Nos. 4-10-0369, 4-10-0370, 4-10-0371 (cons.)

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)	Appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois.
v.	)	03 CF 60, 03 CF 61, 03 CF 62
ANTHONY GAY, Petitioner-Appellant.	)	Honorable Robert Travers, Judge Presiding.

BRIEF AND ARGUMENT FOR AMICI

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POINTS AND AUTHORITIES

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STATEMENT OF INTEREST OF AMICI CURIAE

Each of the amici organizations have extensive experience litigating cases on behalf of prisoners with serious mental illnesses, and many have brought cases challenging the constitutionality of confining prisoners with mental illness to isolated confinement and so-called "supermax" settings. Amici have substantial knowledge and experience concerning: (a) the nature and treatment of mental illness: (b) the effects of isolated confinement, including as it exists in supermax prisons, on persons with mental illnesses: and, (c) the connection between mental illness and behavior in the prison setting.

The **American Civil Liberties Union (ACLU)** is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation (NPP) was established in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation. Throughout its history, NPP's litigation has focused especially on medical and mental health treatment in jails, prisons, and youth detention centers, as well as the detrimental impacts of solitary confinement in both supermax and more conventional prisons.

The **Disability Rights Legal Center ("DRLC")** is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity and lack of

legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with Disabilities Education Improvement Act and other federal and state laws. Its mission is to champion the rights of people with disabilities through education, advocacy and litigation. The DRLC is a recognized expert in the field of disability rights, and regularly files amicus briefs in state and federal courts, and is involved in policy-making activities on behalf of persons with disabilities both statewide and nationally. For example, DRLC filed an amicus brief on the merits at the United States Supreme Court in the cases of *Cullen v. Pinholster,* 131 S.Ct. 1388 U.S. (2011), addressing the impact of disability on the death penalty phase of a criminal matter, and *Graham v. Florida*, 130 S.Ct. 2011 (2010), on the issue of whether disability should be considered in charging and sentencing of minor youths charged as adults. DRLC also filed an amicus brief on the merits at the United States Supreme Court in *Forest Grove Sch. Dist. v. T. A.*, 129 S. Ct. 2484 (2009), on the issue of whether the Individuals with Disabilities Education Act allows reimbursement for private school placement without prior receipt of special education service, and in *Goodman v. Georgia*, 126 S. Ct. 877 (2005), a case addressing the issue of whether Congress properly abrogated state sovereign immunity when enacting Title II of the Americans with Disabilities Act.

Equip for Equality ("EFE") is a private not-for-profit organization designated by the Governor in 1985 to implement the federally mandated Protection and Advocacy system for people with disabilities in Illinois. EFE has broad state and federal oversight authority to carry out its duties and responsibilities. One of the statutory mandates under

which EFE operates is the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"). 42 U.S.C. § 10801 (2006). The purposes of the PAIMI Act are, *inter alia*, "(1) to ensure the rights of individuals with mental illness are protected, and (2) to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will . . . protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution." *Id.* EFE has worked to safeguard the rights of people with mental illness, including in the criminal justice system, through individual and systemic legal advocacy, investigations of abuse and neglect, legislative advocacy, and education of policy makers on issues that affect people with mental illness.

The **Human Rights Defense Center (HRDC)** is a Washington State non-profit, charitable corporation with offices in Vermont that publishes a nationally distributed monthly journal called Prison Legal News (PLN). Since 1990, PLN has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners in the United States and abroad. PLN has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the rights of prisoners, PLN also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. PLN has approximately 7,000 subscribers in all fifty states and abroad and eight times as many readers. Approximately sixty-five percent of PLN subscribers are state and federal prisoners. The remainder are attorneys, judges, advocates, journalists, academics and concerned citizens. PLN's website, www.prisonlegalnews.org, receives approximately 100,000 visitors per month. In addition to publishing PLN and non-fiction reference books, HRDC has regularly

litigates First Amendment issues in federal courts nationwide, challenging prison and jail officials who censor PLN, seeking public records from government agencies and also providing representation in select prisoner cases.

The **John Howard Association (JHA)** is one of the oldest prison reform organizations in the country, and the only group that monitors Illinois' juvenile and adult correctional facilities. Its mission is to achieve a fair, humane, and cost-effective criminal justice system by promoting juvenile and adult prison reform, leading to successful re-integration and enhanced community safety.

The **Juvenile Law Center**, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal. *Amicus*, Juvenile Law Center, works to align juvenile justice policy and practice, including state laws on sentencing with modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

The **Legal Aid Society of the City of New York** is a private organization that has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project (PRP), the Society seeks to ensure that prisoners' constitutional and statutory rights are protected. PRP advocates on behalf of prisoners in the New York City jails and New York state prisons, and conducts litigation on prison conditions. A major focus of litigation has been improving the treatment of prisoners with mental illness in the New York state prison system. PRP was counsel in the state-wide litigation, *Disability Advocates, Inc. v. New York State Office of Mental Health*, et. al., No. 02-Civ-4002 (S.D.N.Y.) ("DAI v. OMH"). *DAI v. OMH* was resolved by a comprehensive private settlement agreement ("PSA") which PRP is in the fourth year of monitoring. The PSA created alternatives to cumulative, harsh, and generally fruitless punishments for the repetitive misconduct of prisoners with mental illness, and established alternative means of maintaining order in a prison population containing a substantial percentage of prisoners with serious mental illness. These alternatives included the creation of several mechanisms to mitigate the use of and the severity of isolated confinement for prisoners with mental illness convicted of disciplinary offenses; Regional Mental Health Units where prisoners with serious mental illness serve disciplinary sentences with four hours per day of out-of-cell programming and treatment; prison intake screening by trained mental health staff so that prisoners with psychiatric problems can be identified and treated upon admission; creation of Transitional Intermediate Care Programs (TICP); and the expansion of Intermediate Care Programs (ICP) (both the TICP and the ICP are mental health housing programs for general population prisoners with serious mental illness).

With over a century of advocacy, public education, and the delivery of programs and services, **Mental Health America** is the country's leading nonprofit dedicated to helping all people live mentally healthier lives. Its board and staff is composed of mental health professionals, advocates and persons with mental health conditions. Mental Health America has affiliates across the country including Mental Health America of Illinois, the oldest state-wide mental health advocacy and education organization in Illinois.

The **National Disability Rights Network ("NDRN")** is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings, including prisons and jails. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. P&As are authorized by federal statute to advocate on behalf of prisoners with mental illness and psychiatric disabilities. Many P&As have addressed and are addressing through litigation and other advocacy systemic issues in prisons and jails including the all too frequent inappropriate use of extreme isolation in response to behaviors that are manifestations of disabilities in lieu of properly identifying mental and psychiatric disabilities and providing proper care and

treatment for disabilities, despite known alternatives to effectively managing such behaviors in humane and constitutional conditions of confinement. Corporate Disclosure Statement: Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Circuit Rule 26.1(a), amicus, the Training and Advocacy Support Center (TASC) housed at the National Disability Rights Network (NDRN) states that it is a non-governmental, non-profit corporation organized under the laws of the state of Florida. The National Disability Rights Network is not a publicly traded corporation and has no parent corporation.

