

**UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA**

HANNAH SABATA, et al,

Plaintiffs,

v.

**NEBRASKA DEPARTMENT OF
CORRECTIONAL SERVICES, et al,**

Defendants.

Case No. 4:17-cv-03107-RFR-MDN

CLASS ACTION

**EXPERT DECLARATION OF ELDON
VAIL IN SUPPORT OF CLASS
CERTIFICATION**

I, Eldon Vail, declare as follows:

1. This declaration has been prepared at the request of Plaintiffs' counsel in the above-captioned action regarding their motion for class certification. It is my opinion that Nebraska Department of Correctional Services (NDCS) policies and practices create a substantial risk of harm to all NDCS prisoners in the form of exposure to dangerous segregation (restrictive housing) units. This risk is the result of NDCS policies and practices that are uniformly applied across institutions, and to NDCS's responses to chronic understaffing and overcrowding across all institutions. The risk of harm is common to all NDCS prisoners, and can be remedied by system-wide changes in the way NDCS manages and staffs its institutions, and in the way it uses segregation (restrictive housing).

I. Summary of Qualifications

2. I am a former correctional administrator with 35 years of experience working in and administering adult institutions. Before becoming a corrections administrator, I held various line and supervisory level positions in a number of adult prisons and juvenile facilities in the State of Washington. I have served as the Superintendent (Warden) of three adult institutions,

including facilities that housed maximum, medium and minimum-security prisoners. Two of those facilities housed men and one housed women.

3. I served for seven years as the Deputy Secretary for the Washington State Department of Corrections (WDOC), responsible for the operation of prisons and community corrections. I briefly retired, but was asked by former Governor of Washington, Chris Gregoire, to come out of retirement to serve as the Secretary of the Department of Corrections in the fall of 2007. I served as the Secretary for four years, until I again retired in 2011. In sum, I served for a total of eleven years in the top one or two positions over the agency.

4. As a Superintendent, Assistant Director of Prisons, Assistant Deputy Secretary, Deputy Secretary, and Secretary, I was progressively responsible for the safe and secure operations of adult prisons in the State of Washington, a jurisdiction that saw and continues to see a significant downward trend in prison violence. In the last fifteen years in the WDOC, violent incidents have decreased over 30%, due in part to improved treatment of the mentally ill and reduced use of segregation. When I became Secretary the rate of violent infractions throughout the prison system was 1.23 events per 100 prisoners. When I left it was 0.66 per 100 prisoners, a 46% reduction in 4 years.

5. My experience as a prison and corrections administrator included responsibility for, and a focus on, the mentally ill population and their custody, housing, and treatment. As a Superintendent, as an Assistant Director of Prisons, as Deputy Secretary and later as Secretary, I continued to focus on providing proper treatment for the mentally ill in prison on a system-wide basis. My opinions are based upon my substantial experience running correctional institutions and presiding over a statewide prison system for more than a decade, a system that successfully addressed the challenge created by the rapid influx of the mentally ill into the prison environment. In my thirty-five years of work in corrections as a practitioner, I spent considerable

time working to provide for the proper custody and care of the mentally ill sentenced to prison. I am experienced in sound correctional practice.

6. Since my retirement I have served as an expert witness and correctional consultant for cases and disputes over 50 times in multiple jurisdictions—state, local and federal. As an expert witness and correctional consultant, I have been retained to evaluate and offer my opinions on a variety of issues in the correctional environment.

7. Specifically, over the last few years, I have testified in the following cases:

Coleman, et al. v. Brown, et al.

No. 2:90-cv-0520 LKK JMP P
United State District Court, Eastern District of California,
Testified, October 1, 2, 17 and 18, 2013

Graves v. Arpaio

No. CV-77-00479-PHX-NVW,
United States District Court of Arizona
Testified, March 5, 2014

Corbett v. Branker

No. 5:13 CT-3201-BO
United States District Court, Eastern District of North
Carolina, Western District
Special Master appointment November 18, 2013
Testified, March 21, 2014

C.B., et al. v. Walnut Grove Correctional Authority, et al.

No. 3:10-cv-663 DPS-FKB,
United States District Court for the Southern District of
Mississippi, Jackson Division
Testified, April 1, 2 and 27, 2015

Fontano v. Godinez

No. 3:12-cv-3042
United States District Court, Central District of Illinois,
Springfield Division
Testified June 29, 2016

Doe v. Kelly

Case 4:15-cv-00250-DCB
United States District Court for the District of Arizona
Testified, November 14, 2016

Braggs, et al. v. Dunn, et al.

No. 2:14-cv-00601-WKW-TFM
United States District Court, Middle District of Alabama
Testified, December 22, 2016, January 4, 2017,
February 21, 2017 and December 5, 2017

Wright v. Annucci, et al.

No. 13-CV-0564 (MAD)(ATB)
United States District Court, Northern District of New York
Testified, February 13, 2017

Padilla v. Beard, et al.

Case 2:14- at-00575
United States District Court, Eastern District of California,
Sacramento Division
Testified April 19, 2017

Cole v. Livingston

Civil Action No. 4:14-cv-1698
United States District Court, Southern District of Texas,
Houston Division
Testified, June 20, 2017

Holbron v. Espinda

Civil No. 16-1-0692-04 RAN
Circuit Court of the First Circuit, State of Hawai'i
Testified, December 20, 2017

Dockery v. Hall

No. 3:13-cv-326 TSL JMR
United States District Court for the Southern District of
Mississippi, Jackson Division
Testified March 5-7, 2018

8. Several of these cases involved issues similar to the current *Sabata* litigation, specifically overcrowding and/or understaffing. These cases are *Braggs v. Dunn* (Alabama), *Coleman v. Brown* (California), *C.B v. Walnut Grove* and *Dockery v. Hall* (Mississippi).

9. Other cases¹ relevant to *Sabata* from my prior expert and consulting work focused on the overuse of segregation and the treatment of the mentally ill or prisoners with disabilities. Some of these cases are *Coleman v. Brown*, *Padilla v. Beard* and *Asker v. Governor of the State*

¹ Some of these cases involved trial testimony, others involved expert or consultant reports.

of California (California); *Graves v. Arpaio* (Maricopa County in Arizona); *C.B. v Walnut Grove and Dockery v. Hall* (Mississippi); *Parsons v. Ryan* (Arizona); *Peoples v. Fischer* and *Wright v. Annucci* (New York); *Commonwealth of Virginia* and *Latson v. Clarke* (Virginia); *Rasho v. Godinez* and *Davis v. Baldwin* (Illinois); *Community Legal Aid Society Inc. v. Robert M. Coupe* (Delaware); *P.D. v. Middlesex County* and *C-Pod Inmates of Middlesex County Adult Correction Center v. Middlesex County* (New Jersey); and, *Johnson v. Mason County* and *Dahl v. Mason County* (Washington). Related consulting work has been performed in Georgia for the United States Department of Justice and for Sacramento County in California on behalf of the county sheriff.

10. A complete copy of my resume, detailing my work experience as a practitioner is attached as **Exhibit 1**.

11. I have been asked by Plaintiffs' counsel to offer my opinions on the effects of overcrowding and understaffing in the Nebraska Department of Correctional Services (NDCS), and on whether or not the overcrowding and understaffing at NDCS impact and/or create dangerous conditions for their prisoner population.

12. I have previously authored a declaration in this case on the Nebraska Department of Correctional Services' grievance system dated August 24, 2018. In that report I opined there were "fundamental flaws"² in the NDCS grievance system and further detailed my concerns in that report.

II. Bases for My Opinions

13. I have reviewed a large variety of documents in preparation for this report. Those documents include multiple NDCS policies and their updates over several years, reports from the Nebraska Ombudsman, the Office of the Inspector General of the Nebraska Correctional System

² Declaration of Eldon Vail, Aug. 24, 2018 (Filing No. 160-35) ¶ 10.

(OIG), and the Nebraska legislature, documents related to the physical plants and capacity of Nebraska prisons, deposition transcripts, and the files of named plaintiffs, and a number of other documents. A list of the materials I reviewed is attached to this report as **Exhibit 2**.

14. I also rely on my own substantial experience as a correctional administrator, including presiding over a statewide prison system for more than a decade, and my knowledge of other prison systems that I gained during my career in corrections and as a consultant and expert witness.

