

No. 19-742

In The
Supreme Court of the United States

JAMES BAILEY-SNYDER,

Petitioner,

v.

UNITED STATES,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

**BRIEF OF FORMER CORRECTIONS
DIRECTORS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are former corrections directors with extensive experience managing prison systems and with safely reducing the use of solitary confinement within those prison systems. *Amici* are concerned that the Third Circuit’s decision in this case trivializes the disparity between the conditions of incarceration in a prison’s general population unit and the conditions of incarceration in a solitary confinement unit. *Amici* assert there is a stark distinction between the two and solitary confinement is a substantially harsher deprivation of liberty. *Amici* take no position on the ultimate disposition of this case but wish to provide information to the Court regarding the distinction between solitary confinement and general population. Further, *amici* assert that solitary confinement is devastating to prisoners, penologically unnecessary, and that it produces counterproductive outcomes for prison administration. *Amici* believe that this information will assist the Court’s consideration of the legal issue at the heart of this case—whether placement in solitary confinement for investigative purposes is sufficiently similar to an arrest to justify Sixth Amendment Speedy Trial protections.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties’ counsel of record received timely notice of the intent to file the brief, and the parties have consented to the filing of this brief.

Additionally, *amici* are concerned the use of long-term solitary confinement, including for prisoners under investigation, has been perpetuated under a misguided belief that prisons have no viable alternative for ensuring security. *Amici* assert that prolonged isolation has proven dangerous and ineffective, whereas alternative prison management methods have successfully eliminated prolonged solitary confinement while decreasing prison violence. *Amici* provide the Court data showing that eliminating solitary confinement in favor of alternative prison management methods leads to safer and more efficient prisons.

Amici are:

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

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in Texas gubernatorial appointments to both a sentencing commission and a council for offenders with mental impairments. He coauthored *Texas Prisons, The Walls Came Tumbling Down*, and has written numerous articles on criminal justice issues.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and

he has served on the Board for the Washington State Coalition to Abolish the Death Penalty since 2012.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections (WDOC). He started his 33-year career as a Correctional Officer, working his way to the senior most position for the department. In 1985, he worked in one of the first intensive management units (IMUs) in WDOC, and 25 years later he led the efforts to reduce the use of 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*.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. He has served as Superintendent of three prisons in Washington state, as Regional Administrator, and Probation Officer. He is currently a consultant for jail operations.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented a wide array of evidence-based programs, including an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary.



SUMMARY OF ARGUMENT

While all prisoners are deprived of their liberty while incarcerated, the significance of that liberty deprivation is substantially heightened by a prisoner's placement in solitary confinement. Prisoners in solitary confinement are locked in a small cell for the vast majority of each day—meals are eaten just feet, sometimes inches, from the toilet and bed, and prisoners are unable to freely move about the prison or to interact with staff or other prisoners. Social interactions typically take place only through a cell door when guards deliver food or medication; interaction with the outside world is severely stunted. While in isolation, many privileges afforded to prisoners in general population are unavailable, including employment in prison industries, along with most educational, therapeutic, and vocational programming. Opportunities for recreation are limited and take place in isolated cages. Confinement in these solitary conditions inflicts substantial and long-lasting psychological trauma and creates a dramatically higher risk for suicidal behavior. Accordingly, there is an apparent and meaningful distinction between living in solitary confinement and living in a prison's general population.

In addition to the harsh restrictions inherent in solitary confinement, the practice increases prison violence and disorder, while inhibiting the rehabilitative elements of incarceration. Aware of isolation's harmful effects, its failure to ensure prison safety, and its tendency to increase violence in prisons, many state

correctional systems have demonstrated that eliminating prolonged solitary confinement is possible through three interrelated reforms: reducing the number of prisoners sent to solitary confinement, providing rehabilitative programming that instills prosocial behaviors benefitting the prison as a whole, and reducing the length of time prisoners spend in solitary. These three strategies, implemented together, have proven to result in safer prisons and safer communities while simultaneously reducing prison operating costs. In light of the availability and success of these reforms, prison administrators can no longer assert a compelling interest for keeping prisoners in long-term solitary confinement, and “[c]ourts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners . . . in near-total isolation from the living world in what comes perilously close to a penal tomb.”²

ARGUMENT

I. Placement In Solitary Confinement Heightens A Prisoner’s Liberty Deprivation By Subjecting The Prisoner To Significantly Harsher And More Restrictive Conditions.