Founded in 1976, the **Prison Law Office** is a non-profit public interest law firm dedicated to ensuring humane and constitutional conditions in correctional institutions in California and other states. The office represents incarcerated adults and youth in individual actions, engages in impact litigation, educates the public and policy-makers about prison conditions and correctional policies, and provides technical assistance to attorneys throughout the country.

Prisoners' Legal Services of New York (PLS) is a not-for-profit organization that has been providing civil legal services to indigent inmates in New York State correctional facilities for over thirty-five years. PLS receives and responds to over 12,000 requests for assistance annually and in 2010 approximately 1200 of those complaints involved claims of inadequate mental health or medical care. In 2002, Prisoners' Legal Services joined the Prisoners' Rights Project of the Legal Aid Society and Disability Advocates, Inc., in filing a statewide lawsuit on behalf of prisoners with mental illness in New York. *Disability Advocates, Inc. v. New York State Office of Mental Health,* (S.D.N.Y. 02-CV-4002). The lawsuit alleged that such prisoners were being denied

adequate mental health care, harshly punished for the symptoms of their mental illnesses and frequently confined under conditions amounting to cruel and unusual punishment. As a result, the suit charged, the conditions of prisoners with mental illness routinely deteriorate in prison, sometimes to the point of self-mutilation or suicide. In 2007, a private settlement agreement was reached that included a monitoring period that will terminate at the end of 2011. PLS has a significant interest in ensuring the protection of the constitutional rights of all prisoners. By providing counsel, advice and representation to inmates on a variety of issues including medical care, PLS' work helps to guarantee that individuals incarcerated in New York State receive fair, just, lawful and humane treatment.

The **Texas Civil Rights Project ("TCRP")** is a non-profit public interest law organization that promotes racial, economic, and social justice, as well as civil liberty under the Bill of Rights of the Texas and United States Constitutions. TCRP, with a membership base of approximately 3,000 Texans, works toward these goals through education, advocacy, and litigation involving civil rights violations. Through its Prisoners' Rights Program, TCRP works to improve conditions of confinement in Texas prisons and jails.

Amici file this brief because the outcome of the Illinois prosecutions of Anthony Gay is an unconscionable and shocking criminalization of his mental illness. Amici write to convey to the Court their shock and dismay that an individual with serious mental illness who was originally sentenced to a suspended term of 7 years now faces 97 years in prison for behaviors that are a direct result of Illinois housing him in isolation and failing to provide him with adequate mental health treatment. At a time when other

states and courts have intervened to stop or reduce the confinement of prisoners with serious mental illness in isolated confinement settings, in this case Illinois has formally criminalized the damaging result of isolation by prosecuting the symptomatic behavior of Mr. Gay and in so doing has obtained the excessive punishment of life in prison for his symptomatic conduct.[1] In reviewing Mr. Gay's request for post-conviction relief, the Court must consider the totality of the circumstances, including his conditions of confinement and the well known effects of solitary confinement on individuals with mental illness, as factors in the entire series of prosecutions that produced this shocking result. When viewed as a whole, Mr. Gay's situation cries out for relief.

While Mr. Gay's brief presents compelling legal arguments in support of such relief, amici write separately to provide the Court with the benefit of their combined decades of expertise developed in litigating and otherwise working with prisoners with serious mental illnesses, and specifically the impact confinement in high security prisons, imposing a regime of total isolation, has on prisoners with mental illness.

STATEMENT OF FACTS

Mr. Gay entered prison in 1994, when he was twenty, after violating probation and receiving a 7-year sentence for the violation. Had he completed his 7-year sentence without incident, and earned all the good time to which he was entitled, he would have been released in 3½ years. That did not happen. Mr. Gay suffers from a significant mental illness. In prison, Mr. Gay's serious mental health needs were readily apparent

[1] *See* discussion *infra* § II (discussing alternative strategies employed by courts, departments of corrections and state legislatures for dealing effectively and humanely with the symptomatic behavior of prisoners who suffer from mental illness rather than isolation and criminalization).

yet he rapidly deteriorated psychiatrically. Today his projected release date is 2095. The only way he will ever be released is if he were to reach the unlikely age of 121 years. In sum, Mr. Gay is now serving a life sentence because he suffers from mental illness.

Mr. Gay was transferred to the Illinois "supermax", Tamms Correctional Center, for the first time shortly after it opened in 1998. Tamms is designed to isolate and control. At Tamms inmates spend the "vast majority" of their time alone in their cells. *Westefer v. Snyder*, 725 F. Supp. 2d 735, 747 (S.D. Ill. 2010). The cells are approximately 9 by 15 feet. *Id.* at 746. All the furniture (including the bed) is made of reinforced concrete. Each cell has one window, inoperable from the inside, and "positioned so that, without making unusual efforts, all that an inmate can see through it is a sliver of sky." 725 F. Supp. 2d at 746. The cell doors are made of steel mesh "perforated with small holes so as to reduce severely visibility inside and outside the cell"; meals are delivered through a "chuck hole" (a tray-sized container slot in the door) which is "locked from the outside and provides no visibility into or out of the cell." *Id* Inmates in disciplinary segregation are permitted "up to" five hours of exercise yard time each week; the "exercise yard," a walled, partly covered space, contains no exercise equipment, and inmates must exercise alone. *Id* Communication with other inmates is, by design, extremely difficult – inmates must stand by their cell doors and shout at other inmates whom they can never see. *Id* at 747-48.

At Tamms Mr. Gay engaged in serious self harming behaviors, repeatedly cutting and mutilating his body. In March 2000, he was transferred from Tamms to the special mental health treatment unit at Dixon. On July 5, 2000, despite his prior deterioration in isolation at Tamms, he was transferred from the mental health treatment unit at Dixon

back to an isolated confinement segregation unit at Pontiac Correctional Center.[2] Mr. Gay's mental condition deteriorated rapidly upon return to isolated confinement. Immediately upon transfer to Pontiac, Mr. Gay began to self-mutilate again. It was at this time that Mr. Gay was alleged to also engage in throwing fecal matter through the slot in the heavy steel door of his isolated confinement cell. It is this behavior, symptomatic of mental illness and an inability to withstand the conditions of isolated confinement, which is the basis of the numerous criminal charges that were brought against Mr. Gay.

Mr. Gay's isolation did not abate. Instead, he was returned to Tamms in late January 2004. Soon after his return to Tamms, he began a regime of determined and continuous self-mutilation (cutting and re-cutting wounds on his legs, groin, testicles and penis) that resulted in his being placed in restraints and/or on suicide watch over a period of several months. *Gay v. Chandra*, 652 F. Supp. 2d 959, 964-67 (S.D. Ill. 2009).

Despite Mr. Gay's deteriorating psychiatric condition and repeated acts of self-harm, the state did not move him out of the toxic environment of isolated confinement. [3]

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[2] Segregation in isolated confinement at Pontiac was found to be less severe than the conditions in Tamms. *Westefer*, 725 F. Supp. 2d at 760-66. However, the conditions in Pontiac are similar to isolated confinement settings that have prompted judicial and legislative action as well as remedies through settlement. *See* discussion *infra* § II.

