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Estimated time: 15 minutes

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

In the Matter of PAUL COOKHORNE,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

BRIAN FISCHER, Commissioner of the New York State
Department of Corrections and Community Supervision,

Respondent.

BRIEF FOR PETITIONER

Docket No. TP 12-01634
Erie County Index No. 1791-2012

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QUESTIONS PRESENTED

Pursuant to Article 78

1. Whether a reasonable hearing officer conducting a prison Tier III disciplinary hearing would have found that the quality and quantity of the proof provided substantial evidence to support a guilty disposition where the only evidence relied upon that could have supported guilt was uncorroborated and inconsistent, and the hearing officer failed to enquire further, while the evidence relied upon which supported seventeen-year-old prisoner Paul Cookhorne's version of the events was logical, consistent and fully corroborated by eyewitnesses?

2. Whether the hearing officer acted arbitrarily and capriciously and abused his discretion when he failed to consider Cookhorne's age of seventeen as a categorically mitigating factor in determining the appropriate punishment?

3. Whether the disposition penalizing seventeen-year-old Cookhorne with four years of punitive isolation in the Special Housing Unit, with four years of loss of packages, phones, commissary, and good time is so excessive it shocks the conscience and is an abuse of discretion as a matter of law?

4. Whether reversal and expungement of Cookhorne's disciplinary record is the proper remedy?

Pursuant to Request for Declaratory Judgment

5. Whether punitive isolation of sixteen- and seventeen-year-olds in the Special Housing Unit violates the Federal and New York State constitutional prohibitions on cruel and

unusual punishment because it violates evolving standards of decency and is deliberately indifferent to their medical and psychological health?

6. Whether punishing seventeen-year-old Cookhorne with four years of punitive isolation in the Special Housing Unit with concurrent deprivations violates both his New York State and Federal constitutional rights to be free from cruel and unusual punishment?

7 Whether DOCCS' regulation, 7 NYCRR § 254.6, is unconstitutional as applied to sixteen- and seventeen-year-olds because the regulation does not require their age to be a per se mitigating factor in prison disciplinary proceedings and because the regulation lacks a prohibition on their placement in punitive isolation in the Special Housing Unit in violation of their right to be free from cruel and unusual punishment?

STATEMENT OF NATURE OF THE CASE

This case is a challenge to a Tier III hearing disposition of four years of punitive isolation in the Special Housing Unit ("SHU") plus four years loss of phones, packages, commissary and good time given to Paul Cookhorne, a seventeen-year-old prisoner in the custody of the New York State Department of Corrections and Community Supervision. Cookhorne challenges the disposition under CPLR Article 78 on the grounds that: (1) it is not supported by substantial evidence because the quality and quantity of proof are insufficient, (2) it is arbitrary and capricious because the hearing officer failed to consider Cookhrone's age as a categorically mitigating factor, and (3) it is an abuse of discretion because it is so excessive that it shocks the conscience.

Cookhorne requests a Declaratory Judgment that: 1) the punitive isolation of sixteen- and seventeen-year-olds in the Special Housing Unit violates the Federal and New York state constitutional prohibitions on cruel and unusual punishment, or in the alternative, that sentencing Paul Cookhorne to four years in punitive confinement in the Special Housing Unit with concurrent loss of privileges constitutes cruel and unusual punishment, and that, 2) DOCCS' Regulation, 7 NYCRR §254.6, is unconstitutional as applied to sixteen- and seventeen-year-olds because, 1) the regulation does not require their age to be a per se mitigating factor in prison disciplinary proceedings and, 2) the regulation lacks a prohibition on their placement in punitive, isolated confinement in violation their right to be free from cruel and unusual punishment.

Cookhorne commenced this hybrid Article 78 proceeding and Request for Declaratory Judgment by filing a Verified Petition with the New York State Supreme Court, Erie County, on May 31, 2012. Respondent Brian Fischer, Commissioner of the New York State Department of

Corrections and Community Supervision, ("DOCCS") submitted its Answer to the Petition on July 26, 2012. Cookhorne filed a Reply to the Answer on August 13, 2012.

This case was transferred to this Court pursuant to CPLR § 7804(g) by an order of Judge Donna M. Siwek dated August 30, 2012, as it raises a question of substantial evidence. Consequently, the lower court did not rule on either Cookhorne's Article 78 claims or his Request for a Declaratory Judgment.

STATEMENT OF THE FACTS

This action arises out of an incident that occurred on November 3, 2011, at Orleans Correctional Facility. (Pet. ¶¶ 6-7.) On that day, Cookhorne, a 5'5", 130 pound seventeen-year-old, was returning to his dorm from vocational programming carrying two magazines in his hands. He had just received them from Deputy Superintendent of Programs Timothy Tracz. (Pet'r's Tr. 4:29, 5:11-29, 11:36-44.) Before Cookhorne reached his dorm, Correction Officer ("CO") Ambrose, who was sitting behind the officer's station, asked him who gave him the magazines. (Pet'r's Tr. 5:27, 10:19.) Cookhorne responded that a civilian from the law library brought them down for him. (Pet'r's Tr. 5:28-29.)

CO Ambrose then instructed Cookhorne to hand over the magazines. (Pet'r's Tr. 5:29-30.) Cookhorne was hesitant to comply because CO Ambrose has a reputation for doing "things to get under inmates' skin." (Pet'r's Tr. 5:38-39.) However, Cookhorne lifted the magazines up so that CO Ambrose could see them. (Pet'r's Tr. 5:29-30, 6:1-2.) CO Ambrose called him a smartass and again told him to hand over the magazines. (Pet. Ex. M.) Cookhorne then asked CO Ambrose why he wanted to see the magazines, but the CO did not answer him and instead ordered him to "go outside." (Pet'r's Tr. 6:2-9.) CO Ambrose did not tell Cookhorne that he wanted to do a pat frisk, and Cookhorne had just been pat-frisked upon leaving his vocational program. (Pet'r's Tr. 6:6-11, 4:33-37.) Cookhorne asked CO Ambrose what he did wrong and why he needed to go outside. (Pet. Ex. M.) The CO responded by exiting the officer's station and grabbing and pushing Cookhorne. (Pet'r's Tr. 6:4-14.)

Cookhorne tried to pull away from CO Ambrose, but the CO placed him in a headlock. (Pet'r's Tr. 6:12-14.) Cookhorne did not resist, "make a move" or "move a muscle." (Pet'r's Tr. 6:25-26.) While keeping Cookhorne in a headlock and "trying to wrestle him down" and "throw

him to the ground," CO Ambrose "slipped to the ground," pulling Cookhorne down with him. (Pet'r's Tr. 14:37-41.) When they fell, the CO landed head first against the floor. (Pet'r's Tr. 14:43-44.) Cookhorne noticed that CO Ambrose was bleeding. (Pet. Ex. M.) Cookhorne pleaded with the CO to let him go. (Pet. Ex. M.) Eyewitnesses Tremell Jordan, Teddy Faison and John Hodder urged the CO to let Cookhorne go so the CO could seek medical attention. (Pet'r's Tr. 14:45, 16:40-44, 19:46–20:1.) CO Ambrose then released him and called for medical assistance. Cookhorne ran back to his cube and lay down on the floor to await responding staff. (Pet'r's Tr. 17:27-36.)

On November 3, 2011, CO Ambrose issued an Inmate Misbehavior Report charging Cookhorne with the following violations of the Standards of Inmate Behavior: 104.11 (Violent Conduct), 100.11 (Assault on Staff), 107.10 (Interference with Employee), 106.10 (Refusing Direct Order), and 115.10 (Refuse Search or Frisk). (Pet. Ex. A.) CO Ambrose alleged in the Misbehavior Report that Cookhorne struck him in the face, attempted to choke him, picked him up and slammed him to the ground, and then pulled away from him and ran. (Pet. Ex. A.) CO Ambrose also wrote in the Misbehavior Report that he "responded by attempting to place Cookhorne in a head lock." (Pet. Ex. A.) CO Ambrose completed a Use of Force Report on November 3, 2011, in which he included the same allegations contained in the Misbehavior Report. (Pet. Ex. B.)

On November 20, 2011, an Unusual Incident Report was completed by Lieutenant Jeziorski. (Pet. Ex. D.) The Unusual Incident Report states that CO Ambrose "applied body holds to inmate Cookhorne," that both of them fell to the floor, and that CO Ambrose then let go of Cookhorne. (Pet. Ex. D.) The Unusual Incident Report also states that CO Ambrose's injury was a minor laceration, for which he received two staples. (Id.)

In addition to the Misbehavior Report, the Use of Force Report, and the Unusual Incident Report, there were five separate To/From Memos submitted by DOCCS staff who responded after the incident. None of them were eyewitnesses. (Pet. Exs. H – L.) The To/From Memo from A. Andrus to Superintendent Kutzworth and the To/From Memo from CO M. Standish to Superintendent Kutzworth both state that Cookhorne was found hiding underneath his bed. (Pet. Exs. H, L.)