Solitary confinement goes by many names: “Administrative Confinement,” “Administrative Detention,” “Segregated Housing,” and “Special Housing Unit,”

² *Apodaca v. Raemisch*, 139 S.Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.) (internal quotation omitted).

among others.³ While these labels typically reflect varying justifications for isolating a prisoner, the underlying conditions of confinement are generally accepted to be “more restrictive than . . . general population.”⁴ Similarly, although specific conditions in solitary confinement may vary, the same harsh restrictions are present across the nation—prisoners are removed from general population, held alone in a small locked cell, and are unable to leave that cell for *at least* 22 hours per day.⁵ Accordingly, there is a stark and meaningful distinction between general population and solitary confinement.

In *Wilkinson v. Austin*, the Court recognized this distinction and the harsh conditions inherent in solitary confinement—specifically, very little human contact, isolation to a small cell for 23 hours per day, and recreation in a small, isolated room.⁶ In *Wilkinson*, the Court reasoned that these conditions, taken together with the indefinite nature of the placement in solitary confinement—like the indefiniteness of the placement endured by Mr. Bailey-Snyder—and the accompanying disqualification from parole consideration constituted

³ U.S. Dep’t of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing: Executive Summary*, 3-6 (Jan. 2016).

⁴ Kenneth McGinnis et al., Report to the Federal Bureau of Prisons, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*, 95 (2014).

⁵ *Report and Recommendations*, *supra* note 3, at 3.

⁶ 545 U.S. 209, 223-24 (2005).

an “atypical and significant hardship” giving rise to a liberty interest in the prison context.⁷

Importantly, prisoners placed in solitary confinement for non-punitive reasons (i.e., pending an investigation or for protective custody) “experience the same living conditions as those placed in what is an explicitly punitive environment.”⁸ For this reason, a comprehensive study of the Federal Bureau of Prisons’ (“BOP”) use of solitary confinement recommended a 45-day limitation on the isolation of prisoners under investigation and recommended that investigations “should be completed in a more timely manner.”⁹ Further, the report also recommended that, for those placed in isolation pending investigation, “there needs to be a clear difference in the conditions of confinement from those in punitive segregation.”¹⁰ The lack of difference in confinement conditions was especially concerning in the face of the data in the report, which indicated that over 80 percent of prisoners in solitary confinement had not been found guilty of any misconduct.¹¹

As this Court noted in *Wilkinson*, solitary confinement often deprives a prisoner of virtually all human contact, environmental stimuli, and a great many

⁷ *Id.* at 224.

⁸ McGinnis, *supra* note 4, at 219.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

privileges otherwise available in general population.¹² Prisoners are only allowed to leave their cells for recreation—which typically takes place individually, in a small and isolated space—or for another circumscribed purpose.¹³ When allowed out of their cell, prisoners are almost always “shackled at the wrists, waist, and legs, and escorted by one or more correctional officers.”¹⁴ While in solitary confinement, prisoners are “given only extremely limited or no opportunities for direct and normal social contact with other persons (i.e., contact that is not mediated by bars, restraints, security glass or screens, and the like), and afforded extremely limited if any access to meaningful programming of any kind.”¹⁵ Unlike general population, where prisoners can typically move freely throughout the unit and engage with correctional staff when needed, most any action that a prisoner wishes to take while in solitary confinement is tightly constrained by staff availability. Similarly, many actions that could easily be taken in general population must go through written requests and/or other similar administrative procedures while in solitary confinement.

While in solitary confinement, a prisoner’s ability to associate with other people, something which is relatively unencumbered in general population, is

¹² 545 U.S. at 214.

¹³ *Report and Recommendations*, *supra* note 3, at 28.

