

No. 20-40379

IN THE
**United States Court of Appeals
for the Fifth Circuit**

DENNIS WAYNE HOPE

Plaintiff-Appellant,

v.

TODD HARRIS, CHAD REHSE, LEONARD ESCHESSA, JONI WHITE,
KELLY ENLOSE, MELISSA BENET, B. FIVEASH

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas Lufkin Division
Case No. 9:18-cv-00027
Honorable Ron Clark

**BRIEF *AMICI CURIAE* OF FORMER CORRECTIONS OFFICIALS DAN
PACHOLKE, PHIL STANLEY, DICK MORGAN, ELDON VAIL, AND
STEVE J. MARTIN IN SUPPORT OF PLAINTIFF-APPELLANT AND
REVERSAL**

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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September 28, 2020

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Former corrections officials Dan Pacholke, Phil Stanley, Dick Morgan, Eldon Vail, and Steve J. Martin respectfully submit this brief as *amici curiae* in support of Plaintiff-Appellant Dennis Wayne Hope's position on the merits and in support of reversal of the district court's dismissal under review.

Dan Pacholke has a long tenure as an officer for the Washington State Department of Corrections. Among other positions, he has served as Secretary of the Department of Corrections (October 2015-March 2016), Deputy Secretary (April 2014-October 2015), Director of Prisons (July 2011-April 2014), and Deputy Director of Prisons (July 2008-July 2011). He also served as the Superintendent of a number of individual correction centers. He has over 33 years' experience in the field of corrections.

Phil Stanley is a long-time officer serving both the New Hampshire Department of Corrections and the Washington State Department of Corrections. In New Hampshire, he was Commissioner of Corrections (May 2000-November

¹ Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* represent that all parties have consented to the filing of this brief *amici curiae*. Pursuant to Rule 29(a)(4)(E), the undersigned counsel further represent that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amici curiae* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

2003). In Washington, his roles have included Director of a regional justice center (2007-2012), Probation Officer (2004-2017), Regional Administrator (1997-2000), and Superintendent (1992-1997). He has about 49 years' experience in the field of corrections.

Dick Morgan is a veteran officer and administrator for the Washington State Department of Corrections. He served as Secretary of the Department (March 2016-January 2017), Director of Prisons (2008-2010), and Assistant Deputy Secretary of Prisons (2006-2008). He also served as Superintendent of three different prisons. 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. He has over 35 years' experience in the field of corrections.

Eldon Vail is a long-serving corrections official for the Washington State Department of Corrections. He was Secretary of the Department (2007-2011), Deputy Secretary (1999-2006), and Superintendent of three institutions (1987 and 1989-1994). He has over 35 years' experience in the field of corrections.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system (1981-1985) and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for prisoners with mental

impairments. He coauthored *Texas Prisons: The Walls Came Tumbling Down*,² and has written numerous articles on criminal justice issues. He has over 49 years' experience in the field of corrections.

As former corrections officials with over 220 years of collective experience, *amici* have substantial first-hand experience administering secure prisons and reducing the use of solitary confinement. *Amici* are concerned that the use of long-term solitary confinement has been perpetuated under a misguided belief that prisons have no viable alternative for ensuring security. *Amici* assert that prison security can be maintained without the extended use of isolation, which has proven dangerous and ineffective. *Amici* respectfully submit this brief to set forth the basis for those views.

SUMMARY OF FACTS

Dennis Wayne Hope is incarcerated in the Texas Department of Criminal Justice's (TDCJ) Polunsky Unit. ROA.64. Mr. Hope was placed in solitary confinement, otherwise referred to as administrative segregation, following his escape from the TDCJ's Darrington Unit in 1994. *See* ROA.74-75; *see also* ROA.138. He has been held in solitary confinement ever since his return to prison, totaling 26 years. *See* ROA.65-66. He is housed in a cell that is nine feet long by

² Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down* (1987).

six feet wide. ROA.65-66. Mr. Hope is not allowed out of this cell for any purpose other than recreation in a small cage, which is limited to two hours a day, five days a week, and showering. ROA.65-68. Prior to removal from the cell, Mr. Hope is required to undergo a strip search. ROA.66.

Because of his classification in solitary confinement, Mr. Hope is denied almost all human contact. ROA.66. He is denied contact visitation with his family and the opportunity to socialize with other prisoners or to participate in religious activities, group recreation, and vocational programs. ROA.66. The only human contact he has had in the last 26 years is with officers and medical staff. ROA.66.

