra* note 2, at 28-30.
[17] *Id*. at 28.
[18] Haney, *supra* note 15, at 299.
[19] *See generally* Brie A. Williams et al., *The Cardiovascular Health Burdens of Solitary Confinement*, 34 J. GEN. INTERNAL MED 1977, 1977-80 (June 21, 2019), https://link.springer.com/article/10.1007/s11606-019-05103-6;

have concluded that solitary confinement's impact on the human brain "is as brutal as a traumatic physical injury."[20] Solitary confinement also leads to physical deterioration.[21] For example, a North Carolina study found that "[p]eople who spent time in solitary confinement . . . were 24% more likely to die in their first year after release than [those] who had not spent any time in solitary."[22]

b. People with SMI are especially vulnerable to deterioration in solitary confinement.

Solitary confinement is particularly harmful for people with serious mental illness who are also disproportionately incarcerated in such conditions. [23]

See generally Smith, *supra* note 6; *See, e.g.,* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 333-37, 341-42 (2006), https://openscholarship.wustl.edu/law_journal_law_policy/vol22/iss1/24.

[20] *See* Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, http://www.newyorker.com/magazine/2009/03/30/hellhole (describing studies using EEG-like tests to measure brain functioning following solitary confinement).

[21] Strong et al., *supra* note 12, at 3.

[22] *Id*.

[23] Eight states have passed legislation restricting placement of individuals with a mental illness in solitary confinement. Those states are Colorado, Connecticut, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, New Jersey, New York, and Texas. Nat'l Conf. of State Legis., Admin. Segregation: State Enactments: January 2018 (2018), https://www.leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Meetings/Mar-2018/Exhibits/sj25-state-enactments-2018-ncsl.pdf (*State Enactments*); Andrew Oxford, *Gov. Lujan Grisham Signs Criminal Justice Legislation,* SANTA FE NEW MEXICAN, Apr. 3, 2019, https://www.santafenewmexican.com/news/legislature/gov-

In solitary confinement, the "isolation, forced idleness, and lack of intensive therapeutic mental health services" aggravates the underlying SMI, causing significant decompensation.[24] One study illustrated that five prison systems reforming their solitary confinement policies had confirmed that between forty to sixty percent of people in solitary had an identified mental health need.[25] Despite extensive research confirming that holding people with SMI in solitary confinement is damaging, multiple jurisdictions self-report that isolation cells are filled with people who need mental health treatment.[26]

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lujan-grisham-signs-criminal-justice-legislation/article_1dbf1aa7-f90e-5a41-b078-a04ddf6bd172.html (last visited Feb. 20, 2023); Amy Fettig, *2019 was a Watershed Year in the Movement to Stop Solitary Confinement*, ALCU.org, https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement (last visited Feb. 20, 2023); The ASCA & Liman Center for Public Interest Law at Yale Law School, *Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019, A Research Brief*, 2-3 (ASCA-Liman 2019) https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf (Montana limits the placement of people with serious mental illness in solitary confinement to fourteen days).

[24] *See* Kayla James & Elena Vanko, *The Impacts of Solitary Confinement*, VERA INSTITUTE OF JUSTICE, 1, 2 (Apr. 2021), https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf.

[25] *See* Leon Digard et al., *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems*, VERA INST. OF JUST., 21-23 (May 2018), https://www.vera.org/downloads/publications/rethinking-restrictive-housing-report.pdf.

[26] The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School,

Additionally, correctional officials—tasked with maintaining safety and good order—can mistake symptoms of SMI for rule violations, resulting in further punishment, often in the form of *more* solitary confinement. But the additional periods of solitary confinement only exacerbate the person's underlying SMI.[27] In sum, solitary confinement does *not* reduce misconduct or violence in prisons.[28]

c. Depriving a person in solitary confinement of the ability to exercise further exacerbates their physical and mental deterioration.