¹⁴ *Id.*

¹⁵ Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement is Psychologically Harmful*, 181 Prison Service Journal 12, 12-20 (2009).

severely curtailed. While correspondence with the outside world via mail may remain a viable option, prisoners in solitary confinement have substantially limited phone privileges.¹⁶ For some prisoners, especially those held pending an investigation or isolated for disciplinary reasons, phone calls are prohibited.¹⁷ Similarly, visitation, if allowed, is often restricted.¹⁸ At many facilities, visitation with family and friends is only allowed through video conference, preventing prisoners from touching and embracing visitors.¹⁹ Associations with other prisoners that would be easily maintained in general population are completely inhibited while in solitary confinement.²⁰ At best, prisoners in solitary confinement *may* be able to socialize with other prisoners held in solitary confinement during recreation time, which is, at most, one hour long.²¹ Even so, prisoners at many facilities do not participate in recreation because it occurs in the early morning hours (often around 5:00 AM) and some prisons lack the equipment or infrastructure to provide meaningful recreation opportunities.²² This means that, in direct contrast to general population, a prisoner is unable to freely speak with correctional staff or other prisoners and is unable to access many prison services. In the

¹⁶ McGinnis, *supra* note 4, at 198-99.

¹⁷ *Id.* at 217.

¹⁸ *Id.*

¹⁹ *Id.* at 199.

²⁰ *Report and Recommendations*, *supra* note 3, at 1.

²¹ *Id.* at 205.

²² *Id.* at 209.

context of this case, this means that a prisoner subject to a criminal investigation will be unable to take meaningful steps to collect evidence and find witnesses or otherwise prepare an effective defense.

In general population, prisoners have access to some form of employment, education, or other form of intellectual stimulation to occupy their mind, however such “diversions [are] no doubt denied to many of today’s” prisoners held in solitary confinement.²³ Inhibited access to prison programming and services means that prisoners held in solitary confinement are unable to maintain employment in prison industries and are often dropped from vocational and educational programming they may have participated in while in general population.²⁴ The small amount of programming available to prisoners in solitary confinement is narrowly limited to activities that can take place inside their own cell.²⁵

The psychological consequences of isolation indicate yet another powerful distinction between life in solitary confinement and life in general population. Considerable research has documented the “strikingly toxic” effects of prolonged isolation on the human brain.²⁶ Even people who are “psychologically resistant

²³ *Davis v. Ayala*, 135 S.Ct. 2187, 2209 (2015) (Kennedy, J., concurring in the Court’s opinion but writing separately to discuss the conditions of solitary confinement).

²⁴ *Id.* at 205.

²⁵ *Id.* at 207-08.

²⁶ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol’y 325, 354 (2006). *See also* Craig

inevitably suffer severe psychological pain as a result of [solitary confinement], especially when the confinement is prolonged.”²⁷ The result is often “prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate’s capacity to reintegrate into the broader community upon release from prison.”²⁸ As some members of this Court have recognized, “a terrible ‘human toll’ is ‘wrought by extended terms of isolation’ and . . . ‘[y]ears on end of near-total isolation exact a terrible’ psychiatric ‘price.’”²⁹

Similarly, placement in solitary confinement subjects a prisoner to a dramatically increased risk of suicide. A study of prisoners in New York indicated that prisoners in solitary confinement were 6.9 times more likely to engage in self-harm and 6.3 times more likely to engage in potentially fatal self-harm, facts which are particularly concerning when there is already a high prevalence of this behavior in normal prison settings.³⁰ Others have found that “close to half of all successful suicides in prison occur among the six to eight percent of the prisoner population that is in isolated

Haney, *Mental Health Issues in Long-term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 140 (2003); *The Social Psychology of Isolation*, *supra* note 15, at 12-20.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Ruiz v. Texas*, 137 S.Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial of application for stay of execution).