[3] The record reflects that Mr. Gay suffers from serious mental illness found by courts to be a basis for exclusion from solitary confinement and supermax prisons. *See, e.g.*, discussion *infra*, § II at 30-33 (*DAI v. OMH* settlement agreement specifically excludes inmates from segregation housing who are actively suicidal or who experience significant functional impairment involving acts of self-harm or other behaviors that have a seriously adverse effect on life or on mental or physical health including cases of severe personality disorder); *Jones 'El v. Berge*, No. 00-C-421-C, Ex. B (W.D. Wis. June 24, 2002) (consent decree); *Austin v. Wilkinson*, No. 4:01-CV-071, at 4 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief). *See also* McKinney's Corrections Law §137(6)(e) (adopting definition of severe mental illness from *DAI v. OMH* settlement agreement as a basis for New York State's "SHU Exclusion Law" which removes prisoners with severe mental illness from solitary confinement and diverts them to

Instead, the state repeatedly criminally prosecuted Mr. Gay for his symptomatic actions that occurred while at Pontiac. On more than 20 occasions beginning in December 2000, Mr. Gay was indicted for felony assault due to throwing matter through a food slot or through the crack between his solid steel door and the wall, and he continued to be held in isolated confinement. In all but two of these cases, Mr. Gay asked and was allowed to represent himself.[4] The resulting substantial periods of incarceration—97 additional years in total—punish Mr. Gay for his status as a person with serious mental illness.

SUMMARY OF ARGUMENT

To incarcerate a person with serious mental illness in an isolated confinement setting well-known to have damaging effects on persons with mental illness, and then to prosecute and punish him for the wholly predictable symptomatic response to such a toxic environment, is contrary to basic principles of American law, including principles of due process and prohibitions against cruel and unusual punishment. What happened to Anthony Gay exemplifies the failure of the criminal justice system to deal humanely, fairly or rationally with persons with mental illness. The cumulative sentence of life in prison for this prisoner, who suffers from serious mental illness, shocks the conscience and requires post-conviction relief.

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residential mental health units where they are provided with improved mental health care).

[4] The fact that Mr. Gay was allowed to represent himself may raise other serious constitutional issues regarding due process. *See Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008); *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680 (1993). However, those issues are beyond the scope of this brief.

ARGUMENT

I. 'SUPERMAX' AND OTHER ISOLATED CONFINEMENT SETTINGS ARE WELL-KNOWN TO EXACERBATE AND INCREASE SYMPTOMS OF MENTAL ILLNESS.

It has long been known that solitary confinement, the deprivation of human contact and other sensory and intellectual stimulation can have disastrous consequences. The damaging effects of isolation on the mental health of prisoners have been known for almost as long as this country has existed. In 1890, the United States Supreme Court looked back to the nation's original experiment with solitary confinement, at the Walnut Street Penitentiary in Philadelphia in 1787, and described the harmful effects of Eighteenth Century solitary confinement regimes with words that still hold true today:

> The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell . . . so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service. . . .

In re Medley, 134 U.S. 160, 168 (1890). The court concluded that solitary confinement "is itself an infamous punishment." *Id* at 169.[5] When a similar form of solitary

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[5] In 1842, Charles Dickens witnessed the use of solitary confinement in American prisons and reported:

> I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers...there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his

confinement was tried in New York,[6] Gustav Beaumont and Alexis de Tocqueville recorded the outcome:

> This experiment, of which such favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim incessantly and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away...[7]

Another historian also termed the New York Auburn experiment a "hopeless failure" and noted that it had "led to a marked prevalence of sickness and insanity on the part of the convicts in solitary confinement."[8]

Modern courts have reiterated these consequences in addressing present-day forms of solitary confinement. In 1988, the Seventh Circuit observed that "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." *Davenport v. DeRobertis*, 844

> fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body....

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

[6] *See* Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1178-1269 (1982) (discussion of forms of imprisonment in use during this period).

[7] Torsten Eriksson, THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (Elsevier Press 1976). *See also* W. Davis Lewis, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848 17-21 (Cornell University Press 1965).

[8] Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 53 (1921).

F.2d 1310, 1313 (7th Cir. 1988).[9] In *Davenport,* the court recognized that "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant) . . ."[10]

In *Jones 'El v. Berge*, a Wisconsin federal court found that isolated confinement in a supermax is:

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

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[9] *See also McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) (the fact that "prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science").

[10] *Davenport*, 844 F.2d at 1316, *citing* S. Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450-54 (1983). Other courts have made similar observations. *See, e.g., Miller ex. rel. Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000) ("it is well accepted that conditions such as those present in the SMU II . . .can cause psychological decompensation to the point that individuals may become incompetent"); *Comer v. Stewart*, 215 F.3d 910, 915 (9th Cir. 2000) ("we and other courts have recognized that prison conditions remarkably similar to [SMU II] can adversely affect a person's mental health"); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) ("[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies"); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) ("[the notion that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) ("many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction
to their extreme social isolation and the severely restricted environmental stimulation in SHU"); *Bono v. Saxbe*, 450 F. Supp. 934, 946 (E.D. Ill. 1978) ("[p]laintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit"), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980).

Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001). In *Madrid v. Gomez*, 889 F. Supp. 1146, 1151 (N.D. Cal. 1995), the court detailed the effects of the Security Housing Unit (SHU) of California's Pelican Bay prison – a new facility, with "newly-minted walls and shiny equipment," where inmates are isolated in windowless cells for 22 1/2 hours a day. The court concluded that, for inmates "at a particularly high risk for suffering very serious or severe injury to their mental health," including those who were "already mentally ill, as well as persons with borderline personality disorders . . ." placement in the SHU was "the mental equivalent of putting an asthmatic in a place with little air to breathe." *Id.* at 1265. The court concluded that the use of isolated confinement was contrary to evolving standards of decency:

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

Id. at 1266.

Judge Murphy of the Southern District of Illinois recently concluded that in the Tamms supermax, inmates deteriorate psychologically: "Every IDOC inmate testifying in this case who currently is confined or formerly was confined in the supermax prison at Tamms complained bitterly of the intense isolation caused by the pervasive lack of contact with other inmates," and a number of them "specifically linked the intense isolation at Tamms to deterioration of their mental health that they suffered during their confinement in the supermax prison." *Westefer v. Snyder*, 725 F. Supp. 2d 735, 748-49 (S.D. Ill. 2010). Symptoms experienced included auditory hallucinations and beliefs that correctional personnel were poisoning the food; severe depression; self-mutilation and

attempted suicide; and continuing paranoia and fear of being around other people that endured even after transfer out of Tamms, although the inmates had not suffered such symptoms before their Tamms incarceration. *Id.* at 749-52. "In sum," the court observed, "it appears that the psychic toll exacted by long-term confinement in the intensely isolated circumstances of Tamms is, in many instances, a continuing one." *Id.* at 752.[11]

Similar findings have been made in numerous other cases around the country. *See, e.g.*, *Koch v. Lewis*, 216 F. Supp. 2d 994, 1001 (D. Ariz. 2001) (experts agreed that extended isolation causes "heightened psychological stressors and creates a risk for mental deterioration"); *Baraldini v. Meese*, 691 F. Supp. 432, 446–47 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev'd on other grounds sub nom. Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989); *Bono v. Saxbe*, 450 F. Supp. 934, 946 ("Plaintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit."), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980).

