

No. 16-2444

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

JWAINUS PERRY

Plaintiff-Appellant,

v.

LUIS S. SPENCER, Commissioner; THOMAS DICKAUT, Former Superintendent;
ANTHONY MENDOSA, Former Deputy of Classification; JAMES SABA,
Superintendent; ABBE NELLIGAN, Deputy of Classification; PATRICK TOOLIN,
Correctional Program Officer; KRISTIE LADOUER; CAROL MICI;

THOMAS NEVILLE,

Defendants-Appellees,

JENS SWANSON, Property Officer,

Defendant.

On Appeal from the United States District Court for the District of Massachusetts
Case No. 1:12-cv-12070
Honorable M. Page Kelley

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

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

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

Dan Pacholke has a long tenure as an officer for the Washington State Department of Corrections (“WDOC”). 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), Deputy Director of Prisons (July 2008–July 2011), and, additionally, was the Co-Director at Vera Institute of Justice (April 2016–August 2017). While in WDOC, he led efforts to reduce the use of intensive management units (“IMUs”) that resulted in a 50 percent reduction of those housed in IMUs and an over 30 percent reduction in system-wide violence. This work is described in a 2016 Department of Justice Bureau of Justice Policy Brief, *More than Emptying Beds: A Systems Approach to Segregation Reform*. He has over 33 years’ experience in the field of corrections.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* represent that no party opposes 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* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

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 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). While Secretary, he successfully reduced violence in the state prison system and implemented a wide array of evidence-based programs, including an intensive treatment program for people in prison with mental illness. He has over 35 years’ experience in the field of corrections. Since his retirement from state service, he has been retained as a correctional consultant or expert witness over 60 times in 23 different states.

Phil Stanley is an experienced corrections administrator 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 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 over 50 years’ experience in the field of corrections and is currently a consultant for jail operations.

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*, and has written numerous articles on criminal justice issues. He also served as an expert for the U.S. Department of Justice Civil Rights Division and the Department of Homeland Security Civil Rights section for over 21 years. He is currently the Federal Court Monitor for the New York City Department of Corrections in *Nunez v. City of New York*, where he provides oversight of New York jails’ compliance with the settlement agreement with federal prosecutors. No. 11 Civ. 5845 (LTS)(JCF), 2015 U.S. Dist. LEXIS 176190, at *14 (S.D.N.Y. July 10, 2015). He has over 50 years’ experience in the field of corrections.

As former corrections officials with over 200 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

In December 2010, after serving nearly seven years of his life sentence in the Department of Corrections (“DOC”), Mr. Jwainus Perry was placed into solitary confinement² at the Souza Baranowski Correctional Center (“SBCC”) on “awaiting action status” pending an investigation into whether he was a member of a “security threat group” (“STG”). ADD at 3–4. Mr. Perry was designated a security threat based solely on an anonymous letter stating that he may be involved in gang-related activity and concerns about past misconduct. *See id.* at 17; DE 51 at 8–9, 30. Mr. Perry denied any gang affiliation and challenged the reliability and sufficiency of the information supporting his STG designation and the determination that he posed a security threat. ADD at 17–18, 18 nn.24–25. Nonetheless, without ever interviewing Mr. Perry, prison officials credited the rumor, and held him in solitary confinement for almost two years, first at SBCC, then at Massachusetts Correctional

² Or what the DOC calls “administrative segregation” in a “Special Management Unit,” or “SMU.” *See* DE 141 at 3–4 (DE citations refer to entries on the *Perry v. Spencer*, No. 1:12-cv-12070 (D. Mass) docket).

Institution (“MCI”)-Cedar Junction, then at a prison in Connecticut, and then again at MCI-Cedar Junction. *Id.* at 3–4, 18 n.25.

For twenty-three to twenty-four hours a day, Mr. Perry had almost no human contact or mental stimulation. *Id.* at 10. He was alone in a windowless cell outfitted with a solid steel door, which prevented him from seeing or speaking to other humans. *Id.* & 10 n.8. His cell was so small that he could stand in the middle of it and touch the walls on both sides. *Id.* He was 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. *Id.* at 11–12. Mr. Perry could exercise alone for one hour, five days a week in an outdoor cage exposed to the elements. *Id.* at 10. He received meals through a slot in his cell door. *Id.* at 11. And was denied many of the privileges afforded to other inmates including adequate access to books and legal resources. *Id.* & 11 n.9.