³⁰ Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 *Am. J. Pub. Health* 442, 445 (2014).

confinement at any given time.”³¹ In 2005, forty-four California prisoners successfully committed suicide—thirty-one of them were held in solitary confinement.³² More recently, a study linked solitary confinement to significantly higher rates of mortality after release from prison—prisoners held in solitary confinement were overall “24% more likely to die within the first year after release, especially from suicide (78% more likely) and homicide (54% more likely); they were also 127% more likely to die of an opioid release in the first 2 weeks after release.”³³

Once a prisoner has been placed in isolation, it is often difficult for them to return to general population. This is, in part, because solitary confinement tends to create a destructive cycle of psychological deterioration and worsening behavioral issues—while in solitary confinement, a prisoner may get “mad and respond[] with more vulgarity. He gets another rule violation and we tack on [thirty] days. Soon you have a guy who never used violence doing three to four years in segregation.”³⁴

³¹ Hans Toch & Terry Allen Kupers, *Violence in Prisons, Revisited*, 45.3 J. of Offender Rehabilitation 1, 19 (2007).

³² Sal Rodriguez, Solitary Watch, *Fact Sheet: The High Cost of Solitary Confinement* (2011).

³³ Lauren Brinkley-Rubenstein et al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, Jama Open Network 1 (2019).

³⁴ Emmitt Sparkman, *Mississippi DOC’s Emmitt Sparkman on Reducing the Use of Segregation in Prisons*, Think Justice Blog (Oct. 31, 2011), <https://www.vera.org/blog/mississippi-docs-emmitt-sparkman-on-reducing-the-use-of-segregation-in-prisons>.

While prisoners typically “have an opportunity to administratively challenge their segregation’s length prior to arrest or accusation,” this is unfortunately not the case for people like Mr. Bailey-Snyder whose ability to administratively challenge their isolation is precluded by an FBI investigation.³⁵ The unfortunate reality in the BOP is that many prisoners under investigation languish in solitary confinement due to “the lack of a policy requirement that investigation be limited to a specified maximum time period,” meaning that “investigations can linger for months without resolution.”³⁶ Sound correctional practice requires investigations to be prioritized and completed as “expeditiously as possible,” and further, the status of prisoners under investigation to be reviewed periodically to ensure that segregation is necessary.³⁷

As Justice Kennedy reiterated, this Court has long “recognized that . . . solitary confinement bears ‘a further terror and peculiar mark of infamy’” not present in general population.³⁸ This is because life in solitary confinement is dramatically different than in general population—almost every aspect of life changes and the most basic of privileges are strictly curtailed. Unable to socialize or engage in many of the normal activities available in general population, isolated prisoners are subjected to substantial psychological harm and

³⁵ *United States v. Bailey-Snyder*, 923 F.3d 289, 294 (3d Cir. 2019).

³⁶ McGinnis, *supra* note 4, at 216.

³⁷ *Report and Recommendations*, *supra* note 3, at 107-09.

³⁸ *Ayala*, *supra* note 23, at 2209.

risk of suicide. Accordingly, the placement of a prisoner in solitary confinement subjects that individual to substantially harsher and more restrictive living conditions that are meaningfully distinct from general population.

II. Solitary Confinement Did Not Reduce Violence Within Prison Systems.

The practice of holding prisoners subject to an investigation in solitary confinement is often couched in a need to promote prison safety. However, the legacy of the use of solitary confinement in the nation's prisons tells a different story—that the use of isolation, regardless of the justification, has utterly failed to promote safety in prisons. Over a century ago, America abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.³⁹ But in the 1980s, solitary confinement returned to America's prisons, partly in reaction to the violence that accompanied exploding prison populations.⁴⁰ The dismantling of state-run mental health hospitals, the “War on Drugs,” and the shift to mandatory minimum sentencing flooded prison systems with more people than cells could hold.⁴¹ The resulting overcrowded

³⁹ Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 747-49 (2015).

⁴⁰ *Id.*

⁴¹ See, e.g., McGinnis, *supra* note 4.

prisons were ill-equipped to address the epidemic of prisoners with mental illness, the growth of prison gangs, or the overall increase in violence.⁴²

Correctional officials believed they could pinpoint the “troublemakers” and the “worst of the worst” who most frequently engaged in prison violence and then isolate them to restore order.⁴³ As a result, many states and the Federal Bureau of Prisons built solitary confinement units and “supermax” prisons.⁴⁴ Prison officials expected that removing difficult prisoners from the general population would reduce prison violence.⁴⁵ They were wrong.