Courts have recognized even less extreme isolation than that found at a supermax such as Tamms as damaging to individuals with mental illness. In *Casey v. Lewis*, the court concluded that the routine use of isolation for prisoners with serious mental illness for more than three days was improper, recording a horrific catalogue of self-injury, suicides, and suicide attempts. *Casey,* 834 F. Supp. 1477, 1529-34 (D. Ariz. 1993). *See*

[11] The court found that IDOC inmates have a due process-protected liberty interest in avoiding placement at Tamms and ordered the implementation of a system of procedures including transfer hearings, routine reviews of placement at Tamms and yearly review hearings. *Westefer*, 725 F. Supp. 2d at 792-95.

also Ruiz v. Johnson, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D.Tex. 2001) (describing Texas administrative segregation units as "incubators of psychoses--seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (citing expert's affidavit regarding effects of Special Housing Unit (New York disciplinary isolated confinement unit) placement on individuals with mental disorders).

Extensive empirical research on settings and situations analogous to solitary confinement has reached consistent conclusions that the experience is painful, stressful and causes psychological harm. Participants in studies of sensory deprivation have experienced a variety of negative psychological reactions, including high levels of anxiety.[12] Negative effects of isolation were found to be more extreme when participants were unaware when the conditions of isolation would terminate.[13] Other research on the importance of social contact in grounding human identity and mental health has demonstrated the relationship between social isolation and numerous dysfunctional

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[12] *See* P. Solomon, *Quantitative Aspects of Sensory Deprivation*, *in* THE PSYCHODYNAMIC IMPLICATIONS OF PHYSIOLOGICAL STUDIES ON SENSORY DEPRIVATION 47 (Leo Madow & Laurence H. Snow, eds., 1970); Frederick Hocking, *Extreme Environmental Stress and its Significance for Psychopathology*, 24 AM. J. PSYCHOTHERAPY 4-26 (1970); Herbert P. Leiderman, *Man Alone: Sensory Deprivation and Behavioral Change*, 8 CORRECTIVE PSYCHIATRY AND JOURNAL OF SOCIAL THERAPY 73 (1962); Paul Gendreau, N. Freedman, G. Wilde, and G. Scott, *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCHOLOGY 54-59 (1972).

[13] Marvin Zuckerman, *Variables Affecting Deprivation Results*, *in* SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH (J. Zubek, ed. 1969).

outcomes including psychiatric illness.[14] Predictable symptoms of isolation include bewilderment, anxiety, frustration, dejection, boredom, obsessive thoughts or ruminations, and depression.[15] Others subject to isolation may experience delirium and hallucinations.[16] Psychological torture through stimulus deprivation and close supervision similar to prison isolated confinement settings has been found to contribute to cognitive impairment, inability to think coherently and logically, anxiety, anger and depression.[17]

Similarly, the psychological harm that results from prolonged exposure to solitary confinement in prison is significant and serious.[18] Studies conducted on prisoners subject

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[14] *See* Neena Chappell & Mark Badger, *Social Isolation and Well-Being*, 44 J. GERONTOLOGY 169-176 (1989); Gary L. Tischler, Jerzy E. Henisz, Jerome K. Myers & Philip C. Boswell, *Utilisation of Mental Health Services*, 32 ARCH. GEN'L PSYCHIATRY 411-415 (1975); Graham Thornicroft, *Social Deprivation and Rates of Treated Mental Disorder: Developing Statistical Models to Predict Psychiatric Service Utilisation*, 158 BRITISH J. PSYCHIATRY 475-484 (1991). *See also* Margaret K. Cooke & Jeffrey H. Goldstein, *Social Isolation and Violent Behavior*, 2 FORENSIC REPORTS 287-294, 288 (1989).

[15] Lawrence E. Hinkle & Harold E. Wolff, *Communist Interrogation and Indoctrination of "Enemies of the States,"* 76 ARCH. NEUROLOGY & PSYCHIATRY 115-174 (1956).

[16] *Id.* at 128.

[17] *See* F.E. Somnier & I.K. Genefke, *Psychotherapy for Victims of Torture*, 149 BRITISH J. PSYCHIATRY 323, 324 (1986); Shaun R. Whittaker, *Counseling Torture Victims*, 16 THE COUNSELING PSYCHOLOGIST 272-278 (1988); Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 27 B.C. INT'L & COMP. L. REV. 275, 310 (1994).

[18] *See* Robert Slater, *Psychiatric Intervention in an Atmosphere of Terror*, 7(1) AM. J. FORENSIC PSYCHIATRY 5-12 (1986) (symptoms suffered by prisoners in reaction to severely restrictive environment included: "tension, irritability, sleeplessness, nightmares, inability to think clearly or to concentrate, and fear of impending loss of impulse control.... the anxiety is severe enough to ... [interfere] with sleep, concentration, work, and study and predisposes to brief psychotic reactions, suicidal behavior and psychophysiological reactions. ... causes misperceptions and over-reactions. ... fuels the cycle of violence, leading to more violence and terror.").

to long-term solitary confinement reach strikingly consistent conclusions about the psychological impact such conditions have on human beings.[19] It exacerbates pre-

[19] A study by a psychiatrist in several isolation units in California noted that the "madness" he witnessed in prisoners was a "partially functional and adaptive" response to extreme conditions where isolated prisoners "become so desperate for relief that they would set their mattresses afire...burst out in a frenzied rage of aimless destruction, tearing their sinks and toilets from the walls, ripping their clothing and bedding, and destroying their few personal possessions in order to alleviate the numbing sense of deadness or non-being and to escape the torture of their own thoughts and despair." *See* Frank Rundle, *The Roots of Violence at Soledad, in* THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA 167 (Erik Olin Wright, ed., 1973). A small-scale study in Maine of prisoners held indefinitely in long-term isolation found similar aberrant behavior where almost every prisoner had attempted suicide and prisoners often acted in seemingly irrational ways – smashing their heads against the concrete walls, destroying their beds and light fixtures. *See* Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. WESTERN L. REV. 265-296 (1977). In a larger, more systematic study of hundreds of prisoners subject to long-term isolation, psychologist Hans Toch noted what he termed "isolation panic" amongst prisoners in solitary confinement which included: rage, panic, loss of control and breakdowns, psychological regression, a build-up of physiological and psychic tension that led to incidents of self-mutilation. *See* Hans Toch, MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISONS 54 (Aldine Publishing Co., Chicago 1975). A thorough psychiatric assessment of prisoners kept in isolation in Massachusetts found similar "strikingly consistent" symptoms among inmates, including massive anxiety, perceptual disturbances such as hallucinations, cognitive difficulties, memory lapses, and thought disturbances such as paranoia, aggressive fantasies and impulse control problems. *See* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450-1454 (1983). *See also* Stuart Grassian and N. Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J. L. & PSYCHIATRY 49-65 (1986). Finally, a study in a "state-of-the-art" supermax by psychologist Craig Haney used a random sample of prisoners in order to find prevalence rates of psychological reactions to long-term isolation. Dr. Haney's research found extraordinarily high rates of psychological trauma. More than four out of five prisoners suffered from anxiety and nervousness, headaches, troubles sleep, lethargy or chronic tiredness. Over fifty percent complained of nightmares, heart palpitations, and fear of impending nervous breakdowns; while a similar percentage reported specific psychopathologic effects of isolation, such as obsessive ruminations, confused thought processes, irrational anger and social withdrawal. Over half also reported violent fantasies, emotional flatness, mood swings, chronic depression, and overall deterioration. Nearly half had suffered hallucinations, perceptual distortions, and a quarter of all prisoners had experienced suicidal ideation. *See* Craig Haney, *Mental Health Issues in Long-Term solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 127 (2003).

