

No. 20-40379

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

DENNIS WAYNE HOPE

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

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

**BRIEF *AMICI CURIAE* OF FORMER CORRECTIONS OFFICIALS DAN  
PACHOLKE, PHIL STANLEY, DICK MORGAN, ELDON VAIL, AND  
STEVE J. MARTIN IN SUPPORT OF PLAINTIFF-APPELLANT'S  
PETITION FOR REHEARING EN BANC**

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## **SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES**

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

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August 23, 2021

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## STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>

The panel majority on this appeal held that subjecting a prisoner to decades of solitary confinement is not cruel and unusual punishment under the Eighth Amendment, as a matter of law, no matter the extent of its “sheer length.” Op. at 14 n.5. *Amici* are former corrections officials, each with decades of experience, who have seen first-hand that prolonged solitary confinement of the sort permitted by the panel majority here—26 years in this case—can cause severe psychological harm. Furthermore, *amici* know that prolonged solitary confinement is not only incredibly harmful, but also costly and often unnecessary, as prison security can be maintained effectively through other means. Because the panel majority’s decision does not reflect the reality of the profound harmfulness of extended isolation, *amici* respectfully submit this brief in support of Plaintiff-Appellant’s petition for rehearing en banc.<sup>2</sup>

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<sup>1</sup> No party or party’s counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person other than the *amici* and counsel identified herein contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> Although unpublished, the panel opinion’s categorical rejection of Eighth Amendment claims based on prolonged solitary confinement will likely influence district courts. *See, e.g., Umana v. Davis*, 946 F.3d 281, 282 (5th Cir. 2020) (Smith, J., dissenting from denial of reh’g en banc) (unpublished panel opinion was “enbanc-worthy because of the confusing signal [it] sends to the district judges”).



*Amici* are Dan Pacholke, Phil Stanley, Dick Morgan, Eldon Vail, and Steve J. Martin, each of whom has substantial experience with corrections generally and solitary confinement specifically.

Dan Pacholke has a long tenure as an officer for the Washington State Department of Corrections. Among other positions, he has served as Secretary of the Department of Corrections (October 2015-March 2016), Deputy Secretary (April 2014-October 2015), Director of Prisons (July 2011-April 2014), and Deputy Director of Prisons (July 2008-July 2011). He also served as the Superintendent of a number of individual correction centers. He has over 34 years of experience in the field of corrections.

Phil Stanley is a long-time officer who has served in both the New Hampshire Department of Corrections and the Washington State Department of Corrections. In New Hampshire, he was Commissioner of Corrections (May 2000-November 2003). In Washington, his roles have included Director of a regional justice center (2007-2012), Probation Officer (2004-2017), Regional Administrator (1997-2000), and Superintendent (1992-1997). He has approximately 50 years of experience in the field of corrections.

Dick Morgan is a veteran officer and administrator for the Washington State Department of Corrections. He served as Secretary of the Department (March 2016-January 2017), Director of Prisons (2008-2010), and Assistant Deputy Secretary of

Prisons (2006-2008). He also served as Superintendent of three different prisons. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board of the Washington State Coalition to Abolish the Death Penalty since 2012. He has over 36 years of experience in the field of corrections.

Eldon Vail is a long-serving corrections official for the Washington State Department of Corrections. He was Secretary of the Department (2007-2011), Deputy Secretary (1999-2006), and Superintendent of three institutions (1987 and 1989-1994). He has over 36 years of experience in the field of corrections.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system (1981-1985) and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for prisoners with mental impairments. He coauthored *Texas Prisons: The Walls Came Tumbling Down* (1987) and has written numerous articles on criminal justice issues. He has over 50 years of experience in the field of corrections.

With over 220 years of collective experience, *amici* have seen that extended isolation is both dangerous and ineffective. *Amici* respectfully submit this brief to set forth the basis for those views.

## ARGUMENT

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

Numerous studies of prolonged solitary confinement detail the serious psychological harm to prisoners as a result of such isolation.<sup>3</sup> People in solitary confinement report the same effects as from other forms of torture, including “severe depression, memory loss, suicidal tendencies, and an inability to relax, being unable to keep track of time due to the tiny window and a lack of natural daylight in the cell.”<sup>4</sup> These prisoners lose the ability to “establish and sustain a sense of identity and to maintain a grasp on reality.”<sup>5</sup> One individual who had been in isolation for almost 25 years described his confinement as being like an “endless toothache,” or a “slow constant peeling of the skin, stripping of the flesh, the nerve-wracking sound of water dripping from a leaky faucet in the still of the night while you’re trying to

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<sup>3</sup> See, e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 130-132 (2003).

<sup>4</sup> Human Rights Clinic at U. of Tex. Sch. of L., *Designed to Break You: Human Rights Violations on Texas’ Death Row*, 21 (Apr. 2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>.