The increased use of solitary confinement was “not associated with reductions in facility or systemwide misconduct and violence.”⁴⁶ Unfortunately, with so many solitary confinement cells already built, isolation

⁴² Bennion, *supra* note 39, at 748-49.

⁴³ Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

⁴⁴ Bennion, *supra* note 39, at 751-52.

⁴⁵ Briggs, *supra* note 43, at 1342.

⁴⁶ B. Steiner & C.M. Cain, U.S. Department of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions* 165, 179 (2016); see also R.M. Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* (Aug. 2015) (unpublished Ph.D. dissertation, Univ. of Cin.).

became an overused part of the correctional toolkit.⁴⁷ Punitive isolation became common for even minor offenses, including disrespect, praying, and swearing.⁴⁸ As the practice proliferated, studies showed that “[p]risoners with higher rates of restrictive housing had higher levels of facility disorder.”⁴⁹ Between 2008 and 2015, Texas prisons experienced a 104 percent increase in prisoner assaults, which correctional staff attributed directly to the overuse of solitary confinement.⁵⁰ Psychologists demonstrated that the social pathology caused by isolation led prisoners to “occupy this idle time by committing themselves to fighting against the system.”⁵¹

In recent decades, attitudes about solitary confinement have shifted. Research confirms prolonged solitary confinement causes extensive harm to people’s mental health.⁵² Litigation has highlighted the risks to prisoners in isolation and sought to limit its use,

⁴⁷ Erica Goode, *Rethinking Solitary Confinement*, N.Y. Times, Mar. 11, 2012, at A1.

⁴⁸ Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* 15 (2018).

⁴⁹ Allen Beck, U.S. Department of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

⁵⁰ ACLU of Texas & Texas Civil Rights Project, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* 9 (2015).

⁵¹ *Mental Health Issues*, *supra* note 26, at 124.

⁵² Craig Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. Criminology 285, 286 (2018).

particularly for juveniles and people with mental illness.⁵³ The United States Senate and several states commissioned studies of the impact of solitary confinement on prisoners and its effectiveness in managing violence.⁵⁴ Simultaneously, international condemnation of prolonged solitary confinement as torture placed a spotlight on its use in the United States.⁵⁵

Mindful that solitary confinement harms prisoners and does not improve prison safety, twenty-one states and the federal government have undertaken

⁵³ See, e.g., *Presley v. Epps*, 4:05cv148 (N.D. Miss. 2006); *Jones'El v. Berge*, No. 00-C-421-C, 2002 WL 32362655 (W.D. Wis. 2002); *Joslyn v. Armstrong*, No. 3:01CR198(CFD), 2001 WL 1464780 (D. Conn. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

⁵⁴ Eli Hager & Gerald Rich, *Shifting Away from Solitary: More states have passed solitary confinement reforms this year than in the past 16 years*, The Marshall Project (Dec. 12, 2014), <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary>; Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell* 87-88 (2018) (ASCA-Liman 2018).

⁵⁵ Juan E. Mendez (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment), ¶¶ 79-89, U.N. Doc. A/63/175 (Jul. 28, 2008), <http://www.refworld.org/docid/48db99e82.html>; G.A. Res. 70/175, Rule 44, *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* (Dec. 17, 2015).

solitary confinement reforms.⁵⁶ For example, several legislators, including Senator Dick Durbin and Senator Kamala Harris, recently introduced the Solitary Confinement Reform Act, which seeks to limit the use of solitary confinement.⁵⁷ Sixteen states passed legislation intended to limit the use of solitary confinement, and many more have reformed correctional practices to reduce the use of solitary confinement.⁵⁸ The American Correctional Association (ACA), the largest accrediting body in the United States for correctional institutions, proposed standards and guidelines recommending limits on the use of solitary confinement.⁵⁹ In 2016, a report published by the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center for Public Interest Law at Yale Law School (Liman Center) 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.”⁶⁰

⁵⁶ Hager & Rich, *supra* note 54; ASCA-Liman 2018, *supra* note 54, at 87-88.

