No. 19-7057

IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

MARKELLE SETH,

Plaintiff-Appellant,

v.

THE DISTRICT OF COLUMBIA, D.C. DEPARTMENT ON DISABILITY SERVICES, ANDREW REESE,

Defendants-Appellees,

On Appeal from the United States District Court
for the District for the District of Columbia
The Honorable Chief Judge Beryl A. Howell,
No. 1:18-cv-01034-BAH

BRIEF OF FORMER CORRECTIONS DIRECTORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties

The Appellant is Markelle Seth. Appellees are the District of Columbia, the District of Columbia Department of Disability Services, and its Director, Andrew Reese, in his official capacity.

B. Rulings Under Review

The rulings under review are the district court's September 28, 2018 order granting the defendants' motion to dismiss (ECF 28) and its May 8, 2019 order denying the appellant's timely motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59 (ECF 36).

C. Related Cases

This civil action is related to Mr. Seth's criminal case in which he was found permanently incompetent to stand trial. *United States v. Seth*, 1:14-mj-00608-BAH-GMH-1 (D.D.C.)

D.C. CIRCUIT RULE 29(d) CERTIFICATE

Amici know that other *amici curiae* intend to file briefs in support of the Appellant. Each of these other briefs has a distinct focus: academic research regarding treatment of persons with intellectual disability; the *Olmstead* standard; and the capability of the agencies in the District of Columbia to take custody of and care for Appellant Markelle Seth. This brief provides the perspective of experienced

corrections directors regarding the challenges people with intellectual disability like the appellant pose in a prison setting and the harms persons like Mr. Seth might experience while incarcerated, particularly if placed in solitary confinement like Mr. Seth. Given the distinct subject matter and expertise of the *amici curiae*, joining in a single brief would be impractical.

s/ Deborah M. Golden
Deborah M. Golden

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GLOSSARY

BOP Bureau of Prisons

ID Intellectual Disability

RULE 29(a)(4)(e) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *amici* certify that no party's counsel authored this brief in whole or in part and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICI CURIAE*

Amici Curiae are former corrections directors and experts with extensive experience overseeing and managing prisons and prison systems. *Amici* are also intimately familiar with the use of prolonged solitary confinement. *Amici* believe the incarceration of people with intellectual disability ("ID") like Markelle Seth in prison is deeply problematic—especially where, as here, those individuals have not been convicted of any crime and are housed in solitary confinement. *Amici* assert that most prisons are unable to properly house or treat people like Mr. Seth, and consequently, people like Mr. Seth are inherently difficult and burdensome for corrections staff to manage. *Amici* are concerned that—as is the case here—corrections staff will house people with ID in prolonged solitary confinement out of an actual or perceived lack of alternatives, causing severe psychological damage that produces counterproductive outcomes for rehabilitation and prison safety. *Amici* believe this brief will assist the Court by providing the perspective of experienced

corrections administrators regarding the consequences of allowing people like Mr. Seth to remain civilly committed to prison.

Amici are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of Correction and Probation for seven years. Mr. Horn has also served as Executive Director of the New York State Sentencing Commission.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in Texas gubernatorial appointments to both a sentencing commission and a council for offenders with mental impairments. He coauthored *Texas Prisons, The Walls Came Tumbling Down*, and has written numerous articles on criminal justice issues.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board for the Washington State Coalition to Abolish the Death Penalty since 2012.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections (WDOC). He started his 33-year career as a Correctional Officer, working his way to the senior most position for the department. In 1985, he worked in one of the first intensive management units (IMUs) in WDOC, and 25 years later

he led the efforts to reduce the use of IMUs that resulted in a 50% reduction of those housed in IMUs and an over 30% reduction in system-wide violence. This work is described in a 2016 Department of Justice Bureau of Justice Policy Brief, *More than Emptying Beds: A Systems Approach to Segregation Reform.*

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. He has served as Superintendent of three prisons in Washington State, as Regional Administrator, and Probation Officer. He is currently a consultant for jail operations.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented a wide array of evidence-based programs, including an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary.

