

No. 19-15224

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TODD ASHKER, ET AL.,

Plaintiffs-Appellees,

v.

GAVIN NEWSOM, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

No. 4:09-cv-05796-CW (RMI)
Hon. Robert M. Illman, Magistrate Judge

**BRIEF OF *AMICI CURIAE* FORMER CORRECTIONS OFFICIALS
IN SUPPORT OF AFFIRMANCE**

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INTEREST OF *AMICI CURIAE*

*Amici curiae*¹ are nine former state corrections directors and experts with experience managing and operating prison systems across the United States. As correctional professionals, *amici* have an interest in ensuring that issues affecting corrections systems are decided in a manner consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the Court of certain principles and practices relevant to the issues presents in this case. *Amici*'s biographies are listed in Appendix A.

¹ This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

This case requires the Court to examine the appropriate role and handling of confidential information in prison disciplinary proceedings. In particular, the case considers the treatment of confidential information in disciplinary proceedings at which the accused may be subject to solitary confinement for six months or more. As former corrections officials who have run major state correctional systems, *amici* have expertise in sound correctional practices regarding solitary confinement, prison disciplinary systems, and the use of confidential information in the prison setting.

Amici have been leaders in a national movement to limit the use of solitary confinement. *Amici* are knowledgeable about the scientific consensus regarding the harmful effects of solitary confinement. *Amici* also understand the many ways in which reliance on solitary confinement impedes the safe and effective function of a prison system.

In this brief, *amici* share with the Court their expertise regarding the serious harms caused by excessive use of solitary confinement, both to the individuals subject to those conditions and to the overall function of a correctional system. In light of these harmful effects, *amici* explain, any disciplinary proceeding in which solitary confinement is a possible sanction must be accompanied by rigorous procedural protections. This is particularly true with respect to the use of

confidential information. *Amici* explain that the use of inaccurate or unreliable confidential information is counterproductive to the administration of well-run prison. Failing to institute meaningful safeguards for the use of confidential information in disciplinary proceedings undermines the perceived legitimacy of the correctional system and can generate anger, hostility, and tension among the incarcerated population. This, in turn, jeopardizes the stability of the prison and the safety of its staff.

Amici urge this Court to uphold the lower court's order extending the settlement agreement due to the systemic misuse of confidential information in disciplinary hearings that return class members to solitary confinement.

ARGUMENT

I. THE OVERUSE OF SOLITARY CONFINEMENT HAS LASTING HARMFUL EFFECTS ON PHYSICAL AND MENTAL HEALTH.

Solitary confinement is an unusually harsh punishment in the American correctional system. People in solitary confinement experience extreme isolation, characterized by lack of meaningful social interactions, lack of recreational opportunities, and substantial sensory deprivations. As a result, prolonged solitary confinement can exact a tremendous physical and mental toll. Consequently, solitary confinement must be used sparingly and only as necessary.

People in solitary confinement generally spend 22 or 23 hours of the day locked in their cells. Access to group programming and religious services is

limited or nonexistent. People in solitary confinement have dramatically fewer opportunities to shower, schedule visits with friends or family, use the telephone, exercise, go outdoors, or socialize. The few social interactions that a person in solitary confinement might have typically take place through a barrier, like a small food port in a locked cell door or behind security glass. Consequently, the central feature of solitary confinement is the extreme deprivation of meaningful social interaction.

There is a broad consensus among psychological professionals and social science researchers that such deprivations can be extremely harmful to human beings. Nearly every empirical study on this issue has concluded that solitary confinement profoundly impacts an individual's psychological well-being. People in solitary confinement often experience anxiety, panic, irritability, aggression, rage, paranoia, ruminations, violent fantasies, cognitive dysfunction, hypersensitivity to stimuli, and hallucinations.² The social isolation of solitary confinement can result in a lack of impulse and emotional control, mood swings, lethargy, flattened affect, and depression.³ Solitary confinement aggravates

² Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 298 (2018) [hereinafter "*Restricting Use*"] (reviewing studies related to the physical and emotional impact of solitary confinement).

³ Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, 8 NAT'L PRISON PROJECT J. 1 (1993).

existing mental illness and can cause individuals to experience new symptoms.⁴

The rates of suicide and instances of self-harm increase in solitary confinement conditions.⁵

Perhaps most troubling, the symptoms that individuals experience while in solitary confinement often persist even after they are released back into general population or into the community.⁶ Upon release from solitary confinement, individuals are more likely to experience panic disorders, traumatic stress syndromes, hypervigilance and worry, and a decreased motivation to seek social connections.⁷ In other words, solitary confinement can inflict lasting mental health trauma.

In addition to its effect on mental health, solitary confinement impacts people's physical health. The conditions of solitary confinement cause individuals to experience stress-related symptoms, like decreased appetite, trembling hands,

⁴ Keramet Reiter et al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018*, AMERICAN JOURNAL OF PUBLIC HEALTH 110, 56 (2020) [hereinafter "*Psychological Distress*"].

⁵ Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, AMERICAN JOURNAL OF PUBLIC HEALTH 104, 3 (2014).

⁶ Reiter, *Psychological Distress*, *supra*, 56-62.

⁷ Stanford Univ. Human Rights in Trauma Mental Health Lab, *Mental Health Consequences Following Release from Long-Term Solitary Confinement in California: Consultative Report Prepared for the Center for Constitutional Rights* 15-25 (2017), https://handacenter.stanford.edu/sites/default/files/publications/mental_health_consequences_following_release_from_long-term_solitary_confinement_in_california.pdf.

sweating palms, heart palpitations, and a sense of impending emotional breakdown.⁸ It also negatively affects people's ability to sleep, often resulting in nightmares and sleeplessness.⁹ After only a few days in solitary confinement, individuals experience a decrease in brain activity.¹⁰ Under conditions of prolonged solitary confinement, people can experience a long-term decline in their perceptual and cognitive function.¹¹ Individuals often experience these physiological symptoms, much like the mental health symptoms, even after release from solitary confinement conditions.¹²

As its mental and physical effects indicate, solitary confinement is a uniquely dangerous punishment. Therefore, it must only be used when necessary. Correctional systems that overuse solitary confinement as a punishment risk subjecting individuals to severe harm without legitimate reason.

⁸ Bruce Arrigo & Jennifer Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and What Should Change*, 526 INT. J. OFFENDER THER. COMP. CRIMINOL. 22 - 40 (2007).

⁹ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U.J. L. & POL'Y 325 (2006) [hereinafter "*Psychiatric Effects*"].

¹⁰ Paul Gendreau, et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, JOURNAL OF ABNORMAL PSYCHOLOGY 79, 57-58 (1972).

¹¹ Grassian, *Psychiatric Effects*, *supra*, at 354.

¹² Haney, *Restricting Use*, *supra*, at 298.

II. EXCESSIVE RELIANCE ON SOLITARY CONFINEMENT MAKES PRISONS MORE DIFFICULT TO MANAGE.

The overuse of solitary confinement not only harms individuals, but also impedes the successful operation of a prison. Correctional systems operate better when people have access to positive environmental stimuli. Prison programming yields greater opportunities for rehabilitation, lower rates of recidivism, and fewer incidents of violence. The overuse of solitary confinement frustrates these efforts by greatly restricting access to programs, education, exercise, and rehabilitative social contact.

Correctional systems have long recognized the value of rehabilitative and educational programming. The CDCR, for example, aspires to “facilitate the successful reintegration of the individuals in [their] care back to their communities ... by providing education, treatment, rehabilitative, and restorative justice programs, all in a safe and humane environment.”¹³ Similarly, the American Bar Association recommends that prisons offer “constructive activities that provide opportunities to develop social and technical skills, prevent idleness and mental

¹³ California Dept. Corr. & Rehab., *Vision, Mission, Values, and Goals*, <https://www.cdcr.ca.gov/about-cdcr/vision-mission-values/> (last visited Feb. 3, 2020).

deterioration, and prepare the prisoner for eventual release.”¹⁴ Such programming reduces rates of recidivism and ultimately saves costs on re-incarceration.¹⁵

But prison systems cannot achieve their rehabilitative goals when large numbers of the people in their custody are in solitary confinement. Individuals in solitary confinement cannot participate in, contribute to, or benefit from positive prison programming. In fact, by depriving people of access to the prison’s programs and resources, the conditions of solitary confinement can undermine correctional systems’ rehabilitative mission.