⁵⁷ Solitary Confinement Reform Act, S.719, 116th Cong. (2019).

⁵⁸ National Conference of State Legislatures, *Administrative Segregation: State Enactments: Jan. 2018*, <https://leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Meetings/Mar-2018/Exhibits/sj25-state-enactments-2018-ncsl.pdf>.

⁵⁹ American Correctional Association, *Restrictive Housing Performance Based Standards* (Aug. 2016), http://www.aca.org/aca_prod_imis/docs/Standards%20And%20Accreditation/RHStandards2016.pdf (ACA Standards).

⁶⁰ Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Aiming*

III. Limiting The Use Of Solitary Confinement Reduced Violence Within Prison Systems And Improved Safety For Corrections Of- ficers.

Recognizing that isolating prisoners—including those subject to an investigation—yields harmful and counterproductive results, over one-third of states have initiated restrictions on solitary confinement. Nine states—Colorado, Idaho, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, and Washington—report system-wide reforms, reducing the population of prisoners in isolation from nearly 100,000 to approximately 60,000 in just four years.⁶¹ Colorado reports reducing the population of prisoners in long-term solitary confinement from seven percent of the prison population to one percent.⁶² In reforming states, prisoners who remain in solitary confinement now reportedly stay for days, not years, in compliance with ACA-recommended standards.⁶³ These states transformed their prisons by reducing the number of prisoners sent to solitary confinement, initiating pro-social training for prisoners in temporary isolation,

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 (2016) (ASCA-Liman 2016).

⁶¹ ASCA-Liman 2018, *supra* note 54, at 7, 10.

⁶² Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 Yale L.J. Forum 253, 263 (Jan. 15, 2016), <https://www.yalelawjournal.org/forum/reforming-solitary-confinement-in-us-prisons-and-jails>.

⁶³ *ACA Standards*, *supra* note 59, at 3.

and reducing the length of time prisoners spend in solitary conditions.

Putting prisoners into isolation did not reduce violence, and the corollary also proved true: letting prisoners out of solitary confinement did not increase violence. Instead, reforms limiting the use of solitary resulted in a dramatic *decrease* in prison violence.⁶⁴ In Mississippi, “the number of incidents requiring use of force plummeted. . . . Monthly statistics showed an almost seventy percent drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”⁶⁵ Similar broad measures of violence in the Colorado prison system, including the number of forced cell entries, decreased by approximately eighty percent post-reforms, and prisoner-on-staff assaults decreased by nearly fifty percent.⁶⁶ In North Dakota, extreme incidents such as suicide attempts and cell flooding used to occur three

⁶⁴ See, e.g., Marc A. Levin, Esq., *Testimony Before the U.S. Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* 3 (Feb. 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf>; Rick Raemisch, Remarks at Vera Institute of Justice, *Webinar: Rethinking Restrictive Housing: What’s Worked in Colorado?* (Sept. 17, 2018), <https://www.safealternativestosegregation.org/webinar/rethinking-restrictive-housing-whats-worked-in-colorado/> (*Raemisch Remarks*); *Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence*, ACA 2018 Winter Conference Seminar (2018) 18-23 (on file with author) (*Deterrence*).

⁶⁵ Terry Allen Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1039 (2009).

⁶⁶ *Raemisch Remarks*, *supra* note 64.

or more times every week in solitary; after dramatic reductions in the use of isolation, they now occur only a few times each year.⁶⁷

Barely a year after launching solitary confinement reforms in 2013, 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.⁶⁸

In Washington, a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.⁶⁹ “In the model’s first year of implementation at its pilot facility, assaults against staff, the use of weapons, and multi-man fights were reduced by 50%.”⁷⁰ Between 2014 and

⁶⁷ Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (Jul. 31, 2018, 5:01 a.m.), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confineme>.

⁶⁸ Levin, *supra* note 64.

⁶⁹ Dan Pacholke & Sandy Felkey Mullins, J.D., U.S. Department of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* 1, 5 (2016), <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>; see generally, Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 171-211 (2017).

⁷⁰ Pacholke & Mullins, *supra* note 69, at 6.