Amici have obtained the consent of all parties to the filing of this brief.

SUMMARY OF ARGUMENT

Markelle Seth, a person with ID who has been found incompetent to stand trial and found by the District's treating professionals to be treatable in the community, does not belong in prison. The civil commitment of persons like Mr. Seth to prison is morally objectionable, and his disability makes him and others like him difficult to manage and treat in a general population setting. This difficulty is

driven by the simple fact that a prison is first, and foremost, a prison, not a treatment facility. As a result of their ID, individuals like Mr. Seth often struggle to understand, remember, or comply with the various demands of prison life and are at a substantial risk of victimization while in a general population setting. Further, their treatment and support needs exceed what most prisons are capable of or intend to provide.

The incarceration of individuals like Mr. Seth imposes a substantial burden on prisons, which frequently hold such individuals in prolonged solitary confinement out of a desire to prevent their disruptive behavior from interfering with prison administration. While in solitary confinement, people with ID suffer severe psychological trauma and deterioration as a result of their enhanced susceptibility to the toxic effects of prolonged isolation. This, in turn, can exacerbate any pre-existing behavioral, mental health, and/or intellectual capacity problems, making these individuals even more ill-suited for normal prison life. Accordingly, while incarcerated, intellectually disabled individuals like Mr. Seth will be trapped in a perpetual downward spiral of continued psychological damage and cyclical disciplinary problems that will virtually ensure that they languish in what "comes perilously close to a penal tomb."[1]

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[1] *Apodaca v. Raemisch,* 139 S.Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.) (internal quotation omitted).

ARGUMENT

Mr. Seth has never been convicted of a crime and, consequently, has never been sentenced to prison. Nevertheless, since his arrest in October 2014, Mr. Seth has spent most of the last five years in solitary confinement at various prisons and jails. After an incompetency finding in December 2016, Mr. Seth was civilly committed to the custody of the Bureau of Prisons ("BOP") and remains incarcerated at the Federal Medical Center in Devens, Massachusetts. Given the District's refusal to take him in, Mr. Seth's incarceration is seemingly indefinite, which is deeply troubling because Mr. Seth will likely remain in solitary confinement as a result of the BOP's perceived or actual inability to house him in another setting. *Amici*, who have extensive experience managing prison systems and prisoners with a variety of needs, seek first to explain the challenge people with ID like Mr. Seth present in a prison setting. As a result of the prison environment's inability to accommodate the complexities inherent to housing people like Mr. Seth, the civil commitment of people like Mr. Seth to prison imposes a significant burden on prison administration, while at the same time denying them the treatment that they need. Second, *amici* assert that without some form of specialized housing with staff trained to manage people with ID, people like Mr. Seth will often be held in prolonged solitary confinement as a result of an actual or perceived lack of alternatives. Further, while

isolated, people with ID will suffer grave psychological harm resulting in counterproductive outcomes for rehabilitation and prison management.

I. People with ID like Mr. Seth are Difficult to Manage in Prison and Do Not Receive Adequate Treatment While Incarcerated.

Normally, when an individual is found incompetent to stand trial, "that person is either committed to a state psychiatric hospital, or as occurs more recently, placed in a community treatment program."[2] Commitment to such programs outside of prison is a recognition of the fact that people found legally incompetent "deserve to be treated, not punished."[3] Similarly, the incarceration of people lacking competency undermines the punitive purpose of the prison environment because punitive measures like prison time are only "justifiably imposed [] if the defendant is capable of understanding why society views his or her conduct as morally reprehensible and appropriate for punishment."[4]

Not only does the incarceration of people like Mr. Seth unjustly subject them to the inherently punitive nature of the prison environment, it also presents significant difficulties to prison administrators. First, as a result of most prisons' lack

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[2] Alan R. Felthous & Joseph D. Bloom, *Jail-Based Competency Restoration*, J. of the Am. Acad. of Psychiatry and the Law Online, 364, 365 (2018).