After the incident, Cookhorne was transferred to Wende Correctional Facility and placed in a New York State Office of Mental Health (OMH) "observation/special watch" cell for approximately ten days. (Pet. Ex. C.) Thereafter, a Tier III disciplinary hearing was held, which began on November 14, 2011 and concluded on November 22, 2011. Cookhorne pled not guilty to all of the charges. (Pet. Ex. E.)

At the hearing, testimony was heard from Cookhorne, CO Ambrose, Deputy Superintendent Tracz, and three eyewitnesses: Tremell Jordan, John Hodder, and Teddy Faison. (Pet. Ex. E.) The hearing officer read the findings of CO Ambrose's injury report into the record. The report was completed by medical staff immediately after the incident and noted that CO Ambrose denied losing consciousness. (Pet'r's Tr. 23:11.) Although CO Ambrose told medical staff that he did not lose consciousness, he testified at the hearing that he blacked out during the incident and woke up ten to twelve feet from where he hit his head. (Pet'r's Tr. 10:6-9.)

CO Ambrose further testified that there were "a couple of discrepancies" in the Misbehavior Report. (Pet'r's Tr. 9:7.) The hearing officer did not inquire as to the nature of the discrepancies, nor did CO Ambrose explain what the discrepancies were other than to note that

the magazines were loose in Cookhorne's hands, (Pet'r's Tr. 9:32-36), and not in a bag as he alleged in the Misbehavior Report, (see Pet. Ex. A).

Cookhorne testified that he did not strike CO Ambrose, nor did he pick the CO up and slam him to the ground. (Pet'r's Tr. 14:22-25, 16:12-14, 19:2-5, 19:45-46; Pet. Ex. M.) He pointed out that this would have been very difficult for him, stating that CO Ambrose "is bigger than me," and "I'm sure he weighs more than me so for me to actually pick him up and slam him, that's kind of hard for me." (Pet'r's Tr. 6:18-21.)

Cookhorne's testimony was fully corroborated by the testimony of all of the witnesses at the hearing. Deputy Superintendent Tracz confirmed that gave the magazines to Cookhorne and that Cookhorne signed a receipt for them. (Pet'r's Tr. 11:31-44.) Eyewitness Tremell Jordan testified that he saw the incident involving Cookhorne and CO Ambrose, that CO Ambrose grabbed Cookhorne first, and that he did not see Cookhorne strike CO Ambrose at any time. (Pet'r's Tr. 14:8-12, 14:22-25, 14:36-37.) Jordan further testified that he observed CO Ambrose slip to the ground while holding onto Cookhorne, which caused them both to fall to the floor with Cookhorne landing on top of CO Ambrose. (Pet'r's Tr. 14:36-46.)

Eyewitness Teddy Faison also testified the he observed CO Ambrose grab Cookhorne first, and that Cookhorne never struck CO Ambrose. (Pet'r's Tr. 16:10-30.) Faison added that he personally pleaded with CO Ambrose to let go of Cookhorne and seek medical assistance. (Pet'r's Tr. 16:40-44.) Faison further noted that Cookhorne did not seem to "understand the severity of the situation" and described him as just "a young kid." (Pet'r's Tr. 17:35, 17:44-18:4.) Eyewitness John Hodder also testified that he saw the incident between Cookhorne and CO Ambrose, that CO Ambrose grabbed Cookhorne first, that Cookhorne did not strike CO Ambrose, and that CO Ambrose slipped causing both of them to fall to the ground. (Pet'r's Tr.

19:5-20, 19:35-20:10.) Hodder further testified that Cookhorne "never messed with this Officer" and that he was "acting normal," but that CO Ambrose "has a reputation of this behavior of doing this to numerous inmates." (Pet'r's Tr. 20:21-31.)

Confidential OMH testimony was taken concerning Cookhorne's mental state. The hearing officer noted that he considered it and concluded "based on this testimony and my observation of you at the hearing your mental state [is] not a contributing or mitigating factor." (Pet. Ex. G.)

In the Statement of Evidence Relied Upon, the hearing officer noted that he considered: (1) the Misbehavior Report written by CO Ambrose; (2) the verbal testimony of CO Ambrose; (3) the verbal testimony of Paul Cookhorne; (4) the verbal testimony of eyewitnesses Jordan, Faison, and Hodder; (5) the verbal testimony of Deputy Superintendent Tracz; (6) confidential OMH testimony; and (7) the Unusual Incident Report, Use of Force Report, To/From Memos, injury reports and photos. (Pet. Ex. G). The hearing officer found Cookhorne guilty of all of the charges and sentenced him to four years of confinement in SHU, beginning on November 3, 2011 and ending on November 3, 2015, and four years of loss of phones, packages, commissary and good time. (Pet. Ex. G).

Prisoners punished with isolated confinement in SHU, ("punitive isolation"), are housed in either small solitary or double-bunked cells for twenty-three hours per day, with one hour of recreation permitted in small, solitary outdoor pen. (Pet. 9:52; Ans. 1:1). On November 3, 2012, Cookhorne will have been confined in punitive isolation for one year, including more than three months in solitary confinement at Attica Correctional Facility. (Pet. Ex. G.)

On November 29, 2011, Cookhorne submitted a timely administrative appeal of the Tier III hearing disposition. His counsel submitted a Supplemental Appeal on January 18, 2012.

Albert Prack, Director of Special Housing/Inmate Disciplinary Program, reviewed and affirmed the disposition on February 1, 2012. Cookhorne then submitted a Request for Reconsideration on February 2, 2012, and his counsel submitted an additional Request for Reconsideration on March 29, 2012. In response, on April 11, 2012, Mr. Prack again affirmed the hearing disposition and stated that no further administrative action would be taken. Cookhorne filed this hybrid Article 78/Request for Declaratory Judgment action for judicial review on May 31, 2012.

ARGUMENT

PURSUANT TO ARTICLE 78

POINT I

A Reasonable Hearing Officer Would Not Have Found That the Quality and Quantity of the Proof Provides Substantial Evidence Necessary to Support a Guilty Determination.

New York law requires that a hearing officer's determination of guilt at a Tier III prison disciplinary hearing be supported by substantial evidence. CPLR § 7803(4). The substantial evidence requirement is higher than the 'some evidence' standard necessary to afford due process. *Sira v. Morton*, 380 F.3d 57, 76 n.9 (2d Cir. 2004) (citing *Superintendent v. Hill*, 472 U.S. 445, 449 (1985)). Evaluating whether substantial evidence exists "involves a weighing of the quality and quantity of the proof." *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978).

Although "the quantum of evidence that rises to the level of 'substantial' cannot be precisely defined, the inquiry is whether 'in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.'" *People ex rel Vega v. Smith*, 66 N.Y.2d 130, 139 (1985) (quoting *National Labor Relations Bd. v. Remington Rand*, 94 F.2d 862, 873 (2d Cir. 1938)). "Substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably – probatively and logically." *300 Gramatan Ave.*, 45 N.Y.2d at 181.

Here, the guilty disposition rendered by the hearing officer was not supported by substantial evidence. The only evidence relied upon that could support guilt is: (1) CO Ambrose's Misbehavior Report, which he admitted had discrepancies and is inconsistent with

other documentary evidence; (2) the Use of Force Report, also written by CO Ambrose, which repeats the same language of the Misbehavior Report; (3) CO Ambrose's vague and conflicting testimony; and (4) the To/From Memo written by A. Andrus and the Unusual Incident Report written by Lieutenant Jeziorski, in which the only information supportive of guilt was provided by CO Ambrose.

The Misbehavior Report alleges that Cookhorne picked CO Ambrose up and slammed him to the ground, whereas the Unusual Incident Report states that they both fell to the ground (Pet. Ex. A; Pet. Ex. B, 1.) This is a significant inconsistency because the Misbehavior Report alleges an assaultive explanation for CO Ambrose's injury while the Unusual Incident Report provides an accidental explanation for the CO's injury. The Misbehavior Report further states that Cookhorne pulled away from CO Ambrose, whereas the Unusual Incident Report states that the CO let him go. (Id.) This is also a significant inconsistency because the Misbehavior Report implies that Cookhorne was in control while the Unusual Incident Report implies that CO Ambrose was in control. Additionally, CO Ambrose claims in both of his reports that he responded by putting Cookhorne in a headlock. (Id.) The Unusual Incident Report states that CO Ambrose used body holds on Cookhorne. (Pet. Ex. D.) The inconsistency of the allegations is amplified by the fact that Cookhorne is of slight build. He is a barely 5'5", 130-pound teenager. (Pet. Ex. F.) Cookhorne pointed this out during the hearing. (Pet'r's Tr. 6:18-21.)