Mr. Hope is also exposed to unsanitary living conditions in solitary confinement. ROA.66, 69-70. He is moved from cell to cell nearly every week, and the cells are not disinfected or cleaned prior to his placement. ROA.70. Mr. Hope has been moved into cells with feces, urine, and mold on the walls, floors, and doors. ROA.70. On one occasion, Mr. Hope was moved into a cell with black mold on the back wall and floor, covering approximately 80% of the wall. ROA.70. Mr. Hope notified prison officials about the condition of the cell, but no action was taken and he was denied cleaning supplies. ROA.70-71.

Mr. Hope has developed serious physical and mental medical issues because of the conditions of his confinement. Mr. Hope suffers from chronic lower back pain, knee pain, and swelling due to the cramped size of his cell. ROA.70. Mr.

Hope additionally suffers from depression, anxiety, and insomnia after directly observing other prisoners physically harm themselves and commit suicide. ROA.71-72. He has also experienced visual and auditory hallucinations. ROA.71-72. He is frequently denied access to medical appointments and medical treatment for these conditions. ROA.71-72. Despite recommendations that he be placed in a diversion program, Mr. Hope's requests have been denied. ROA.157; ROA.72-73.

Mr. Hope was initially placed in solitary confinement because he was designated an "[e]scape risk" following his 1994 escape from prison. *See* ROA.75-76. However, in December 2005, the Security Precautions Designator committee reviewed and removed the "[e]scape risk" designation from Mr. Hope's file. ROA.76. In April 2007, SCC member Steve Rogers again reviewed Mr. Hope's file and determined that he was not an escape risk. ROA.76. Mr. Rogers ordered that Mr. Hope be released from solitary confinement on two occasions, but was overruled by the Assistant Director of Classifications at the TDCJ, Joni White, and Chairperson of the State Classification Committee (SCC), Kelly Enloe. ROA.76. Mr. Hope alleges that Ms. White and Ms. Enloe "have been working in conjunction to deny Mr. Hope any meaningful reviews or the Due Process afforded him from the United States Constitution." ROA.76.

Mr. Hope has filed several grievances and petitions to the Administrative Segregation Committee and the SCC about the status of his confinement. ROA.77.

He has not received any information about what he must do to be released to the general population, but has learned that his current behavior and attitude are never considered by either Committee. ROA.75. The initial reason for Mr. Hope's placement in solitary—Mr. Hope's 1994 escape from prison—continues to be the reason for his classification in solitary. ROA.75. During one of Mr. Hope's hearings, he was told by an SCC member that she did not have the authority to release him from solitary confinement because he was "high profile." ROA.73. He has heard from outside advocates that Ms. White has said that she will not allow his release, or make recommendations for his release, because she does not want the responsibility that goes along with that decision. ROA.75-76.

On February 16, 2018, Mr. Hope brought a civil rights action pursuant to 42 U.S.C. § 1983 against prison officials from the Polansky Unit of the TDCJ—Institutional Division as well as officials from the State Classification Committee. ROA.8-9. The magistrate judge recommended that Defendants' motion to dismiss be granted, reasoning that Mr. Hope's claims were frivolous and failed to state a claim upon which relief may be granted. ROA.144-145. On May 5, 2020, the district court overruled Mr. Hope's objections to the magistrate judge's report and recommendation, accepted the findings of fact and conclusions of law, and granted Defendants' motion to dismiss with prejudice. ROA.164.

SUMMARY OF ARGUMENT

The first-hand experience of *amici*, across a variety of correctional settings, has led them to understand that the extended placement of inmates in solitary confinement is generally harmful and unnecessary to institutional safety or security. In *amici*'s experience, prolonged solitary confinement serves no penological purpose: Prolonged solitary confinement does not reduce violence in prison systems and is not necessary to prevent escapes.

Mr. Hope's allegations demonstrate that he is not being kept in solitary confinement for lawful reasons of prison administration. Indeed, the "escape risk" designation was removed from Mr. Hope's file in 2005. His continued classification in solitary is simply a means to punish him further for his 1994 escape from prison.³

Accordingly, the district court's order dismissing Mr. Hope's case should be reversed.

³ Many courts have found that much shorter periods of solitary confinement trigger a right to procedural due process. See Appellant's Br. at 46 (citing *Bailey v. Fisher*, 647 F. App'x 472, 476 (5th Cir. 2016)); see also *Colon v. Howard*, 215 F.3d 227, 231-232 (2d Cir. 2000); *Brown v. Oregon Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014).