15. My work on this matter is ongoing and my opinions are partial and preliminary, based on the available information I have reviewed to date. It is my understanding that additional documents and information will be forthcoming during the course of this litigation, and that a number of relevant documents requested by Plaintiffs' counsel have yet to be produced. Based on the information I have reviewed, I am confident in the preliminary opinions contained in this declaration. I anticipate however that these opinions will be further developed and supplemented as more information becomes available.

III. Summary of Opinions

16. Prison overcrowding is clearly to a point of perpetual crisis in Nebraska prisons. This has been known for at least two decades yet no efforts to significantly impact the prison population have been accomplished. As of this writing, according to NDCS Director Scott Frakes, the current overcrowding level in the NDCS is at about 162%. There is a direct impact between overcrowding and prison safety, a fact well known by experienced corrections administrators and documented in the available research.

17. The Nebraska prison system suffers from chronic understaffing. Combined with their level of overcrowding, this exacerbates the risks for the prisoners when too few staff are

available to supervise the number of persons incarcerated and creates even more dangerous conditions for the prisoner population than overcrowding does alone.

18. Due to the combined impacts of overcrowding and understaffing, the NDCS over relies on segregation to control their prisoners, including the dangerous practice of double bunking prisoners in segregation cells designed to house only one person. The overuse of segregation results in extreme social isolation and hardship that are both unnecessary and counterproductive to good prison security, and is harmful for all prisoners.

IV. Opinions

A. Nebraska Prisons Are Severely Overcrowded

19. According to the latest NDCS Quarterly Data Sheet for October – December 2018, the NDCS has 5,358 prisoners in its custody, but its prisons are only designed to house 3,375 prisoners, meaning that they were operating at 158.75% of their design capacity, with 1,983 more prisoners than the system was designed to house.³ More recently, as NDCS Director Frakes reported in January of 2019, NDCS is at about 162% of its design capacity.⁴ The Inspector General of the Nebraska Correctional System identifies Nebraska as one of the most overpopulated prison systems in the United States; in 2017, only Alabama was operating at a higher level of its design capacity.⁵ There appears to be no end or relief in sight for the prisoners or the staff in Nebraska prisons.

³ NDCS Quarterly Data Sheet, October-December 2018, page 1.

⁴ Paul Hammel, *Frakes Doesn't Think Nebraska Prisons Will Meet Deadline to Ease Crowding*, Omaha World-Herald (Jan. 19, 2019), available at https://www.omaha.com/news/nebraska/frakes-doesn-t-think-nebraska-prisons-will-meet-deadlineto/article_1d7297f9-827b-5cf4-b178-4a1815e60824.html

⁵ Office of Inspector General of the Nebraska Correctional System 2017/2018 Annual Report (OIG 2017/2018 Annual Report), page 38.

20. In its population data, NDCS tracks both the population percentage in comparison to the “design capacity” and “operational capacity” of its prisons. The United States Department of Justice, Bureau of Justice Statistics (BJS) defines “design capacity” as the number of prisoners that the planners or architects intended for the correctional facility, and “operational capacity” as the number of prisoners that can be accommodated based on a facility’s staff, existing programs, and services. In my opinion, the design capacity is the relevant measure to assess the degree to which a prison system is overcrowded, as it provides a clear and objective standard to measure against the prisoner population: the actual number of people that the correctional facilities that make up the prison system were designed and built to serve. By contrast, the use of “operational capacity” is often suspect. Here, NDCS testified that the operational capacity was determined for each prison as part of its 2014 master plan, and has not been updated since.⁶ Operational capacity is defined based in part on program availability and facility staffing, both of which are well-documented shortfalls in the NDCS system that have only gotten worse since the 2014 master plan was completed, as discussed below, making the out-of-date operational capacity estimates more suspect. For these reasons, this report focuses on design capacity as the important measure of the scope overcrowding of Nebraska’s prison system.

21. Seven out of ten NDCS facilities are operating at over 150% of their design capacity, and five out of ten are overcrowded at levels well beyond the total level of overcrowding existing throughout the entire Nebraska prison system, including prisons with a diversity of missions serving different types of prisoner populations: the Work Ethic Camp (WEC), which houses minimum security male prisoners, is operating at 173% of its design capacity; the Nebraska State Penitentiary (NSP), a maximum, medium, and minimum security

⁶ Transcript of Rule 30(b)(6) Deposition of Diane Sabatka-Rine (Dec. 14, 2018) (Sabatka-Rine Depo.) at 102:4-105:19.

facility for male prisoners, is operating at 187.46%; the Community Correctional Center-Omaha (CCC-O), a community-based facility that houses male prisoners eligible for work detail or work release, is operating at 188.88%; the Omaha Correctional Center (OCC), a medium and minimum security facility for male prisoners, is operating at 196.96%; and the Diagnostic & Evaluation Center (DEC), which is the reception center for all male prisoners (adults and juveniles) brought into the custody of the Nebraska prison system, and also includes a skilled nursing facility, is operating at an astonishing 336.25% of its design capacity.⁷

22. Reception and intake facilities like DEC perform screening and classification functions that are vital to the safety of prisoners and staff. Allowing such facilities to become as crowded as NDCS has creates unreasonable risks of harm as it overburdens the staff responsible for making classification and placement decisions that carry through the prisoner's entire term.

23. Nebraska has added some beds in recent years but not enough to stem the rising rate of overcrowding or to begin to approach the need for beds identified by NDCS's 2014 master plan, which recommended that 1,622 beds be constructed between 2014 and 2024.⁸ According to the OIG's 2017/2018 Annual Report, NDCS added 100 beds through construction of a dormitory that was completed in September 2017, and construction was in progress to add an additional 160-bed unit to house female prisoners.⁹ Other increases in beds have been proposed by Director Frakes to the legislature for 2019-2021,¹⁰ but it remains to be seen if they

⁷ NDCS Quarterly Data Sheet, October-December 2018, page 1.

⁸ NDCS 2014 Master Plan Report, Oct. 27, 2014 (2014 Master Plan) at Ch. 4-5, page 133, available at https://www.corrections.nebraska.gov/sites/default/files/files/46/2014_ndcs_master_plan_final_report_reduced_2.pdf.

⁹ OIG 2017/2018 Annual Report, page 47.

¹⁰ NDCS 2019-2021 Biennial Budget Request, Capital Construction and Building Renewal Budget Request, Sept. 14, 2018), available at <https://das-nebs.ne.gov/public/faces/brdIndex.jsp>.

are actually funded or more importantly, even built. The recent proposals only add another 64 beds to DEC (increasing its design capacity from 160 to 224),¹¹ and another 100 beds to NSP (increasing its design capacity from 718 to 818).¹² Even if these construction projects were already funded and completed, and the proposed new beds were all being used to house prisoners, NSP and DEC would still be dangerously overcrowded: NSP would be operating at greater than 164% and DEC would be at more than 240% of design capacity.¹³ Adding capacity of only 164 beds will not come close to meeting the current shortfall, with the most recent data showing NDCS is holding 1,983 more prisoners than the system is designed to house.¹⁴

24. The efforts of the authorities to address overcrowding in Nebraska are a far cry from meeting the need and reducing overcrowding in their prison system. Without construction of many more beds and/or a significant reduction in the prison population, Nebraska prisons are poised to continue to suffer the dangerous effects from severe overcrowding for decades.

25. As the prison population increased in states across the country in the 1980's and 1990's most states felt the pressure to incarcerate more persons in existing facilities. New prisons cost a lot of money to build and to operate and in many jurisdictions elected officials pressured departments of corrections to explain why adding bunks to existing cells and dormitories was not an effective, lower cost solution. My own experience with crowding as a practitioner in Washington State paralleled this tension. We were forced by legislators and their budget writers to explain why we could not simply house more people in existing prisons and avoid building new ones. This tension and political debate was ongoing for several years. We were pushed to

¹¹ Ibid, page 7 (NDCS 081891).

¹² Ibid, page 13 (NDCS 081897).

¹³ NDCS Quarterly Data Sheet, October-December 2018, page 1.

¹⁴ Ibid.

define capacity so that elected officials could plan and budget for the future. Finally, agency administrators compromised with elected officials and we agreed that we could not operate beyond 105% of capacity. If we reached that point, action needed to occur, either to reduce the prison population, build new prisons or rent beds in other, out of state jurisdictions. We exercised all of those options and avoided long term overcrowding in our prison facilities.