CO Ambrose's unusually vague testimony was also inconsistent and illogical, and failed to corroborate any of the specific facts that he alleged in the Misbehavior Report. His minimal testimony consists of an admission that the Misbehavior Report he wrote contained discrepancies, and a statement about losing consciousness that directly contradicted the statements he made to medical staff after the incident. (Pet'r's Tr. 9:4-10:34.) He did not

explain or justify these discrepancies or his conflicting statements. He specified only that he incorrectly reported that Cookhorne was carrying a bag with magazines in it when in fact Cookhorne was carrying the magazines in his hands. (Pet'r's Tr. 9:32-36.) CO Ambrose's testimony highlights the unreliability of his written reports and calls into question the accuracy of the statements he made after the incident. The reports also fail to account for the whereabouts of the magazines Cookhorne was holding in his hands. They state that Cookhorne refused to hand the magazines over while asserting that he used both hands to attack CO Ambrose.

In addition to being illogical and implausible, CO Ambrose's version of the incident was not corroborated by anyone else. The Misbehavior Report, the Use of Force Report, the Unusual Incident Report, and the relevant To/From Memos were either written by CO Ambrose or based on information he provided to staff. (See Pet. Exs. A, B, H-L.) The additional reports and memos do not add probative weight to his story, nor do they amount to evidence that is any more substantial than if the Misbehavior Report stood alone. Although a Misbehavior Report alone may constitute substantial evidence, this is when it was accurate and contained simple charges which the prisoners denied without explanation. *See People ex rel Vega*, 66 N.Y.2d at 140. That is not the case here.

In addition to being uncorroborated, the three eyewitness directly contradicted CO Ambrose's description of the incident. Eyewitnesses Jordan, Faison and Hodder all confirmed that Cookhorne did not hit CO Ambrose and that CO Ambrose was the aggressor who initiated physical contact. (Pet'r's Tr. 13:1, 14:8-25, 16:12-30, 19:2-20, 19:45-46.) Furthermore, Deputy Superintendent Tracz testified that he gave Cookhorne the magazines from his vocational program. This corroborates Cookhorne's testimony that he told CO Ambrose that the "civilian from the library" brought him the magazines. (Pet'r's Tr. 5:27-28).

Cookhorne presented a probative, logical and consistent explanation of the incident. His testimony was factually specific, coherent, and fully corroborated by the four separate witnesses. Deputy Superintendent Tracz confirmed that he gave Cookhorne the magazines and thus that they were authorized material. (Pet'r's Tr. 11:33-44.) The fact that Cookhorne received the approved magazines directly from Deputy Superintendent Tracz explains his confusion as to why CO Ambrose ordered him to turn them over. Eyewitness Hodder's testimony also confirmed, as Cookhorne stated, that CO Ambrose has a reputation among prisoners for doing things to get under their skin. (Pet'r's Tr. 20:28-31.) This further explains Cookhorne's skeptical response to CO Ambrose's order to hand over the authorized magazines. In addition, Cookhorne had been pat frisked when he left the vocational program moments before CO Ambrose questioned him and was understandably confused as to why CO Ambrose was ordering him to go outside. (Pet'r's Tr. 4:37, 6:8.)

The confidential OMH testimony, included as evidence relied upon by the hearing officer, can only be related to whether Cookhorne's mental state was a contributing or mitigating factor during the incident. 7 NYCRR § 254.6(c)(3). Such testimony could not have provided any facts about what actually occurred and is thus irrelevant to a finding of substantial evidence. DOCCS admitted this fact in its Answer. (Answer 1 ¶ 1, Pet. 13 ¶¶ 75-76.)

When weighed, the evidence relied upon does not amount to evidence of the quality or quantity sufficient to persuade a reasonable, fair and detached fact finder of Cookhorne's guilt. The disciplinary proceeding and the severity of Cookhorne's punishment are serious affairs. As discussed in POINTS III through VI, confinement in SHU is the harshest punishment available in New York State prisons, and the harmful effects of lengthy confinement in SHU are well-known and destructive, especially for teenagers like Cookhorne. *See, e.g.*, Stuart Grassian,

Psychiatric Effects of Solitary Confinement, 22 Wash. U. J.L. & Pol'y 325 (2006) (discussing damaging consequences of solitary confinement on the brain and psyche). In such a serious affair, responsible people would not rely on inconsistent and illogical reports and conflicting testimony to support a finding of guilt. *See German v. Fischer*, 94 A.D.3d 1295, 1296 (2012) (holding that there was no substantial evidence where contradictory hearsay information in a misbehavior report and a property transfer form were attributed the same author).

Moreover, the hearing officer has a duty to inquire further when presented with evidence that suggests a need for further inquiry. *See People ex rel Vega*, 66 N.Y.2d at 140 (holding that a mere denial of charges by a prisoner does not trigger the "need for additional inquiry"). The hearing officer's duty to inquire is needed to meet minimum due process requirement, as prisoners have a right to a fair hearing. *Wolf v. McDonnell*, 418 U.S. 539 (1974) (the purpose of a disciplinary hearing is to conduct fact finding in a fair and impartial manner). A fair hearing cannot be achieved if the evidence relied upon is not reliable. *Sira v. Morton*, 380 F.3d 57 at 75-77 (in order to meet due process requirements, the evidence relied upon must be reliable). This duty is essential in non-adversarial proceedings because it is the hearing officer's duty to ensure that the relevant facts are fully developed and considered. *Cruz v. Sullivan*, 912 F.2d 8, 11 (2d Cir. 1990). This duty is heightened when the subjects of the proceeding are unrepresented, *id.*, such as in the prison disciplinary context. *Baxter v. Palmigiano*, 425 U.S. 308, 314-15 (1976) (prisoners have no right to retained or appointed counsel in prison disciplinary proceedings).

Here, the inconsistent reports and CO Ambrose's brief and contradictory testimony were not reliable without further inquiry into the facts. A reasonable hearing officer would not have relied on this evidence to support a finding of guilt. Cookhorne's disciplinary disposition is not supported by substantial evidence.

POINT II

The Hearing Officer Acted Arbitrarily and Capriciously and Abused His Discretion When He Did Not Consider Seventeen-Year-Old Cookhorne's Age as a Per Se Mitigating Factor.

By failing to consider Cookhorne's age in rendering the Tier III disposition, the hearing officer acted arbitrarily and capriciously. Arbitrary action lacks a sound basis in reason and is made without regard to the facts or in contravention of the law. *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester Cnty.*, 34 N.Y.2d 222, 231 (1974). A decision that fails to consider a juvenile's age as a per se mitigating factor is a decision made without regard to the facts and is not based in sound reason, nor is it in compliance with the prevailing Supreme Court jurisprudence concerning the treatment of juveniles in the adult criminal justice system and, thus, is in contravention of the law.

The Eighth Amendment to the U.S. Constitution and Article 1, Section 5 of the New York State Constitution prohibit "cruel and unusual punishments." The U.S. Supreme Court's Eighth Amendment juvenile justice jurisprudence mandates that youth be viewed as a mitigating factor which must be considered in sentencing, and that a juvenile's age is a categorically mitigating factor that prohibits imposing on them the most severe punishments. Specifically, the Court held that adolescents under the age of eighteen at the time of their crimes are categorically prohibited from receiving the death penalty. *Roper v. Simmons*, 543 U.S. 551, 570-75 (2005). In *Roper*, seventeen-year-old Christopher Simmons was convicted of planning and carrying out a brutal murder. Simmons picked out the victim, enlisted two of his friends, broke into the victim's home, tied her up with electrical wire and duct tape and threw her off of a bridge. 542 U.S. at 556-57. Simmons "assured his friends that they could 'get away with it' because they were minors," and later bragged to other friends about committing the crime. *Id.* at 556. In

spite of these disturbing facts, the Court held that because Simmons was seventeen at the time of the crime, he was categorically less culpable. *Id.* at 568. In reaching the conclusion that juveniles are categorically less culpable than adults, the Court found that a categorical rule was necessary "to ensure that the mitigating force of youth was not overlooked." *Id.* at 573.

