

MAY 31 2012

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

ERIE COUNTY
CLERK'S OFFICE

In the Matter of PAUL COOKHORNE,

Petitioner,

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

VERIFIED PETITION

Index No. 2012001791

-against-

RJI No. _____

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

Respondent.

MAY 31 2012

PAID
CHECK CASH

ERIE COUNTY
CLERK'S OFFICE

The petition of PAUL COOKHORNE, by and through his attorneys, Prisoners' Legal
Services of New York, Maria Pagano, of counsel, respectfully alleges the following:

NATURE OF THE PROCEEDING

1. This is a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) as well as an action for a declaratory judgment pursuant to CPLR § 3001.¹
2. This petition challenges Respondent's determination of February 1, 2012, which affirmed a Tier III disciplinary hearing disposition from Wende Correctional Facility (hereinafter "Wende C.F.") in Alden, New York, dated November 22, 2011, that resulted in Petitioner being placed in punitive segregation in a Special Housing Unit

¹ The practice of combining Article 78 claims with other claims in a "hybrid" pleading is recognized by New York courts of all levels, including the Court of Appeals, and CPLR § 3017(b).

(SHU) cell for four years, with four years recommended loss of good time, and four years loss of commissary, phones and packages.

PARTIES

3. The Petitioner, PAUL COOKHORNE, is an inmate presently serving a term of imprisonment in the State of New York and, as such, is in the care and custody of the Department of Correction and Community Supervision (DOCCS). At the time of the hearing challenged herein, Petitioner was an inmate at Wende C.F. Currently, Petitioner is housed at Upstate C.F. in Malone, New York.

4. Upon information and belief, the Respondent, BRIAN FISCHER, is the Commissioner of DOCCS. In that capacity, Respondent is the Chief Executive Officer of DOCCS and is charged with the overall responsibility for the proper and lawful administration of all facilities within the jurisdiction of DOCCS, including the action and conduct of those officers, agents, and/or employees who may be employed at such facilities. Additionally, Respondent has the authority and responsibility to review dispositions of Tier III hearings pursuant to 7 NYCRR § 254. A representative of the Commissioner's office, Albert Prack, affirmed the determination made at Petitioner's Tier III hearing that is the subject matter of this proceeding.

VENUE

5. Pursuant to CPLR § 7804 and § 506(b), venue of this proceeding is in Erie County as that is where the material event giving rise to this proceeding, Petitioner's Tier III hearing at Wende C.F., located in Alden, NY, County of Erie, took place.

FACTS

6. On, November 3, 2011, Petitioner was seventeen years old and was confined at Orleans C.F.

7. On that day, Petitioner was issued an Inmate Misbehavior Report charging him 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). See Inmate Misbehavior Report ("Misbehavior Report"), annexed hereto as Exhibit A.

8. The Misbehavior Report authored by Correction Officer (hereinafter "CO") Ambrose on November 3, 2011, described the incident as follows:

[W]hile on duty on E-2 dorm, I observed inmate Cookhorne, P. 11B2020 returning from the program area carrying a bag with two magazines. I then questioned him at the officer's station where the magazine's [sic] came from and he stated, 'someone on the walkway.' I then gave him a direct order to give me the magazines and he refused, stating, 'I don't have to.' I ordered him twice more and he again refused. I then directed him to the vestibule area so I could pat frisk him and he refused. I then exited the officer's station to speak to Cookhorne when he proceeded to strike me in the left side of my face with his closed right fist. He then proceeded to place both hands around my neck and attempted to choke me. At this time, I responded by attempting to place Cookhorne in a head lock to cease the attack. Cookhorne then wrapped both hands around my torso area, picked me up and slammed me to the ground. Cookhorne then pulled away from me and ran away from then [sic] area. I then activated my personal alarm.

See Ex. A.

9. CO Ambrose also completed a Use of Force Report on November 3, 2011, which describes the events leading up to the application of force as follows:

Inmate Cookhorne 11B2020 returned to E-2 housing unit and was in possession of magazines that dorm [sic] I directed Cookhorne to give them to me for inspection. Cookehorne refused numerous orders to turn them over and then refused subsequent orders to be pat frisked. Inmate Cookhorne then struck me in

the left side of my face with a closed right fist. He then placed both hands around my neck in an effort to choke me.