<sup>5</sup> See Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 *Ind. L.J.* 741, 776 (2015) (internal quotations omitted).

sleep. Drip, drip, drip, the minutes, hours, days, weeks, months, years, constantly drip away with no end or relief in sight.”<sup>6</sup>

The prevalence of suicide and self-harm in solitary confinement illustrates the dangers of isolation. Approximately 50% of prisoner suicides occur among prisoners housed in solitary confinement.<sup>7</sup> Detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population; in California prisons in 2004, 73% of all suicides occurred in isolation units.<sup>8</sup> It is not unusual for prisoners in solitary confinement to swallow razors, smash their heads into walls, compulsively cut their flesh, and try to hang themselves.<sup>9</sup>

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

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<sup>6</sup> Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 116 (2008) (internal quotations omitted).

<sup>7</sup> See Stuart Grassian & Terry Kupers, *The Colorado Study vs. The Reality of Supermax Confinement*, 13 Corr. Mental Health Rep. 1, 11 (2011).

<sup>8</sup> Expert Report of Craig Haney ¶ 81 n. 119, *Coleman v. Schwarzenegger*, No. Civ S 90-0520 LKK-JFMP, 2008 WL 8697735 (E.D. Cal. Aug. 15, 2008); see also Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 442, 445 (2014).

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

solitary confinement.”<sup>10</sup> The psychological consequences for those who are held in solitary confinement for extended periods of time are profoundly negative. Put simply, “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasted for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects.”<sup>11</sup>

Because of these incredibly harmful effects of solitary confinement, there has been a marked trend among corrections officials—like *amici*—to support limitations on the practice. The Association of State Correctional Administrators in 2016 described the growing tendency toward reform: “Documentation of the harms of isolation, coupled with its costs and the dearth of evidence suggesting that it enhances security, has prompted prison directors . . . to try to limit reliance on [solitary confinement]. Instead of being cast as the solution to a problem, [solitary

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<sup>10</sup> Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 *Crime & Just.* 441, 495 (2006); see also Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 *Pace Int’l L. Rev.* 1, 13 (2006) (“[T]he longer an individual experiences conditions of isolation, the likelier they are to develop significant mental illness.”).

<sup>11</sup> *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019) (internal quotations and emphasis omitted); see also Lobel, *supra* note 5, at 118 (“[N]o study of the effects of solitary . . . that lasted longer than 60 days failed to find evidence of negative psychological effects.”) (internal quotations omitted).

confinement] has come to be understood by many as a problem in need of a solution.”<sup>12</sup>

## **II. PROLONGED SOLITARY CONFINEMENT SERVES NO PENOLOGICAL PURPOSE.**

Some form of restrictive housing, imposed on a prisoner for a limited amount of time following an individualized assessment, may be an appropriate correctional tool. However, there exists no penological interest in maintaining prisoners in *prolonged* solitary confinement—which is not necessary to reduce violence within prison systems, to prevent prisoner escapes, or to accomplish any other legitimate penological aim.

### **A. Solitary Confinement Does Not Reduce Violence Within Prison Systems, But Rather Contributes to It.**

Over a century ago, the United States abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.<sup>13</sup> But in the past few decades, solitary confinement has returned to America’s prisons, partly in reaction to exploding prison populations, the growth of prison gangs, and the overall

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<sup>12</sup> The Assoc. of State Corr. Adm’rs & The Liman Ctr. for Publ. Interest Law at Yale L. Sch., *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms*, 15 (Nov. 2016), <https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducetic.pdf>.

<sup>13</sup> See Bennion, *supra* note 4, at 747.

increase in violence in correctional facilities.<sup>14</sup> Correctional officials believed that using solitary confinement to separate difficult prisoners from the general population would reduce prison violence.<sup>15</sup> That belief has proven wrong.

Studies, including by the United States Department of Justice, have shown that prisons with higher rates of solitary confinement have been associated with “*higher* levels of facility disorder.”<sup>16</sup> The connection between solitary confinement and violence has been apparent to correctional professionals. For example, after Texas prisons experienced a substantial increase in prisoner assaults, the state’s largest correctional officers union directly attributed the increase to the overuse of solitary confinement.<sup>17</sup>

Rather than reducing violence in prisons, the available evidence has proved the opposite is true: letting prisoners out of solitary confinement has resulted in a dramatic *decrease* in prison violence.<sup>18</sup> For example, in Mississippi, as the solitary

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<sup>14</sup> *Id.* at 747-751.

<sup>15</sup> Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

<sup>16</sup> Allen J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, U.S. Dep’t of Just. 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> (emphasis added).

<sup>17</sup> ACLU of Tex. & Tex. Civil Rights Project-Houston, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas*, 44 (Feb. 2015), [https://www.aclutx.org/sites/default/files/field\\_documents/SolitaryReport\\_2015.pdf](https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf) (citing interview with union president).

<sup>18</sup> *See, e.g.*, Marc A. Levin, *Director of the Center for Effective Justice at the Texas Public Policy Foundation, Testimony Before the U.S Senate Judiciary Subcommittee*

confinement population plunged, “the number of incidents requiring use of force plummeted . . . . Monthly statistics showed an almost 70% drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”<sup>19</sup> In Maine, barely a year after launching solitary confinement reforms in 2011, state 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.<sup>20</sup>

In Washington, a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.<sup>21</sup> “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%.”<sup>22</sup>

Thus, experience has shown that solitary confinement does not reduce prison violence, but rather, contributes to it.