The Court expanded this categorical rule in *Graham v. Florida* to prohibit sentencing juveniles to life without parole for non-homicide offenses. – – U.S. – –, 130 S.Ct. 2011 (2010). Seventeen-year-old Terrence Graham was convicted of violating his parole for armed robbery. Less than six months after his release, he was arrested for a home invasion robbery, possessing a firearm, and associating with people engaged in criminal activity. *Id.* at 2018-19. Graham and his accomplices held a man at gun point while ransacking his home, then barricaded him in his own closet before leaving the house. *Id.* Graham attempted to commit another armed robbery later the same night, which ended in Graham trying to evade arrest, both by car and on foot. *Id.* at 2018-20. Despite Graham's continued criminal activity, the Court held that, because he was seventeen, he was categorically less deserving of the most severe punishment. *Id.* at 2027. The Court found that because Graham was a juvenile who had not committed a homicide offense, he had "twice diminished moral culpability." *Id.*

The Court further affirmed its position on the mitigating force of youth in *Miller v. Alabama*, holding that mandatory life imprisonment without the possibility of parole for juveniles convicted of homicide offenses violates the Eighth Amendment's prohibition on cruel and unusual punishment. – – U.S. – –, 132 S.Ct. 2455, 2475 (2012). The *Miller* decision jointly decided two cases involving juveniles who were given mandatory life sentences without the possibility of parole. In the first case, Kuntrell Jackson and two other boys robbed a video store. Id. at 2461. The boys entered the store and demanded that the clerk "give up the money." When

the clerk refused, one of the boys shot and killed her. *Id.* All three boys then fled empty-handed. *Id.* Jackson was charged as an adult and convicted of capital felony murder and aggravated armed robbery. *Id.*

In the second case, Evan Miller and a friend smoked marijuana and played drinking games along with a neighbor in the neighbor's trailer. *Miller*, 132 S.Ct. at 2462. The neighbor passed out, Miller took his wallet from his pocket and stole the cash inside. *Id.* When Miller attempted to put the wallet back in the neighbor's pocket, he woke up and grabbed Miller. *Id.* Miller's friend hit the neighbor with a baseball bat. *Id.* Miller then picked up the bat and repeatedly struck the neighbor, stating "I am God, I've come to take your life." The two boys later returned to the neighbor's trailer and set it on fire to cover up the crime. *Id.* Miller was charged as an adult and convicted of murder in the course of arson. *Id.* at 2463.

Despite the serious nature of these crimes, the Court held that because the offenders were juveniles, mandatory life sentences without parole violated their Eighth Amendment rights. Although the Court did not categorically prohibit life without parole sentences for juveniles, it found that when such a sentence is mandatory it is unconstitutional as applied to juveniles because it prevents the sentencing court from considering the mitigating force of youth. *Id.* at 2466.

The Court has also extended the mandatory consideration of youth as a mitigating factor beyond sentencing, holding in *J.D.B. v. North Carolina*, – – U.S. – –, 131 S.Ct. 2394 (2011), that a juvenile's age is a relevant factor that must be considered in a Miranda custody analysis. In *J.D.B.* the Court again recognized that, due to their age, juveniles are particularly vulnerable, and that the universal characteristics of youth make juveniles categorically different from adults in a variety of legal contexts. 131 S.Ct. at 2403.

As recognized by the Court in *Roper*, *Graham*, *Miller*, and *J.D.B.*, the age and concurrent level of mental development of an adolescent is, by its very nature, always at issue during any incident in the adolescent's life. *Roper*, 543 U.S. at 572; *Graham*, 130 S.Ct. at 2026; *Miller*, 132 S.Ct. at 2465; *J.D.B.*, 131 S.Ct. at 2403-04. The Court has recognized the abundance of current scientific research that incontrovertibly demonstrates that juveniles do not act with the same level of maturity, responsibility, or impulse control as adults. *Roper*, 543 U.S. at 572; *Graham*, 130 S. Ct. at 2026; *Miller*, 132 S.Ct. at 2465; *J.D.B.*, 131 S.Ct. at 2403-04. Juveniles are not fully developed cognitively, emotionally, physically, or socially, which makes them "less capable of making developmentally mature decisions than adults." Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 293 (2012). Indeed, "[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." *J.D.B.*, 131 S.Ct. at 2404 (alteration in original) (internal quotations omitted) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)).

As Chief Judge of the New York State Court of Appeals Jonathan Lippman stated:

> Treating 16- and 17- year-olds as adults flies in the face of what science tells us about adolescent development. The adolescent brain is not fully mature. Even older adolescents have a more limited ability to make reasoned judgments and engage in the kind of thinking that weighs risks and consequences in a mature fashion. The adult criminal justice system is simply not designed to address the special problems and needs of 16- and 17- year olds.

The State of the Judiciary 2012, Section I - Rethinking Juvenile Justice, 3.

As the Supreme Court has recognized, a juvenile's age must be a categorically mitigating factor when decisions are made that affect his or her constitutional rights. "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*, 132 S.Ct. at 2462 (quoting *Graham*,

130 S. Ct. at 2031). It follows that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S.Ct. at 2466. However, that is exactly what happened here.

The hearing officer sentenced Cookhorne to four years of punitive isolation, the most severe penalty available in New York State prisons, without considering Cookhorne's young age as a per se mitigating factor. It is apparent that Cookhorne's youth was not taken into account because his sentence of four years of punitive isolation, with four years loss of commissary, phones, packages, and good time, would have been extreme even if it were imposed on an adult prisoner. Cookhorne's sentence is over five times longer than DOCCS' Guidelines for Disciplinary Dispositions, which were developed for adult prisoners. (Pet. Ex. S.)

The evidence provided at the hearing revealed Cookhorne's youth. Eyewitness Faison pointed to Cookhorne's youth when he described the sequence of events that he observed, noting that Cookhorne did not seem to understand the severity of the situation and that he was just "a young kid." (Pet'r's Tr. 17:35). The DOCCS staff who responded after the incident also noted that Cookhorne was found hiding underneath his bed. All accounts of the incident show that Cookhorne behaved as an adolescent, like a typical teenager who questions authority, acts impulsively, makes immature decisions and has a greater sensitivity to invasions of his privacy. Levick, *The Eighth Amendment Evolves*, 15 U. Pa. J. L. & Soc. Change at 293-96.

Further, Albert Prack, Director of Special Housing/Inmate Disciplinary Program, stated in his response to counsel's Request for Reconsideration that "the Department is mindful of his age and will carefully weigh that factor at the appropriate time as part of the review process." (Pet. Ex. R). The crucial and necessary time to have considered the weight of Cookhorne's youth was at the Tier III hearing and before the disposition, not at some unspecified time in the

future, if at all. This is important because unlike a juvenile criminal defendant who has a right to counsel and who can only be convicted upon proof beyond a reasonable doubt, a juvenile in a New York State adult correctional facility has no right to counsel or representation of any kind at a Tier III hearing where the standard of proof is substantial evidence, a much lower standard.

The Supreme Court's prevailing juvenile justice jurisprudence and common sense require that a juvenile's age be taken into account when determining a punishment. Respondent's failure to consider Cookhorne's age as a per se mitigating factor, both before the disposition and on administrative Appeal to the Commissioner, lacks sound basis in reason, disregards the immutable fact of Cookhorne's age, and contravenes the law. Accordingly, the disposition was arbitrary and capricious.

POINT III

The Tier III Disciplinary Disposition Sentencing Cookhorne to Four Yeara of Punitive Isolation in the Special Housing Unit with Four Years of Loss of Phones, Commissary, Packages and Good Time Is an Abuse of Discretion Because It Is So Excessive It Shocks the Conscience.

The categorical rules relating to the diminished culpability of juveniles created by the *Roper* and *Graham* decisions are based on the Court's finding that irresponsible juvenile misconduct is not as morally reprehensible as the same conduct when engaged in by an adult, *Roper*, 543 U.S. at 570, and that juveniles are thus less deserving of the most severe punishments. *Graham*, 130 S.Ct. at 2026. The Court recognized that the concept of proportionality is central to an Eighth Amendment analysis of whether a punishment is cruel and unusual. *Id.* at 2021. A proportionality analysis "requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics." *Id.* at 2026. Because juveniles are categorically less culpable, their age weighs in favor of a less severe punishment.

Accordingly, whether an offender is a juvenile plays a critical role in considering the proportionality of a sentence. *Miller*, 132 S.Ct. at 2466.

The same proportionality analysis is equally central to judicial review of Cookhorne's Tier III disciplinary disposition. A penalty cannot be upheld where it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *Pell*, 34 N.Y.2d at 233 (internal citation omitted). An administrative sanction "must be upheld unless it shocks the judicial conscience, and, therefore constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

The hearing officer not only failed to consider the mitigating force of Cookhorne's youth but also sentenced Cookhorne to disciplinary sanctions which would be excessive for an adult inmate and are grossly disproportionate to the alleged offense. The incident between Cookhorne and CO Ambrose did not involve a weapon, nor did either party endure any serious injury. (Pet. Ex. D.) DOCCS' Guidelines for Disciplinary Dispositions lists dispositions of 3 to 9 months' confinement time and 3 to 6 months' loss of good time for assault without a weapon with minor injuries, and 9 to 18 months' confinement time and loss of good time for assault without a weapon with serious injuries. (Pet. Ex. S). The disposition is over five times harsher than DOCCS own disciplinary guidelines for sanctioning adult prisoners. "Where the Department of Correctional Services fails to comply with its own regulations in arriving at an administrative determination, that determination cannot stand." *Peralta v. Artuz*, 272 A.D.2d 330, 331, (2d Dep't 2000). Cookhorne's disposition so far exceeds the disciplinary guidelines as to render the decision shocking to one's sense of fairness and is an abuse of discretion. *Featherstone*, 95 N.Y.2d at 554.