26. Overcrowding is not inevitable. Responsible officials must take action in order to avoid the dangerous conditions well known to be associated with prison overcrowding.

B. Impacts of Overcrowding

27. The severely overcrowded conditions of NDCS make Nebraska's prisons unsafe for staff and prisoners. This reality is clearly recognized by state officials. As far back as 1989, the NDCS Director at the time, Frank Gunter, explained to the state legislature the dangers inherent in overcrowding at a time when the prison system was at 138% of its design capacity.¹⁵ Director Gunter testified that "when the prison population exceeds capacity, [prison administrators'] ability to manage the prisoner population begins to erode," creating "an increasing level of stress for both inmates and staff," and as staffing becomes inadequate to manage the overcrowded conditions, it "ultimately means less control of the prisoner population," which increases disciplinary actions and "potential violence."¹⁶ In my opinion, Director Gunter's testimony accurately describes the risks of operating an overcrowded prison system, and his warnings apply even more so today as the Nebraska prison system has become far more overcrowded than it was in 1989.

¹⁵ Office of Inspector General of the Nebraska Correctional System 2016/2017 Annual Report (OIG 2016/2017 Annual Report), Attachment 58, page 18.

¹⁶ OIG 2016/2017 Annual Report, Attachment 58, pages 2-3.

28. Overcrowding makes prisons more violent and more dangerous for both the staff and for the prisoners, which in turn puts additional strain on the prison's health care system. In my own experience, the overall violence and risk of disturbance is significantly elevated.

29. In 1992, I was appointed the Superintendent of the McNeil Island Corrections Center in Washington. McNeil was a 1,250-bed medium/maximum security facility with a 150-bed minimum security unit located outside the secure perimeter of the main facility. At the time I took over the prison, due to overcrowding of the Washington prison system, the minimum security was at approximately 266% of its design capacity, housing about 400 prisoners in a unit designed for 150. As I began to learn the issues that confronted the facility I noticed the extreme number of grievances coming from the minimum unit about the effects on conditions of confinement due to the level of extreme overcrowding. I brought the issue to the attention of my superiors in our central office and they explained to me that the overall crowding in the Washington prison system was so profound at the time that they saw temporary overcrowding of the minimum facility on McNeil as an issue of concern for them as well but also one of the only places where they believed they could safely house some of the excess population. They were wrong. On the Friday night before Labor Day in 1992, a fight among racial groups escalated into a full-scale riot that caused staff to abandon their posts for their own safety. The result was the death by stabbing of one prisoner and several others being injured, and a unit that was out of control until dawn of the next morning. Regaining control of the unit required the help of emergency response teams from two other prisons and the Washington State Patrol. Shortly thereafter, the population of the minimum security unit was reduced to its design capacity. We had no similar events until the day the prison closed two decades later. We determined in our review that the "flash-point" for the riot was competition for access to recreation facilities (the weight pile), a conflict typical of an overcrowded prison. Overcrowded prisons, even at the

minimum security level, are more likely to explode than prisons that do not exceed the number of prisoners they were designed to hold.

30. The link between overcrowding and rising levels of prison violence is widely recognized by researchers throughout the field. Dr. Craig Haney,¹⁷ a psychologist and professor at the University of California at Santa Cruz, has written extensively on the impacts of overcrowding in prisons. In 2006, he published an article entitled *The Wages of Overcrowding* that summarizes much of the then-current research on overcrowded prisons.¹⁸ Several examples from his paper inform the discussion about the severe overcrowding and the resultant danger to prisoners in Nebraska's prisons. First, he notes:

...[w]here crowded conditions are chronic rather than temporary...there is a clear association between restrictions on personal space and the occurrence of disciplinary violations.¹⁹

Second, he states:

...overcrowding means that there is less for prisoners to do, fewer outlets to release the resulting tension, a decreased staff capacity to identify prisoner problems, and fewer ways to solve them when they do occur...[Therefore,] overcrowded conditions in which prisoners have a significant idle time can contribute to a higher level of prison rapes.²⁰

31. As far back as 1980 scholars studying overcrowding in six federal prisons concluded that:

The findings were generally consistent across all institutions and inmate populations. The basic finding, which confirms common sense, is that there is a progressive and measurable increase in

¹⁷ Dr. Haney is an expert in this case. I have worked with him in California, New York, Illinois and Arizona. He is widely recognized as an expert on the impacts on behavior caused by overcrowding prison conditions, as well as the harmful effects of isolation.

¹⁸ Haney, Craig, *The Wages of Overcrowding*, Washington University Journal of Law & Policy, Volume 22, January 2006.

¹⁹ Ibid, page 272.

²⁰ Ibid, page 276.

negative effects with an increase in housing density.²¹

High degrees of sustained crowding have a wide variety of negative psychological and physiological effects including increased illness complaint rates, higher death and suicide rates, and higher disciplinary infraction rates.²²

32. These same scholars, studying overcrowding in the Texas and Oklahoma prison systems found that:

In Texas, the rate of suicides, violent deaths, disciplinary incidents, natural deaths for “elderly” (age 50 or more) inmates, increased beyond statistical expectancies.²³

Over a ten-year period total population in the Texas Department of Corrections increased sharply while facilities increased only slightly. Death rates, suicide rates and disciplinary rates rose even more sharply than population. In the Oklahoma system when population dropped there was an even greater drop in rates of death due to violence. These results confirm earlier findings from Illinois.²⁴

33. This is only a sample of the available research. Experienced correctional administrators are well aware of the risks to both the staff and prisoners of overcrowding prisons. The historic, current and potential future level of crowding in Nebraska’s prison system, based on the available research and my decades of experience, increases the level of danger for all persons in Nebraska’s prisons.

34. Nebraska’s own 2014 master plan identified what they call “operational stress” as a result of prison overcrowding, which they observed at NDCS facilities at a time when the Nebraska prison system was operating at 148% of design capacity:²⁵

a. “Inmates sleeping on movable cots in dayrooms at DEC.”

²¹ *The Effect of Prison Crowding on Inmate Behavior*, McCain, Cox and Paulus, U.S. Department of Justice, National Institute of Justice, December, 1980, page iv.

²² Ibid, page 1.

²³ Ibid, page vi.

²⁴ Ibid, pages 128-129.

²⁵ 2014 Master Plan at Ch. 1-10, page 22.

b. “Very long meal periods and/or very short meal shifts, or both – i.e. lunch which extends from beyond 10:00 am to 2:00 pm or lunch shifts which only last 15 minutes per group.”

c. “Shorter periods of short-term disciplinary housing due to a lack of RESd capacity.”

d. “Converting GP housing units to RESd units due to lack of sufficient RESd space for the ADP of a facility.”

e. “HVAC systems which cannot keep up with the air circulation required, so run continually or which maintain conditions at uncomfortable levels.”

f. “Fans which run continually, such as the shower fan to exhaust humidity in Housing Unit K of OCC.”

g. “Housing intake inmates long-term in infirmary or other special housing due to lack of appropriate GP options.”

h. “Equipment which breaks down more frequently than anticipated (water heaters, dishwashers, ovens, etc.) due to excessive use or prematurely short Estimated Useful Life.”

i. “Lack of available meeting or other group space due to overutilization of limited existing meeting spaces.”²⁶

35. The OIG’s 2015/2016 Annual Report documented the impact of overcrowding (and understaffing) on the ability of NDCS to keep up with off-site medical appointments.

NDCS is unable to keep up with travel orders related to medical consult requests despite the efforts of a work group on this issue in 2015 and 2016.²⁷

²⁶ Ibid at Ch. 2-8, page 50.

²⁷ Office of Inspector General of the Nebraska Correctional System 2015/2016 Annual Report

Not having enough custody staff to be able to transport prisoners to medical appointments is a dangerous consequence of NDCS's overcrowding and understaffing crises, as it inevitably puts prisoners at risk when their access to health care is delayed because there are not enough custody staff to meet the minimum staffing requirements to supervise the facility and also be able to transport prisoners to medical appointments.