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*on The Constitution, Civil Rights and Human Rights*, Tex. Pub. Policy Found. 3 (Feb. 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf> (collecting sources).

<sup>19</sup> Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1043 (2009).

<sup>20</sup> Levin, *supra* note 17, at 3 (quoting Maine Corrections Commissioner Joseph Ponte).

<sup>21</sup> Dan Pacholke & Sandy Felkey Mullins, J.D., *More Than Emptying Beds: A Systems Approach to Segregation Reform*, U.S. Dep’t of Just. 6-9 (2016), <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>.

<sup>22</sup> *Id.* at 6.



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

Solitary confinement is sometimes invoked, as it was in this case, as a solution to the problem of prisoner escapes. However, advances in penological technology render solitary confinement unnecessary for this purpose.

Today, prison systems are more secure than ever before. One reason for this is that prisons have a better understanding today of the quality controls needed to create a secure prison environment.<sup>23</sup> Prisons now employ security audit programs and covert testing to test the processes and procedures designed to maintain security and prevent escape.<sup>24</sup>

Prisons also have access to intensive perimeter security to prevent escape and ensure public protection, alongside more dynamic internal security that allows for purposeful activity and controlled contact with families and the outside world.<sup>25</sup> Technology such as improved metal detectors and other scanners help prison staff

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<sup>23</sup> See, e.g., U.N. Office on Drugs and Crime, *Handbook on Dynamic Security and Prison Intelligence*, 26-28 (2015), [https://www.unodc.org/documents/justice-and-prison-reform/UNODC\\_Handbook\\_on\\_Dynamic\\_Security\\_and\\_Prison\\_Intelligence.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_on_Dynamic_Security_and_Prison_Intelligence.pdf).

<sup>24</sup> See *id.* at 24-26.

<sup>25</sup> See, e.g., U.N. Office on Drugs and Crime, *Handbook on the Management of High-Risk Prisoners*, 71 (2016), [https://www.unodc.org/documents/justice-and-prison-reform/HB\\_on\\_High\\_Risk\\_Prisoners\\_Ebook\\_appr.pdf](https://www.unodc.org/documents/justice-and-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf).

screen anything and anyone entering or exiting prisons.<sup>26</sup> And improvements in network surveillance and access control provide prison staff with the ability to review digital footage in real-time.<sup>27</sup>

These and other improved security measures have effectively decreased both escape risks and actual escapes. The number of individuals who have escaped, as reported by the Bureau of Justice Statistics, has dramatically decreased since the mid-1990s. In 1994, 14,307 prisoners in the United States escaped from prison systems.<sup>28</sup> In 2018, the most recent year of available data, only 2,353 prisoners escaped.<sup>29</sup> This represents an 84% drop in the number of prison escapes, even as rates of incarceration were rising precipitously.

Texas in particular has seen a dramatic drop in the number of escapes. In 1990, Texas reported that 141 individuals escaped from prison.<sup>30</sup> Only one prisoner

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<sup>26</sup> See, e.g., Philip Bulman, *Using Technology to Make Prisons and Jails Safer*, 262 Nat'l Inst. Just. 38, 38-41, <https://www.ncjrs.gov/pdffiles1/nij/225764.pdf>.

<sup>27</sup> See, e.g., Erik Sofge, *High-Tech Lockup: Inside 4 Next-Gen Prison Security Systems*, Popular Mechanics (Oct. 1, 2009), <https://www.popularmechanics.com/military/a5176/4248844/>.

<sup>28</sup> E. Ann Carson & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT)—Prisoners AWOL/Escape*, Bureau of Just. Stat. (2020), available at <https://www.bjs.gov/index.cfm?ty=nps>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

has escaped from the entire Texas prison system from 2012 to 2018, the last seven years of available data.<sup>31</sup>

Thus, the risk of escape no longer serves as a justification for placing a prisoner in prolonged solitary confinement, particularly in Texas, where the risk of escape has been essentially non-existent for years.

### **III. SOLITARY CONFINEMENT IS COSTLY.**

Finally, solitary confinement is costly. The U.S. Government Accountability Office calculated that solitary housing costs can be as much as three times as much as general population housing.<sup>32</sup> Thus, it does not advance budgetary interests.

### **CONCLUSION**

Plaintiff-Appellant's petition for rehearing en banc should be granted.

Respectfully submitted,

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<sup>31</sup> *Id.*

<sup>32</sup> See U.S. Gov't Accountability Off., *Bureau of Prisons: Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing*, 31 (May 2013), <http://www.gao.gov/assets/660/654349.pdf>.

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August 23, 2021

### **CERTIFICATE OF SERVICE**

I certify that on August 23, 2021, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All counsel of record are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Laura Rovner  
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## CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitations in Fed. R. App. P. 29(b)(4) because it contains 2,596 words, excluding those parts exempted by Fed. R. App. P. 32(f).

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

/s/ Laura Rovner  
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