ARGUMENT

I. PROLONGED SOLITARY CONFINEMENT CAUSES SERIOUS HARM TO PRISONERS' MENTAL AND PHYSICAL HEALTH.

Numerous studies of prolonged solitary confinement detail the serious psychological harm to prisoners as a result of such isolation.⁴ Inmates in solitary confinement report the same effects as from other forms of torture,⁵ including “severe depression, memory loss, suicidal tendencies, and an inability to relax, being unable to keep track of time due to the tiny window and a lack of natural daylight in the cell.”⁶ These inmates lose the ability to “establish and sustain a sense of identity and to maintain a grasp on reality.”⁷ One individual who had been in isolation for almost twenty-five years described his confinement as being like an “endless toothache,” or a “slow constant peeling of the skin, stripping of the flesh, the nerve-wracking sound of water dripping from a leaky faucet in the still of

⁴ See, e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 130-132 (2003).

⁵ See Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 *Am. U. L. Rev.* 1331, 1364 (2012).

⁶ Human Rights Clinic at U. of Tex. Sch. of L., *Designed to Break You: Human Rights Violations on Texas’ Death Row*, 21 (Apr. 2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>.

⁷ See Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 *Ind. L.J.* 741, 776 (2015) (internal quotations omitted).

the night while you're trying to sleep. Drip, drip, drip, the minutes, hours, days, weeks, months, years, constantly drip away with no end or relief in sight.”⁸

The prevalence of suicide and self-harm in solitary confinement illustrates the dangers of isolation. Approximately 50% of prisoner suicides occur among prisoners housed in solitary confinement.⁹ Detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population; in California prisons in 2004, 73% of all suicides occurred in isolation units.¹⁰ This is not a surprising result; many prisoners in solitary deteriorate dramatically. It is not unusual for prisoners in solitary confinement to swallow razors, smash their heads into walls, compulsively cut their flesh, and try to hang themselves.¹¹

These “negative (sometimes severe) health effects can occur after only a few days of solitary confinement,” and “[t]he health risk rises for each additional day in

⁸ Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 116 (2008) (internal quotations omitted).

⁹ See Stuart Grassian & Terry Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, 13 *Corr. Mental Health Rep.* 1, 11 (2011).

¹⁰ Expert Report of Craig Haney ¶ 81 n. 119, *Coleman v. Schwarzenegger*, No: Civ S 90-0520 LKK-JFM P, 2008 WL 8697735 (E.D. Cal. Aug. 15, 2008); see also Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 *Am. J. Pub. Health* 442, 442-447 (2014).

¹¹ See David Fathi, *Supermax Prisons: Cruel, Inhuman and Degrading*, ACLU Blog (July 9, 2010), <https://www.aclu.org/blog/national-security/supermax-prisons-cruel-inhuman-and-degrading>.

solitary confinement.”¹² The psychological consequences for those who are held in solitary confinement for extended periods of time is profoundly negative. Put simply, “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasted for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects.”¹³

Just as it has become increasingly well-documented and understood that prolonged solitary confinement causes extensive harm to mental health, attitudes about solitary confinement have too begun to shift. Litigation has highlighted the risks to prisoners in isolation and sought to limit its use.¹⁴ Indeed, even over twenty years ago solitary confinement in Texas was recognized by a federal court

¹² Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 *Crime & Just.* 441, 495 (2006); see also Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 *Pace Int’l L. Rev.* 1, 13 (2006) (“[T]he longer an individual experiences conditions of isolation, the likelier they are to develop significant mental illness.”).

¹³ *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019) (internal quotations and emphasis omitted); see also Lobel, *supra* note 8, at 118 (“[N]o study of the effects of solitary . . . that lasted longer than 60 days failed to find evidence of negative psychological effects.” (internal quotations omitted)).

¹⁴ See, e.g., *Fussell v. Vannoy*, 584 F. App’x 270 (5th Cir. 2014); *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019); *Porter v. Pa. Dep’t of Corr.*, ___ F.3d ___, 2020 WL 5100680 (3d Cir. 2020).

as causing “profound and obvious psychological pain and suffering” and being “virtual incubators of psychoses-seeding illness.”¹⁵

The United States Senate and several states commissioned studies of the impact of solitary confinement on prisoners and its effectiveness in managing violence.¹⁶ Mindful of the harm that solitary confinement inflicts on prisoners, the federal government and several states have undertaken solitary confinement reforms. Twenty-eight states have introduced legislation to ban or restrict solitary confinement, and twelve states passed reform legislation: Arkansas, Connecticut, Georgia, Maryland, Minnesota, Montana, Nebraska, New Jersey, New Mexico, Texas, Washington, and Virginia.¹⁷ Several states, including Hawaii, New York,

¹⁵ *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999), *rev'd and remanded sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

¹⁶ See Eli Hager & Gerald Rich, *Shifting Away from Solitary: More States Have Passed Solitary Confinement Reforms This Year Than in the Past 16 Years*, The Marshall Project (Dec. 23, 2014) <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary>; Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; The Assoc. of State Corr. Adm’rs & The Liman Ctr. for Publ. Interest Law at Yale L. Sch., *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell*, 87-88 (Oct. 2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf.