Week in and week out, he existed alone in his cell—except for a ten day stay in the infirmary where he landed due to a hunger strike in protest of his isolation. *Id.* at 4. This extreme isolation exacerbated Mr. Perry’s existing mental health issues, which include bipolar disorder and ADHD. *See id.* at 10; DE 51 at 26, 28. Despite the increased need for mental health resources, Mr. Perry contends that he was denied access to medical appointments, treatment, and necessary medications. DE 23 at 5; DE 110 at 38.

Prison officials stated that they provided Mr. Perry with “periodic written notifications” that “administrative reviews of his placement [in solitary confinement] had been conducted,” but Mr. Perry disputes that he ever received such notice. ADD at 24 & n.28. And although prison officials reviewed Mr. Perry’s placement approximately three times per week to determine whether he should continue to be held in solitary confinement, none were held in his presence. DE 141 at 4. Mr. Perry was simply told that the review had occurred and that a decision had been made to continue his confinement. *Id.* He received no information about what he must do to be released into the general population. *Id.* at 11–12. Nor was he provided an opportunity to participate in the reviews or test the basis for his confinement. *Id.* There were no means of appealing the status review determinations. *Id.* at 12. All of his and his attorneys’ requests, letters, and grievances went ignored. *See, e.g.*, RA 110 at 89.

In total, during this particular stint, Mr. Perry spent 611 days of his life in solitary confinement. He was finally released and placed back into the general population at a medium security facility in February 2013. ADD at 23–24, 23 n.27. Several months later, prison officials reported that Mr. Perry had a job, received average housing evaluations, and had not incurred any disciplinary reports. *Id.* at 24.

On November 5, 2012, Mr. Perry, acting *pro se*, brought a civil rights action

pursuant to 42 U.S.C. § 1983 against nine Massachusetts DOC officials alleging that his prolonged solitary confinement, without meaningful review, constituted a violation of his Fourteenth Amendment right to due process.³ *See generally* DE 1. Mr. Perry then filed an amended complaint on March 5, 2013, and a second amended complaint on April 30, 2014. *See* DE 23; DE 51. Although the district court denied the defendants’ motion to dismiss, *see* ADD 34–48, on summary judgement, the district court held that the defendants were shielded by qualified immunity. *Id.* at 31. Mr. Perry appealed to this Court without the assistance of counsel RA 144, and on August 29, 2018, the Panel affirmed the lower court’s decision on the basis of qualified immunity. DE 141. Mr. Perry filed a Petition for Rehearing En Banc on November 19, 2018. On January 3, 2022, this Court vacated the Panel opinion, set a new briefing schedule, and ordered en banc argument.

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

³ Mr. Perry also alleged violations of his right to equal protection and discrimination in violation of the Americans with Disabilities Act.

and exacerbates mental health concerns, especially for persons with serious, pre-existing mental illnesses.

Moreover, to the extent solitary confinement is used at all, it must be based on individual classification with meaningful and regular review. Mr. Perry's allegations demonstrate that he was not put in solitary confinement after meaningful review—instead his classification was based on an unverified rumor and stale concerns about years-old misconduct—and that he was kept in segregation without any involvement in the process or any ability to test or appeal his continued confinement. His segregation for 611 days only served to exacerbate his mental illnesses.

Accordingly, this Court should find that Mr. Perry's prolonged solitary confinement was unconstitutional and reverse the district court's summary judgment order.⁴

ARGUMENT

I. PROLONGED SOLITARY CONFINEMENT SERVES NO PENOLOGICAL PURPOSE.

Known by a variety of names, solitary confinement is some form of restrictive

⁴ Many courts have found that much shorter periods of solitary confinement trigger a right to procedural due process. *See* Appellant's Pet. for Reh'g at 8 (citing *Colon v. Howard*, 215 F.3d 227, 231–232 (2d Cir. 2000) (305 days)); *see also* *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 694 (7th Cir. 2009) (240 days); *see also* *Brown v. Oregon Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014) (approximately two years); *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004) (500 days).

housing that commonly involves between 22 and 24 hours a day of physical isolation and strict regulations about when, and under what conditions, a prisoner may be permitted to leave their cell.⁵ When imposed on a prisoner for a limited amount of time following an individualized assessment, solitary confinement 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. Further, solitary confinement is no longer reserved for the most violent inmates and what was once considered a last-resort disciplinary practice is now a default option when correctional and administrative protocols fail after the first attempt.⁶ Such prolific use of solitary confinement is both counterproductive and expensive. Indeed, numerous states have begun to investigate options for reducing their use of solitary confinement.⁷

⁵ See, e.g., Brad Bennett et al., *Solitary Confinement: Inhumane, Ineffective, and Wasteful*, S. Poverty L. Ctr. 6 (2019).