[3] E. Fuller Torrey, et al., *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States*, 2 (Treatment Advocacy Center, 2010).

[4] Grant H. Morris, et al., *Competency to Stand Trial On Trial*, 4 Hous. J. Health L. & Pol'y 193, 202 (2004).

of knowledge and inability to accommodate their disability, people like Mr. Seth may be unable to safely function in an open prison population. Second, the treatment and support they require often exceed what prisons are capable of providing.

A. As a Result of Their ID, Individuals Like Mr. Seth Are Often Unable to Comply with the Various Demands of Prison Life, Making Them Difficult and Burdensome to Manage.

One of the most basic and omnipresent aspects of prison is an intricate system of rules and procedures that govern every aspect of a prisoner's life. Prisoners must comply with many strict rules dictating where they can and must be in the prison at various times and when and where various activities are permitted. Many other rules and procedures govern dress code, visitation, access to various prison services, commissary, dining, religious practice, and what possessions a prisoner may keep, among other things. Prison staff require strict compliance with these rules, and violations are subject to a structured disciplinary process. This structure exists in order to create a safe, predictable, and functional prison environment, for both prisoners and staff. In order to maintain such an environment, "prison administrators depend heavily upon a cooperative and conforming inmate population."[5] However, for people with ID, this rigid structure makes prison life difficult; lacking the

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[5] Kenneth McGinnis et al., Report to the Federal Bureau of Prisons, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*, 26 (2014).

capacity to understand, remember, or comply with the numerous demands of prison life, people like Mr. Seth will frequently violate rules and protocol.

For people like Mr. Seth, the symptoms inherent in their ID "make it difficult to conform to the highly regimented rules and procedures of the prison environment."[6] Conformity is difficult because ID substantially limits many basic cognitive skills required to understand and properly "comply with the prison routine."[7] This means that while people like Mr. Seth are incarcerated, they may frequently struggle to remember, understand, or comply with the various things that correctional staff expect of them. Indeed, as Mr. Seth's history in prison shows, incarcerated individuals with ID will frequently violate the rules because their ID inhibits their ability to comply with, remember, or even understand what prison rules require. As noted by Dr. Denney, a long-time BOP psychologist and expert witness in this case, Mr. Seth's segregation is

> not due to serious violence but due to a series of immature impulsive incidents that are directly related to the nature of his disability – short attention span, poor frustration tolerance, impulsivity, inability to foresee consequences (e.g., numerous petty issues like conflicts over television programming; wearing earbuds where not allowed; wearing the wrong uniform or wearing the uniform incorrectly (not buckling his belt); not

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[6] Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 752 (2015); *see also* Margo Schlanger, *Prisoners With Disabilities*, In Reforming Criminal Justice: Punishment, Incarceration, and Release, 298–300 (2017).

[7] Joan Petersilia, *Doing Justice? Criminal Offenders with Developmental Disabilities*, California Policy Research Center, 23–24 (2000).

> standing for the count; speaking disrespectfully to an officer; pushing or hitting an inmate who grabbed a bag of chips from him).[8]

In an environment like prison where strict conformity and compliance are required, these types of behaviors are problematic. Conformity with rules—even less serious ones like those dictating when and where prisoners can use earbuds, wear certain clothes, and use a particular tone of voice with correctional officers—is required in order for prison staff to retain control; because they are significantly outnumbered by prisoners, control is necessary to ensure the safety of staff, which in turn allows them to protect prisoners from one another.[9] The maintenance of stability and order in prisons may also be linked to reductions in recidivism.[10] If staff make exceptions for individuals like Mr. Seth, they risk undermining their control over the prison environment. This is because the prison population's perception of the legitimacy of staff authority often depends on whether rules are enforced "not just in particular instances, but consistently over time."[11] This theory of legitimacy is captured by the phrase "Firm, Fair, and Consistent," a common correctional motto that references the practice of applying the rules in the same way every time, without consideration