Making solitary confinement harsher and more restrictive for an individual with SMI by preventing them from exercising merely adds fuel to a terrible fire. As Justice Sonia Sotomayor noted, the deprivations associated with the denial of outdoor exercise deserve careful review by the courts.[29] She emphasized that "to deprive a prisoner of any outdoor exercise for an extended period of time in the absence of an especially strong basis for doing so is deeply troubling—and has been recognized as such for many years."[30] As one incarcerated journalist noted, "Often, our only defense against [the stress of prison] is

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Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms, 48 (ASCA-Liman 2016), https://www.cor.pa.gov/About%20Us/Initiatives/Documents/Admin%20Segregation/ASCA%20Report%20November%202016%20Liman%20Aiming%20to%20Reduce%20Time%20In%20Cell.pdf.

[27] James & Vanko *supra* note 24, at 2.

[28] *Id.* at 5.

[29] *Apodaca v. Raemisch*, 139 S.Ct. 5, 5 (2018).

[30] *Id.*

exercise. We must get fit to live. It's a matter of both physical and mental health."[31] For this reason, the American Correctional Association (ACA) standards require solitary confinement units to build indoor and outdoor exercise areas with minimum required square footage.[32]

Exercise has well-known benefits for mental health, especially in prison. It is particularly important in the solitary confinement context, where exercise has been found to alleviate symptoms such as anxiety, depression, stress, and anger. [33] For example, Virginia partnered with the Vera Institute of Justice to evaluate its solitary confinement conditions and determined that "minimal time outside of a cell is not healthy for the body or mind."[34] Virginia concluded that to reduce idleness and improve prison management "[d]aily outdoor recreation should be provided—in spaces adequate for physical activity and

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[31] Adam M. Kinzer, *Surviving Prison is 90% Mental. That's Why I Teach Workouts That Strengthen the Mind*, LIFE INSIDE (Apr. 8, 2022 at 6:00 A.M.). https://www.themarshallproject.org/2022/04/08/prison-workouts-benefit-mind (last visited Feb. 20, 2023).

[32] ACA Standards, *supra* note 3, at 5-ACI-4B-24.

[33] Claudia Battaglia et al., *Participation in a 9-month Selected Physical Exercise Programme Enhances Psychological Well-Being in Prison Population*, 25 CRIMINAL BEHAVIOR & MENTAL HEALTH 343, 344 (Dec. 2015); *see* Ali A. Weinstein et al., *Mental Health Consequences of Exercise Withdrawal: A Systematic Review*, 49 GEN. HOSP. PSYCH. J., 11, 17 (2017); A. Cashin et al., *The Relationship Between Exercise and Hopelessness in Prison*, 15 J. OF PSYCHIATRIC & MENTAL HEALTH NURSING 66, 67 (2008).

[34] Byron Kline et al., *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections*, VERA INST. OF JUST., CNTR. ON SENT'G & CORRS., 22 (Dec. 2018).

with equipment for exercising—in addition to expanded opportunities for indoor recreation . . . ."[35] The Vera Institute found that providing people with opportunities to exercise and program helps to reduce the negative effects of solitary confinement, like future disruptions.[36] Similarly, Colorado reports that it reformed segregation by developing short-term de-escalation rooms, and allowing incarcerated people at its supermax access to exercise and recreation, and saw a decline in assaults by forty percent.[37]

When a corrections system denies exercise to people in solitary confinement, it deprives them of one of their few ways to manage "the mental strain of being in isolation,"[38] compounding the physical and psychological deterioration already associated with solitary confinement. This deterioration can result in disruptive behavior, creating less safe and less secure prison conditions.[39]

d. Imposing 24/7 solitary confinement on people with SMI creates a devastating and dangerous cycle where disruptive behavior is punished with longer, more intense forms of solitary confinement.

For an individual with serious mental illness, 24/7 solitary confinement is devastating. It also lacks

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[35] *Id.*

[36] *See* Digard et al., *supra* note 25, at 30-33.

[37] *See* Rick Raemisch, *Why I ended the Horror of Long-Term Solitary in Colorado's Prisons* (Dec. 5. 2018) https://www.aclu.org/news/prisoners-rights/why-i-ended-horror-long-term-solitary-colorados-prisons (last visited Feb. 20, 2023).