Cookhorne's disposition is also excessive because juveniles subjectively experience any given duration of confinement as longer than it is because of how they experience time. *See* David E. Arredondo, *Principles of Child Development and Juvenile Justice, Information for Decision-Makers*, 5 J. Ctr. Families, Child. & Cts. 127, 131 (2004). This is one of many reasons why lengthy confinement in SHU is much more harmful to youth like Cookhorne. His disposition is approximately one-quarter of his lifetime. Additionally, Cookhorne has already been in isolated confinement for close to a year. This is an "atypical and significant hardship . . in relation to the ordinary incidents of prison life" under *Sandin v. Conner,* 515 U.S. 472, 486 (1995). It meets the durational threshold for a protected liberty interest of 305 days in New York under *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000).

Also critical to an Eighth Amendment proportionality analysis is an assessment of the penological justifications for imposing the particular sentence because "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore unconstitutional. *Graham*, 130 S.Ct. at 2028. Sentencing Cookhorne to four years in SHU is not justified by any of the legitimate goals of penal sanctions—retribution, deterrence, rehabilitation, and incapacitation. It serves no useful purpose. "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentence on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2465.

Retribution is justified in relation to the offender's blameworthiness. The argument for retribution is much weaker with respect to juveniles because "culpability or blameworthiness is diminished to a substantial degree by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

The adolescent characteristics that make juveniles less culpable than adults also make them "less susceptible to deterrence." *Id.* Juveniles' immaturity, lack of impulse control, and

"underdeveloped sense of responsibility" makes them less likely to consider possible punishment when they make decisions. *Graham*, 130 S.Ct. at 2028-29 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

The same characteristics of youth that make juveniles less morally culpable also enhance their ability to rehabilitate. *Roper*, 543 U.S. at 570. Juveniles' capacity to change is exactly why the courts have found that rehabilitation should be the primary goal of punishment for minors. *Graham*, 130 S.Ct. at 2030. Overwhelming research shows that prisoners in punitive isolation deteriorate, they do not rehabilitate. *See generally*, Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325. Because Cookhorne's disposition of four years of punitive isolation is longer than the maximum duration of his underlying sentence, it deprives him of any opportunity to rehabilitate during his term of incarceration.

Indeed, Cookhorne will be released directly from SHU to society. The re-entry and adjustment difficulties experienced by prisoners who are released directly from SHU into society pose significant challenges and threats to both the prisoners and the public. "[T]he Commission on Safety and Abuse in America's Prisons recently found, 'the overreliance on and inappropriate use of segregation hurts individual prisoners and officers. But the consequences are broader than that: The misuse of segregation works against the process of rehabilitating people and threatens public safety.'" *Peoples v. Fischer*, 2012 WL 2402593, at *1 (S.D.N.Y. June 26, 2012). *See also* New York Civil Liberties Union, *Boxed In: The True Cost of Extreme Isolation in New York's Prisons*, 27-42 (2012), (Appendix at Item 1.)

Finally,"[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 130 S.Ct. at 2029. Cookhorne's disposition does just that. It incapacitates him without a meaningful opportunity

to rehabilitate and without regard to his physical and mental health. No recognized penological goal justifies punishing Cookhorne to four years in punitive isolation, with concurrent deprivations. Therefore, the disposition is disproportionate to the offense and excessive. *Id.* at 2028.

DOCCS argues that its SHU Progressive Inmate Movement policy (PIMS) cures the excessiveness of Cookhorne's sentence to the SHU. It does not. Pursuant to the PIMS policy, and assuming the absolute best case scenario, Cookhorne will remain in SHU for a minimum of three years, and will be released directly from SHU on his maximum expiration date. This best case scenario is equally excessive for all of the same reasons set forth above. Cookhorne's sentence is not merely excessive in light of the particular circumstances of his case. It is excessive because, as Cookhorne argues below, punishing juveniles with solitary confinement violates the Eighth Amendment's prohibition against cruel and unusual punishment.

POINT IV

The Appropriate Remedy Is Reversal and Expungement Because the Tier III Disposition Violates Cookhorne's Constitutional Rights.

Where a disciplinary disposition constitutes a violation of a constitutional right, the appropriate remedy is reversal and expungement. *See Rosario v. Selsky*, 162 A.D.2d 939 (3d Dep't 1990) (finding that a "violation of constitutional rights necessitates dismissal of the charges upon which the hearing was held and expungement of the tainted proceedings"). Similarly, where a disposition is not supported by substantial evidence it must be reversed and expunged. *Hartje v. Coughlin*, 70 N.Y.2d 866; *Matter of Wynter v. Jones*, 135 A.D.2d 1032, 1033-34. Other equitable considerations also require expungement of the record rather than

remittal for further proceedings. *Matter of Williams v. Coughlin*, 145 A.D.2d 771, 773 (holding that "a rehearing is inappropriate where an inmate has served a substantial portion of his penalty").

This case meets all of the above-mentioned requirements necessitating reversal and expungement. The disposition was not supported by substantial evidence. Cookhorne's constitutional rights were violated because it is cruel and unusual punishment to confine Cookhorne in punitive isolation for four years. Both constitutional violations and equitable considerations require reversal and expungement.

PURSUANT TO A DECLARATORY JUDGMENT

POINT V

Punitive Isolation of Sixteen- and Seventeen- Year-Olds in the Special Housing Unit Violates the Federal and New York State Constitutional Prohibitions on Cruel and Unusual Punishment Because It Violates Evolving Standards of Decency and Is Deliberately Indifferent to Their Medical and Mental Health Needs

a. Punitive Isolation of Sixteen- and Seventeen- Year-Olds Is Cruel and Unusual Punishment Because It Violates Evolving Standards of Decency.

The determination of whether a punishment is cruel and unusual is based on "evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). Evolving standards of decency are derived from "objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia*, 428 U.S. at 153, 173.

As previously discussed, the Supreme Court's juvenile justice jurisprudence regarding sentencing recognizes that evolving standards of decency demonstrate both a national and international consensus against the death penalty and life without parole for non-homicide and homicide juvenile offenders. The Court considered the objective indicia of society's standards in relation to the sentencing of juveniles. It looked to scientific research and findings regarding the psychological and physical development of adolescents, legislative enactments and state practices, and international treaties and standards related to the punishment of juveniles in determining whether a certain punishment violated a juvenile's the Eighth Amendment right to be free from cruel and unusual punishment.

As set forth in POINTS II and III, the Court recognized the constitutional relevance of adolescent development and traits in *Roper*, *Graham*, and *Miller*, in reaching its conclusions that the imposition on juveniles of the most severe criminal sentences constitutes cruel and unusual punishment. *See generally*, *Roper*, 543 U.S. 551, *Graham*, 130 S.Ct. 2011, and *Miller*, 132 S.Ct. 2455. The Court's analysis relied on the growing body of settled research relating to the developmental differences between juveniles and adults. *Id.* The Court's analysis in its juvenile sentencing cases applies equally to a state's punitive use of the isolated confinement of juveniles in adult prisons as it the most severe sentence a prisoner can receive for a violation of prison rules.

The bulk of current scientific research demonstrates that juveniles do not have the same biological capacity for impulse control as adults. *See*, David E. Arredondo, M.D., *Principles of Child Development and Juvenile Justice, Information for Decision-Makers*, 5 J. Ctr. for Families, Child. & Cts. 127, 129 (2004). *See also*, Tracy Rightmer, *Arrested Development: Juveniles Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L.J. 1 (2005).

This is because their brains are physiologically different from those of adults. *Id.* Consequently, adolescents process thoughts, feelings, and information in qualitatively different ways than adults and they are psychologically very different from adults. *Id.* at 15.

Adolescence is an intense period of rapid development culminating in identity formation and social integration. The brain's frontal lobe is continually developing throughout adolescence. *Id.* at 12. Because juveniles lack a developed frontal lobe, they tend to process emotional decisions in the limbic system, the part of the brain charged with instinctive reactions. *Arredondo* at 129. By comparison, an adult's fully developed frontal lobe is typically able to curb instinctive impulses coming from other parts of the brain such as the limbic system. Rightmer, *Arrested Development*, 9 Quinnipiac Health L.J. at 14. The same is not true for juveniles. *Id.* As such, normal juveniles cannot be expected to operate with the level of maturity, judgment, risk aversion or impulse control of an adult. *Id.* at 15. This is particularly true in stressful situations where juvenile brain circuitry is not sufficiently established to sustain adult-level cognitive control of behavior in the face of heightened states of affect or motivation. *Id.*

Additionally, extensive research by developmental experts shows that "the most critical part of the brain develops 95 percent of its capacity in adolescence – it doesn't even begin to develop until you hit 11 or 12, and it doesn't finish until you're 19 or 20." *Roper*, Amicus Curiae Brief of the Coalition for Juvenile Justice, 8-12 (internal citations omitted). Placing juveniles in punitive isolation effectively prohibits proper brain development during this critical stage.