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[8] Joint Appendix ("J.A.") at 408.
[9] McGinnis, *supra* note 5, at 26.
[10] John Woolredge & Benjamin Steiner, *The Exercise of Power in Prison Organizations and Implications for Legitimacy*, 106 J. of Crim. L. & Criminology, 125, 160–61 (2016).
[11] *Id*. at 129.

of individual circumstances.[12] Staff believe that doing so best facilitates the management of an entire population of prisoners.[13] While some staff members may want to exercise leniency with people, like Mr. Seth, who lack the capacity to comply with the rules, they are stuck between a rock and a hard place—carve out an exception for people like Mr. Seth and risk undermining their authority or enforce the rules equally and impose an unfair punishment. As Mr. Seth's incarceration over the past five years shows, staff will typically choose the latter so that they do not jeopardize the stability and safety of the prison environment.

People like Mr. Seth may also be isolated for their own protection because their ID makes them vulnerable to victimization while housed in general population. "It has been reported that individuals with intellectual disabilities in [] general population are more likely to be maltreated (i.e., psychologically or physically abused)" than those without a disability.[14] This maltreatment includes things like "extortion, exploitation, threats, and physical and sexual abuse," which occurs because people like Mr. Seth often make for easy targets in a general population

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[12] Peter M Carlson & Judith Simon Garrett, *Prison and Jail Administration, Practice and Theory*, 524 (2008).

[13] Robert G. Thomas & R. Murray Thomas, *Effective Teaching in Correctional Settings*, 81 (2008) (discussing the applicability of the "Firm, Fair, and Consistent" motto in the setting of prison educational programming).

[14] Margaret E. Loberg, *Victimization of Inmates with Intellectual Disability: A Qualitative Study*, 14–15 (2009) (unpublished Ph. D dissertation, Pacific Univ.).

setting.[15] Accordingly, not only are individuals with ID difficult to manage because of their struggle to comply with the prison routine, but they also pose management problems because they require substantial supervision to keep them safe.

B. The Extensive Treatment Needs of People like Mr. Seth Exceed What Prisons are Capable of Providing.

In addition to the inability of most prisons to accommodate the various complexities of housing people with ID, like Mr. Seth, prisons also are typically unable to provide the treatment and support that such individuals require. While this is concerning for any prisoner, it is especially troubling for legally incompetent individuals like Mr. Seth, for whom commitment to a specialized, non-carceral treatment program is an option. The inability of prisons to treat individuals like Mr. Seth is partly driven by the fact that mental health staff in prisons are already stretched thin; it is also driven by the fact that prisons are first and foremost prisons, not treatment facilities intended to or capable of providing the level and type of care required by people like Mr. Seth.

Over recent decades, the demand for mental health services in prison has dramatically increased, a trend driven by the continual dismantling of state-run

[15] M.H. Fisher, et al., *Victimization of Individuals With Intellectual and Developmental Disabilities Across the Lifespan*, 51 Int. Rev. of Res. In Developmental Disabilities, 233 (2016); Cynthia L. Blitz, et al., *Physical Victimization in Prison: The Role of Mental Illness*, Int. J. of L. & Psychiatry, 385 (2008).

mental health hospitals and reductions in funding for services, leaving countless mentally ill individuals without treatment or adequate housing.[16] Prisons often lack the resources, training, time, and appropriate infrastructure to provide adequate mental health services to their populations.[17] There are also pervasive mental health staffing challenges in many prisons, something felt acutely by the BOP after the Trump administration ordered a hiring freeze in 2016.[18] From 2016 to 2018, the BOP experienced 12 percent drop in of its workforce.[19] In its 2019 Budget Report to Congress, the Department of Justice flatly stated that recruiting and retaining prison medical staff was among its greatest challenges.[20] Understaffing has long been a problem for the BOP, to the point that a long-time BOP psychologist stated that the BOP's catchphrase is "do more with less," a theme embodied by anecdotes about

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[16] Bennion, *supra* note 6 at 748–49; *see generally* Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, AMA J. of Ethics, (2013), https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10.