[38] Strong et al., *supra* note 12, at 9.

[39] *See* Ambrose & Rosky, *supra* note 11, at 364.

penological justification. An incarcerated person with SMI may decompensate while in solitary, leading to disciplinary infractions that are traditionally punished though even longer stays in solitary or more intense isolation (*i,e.*, out-of-cell and exercise deprivation). Research shows that solitary confinement "lead[s] to the psychological deterioration of [incarcerated people]"[40] and can cause incarcerated people to act out and lose their ability to control their own behavior.[41] This cycle of punishing SMI with the very conditions that trigger it is ineffective and counterproductive.

Mental health symptoms can often be flagged as disruptive behavior in prison and result in disciplinary action. Common "offenses" that land incarcerated people in punitive solitary confinement include disobeying orders, disrespect, and swearing.[42] For instance, Nebraska reported twenty-eight percent of incarcerated people in punitive isolation were there for "disobeying an order," and another thirty-eight percent for "threatening language or gestures," "swearing," or "disruption."[43] Just eight percent of infractions leading to solitary confinement were

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[40] Mimosa Luigi et al., *Solitary Confinement of Inmates Associated with Relapse Into Any Recidivism Including Violate Crime: A Systematic Review and Meta-Analysis,* 23 TRAUMA, VIOLENCE & ABUSE 331, 445 (Apr. 2022).

[41] Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units*, 52 INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 622, 628-29 (Dec. 2008).

[42] Digard et al., *supra* note 25, at 15-17.

[43] *Id*. at 17.

assaults.[44] As one corrections executive observed, "in segregation, [the person is] mad and responds with more vulgarity. He gets another rule violation and we tack on [thirty] days. Soon you have a guy who has never used violence doing three to four years in segregation. He probably needs some anger management."[45]

In sum, these circumstances can lead to a destructive and punitive cycle for individuals with SMI. First, incarcerated people with SMI are particularly vulnerable to being sent to solitary, which causes further deterioration of their mental health. That deterioration triggers "problematic behaviors," which are punished with the imposition of more extreme forms of isolation—in this case, 24/7 solitary confinement and deprivation of exercise. And this extreme isolation and deprivation causes further mental health deterioration, which leads to continued problematic behavior. In this [un]ending cycle, everyone loses.

Ultimately, this cycle of isolation prevents people from re-establishing the prosocial behaviors necessary for them to successfully transition out of solitary.[46] Without an opportunity to relearn social

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[44] *Id.*

[45] Emmitt Sparkman, *Mississippi DOC's Emmitt Sparkman on Reducing the Use of Segregation in Prisons*, THINK JUSTICE BLOG (Oct. 31, 2011), https://www.vera.org/blog/mississippi-docs-emmitt-sparkman-on-reducing-the-use-of-segregation-in-prisons.

[46] Hans Toch & Terry Kupers, *Violence in Prisons, Revisited* 45.3 J. of Offender Rehabilitation 1, 17-18 (2007).

skills after isolation, it is often true that those who have been in solitary cannot escape it for long.[47]

This case is an alarming example of the problems that occur when this cycle continues without interruption. Petitioner Johnson, diagnosed as seriously mentally ill by the Illinois Department of Corrections, spent over three years in solitary confinement, locked alone in a windowless cell too small for in-cell exercise. And because he had additional disciplinary sanctions imposed on him due to infractions while in solitary confinement, he was restricted to one hour of out-of-cell recreation per month, and frequently even less often than that. Foreseeably, the Petitioner deteriorated and behavior did not improve.

II. The cycle of increasingly restrictive solitary confinement makes prisons and communities less safe.

Solitary confinement, and especially the 24/7 isolation described here, makes prisons and communities less safe. As Leann Bertsch, former President of the Association of State Correctional Administrators (ASCA), noted "[r]estricted housing places substantial stress on both the staff working . . . as well as the incarcerated people housed in those units."[48]

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[47] *See id.* at 18.

[48] ASCA-Liman 2016, *supra* note 26, at 2.

a. 24/7 solitary confinement does not serve penological interests.