It then describes the actual force used stating:

I used both arms to grab inmate Cookhorne in a head lock to cease the attack. He then proceeded to place both arms around my torso and picked me up and slammed me to the floor.

See Use of Force Report, annexed hereto as Exhibit B.

10. Petitioner was placed in a New York State Office of Mental Health (OMH) observation/special watch cell for approximately 10 days. See Disciplinary Hearing Extension Request, annexed hereto as Exhibit C.

11. On November 10, 2011, an Unusual Incident Report was completed by Lieutenant Jeziorski, which described the incident as follows:

Inmate Cookhorne, P. 11B2020 0E-02-31B returned to his housing unit carrying magazines in a bag. Officer Ambrose gave multiple direct orders to the inmate to turn over the items for inspection. The inmate refused and CO Ambrose stepped down off his platform and ordered the inmate to comply with a pat frisk. Inmate Cookhorne used a closed fist and punched Officer Ambrose's left side of his face. The inmate then used both of his hands and began choking the officer. At that point Officer Ambrose applied body holds to inmate Cookhorne in an attempt to control him. The inmate then placed both arms around Ambrose's middle torso which caused both of them to fall to the floor. Inmate Cookhorne landed on top of CO Ambrose which caused the Officer's head to hit the floor and the personal alarm was dislodged from his possession. In order to call for assistance Officer Ambrose let go of the inmate, crawled to the radio and pulled the pin. Inmate Cookhorne then ran back to his cube and hid underneath his bed.

See Unusual Incident Report, page 1, annexed hereto as Exhibit D.

12. The Unusual Incident Report states that CO Ambrose's injury was a minor laceration. See Ex. D, p. 4.

13. On November 14, 2011, hearing officer Rasmus commenced a Tier III disciplinary hearing at Wende C.F. based on the charges listed in the Misbehavior Report.

See Hearing Record Sheet, annexed hereto as Exhibit E.

14. Petitioner entered a plea of "Not Guilty" to all of the charges. See Ex. E.

15. At the hearing, CO Ambrose admitted to their being "a couple of discrepancies" in the Misbehavior Report. See Transcript.²

16. The hearing officer did not inquire as to the nature of the discrepancies in the Misbehavior Report.

17. CO Ambrose's testimony did not identify these discrepancies, but he did testify that his statement in the Misbehavior Report that Petitioner was "carrying a bag" with two magazines was not correct and that the magazines were in fact loose in Petitioner's hands.

18. At the hearing, the hearing officer read into the record the findings of CO Ambrose's injury report, which were noted by medical staff immediately after the incident.

19. The findings of the injury report stated, "officer [Ambrose] denies losing consciousness."

20. However, CO Ambrose testified: "I blacked out during the incident . . . when I woke up I was 10 to 12 feet away from where I hit my head."

21. Petitioner testified that he was returning to his dorm with two magazines he had received from vocational program staff when CO Ambrose stopped him and asked about the magazines.

22. Petitioner continued that when CO Ambrose asked him about the magazines he responded that the civilian from the law library had brought them down for him.

² Pursuant to CPLR § 7804(e), the transcript of the hearing must be provided to the court by Respondent; all references to testimony herein refer to the testimony on the tape recording of the hearing that was provided to Petitioner's counsel.

23. Timothy Tracz, Deputy Superintendent of Programs at Orleans C.F., corroborated this, testifying that he had given Petitioner two magazines and that Petitioner signed a receipt after receiving them.

24. Petitioner further testified that he was hesitant to physically hand CO Ambrose the magazines because CO Ambrose had a reputation among inmates for doing "things to get under inmates' skin." However, Petitioner stated that he lifted the magazines up so that CO Ambrose could view them.

25. Petitioner then stated that CO Ambrose called him a "smartass" and again told him to hand over the magazines. Petitioner continued that he asked CO Ambrose why he wanted to see them, but that CO Ambrose did not answer and instead told him to "go outside."

26. Petitioner continued that he did not refuse to go outside but asked CO Ambrose, "What for?" as the CO had not told him that he wanted to do a pat frisk.