2017, violent incidents in the two high-security prisons utilizing the model decreased by nearly sixty percent and prisoner-on-staff assaults decreased by nearly ninety percent.⁷¹ Indeed, reduced numbers of isolated prisoners and reduced time in solitary confinement *improved* the security of prisons in these states. This fact undermines the conclusion that solitary confinement is necessary to incapacitate prisoners, including those subject to an ongoing investigation.

IV. States Reduced Their Use Of Solitary Confinement By Limiting The Reasons And Managing The Behaviors That Result In Prisoners Being Sent To Solitary.

In order to actualize change, reforming correctional systems have strictly limited the reasons for sending prisoners to solitary confinement and prioritized the use of alternative housing for prisoners with specialized management needs. These alternatives allow prison officials to actualize their penological goals—like monitoring or controlling the actions of a prisoner who is under investigation—while abandoning the harmful and counterproductive practice of solitary confinement. For example, a correctional facility in New York places prisoners who have been found in possession of a weapon in “Enhanced Security Housing” (ESH) to avoid placing them in solitary confinement.⁷²

⁷¹ *Deterrence*, *supra* note 64.

⁷² Vedan Anthony-North et al., *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the New York City Department of Correction*, Vera Institute of Justice, 20

While in this unit, prisoners have seven out-of-cell hours and are able to earn additional out-of-cell time for good behavior.⁷³ Many other prison officials have developed strategies to reduce the influx of prisoners into isolation, including deterring the violent acts that resulted in solitary placement, eliminating punitive isolation for minor infractions, and creating alternative housing for prisoners who need mental health treatment or protective custody.⁷⁴

Prison officials began reforms by evaluating who was put in solitary confinement and why. They discovered that rather than housing “the worst of the worst,” isolation cells often were filled with people who were simply disruptive, had mental illness, or sought protective custody.⁷⁵ The first ASCA-Liman report revealed “the criteria for entry [into solitary confinement] were broad, as was the discretion accorded correctional officials when making individual decisions about placement.”⁷⁶ Self-reports from correctional departments indicated “[l]ow-level nonviolent offenses were among

(2017), <https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-nycsas.pdf>.

⁷³ *Id.*

⁷⁴ Digard, *supra* note 48, at 28-29.

⁷⁵ Hans Toch & Terry Allen Kupers, *Violence in Prisons, Revisited*, 45.3 J. of Offender Rehabilitation 1, 18 (2007); Digard, *supra* note 48, at 15.

⁷⁶ Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* i (2015), <https://nicic.gov/time-cell-asca-liman-2014-national-survey-administrative-segregation-prison>.

the most common infractions to result in disciplinary segregation sanctions,” and in some states, eighty percent of prisoners in solitary confinement had been diagnosed with a mental illness.⁷⁷ Reforming states withhold privileges from people who committed less serious infractions instead of sending them to solitary.⁷⁸ Officials reserve solitary confinement for prisoners who “pose a serious threat to the safety of others,” and “only when a less-restrictive setting is not sufficient.”⁷⁹

States also reduced the influx of prisoners into isolation by creating alternative housing for prisoners who need mental health treatment and/or protective custody. Several states—including Colorado, Massachusetts, Nebraska, New Mexico, New York, and Texas—passed legislation preventing the isolation of prisoners with serious mental illness.⁸⁰ New Mexico also excludes from solitary any prisoner who exhibits self-injurious or suicidal behaviors.⁸¹ These states, along with Arizona, Mississippi, North Carolina, North Dakota, Pennsylvania, Virginia, Washington, and the federal government, created policies for housing prisoners with mental illness in ways that do not exacerbate their illnesses.⁸² Reforming states report implementing

⁷⁷ Digard, *supra* note 48, at 16; *ASCA-Liman 2016*, *supra* note 59, at 50.

⁷⁸ Digard, *supra* note 48, at 31-32.

⁷⁹ *Id.* at 32.

⁸⁰ *State Enactments*, *supra* note 58.