Solitary confinement has traditionally been justified because of its purported deterrent and incapacitating effects.[49] But research shows that solitary confinement fails to incapacitate or deter unwanted behaviors.[50]

The ACA mandates that incarcerated people are given access to out-of-cell exercise for one hour per day, five days a week, while they are housed in solitary confinement, absent any security or safety concerns.[51] This is common sense—exercise is an outlet for anxiety and depression, and provides people in solitary confinement with a routine.[52] As such, the Council of Europe's Committee for the Prevention of Torture recognizes that a "satisfactory programme of activities," including exercise, is of "crucial importance for the mental well-being of prisoners."[53] If the goal of solitary confinement is truly to deter unwanted behaviors, it is counterproductive to use exercise deprivation as punishment.

First, solitary confinement is an ineffective deterrent. Research demonstrates the increased use of

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[49] Jules Lobel, *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in America's Prisons*, 115 NW. UNIV. L. R. 159, 166, 192 (2020).
[50] *See* Luigi et al., *supra* note 40, at 445.
[51] ACA Standards, *supra* note 3, at 5-ACI-4B-24.
[52] Ambrose & Rosky, *supra* note 11, at 364-66.
[53] Stephenson et al., *Time Out of Cell and Time in Purposeful Activity and Adverse Mental Health Outcomes Amongst People in Prison: A Literature Review*, 17 INT'L J. OF PRISONER HEALTH 54, 64 (Jan. 4, 2021).

solitary confinement is "not associated with reductions in facility or systemwide misconduct and violence."[54] Nor does it "reduce inmate-on-inmate violence [or] staff assaults."[55] In fact, solitary confinement does not "inspire even short-term behavioral changes in inmates."[56] On the contrary, "[p]risons with higher rates of restrictive housing had higher levels of facility disorder."[57]

Moreover, the use 24/7 solitary confinement as punishment for behaviors that are manifestations of an SMI also fails to promote deterrence.[58] Generally, deterrence is premised on individuals making conscious choices based on their prediction of likely outcomes.[59] But when the behaviors that correctional officials seek to deter are manifestations of SMI, that

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[54] B. Steiner & C.M. Cain, U.S. Department of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, in* RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 165, 179 (2016).

[55] Luigi et al., *supra* note 40, at 445.

[56] *Id.*

[57] Allen J. Beck, U.S. Department of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 1 (Oct. 2015), https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf.

[58] *See* James & Vanko, *supra* note 21; *see also* Kristen M. Zgoba et al., *Assessing the Impact of Restrictive Housing on Inmate Post-Release Criminal Behavior*, 45 AM. J. CRIM. JUST., 102, 102-25 (2020); *see also* Daniel H. Butler et al., *An Examination of the Influence of Exposure to Disciplinary Segregation on Recidivism*, 66 CRIM. & DELINQUENCY 485-512 (2020).

[59] Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27(3) L. & SOC'Y REV., 467, 469 (1993).

conduct is often involuntary and, therefore, cannot be deterred in the traditional sense.

Second, solitary confinement fails to incapacitate a person engaging in such disruptive behavior. In fact, the conditions of solitary confinement led to predictable mental health deterioration, including self-harm behaviors such as cutting or banging their heads against the wall.[60] Besides posing dangers to the incarcerated person, these behaviors may necessitate use of force,[61] increasing the risk of physical harm to both the correctional staff. Solitary confinement, rather than addressing underlying concerns, consistently leads to deterioration in mental health.[62] Correctional officers should not expect a person's problematic behavior to improve when they are subjected to 24/7 solitary confinement.

b. 24/7 solitary confinement puts correctional officers at increased risk.

Imprisoning people in solitary confinement (with or without exercise deprivation) cannot be justified based on safety. In fact, research demonstrates that reforms limiting the use of solitary resulted in a dramatic decrease in prison violence.[63]

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[60] Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104(3) AM. J. PUBLIC HEALTH, 442, 444-45, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953781/.

[61] *See* Toch & Kupers, *supra* note 46, at 18.

[62] *Id*. at 17.