27. Petitioner continued that CO Ambrose responded to his question by grabbing and pushing him.

28. Petitioner stated that he tried to pull away from CO Ambrose but denied striking the CO.

29. Petitioner stated that next CO Ambrose placed him in a headlock and attempted to turn him around. He testified that he did not resist, "make a move" or "move a muscle."

30. Petitioner continued that he did not pick up CO Ambrose, specifically pointing out that the CO "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."

31. Petitioner is approximately 5'5" and 130 pounds. See Elmira Reception Medical document dated July 5, 2011, annexed hereto as Exhibit F.

32. Petitioner stated that CO Ambrose lost his balance while attempting to maintain his headlock on Petitioner while also trying to turn Petitioner around pulling Petitioner to the ground with him.

33. Petitioner testified that when they both fell to the ground, CO Ambrose fell head first and hit his head against the floor whereupon Petitioner noticed that the CO was bleeding from the back of his head.

34. Petitioner continued that despite CO Ambrose's injury, the CO refused to let him go to call for medical assistance. Petitioner stated that CO Ambrose did finally release his hold on him and call for assistance.

35. Petitioner stated that while the CO was requesting assistance Petitioner ran to his cube and lay down on the floor to await responding staff.

36. Three additional eyewitnesses who testified at the hearing corroborated Petitioner's testimony.

37. Eyewitness Tremell Jordan testified that he saw the incident involving Petitioner and CO Ambrose. He stated that CO Ambrose grabbed Petitioner first, and that he did not see Petitioner strike CO Ambrose at any time.

38. Eyewitness Jordan further testified that he observed CO Ambrose "trip up on his own" while holding onto Petitioner causing them both to fall to the floor with Petitioner landing on top of CO Ambrose.

39. Eyewitness John Hodder testified that he saw CO Ambrose grab Petitioner first and that Petitioner did not strike CO Ambrose.

40. Eyewitness Hodder also stated that CO Ambrose slipped causing both himself and Petitioner to fall to the floor.

41. Eyewitness Hodder further noted that Petitioner "never messed with this officer" and that Petitioner was "acting normal" but that CO Ambrose "has a reputation of this behavior."

42. Eyewitness Teddy Faison testified that he observed CO Ambrose grabbing Petitioner first and that Petitioner did not strike CO Ambrose.

43. Eyewitness Faison also stated that he personally pleaded with CO Ambrose to let go of Petitioner so that the CO could seek medical assistance for his head injury.

44. Eyewitness Faison further testified that Petitioner did not seem to "understand the severity" of the situation, and described Petitioner as just "a young kid."

45. The Statement of Evidence Relied Upon states that, "OMH confidential testimony has been taken and considered concerning your mental state. Based on this testimony and my observation of you at the hearing your mental state [is] not a contributing or mitigating factor." See Hearing Disposition Rendered Form, page 2, annexed hereto as Exhibit G.

46. 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 whom were eyewitnesses. See To/From Memos, annexed hereto as Exhibits H – L.

47. The To/From Memo from A. Andrus to Superintendent Kutzworth, (Ex. H), and the To/From Memo from CO M. Standish to Superintendent Kutzworth, (Ex. L), both state that Petitioner was found hiding underneath his bed.

48. In his Statement of Evidence Relied Upon, the hearing officer stated that he considered the following: 1) the Misbehavior Report authored by CO Ambrose; 2) the verbal testimony of CO Ambrose; 3) the verbal testimony of Petitioner; 4) the verbal testimony of witnesses Jordan, Faison, and Hodder; 5) the verbal testimony of Deputy Superintendent Tracz; 6) confidential OMH testimony; and 7) the Unusual Incident Report, the Use of Force Report, To/From memos, injury reports and photos. See Ex. G, p. 2.

49. Petitioner was found guilty of all of the charges. See Ex. G, p. 1.

50. The guilty disposition resulted in penalties of: (1) four years of confinement in SHU, beginning on November 3, 2011, until November 3, 2015; (2) four years' loss of packages; (3) four years' loss of commissary; (3) four years' loss of phone use; and (4) four years' loss of good time. See Ex. G, p. 1.

51. Presently, Petitioner has been housed in a SHU cell for over six months, including time in solitary confinement in Attica C.F.