36. Dr. Bruce Gage,²⁸ after conducting a review of behavioral health for NDCS, documented his concerns with mental health treatment due to overcrowding:

Movement out of the residential units can be difficult to effect owing to overcrowding in general population.²⁹

Being able to promptly open space for those with more acute [mental health] needs, without having to place them in highly secure settings when unneeded, is a critical need.... Overcrowding makes it very difficult to have the flexibility that is needed to move inmates promptly, preventing efficient use of beds.³⁰

Conditions such as crowding, violence, and limited direct oversight by correctional staff are particularly notable in terms of the likelihood of leading to mental health decompensation.³¹

37. In my experience prisoners who suffer from mental illness are less equipped to handle the stresses of overcrowding. As Dr. Gage says, the lack of direct oversight of prisoners by correctional staff makes it more difficult to detect prisoners who may be decompensating or experiencing other difficulties due to the stresses of overcrowding. Not being able to move

(OIG 2015/2016 Annual Report), page 8, *available at* https://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector_General_of_the_Nebraska_Correctional_System/600_20160915-141014.pdf.

²⁸ Dr. Gage was my Chief Psychiatrist when I was the Secretary of the Washington Department of Corrections.

²⁹ NDCS Behavioral Health Needs Assessment (Dec. 2015), page 26, *available at* https://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Correctional_Services_Department_of/558_20151231-152218.pdf.

³⁰ Ibid, page 39.

³¹ Ibid, page 36.

prisoners in and out of residential or treatment units in a timely manner also means that sometimes, necessary mental health treatment is delayed.

38. There is no question that Nebraska prisons are overcrowded and that authorities are aware of the risks that creates for prisoners and staff, starting with the 1989 comments from Director Gunter and continuing in the more recent reports from the OIG.

C. Chronic Understaffing

39. The severe overcrowding in Nebraska's prison system and the challenges it presents are exacerbated by the chronic and ongoing understaffing crisis due to high staff turnover and vacancies. The result is that there are too few staff available to safely supervise the number of persons incarcerated, creating even more dangerous conditions for the prisoner population than overcrowding does alone.

40. The Commissioner of the Alabama Department of Corrections (ADOC) is Jefferson Dunn. In 2016 he wrote an editorial that said, in part:

The APTI³² is an ambitious plan designed to address ADOC's two main critical problems: overcrowding and understaffing. This two-headed monster hinders not only the department's ability to provide a reasonable level of safety and security for our staff and inmates, but also it prevents us from offering proven and effective rehabilitation services to the thousands of inmates who transition back into our communities every year. These services represent our best opportunity to help inmates become successful, law-abiding, contributing members of society.³³

41. This honest assessment by Commissioner Dunn fits the current state of the Nebraska prison system as well. Like Alabama, the "two-headed monster" of overcrowding and understaffing parallels the Nebraska prison system. Alabama is the most overcrowded prison system in the country and Nebraska is now the second most overcrowded system, according to

³² APTI is the Alabama Prison Transition Initiative, a plan to re-build Alabama's prison system.

³³ https://www.al.com/opinion/index.ssf/2016/04/departments_of_corrections_comm.html

the latest information I have seen.³⁴ I have been involved with the Alabama prison system since August 2014. I have also worked in California when its prison system was severely overcrowded but they never had the “two-headed monster” challenge faced by Alabama and Nebraska, as they always had sufficient staffing, which makes an enormous difference in the ability to manage an overcrowded prison system.

42. Nebraska authorities have expressed their own concerns about the “two-headed monster” of overcrowding and understaffing described above. The NDCS Special Investigative Committee reported to the legislature in December 2016:

The Department is caught in a vicious cycle that is driven by non-competitive wages and overcrowded prison facilities resulting in large-scale staff vacancies, staff shortages, and an extreme employee turnover rate causing staff to perform duties for which they were not hired and management to resort to the use of excessive mandatory overtime all of which is inhibiting the ability to provide even minimal programming leaving inmates idle and crammed into facilities that are not large enough to hold their numbers which seriously jeopardizes the safety of staff and inmates.³⁵

43. The OIG has also expressed concern about understaffing in NDCS for several years. The OIG’s 2015/2016 Annual Report says:

The staffing issues facing NDCS have long been obvious. While the Tecumseh State Correctional Institution (TSCI) was receiving the most attention due to the riot that took place on Mother’s Day in 2015, other facilities and parts of the system were also facing significant staffing challenges[.] Such staffing challenges impact the entire system, including safety and security, treatment and programs for inmates, reentry efforts, and even the ability to carry out a travel order.

³⁴ OIG 2017/2018 Annual Report, page 38.

³⁵ Department of Correctional Services Special Investigative Committee LR34: Report to the Legislature, Dec. 22, 2016 (Special Investigative Committee 2016 Report), page 11, *available at* https://nebraskalegislature.gov/pdf/reports/committee/select_special/lr34_2015/lr34_report.pdf.

In short: NDSC is in a staffing crisis.³⁶

44. The OIG's 2015/2016 Annual Report goes on to analyze the problem of short staffing in more detail, explaining that the need for overtime for 2016 increased more than 31% when compared to 2014.³⁷ This is a dramatic increase likely to lead to decreased staff morale and additional job related stress.

45. The OIG's 2015/2016 Annual Report also documents the problem of staff turnover in 2016, saying,

Turnover rates for protective services employees³⁸ increased for at least five straight years before 2016 and are projected to increase again this year.³⁹

Prisons operate successfully based on the stability of tradition and culture of each individual facility. High rates of turnover and excessive overtime create instability in prison operation, which is antithetical to good prison security.

46. This is contrary to what NDCS hoped to see happen with their turnover rate. In 2015 NDCS said:

Organizations typically view turnover rates of 12-15% as a healthy and normal part of business operations. Turnover levels in excess of 15%, however, may indicate instability and create management difficulties. Over the past 5 years, NDCS has maintained an agency wide turnover rate of 18.5% or higher. The turnover issue is particularly troublesome among security staff positions, with turnover rates of over 28% in FY 15 and slightly higher so far this fiscal year. In order to combat this issue, NDCS is focusing its

³⁶ OIG 2015/2016 Annual Report, page 14.

³⁷ Ibid. The OIG did not use 2015 overtime data for this comparison because of the increased use of overtime that year as a result of the May 10, 2015 riot at TSCI.

³⁸ NDCS refers to custody staff (correctional officers, corporals, sergeants, etc.) as "protective services."

³⁹ OIG 2015/2016 Annual Report, page 15.

efforts on reducing turnover among key security and unit staff with a target of reducing it to 28% or lower by the end of FY 2016.⁴⁰

47. The turnover rate for one institution, TSCI, was reported by the OIG to be nearly 70% from January 1, 2015 to January 1, 2016.⁴¹ That is an astronomical rate of turnover at an individual prison. Such turnover would create great risk for the prisoners housed at that facility. In my experience, working the floor in the prison is not the right employment for everyone. Prisons rely on experienced employees to teach and coach new employees in how to do the job. With this prison suffering such a high level of turnover it is unlikely there would be sufficient collective wisdom among the staff to help the new officers learn the job and therefore be better prepared to keep the prisoners safe.

48. The May 10, 2015 Mother's Day riot at TSCI is the type of dangerous incident that is significantly more likely to happen because of NDCS's severe staffing shortages and high staff turnover rates. During this incident, NDCS lost control of significant portions of TSCI for more than ten hours when several hundred prisoners rioted, assaulting staff, setting fires and demolishing walls in one of the housing units, and resulting in the death of two prisoners.⁴² TSCI was at more than 106% of its design capacity at the time of the riot, housing 1,024 prisoners at a facility designed for 960.⁴³ The Nebraska Ombudsman's Report on the disturbance concluded

⁴⁰ NDCS LB 657 Mandatory Overtime Reduction Report (2016), page 3, *available at* https://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Correctional_Services_Department_of/559_20151231-152325.pdf.

⁴¹ OIG 2015/2016 Annual Report, page 15.

⁴² Ombudsman's Report: The Mother's Day Riot at the Tecumseh State Correctional Institution, Oct. 20, 2015 (Ombudsman's Report on TSCI Mother's Day Riot), page 1, *available at* https://nebraskalegislature.gov/pdf/reports/public_counsel/2015ombud_tsc_riot.pdf; *see also* Tomas Fithian, A Critical Incident Review of the Events Surrounding the Inmate Disturbance on May 10-11, 2015, June 2015 (Fithian Report), page 4, *available at* <https://bloximages.newyork1.vip.townnews.com/kmaland.com/content/tncms/assets/v3/editorial/5/f0/5f0ceb4a-1f53-11e5-a516-8b3e751c60d9/5592dbcacfc63.pdf.pdf>.