The Court's reasoning in *Roper*, *Graham* and *Miller*, all cases in which, like Cookhorne, juveniles were sentenced as adults, directly applies to Eighth Amendment analyses of the

treatment and conditions of confinement of juveniles within adult correctional facilities. Regardless of whether a sixteen- or seventeen-year-old is sent to adult prison charged as an adult or as a youthful offender he is still a juvenile, and his age, an immutable fact, must nevertheless inform any disciplinary sanction he receives while incarcerated. A sixteen- or seventeen-year-old's age is not less relevant to sentencing and punishment simply because he or she is incarcerated.

Objective indicia of society's standards demonstrate a national trend against the punitive confinement of juveniles. New York State prohibits the solitary confinement of juveniles housed in Office of Child and Family Services (OCFS) juvenile detention facilities. 9 NYCRR 180.9(c)(10)(iii), (Pet. Ex. T.) In very limited circumstances, room confinement may be used when a youth poses a serious and evident danger to himself or herself or others, but never for punishment. 9 NYCRR 180.9(c)(11). Additionally, a review of the necessity for continued confinement of each child shall be made at least one time in each 24-hour period, by the head of the institution or designee, to effectuate the return of the child to the regular program as soon as the child is no longer a danger to himself/herself or to others. 9 NYCRR 180.9(c)(11)(ii). However, if this same youth is in the custody of DOCCS he or she can be punished with an unlimited number of years in solitary confinement. 7 NYCRR 254.6.

The American Correctional Association standards for juvenile detention facilities limit the isolation of juveniles to a maximum of five days when the youth presents a danger to self or others and requires that the youth be checked visually by staff every fifteen minutes. *See* American Correctional Association, *Standards for Juvenile Detention Facilities*, 3d ed. (Latham, MD: ACA, 1991), 67-68. (Pet. Ex. V.)

As Steven H. Rosenbaum, Chief of the Special Litigation Section of the United States Department of Justice, Civil Rights Division remarked:

> The wholesale adoption of many adult practices without taking adequate account of the relevant differences between adults and adolescents, has often resulted in operational difficulties and violations of juvenile's federal rights. The use of extended isolation as a method of behavior control, for example, is an import from the adult system that has proven both harmful and counterproductive when applied to juveniles. It too often leads to increased incidents of depression and self-mutilation among isolated juveniles, while also exacerbating their behavior problems.

Fourteenth Annual National Juvenile Corrections and Detention Forum at Long Beach, California, May 16, 1999 (Remarks of Steven H. Rosenbaum, Chief, Special Litigation Unit, Civil Rights Division, United States Department of Justice).

The American Academy of Child and Adolescent Psychiatry opposes the use of solitary confinement for juveniles due to their developmental vulnerability and the well-known psychiatric consequences of prolonged isolation in solitary confinement. American Academy of Child and Adolescent Psychiatry, *Policy Statement: Solitary Confinement of Juvenile Offenders* (April 2012). (Pet. Ex. W.)

The growing trend against punishing juveniles with isolated confinement has been officially embraced by at least seven states: "Connecticut, Arizona, Maine, Oklahoma, West Virginia, Missouri, and Alaska prohibit the use of isolation for youth as punishment." Statement of Ella Baker Center for Human Rights Books Not Bars Campaign, to *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences* Hearing before the Subcomm. on the Constitution, Civil & Human Rights, of the Senate Comm. on the Judiciary, (June 19, 2012). A class action lawsuit resulted in a complete ban on the use of solitary confinement of juveniles in both juvenile and adult correctional facilities in Mississippi. *See C.B. v. Walnut Grove Correctional Authority*, Case No. 3:10-cv-663 (S.D. Miss. 2010) (Consent

Decree). (Pet. Ex. U.) In Montana a settlement agreement was reached mandating strict new policies severely limiting the use of solitary confinement for juveniles. *Katka v. State of Montana*, Case No. BDV 2009-1163 (Montana 1st Judicial Dist. Crt., Lewis & Clark Cty.) (Settlement Agreement).

There is also widespread international consensus against the solitary confinement of juveniles. The Supreme Court has recognized the significance of customary international law in interpreting the Eighth Amendment's prohibition of cruel and unusual punishments. *See Graham*, 130 S.Ct. at 2034 (noting the overwhelming weight of international opinion against life without parole for non-homicide offenses committed by juveniles); *Roper*, 543 U.S. at 554 (noting the overwhelming weight of international opinion against the juvenile death penalty); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (noting the virtual unanimity within the international community that statelessness not be imposed as punishment to support its holding that denationalization constitutes cruel and unusual punishment).

The practice of imposing solitary confinement on juveniles violates customary international law and international treaties including the Convention on the Rights of the Child (CRC). Customary international law is that "which results from a general and consistent practice of states followed by them from a sense of legal obligations." Restatement (Third) of Foreign Relations §102(2) (1987). The prohibition against the solitary confinement of juveniles is a customary practice as well as international law under the CRC, ratified by all countries except the United States and Somalia. *United Nations Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). Article 37 of the CRC provides, in part, "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment . . ." and "Every child deprived of liberty shall be treated with humanity and respect

for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."

The United Nations Committee on the Rights of the Child, the treaty body that monitors compliance with the CRC, has interpreted Article 37 to preclude the use of solitary confinement but for "very exceptional cases" and has otherwise mandated abolition of the practice. *Report of the Committee on the Rights of the Child*, U.N. Doc. CRC/C/15/Add.273, ¶ 58, a-b (Sept. 30, 2005). This has particular force since the CRC has been ratified by nearly every nation. This lead the Court to conclude in both *Roper* and *Graham* that "'the United States now stands alone in a world that has turned its face against' [the death penalty and] life without parole for juvenile nonhomicide offenders." *Graham*, 130 S.Ct. at 2034 (quoting *Roper*, 543 U.S. at 577).

Moreover, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly, strictly prohibit placement in "closed or solitary confinement" as a form of cruel, inhuman, or degrading treatment. G.A. Res. 45/113, ¶ 67, U.N. Doc. A/RES/45/113 (Dec. 14, 1990). The Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also called for a complete ban on the use of punitive solitary confinement of juveniles. U.N. GAOR, 66th Sess., 1st & 2nd mtgs., GA/SHC/4014 (Oct. 18, 2011).

Regional human rights institutions, especially the Inter-American Commission on Human Rights (IACHR), have also condemned the imposition of solitary confinement on juveniles. The IACHR is a permanent body of the Organization of American States (OAS) that is responsible for adopting human rights standards for member states. The IACHR has interpreted the American Declaration of the Rights and Duties of Man, which the United States has ratified, to strictly forbid the imposition of solitary confinement on children deprived of liberty. *Principles*

and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII(3), OEA/Ser/L/V/II.131 doc. 26 (March 14, 2008).

The international consensus against juvenile solitary confinement is demonstrated by the near unanimous ratification of the CRC, the unequivocal positions of the Committee on the Rights of the Child and the United Nations General Assembly regarding the scope of the CRC, and the categorical prohibition against juvenile solitary confinement adopted by the Inter-American Commission on Human Rights. Such an international consensus strongly supports the finding that punitive isolation of juveniles in SHU is a violation of the Eighth Amendment.

The categorical prohibitions on placing juveniles in solitary confinement are in place because the major national correctional organization in the U.S., the scientific and medical community, the ABA, states' lawmakers, numerous criminal justice organizations, and the international community recognize the unique physical and psychological developmental stage of juveniles, their concurrent needs, and the permanent and unnecessary damage done to them if placed in solitary confinement. Therefore, the punitive isolation of sixteen- and seventeen-year-olds in SHU violates evolving standards of decency and is cruel and unusual punishment in violation of both the Federal and New York State Constitutions.

i. The Punitive Confinement of Paul Cookhorne To Four Years in the Special Housing Unit With Four Years Loss of Phones, Packages, Commissary and Good Time Violates Evolving Standards of Decency and Is So Disproportionate To the Alleged Offense that It Is Unconstitutional

Cookhorne's sentence of four years in SHU with concurrent deprivations violates evolving standards of decency, as set forth in POINT IV, and is grossly disproportionate to the alleged offense as set forth in POINTS II and III. A proportionality analysis requires

consideration of the culpability of the offender in light of their crime and characteristics, along with the severity of the punishment imposed. *Graham*, 130 S.Ct. at 2026.

Here, Cookhorne's age, the circumstances of the allegations against him, the alleged rule violations, and the disposition must be considered. Cookhorne was seventeen when he allegedly violated prison disciplinary rules, (Pet. 1). As previously set forth, his age is a per se mitigating factor that must be considered in determining an appropriate punishment and his age prohibits the most severe punishments. The alleged rule violations included typical adolescent behavior such as questioning authority and answering back, as well as an alleged impulsive assault on a corrections officer which resulted in minor injuries. (Pet. Ex. E, 4.) Yet, Cookhorne was held to the same standard as adult prisoners and received a punishment that far exceeded DOCCS Guidelines for Disciplinary Dispositions, which were meant for adults. (Pet. Ex. S.)