52. An inmate housed in a SHU cell is confined to his cell for twenty-three hours per day with one hour of recreation permitted in a solitary outdoor pen.³

53. On November 29, 2011, Petitioner submitted a timely administrative appeal of the hearing disposition. See Petitioner's Administrative Appeal, annexed hereto as Exhibit M.

³ Correctional Association of New York, Lockdown New York: Disciplinary Confinement in New York State Prisons, 2 (Oct. 2003).

54. On January 18, 2012, Petitioner's counsel submitted a Supplemental Appeal. See Counsel's Supplemental Appeal, annexed hereto as Exhibit N.

55. On February 1, 2012, Albert Prack, Director of Special Housing/Inmate Disciplinary Program, reviewed and affirmed the disposition. See Review of Superintendent's Hearing, annexed hereto as Exhibit O.

56. On February 2, 2012, Petitioner submitted a Request for Reconsideration. See Petitioner's Request for Reconsideration, annexed hereto as Exhibit P.

57. On March 29, 2012, Petitioner's counsel submitted an additional Request for Reconsideration. See Counsel's Request for Reconsideration, annexed hereto as Exhibit Q.

58. On April 11, 2012, Albert Prack affirmed the hearing disposition and stated that no further administrative action would be taken. See Response to Request for Reconsideration, annexed hereto as Exhibit R.

59. Petitioner has exhausted his administrative remedies.

FIRST CAUSE OF ACTION

(PURSUANT TO CPLR ARTICLE 78)

The Guilty Disposition Is Not Supported by Substantial Evidence

60. Petitioner repeats and realleges each and every allegation of Paragraphs 1 through 60.

61. An inmate at a Tier III disciplinary hearing has a right under the Fourteenth Amendment of the United States Constitution to a determination of guilt that is supported by some evidence.

62. An inmate at a Tier III disciplinary hearing in New York has a statutory right, pursuant to CPLR § 7803(4), to a determination of guilt that is supported by substantial evidence.

63. Substantial evidence is “related to the charge . . . and 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).

64. “While 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)).

65. “In final analysis, 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.

66. Here, the guilty dispositions rendered by hearing officer Rasmus are not supported by substantial evidence.

67. The allegations in the Misbehavior Report contain inaccuracies, are illogical and are inconsistent with the Unusual Incident Report in two significant ways.

68. First, the Misbehavior Report alleges an assaultive explanation for CO Ambrose’s injury, as it states that Petitioner picked the CO up and slammed him to the ground, see Ex. A, while the Unusual Incident Report provides an accidental explanation

for the CO's injury, as it states that both Petitioner and CO Ambrose fell to the floor, which caused the CO to hit his head, see Ex. D, p.1.

69. Second, the Misbehavior Report states that Petitioner pulled away from CO Ambrose, while the Unusual Incident Report states that CO Ambrose let Petitioner go.

70. The inconsistent allegations in the Misbehavior Report are even more problematic when juxtaposed with the fact that Petitioner is only 5'5" tall and approximately 130 pounds, yet the Misbehavior Report alleges that Petitioner picked up CO Ambrose, slammed him to the floor and then pulled away from him.

71. CO Ambrose's testimony was vague, inconsistent and illogical, and failed to corroborate the specific facts alleged to have occurred in the Misbehavior Report.

72. In contrast, Petitioner presented a probative, logical and consistent explanation of the incident. His testimony was factually specific and fully corroborated by four separate witnesses: Deputy Superintendent Tracz and eyewitnesses Jordan, Faison and Hodder.

73. Further, the confidential OMH testimony could not legally have provided any evidence of guilt.

74. 7 NYCRR § 254.6(c)(3) states, "where an inmate's mental state is at issue, [the hearing officer shall], out of the presence of the inmate and on a confidential tape, interview an OMH clinician as may be available concerning the inmate's mental condition at the time of the incident and the time of hearing."

75. The confidential OMH testimony received by hearing officer Rasmus would only have concerned whether Petitioner's mental state was a contributing or mitigating factor during the incident.

76. The confidential OMH testimony could not have provided any facts about what occurred during the incident.

77. In sum, when weighed, the evidence relied upon does not provide the quality and quantity of proof necessary to probatively and logically persuade a reasonable, fair and detached fact finder of the Petitioner's guilt.

78. The sentencing of a juvenile to confinement in SHU, the most severe punishment available in New York state prisons, is a most "serious affair."