⁴³ Fithian Report, page 3.

that TSCI's staffing shortage was also a contributing factor: the total number of staff on duty at the time the riot began was 57, "four employees short" of TSCI's minimum staffing requirement to run the facility, and of those, 9 were working overtime.⁴⁴ Moreover, due to high staff turnover rates, out of more than 210 custody staff employed at TSCI at the time, over 35% had less than two years of experience.⁴⁵ The Ombudsman concluded that TSCI's high rate of turnover and understaffing meant that the staff lacked sufficient experience and did not have the opportunity to learn to work together as team, and that TSCI had a "dependence on mandatory overtime to fill staffing gaps," which "can lead to a situation where some of the staff are performing at less than peak capacity because they are in the twelfth hour on the job without a rest."⁴⁶

49. I agree with the Ombudsman's conclusions about how the staffing crisis and high turnover rates made it more likely that this riot would take place and that TSCI staff would lose control for an extended period. The overcrowded and understaffed conditions at TSCI that helped spark the Mother's Day riot are similar what I experienced at McNeil Island Corrections Center in 1992 during the Labor Day riot, discussed earlier. Another similarity was the level of idleness at both prisons. At McNeil, we did not have enough work or educational assignments to keep a majority of the prisoners productively occupied. The Fithian Report on the riot at TSCI stated that, "several prisoners have a large amount of time during the day where they are not participating in meaningful activities, such as programming or idleness reducing activities," and recommended that TSCI "explore ways to increase the amount of programming and idleness reducing activities available[.]"⁴⁷ Both facilities also had a troubled grievance system. As I said

⁴⁴ Ombudsman's Report on TSCI Mother's Day Riot, pages 31-32.

⁴⁵ Ibid, page 32.

⁴⁶ Ibid, pages 33-34.

⁴⁷ Fithian Report, page 28.

above about McNeil, we were seeing an enormous amount of grievances regarding the conditions of confinement coming out of the minimum security housing unit and we were not able to facilitate a positive response. According to the Ombudsman, at TSCI, “the intent (of certainly some, and possibly the majority of inmates in the main yard on May 10) was to use the event as a way of raising and dramatizing inmates’ collective grievances.”⁴⁸

50. After the riot at McNeil, we addressed the overcrowding and understaffing by reducing the population to its design capacity, and had no similar disturbances for the next two decades until the facility was closed in 2011. By contrast, NDCS did not address the staff shortages and high turnover rate at TSCI and, less than two years later, on March 2, 2017, there was another riot at TSCI where prisoners took control over part of a housing unit for more than nine hours, resulting in the death of two prisoners.⁴⁹ The Critical Incident Review on the March 2017 riot concluded that “TSCI is a correctional facility that is bordering on a crisis condition where staff and inmates both expressed concerns about the safety and the control of the facility,” with staff turnover reaching the point where “20% of all positions were staffed by individuals with less than one year of experience and over half of the staff had between one and five years of experience.”⁵⁰ The OIG’s 2016/2017 Annual Report concluded that TSCI “still remains in a type of emergency situation due to the number of staff vacancies and as a result protective service employees work 12 hour shifts. This has been going on since May 2015.”⁵¹ TSCI’s Warden stated in August 2017 that “staffing is as bad as it has ever been.”⁵² The statewide staffing

⁴⁸ Ombudsman’s Report on TSCI Mother’s Day Riot, page 8.

⁴⁹ OIG 2016/2017 Annual Report, page 66, *available at* https://nebraskalegislature.gov/pdf/reports/public_counsel/2017_oig-ncs.pdf.

⁵⁰ Ibid.

⁵¹ Ibid, page 69.

⁵² Ibid.

problems also continued into 2017. The Inspector General for Corrections informed the Nebraska legislature in March 2017 of “significant increases” in overtime for protective services workers and that 2016 “was an all-time high for staff turnover within the Department.”⁵³

51. The OIG’s 2017/2018 Annual Report documented the ongoing chronic staffing problem. The OIG said:

The 2016 Annual Report by the OIG put it bluntly by stating, “NDSC is in a staffing crisis.” The 2016 report found that while recruitment numbers had increased, overtime, staff turnover, and staff vacancies had all increased. The 2017 OIG report had similar findings.⁵⁴

The same report also found that:

- “NDCS overtime has more than doubled in the last four years.”
- “NDCS protective services positions experienced the highest turnover in recent history, if not ever.”
- “According to the Nebraska Department Administrative Services, the turnover rate for all NDCS employees exceeded 30% in 2016 and 2017.”⁵⁵

52. The OIG’s 2016/2017 Annual Report raised other concerns with dangerously low staffing. Speaking about TSCI, the OIG said:

The gymnasium has not been staffed with a corporal for a significant length of time so these security measures [conducting searches of areas in the gymnasium and of those entering the gymnasium] are no longer being completed on a consistent basis. As a result, recreation staff are expected to do their duties and the duties of the corporal. This could include monitoring up to 64 individuals at one time. TSCI is now looking at doubling the number of individuals who can be receiving recreation at one time which means that one recreation staff member may supervise up to

⁵³ Inspector General Memo to Appropriations Committee Re: NDCS Data, Mar. 7, 2017 (March 7, 2017 OIG Memo), page 1.

⁵⁴ OIG 2017/2018 Annual Report, page 13.

⁵⁵ Ibid, page 7.

128 individuals at one time. Similar concerns have been expressed in the past regarding the library and kitchen areas.⁵⁶

Having non-correctional staff regularly supervise prisoners without adequate custody backup will lead to an increased level of danger to the safety of the prisoners and the staff.

53. The OIG's 2016/2017 Annual Report also expressed equally important concerns about the lack of program staff:

TSCI is making attempts to add more programming options for individuals at the facility. Some of these additional programs are run by groups that receive grant funds through the Vocational and Life Skills Program. A program run by the Department that is anticipated to start in January is the Violence Reduction Program. It is a core program that is sorely needed throughout the system yet only a group of 9-12 individuals can currently take the program at the Nebraska State Penitentiary and the program lasts for about one year. There are currently 47 individuals at TSCI who are officially on the waiting list for the program. It is likely that there are more individuals at TSCI in need of the program who have not yet been screened for the program or have refused the program. Despite the commitment to additional programming options, the barrier to more programming at TSCI is the availability of staff.⁵⁷

This understaffing of program resources necessary to prepare prisoners for eligibility for parole contributes directly to the level of crowding in the NDCS. If prisoners have not completed the required programs, their release from prison may well be delayed, which is a focus of the OIG and the NDCS in several of their reports.

54. The Nebraska Board of Parole chairperson confirms multiple times in her deposition that some prisoners must complete required programs before they can be paroled.⁵⁸ This is most strikingly illustrated in the Board of Parole's 2018 annual report, where it is

⁵⁶ OIG 2016/2017 Annual Report, Attachment 44, page 1.

⁵⁷ Ibid, Attachment 44, pages 1-2.

⁵⁸ Transcript of Rule 30(b)(6) Deposition of Rosalyn Cotton (Dec. 4, 2018) (Cotton Depo.) at 48:13-21, 51:16-52:9, 124:3-12, 127:3-12, 130:17-131:16.

indicated that 1,766 prisoners had parole hearings delayed because “Continued Correctional Treatment is Needed.”⁵⁹ NDCS offers six programs which can be required to be considered for parole and, as of June 2018, there were 1,380 prisoners on waitlists for these programs, 147 of whom had passed their parole eligibility date but are still waiting to be able to enroll in required programming.⁶⁰

55. Due to a lack of staffing resources for programs that are required to earn parole, prisoners in the NDCS are staying in prison longer than they would if those programs were available—in effect creating a significant obstacle to reduce the prison overcrowding.

56. It is clear from the documents provided that the NDCS is suffering a crisis in staffing for both “protective services” (custody) staff and program staff. The first makes it much more difficult to manage an overcrowded prison system and the second keeps the system from experiencing some relief because prisoners cannot enroll in and complete programs required for their release from prison. Once again, the “two-headed monster” is an apt description.

57. Adding to the problem of understaffing for the existing protective service positions is the question of whether or not the existing staffing levels are appropriate for safety and security. To the end the NDCS embarked on a custody staffing analysis⁶¹ conducted from August 2015 to July of 2016. That staffing analysis⁶² showed that the current authorized staff for

⁵⁹ Cotton Depo., Ex. 22, page 12 (Nebraska Board of Parole Annual Report, 2018).