More broadly, an overreliance on solitary confinement is an indicator of a poorly functioning correctional system. Institutions that rely heavily on restrictive housing generally have more institutional disorder, resulting in increased rule violations and possibly more violence.¹⁶

Conversely, prisons operate more effectively when correctional systems limit their use of solitary confinement.¹⁷ Under general population conditions,

¹⁴ ABA Criminal Justice Standards for the Treatment of Prisoners, Standard 23-8.2 (3rd ed. 2011).

¹⁵ Lois Davis et al., *Evaluating the Effectiveness of Correctional Education*, BUR. OF JUST. ASS’T (Aug. 22, 2013).

¹⁶ Ryan Labrecque & Paula Smith, *Reducing Institutional Disorder: Using the Inmate Risk Assessment for Segregation Placement to Triage Treatment Services at the Front End of Prison Sentences*, 25 CRIME & DELINQUENCY 3 (2019).

¹⁷ It is well established that solitary confinement is an ineffective strategy for improving the behavior of prisoners or the overall performance of the prison. *See generally* Chad Briggs, Jody Sundt & Thomas Castellano, *The Effect of*

incarcerated people have greater access to programming, education, religious services, exercise, and outdoor time. As a result of increased access to services, the incarcerated population experiences a lower rate of disciplinary offenses, further reducing the need for solitary confinement.¹⁸ Indeed, California’s Legislative Analysis Office (LAO) has acknowledged that programming is beneficial to the operation of a prison: “In addition to reducing recidivism, rehabilitation programs can also serve other related goals, such as making it easier to safely manage the inmate population, improving overall inmate wellbeing, and improving inmate educational attainment.”¹⁹ The LAO concluded that expanded programming could *reduce* the overall cost of running a prison: “[A]n easier-to-manage inmate population could result in fewer inmates needing to be housed in higher security units, which could minimize the need and costs for additional security staff.”²⁰ Indeed, in *amici*’s experience managing correctional systems,

Supermaximum Security Prisons on Aggregate Levels of Institutional Violence, 41 CRIMINOLOGY 1341-1376 (2003); Ryan Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation*, U.S. DEP’T OF JUSTICE (2015). Overwhelming evidence also demonstrates that restrictive housing does not decrease the level of violence at a prison. See National Institute of Justice, *Administrative Segregation in U.S. Prisons: Restrictive Housing in the U.S. Issues, Challenges, and Future Directions* (2016) (reviewing studies).

¹⁸ Labrecque & Smith, *Reducing Institutional Disorder*, *supra*.

¹⁹ California Legislative Analysis Office, *Improving In-Prison Rehabilitation Programs*, December 6, 2017, <https://lao.ca.gov/Publications/Report/3720> (last visited Feb. 3, 2020).

²⁰ *Id.*

incarcerated people who are occupied with prosocial activities are less likely to engage in illicit or disruptive behavior.

Notably, general population conditions allow correctional staff to directly supervise the incarcerated population. Direct supervision, or face-to-face communication, enables custody staff to better engage with the people they supervise. Personal relationships between correctional officers and incarcerated people help reduce conflict in prison.²¹ In a general population setting, correctional officers are better able to observe the incarcerated population interact and to maintain a consistent dialogue with incarcerated people. Custody officers are physically present in the living space, allowing for continuous and personal interactions with the people they supervise.

In solitary confinement conditions, by contrast, correctional staff are generally only able to indirectly supervise the incarcerated population—*i.e.*, through a locked barrier. Indirect supervision makes it harder for staff to maintain order and safety in prison. Correctional officers are less aware of how a particular person is faring, whether a conflict is worsening, or what steps are necessary to

²¹ See generally Jay Farbstein & Associates, Inc. & Richard Wener, *A Comparison of “Direct” and “Indirect” Supervision Correctional Facilities - Final Report*, NAT’L INST. OF CORR. - PRISON DIVISION, U.S. DEP’T OF JUSTICE (2006) (“[Prison] security depends upon the ability of highly trained staff to detect and defuse potential problems.”).

prevent an imminent security threat. Consequently, the overuse of solitary confinement conditions make day-to-day prison management more difficult.