79. In Matter of Hartje v. Coughlin, 70 N.Y.2d 866 (1987), the New York State Court of Appeals held that a disciplinary disposition must be expunged where the disposition is not supported by substantial evidence. Accordingly, the disposition should be reversed and expunged from Petitioner's disciplinary record.

SECOND CAUSE OF ACTION

(PURSUANT TO CPLR ARTICLE 78 AND FOR A DECLARATORY JUDGMENT)

The Hearing Officer Acted Arbitrarily And Capriciously, And Abused His Discretion When He Did Not Consider Petitioner's Age As A Mitigating Factor

80. Petitioner repeats and realleges each and every allegation of Paragraphs 1 through 80.

81. The U.S. Supreme Court's Eighth Amendment juvenile jurisprudence mandates that youth be viewed as a mitigating factor which must be considered in

sentencing. In Roper v. Simmons the Court held that adolescents under 18 at the time of their crimes are categorically prohibited from receiving the death penalty. 543 U.S. 551, 570-75 (2005). Finding that juveniles are categorically less culpable than adults, the Court concluded that a categorical rule was necessary “to ensure that the mitigating force of youth was not overlooked.” Id. at 573. In Graham v. Florida, the Court expanded its categorical rule to prohibit the imposition on juveniles of sentences of life without parole for non-homicide offenses. 130 S. Ct. 2011 (2010).

82. As recognized by the Supreme Court in Roper, the mental state of an adolescent is, by its very nature, always at issue during any incident in the adolescent’s life. 543 U.S. at 572.

83. The hearing officer failed to consider Petitioner’s age as a mitigating factor when deciding the Tier III hearing disposition.

84. The developmental stage of Petitioner’s brain—that of adolescence—along with its congruent psychological and social immaturity, affected his mental state at the time of the incident.

85. Eyewitness Faison recognized Petitioner’s juvenile status when he observed the incident and referred to Petitioner as just “a young kid.”

86. Staff responding after the incident observed Petitioner’s juvenile behavior and noted that they found him hiding underneath his bed. See Exs. H, L.

87. Hiding under a bed is not adult behavior. It is the behavior of a frightened child.

88. The bulk of current scientific research incontrovertibly demonstrates that juveniles do not act with the same level of maturity or impulse control as adults.

89. The OMH testimony failed to consider Petitioner's mental state in the context of the extensive psychological research regarding adolescent behavior and its relation to brain maturity.

90. In his response to the Request for Reconsideration submitted by Petitioner's counsel, Albert Prack stated that the Department is mindful of Petitioner's age and will carefully weigh that factor at the appropriate time as part of the review process. See Ex. R.

91. The crucial and necessary time to have acknowledged Petitioner's age and weigh that factor was prior to the Tier III hearing disposition, not some time after when Respondent deems it appropriate.

92. The hearing officer's observations of Petitioner at the hearing are not relevant to his mental state at the time of the incident. Petitioner's demeanor at the hearing would not have changed the fact that he had an adolescent brain at the time of the incident.

93. By failing to take into account "the mitigating force of youth" in deciding Petitioner's disposition, the hearing officer's decision was arbitrary and capricious and an abuse of discretion.

94. Accordingly, the disposition should be reversed and expunged from Petitioner's disciplinary record.

95. Moreover, Petitioner is entitled to a judgment declaring that the age of sixteen and seventeen year-old prisoners housed in New York State adult correctional facilities must be considered by Respondent as a mitigating factor in all disciplinary proceedings.

THIRD CAUSE OF ACTION

(PURSUANT TO CPLR ARTICLE 78)

Petitioner's Tier III Hearing Disposition Of Four Years' Confinement In SHU Is So Excessive It Shocks The Conscience

96. Petitioner repeats and realleges each and every allegation of Paragraphs 1 through 96.

97. Petitioner's disposition of four years' confinement in a SHU cell is grossly disproportionate to the offense.

98. The categorical rules relating to the diminished culpability of juveniles created by the Roper and Graham decisions were based on the U.S. Supreme Court's finding that irresponsible juvenile misconduct is not as morally reprehensible as the same conduct when engaged in by an adult and, as such, juveniles are less deserving of the most severe punishments. Roper, 543 U.S. at 569-70; Graham, 130 S.Ct. at 2026.