¹⁷ Amy Fettig, *2019 was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (Dec. 16, 2019), <https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement/>.

and Pennsylvania, have proposed legislation that would limit the maximum number of continuous days in administrative segregation to fifteen days.¹⁸

Various correctional and professional organizations have also recommended limitations on the use of solitary confinement. For example, the National Commission on Correctional Health Care has stated that “Prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and degrading treatment, and harmful to an individual’s health.”¹⁹ In 2016, a report published by the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center for Public Interest Law at Yale Law School captured the growing tendency toward reform: “Instead of being cast as the solution to a problem, restricted housing has come to be understood by many as a problem in need of a solution.”²⁰

¹⁸ Corr. Leaders Assoc. & The Liman Ctr. for Publ. Interest L. at Yale L. Sch., *Time-In-Cell 2019: A Snapshot of Restrictive Housing Based on a Nationwide Survey of U.S. Prison Systems*, 83 (Sept. 2020), https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_2019.pdf.

¹⁹ Nat’l Comm’n on Corr. Healthcare, *Solitary Confinement (Isolation)*, (April 10, 2016), <https://www.ncchc.org/solitary-confinement>.

²⁰ The Assoc. of State Corr. Adm’rs & The Liman Ctr. for Publ. Interest Law at Yale L. Sch., *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*, 15 (Nov. 2016), <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducet ic.pdf>.

Despite this trend, TDCJ leads the nation in long-term solitary confinement. As of May 2019, Texas held 4,165 people in solitary confinement.²¹ On average, people placed in solitary confinement spend approximately five years in isolation.²² And over one hundred Texas prisoners have spent more than twenty years in solitary.²³ Texas holds more prisoners in prolonged solitude than all the other states and the Federal Bureau of Prisons combined.²⁴

Like so many others held in solitary confinement, Mr. Hope's allegations show that he has developed serious physical and mental medical issues from his twenty-five continuous years in solitary. Mr. Hope suffers from depression, anxiety, and insomnia. ROA.71-72. Mr. Hope has directly observed other prisoners physically harm themselves and commit suicide while in solitary confinement. ROA.72. He has also experienced visual and auditory hallucinations. ROA.71-72; ROA.152-153. Mr. Hope additionally suffers from

²¹ Meagan Harding & Peter Steffensen, *Torture By Another Name: Solitary Confinement in Texas*, Tex. Civil Rights Project 1 (Oct. 2019), <https://texascivilrightsproject.org/wp-content/uploads/2019/10/2019-SolitaryConfinement-Report.pdf>.

²² *Id.*

²³ ACLU of Tex. & Tex. Civil Rights Project-Houston, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas*, 9 (Feb. 2015), https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf.

²⁴ Harding & Steffensen, *supra* note 21 at 1.

chronic lower back pain, knee pain, and swelling due to the cramped size of his cell. ROA.71.

II. PROLONGED SOLITARY CONFINEMENT SERVES NO PENOLOGICAL PURPOSE.

Some form of restrictive housing, imposed on a prisoner for a limited amount of time following an individualized assessment, may be an appropriate tool in the correctional arsenal. However, there exists no penological interest in maintaining prisoners in *prolonged* solitary confinement. Studies have shown that solitary confinement does not reduce violence within prison systems. Moreover, reasons that may have previously justified a prisoner's isolation, like the risk of escape, no longer do. Technological improvements have dramatically decreased the risk that any prisoner can escape, whether from the general population or solitary confinement. Accordingly, prison officials can maintain secure prisons while reducing the use of solitary confinement.

A. Solitary Confinement Does Not Reduce Violence Within Prison Systems.

Over a century ago, the United States abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.²⁵ In the past few decades, solitary confinement has returned to America's prisons, partly in

²⁵ See Bennion, *supra* note 7, at 747.

reaction to exploding prison populations.²⁶ The resulting overcrowded prisons were ill-equipped to address the epidemic of prisoners with mental illness, the growth of prison gangs, or the overall increase in violence.²⁷

Correctional officials believed they could pinpoint the “worst of the worst” who most frequently engaged in prison violence and then isolate them to restore order.²⁸ Many states and the Federal Bureau of Prisons built solitary confinement units and “supermax” prisons.²⁹ Officials expected that removing difficult prisoners from the general population would reduce prison violence.³⁰ They were wrong.