[17] Anna L. S. Brandt, *Treatment of Persons With Mental Illness in the Criminal Justice System: A Literature Review*, 51 J. of Offender Rehabilitation, 541, 547–48 (2012).

[18] *See generally*, Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, The Marshall Project, Nov. 21, 2018.

[19] Justin George & Weihua Li, *Epstein's Death Highlights A Staffing Crisis in Federal Prisons*, The Marshall Project, Aug. 14, 2019.

[20] United States Department of Justice Federal Prison System, *FY 2019 Performance Budget Congressional Submission*, 10–11 (2019).

psychologists being re-tasked to perform prisoner escorts and sitting in guard towers with high-powered rifles, thanks to system-wide staffing shortages.[21]

The seemingly insurmountable challenge to meet the vast mental health needs of prison populations is of crucial importance here because, before a prison attempts to engage in intensive treatment of individuals with expansive treatment needs, like Mr. Seth, "it should first ensure that it is meeting the mental health needs [of those] that are properly and traditionally within its purview."[22] This is because such a significant investment of time and resources into one person may further impede the prison's ability to serve the rest of its population.[23] Further, even when such a focused allocation of resources is possible, an individual's treatment needs may simply exceed what is possible in a prison context. Ultimately, even if a prison invests significant resources into a person like Mr. Seth, such a concentration of resources could be fruitless and could impair its ability to deliver services to many other prisoners in need.

The treatment and support needs of individuals with ID like Mr. Seth are extensive, require a significant investment of personnel, and may well exceed what is possible in a prison setting. Mr. Seth's circumstances are instructive on this point—recognizing that Mr. Seth requires treatment outside of the prison context,

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[21] Thompson, *supra* note 18.
[22] Felthous, *supra* note 2, at 369.
[23] *Id.*

the District of Columbia, through a contracted service provider, developed a comprehensive plan for housing, supporting, and treating him.[24] The proposal recommends housing Mr. Seth in a community-based program outside of prison, where he can receive extensive supervision and care.[25] It further recommends that Mr. Seth be supervised, one-on-one, for twenty-four hours a day by staff specifically trained to de-escalate undesired behavior; that he receive daily assistance in developing basic life skills (hygiene, cleaning, and reading, among other things); that he visit a dedicated psychiatrist and behavioral psychologist; that staff be trained in specialized de-escalation techniques for individuals with ID; and that an individualized and dynamic treatment plan be created and followed.[26] These are treatment services that any prison—even a specialized medical prison—will be incapable of providing due to a lack of resources, staff, time, and appropriate infrastructure. This has already been pointed out in this case by Dr. Denney, who opined that "the design, service provision, and staffing models of the BOP will virtually ensure" that Mr. Seth does not receive proper treatment, and that "even the Federal Medical Center [a facility designed to house prisoners requiring long-term and extensive medical care] is not equipped to provide the individualized services

[24] *See generally*, J.A. at 170–82.
[25] J.A. 174–76.
[26] J.A. at 177.

Mr. Seth needs."[27] Accordingly, while people like Mr. Seth are civilly committed to prison, they will not receive the treatment and support they need and are unlikely to make meaningful steps toward rehabilitation. Instead, these individuals are likely to be caught in a troubling cycle of disciplinary sanctions and victimization leading to long periods of solitary confinement and resulting psychological deterioration.

II. When People like Mr. Seth Are Civilly Committed to Prison, They Often End Up in Long-Term Solitary Confinement, Where They Suffer Substantial Psychological Harm.

Prisons struggle to manage and care for individuals with ID who are civilly committed to their custody, and this struggle often results in practices that are deeply problematic because people with ID are often relegated to solitary confinement out of a perceived or actual lack of alternatives. While isolated, people like Mr. Seth suffer substantial psychological harm and are unable to engage in meaningful rehabilitation.

The use of solitary confinement to house difficult-to-manage prisoners warrants some historical context. Over a century ago, America abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.[28] But in the 1980s, solitary confinement returned to America's prisons, partly in reaction to the violence and disorder created by exploding prison

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[27] J.A. at 406.