[63] *See, e.g.*, Marc A. Levin, Esq., *Testimony Before the U.S Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* 3 (February 25, 2014), https://www.judiciary.senate.gov/imo/media/doc/02-25-

There are many examples of correctional systems experiencing major decreases in violence after limiting the use of solitary confinement. In Washington, violent incidents dropped dramatically after prison officials implemented a group violence deterrence strategy that reduced their reliance on solitary.[64] "In the model's first year at its pilot facility, assaults against staff, the use of weapons, and multi-man fights were reduced by 50 percent."[65] After it reported implementing this group violence deterrence model in two high-security prisons, assaults on staff decreased by sixty-four and eighty-three percent.[66] Similarly, after reporting reforms in Colorado, the number of forced cell entries decreased by approximately forty percent.[67] As Washington and Colorado reported solitary reforms, assaults against staff declined by forty to eighty percent.[68] In North

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14LevinTestimony.pdf*; Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence*, ACA 2018 Winter Conference Seminar (2018) 18-23 (on file with author).

[64] Dan Pacholke & Sandy Felkey Mullins, J.D., U.S. Department of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* 5 (2016), https://www.bja.gov/publications/MorethanEmptyingBeds.pdf; *see generally* Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 171-211 (2017).

[65] Pacholke & Mullins, *supra* note 64.

[66] *Focused Deterrence Initiatives*, *supra* note 63, at 23.

[67] Rick Raemisch, *Why I Ended the Horror of Long-Term Solitary in Colorado's Prisons*, ACLU (Dec. 5, 2018), https://www.aclu.org/news/prisoners-rights/why-i-ended-horror-long-term-solitary-colorados-prisons.

[68] *Focused Deterrence Initiatives, supra* note 63, at 23; Vera Institute of Justice*, Rethinking Restrictive Housing: What's Worked in Colorado?* 67 (Sept. 17, 2018) (on file with author).

Dakota, extreme incidents like suicide attempts and cell flooding occurred at least three times weekly in solitary; after dramatic reductions in its use, they occur only a few times each year.[69] Barely a year after launching solitary confinement reforms, Maine's prison system reported reductions in violence, use of force, restraint chairs, and self-harm among incarcerated people.[70] Ultimately, reduced use of solitary confinement improved the security of prisons in these states.

c. 24/7 solitary confinement harms communities beyond the prison.

24/7 solitary confinement also harms communities beyond the prison walls because the practice increases recidivism. Research shows that solitary confinement can increase recidivism because it reduces impulse control while increasing depression, anxiety, and cognition.[71] People imprisoned in solitary confinement experience higher rates of post-release depression resulting in poor familial relationships, creating barriers to reintegration in the community.[72] Absent careful reintegration efforts, communities bear the costs of

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[69] Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement,* NPR Morning Edition (July 31, 2018, 5:01 a.m.), https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confinemet.
[70] Levin, *supra* note 63, at 3.
[71] Luigi et al., *supra* note 40, at 450.
[72] *Id.*

additional "law enforcement, prosecution, courts, community supervision, and reincarceration."[73]

In fact, research shows a direct correlation between the length of imprisonment in solitary confinement and the odds of recidivism.[74] One meta-analysis found that the longest terms in solitary confinement were associated with the highest rates of recidivism, suggesting that increases in the length of exposure may have deleterious effects.[75] It follows that 24/7 solitary confinement for prolonged periods would only heighten reintegration problems.

III. There are viable, humane alternatives to 24/7 solitary confinement.

Few prison systems use punitive exercise deprivation for people already in solitary confinement, in large part because more humane and effective alternatives exist. In 2016, the ASCA and the Arthur Liman Center for Public Interest Law at Yale Law School recognized that: "Instead of being cast as the solution to a problem, [solitary confinement] has come to be understood by many as a problem in need of a solution."[76] The ACA, the largest accrediting body in the United States for correctional institutions, has adopted limitations on the use of solitary confinement, including: (1) a prohibition against imprisoning people with SMI in prolonged solitary confinement and, (2) ensuring that people imprisoned in solitary