⁶ Ilanit Turner & Noelle Collins, *A Call to Reform Federal Solitary Confinement*, Right on Crime & Tex. Pub. Pol’y Found. 1, 5 (2022), <https://rightoncrime.com/wp-content/uploads/2022/01/ROC-ReformFederalSolitaryConfinement-Turner-Collins-12-21.pdf>.

⁷ See U.S. Dep’t of Just., *Report and Recommendations Concerning the Use of Restrictive Housing: Final Report*, 72–78 (Jan. 2016), <https://www.justice.gov/archives/dag/file/815551/download> (noting several States’ self-reported claims to be undertaking reform efforts).

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.⁸ In the past few decades, solitary confinement has returned to America’s prisons, partly in reaction to exploding prison populations.⁹ Prisons, however, were ill-equipped to address the resulting volume of prisoners with mental illness and the overall increase in violence due to overcrowding.¹⁰

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.¹¹ Many states and the Federal Bureau of Prisons built solitary confinement units and “supermax” prisons.¹² Officials expected that removing difficult prisoners from the general population would reduce prison violence.¹³ They were wrong.

The increased use of solitary confinement was “not associated with reductions

⁸ See, e.g., Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 746–747 (2015).

⁹ *Id.* at 747–751.

¹⁰ See *id.* at 748–751.

¹¹ See, e.g., *id.* at 750; Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341–1342 (2003).

¹² See, e.g., Bennion, *supra* n.8, at 751–752.

¹³ See Briggs, *supra* n.11, at 1341–1342.

in facility or systemwide misconduct and violence.”¹⁴ As the practice expanded, studies showed that “[p]risons with higher rates of restrictive housing had higher levels of facility disorder.”¹⁵ For example, Texas prisons experienced a 104 percent increase in prisoner assaults between 2009 and 2015, which correctional staff attributed directly to the overuse of solitary confinement.¹⁶ Psychologists demonstrated that the social pathology caused by isolation led prisoners to “occupy this idle time by committing themselves to fighting against the system”¹⁷

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.¹⁸

Statistics from reforming states demonstrate that reducing long-term isolation

¹⁴ 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).

¹⁵ Allen J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12*, U.S. Dep’t of Just. 1 (Oct. 2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

¹⁶ See ACLU of Tex. & Tex. Civil Rights Project-Houston, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas*, 9, 44 (Feb. 2015), https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf.

¹⁷ Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 140 (2003).

¹⁸ 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. Pol’y Found. 3 (Feb. 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf>.

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.”¹⁹ 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.²⁰

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.²¹

In Washington, a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.²² “In the

¹⁹ 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, 1043 (2009).

²⁰ Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (July 31, 2018, 5:01 AM), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-thinkoutside-the-box-to-revamp-solitary-confineme>.

²¹ Levin, *supra* n.18, at 3 (alterations in original) (internal quotations omitted).

²² 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>.

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 percent."²³

B. Limiting the Use of Solitary Confinement Also Reduces Costs.

Limiting solitary confinement also provides long-term cost savings. The Government Accountability Office estimated that the cost of holding a person in solitary confinement can be as much as three times the cost of holding a person in the general population per year.²⁴ Further, the cost of constructing a supermax prison, built specifically to house prisoners in solitary confinement, can be as high as three times the cost to build a conventional prison.²⁵ These facilities must also be staffed more robustly because prisoners cannot do many of the jobs they would do in general population housing.²⁶ Additionally, 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.²⁷

As of 2015, the Texas Department of Criminal Justice spent \$46 million a year

²³ *Id.* at 6.

²⁴ 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>.

²⁵ 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.

²⁶ *Id.* at 11.

²⁷ *Id.*

housing inmates in solitary confinement, spending \$19.17 more on each person per day than it would housing a person in the general population.²⁸ Colorado estimated it costs over \$15,000 more per year to house a prisoner in isolation than in the general population, and spent \$20 million housing prisoners in solitary confinement in 2010 alone.²⁹ 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.”³⁰

In 2013, Illinois closed its supermax prison, Tamms, which cost \$64,000 per

²⁸ Douglas Smith, *Allow the Texas Department of Criminal Justice to Document and Review Its Policies Regarding Confinement in Administrative Segregation*, Tex. Crim. Just. Coal. (2015), <https://www.texasdcj.org/system/files/publications/TCJC%20Fact%20Sheet%20HB%201084%20%28Administrative%20Segregation%29.pdf>.