existing psychological disorders and contributes to the emergence of symptoms including self-harming behaviors and suicide. The psychological risks of long-term isolation in prison include increases in potentially damaging symptoms and problematic behaviors including: negative attitudes and affect,[20] insomnia,[21] anxiety,[22] panic,[23] withdrawal,[24]

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[20] *See* Michael Bauer, Stefan Priebe, Bettina Haring & Kerstin Adamczak, *Long-Term Mental Sequelae of Political Imprisonment in East Germany*, 181 J. NERVOUS & MENTAL DISEASE 257-262 (1993) (a study of persons who had spent at least six weeks in political imprisonment that included solitary confinement); Thomas Hilliard, *The Black Psychologist in Action: A Psychological Evaluation of the Adjustment Center Environment at San Quentin Prison*, 2 J. BLACK PSYCHOLOGY 75-82 (1976) (Conditions in the Adjustment Center were described in *Spain v. Procunier*, 408 F. Supp. 534 (1976), *aff'd in part, rev'd in part*, 600 F. 2d 189 (9th Cir. 1979); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOCIAL JUSTICE 8-19, (1988); Richard Korn, *Follow-up Report on the Effects of Confinement in the High Security Unit at Lexington*, 15 SOCIAL JUSTICE 20-29 (1988) (studies of women federal prisoners subjected to "small group isolation"); Ida Koch, *Mental and Social Sequelae of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark, in* THE EXPANSION OF EUROPEAN PRISON SYSTEMS, WORKING PAPERS IN EUROPEAN CRIMINOLOGY NO. 7 119 (Bill Rolston & Mike Tomlinson eds. 1986); Holly Miller & Glenn Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?* 7 CRIMINAL BEHAVIOUR AND MENTAL HEALTH 85-94 (1997); Peter Suedfeld, Carmenza Ramirez, John Deaton, & Gloria Baker-Brown, *Reactions and Attributes of Prisoners in Solitary Confinement,* 9 CRIMINAL JUSTICE & BEHAVIOR 303-340 (1982).

[21] *See* Bauer et al., *supra* note 20; Stanley Brodsky and Forrest R. Scogin, Inmates *in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REPORTS 267-280 (1988) (Study of protective custody where conditions of isolation and restricted movement parallel many of those that exist in most supermaxes); Craig Haney, *supra* note 19 (Study of supermax found extraordinarily high rates of symptoms of psychological trauma); Koch, *supra* note 20; Korn, *supra* note 20.

[22] *See* Henrik Andersen, Dorte Sestoft, Tommy Lillebaek, Gorm Babrielsen, & Ralf Hemmingsen, *A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement*, 26 INT'L J. L. & PSYCHIATRY 165-177 (2003); Brodsky & Scogin, *supra* note 21; Stuart Grassian, *supra* note 19; Stuart Grassian and N. Friedman, *supra* note 19; Haney, *supra* note 19; Hilliard, *supra* note 18; Koch, *supra* note 20; Korn, *supra* note 20; Toch, *supra* note 19; Richard Walters, John Callagan & Albert Newman, *Effect of Solitary Confinement on Prisoners*, 119 AM. J. PSYCHIATRY 771-773 (1963).

[23] *See* Toch, *supra* note 19.

[24] *See* Bruno M. Cormier & Paul J. Williams, *Excessive Deprivation of Liberty*, 11 CANADIAN PSYCHIATRIC ASSOC. J. 470-484 (1966); Haney, *supra* note 19; Miller &

hypersensitivity to stimuli,[25] ruminations,[26] cognitive dysfunction,[27] hallucinations,[28] loss of control,[29] irritability, aggression, and rage,[30] paranoia,[31] hopelessness,[32] lethargy,[33] depression,[34] a sense of impending emotional breakdown,[35] self-mutilation,[36] and suicidal ideation and behavior.[37]

Young, *supra* note 20; G. Scott & M. Gendreau, *Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison*, 14 CANADIAN PSYCHIATRIC ASSOC. J. 337-341 (1969); Toch, *supra* note 19.

[25] *See* Grassian, *supra* note 19; Haney, *supra* note 19.

[26] *See* Brodsky & Scogin, *supra* note 21; Haney, *supra* note 19; Korn, *supra* note 20; Miller & Young, *supra* note 20.

[27] *See* Brodsky & Scogin, *supra* note 21; Grassian, *supra* note 19; Haney, *supra* note 19; Koch, *supra* note 20; Korn, *supra* note 20; Miller & Young, *supra* note 20; Peter Suedfeld & Chunilal Roy, *Using Social Isolation to Change the Behavior of Disruptive Inmates*, 19 INTERNATIONAL JOURNAL OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 90-99 (1975).

[28] *See* Brodsky & Scogin, *supra* note 21; Grassian, supra note 19; Haney, *supra* note 19; Koch, *supra* note 19; Korn, *supra* note 19; Suedfeld & Roy, *supra* note 27.

[29] *See* Grassian, *supra* note 19; Haney, *supra* note 19; Suedfeld & Roy, *supra* note 27; Toch, *supra* note 19.

[30] *See* Frank Rundle, *supra* note 19 (Some prisoners at Soledad's isolated confinement "adjustment center" set fires in order to be get out of their cells, others entered a frenzied rage destroying cell and personal property); Bauer et al., *supra* note 20; Brodsky & Scogin, *supra* note 21; Cormier & Williams, *supra* note 24; Grassian, *supra* note 19; Haney, *supra* note 19; Hilliard, *supra* note 20; Koch, *supra* note 20; Miller & Young, *supra* note 20; Suedfeld, Ramirez, Deaton, & Baker-Brown, *supra* note 20; Toch, *supra* note 19.

[31] *See* Cormier & Williams, *supra* note 24; Grassian, *supra* note 19.

[32] *See* Haney, *supra* note 19; Hilliard, *supra* note 20.

[33] *See* Brodsky & Scogin, *supra* note 21; Haney, *supra* note 19; Koch, *supra* note 20; Scott & Gendreau, *supra* note 24; Suedfeld and Roy, *supra* note 27.

[34] *See* Andersen, et al., *supra* note 45; Brodsky & Scogin, *supra* note 20; Haney, *supra* note 19; Hilliard, *supra* note 20; Korn, *supra* note 20.

[35] *See* Brodsky & Scogin, *supra* note 21; Grassian, *supra* note 19; Haney, *supra* note 19; Koch, *supra* note 20; Korn, *supra* note 20; Toch, *supra* note 19.