The increased use of solitary confinement was “not associated with reductions in facility or systemwide misconduct and violence.”³¹ Unfortunately, with so many solitary confinement cells already built, isolation became an

²⁶ *Id.* at 747-751.

²⁷ *See id.* at 748-751.

²⁸ Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

²⁹ Bennion, *supra* note 7, at 751-752.

³⁰ *See* Briggs, *supra* note 28, at 1341-42.

³¹ Benjamin Steiner & Calli M. Cain, *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*, Nat’l Inst. of Just. 165, 179 (2016).

overused part of the correctional toolkit.³² Punitive isolation became common.³³ As the practice proliferated, studies showed that “[p]risons with higher rates of restrictive housing had higher levels of facility disorder.”³⁴ Between 2009 and 2015, Texas prisons experienced a 104 percent increase in prisoner assaults, which correctional staff attributed directly to the overuse of solitary confinement.³⁵ Psychologists demonstrated that the social pathology caused by isolation led prisoners to “occupy this idle time by committing themselves to fighting against the system.”³⁶

Putting prisoners into isolation did not reduce violence. Rather, the available evidence has proved the opposite is true: letting prisoners out of solitary confinement resulted in a dramatic decrease in prison violence.³⁷

³² See Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. Times (Mar. 11, 2012), <https://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html>.

³³ See Léon Digard et al., *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems*, Vera Inst. of Just. 15 (May 2018).

³⁴ Allen J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, U.S. Dep’t of Just. 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

³⁵ See ACLU of Tex., *A Solitary Failure*, *supra* note 23, at 44.

³⁶ Haney, *Mental Health Issues in Long-Term Solitary*, *supra* note 4, at 140.

³⁷ See, e.g., Marc A. Levin, Esq., *Director of the Center for Effective Justice at the Texas Public Policy Foundation Before the U.S Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights*, Tex. Pub. Policy Found. 3 (Feb. 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf>.

Statistics from reforming states demonstrate that reducing long-term isolation decreases violent prison incidents. In Mississippi, as the solitary confinement population plunged, “the number of incidents requiring use of force plummeted Monthly statistics showed an almost 70% drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”³⁸ In North Dakota, extreme incidents such as suicide attempts and cell flooding used to occur three or more times every week in solitary confinement units; after dramatic reductions in the use of isolation, they now occur only a few times each year.³⁹

Barely a year after launching solitary confinement reforms in 2011, Maine prisons reported:

substantial reductions in violence, reductions in use of force, reductions in use of chemicals, reductions in use of restraint chairs, reductions in inmates cutting [themselves] up—which was an event that happened every week or at least every other week . . . The cutting [has] almost been totally eliminated as a result of these changes.⁴⁰

³⁸ Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1039 (2009).

³⁹ 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-thinkoutside-the-box-to-revamp-solitary-confineme>.

⁴⁰ Levin, *supra* note 37, at 3.

In Washington, a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.⁴¹ “In the model’s first year of implementation at its pilot facility, assaults against staff, the use of weapons, and multi-man fights were reduced by 50%.”⁴²

B. Prolonged Solitary Confinement Is Not Necessary to Prevent Prisoner Escapes.

Prison systems are more secure today than ever before. One reason for this is that prisons have a better understanding today of the quality controls needed to create a secure prison environment.⁴³ Prisons now employ security audit programs and covert testing to test the processes and procedures designed to maintain security and prevent escape.⁴⁴

Prisons also have access to intensive perimeter security to prevent escape and ensure public protection, alongside more dynamic internal security that allows

⁴¹ Dan Pacholke & Sandy Felkey Mullins, J.D., *More Than Emptying Beds: A Systems Approach to Segregation Reform*, U.S. Dep’t of Just. 6-9 (2016), <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>.

⁴² *Id.* at 6.

⁴³ *See, e.g.*, U.N. Office on Drugs and Crime, *Handbook on Dynamic Security and Prison Intelligence*, 26-28 (2015), https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_on_Dynamic_Security_and_Prison_Intelligence.pdf.

⁴⁴ *See id.* at 24-26.

for purposeful activity and controlled contact with families and the outside world.⁴⁵ Today, technology such as improved metal detectors and other scanners help prison staff screen anything and anyone entering or exiting prisons.⁴⁶ And improvements in network surveillance and access control provide prison staff with the ability to review digital footage in real-time.⁴⁷ This technology did not exist in the mid-1990s when Mr. Hope escaped, and it has reduced the need to continue confining him in long-term isolation.