99. The Court in Graham held that proportionality was central to an Eighth Amendment analysis of whether or not a punishment is cruel and unusual. 130 S.Ct. at 2021. A proportionality analysis requires consideration of the culpability of the offender in light of the crime and characteristics, along with the severity of the punishment imposed. Id. at 2026.

100. Here, a proportionality analysis is equally central and Petitioner's age and the characteristics of the incident should have been considered in determining the appropriate punishment.

101. 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. See DOCCS Guidelines for Disciplinary Dispositions, annexed hereto as Exhibit S.

102. The alleged incident did not involve a weapon or serious injuries.

103. Four years in SHU and four years loss of good time is approximately five times harsher than those listed in the above guidelines, which were meant for adults.

104. Petitioner's disposition of four years in SHU is approximately one-quarter of his lifetime.

105. Confinement in SHU is the most severe punishment DOCCS can impose on an inmate for violating a prison rule.

106. Beyond being excessively harsh, Petitioner's sentence to four years in SHU, in addition to four years' loss of good time, commissary, phones and packages, serves no useful purpose. He is a teenager who, like all teenagers, holds great promise for maturing into a responsible and caring young man. He needs guidance, recreation, and a social routine that includes study and work with others so that he can grow and learn. He has already spent over six months in the SHU being deprived of the basic necessities every youth needs.

107. This disposition is an abuse of discretion and is so excessive it shocks the conscience.

108. Accordingly, the disposition should be reversed and expunged from Petitioner's disciplinary record.

FOURTH CAUSE OF ACTION

(FOR A DECLARATORY JUDGMENT)

**The Confinement Of Sixteen And Seventeen Year-Olds In SHU Cells Is Cruel And Unusual
Punishment Because It Violates Evolving Standards Of Decency And Is Deliberately
Indifferent To Their Medical And Psychological Health**

109. Petitioner repeats and realleges each and every allegation of Paragraphs 1 through 109.

110. Article I, § 5 of the New York State Constitution prohibits the infliction of cruel and unusual punishments.

111. The Eighth Amendment of the U.S. Constitution prohibits the infliction of cruel and unusual punishments.

112. A determination that a punishment is cruel and unusual must be 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.); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop, 356 U.S. at 101).

113. The New York State Office of Child and Family Services (OCFS) is prohibited from placing sixteen and seventeen year-olds in its custody in solitary confinement. See 9 NYCRR 180.9(c)(10)(iii) (subsection under Discipline of Children stating that “solitary confinement is prohibited”), annexed hereto as Exhibit T. Yet, if this same sixteen or seventeen year-old is in the custody of DOCCS he or she can be punished with an unlimited number of years in solitary confinement.

114. The State of Mississippi Department of Corrections has agreed to prohibit placing juveniles in solitary confinement in both juvenile and adult correctional facilities. See C.B. v. Walnut Grove Correctional Authority, Case No. 3:10-cv-663 (U.S. Dist. Ct., So. Dist. of Miss., 2010), p. 9 (Consent Decree stating that the Mississippi Department of

Corrections “will ensure that youth are never subjected to solitary confinement”), annexed hereto as Exhibit U.

115. The American Correctional Association (ACA) standards for juvenile justice detention facilities limit the isolation of juveniles to a maximum of five days. See American Correctional Association, Standards for Juvenile Detention Facilities, 3d ed. (Latham, MD: ACA, 1991), pp. 67-68, annexed hereto as Exhibit V.

116. Steven H. Rosenbaum, Chief of the Special Litigation Section of the U.S. Department of Justice, Civil Rights Division, has remarked that:

[T]he 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.²⁶

117. 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 potential psychiatric consequences of prolonged isolation in solitary confinement, which include depression, anxiety, psychosis and suicide. See Policy Statement of the American Academy of Child and Adolescent Psychiatry, Solitary Confinement of Juvenile Offenders, April 2012, annexed hereto as Exhibit W.

118. The international consensus against juvenile solitary confinement is abundantly clear: (1) the U.N. Committee on the Rights of the Child interprets the

²⁶Fourteenth 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).