[36] *See* Thomas B. Benjamin and Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison*, 9

The over representation of prisoners with mental illness in solitary confinement settings is illustrated all too well by the prevalence of suicides in isolation housing units. On average, 50% of completed suicides by inmates occur among the 2–8% of prisoners who are housed in solitary confinement.[38] Some researchers have concluded that more severe levels of restriction imposed on inmates in solitary confinement housing increase the problems within prison systems.[39]

In their amicus brief in the Supreme Court case *Wilkinson v. Austin*,[40] distinguished, nationally renowned mental health experts summarized the clinical and research literature about the effects of prolonged solitary confinement and concluded: "No study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects" (Statement of Interest

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CLEARINGHOUSE REVIEW 83-90 (1975); Thomas B. Benjamin and Kenneth Lux, *supra* note 19 (One prisoner nearly died from loss of blood after cutting himself up with his broken light bulb, another swallowed glass, and a number of prisoners attempted hanging (several successfully); Grassian, *supra* note 19; Toch, *supra* note 19 (Psychologist Hans Toch concluded that "isolation panic" was a serious problem among prisoners in solitary confinement producing symptoms of rage, panic, loss of control and breakdowns, psychological regression, a build-up of physiological and psychic tension that led to incidents of self-mutilation).

[37] *See* Benjamin & Lux, *supra* note 19; Cormier & Williams, *supra* note 24; Grassian, *supra* note 19; Haney, *supra* note 19.

[38] Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REPORT 1, 9 (May/June 2011). *See also* Jennifer R. Wynn and Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 516 (2004) (A study of isolated confinement in New York prisons). The over-representation of prisoners with mental illness in New York's disciplinary isolated confinement units and the prevalence of suicides in those units prompted state-wide litigation. *See* discussion *infra* of *DAI v. OMH* at 31-33.

[39] *See* Miller & Young, *supra* note 20.

[40] Amici here acknowledge their reliance on the research conducted and summarized more fully in the Brief of *Amici Curiae* Professors and Practitioners of Psychology and Psychiatry, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-4995).

of Amici, p. 4). Brief of *Amici Curiae* Professors and Practitioners of Psychology and Psychiatry, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-4995).[41] After their review of the clinical and research materials, amici noted that "[t]he overall consistency of these findings – the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods – is striking." *Id.* at 23. *See also* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History of the Literature*, 34 CRIME & JUSTICE 441 (2006).

II. STATES, COURTS AND LEGISLATURES HAVE INTERVENED TO STOP OR REDUCE THE CONFINEMENT OF PRISONERS WITH SERIOUS MENTAL ILLNESS IN SOLITARY CONFINEMENT SETTINGS.

A growing number of states have taken steps, either independently or because of litigation, to exclude prisoners with serious mental illness from solitary confinement housing areas, to increase mental health services for prisoners with serious mental illness who are held in restrictive settings within prisons, and to mitigate prison disciplinary proceedings when they involve prisoners with mental illness.[42] Courts have approved

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

[42] In addition to the growing national recognition that long-term solitary confinement and supermaximum confinement raises serious legal and policy concerns, human rights experts around the world have also criticized the use of long-term solitary confinement in the United States as a violation of international human rights law and standards. *See, e.g.*, Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. CONST. L. 115, 122-25 (2008); Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 98 (2005). Indeed the U.N. Committee Against Torture, the official body established pursuant to the Convention Against Torture, has recommended that the practice of long-term solitary confinement be abolished altogether. *See, e.g.*,

remedies, both litigated judgments and settlement agreements, for prisoners with mental illness in isolation. States have passed regulations requiring that mental illness be taken into consideration in prison disciplinary hearings. One state has passed legislation that limits solitary confinement of prisoners with serious mental illness and several other states are considering similar legislation to end this inhumane practice and its tragic outcomes that include repeated acts of self-harm and suicide.

These steps have been taken amidst the growing awareness of the enormous rise in the incarceration of individuals with mental illness.[43] By mid-year 2005, over half of all prison and jail inmates had a mental health problem as defined by the federal government.[44] Many cite the crisis in the mental health system nationwide as the driver of this enormous change. For instance, a presidential advisory commission recently reported that the mental health system is "in disarray," citing barriers to use, lack of

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U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark*, ¶ 14, U.N. Doc. CAT/C/DNK/CO/5 (July 16, 2007). When the same Committee reviewed the practices in the United States, it expressed grave concerns over the extremely harsh regime imposed on prisoners in "super-maximum" prisons. The Committee specifically noted the prolonged isolation periods prisoners are subject to and the effect such treatment has on their mental health. Based on the United States' commitment to the Convention, the Committee recommended that "[t]he State party should review the regime imposed on [prisoners] in 'supermaximum prisons,' in particular the practice of prolonged isolation." *See* U.N. Comm. Against Torture, 36th Session, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: United States of America*, U.N. Doc. CAT/C/USA/CO/2, at ¶ 36 (May 18, 2006).

[43] DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1-2 (2006); PAULA M. DITTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 3 (1999).

[44] James & Glaze, *supra* note 43 at 1.

funding and fragmentation as endemic problems.[45] The Council of State Governments, a national organization representing state legislators and leaders, also identified the lack of mental health care in communities across the country as the key component of the unprecedented rise in the number of individuals with mental illness behind bars: "[I]f many of the people with mental illness received the services they needed, they would not end up under arrest, in jail, or facing charges in court ..." .[46] The widespread inadequacy of community mental health services has created unintended and tragic outcomes in our criminal justice system.

The sheer numbers of individuals with mental illness entering the criminal justice system has transformed the population in correctional institutions—but many correctional institutions have been unable to rise to this new challenge. Prisons and jails are ill equipped to provide the type and quality of care needed to successfully treat patients with mental illness. These institutions do not have sufficiently qualified staff, programs are inadequately administered and supervised, and the result is often little more than medication for treatment – and that too is often poorly administered and supervised.[47] Without necessary mental health care, many prisoners suffer and deteriorate while in correctional institutions.

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[45] PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 3 (2003), *available at* http://www.mentalhealthcommission.gov/reports/FinalReport/toc.html.

[46] COUNCIL OF STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 26 (2002), available at http://consensusproject.org/downloads/Entire_report.pdf.

[47] Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 394-95 (2006).

At the same time, prisoners with mental illness have difficulties complying with and understanding prison rules. As a result of their illnesses, prisoners may huddle incapacitated in their cells, yell incessantly, display paranoid behavior or exhibit disruptive, aggressive, or even violent behavior. At times they will suddenly refuse to follow routine orders, such as removing clothes or standing for the count. Others will self-mutilate, smear themselves with feces, or attempt suicide.[48] All of these behaviors result in disciplinary actions in prison. This fact is starkly illustrated by the overwhelming numbers of individuals with severe mental illness or cognitive disabilities in our nation's supermax prisons.[49] For example, in Indiana's supermax, prison officials admitted that "well over half" of the prisoners suffer from mental illness.[50] On average, researchers estimate that at least 30% of the prisoners held in solitary confinement suffer from mental illness.[51]

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[48] *See, e.g.*, TERRY A. KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 81 (1999); SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 17, 59 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003pdf.

[49] Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 127 (2003).

[50] Howard Greninger, *Suit targets Carlisle Prison*, TERRE HAUTE TRIBUNE-STAR, Feb. 4, 2005, *available at* www.tribstar.com/articles/2005/02/04/news/top_stories/top01txt.

[51] *See, e.g.*, James Ridgeway & Jean Casella, *Locking Down The Mentally Ill: Solitary Confinement Cells Have Become America's New Asylums,* THE CRIME REP., Feb.20, 2010, *available at* http://mostlywater.org/locking_down_mentally_ill_solitary_confinement_cells_have_become_america%E2%80%99s_new_asylums; MARY BETH PFEIFFER, CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL (2007); JENNIFER R. WYNN, ALISA SZATROWSKI & GREGORY WARNER, THE CORRECTIONAL ASSOCIATION OF NEW YORK, MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK STATE PRISONS 48 (2004).