[28] Bennion, *supra* note 6 at 747-50 (2015).

populations.[29] Correctional officials believed they could pinpoint the "troublemakers" and the "worst of the worst" who most frequently engaged in prison violence and then isolate them to restore order.[30] Many states and the Federal Bureau of Prisons built solitary confinement units and "supermax" prisons.[31] They did so under the misguided belief that removing difficult prisoners from the general population and housing them in isolation—sometimes for years or decades—would reduce prison violence.[32]

As a result of this seismic shift in penal philosophy, solitary confinement has become engrained in correctional culture as a disciplinary sanction for prisoners who commit violations of prison rules.[33] Punitive solitary confinement (sometimes referred to as "disciplinary segregation") became a prevalent punishment for disruptive and non-violent disciplinary infractions.[34] Underlying this development is the belief that non-violent, yet "highly disruptive" prisoners pose "significant challenges" to prison administration, and as a result, correctional staff habitually use

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[29] *Id.*
[30] Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 Criminology 1341, 1341-42 (2006).
[31] Bennion, *supra* note 6, at 750-52.
[32] Briggs, *supra* note 30, at 1342.
[33] *See generally*, Erica Goode, *Rethinking Solitary Confinement*, N.Y. Times, March 11, 2012.
[34] David Shapiro, *Solitary Confinement In the Young Republic*, 113 Harvard L. R. 542, 584–87 (2019); Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems*, 15 (2018).

solitary confinement to "mitigate the impact of highly disruptive offenders within the correctional system."[35] The use of solitary confinement to incapacitate "highly disruptive" prisoners has become so common that at many institutions, "low-level nonviolent offenses [are] among the most common infractions" punished with isolation.[36]

However, individuals like Mr. Seth, whose disruptive behavior is driven by a lack of intellectual capacity rather than intentional behavior, pose a difficult problem: How is a prison to deal with a person with ID who will likely never be capable of complying with the various demands of life in a typical prison setting? As Mr. Seth's extensive time in isolation shows, even at the treatment-focused federal medical centers, the answer is often prolonged solitary confinement due to an actual or perceived "lack of proper placement options."[37]

The likelihood that individuals like Mr. Seth will languish in isolation is especially problematic because it inhibits their treatment needs and rehabilitative goals. This is because isolation prevents the development and/or maintenance of social skills, life skills, and other abilities necessary to function properly in the real world and also severely disrupts the ability of mental health staff to provide

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[35] McGinnis, *supra* note 5, at 39.
[36] Digard, *supra* note 34 at 15.
[37] McGinnis, *supra* note 5, at 39.

services.[38] Again, Mr. Seth's circumstances are instructive here: in his declaration, Dr. Denney observed that while in isolation, Mr. Seth will be unable to "improve his social functioning or to engage in more productive social interactions" because social skills "need to be learned by practicing with others rather than simply through education."[39] Similarly, while in isolation, prisoners are generally unable to participate in group recreation, socialization, therapeutic prison programming, and other rehabilitative prison experiences.[40] While problematic for any prisoner, this lack of programming participation is particularly concerning for people like Mr. Seth who have been deemed too dangerous to be released unsupervised, as isolation will prevent them from taking meaningful steps toward shedding this designation. This, together with the psychological damage inflicted by isolation discussed below, can prevent individuals like Mr. Seth from taking the rehabilitative steps that might enable them to function in the real world. Accordingly, the outlook for individuals like Mr. Seth is bleak—while they remain civilly committed to prison, they will likely be isolated indefinitely.