Cookhorne will mentally suffer and physically languish in a small cell twenty-three hours per day for approximately one-quarter of his lifetime with no phones, packages or commissary. The deprivations that are in place mean Cookhorne cannot speak on the phone to his parents, family members or friends. He cannot receive any gifts or goods, including food, from family or friends and he cannot buy additional food for his teenage appetite and personal hygiene items from commissary. His disposition violates evolving standards of decency, is grossly disproportionate to the offense and constitutes cruel and unusual punishment in violation of both the U.S. and New York State constitutions.

b. The Punitive Isolation of Sixteen and Seventeen Year-Olds Is Cruel and Unusual Punishment Because It Is Deliberately Indifferent to Their Medical and Mental Health Needs.

Deliberate indifference to serious medical needs also constitutes a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104(1976). An Eighth Amendment violation is proven when an inmate demonstrates that he has been subjected to a sufficiently serious condition of confinement, the objective test, and that prison officials acted with deliberate indifference, the subjective test. *Farmer v. Brennan*, 511 U.S 825, 825-27 (1994). Conditions of confinement violating contemporary standards of decency meet the sufficiently serious objective test of an Eighth Amendment violation. *Phelps v. Kapnolas*, 308 F.3d 180 (2d Cir. 2002). As set forth in POINTS II, III, and V, solitary confinement of juveniles violates contemporary standards of decency and thus meets the sufficiently serious, objective prong of the test for an Eighth Amendment violation.

Regarding the subjective test, DOCCS is definitely aware of the abundance of scientific research and contemporary standards opposing the placement of juveniles in punitive isolation. DOCCS is also aware that in recognition of the physical and psychological damage that can be done to juveniles New York State prohibits the punitive confinement of juveniles in facilities operated by NYS-OCFS. *See* Human Rights Watch and American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* 38 (2012). (Appendix at Item 2, p. 38.)

Adolescents need at least an hour of daily exercise in order for their muscles, bones, and cardiopulmonary systems to properly develop. Their daily exercise should include aerobic activity and muscle and bone strengthening activity such as brisk walking or vigorous-intensity activity such as running, and sports such as basketball.

Regarding their emotional and social development, "[y]outh is more than [a] chronological fact. It is a time and condition of life when a person may be the most susceptible

to influence and to psychological damage." *Roper*, 543 U.S. at 569 (citing *Eddings*, 455 U.S. at 115). In fact, the developmental deficiencies of juveniles are comparable to that of the mentally disabled. *Roper*, Amicus Curiae Brief of the Coalition for Juvenile Justice, 8-12. New York State has recognized the special needs of mentally ill inmates through legislation which generally excludes them from being housed in SHU. *See* N.Y. Correct. Law § 2.23; N.Y. Correct. Law § 137.6(d)(ii)(E); N.Y. Correct. Law § 401-a.

DOCCS is also aware of the widely publicized and harmful physiological and psychological effects of solitary confinement which include: "(1) hypersensitivity to external stimuli; (2) perceptual distortions and hallucinations; (3) increased anxiety and nervousness; (4) revenge fantasies, rage, and irrational anger; (5) fears of persecution; (6) lack of impulse control; (7) claustrophobia; (8) severe and chronic depression; (9) appetite loss and weight loss; (10) heart palpitations; (11) withdrawal; (12) blunting of affect and apathy; (13) talking to oneself; (14) headaches; (15) problems sleeping; (16) confusing thought processes; (17) nightmares; (18) dizziness; (19) self-mutilation; and (20) lower levels of brain function, including a decline in EEG activity. EEG changes were observed after only seven days in solitary confinement. *Written Statement Submitted by the American Civil Liberties Union, a Non-Government Organization in Special Consultative Status*, UNHRC 19th session, UN Doc. No. A/HRC/19/NGO/31 (Feb. 10, 2012). This report also concluded that "no study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects." *Id.*

These profoundly harmful effects have an even more destructive impact on juveniles because they are still developing their physical and mental capacities. Consequently, they are not only more susceptible to these detrimental effects but are also less able to deal with them.

This is evidenced by the alarming rate at which juveniles commit suicide in solitary confinement. "A seminal juvenile justice study found that 62% of juveniles who committed suicide while incarcerated had a history of isolation before their death, and 50% were on isolation status at the time of their death." *Id.* (*citing* Lindsay M. Hayes, Nat'l Ctr. On Institutions and Alternatives, *Juvenile Suicide in Confinement: A National Survey*, 40 (2004)).

In addition to the irreparable physical and mental harm that punitive confinement in SHU causes sixteen- and seventeen-year-olds, such confinement also deprives them of any sort of activities which promote social development, another critical aspect of adolescent growth. An adolescent in SHU is deprived of all group activities and programs, including religious congregate services, vocational training, school classes, team sports such as basketball or baseball, and group counseling.

DOCCS' placement of sixteen- and seventeen-year-olds in punitive isolation in SHU meets both the objective and subjective tests of an Eighth Amendment violation and is deliberately indifferent to their medical and mental health needs.

i. The Punitive Isolation of Paul Cookhorne to Four Years in the Special Housing Unit with Four Years Loss of Phones, Packages, Commissary and Good Time Is Deliberately Indifferent to His Medical and Mental Health Needs.

DOCCS is aware that Paul Cookhorne's continuing developmental needs are physical, psychological and social. He requires sufficient exercise and recreational activity, fresh air, stimulation, and normal, human social interaction so that he can healthily mature and develop to his natural potential. DOCCS is also aware that he is being deprived of an appropriate education, access to religious services, access to vocational training, phone calls with his family and

packages from home, and commissary food items to supplement his teenage appetite. DOCCS knows that these deprivations are causing him physical and psychological harm and exposing him to a high risk of irreversible damage. *See* New York Civil Liberties Union, *Boxed In: The True Cost of Extreme Isolation in New York's Prisons*, 27-42 (2012). (Appendix at Item 1, p. 27.)

Cookhorne has advised counsel that he is feeling depressed due to his being in his cell all day long, that he feels weak because he has been denied recreation, and that he cannot work out in his cell like he wants to because he was behind plexiglass with hardly any air circulation in his cell which makes him get dizzy quickly. He also advised counsel he was having trouble sleeping. (Pet'r's Reply, 8 ¶ 22.)

Additionally, despite the fact that Respondent claims that SHU cell mates are screened for compatibility, (Answer Ex. J, ¶ 15), Cookhorne advised counsel that he was afraid of his cell mate, who was a thirty year-old prisoner with mental health issues who was not receiving mental health care, had never been double-bunked before, and was not adjusting well to being double-bunked. (Pet'r's Reply, 8 ¶ 22.) It wasn't until counsel submitted Petitioner's Request for Reconsideration that Cookhorne was eventually moved to another cell with a different cell mate. (Id.) Counsel remains deeply concerned that he is suffering from the deteriorating effects of almost one year in punitive isolation in SHU.

Cookhorne is a teenager who, like all teenagers, holds great promise for maturing into a responsible and caring young man. He needs guidance and a social routine that includes study, work, recreation and the ability to take part in religious services with others so that he can grow, learn and develop healthy self-esteem and social skills. He has already spent close to a year suffering in punitive confinement in SHU while being deprived of the basic necessities every

youth needs. He disposition of four years in punitive isolation meets both the objective and subjective tests of an Eighth Amendment violation as it is deliberately indifferent to Cookhorne's medical and mental health needs.

POINT VI

Respondent's Regulation, 7 NYCRR § 254.6, Is Unconstitutional As Applied to Sixteen- and Seventeen-Year-Old Prisoners In Adult Correctional Facilities Because It Lacks A Requirement That Their Age Be Considered a Per Se Mitigating In Disciplinary Proceedings and It Lacks a Prohibition on Their Punitive Isolation in the Special Housing Unit.

Respondent's regulation, 7 NYCRR § 254.6, permits the unlimited punitive confinement of sixteen and seventeen year-olds in SHU. There is no requirement that a juvenile's age be considered a categorically mitigating factor and no prohibition on punitive isolation for sixteen- and seventeen-year-olds.

DOCCS argues that there need not be a formal record regarding the characteristics of youth because the approximate age of an inmate is self-evident from his or her appearance or can be ascertained with exactitude from the inmate's file. (Answer Ex. J, 4, ¶ 12.) DOCCS also argues that it is common knowledge that young people can be immature, impulsive and lack self-control. (Id.) DOCCS states that Cookhorne's age was made the specific focus of the Office's deliberations after it received Counsel's Supplemental Appeal but that the alleged violence against a corrections officer militated in favor of lengthy confinement in SHU in order to minimize risk to staff and other inmates. (Answer Ex. J, 4, ¶ 13.) Yet, Cookhorne was placed in a double-cell in SHU with another inmate. This placement contradicts DOCCS assertion that the reason he was placed in SHU was because he posed a risk to others.