The overwhelming presence of individuals with mental illness in our prisons and jails, and especially in long-term solitary confinement units, calls for a different response from our correctional institutions. Below amici discuss the specific solutions that courts, state legislatures and government agencies around the country have developed as humane, therapeutic alternatives to the long-term isolation of prisoners with mental illness.

The Mississippi Department of Correction was ordered to provide yearly assessments and better mental health care for death row prisoners, who were subject to conditions of isolation. *Gates v. Cook*, 376 F.3d 323, 342 (5th Cir. 2004) (ordering mental health examinations and care for death row prisoners). Later litigation in Mississippi first resulted in a consent decree requiring separate housing of prisoners diagnosed with psychosis and severe mental illnesses in Unit 32 of the Mississippi State Penitentiary. *Presley v. Epps*, No. 4:05CV148-M-D (Feb. 15, 2006). A supplemental consent decree was later entered which required that "[a]fter December 1, 2007, Unit 32 will not be used for long-term housing of prisoners with Severe Mental Illness, other than those on Death Row. For purposes of this Order "long term" means more than 14 days." Supplemental Consent Decree on Mental Health Care, Use of Force and Classification, *Presley v. Epps*, No. 4:05CV148-M-D ¶ 1 (Nov. 15, 2007). The consent decree definition of "severe mental illness" includes "any disorder characterized by repetitive self-harm." *Id.*

The litigation and the subsequent policy changes adapted by the state of Mississippi revolutionized its supermax prison system. The state reduced the supermax population of one institution from 1000 to 150 men and eventually closed the entire

unit.[52] Prison officials estimate that diverting prisoners from solitary confinement under Mississippi's new model saves about $8 million dollars a year.[53] At the same time, changes in the management of the solitary confinement population reduced violence levels by 70%.[54]

One of the components of the Mississippi model involved the diversion of individuals with serious mental illness out of solitary and into a newly developed intermediate-level mental health step-down unit that focuses on treatment rather than punishment. This unit provides a level of mental health treatment comparable to a halfway house or day treatment program in the community. It is used for prisoners with mental illness who cannot return to open populations because of their behavior. Prisoners in this program are not subject to severe isolation and are able to progress rapidly to less restrictive confinement for good behavior. They also engage in group treatment and congregate activities free of handcuffs and ankle restraints. Importantly, medical and custody staff collaborate as part of the treatment team, and custody staff on this unit undergoes extensive mental health training.[55]

In New York, multiple cases were brought on behalf of prisoners with serious mental illness housed in the state's disciplinary isolated confinement units or "Special

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

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

[54] Kupers, *supra* note 52, at 1043.

[55] *Id.* at 1043-44.

Housing Units" (SHUs). In 1987, New York Department of Correctional Services (DOCS) and Office of Mental Health (OMH) were subject to a court-ordered stipulation in the case of *Langley v. Coughlin*, 84 Civ 5431 (S.D.N.Y.), concerning treatment of prisoners with mental illness in the Bedford Hills SHU. The *Langley* Stipulation required, among other things: (a) an assessment of prisoners on the OMH caseload at Bedford Hills for possible diversion from SHU "if it is clinically indicated that the inmate is unable to continue confinement in SHU"; (b) ten hours of OMH presence per week in the Bedford Hills SHU; and (c) a private interview room so that private therapy sessions may be conducted. *Langley v. Coughlin*, 84 Civ 5431, at 3-4 (S.D.N.Y. July 23, 1987) (stipulation of settlement).

Eng v. Goord, Civ 80-385S (W.D.N.Y.) included claims that there was inadequate mental health treatment in the SHU at Attica Correctional Facility. The amended stipulation of settlement in the *Eng* litigation led to the creation of the Special Treatment Program (STP) and a Joint Case Management Committee (JCMC) for prisoners with mental illness housed in the SHU at Attica. *Eng v. Goord*, Civ 80-385S, at 3-7 (W.D.N.Y. June 12, 2000) (stipulation of settlement). The STP was the first treatment program in New York for prisoners with mental illness serving time in SHU which provided out-of-cell mental health programming.[56] The JCMC brought OMH and DOCS staff together to discuss and work on treatment plans for prisoners with mental illness housed in the Attica SHU.

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[56] A stipulation entered in the *Eng* litigation, ordered in 1998 and then amended and ordered in 2000, required among other things the diversion from the Attica SHU of prisoners "known to be at substantial risk of serious mental or emotional deterioration," and alternative placement if the patient is at substantial risk of serious mental or emotional deterioration if sent to SHU. *Eng v. Goord*, Civ 80-385S, at 3-7 (W.D.N.Y. June 12, 2000) (stipulation).

Anderson v. Goord, 87 CV 141 (N.D.N.Y.) claims included the failure to provide adequate mental health care to prisoners housed in the SHUs and the failure to appropriately consider mental illness during disciplinary hearings at two prisons. In 2003, a settlement of the *Anderson* due process claims about disciplinary hearings resulted in expanded use of JCMCs, as well as state-wide regulations that require clinical testimony when the mental health of the prisoner is at issue during the hearing process. *See* 7 N.Y.C.R.R. §§ 251.2, 254.6, 254.7 and 310. The regulations authorize the hearing officer to use evidence of mental illness to mitigate the penalty or dismiss the charges.[57]

The state-wide case *Disability Advocates, Inc. v. New York State Office of Mental Health,* No. 02-Civ-4002 (S.D.N.Y.) (*DAI v. OMH*) specifically challenged the problem of prisoners with mental illness repeatedly running afoul of prison rules. *DAI v. OMH* identified the persistent problem that far too many prisoners with serious mental illness entered an uninterrupted cycle of discipline, psychiatric deterioration, crisis care and further punishment. The state's failure to interrupt this harmful cycle caused disabled prisoners to repeatedly experience the depths of severe psychiatric illness—at the cost to them of untold misery, and to the state of increased disruption, injury to prisoners and staff, psychiatric hospitalization in many cases, and suicides.[58] The April 27, 2007

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[57] *See also D.M. v. Terhune*, 67 F. Supp. 2d 401, 403 (D.N.J. 1999) (requiring that prison hearing officers are informed whether inmates are receiving mental health treatment, and requiring removal from disciplinary isolated confinement if mental health status deteriorates).