The Polunsky Unit in Texas has seen dramatic improvements in technology since Mr. Hope's initial classification in solitary confinement. The Unit was upgraded with "state-of-the-art" surveillance technology and sophisticated new video surveillance system in 2011.⁴⁸ The new IP-based system uses Ocularis video management software "with over 2,000 Panasonic network cameras system wide to

⁴⁵ See, e.g., U.N. Office on Drugs and Crime, *Handbook on the Management of High-Risk Prisoners*, 71 (2016), https://www.unodc.org/documents/justice-and-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf.

⁴⁶ See, e.g., Philip Bulman, *Using Technology to Make Prisons and Jails Safer*, 262 Nat'l Inst. Just. 38, 38-41, <https://www.ncjrs.gov/pdffiles1/nij/225764.pdf>.

⁴⁷ See, e.g., Erik Sofge, *High-Tech Lockup: Inside 4 Next-Gen Prison Security Systems*, Popular Mechanics (Oct. 1, 2009), <https://www.popularmechanics.com/military/a5176/4248844/>.

⁴⁸ *Texas Prisons Migrate to Network Video*, SecurityInfoWatch.com (Dec. 15, 2011), <https://www.securityinfowatch.com/video-surveillance/news/10534358/texas-prisons-deploy-ip-video-technology-from-onssi-and-panasonic>.

capture detailed video of everything that happens within the prison walls.”⁴⁹ The system provides prison staff “unprecedented access to the units” both in administrative segregation and the general population.⁵⁰ Outside, cameras that pan, tilt and zoom in as far as a mile are mounted on two towers; others are interspersed around the perimeter.⁵¹ Linked together, Senior Warden Tim Simmons said the interior and exterior cameras are a “game changer” for TDCJ.⁵²

These improved security measures at Polunsky and other prisons over the last two decades have decreased both escape-risks and actual escapes, thereby decreasing or eliminating the need to hold individuals who have previously escaped in solitary confinement. The number of individuals who have escaped, as reported by the Bureau of Justice Statistics, has dramatically decreased since the mid-1990s. In 1994, 14,307 prisoners in the United States escaped from prison systems.⁵³ In 2018, the most recent year of available data, only 2,353 prisoners

⁴⁹ *Id.*

⁵⁰ *Id.*; *Comprehensive Video Surveillance Installed at TDCJ Unit*, Crim. Just. Connections (Jan./Feb. 2011), https://www.tdcj.texas.gov/connections/JanFeb2011/agency_vol18no3.html.

⁵¹ *Comprehensive Video Surveillance Installed at TDCJ Unit*, *supra* note 50.

⁵² *Id.*

⁵³ E. Ann Carson & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT)—Prisoners AWOL/Escape*, Bureau of Just. Stat. (2020), available at <https://www.bjs.gov/index.cfm?ty=nps>.

escaped.⁵⁴ This represents an 84% drop in the number of prison escapes, even as rates of incarceration were rising precipitously.

Texas in particular has seen a dramatic drop in the number of escapes. In 1990, Texas reported that 141 individuals escaped from prison.⁵⁵ Only one prisoner has escaped from the entire Texas prison system from 2012 to 2018, the last seven years of available data.⁵⁶ The risk of escape no longer serves as a justification for placing a person in prolonged solitary confinement, particularly in Texas where the risk of escape has been nearly zero percent for years.

Mr. Hope is also a low risk prisoner because of his age. The likelihood that a person living behind bars will attempt an escape decreases with age.⁵⁷ Research suggests that youthfulness is the best predictor of escape behavior.⁵⁸ In other words, younger inmates are more likely to escape from custody than older inmates. Mr. Hope is 26 years older today than he was during his last escape in 1994.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, (Jan. 27, 2012), <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states>.

⁵⁸ See Bryce E. Peterson, *Inmate-, Incident-, and Facility-Level Factors Associated with Escapes From Custody and Violent Outcomes*, 19-20 (Feb. 2015) (Ph.D. dissertation, CUNY), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1605&context=gc_etds.

Accordingly, the risk that he escapes is significantly lower than it was at time of his initial placement in solitary.

III. PRISONS CAN LIMIT THE USE OF SOLITARY CONFINEMENT THROUGH INDIVIDUAL CLASSIFICATION WITH MEANINGFUL AND REGULAR REVIEW.