Convention on the Rights of the Child (CRC) as mandating the abolition of solitary confinement except for “very exceptional circumstances;”²⁷ (2) the Inter-American Commission on Human Rights (IACHR) condemns the use of solitary confinement of juveniles; (3) the American Declaration of the Rights of Man categorically prohibits the imposition of solitary confinement on juveniles;²⁸ (4) the United Nations Rules for the Protection of Juveniles Deprived of their Liberty adopted by the General Assembly strictly prohibit placement of juveniles in “closed or solitary confinement,” viewing it as a form of cruel, inhuman, or degrading treatment;²⁹ and (5) the United Nations’ Office of the High Commissioner for Human Rights, Special Rapporteur on torture, has called for a complete ban on the use of solitary confinement of juveniles.³⁰

119. These categorical prohibitions on placing juveniles in solitary confinement are in place because New York and other states’ lawmakers, the major national correctional organization in the U.S., the scientific community, and the international community recognize that due to the physical and psychological development of juveniles, they are likely to be greatly and possibly irreparably damaged by prolonged isolated confinement.

120. Because of Petitioner’s youth, confining him in SHU is cruel and unusual punishment because it violates evolving standards of decency.

121. Deliberate indifference to a prisoner’s serious medical needs also constitutes a violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976).

²⁷ Report of the Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.273, ¶ 58, a-b (Sept. 30, 2005).

²⁸ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII(3), DEA/Ser/L/V/II.131doc.26 (Mar. 14, 2008).

²⁹ G.A.Res.45/113, ¶ 67, U.N.Doc. A/RES/45/113 (Dec.14,1990).

³⁰ U.N. GAOR, 66th Sess., Third Committee, U.N. Doc. GA/SHC/4014 (Oct. 18, 2011).

122. An Eighth Amendment violation is proven when an inmate demonstrates that he has been subjected to a “sufficiently serious” condition of confinement, and that prison officials acted with “deliberate indifference.” Ex Parte Wilson, 114 U.S. 417, 429, 5 S.Ct. 935 (1885).

123. 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, 185 (2d Cir. 2002).

124. Extensive scientific evidence, as well as our contemporary standards of decency, oppose the placement of juveniles in solitary confinement.

125. Placing Petitioner, a juvenile, in prolonged solitary confinement is deliberately indifferent to Petitioner’s medical and psychological health and violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

126. Petitioner has no adequate remedy at law.

127. Petitioner is entitled to a judgment declaring that punishing sixteen and seventeen year-olds by confining them in SHU cells 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 Petitioner by confining him 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.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court render a judgment and order containing the following relief:

(a) Vacating and setting aside the disposition of Petitioner's Tier III hearing, and the affirmation of such disposition by Respondent;

(b) Ordering the Respondent, or whomever else shall have care and custody of the Petitioner's records to expunge all entries of such Tier III hearing, and the disposition thereof, from all of Petitioner's records, including but not limited to Petitioner's disciplinary record, service unit files, temporary release committee files, and from all reports submitted by Respondent and/or his employees and agents to the New York State Parole Board;

(c) Restoring Petitioner in all respects to the status he enjoyed prior to the commencement of the Tier III hearing, including removal of Petitioner's status as a Central Monitoring Case (CMC);

(d) Ordering Respondent to file with the Court a sworn statement setting forth in specific detail what measures he has taken to expunge Petitioner's records;

(e) Declaring that the age of sixteen and seventeen year-old prisoners housed in New York State adult correctional facilities must be considered by Respondent as a mitigating factor in all disciplinary proceedings;

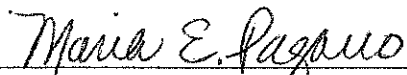
(f) Declaring that punishing sixteen and seventeen year-olds by confining them in SHU cells in New York State adult correctional facilities constitutes cruel and unusual punishment per se, under both the Federal and New York State constitutions; or, in the alternative, declaring that punishing Petitioner by confining him 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.

(g) Ordering that this matter be transferred to the Appellate Division, Fourth Department pursuant to CPLR § 7804(g);

(h) Ordering Respondent to pay Petitioner's attorney's fees pursuant to the New York State Equal Access to Justice Act, codified at CPLR § 8600, et. seq; and

(i) Granting such other relief as the Court deems just.

DATED: Buffalo, New York
May 31, 2012



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