⁶⁰ NDCS Quarterly Data Sheet, April-June 2018, pages 3-4.

⁶¹ A staffing analysis is a set of tools and a process to assess staffing levels for prisons. It takes into account such things as the design of the physical plant, the custody level of the prison population and the program opportunities for the prisoners.

⁶² The staffing analysis was conducted by NDCS staff but guided by experts from the National Institute of Corrections, some of whom I have worked with previously. I have not conducted a staffing analysis of NDCS’s staffing needs and cannot speak at this time to whether the staffing analysis recommended enough new positions to safely manage the prison system, but it is important to note that NDCS is not close to meeting those targets.

custody staff was short by 138 positions.⁶³ According to the Special Investigative Committee LR34 December 22, 2016 Report to the Legislature, the staffing analysis initially found that there was a need for 254 new protective services staff positions, but after NDCS Director Frakes reviewed the draft, a revised staffing analysis reduced the need to 138 new positions.⁶⁴

58. According to the OIG's 2015/2016 Annual Report:

When the NDCS staffing analysis is taken into account, there are over 300 protective services employee vacancies in the system⁶⁵

59. What this means is that in addition to the high levels of vacancies for the funded protective service positions in NDCS, they were short by 138 positions that were not funded, illustrating the depth of their staffing problems on the custody side. In June 2018, NDCS had 294 vacant positions,⁶⁶ including about 120 vacancies in the area of protective services,⁶⁷ which does not include the additional 138 protective services positions that the 2016 staffing analysis identified as necessary (or the additional 254 positions that the staffing analysis initially recommended).⁶⁸ It is not clear what, if any, concrete actions have been taken to address the shortfall in custody staffing.

60. There has been no attempt as yet to conduct an analysis to determine the need for additional program (non-custody) staff so that prisoners might get access to programs required

⁶³ NDCS Prison Staffing Analysis, Custody Staff, Aug. 2015-July 2016, page 5 (NDCS 246926).

⁶⁴ Special Investigative Committee 2016 Report, page 8. At this point in my research I cannot account for the basis for this reduction.

⁶⁵ OIG 2015/2016 Annual Report, page 6.

⁶⁶ OIG 2017/2018 Annual Report, page 23.

⁶⁷ 2018 Report of the Nebraska Justice System Special Oversight Committee of the Legislature, Dec. 14, 2018 (Nebraska Justice System Special Oversight Committee 2018 Report), page 11, *available at* https://nebraskalegislature.gov/pdf/reports/committee/select_special/cso/2018_lr127.pdf.

⁶⁸ Special Investigative Committee 2016 Report, page 8.

prior to release. As I stated above, this problem directly relates to the problem of overcrowding in the NDCS and an analysis is desperately needed if progress is to be made in this area.

According to the Nebraska Justice System Special Oversight Committee's 2018 Report,

Nebraska statute will now require the Department to conduct a[system-wide staffing] analysis and provide it to the Legislature in advance of the next biennial budget cycle, with the report required on or before September 15, 2020.⁶⁹

But just because a report is required in advance of budget preparation, that is no guarantee that the proposal will be funded so that necessary custody staffing levels might finally be established for the NDCS and some relief be provided to the prisoners and the staff. As of this writing, I have seen no indication that such an analysis has been funded or begun. Until it is, one of the primary impediments to reducing overcrowding in the NDCS will remain in place.

D. Overuse of Segregation

61. NDCS over relies on segregation⁷⁰ to control their prisoners, including the ill-advised practice of double bunking prisoners in segregation cells designed to house only one person. The overuse of segregation results in extreme social isolation and hardship that are both unnecessary and counterproductive to good prison security, and is harmful for all prisoners.

62. Corrections officials have a dual responsibility. First, to provide for the safety of individual prisoners, taking into account their individual risks and needs. But that responsibility is contrasted by corrections officials' responsibility to keep everyone safe. If a prisoner's

⁶⁹ Nebraska Justice System Special Oversight Committee 2018 Report, page 5.

⁷⁰ The term "restrictive housing" was coined some years ago to describe what had previously been labeled segregation, solitary confinement or isolation. I prefer the term "segregation" and use it in this declaration, but it is interchangeable with these other terms. In Nebraska, the legislature has defined "restrictive housing" as "conditions of confinement that provide limited contact with other offenders, strictly controlled movement while out of cell, and out-of-cell time of less than twenty-four hours per week." Neb. Rev. St. § 83-170(13). This is consistent with the type of conditions I refer to as segregation and that are also referred to as isolation, segregation, or solitary confinement by other prison systems and in academic literature.

behavior is disruptive to others, those “others” need to be kept safe as well. When prisons suffer from the “two-headed monster” of severe overcrowding and dangerously low staffing levels, my experience is that the prison system will be challenged to maintain basic control of the prisoner population. Short on resources and suffering from severe overcrowding, corrections officials will attempt to compensate by overusing segregation as a means of control. This is not productive because it creates new harms that, perversely, make the institution even harder to control. That is exactly what is happening in the Nebraska prison system.

63. NDCS governs its prison system through a centralized system of Administrative Regulations (ARs) that every facility must follow. While individual facilities may set their own policies, called Operational Memoranda (OM), the OMs must be consistent with the system-wide ARs and, to the extent there is a conflict, the requirements of the system-wide AR controls.⁷¹ This centralized organizational structure is typical of correctional systems.

64. The use of segregation, which NDCS refers to as “restrictive housing,” is governed by AR 210.01, which controls placement of prisoners in restrictive housing, the conditions of confinement in all restrictive housing units, and the process for reviewing placement of prisoners in longer-term restrictive housing.⁷² There are five NDCS facilities with restrictive housing units, each of which are governed by AR 210.01: Lincoln Correctional Center (LCC), NSP, Nebraska Correctional Center for Women (NCCW), Nebraska Correctional Youth Facility (NCYF), and TSCI.⁷³

⁷¹ Transcript of Rule 30(b)(6) Deposition of Robert Madsen (Dec. 13, 2018) (Madsen Depo.) at 24:2-25.

⁷² AR 210.01; Madsen Depo at 22:22-24:1.

⁷³ TSCI and NSP’s OM’s implementing the statewide administrative regulation are consistent with AR 210.01, and LCC, NCCW, and NCYF did not issue OM’s implementing AR 210.01.

65. From my own training and experience in the corrections field, I understand what conditions of isolation can do to a person and the negative consequences that often result. NDCS policy allows for very limited out-of-cell time in restrictive housing: only one hour of out-of-cell exercise five days a week and three opportunities per week to shave and shower are required, which may be further restricted to three times per week or less.⁷⁴ The Nebraska Inspector General has found that “nearly every inmate who is placed in restrictive housing receives an average of less than one hour out of their cell each day.”⁷⁵ Prisoners held in the restrictive housing units are allowed very limited property⁷⁶ and, although they are supposed to be allowed to participate in programs once they have been in segregation for 30 days,⁷⁷ what is actually available to them is mostly programs that a prisoner completes alone in his or her cell.⁷⁸

66. In my opinion, the overuse of this level of isolation creates a significant risk of causing psychological harm to prisoners. The social isolation and extreme amounts of idle time put great stress on prisoners in segregation, often resulting in hopelessness and anger that can lead to a spiral of behaviors that will keep the prisoners in segregation for longer periods of time, and that make the prisoners more difficult to manage, which is counterproductive to the safety and security of the prison and subjects all prisoners and staff to an increased risk of serious harm.

67. There is broad consensus in the corrections field and in the academic literature that the placement of prisoners in segregation creates a significant risk of harm, for both people who are mentally ill and people without a preexisting mental illness. Dr. Terry Kupers, one of the foremost psychiatric experts on the impact of solitary confinement, has opined on the

⁷⁴ AR 210.01(XI)(A)(13), AR 210.01(XI)(F).

⁷⁵ OIG 2017/2018 Annual Report, page 59.

⁷⁶ AR 210.01 (XI)(D).

⁷⁷ AR 210.01 (XI)(B).