III. CORRECTIONAL SYSTEMS ACROSS THE COUNTRY ARE USING SOLITARY CONFINEMENT MORE SPARINGLY AND EMPLOYING GREATER PROCEDURAL PROTECTIONS.

In recent years, a number of correctional systems throughout the country have significantly limited their use of solitary confinement. In 2013, as many as 100,000 people were living in solitary confinement conditions in U.S. prisons.²² Since that time, correctional administrators, human rights organizations, and social science researchers have acknowledged the tremendous toll that solitary confinement inflicts on a person. In response, jurisdictions have taken action to limit their use of restrictive housing. Only four years later, in 2017, the solitary confinement population had dropped by nearly half to 61,000.²³

As part of the efforts to reduce the use of solitary confinement, correctional systems have imposed stronger procedural protections in their disciplinary and classification processes. Since 2016, at least twenty-three jurisdictions have reformed their criteria for placement in solitary confinement.²⁴ Arkansas, for example, places people in restrictive housing only if they misbehave in a way that

²² Ass'n of State Corr. Adm'rs & Liman Ctr. for Pub. Interest L. at Yale L. Sch., *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, 4 (2018).

²³ *Id.*

²⁴ *Id.* at 60.

causes a security threat.²⁵ Similarly, North Carolina only places people in solitary confinement if they act in a manner that is “considered violent or compromise[s] security in a significant manner.”²⁶ Twenty-one jurisdictions now require that officials consider a less restrictive alternative before placing someone in restrictive housing.²⁷

Many correctional systems now also require prison officials to review the basis and necessity of a person’s retention in solitary confinement. Iowa, Minnesota, North Dakota, and Ohio report that they have a committee or independent body that reviews solitary confinement placements on a weekly basis.²⁸ Other states, like Delaware, Montana, and New York, review solitary confinement placements at least every 30 days.²⁹ In Idaho, a special committee at the prisons’ division leadership level reviews all restrictive housing placements that exceed 15 days; the committee includes deputy chiefs of the prisons.³⁰ These changes reflect the increasingly accepted view that restrictive housing should “be used rarely, applied fairly, and subjected to reasonable constraints.”³¹

²⁵ *Id.* at 60, 60 n.114.

²⁶ *Id.* at 60, 60 n.112.

²⁷ *Id.* at 61, 61 n.124.

²⁸ *Id.* at 61, 61 n.130.

²⁹ *Id.* at 61, 61 n.130.

³⁰ *Id.* at 70-71.

³¹ U.S. Dept’ of Justice, *Reports and Recommendations Concerning the Use of Restricted Housing, Executive Summary* (Jan. 2016).

In sum, there is an accepted recognition that due to the tremendous toll that solitary confinement exacts on individuals and correctional systems, prison administrators must carefully review the processes and criteria by which solitary confinement is imposed.

IV. CONFIDENTIAL INFORMATION MUST BE USED CAREFULLY AND SPARINGLY FOR THE SAFE OPERATION OF A PRISON SYSTEM.

A. Given the Serious Stakes Involved, Prison Disciplinary Proceedings Involving Solitary Confinement Must Be Fair, Just, and as Transparent as Possible.

A prison disciplinary system should maintain order, ensure staff and inmate safety, and prepare prisoners for reentry into the community. To accomplish to these goals, the disciplinary system must be fair, consistent, reliable, and as transparent as possible.

These principles are of particular importance where solitary confinement is a possible sanction in the disciplinary proceeding. Absent meaningful procedural protections, correctional systems run the risk of imposing solitary confinement unnecessarily or erroneously, to the detriment of the prison, prison staff, and prisoners.

The use of confidential information poses unique challenges to any correctional disciplinary system. Unlike other forms of evidence, confidential information is largely shielded from scrutiny. The accused generally cannot evaluate, challenge, or correct confidential information in the same manner that

they can with non-confidential evidence. The incarcerated person who is subject to discipline has a very limited opportunity to detect errors with the evidence against him or evaluate the motives of its source. The accused is wholly reliant on prison officials to provide accurate and comprehensive disclosures about the confidential information upon which the disciplinary proceeding is based.

Moreover, confidential information can be highly unreliable. Informants may attempt to provide false information for personal gain or to curry favor with prison officials. They may also attempt to manipulate the disciplinary process as a way to target rivals in the prison.