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[73] Illinois Sentencing Policy Advisory Council (SPAC), *Illinois Results First: The High Cost of Recidivism* 1-2 (Summer 2018), https://perma.cc/R59T-FQ5E.
[74] Luigi et al., *supra* note 40, at 446-48.
[75] Luigi et al., *supra* note 40, at 449-50.
[76] ASCA-Liman 2016 *supra* note 26, at 15.

confinement have at least one hour of exercise, five days per week, absent security concerns.[77]

Even before the ACA adopted these standards, some prisons limited solitary confinement of people with SMI to situations where the person "pose[d] a serious threat to the safety of others," and "only when a less-restrictive setting is not sufficient."[78] Because incarcerated people could no longer be sent to solitary confinement for "disruption" (manifestations of SMI), officials needed to address the underlying problems causing the "disruptive" behaviors.[79] "By looking at the pathways that lead inmates to be placed in segregation, an agency can begin to deter the behavior that leads to segregation placement and identify more effective responses."[80] In states that have undertaken reforms, alternatives to solitary confinement prevented "difficult" incarcerated people from being sent to solitary confinement and quickly shrunk the population of people in supermax facilities and isolation units.[81]

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[77] ACA Standards *supra* note 3, at 5-ACI-4B-30; 5-ACI-4B-24.
[78] ACA Standards, *supra* note 3, at 5-ACI-4B-30.
[79] Digard et al., *supra* note 25, at 31; Bernie Warner et al., Washington State Department of Corrections, *Operation Place Safety: First Year in Review* 23-24 (2014), https://nnscommunities.org/wp-content/uploads/2017/10/Operation_Place_Safety_First_Year_Report_2014.pdf.
[80] Warner et al., *supra* note 79, at 13-16.
[81] Rick Raemisch & Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado*, 3, 3 (2015) https://drive.google.com/file/d/0B30yLl0I1yBRY2h2UDBCZ0Q5WlE/view; Pacholke & Mullins, supra note 64, at 9.

Additionally, reforming states adopted strategies to deter violent incidents that resulted in solitary placement, eliminated punitive isolation for minor infractions, and created alternative housing for incarcerated people who need mental health treatment or protective custody.[82] Specifically, providing rehabilitation and therapy opportunities for people in solitary confinement enabled the swift return of many to general population housing.[83] For example, Colorado instituted "Thinking for a Change," a "program with a track record of significantly reducing recidivism rates."[84] "Staff began to witness successful, permanent transitions [out of solitary confinement]."[85]

Correctional experts from across the nation agree that "allowing increased access to outdoor exercise and recreation, as well as increasing dayroom time and other privileges such as visitation and phone calls, are other areas where systems can enhance social interaction and environmental stimulation to lower the psychological stress of isolated confinement."[86] Both individual corrections administrators and the ACA have advocated for allowing incarcerated people access to outdoor exercise. These rehabilitative and treatment-based best practices stand in stark contrast to the approach

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[82] Digard et al., *supra* note 25, at 28-29.
[83] Kupers, *Solitary*, *supra* note 64, at 224-32.
[84] Raemisch & Wasko, *supra* note 81, at 5.
[85] *Id.* at 7.
[86] John Jay College of Criminal Justice, Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prisons 13 (2015), http://johnjaypri.org/wp-content/uploads/2016/08/LangelothReport _web.pdf.

used by the Illinois Department of Corrections in this case.

CONCLUSION

Imprisoning people with SMI in solitary confinement is detrimental to their mental and physical health. Further punishing those people with round-the-clock, unrelenting 24/7 solitary confinement and deprivation of exercise as punishment for behaviors caused by their SMI is illogical and counterproductive to the goals of safety, security, and good order of correctional facilities.

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Respectfully submitted,

LAURA L. ROVNER
Counsel of Record
AURORA L. RANDOLPH
MEREDITH B. ESSER
UNIVERSITY OF DENVER COLLEGE OF LAW
STUDENT LAW OFFICE | CIVIL RIGHTS CLINIC
2255 East Evans Ave., Suite 335
Denver, Colorado 80208
(303)-871-6441
lrovner@law.du.edu