⁷⁸ OIG 2017/2018 Annual Report, page 66.

dangerous effects of segregation on all prisoners, regardless of whether they have preexisting mental health conditions:

It is predictable that prisoners' mental state deteriorates in isolation. Human beings require at least some social interaction and productive activities to establish and sustain a sense of identity and to maintain a grasp on reality. In the absence of social interactions, unrealistic ruminations and beliefs cannot be tested in conversation with others, so they build up inside and are transformed into unfocused and irrational thoughts. Disorganized behaviors emerge. Internal impulses linked with anger, fear and other strong emotions grow to overwhelming proportions.⁷⁹

68. Dr. Haney, a professor from the University of California-Santa Cruz who has been involved with several landmark cases related to the impacts of segregation has said, based on the results of several decades of research, that,

There is not a single published study of solitary or supermax-like confinement in which non-voluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects. The damaging effects ranged in severity and included such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.⁸⁰

69. One of the more recent studies about the risk of suicide comes out of the New York City jail system. That report found,

[T]hat acts of self-harm were strongly associated with assignment of inmates to solitary confinement. Inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm.⁸¹

⁷⁹ Kupers, T., *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment's Sake?*, The Routledge Handbook of International Crime and Justice Studies (2013), page 5.

⁸⁰ Haney, C., *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, Crime & Delinquency (2003), page 49.

⁸¹ Venters, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, Research and Practice, American Journal of Public Health, March 2014.

70. It is clear that placement in segregation is a strong risk factor for suicide. This does not appear to be known by the top leadership of the NDCS. When asked about the increased risk of suicide or self-harm for prisoners in segregation during his deposition, Deputy Director of Prisons Robert Madsen, testifying on behalf of NDCS, said that he did not know.⁸²

71. The NDCS invited the Vera Institute of Justice to help identify how to make improvements in their use of segregation. Commenting on their assessment of NDCS, the Vera Institute said:

The Nebraska Department of Correctional Services (NDCS) operates 10 prisons designed to hold 3,275 people. Nebraska has one of the most severely overcrowded systems in the country, however, and has been operating at almost 160 percent capacity (with more than 5,000 people) in recent years. Vera found that 13.9 percent of the population was held in some form of restrictive housing, on average, during a two-year period ending June 30, 2015. About half of these people were in highly restrictive settings where they were kept in their cells for approximately 23 hours a day. The other half were in less-restrictive environments, which placed limits on out-of-cell time but typically allowed for more than one hour per day out of their cells.⁸³

72. Despite NDCS's efforts to reform their segregation practices, the pressures of severe overcrowding and chronic understaffing have undermined their efforts. Unfortunately but unsurprisingly, the number of prisoners held in restrictive housing has continued to increase, and the number of prisoners held in restrictive housing for more than 180 consecutive days has more than doubled over the past two years. From the OIG's 2017-2018 Annual Report:

One of the goals of the restrictive housing changes was to decrease the number of people placed in such a setting. In November 2014, the total number of inmates in restrictive housing units was 319 and the total number of inmates in protective management units was 310. In August 2018 the numbers had increased to 414

⁸² Madsen Depo. at 96:15-97:21.

⁸³ Vera Institute of Justice, Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems, May 2018, page 11, available at <https://www.vera.org/publications/rethinking-restrictive-housing>.

inmates in restrictive housing units, and 473 inmates in protective management units.... Since the fall of 2016 the number of individuals kept in a restrictive housing unit for at least 180 days has significantly increased as well. In September 2016 there were 62 individuals who had been in a restrictive housing unit for at least 180 days. Earlier this year it had increased to 185 individuals but had decreased to 158 by August 2018.⁸⁴

73. According to the NDCS's 2017 Restricted Housing Annual Report, the total number of unique prisoners who spent some time in segregation was 1,651, a large percentage of the overall prison population.⁸⁵ The number with a serious mental illness diagnosis who wound up being placed in segregation was 639,⁸⁶ again a cause for concern.⁸⁷ The average daily population in restrictive housing has also increased—on average, about 404 prisoners were held in restrictive housing on any given day in 2018 (compared to 388.54 in 2016 and about 348.22 in 2017).⁸⁸ All of these prisoners experienced the dangerous conditions inherent in the social isolation of segregation.

74. Prison systems throughout the country have found that an overreliance on segregation is not necessary for good institutional safety and security or conducive to motivating prisoners to change their behavior, and it often inflicts serious harm on prisoners. The WDOC worked for more than a decade to establish effective step-down programs for prisoners who

⁸⁴ OIG 2017-2018 Annual Report, page 56.

⁸⁵ 2017 Restrictive Housing Annual Report, Nebraska Department of Correctional Services, Sept. 15, 2017 (2017 Restrictive Housing Report), page 5, *available at* https://nebraskalegislature.gov/FloorDocs/105/PDF/Agencies/Correctional_Services_Department_of/602_20170915-165720.pdf.

⁸⁶ Ibid, page 9.

⁸⁷ The 2018 Restrictive Housing Annual Report changed format and no longer tracks the number of unique prisoners who spent time in restrictive housing or the number of prisoners in restrictive housing who were diagnosed with a serious mental illness.

⁸⁸ 2018 Restrictive Housing Annual Report, Nebraska Department of Correctional Services, Sept. 14, 2018 (2018 Restrictive Housing Report), page 5.

repeatedly returned to isolation. We targeted the most recalcitrant prisoners to see what we could do to offer them structured interventions that developed the internal skills and self-control necessary to help them live in general population. Our success with program outcomes was studied by researchers from the University of Washington.⁸⁹ Much has been learned in Washington from these initial efforts and their step down programs continue to operate and improve to this day.

75. NDCS attempted to launch such a step down program in 2017 called The Challenge Program (TCP), but it has not been a success. The Nebraska Inspector General explained that there has been lack of prisoner willingness to participate in TCP, in part because participants must spend at least 52 weeks in a setting that the OIG described as “Restrictive Housing Lite” on top of the time already spend in restrictive housing in order to successfully complete the program, preventing them from being eligible to participate in programs such as substance abuse treatment and violence reduction that they are required to complete in order to be considered for parole. The broader NDCS issue of severe staffing shortages also contributes to the lack of interest in TCP—for example, the OIG reported that a required program for completion of the second phase of TCP was not offered for two weeks due to the lack of availability of a facilitator to run the program. The result of the lack of interest in TCP is 82 unused beds in a system that is severely overcrowded.⁹⁰

76. It is entirely predictable that the segregation population is high in the NDCS. It will likely stay that way until the level of overcrowding can be reduced, more custody staff are available to supervise the prisoners and more program staff are brought on board to provide

⁸⁹ D. Lovell, *The Reintegration Program (RIP) at the Washington State Penitentiary: A Program Evaluation* (2009).

⁹⁰ OIG 2017/2018 Annual Report, pages 63-65.

programs necessary for the prisoners' release and to reduce the level of idleness. In the meantime, NDCS continues to follow the dangerous management strategy of overusing segregation to counteract the staffing shortages and keep prisoners under control, exposing prisoners to the dangers I described above and making the prison system less safe for everyone.

E. The Dangerous Practice of Double Celling Segregation

77. Overcrowding in the NDCS has also led to the dangerous practice of placing two prisoners in one segregation cell, a practice known to result in danger to prisoners.

78. Writing about the tragic death of a prisoner who was murdered by his cellmate at TSCI in April 2017, the OIG quotes the experts about this misguided practice:

In *Madrid v. Gomez*, a case examining conditions of extreme isolation at California's Pelican Bay State prison where "[r]oughly two-thirds of the inmates [were] double celled," the court cited testimony from Professor Haney and Dr. Stuart Grassian in observing: [Double-celling] does not compensate for the otherwise severe level of social isolation The combination of being in extremely close proximity with one other person, while other avenues for normal social interaction are virtually precluded, often makes any long-term normal relationship with the cellmate impossible. Instead, two persons housed together in this type of forced, constant intimacy have an 'enormously high risk of becoming paranoid, hostile, and potentially violent towards each other.' The existence of a cellmate is thus unlikely to provide an opportunity for sustained positive or normal social contact.⁹¹

The OIG also quoted Dr. Haney's testimony to the United States Senate in 2012:

[Doublecelled prisoners] are ... simultaneously isolated and overcrowded. They ... really can't relate in any meaningful way with whom they're celled, and so they basically develop a kind of within cell isolation of their own. And it adds to the tension, and the tensions then can get acted out on each other. It creates hazards for the people who are forced to live that way. It creates hazards

⁹¹ Summary of the Report on the Death of Terry Berry, Office of Inspector General of Corrections, Aug. 28, 2017 (OIG Report on Death of Terry Berry), page 8, *available at* https://nebraskalegislature.gov/pdf/reports/public_counsel/2017berry.pdf.

for the correctional officers who have to deal with prisoners who are living under those kinds of pressures.⁹²

The OIG quoted a federal judge in *Braggs v. Dunn*, the federal court case about Alabama's prison system in which Dr. Haney and I both testified:

Admittedly, ADOC uses double-celling in some segregation units, which means putting two prisoners into a single segregation cell. At first blush, this practice might seem to mitigate the harmful effects of solitary confinement. However, double-celled segregation has an even more severe impact on the mental health of prisoners. Dr. Haney credibly explained that double-celled prisoners "in some ways ... have the worst of both worlds: they are 'crowded' in and confined with another person inside a small cell but—and this is the crux of their 'isolation'—simultaneously isolated from the rest of the mainstream prisoner population, deprived of even minimal freedom of movement, prohibited from access to meaningful prison programs, and denied opportunities for any semblance of 'normal' social interaction."⁹³

79. The OIG discovered on his own the very real fears of the staff that must work in units where prisoners are double celled in segregation.