⁸¹ *Id.*

⁸² *Hager & Rich*, *supra* note 54; *Report and Recommendations*, *supra* note 3, at 48-49.

screening policies to ensure vulnerable people are not placed with people known to be violent.⁸³ “Innovations in an increasing number of jurisdictions now demonstrate that agencies can safely reduce their use of segregation . . . by removing vulnerable, nonviolent individuals from segregation and considering alternative strategies as an initial response for those screened at risk of sexual victimization or abusiveness.”⁸⁴ Accordingly, the isolation of individuals like Mr. Bailey-Snyder is not necessary, as less restrictive and destructive methods for actualizing penological goals exist.

V. Limiting The Use Of Solitary Confinement Also Reduces Costs.

Limiting solitary confinement not only reduces violence in prisons, it provides long-term cost savings. The Government Accountability Office calculated solitary housing costs three times as much as general population housing.⁸⁵ The facilities must be staffed more robustly because prisoners cannot do many of the jobs they would do in general population housing.⁸⁶ Isolation units need a higher ratio of correctional officers to

⁸³ Allison Hastings et al., National PREA Resource Center, *Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails* 7-8 (2015).

⁸⁴ *Id.* at 18-19.

⁸⁵ United States Government Accountability Office, *Bureau of Prisons: Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing* 29-33 (2013), <http://www.gao.gov/assets/660/654349.pdf> (GAO Report).

⁸⁶ *Id.* at 11.

prisoners because policies require at least two officers be present to move prisoners between their cells, exercise areas, and showers.⁸⁷

Colorado estimated it cost over \$15,000 more per year to house a prisoner in isolation than in the general population.⁸⁸ In 2009, the California Office of the Inspector General “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.”⁸⁹ In 2013, Illinois closed its supermax prison, Tamms, which the governor’s office projected would save the state over \$48 million in 2013 alone.⁹⁰ 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.⁹¹ Louisiana and Washington have also saved costs by closing supermax prisons.⁹²

⁸⁷ *Id.*

⁸⁸ Rick Raemisch, *Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Human Rights* 4 (Feb. 25, 2014), <https://bit.ly/2wjdgMY>; Sal Rodriguez, *supra* note 32.

⁸⁹ David Shaw, Office of Inspector General, *Special Review: Management of the California Department of Corrections and Rehabilitation’s Administrative Segregation Unit Population* 3 (2009), <https://bit.ly/2VXT10c>.

⁹⁰ Steve Mills, *Quinn’s Prison Plan Causes Stir*, Chicago Tribune, Feb. 23, 2012, <https://bit.ly/2wfyDZc>.

⁹¹ GAO Report, *supra* note 85, at 34-35.

⁹² *Restricting the Use of Solitary Confinement*, *supra* note 52, at 303.

CONCLUSION

It is clear that prisons do not have to house prisoners under investigation in solitary confinement. Viable alternatives to solitary confinement exist, and multiple state correctional systems have demonstrated the efficacy of these methods. Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation and former President of the ASCA, explained the logic behind North Dakota's approach to reducing the use of prolonged solitary confinement, pointing out that "[r]estricted housing places substantial stress on both the staff working in those settings as well as the prisoners housed in those units. Our highest priority is to operate institutions that are safe for staff and prisoners and to keep communities to which prisoners will return safe."⁹³ Reforming states have demonstrated that less harmful and more effective alternatives can prevail over long-term isolation. "Moreover, many of these alternative approaches to social control in prison systems do not have the dubious moral qualities, legal uncertainties, and costs that are associated with supermax prisons."⁹⁴

The alternatives to solitary confinement employed by a large and growing number of states have enhanced prison security, prisoner welfare, and societal safety, demonstrating there is no longer a penological interest in maintaining prisoners in prolonged isolation. While prisons may have reason to remove prisoners

⁹³ *ASCA-Liman 2016*, *supra* note 60, at 2.

⁹⁴ Briggs, *supra* note 43, at 1371.

subject to an investigation from general population, stranding individuals like Mr. Bailey-Snyder in solitary confinement indefinitely is destructive and serves no penological purpose. Minimizing solitary confinement's harm to all prisoners is not only a moral imperative, but a practical necessity.

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