These risk factors make the careless or unscrupulous treatment of confidential information in disciplinary proceedings all the more alarming. The conduct described by the lower court in this matter is highly problematic. For example, the lower court found evidence the correctional officials generated materially inaccurate and misleading disclosures, cited and relied upon inculpatory evidence that did not exist, and failed to disclose critical exculpatory evidence to people accused of rule violations for which they faced substantial terms in the Security Housing Unit (SHU). The court also found that correctional officers failed to adequately assess and review the reliability of confidential information upon which they relied in disciplinary proceedings. Such practices shed doubt on the integrity of a correctional disciplinary process.

Correctional officials must institute safeguards to ensure that the evidence relied upon in a disciplinary proceeding is adequately and accurately disclosed to the accused so that they can understand and meaningfully challenge the evidence. Correctional systems must have effective procedures for independently reviewing the reliability of this evidence. Failure to do so undermines the correctional system's basic function.

B. Misuse of Confidential Information Undermines the Legitimacy of the Prison System.

Careless or unscrupulous treatment of confidential information does not just fall short of correctional best practices; it endangers the safety and security of the correctional system. Legitimacy is foundational for the safe operation of a prison, and a correctional system's perceived legitimacy depends upon its fair administration of the rules. This legitimacy is created when the incarcerated population perceives correctional officials to rightly have authority over them.³² Simply put, when the incarcerated population views the correctional system as legitimate, people are more likely to follow orders, abide by prison rules, and generally keep order.

Substantial empirical evidence, as well as *amici's* own experience, supports the proposition that the incarcerated population will only perceive a correctional

³² Michael D. Reisig & Gorazd Mesko, *Procedural Justice, Legitimacy, and Prisoner Misconduct*, 15 PSYCHOLOGY, CRIME & LAW 41-59 (2009).

system as legitimate if its procedures are fair and just—a concept known as “procedural justice.”³³ In other words, “[t]he general functioning of prison life, while at root coercive, must . . . depend on compliance of the established rules by the inmates, and indeed, by the prison officers in enforcing such rules in a fair and consistent way.”³⁴ If a correctional system consistently renders disciplinary decisions that are inaccurate or lack proper evidentiary support, the incarcerated population will view the prison and its agents as illegitimate and lacking in proper authority.³⁵ Procedural justice, therefore, is “instrumental in ensuring compliance from prisoners in ways that are more effective (and durable) than securing order solely through direct and indirect force.”³⁶ At its core, procedural justice requires prisons apply their rules equitably and fairly.

When a correctional system is no longer viewed as legitimate, the safety and security of staff and the incarcerated population are threatened. In any prison setting, incarcerated people significantly outnumber correctional staff. For example, only a few correctional officers might be responsible for supervising a

³³ Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2013) [hereinafter “*Beyond Procedural Justice*”].

³⁴ Ian Brunton-Smith & Daniel J. McCarthy, *Prison Legitimacy and Procedural Fairness: A Multilevel Examination of Prisoners in England and Wales*, 33 JUSTICE QUARTERLY 1029-1054 (2015) [hereinafter “*Prison Legitimacy and Procedural Fairness*”].

³⁵ Bottoms & Tankebe, *Beyond Procedural Justice*, *supra*.

³⁶ Brunton-Smith & McCarthy, *Prison Legitimacy and Procedural Fairness*, *supra*.

unit that houses 120 people. When correctional officers are seen as an illegitimate source of authority, the incarcerated population no longer has an incentive to follow orders. In such circumstances, inmates are emboldened to violate the rules, which can lead to relatively minor offenses, like disrespectful behavior, or more serious offenses, like staff or inmate assaults.³⁷ Even more concerning, if a significant number of inmates are encouraged to disobey orders, riots and uprisings can occur. Thus, a correctional system must perpetually work to maintain its legitimate authority, or risk undermining the entire prison operation.

The use of confidential information poses inherent challenges to the perceived legitimacy of a disciplinary system because of the lack of transparency. When a correctional system fails to verify the accuracy of confidential information in its disciplinary proceedings or mischaracterizes the evidence from confidential sources, the disciplinary system operates in a manner that is both unfair and unjust. The people who are being disciplined, as well as their community in prison, know whether they have in fact committed the charged offense. When a system employs inaccurate information in disciplinary proceedings, the incarcerated population is aware of the unjust process. The incarcerated population, in turn, loses its incentive to continue to obey the rules.