Another part of the double bunking issue is the safety of staff in these situations. During interviews with staff about Mr. Berry's death, some of the staff shared that they do not agree with double bunking in a restrictive housing unit because it can create safety issues for them. They shared that having two inmates in those cells makes it more difficult to extract, move or work with one or both inmates.⁹⁴

80. And remarkably, the OIG witnessed the very danger the staff feared:

Recently, the OIG was in the restrictive housing unit at TSCI and interviewed an inmate (who was double bunked) in a separate interview room. When the inmate was returned to his cell, the staff opened the door and the other inmate charged out of the cell and attacked a staff member.⁹⁵

⁹² Ibid, page 7.

⁹³ Ibid.

⁹⁴ Ibid, page 8.

⁹⁵ Ibid.

81. The murder of the prisoner by his cellmate simply would not have happened if NDCS did not double cell prisoners in segregation. Nor would the staff member referenced above have been attacked. While this is a practice sometimes used in other jurisdictions, in my experience in-cell fights are frequent as is the occurrence of both prisoners charging officers when their cell door is opened. The NDCS has clearly been warned about the dangers of this practice and they appear to have no plan to implement a change.

82. Unfortunately the top leadership of NDCS thinks otherwise. In a deposition Chief of Operations Sabatka-Rine, testifying on behalf of NDCS, said,

Because I don't believe that double celling in and of itself impacts safety or mental well-being of individuals.⁹⁶

This statement is not consistent with my experience in multiple jurisdictions that double-celling in the locked-down conditions of segregation creates an unacceptable risk of harm to both prisoners and staff.

83. In letters to the OIG addressing the issue of double bunking in segregation, Director Frakes said,

I acknowledged no studies regarding double bunking and expressed that, based on my corrections knowledge and my 35 years of experience, double bunking in restrictive housing can be as safe as in general population.⁹⁷

And,

Again, I will note that my years of experience not only having worked in restrictive housing, but also having led the charge in the state of Washington to reduce the use of restrictive housing provide me the expertise to make such a statement.⁹⁸

These responses from Director Frakes are most disappointing and I do not know what in his

⁹⁶ Sabatka-Rine Depo. at 133:10-134:12.

⁹⁷ OIG Report on Death of Terry Berry, page 12.

⁹⁸ Ibid.

experience would cause him to make these claims. My career in corrections in the State of Washington paralleled his and we have not double bunked prisoners in segregation since the mid-1980's. It is simply too dangerous and far safer to avoid such a practice. Were it not for the level of overcrowding and resultant disciplinary problems in the NDCS, I suspect they would do just that.

F. Closed Management and Modified Operations

84. In May 2017, the Deputy Ombudsman for Corrections sounded the alarm that the segregation population may be expanding under the guise of "closed management." In a letter to the Long-Term Restrictive Housing Work Group, he said,

After the events on May 2, 2017, which resulted in the death of two inmates, the Ombudsman's office noticed a shift in Department policy relating to restricting housing. It appears that the department has adopted a new housing unit concept called, "closed management." It would also appear that this new concept is supposed to be considered "specific mission housing" but the inmates out of cell time is woefully less than what restrictive housing placement inmates receive. The puesphdo [sic] restrictive housing unit (Closed management) is currently being operated at the Nebraska State Penitentiary (NSP) and Tecumseh State Correctional Institution (TSCI). At this point in time, I have observed operations in these units to be more restrictive than the designated restrictive housing units at the aforementioned facilities. The inmates placed in these units do not have access to programming, activities or education. Additionally, the out of cell time is less than 1.5 hrs. per day.⁹⁹

85. The Deputy Ombudsman goes on to detail concerns with this practice, including input from prisoners and the staff who live and work in those units. The "closed management" housing unit concept described by the Deputy Ombudsman is alarming, and may well mean that the number of prisoners in segregation is being undercounted. I have seen no resolution of these concerns addressed in the materials I have reviewed.

⁹⁹ Deputy Ombudsman for Corrections May 22, 2017 Letter (NDCS 245029-245032), page 1.

86. Relatedly, the OIG's 2017/2018 Annual Report raised concern that over the past year or more, NDCS has reacted to incidents in housing units by placing the units on "modified operations," during which prisoner movement and privileges are restricted, making the housing units operate more like restrictive housing. The OIG Report explained that in the past year, housing units were placed on modified operations for extended periods, during which "food trays were delivered under cell doors, and placed on floors which had been recently flooded with overflowed toilets," and concerns were raised by prisoners about the quality and quantity of the food. During the modified operations periods, the prisoners "received very limited or no shower time, the units were unkempt and unsanitary, and some prisoners had hygiene items, clothing and bedding taken away for extended periods of time."¹⁰⁰

87. Based on my training and experience, it is my opinion that the increased use of these segregation-like conditions referred to as "closed management" and "modified operations," like the overuse of segregation, are attributable to the severe overcrowding and understaffing crisis. Without enough staff to safely manage the prisoner population, the overall risk of violence and disturbances is significantly elevated, and the unsafe management strategy of simply imposing restrictive housing conditions on prisoners is often adopted by strained prison systems to control the prisoner population. As I have explained, overuse of segregation and segregation-like conditions in response to severe overcrowding and staffing shortages is counterproductive to the safety and security of the prison, and puts all prisoners and staff in danger.

V. Conclusion

88. The Nebraska prison system has recognized they are overcrowded for decades and created master plans to clearly define what they need to build but they have taken far too little action on the recommendations made to them. In the meantime their overcrowding has

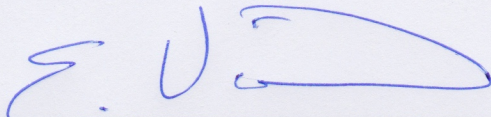
¹⁰⁰ OIG 2017/2018 Annual Report, pages 65-66.

gotten worse. They have recognized they are understaffed and commissioned a custody staffing analysis to define what they need to do to keep prisoners and their staff safe. Yet they have put off implementation of their new staffing model. They know they need more program staff so that prisoners can complete programs required for their release and they appear to have not yet begun finding a solution for that problem. They know they are housing too many people in segregation yet their segregation population has increased. While all this talk and so many reports have happened, there has been very little action to meaningfully solve their problems—their staff assault rates increased¹⁰¹ and they have had serious prison riots and prisoner deaths¹⁰²—all of which could have been avoided if not for their chronic overcrowding and understaffing. The top leadership of the agency appears to have adjusted to this new normal, for example denying the risks of double celling for prisoners placed in segregation. In the meantime, all prisoners in the NDCS suffer the risk to their safety that results from overcrowding, understaffing and a high likelihood of winding up in a segregation cell, sometimes with a cellmate. At this point, in my opinion the NDCS requires the intervention of the court to address their crisis as they have clearly demonstrated that their good intentions are unlikely to result in solutions to solve their problem of the “two-headed monster” of overcrowding and chronic understaffing. In the meantime the prisoners and the staff are forced to exist in a situation that is dangerous and unsafe for everyone.

¹⁰¹ March 7, 2017 OIG Memo, page 7.

¹⁰² See, e.g., Ombudsman’s Report on TSCI Mother’s Day Riot; Fithian Report; OIG Report on Death of Terry Berry; OIG 2016/2017 Annual Report, pages 66-68 (discussing March 2017 TSCI riot).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration is executed at Olympia, Washington this 14 day of February, 2019.



Eldon Vail