²⁹ See 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, *Fact Sheet The High Cost of Solitary Confinement*, Solitary Watch (2011), <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

³⁰ 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%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf>.

prisoner per year, contrasted with \$21,000 per year for general population prisoners.³¹ The governor's office projected that closing Tamms would save the state over \$48 million in 2013 alone.³² 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.³³ Louisiana also closed a facility eliminating 416 restrictive housing cells.³⁴ In each state, reducing the use of solitary confinement also reduced ballooning corrections costs.

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

Long-ago, physician and Supreme Court Justice Samuel Freeman Miller cautioned of the effects of solitary confinement on prisoners in Pennsylvania, Massachusetts, New Jersey, and Maryland:

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

³¹ 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/>.

³² *Id.*

³³ GAO Report, *supra* n.24, at 34–35.

³⁴ Ass'n of State Corr. Adm'rs & The Liman Ctr. for Pub. Int. L. at Yale L. Sch., *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell*, 107 *n.34* (Oct. 2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf.

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.³⁵

Today, numerous studies of prolonged solitary confinement detail the serious psychological harm to prisoners as a result of such isolation.³⁶ Inmates in solitary confinement report the same effects as from other forms of torture,³⁷ 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.”³⁸ These inmates lose the ability to “establish and sustain a sense of identity and to maintain a grasp on reality.”³⁹ 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-racking sound of water dripping from a leaky faucet in the still of 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.”⁴⁰

³⁵ *In re Medley*, 134 U.S. 160, 168 (1890).

³⁶ See, e.g., Haney, *Mental Health Issues*, *supra* n.17, at 130–132.

³⁷ See Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 Am. U. L. Rev. 1331, 1364 (2012).

³⁸ 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>.

³⁹ See Bennion, *supra* n.8, at 776 (internal quotations omitted).

⁴⁰ Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 116 (2008) (internal quotations omitted).

The prevalence of suicide and self-harm in solitary confinement illustrates the dangers of isolation. Approximately 50% of completed prisoner suicides occur among prisoners housed in solitary confinement.⁴¹ Detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in the general population; in California prisons in 2004, 73% of all suicides occurred in isolation units.⁴² 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.⁴³

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 solitary confinement.”⁴⁴ The psychological consequences for those who are held in

⁴¹ Stuart Grassian & Terry Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, 13 *Corr. Mental Health Rep.* 1, 11 (2011).

⁴² Expert Report of Craig Haney ¶ 81 n.119, *Coleman v. Schwarzenegger*, No: Civ S 90-0520 LKK-JFMP, 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, 444 (2014).

⁴³ *See, e.g.*, 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>.

⁴⁴ 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.”).

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.”⁴⁵ Describing his motivation to drive reform, one prison official recounted his learning about the health consequences of solitary confinement as:

Now I think that longer term staff acknowledge that some residents have been permanently damaged by being locked up in restrictive housing for so many years, after listening to the personal stories of some of our residents talk about what it had done to them. It made me cry, thinking what we had done to people before we made these changes.⁴⁶

A. Prisoners With Serious Mental Illnesses Are Overrepresented in Solitary Confinement.

Studies demonstrate that prisoners with mental health illnesses are overrepresented in restrictive housing, and there is a broad concern that isolation is being used for “nuisance” prisoners rather than those who may pose a threat to the safety and security of others.⁴⁷

⁴⁵ *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019) (internal quotations and emphasis omitted); *see also* Lobel, *supra* n.40, 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)).

⁴⁶ David Cloud et al., “*We Just Needed to Open the Door*”: *A Case Study of the Quest to End Solitary Confinement in North Dakota*, 9 *Health & Just.* 1, 6–8 (2021).

⁴⁷ Sonja E. Siennick et al., *Revisiting and Unpacking the Mental Illness and Solitary Confinement Relationship*, *Just. Q.* 1, 1–2 (2021).

A comprehensive study of prisoners in Washington State’s supermax prisons concluded that mental illness was present in approximately 30% of segregated prisoners, which was two to three times more common than prisoners in the general population.⁴⁸ Moreover, men with mental illnesses have higher odds of being placed in restrictive housing for safety reasons, institutional adjustment, and contraband, and have spent more total days in those placements than men without mental illnesses.⁴⁹ In fact, prisoners with diagnosed serious mental illnesses, including bipolar disorder, are 170% more likely to be in prolonged solitary confinement than those without a serious mental illness.⁵⁰

These studies suggest that prison officials may perceive prisoners with mental illnesses to be a threat to the safety or security of the facility—regardless of the actual validity of the threat—and are more likely to segregate prisoners with mental illness in solitary confinement.⁵¹

B. Prisoners Suffering From Preexisting Mental Illnesses Are Especially Vulnerable to the Harms of Solitary Confinement.

Prisoners with mental illnesses are the most vulnerable to the psychological and physiological harms caused by solitary confinement, and they are also at the

⁴⁸ Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 *Denv. U.L. Rev.* 1, 46–47 (2013).