The essential elements of safe and secure facilities include risk-assessment classification and defining and conveying expectations for behavior, including positive-behavior incentives.⁵⁹ Nothing about prisoners with an escape history excludes them from this widely accepted theory of management. Where an individual is placed in solitary confinement, the U.S. Department of Justice recommends that an inmate's initial and ongoing placement in restrictive housing be regularly reviewed by a multi-disciplinary staff committee, which should include not only the leadership of the institution where the inmate is housed, but also medical and mental health professionals.⁶⁰

The U.N. Handbook on the Management of High-Risk Prisoners contains similar guidance: an individualized “assessment of each prisoner should be undertaken upon admission to prison and then repeated at regular intervals

⁵⁹ Virginia Hutchinson et al., *Inmate Behavior Management: The Key to a Safe and Secure Jail*, U.S. Dep't of Just., Nat'l Inst. of Corr. 8-10 (Aug. 2009), <https://info.nicic.gov/nicrp/system/files/023882.pdf>.

⁶⁰ See *U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing Final Report*, U.S. Dep't of Just. Working Grp. 50, 95, 106 (Jan. 2016), <https://www.justice.gov/archives/dag/file/815551/download>.

throughout a prisoner's sentence . . . to make sure that it is still relevant to the prisoner."⁶¹ The handbook also explains that there should be minimal numbers of prisoners held in high-security conditions and specifically focuses on prisoners with an escape history:

The number of prisoners who present a genuine risk of escape or a risk to the safety of others is usually quite small and it is important that only those prisoners who have been assessed as belonging to this category are held in high-security conditions. This principle requires a proper risk assessment upon admission to prison in order to decide the most appropriate security level for each prisoner. It also requires regular reviews so that prisoners whose behavior no longer represents a risk are re-allocated to less restrictive conditions.⁶²

Meaningful hearings ensure less-restrictive placements are considered whenever possible and return isolated prisoners to general population within days or weeks rather than months or years.

To date, twenty-one states have mandated panel reviews for each prisoner sent to isolation.⁶³ Some reviews are more meaningful than others. Maine requires senior leadership to review referrals to solitary within three days.⁶⁴ Washington

⁶¹ See *Handbook on the Management of High-Risk Prisoners*, *supra* note 45, at 11-12.

⁶² See *id.* at 11.

⁶³ 2018 ASCA-Liman Nationwide Survey of Time-In-Cell, *supra* note 16, at 62 n. 171.

⁶⁴ Zachary Heiden, *Change is Possible: A Case Study of Solitary Confinement Reform in Maine*, ACLU Me. 15 (Mar. 2013), https://www.aclumaine.org/sites/default/files/field_documents/aclu_solitary_report_webversion.pdf.

requires a multidisciplinary team to review placement in solitary and “start[s] with the assumption that disciplinary segregation should continue for no longer than [thirty] days.”⁶⁵ Colorado reports limiting solitary confinement to fifteen days, which meets the international standard set by the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).⁶⁶

In theory, the Texas Department of Criminal Justice agrees that individuals placed in solitary confinement should receive regular and routine reviews of their classification. The Offender Orientation Handbook explains that the Administrative Segregation Committee is responsible for the process of reviewing prisoners for initial placement in administrative segregation and routine reviews of those prisoners.⁶⁷

But as Mr. Hope’s allegations reveal, he has never received a meaningful review of his classification. His reviews have yielded identical conclusions despite the passage of 26 years. Mr. Hope has received no information about what he must do to be released to the general population, but has learned that his current behavior and attitude are never considered by either Committee. ROA.72-73. Mr. Hope’s experience is not an outlier. Another TDCJ prisoner said of reviews:

⁶⁵ Pacholke & Mullins, *supra* note 41, at 6-7.

⁶⁶ 2018 ASCA-Liman Nationwide Survey of Time-In-Cell, *supra* note 16, at 67.

⁶⁷ TDCJ, *Offender Orientation Handbook*, 7 (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf.

“They only last 2 to 5 minutes . . . The paperwork is always already filled out before I get there. They ask for my name and number then hand me the paperwork and say ‘see you in 6 months’ ‘denied’.”⁶⁸ The Texas Civil Rights Project further explains that:

a person’s age, health, disciplinary record in solitary and statements on their own behalf seem to have little to no bearing on the decision to keep someone held in isolation. In fact, the hearing review form lists a series of check boxes and does not require a hearing officer to indicate specific reasons for the denial of release. . . Furthermore, prisoners cannot have legal counsel [and] are not informed about the evidence used to justify continuing to house them in isolation.⁶⁹

During one of his hearings, Mr. Hope was told by an SCC member that she did not have the authority to release him from solitary confinement because he was “high profile.” ROA.73. He has heard from outside advocates that Ms. White has said that she will not allow Mr. Hope’s release or make recommendations for his release because “she doesn’t want the responsibility that goes along with making that decision.” ROA.75-76. These comments are particularly troublesome given the Security Precautions Designator Committee stopped designating Mr. Hope as an escape risk in 2005. ROA.76. In light of this reclassification, there is no longer any basis to keep Mr. Hope in solitary confinement because no other reason has ever been provided for his segregation from the general population.