³⁷ Karen Lahm, *Inmate-on-Inmate Assault: A Multilevel Examination of Prison Violence*, 35 CRIMINAL JUSTICE & BEHAVIOR 120-137 (2008) (finding that broader prisoner environment has an effect on the number of staff/inmate assaults).

In *amici*'s experience and observation operating and managing prisons throughout the country, a disciplinary system that unfairly punishes people in this manner breeds discontent, disobedience, and, ultimately, a mentality that fosters insurrection. Put simply, a prison is more dangerous to operate when it does not fairly enforce its rules.

Moreover, in the context of prison, "people view the behaviour of officials as representing the system as a whole."³⁸ Incarcerated people, therefore, view the custody staff as a part of the disciplinary system. When a term of solitary confinement is unjustly imposed on the basis of inaccurate confidential information, incarcerated people may experience frustration not only with particular hearing officers, but also with the correctional staff that supervise them at the prison each day. Prisons operating without fair and adequate procedures thus breed animosity and hostility towards the entire correctional staff, resulting in higher incidents of violence and rendering the job of line officers more difficult.³⁹

³⁸ Jonathan Jackson et al., *Legitimacy and Procedural Justice in Prisons*, PRISON SERVICE JOURNAL (2010); see also Richard Sparks & Anthony Bottoms, *Legitimacy and Order in Prisons*, 46 THE BRITISH JOURNAL OF SOCIOLOGY 45, 60 (1995).

³⁹ David Bierie, *Procedural Justice and Prison Violence: Examining Complaints Among Federal Inmates (2000–2007)*, 19 PSYCHOLOGY, PUBLIC POLICY, AND LAW 15-23 (2013) (finding that violence within a given prison increases significantly with the volume of late replies to grievances as well as substantive rejections of complaints).

We note that in a time where recruitment and retention of custody staff is a primary challenge for correctional systems, it is particularly important to facilitate safe and positive interactions between correctional officers and the incarcerated population. Researchers have noted that “U.S. correctional agencies are . . . experiencing a labor shortage, plus problems recruiting qualified candidates for correctional officer positions.”⁴⁰ One study indicated that “44 percent of the 44 U.S. correctional systems and four Canadian systems that responded to a work force survey face serious difficulties in recruiting and retaining an adequate staff of qualified correctional officers.”⁴¹ In the context of these serious, ongoing staffing challenges, it is intolerable to maintain or defend correctional practices that breed mistrust and erode the perceived legitimacy of correctional officers.

C. Overreliance on Confidential Information Undermines a Disciplinary System.

Even if strong procedural protections were in place, correctional officials should limit the use of confidential information in disciplinary proceedings.

⁴⁰ Melvina Sumter, *The Correctional Work Force Faces Challenges in the 21st Century*, American Correctional Association (Aug. 2018), http://www.aca.org/aca_prod_imis/Docs/Corrections%20Today/ResearchNotes/ResearchNotes_Aug08.pdf; see also Jennifer Fifield, *Many States Face Dire Shortage of Prison Guards*, Pew, (March 1, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/01/many-states-face-dire-shortage-of-prison-guards>.

⁴¹ *Id.*

Overreliance on confidential information in the disciplinary process is counterproductive to penological goals. Many correctional systems, including those that *amici* have managed, use confidential information to some extent. Ongoing communication between correctional staff and the incarcerated population is an important aspect to operating a successful prison. Undoubtedly, some of the information that prisoners share with correctional staff must remain confidential for safety and security reasons, including for the safety of the informant. But as described, confidential information is a dangerous commodity. Whenever possible, it should not be relied upon as the sole basis for discipline at a hearing.

In most cases, confidential information can be used as a starting point for further investigation. Prison officials have a variety of tools at their disposal to conduct a thorough investigation once they have received a confidential tip. For example, if an informant relays that another person is smuggling contraband into the prison, correctional officials can listen to the suspect's phone calls, search his cell and property, or interrogate him about the allegation in order to amass evidence of a rule violation.