⁴⁹ Siennick, *supra* n.47, at 10–13.

⁵⁰ *Id.* at 13; *see also* Turner & Collins, *supra* n.6, at 7.

⁵¹ *See, e.g.*, Siennick, *supra* n.47, at 14.

greatest risk of suffering “permanent and disabling” harms.⁵² They are “far less likely to be able to withstand the stress, social isolation, sensory deprivation, and idleness” of solitary confinement.⁵³ When deprived of social interaction, “many prisoners with mental illness experience catastrophic and often irreversible psychiatric deterioration.”⁵⁴ One clinician noted, “there is even more awareness that someone with a serious mental illness shouldn’t be in [solitary confinement].”⁵⁵ Another expert declared conditions in one supermax facility to be “‘toxic’ for seriously mentally ill inmates.”⁵⁶

By its very nature, solitary confinement impedes the delivery of mental health services on a timely basis. The location of the units themselves and the extremely restrictive manner in which they are run greatly limit the access of mental health staff and the nature and timeliness of the treatment they can provide.⁵⁷ This means mentally ill inmates endure painful, dangerous, isolated confinement without receiving the necessary treatment that might help to at least alleviate some of the

⁵² See Haney, *Mental Health Issues*, *supra* n.17, at 142.

⁵³ Hafemeister & George, *supra* n.48 at 41–42.

⁵⁴ *Id.* at 38–39 (quoting David Fathi, *Solitary Confinement in Arizona: Cruel and Unusual*, Nat’l Prison Project (Mar. 6, 2012, 1:09 PM), <http://www.aclu.org/blog/prisoners-rights/solitaryconfinement-arizona-cruel-and-unusual>).

⁵⁵ Cloud, *supra* n.46, at 13 (internal quotation omitted).

⁵⁶ *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1103 (W.D. Wis. 2001).

⁵⁷ See, e.g., Hafemeister & George, *supra* n.48 at 42–43.

harm to which they are subjected.⁵⁸

There is interdisciplinary consensus that seriously mentally ill and other vulnerable prisoners should not be consigned to isolation. The American Psychiatric Association states that “[p]rolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential harm to such inmates.”⁵⁹ Similarly, the American Public Health Association and the National Commission on Correctional Health Care call for the exclusion of individuals with serious mental illness from restricted housing.⁶⁰ Leading correctional associations and prominent prison administrators also condemn the practice of placing vulnerable prisoners in solitary confinement.⁶¹

Like so many others held in solitary confinement, Mr. Perry contends that being in solitary confinement, coupled with a lack of access to medical care and

⁵⁸ See, e.g., *id.*

⁵⁹ Am. Psych. Ass’n, *Position Statement on Segregation of Prisoners with Mental Illness*, (Dec. 2012), <http://nrcat.org/storage/documents/apa-statement-on-segregation-of-prisoners-with-mental-illness.pdf>.

⁶⁰ See Nat’l Comm’n on Corr. Health Care, *Position Statement: Solitary Confinement (Isolation)*, (2016), <https://www.ncchc.org/solitary-confinement>; Am. Pub. Health Ass’n, *Solitary Confinement as a Public Health Issue*, Policy 201310 Statement (Nov. 5, 2013), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>.

⁶¹ See, e.g., Gary C. Mohr & Rick Raemisch, *Restrictive Housing: Taking the Lead*, *Corrs. Today* (2015), <https://cl.memberclicks.net/assets/docs/6.pdf>; see also Am. Corr. Ass’n, *2016 Standards Supplement*, 70, 76–77 (Nov. 2016), <https://www.aca.org/common/Uploaded%20files/2016%20Standards%20Supplement.pdf>.

mental health treatment while held there, led to a profound deterioration in his mental health.

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.⁶² 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.⁶³

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 repeated at regular intervals throughout a prisoner’s sentence . . . to make sure that it is still relevant to the prisoner.”⁶⁴ The

⁶² 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>.

⁶³ DOJ Final Report, *supra* n.7, at 50, 95, 106.