⁶⁸ Harding & Steffensen, *supra* note 21, at 9.

⁶⁹ *Id.*

IV. LIMITING THE USE OF SOLITARY CONFINEMENT ALSO REDUCES COSTS.

Limiting solitary confinement also provides long-term cost savings. The Government Accountability Office calculated that solitary housing costs can be as much as three times as much as general population housing.⁷⁰ The cost of constructing supermax prisons, built specifically to house prisoners in solitary confinement, can be as high as three times the cost to build a conventional prison.⁷¹ The facilities must be staffed more robustly because prisoners cannot do many of the jobs they would do in general population housing.⁷² Isolation units need a higher ratio of correctional officers to prisoners because policies require at least two officers be present to move prisoners between their cells, exercise areas, and showers.⁷³

As of 2015, Texas had the second-largest population of incarcerated individuals in solitary confinement, housing more than 7,500 individuals.⁷⁴ The

⁷⁰ See U.S. Gov't Accountability Off., *Bureau of Prisons: Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing*, 31 (May 2013), <http://www.gao.gov/assets/660/654349.pdf>.

⁷¹ ACLU, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, 2 (Aug. 2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_update_d_august_2014.pdf.

⁷² *Id.* at 11.

⁷³ *Id.*

⁷⁴ Douglas Smith, *Allow the Texas Department of Criminal Justice to Document and Review Its Policies Regarding Confinement in Administrative Segregation*,

Texas Department of Criminal Justice spends \$46 million a year housing inmates in solitary confinement, spending \$19.17 more on each person per day than it would housing a person in general population.⁷⁵

Other states shared Texas's experience. Colorado estimated it costs over \$15,000 more per year to house a prisoner in isolation than in general population, and spent \$20 million housing prisoners in solitary confinement in 2010 alone.⁷⁶ In 2009, the California Office of the Inspector General investigated the costs per prisoner in California's administrative segregation units and "estimated that the annual correctional staff cost of a standard [segregation] bed [was] at least \$14,600 more than the equivalent general population bed," amounting to "nearly \$130 million a year."⁷⁷

Tex. Crim. Just. Coal. (2015),
<https://www.texasjc.org/system/files/publications/TCJC%20Fact%20Sheet%20HB%201084%20%28Administrative%20Segregation%29.pdf>.

⁷⁵ *Id.*

⁷⁶ Rick Raemisch, *Executive Director of the Colorado Department of Corrections "Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences"*, 4 (Feb. 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14RaemischTestimony.pdf>; Sal Rodriguez, Solitary Watch, *Fact Sheet The High Cost of Solitary Confinement*, (2011), <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

⁷⁷ David R. Shaw, *Special Review: Management of the California Department of Corrections and Rehabilitation's Administrative Segregation Unit Population*, Off. of the Inspector Gen. 3 (Jan. 2009), <https://www.oig.ca.gov/media/reports/ARCHIVE/BOA/Reviews/Management%20>

In 2013, Illinois closed its supermax prison, Tamms, which cost \$64,000 per prisoner per year, contrasted with \$21,000 per year for general population prisoners.⁷⁸ The governor's office projected that closing Tamms would save the state over \$48 million in 2013 alone.⁷⁹ Mississippi saved nearly \$6 million a year by closing its supermax facility; Colorado estimated it saved over \$5 million after closing just one of its supermax prisons.⁸⁰ Louisiana also closed supermax prisons.⁸¹ In each state, reducing the use of solitary confinement also reduced ballooning corrections costs.

CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiff-Appellant's brief, the district court's dismissal should be reversed.

of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf.

⁷⁸ Steve Mills, *Quinn's Prison Plan Causes Stir*, Chicago Tribune (Feb. 23, 2012), <https://www.chicagotribune.com/news/ct-xpm-2012-02-23-ct-met-illinois-state-budget-prisons-20120223-story.html>; Amnesty Int'l, *Tamms Supermaximum Security Prison Now Closed*, (Jan. 10, 2013), <https://www.amnestyusa.org/victories/tamms-supermaximum-security-prison-now-closed/>.

⁷⁹ *Id.*

⁸⁰ GAO Report, *supra* note 70, at 34-35.

⁸¹ *2018 ASCA-Liman Nationwide Survey of Time-In-Cell*, *supra* note 16, at 107 n. 34.

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CERTIFICATE OF SERVICE

I certify that on September 28, 2020, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All counsel of record are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitations in Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 6,104 words, excluding those parts exempted by Fed. R. App. P. 32(f).

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