DOCCS also argues that punitive isolation in SHU is not comparable to the death penalty or life without parole. (Answer Ex. J, 5, ¶ 14.) To the contrary, because solitary confinement is

the most severe punishment available in New York State prisons, it is comparable to the most severe punishments at criminal sentencing, especially for juveniles. It is noteworthy that "extensive research by mental health and medical professionals has shown that solitary confinement of adults is the most extreme form of criminal punishment besides death, and only should be used in the most limited of circumstances." *Statement of the Pacific Juvenile Defender Center*, Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the Senate Judiciary Comm. (2012). Punitive confinement in SHU is further comparable to life without parole and the death penalty because it also constitutes cruel and unusual punishment when applied to juveniles. As set forth in POINTS II, III, IV, V and VI, it is excessive, violates evolving standards of decency, and is deliberately indifferent to their medical and mental health needs.

DOCCS also states that Cookhorne can earn a time cut from SHU confinement under the PIMS policy, which does not consider age as a mitigating factor. (Answer Ex. J, 5, ¶ 14.) Even in the best case scenario of this policy Cookhorne will serve his entire three year prison sentence in SHU. (Pet'r's Reply, 7 ¶20.) See POINT III for further discussion. Additionally, the policy is not relevant to an Eighth Amendment analysis because it relates to conditions after the violation occurs. In Cookhorne's case, it does not affect his disposition at all.

DOCCS regularly places juveniles in double-bunk SHU cells. DOCCS attempts to diminish the severity of SHU conditions by pointing out that Cookhorne is double-bunked at Upstate Correctional Facility. (Pet'r's Reply, 7-8 ¶¶ 21-22.) However, double-bunking creates additional problems for juveniles who are vulnerable and have an increased need for privacy. Not only are they subject to the same extreme deprivations of solitary punitive isolation,

"double-celled prisoners must also endure the constant, unabating presence of another man in their personal physical and mental space." (See Appendix at Item 1, p.34.) Because juveniles are an extremely small minority population within DOCCS, it is highly likely that they will be housed with an incompatible, older adult.

In arguing for the punitive confinement of juveniles to SHU, DOCCS states that if inmates less than eighteen years old of age could not receive SHU sanctions then juveniles would be recruited or strong-armed by other inmates to commit assaults or other serious infractions. DOCCS also justifies placing juveniles in SHU because "the special treatment afforded the younger inmates would engender resentment in older inmates." (Answer Ex. J, 6 ¶ 16.)

These arguments, which are speculative, are admissions by DOCCS that the agency is placing juveniles in danger by housing them with adults while justifying placing juveniles in SHU in order to protect them from adults. (Pet'r's Reply, 8 ¶ 23.) DOCCS essentially argues that a juvenile's age can be used against them in determining punishment, the very opposite of what the Supreme Court's jurisprudence and evolving standards of decency require. The prohibition of punitive solitary confinement for juveniles is "fair" treatment, not "special treatment". While unresponsive to an allegation of an Eighth Amendment violation, DOCCS' arguments highlight that 7 NYCRR § 254.6 is unconstitutional as applied to sixteen and seventeen year olds because it does not protect them from cruel and unusual punishments.

DOCCS states that Cookhorne was tried as an adult, does not have Youthful Offender ("YO") status, and was committed to DOCCS, not a facility operated by the Office of Child and Family Services. (Answer Ex. J, 6 ¶ 17.) This argument is misplaced and not relevant to an Eighth Amendment analysis. New York State law mandates that, as a seventeen-year-old, and

whether or not he was given YO status, Cookhorne was to be tried in adult court with any sentence to be served in DOCCS custody. Penal Law §30.00.

DOCCS implies that YO's are treated differently for disciplinary purposes because of their status. To the contrary, sixteen- and seventeen-year-olds with and without YO status are regularly, and disproportionately, sentenced to punitive confinement in SHU. DOCCS punitively confines nearly twice the percentage of its sixteen-, seventeen- and eighteen-year-olds in SHU than it does its adult population. Sixteen-, seventeen- and eighteen-year-olds are approximately 1.2% of the total NYS prison population yet make up 1.9% of the SHU population. As of January 1, 2012, 83 out of 653 of the sixteen-, seventeen-, and eighteen-year-olds in DOCCS custody, 12.7%, are confined in SHU. Additionally, 4,216 out of 55,090 nineteen-year-olds and older, 7.7%, are confined to SHU. Sixteen-, seventeen- and eighteen-year-olds are being disproportionately confined to the SHU and they have a one in eight chance of being punitively confined to SHU whereas prisoners who are nineteen or older have a one in thirteen chance of being punitively confined to SHU. (*See* Appendix - Item 1 at p. 22; Appendix - Item 3, New York State Department of Corrections and Community Supervision, *Table 6, Current Age By Offender Gender Undercustody Population January 1, 2012* (obtained by counsel through NYS-FOIL from NYS-DOCCS.)

Respondent's regulations do not require that the age of sixteen- and seventeen-year-olds is a categorically mitigating factor when determining Tier III hearing dispositions. "There is no prohibition in state law or NY DOCCS policies or regulations against holding young people in solitary confinement in New York prisons. Young people under age 18 in NY DOCCS facilities are subjected to the same disciplinary rules as adults." (*See* Appendix - Item 2 at p. 131, Footnote 356. Peter Cutler, Director of Public Information, NY DOCCS.)

The fact many jurisdictions do not expressly prohibit the sentencing practices at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. *Graham* 130 S.Ct. at 2025-26. Likewise, the fact that 7 NYCRR § 254.6 does not prohibit the punitive isolation of juveniles or require categorical mitigation of their disciplinary hearing dispositions does not mean the NYS legislature has deliberately concluded that this practice is appropriate.

Moreover, the defendants in *Roper*, *Graham*, *J.D.B.* and *Miller* were all tried and sentenced as adults in similarity with Cookhorne. Absent a regulatory requirement that the age of sixteen- and seventeen-year-olds is a categorically mitigating factor in the determination of disciplinary punishments and a prohibition on placing them in isolated confinement, DOCCS regulations are unconstitutional as applied to juveniles. The fact that youth in DOCCS facilities are disproportionately sentenced to isolated confinement in SHU highlights the unconstitutionality of 7 NYCRR § 254.6 when applied to them.

CONCLUSION

Pursuant to Article 78, seventeen-year-old Paul Cookhorne argues that his Tier III hearing disposition of four years of punitive isolation in the SHU with concurrent deprivations lacks substantial evidence. He also argues that it is arbitrary and capricious because his age was not considered as a per se mitigating factor and that it is an abuse of discretion because it is excessive.

The relief from the Court he is requesting pursuant to Article 78 is an order, 1) vacating and setting aside the disposition of Cookhorne's Tier III hearing, and the affirmation of such disposition by DOCCS ; 2) ordering DOCCS, or whomever else shall have care and custody of the Cookhorne's records to expunge all entries of such Tier III hearing, and the disposition thereof, from all of his records, including but not limited to his disciplinary record, service unit files, temporary release committee files, and from all reports submitted by DOCCS and/or his employees and agents to the New York State Parole Board; 3) restoring Cookhorne in all respects to the status he enjoyed prior to the commencement of the Tier III hearing, including removal of Cookhorne's status as a Central Monitoring Case (CMC); 4) ordering DOCCS to file with the Court a sworn statement setting forth in specific detail what measures it has taken to expunge Cookhorne's records; 5) ordering DOCCS to pay Cookhorne's attorney's fees pursuant to the New York State Equal Access to Justice Act, codified at CPLR §8600, et.seq.

Pursuant to a Request for a Declaratory Judgment, Cookhorne argues that the punitive isolation of sixteen- and seventeen- year olds in the custody of NYS-DOCCS and housed in adult prisons violates both the Eighth Amendment of the U.S. Constitution and Article 1, Section 5 New York State Constitution. Cookhorne also argues that his confinement in SHU violates his Federal and State rights to be free from cruel and unusual punishment.

Cookhorne also argues that 7 NYCRR 254.6 is unconstitutional as applied to sixteen- and seventeen-year-olds because it lacks a requirement that their age be considered a per se mitigating factor in disciplinary proceedings and also lacks a prohibition on their placement in punitive, isolated confinement.

The relief requested pursuant to Cookhorne's Request for a Declaratory Judgment is an order declaring that the age of sixteen- and seventeen year-old prisoners housed in New York State adult correctional facilities must be considered by DOCCS as a mitigating factor in all disciplinary proceedings; 2) declaring that punishing sixteen- and seventeen-year-olds by confining them in punitive isolation in SHU in New York State adult correctional facilities constitutes cruel and unusual punishment per se, under both the Federal and New York State constitutions; or, in the alternative, declaring that punishing Cookhorne by confining him for four years in punitive isolation in the SHU is cruel and unusual punishment in violation of both the Federal and New York State constitutions, and ordering his immediate release from SHU confinement and 3) ordering DOCCS to pay Cookhorne's attorney's fees pursuant to the New York State Equal Access to Justice Act, codified at CPLR § 8600, et. seq; and granting such other relief as the Court deems just.

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Respectfully Submitted,

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