⁶⁴ See U.N. Office on Drugs and Crime, *Handbook on the Management of High-Risk Prisoners*, 11–12 (2016), https://www.unodc.org/documents/justice-and-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf.

handbook also explains that there should be minimal numbers of prisoners held in high-security conditions:

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.⁶⁵

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

To date, twenty-one states have mandated panel reviews for each prisoner sent to isolation.⁶⁶ Some reviews are more meaningful than others. Maine requires senior leadership to review referrals to solitary within three days.⁶⁷ Washington 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.”⁶⁸ Colorado reports limiting solitary confinement to fifteen days, which meets the international standard set by the U.N. Standard Minimum Rules for the

⁶⁵ *Id.* at 11.

⁶⁶ *Reforming Restrictive Housing*, *supra* n.34, at 62.

⁶⁷ Zachary Heiden, *Change is Possible: A Case Study of Solitary Confinement Reform in Maine*, ACLU Me. 15 (Mar. 2013), <https://www.aclu.org/report/change-possible-case-study-solitary-confinement-reform-maine>.

⁶⁸ Pacholke & Felkey Mullins, *supra* n.22, at 7.

Treatment of Prisoners (the Nelson Mandela Rules).⁶⁹

Because “an inmate’s mental health symptoms [can] lead to placement or extension of placement” in solitary confinement, the Federal Bureau of Prisons requires psychologists to participate in prison disciplinary hearings to “advise . . . on the inmate’s competency and responsibility” in light of his or her mental illness.⁷⁰ Moreover, the U.N. Handbook on Dynamic Security and Prison Intelligence contains guidance for prison officials on how to complete a risk assessment and explains how to assess prisoners with mental illness:

Different considerations should also apply to prisoners with mental illness, who should be held in conditions that take into account their mental health requirements, and which should be the least restrictive possible, balanced with the need for secure custody. Such offenders may, for example, be held in secure psychiatric facilities or sections of hospitals designed to hold people who have committed a criminal offence but who have a treatable mental illness.⁷¹

Various correctional and professional organizations have further recommended limitations on the use of solitary confinement at all. For example, the National Commission on Correctional Health Care has stated that “Prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and

⁶⁹ See *Reforming Restrictive Housing*, *supra* n.34, at 67.

⁷⁰ U.S. Dep’t of Just., *Report and Recommendations*, *supra* n.7, at 51–52.

⁷¹ U.N. Office on Drugs and Crime, *Handbook on Dynamic Security and Prison Intelligence*, (2015), https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_on_Dynamic_Security_and_Prison_Intelligence.pdf.

degrading treatment, and harmful to an individual’s health.”⁷² In 2016, a report published by the Association of State Correctional Administrators 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.”⁷³ And litigation has highlighted the risks to prisoners in isolation and sought to limit its use.⁷⁴ As a result, twenty-eight states have introduced legislation to ban or restrict solitary confinement, and twelve states have passed reform legislation including: Arkansas, Connecticut, Georgia, Maryland, Minnesota, Montana, Nebraska, New Jersey, New Mexico, Texas, Washington, and Virginia.⁷⁵ Several states, including Hawaii, New York, and Pennsylvania, have proposed legislation that would limit the maximum number of continuous days in

⁷² *Position Statement: Solitary Confinement (Isolation)*, *supra* n.60.

⁷³ Ass’n of State Corr. Adm’rs & The Arthur Liman Ctr. for Pub. Int. L. 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/aimingtoreductic.pdf>.

⁷⁴ *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.*, 974 F.3d 431 (3d Cir. 2020).

⁷⁵ 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/>.

administrative segregation to fourteen or fifteen days.⁷⁶

All this makes Mr. Perry's situation all the more troubling—although he received plenty of process on paper—he never received a *meaningful* review of his classification. While prison officials reviewed his placement in solitary confinement approximately three times per week, Mr. Perry was not allowed to contest his classification and was only informed after the fact that a decision had been made to continue his placement in solitary confinement. His reviews yielded identical conclusions despite the passage of over 600 days. Mr. Perry received no information about what he must do to be released to the general population and there was no actual means of appealing these rote determinations.

CONCLUSION

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

Respectfully submitted,
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⁷⁶ Corr. Leaders Ass'n & The Arthur Liman Ctr. for Pub. Int. 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.

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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 6,261 words, excluding those parts exempted by Fed. R. App. P. 32(f).

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

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CERTIFICATE OF SERVICE

I certify that on March 11, 2022, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First 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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