[58] Solitary confinement housing is a well known suicide risk factor in New York DOCS and elsewhere. B. WAY, D. SAWYER, S. BARBOZA, R. NASH, INMATE SUICIDE AND TIME SPENT IN SPECIAL DISCIPLINARY HOUSING IN NEW YORK STATE PRISON, PSYCHIATRIC SERVICES, 2007; R. MIRAGLIA & R. BEER, QUALITY ASSURANCE REVIEW OF SUICIDES IN NEW YORK STATE CORRECTIONAL FACILITIES, NEW YORK STATE OFFICE OF MENTAL HEALTH (2002); Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors*

settlement in *DAI v. OMH* includes among its provisions a minimum of two hours per day of out-of-cell treatment or programming for prisoners with serious mental illness confined in solitary confinement (SHU), universal and improved mental health screening of all prisoners upon admission to the state prison system, creation and expansion of residential mental health programs, required and improved suicide prevention assessments upon admission to solitary confinement (SHU), improved treatment and conditions for prisoners in psychiatric crisis in observation cells, and modifications to the disciplinary process. A stated goal of the agreement is to provide mental health treatment rather than to isolate and punish prisoners with serious mental health needs. The definition of serious mental illness included in the *DAI v. OMH* settlement agreement specifically includes inmates who are actively suicidal or who experience significant functional impairment involving acts of self-harm or other behaviors that have a seriously adverse effect on life or on mental or physical health including cases of severe personality disorder. *See DAI v. OMH*, Private Settlement Agreement, April 27, 2007 ¶¶ 1 b. through e.

The definition of serious mental illness, along with many other provisions of the *DAI v. OMH* settlement agreement designed to protect prisoners with serious mental illness from being housed in solitary confinement, were adopted by the New York Legislature and are now New York state law. The "SHU Exclusion Law" in New York requires that prisoners with serious mental illness must be diverted or removed from solitary confinement to residential mental health units and provided with improved

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with the Self-Injury-Free Time of Male Prisoners, 48 J. OFFENDER REHABILITATION 529, 539-40 (2009).

mental health care.[59] Most of the provisions of the SHU Exclusion Law appear as amendments to N.Y. Correction Law § 137. *See* McKinney's Correction Law § 137.

Numerous other states have also taken action to remedy the overuse of solitary confinement for prisoners with serious mental illness.[60] In Connecticut, the March 8,

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[59] An effort to pass similar legislation in Maine to limit the use of Maine State Prison's supermax – the Special Management Unit (SMU) – resulted in a voluntary dramatic reduction of the SMU population. *See* Lance Tapley, *Reform Comes to the Supermax*, THE PORTLAND PHOENIX, May 25, 2011, *available at*, http://portland.thephoenix.com/news/121171-reform-comes-to-the-supermax/?page=1#TOPCONTENT. Significantly, the sharp reduction in the SMU population resulted in no rise in violence. Lance Tapley, *Maine's Dramatic Reduction of Solitary Confinement*, THE CRIME REPORT, July 21, 2011, *available at* http://www.thecrimereport.org/news/inside-criminal-justice/2011-07-maines-dramatic-reduction-of-solitary-confinement. In Colorado, a recently proposed bill would have created an assessment process for mental health issues and required that prisoners would not be released from isolated confinement to the community, but would instead be transitioned through the general prison population before their release. SB 11-176, 2011 Leg., 68th Reg. Sess. (Co. 2011).

[60] In recognition of the inherent problems of solitary confinement, the American Bar Association also recently approved standards to reform its use. The ABA's *Standards for Criminal Justice, Treatment of Prisoners* address all aspects of solitary confinement (the Standards use the term "segregated housing"). *See* ABA Criminal Justice Standards on the Treatment of Prisoners (2010), available at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html These Standards represent the product of a five-year drafting process, approved by the American Bar Association House of Delegates in February 2010. They are based on constitutional and statutory law, relevant correctional policies and professional standards, and the deep expertise of the drafters who represented all segments of the criminal justice system, as well as the comments of dozens of additional experts and groups (among them heads and former heads of correctional agencies, prisoners' advocacy organizations, and many professional associations). The solutions presented in the Standards represent a consensus view of representatives of all segments of the criminal justice system who collaborated exhaustively in formulating the final ABA Standards. Among the key provisions in the Standards is the requirement that correctional systems refrain from placing prisoners with serious mental illness in what is an anti-therapeutic environment; instead they must maintain appropriate, secure mental-health housing for such prisoners. (ABA Treatment of Prisoners Standard 23-2.8, 23-6.11 [hereinafter cited by number only]). Other Standards require adequate and meaningful process prior to placing or retaining a prisoner in segregation to be sure that segregation is warranted. (23-2.9; limitations on the duration of disciplinary segregation — in general, stays should be brief and should

2004 settlement of *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski* called for exclusion of prisoners with serious mental illness from the Northern Correctional Institution, Connecticut's supermax prison. *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Choinski*, Civ. No. 3:03 CV 1352, at 6 (D. Conn. March 8, 2004) (settlement agreement). In Wisconsin, the settlement in *Jones'El v. Berge* excluded prisoners with serious mental illness from super-maximum security housing. *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (granting preliminary injunction requiring removal of those with serious mental illness from "supermax" prison). In New Jersey, prisoners *must* be released from administrative segregation if they have a mental illness history and it appears that ongoing confinement there would harm them. *D.M. v. Terhune*, 67 F. Supp. 2d 401, 403 (D.N.J. 1999). In California, *Madrid v. Gomez* resulted in prisoners with serious mental illness being excluded from the Pelican Bay prison's SHU. 889 F. Supp. at 1265. Litigation concerning the Ohio supermax, Ohio State Penitentiary, resulted in prisoners with serious mental illness being excluded from the facility. *Austin v. Wilkinson*, Civ. No. 4:01-CV-071, at 27 (N.D. Ohio Nov. 21, 2001) (order granting

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rarely exceed one year. Longer-term segregation should be imposed only if the prisoner poses a continuing and serious threat. Segregation for protective reasons should take place in the least restrictive setting possible. (23-2.6, 23-5.5); policies to decrease extreme isolation by allowing for in-cell programming, supervised out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material. (23-3.7, 23-3.8); policies to decrease sensory deprivation by limiting the use of auditory isolation, deprivation of light and reasonable darkness, punitive diets, etc. (23-3.7, 23-3.8); policies that allow prisoners to gradually gain more privileges and be subjected to fewer restrictions, even if they continue to require physical separation. (23-2.9; and careful monitoring of prisoners in segregation for mental-health deterioration and appropriate action if deterioration occurs. (23-6.11).

preliminary injunction); *Austin*, No. 4:01-CV-071, at 2 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief).

CONCLUSION

The record is unequivocal. Mr. Gay has a serious mental illness that was inadequately treated and exacerbated during periods of long-term isolation in solitary confinement settings. The result of the repeated prosecutions of Mr. Gay for predictable, symptomatic behaviors, arising after being sent to a prison mental hospital and thereafter being returned to solitary confinement for 10 months at Pontiac Correctional Facility, amounted to the imposition of sentences totaling an additional 97 years to his original seven-year sentence. These results shock the conscience, violate evolving standards of decency, and violate the Illinois and Federal Constitution. These constitutionally impermissible results require reversal or other post-conviction review and remedy.

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CERTIFICATE OF COMPLIANCE

I, Alan Mills, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b), and this Court's order of April 1, 2011, extending the page limitation by eight pages. The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a) is 35 pages.

Certificate of Service

The undersigned, Alan Mills, an attorney, hereby certifies that he caused the foregoing amicus brief to be served on:

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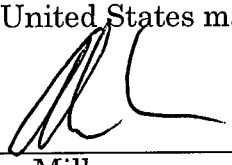

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IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois.
Respondent-Appellee,	)	
	)	
v.	)	03 CF 172
	)	
ANTHONY GAY,	)	Honorable Robert Travers, Judge Presiding.
Petitioner-Appellant.	)	

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