To rely solely on an informant's tip to discipline the suspect, however, is problematic. The process of completing a thorough investigation might be more painstaking and resource-intensive than merely relying on confidential

information, but the credibility and respect that follow a fair disciplinary process warrant the time and effort.

Even in situations where the confidential information can be verified as accurate, a person is more likely to accept the outcome of his disciplinary proceeding, and eventually comply with the sentence, if he understands the evidentiary basis for the punishment. When correctional officials disclose the evidence against the accused, the disciplinary process is more likely to be perceived as fair and just. By contrast, if individuals receive harsh punishments, like solitary confinement terms, solely on the basis of confidential evidence, the disciplinary system stands to lose credibility. In such cases, the incarcerated population can become resentful, disobedient, and resistant.

In sum, confidential information should be used sparingly in disciplinary proceedings in order to preserve stability and safety in the prison.

CONCLUSION

Solitary confinement is a harsh punishment, capable of inflicting significant and lasting damage. When overused or misused, solitary confinement also degrades the function and undermines the goals of a prison system. To protect against the excessive, erroneous, or arbitrary imposition of solitary confinement, correctional officials must institute rigorous procedural protections. These safeguards are particularly essential when prison officials rely on confidential

information in disciplinary proceedings. The conduct described in the lower court decision with respect to the use of confidential information is irresponsible and dangerous.

In light of these concerns, we urge this Court to uphold the lower court's decision to extend the settlement agreement.

Dated: February 12, 2020

Respectfully submitted,

/s/ Margot Mendelson

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/s/ Margot Mendelson
Margot Mendelson

Counsel for Amici Curiae

APPENDIX A: BIOGRAPHIES OF AMICI CURIAE

Kathleen Dennehy, Ph.D., worked for the Massachusetts Department of Corrections for more than 30 years, serving as Commissioner from 2004 until 2007. She is currently a correctional expert and consultant, and a monitor for the Department of Justice. Ms. Dennehy has a Ph.D. from the Heller School for Social Policy and Management at Brandeis University.

Brian Fischer served as the Commissioner of the New York State Department of Corrections and Community Supervision for six years after being the Superintendent of Sing Sing Correctional Facility for seven years. He currently serves on a number of non-profit organizations related to criminal justice initiatives.

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 Corrections 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 gubernatorial appointments in Texas on both a sentencing commission and a council for offenders with mental impairments. He coauthored *Texas Prisons: The Walls Came Tumbling Down*, and he has written numerous articles on criminal justice issues.

Gary Mohr is currently the President of the American Correctional Association, the largest corrections accrediting body in the United States. He has more than 40 years of correctional experience, including as the director of the Ohio Department of Rehabilitation and Correction (ODRC), the deputy director and superintendent of the Ohio Department of Youth Services, the deputy director of administration for ODRC, and the deputy director for the ODRC Office of Prisons. Mr. Mohr signs this brief in his individual capacity.

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. Mr. Morgan is currently a consultant and expert witness on matters of correctional policy and operations.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. His 50-year career in corrections includes terms as Jail Director, Prison Superintendent, Regional Administrator, Probation Officer, and Youth Correctional Officer. He is currently a consultant for jail operations.

Richard Subia is a former Director of the California Department of Corrections and Rehabilitation, a senior position within one of the largest

correctional systems in the United States. Mr. Subia served in the Department for 26 years. He is now the President of Subia Consulting Services, Inc., through which he offers his expertise in correctional operations, oversight, and rehabilitative programming. He has served as an expert witness for a variety of correctional issues in numerous state and federal court cases.

Roger Werholtz served as the Secretary of Corrections of Kansas from 2002 until his retirement in 2010. He also served as the Deputy Secretary of Corrections of Kansas. He has supervised all three divisions of the Kansas Department of Corrections: Community and Field Services, Programs and Staff Development, and Facilities Management. He has community mental health experience and served on the Governor's Mental Health Services Planning Council. He also served as the Midwest Regional Representative on the Executive Committee of the ASCA. He is the recipient of the 2009 Michael Franke Award, given in recognition of outstanding correctional administration. Most recently, Mr. Werholtz headed the Colorado Department of Corrections on an interim basis, and he returned as head of the Kansas Department of Corrections on an interim basis from January through May 2019.