Unfortunately, as *amici* have observed, solitary confinement not only interferes with the treatment goals of people with ID, it also can inflict substantial

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[38] Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. of Psychiatry and the Law 104, 105 (2010).
[39] J.A. at 409.
[40] McGinnis *supra* note 5, at 29–30; J.A. at 408–09.

psychological harm and pain. Extensive research documents the negative psychological effects of solitary confinement.[41] While held in prolonged solitary confinement, even mentally resilient individuals "inevitably suffer severe psychological pain as a result of such confinement."[42] Study after study around the world and over decades have shown that the resulting damage is often horrific and exacerbates any underlying mental health issues.[43] This research shows that deprivation of environmental and social stimuli inflicts "strikingly toxic" damage to brain function and often dramatically impairs an individual's ability to interact with and understand the real world.[44] Psychologists have opined that this damage can trigger the "appearance of acute mental illness in individuals who had previously

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[41] *See e.g.*, Elena Blanco-Suarez, *The Effects of Solitary Confinement on the Brain*, Psychology Today, February 27, 2019,https://www.psychologytoday.com/us/blog/brain-chemistry/201902/the-effects-solitary-confinement-the-brain; Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units*, 52 Int. J. of Offender Therapy and Comparative Criminology, 622 (2008) (*Psychological Effects*); Craig Haney, *Mental Health Issues in Long-term Solitary and "Supermax" Confinement*, 49 Crime & Delinq. 124 (2003)(*Mental Health Issues*); Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 Int. J. of L. and Psychiatry, 49 (1985)
; Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. of Psychiatry, 1450 (1983)(*Psychopathological Effects of Solitary Confinement*).

[42] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. of L. & Pol'y., 325, 354 (2006) (*Psychiatric Effects*).

[43] *See generally*, *Psychological Effects*, *supra* note 41; *Psychiatric Effects*, *supra* note 42; *Mental Health Issues*, *supra* note 41; *Effects of Sensory Deprivation*, *supra* note 41; *Psychopathological Effects of Solitary Confinement*, *supra* note 41.

[44] *Psychiatric Effects*, *supra* note 42 at 354.

been free of any such illness," and can result in "prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community."[45] Further, a recent study showed that prisoners released from solitary confinement face dramatically increased mortality rates after release—people held in solitary confinement are 24% more likely to die within a year of release, 78% more likely to commit suicide, and 127% more likely to die from an opioid overdose within two weeks of release.[46]

Recognizing the tendency of solitary confinement to impair prisoners' ability to reintegrate into general population and into the world outside prison, many state correctional systems have implemented programs intended to counteract these effects. These programs provide rehabilitation, therapy, socialization, and education opportunities to isolated prisoners, which enabled easier and more successful transitions out of solitary confinement.[47] Although methods exist to ease the

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[45] *Id. See also*, American Psychiatric Association, *Position on Position Statement on Segregation of Prisoners with Mental Illness*, (2017); Christie Thompson*, From Solitary to The Street: What Happens When Prisoners go From Complete Isolation to Complete Freedom In a Day?*, The Marshall Project (Jun. 11, 2015); ACLU, Briefing Paper: The Dangerous Overuse of Solitary Confinement in the US, 10 (2014); Daniel P. Mears & William D. Bales, Supermax Incarceration and Recidivism, 47 Criminology 1131, 1135 (2009); David Lovell, et al., *Recidivism of Supermax Prisoners in Washington State*, 53 Crime & Delinq., 633, (2007).

[46] Lauren Brinkley-Rubenstein, *et al*., *Association of Restrictive Housing During Incarceration With Mortality After Release*, 1 Jama Open Network (2019).

[47] Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 Crime & Just. 384 (2018) (*Systematic Critique*); Terry Allen Kupers,

transition out of solitary confinement, the psychological damage inflicted during isolation remains.

Psychologists have shown that it is common for isolated prisoners to develop memory problems and difficulties thinking clearly.[48] Development of mood disorders and severe emotional sensitivity and instability are similarly common.[49] As isolation continues, the social capacity of prisoners deteriorates as they become accustomed to an asocial life.[50] As *amici* have observed, prolonged isolation can also cause a deterioration of impulse control, resulting in random violent outbursts that include destruction of personal property and self-mutilation.[51] Psychologists have also documented that prisoners may begin to experience distortions to reality, including auditory and visual hallucinations, as their grip on reality fades.[52]

Amici also recognize the findings of psychologists that the harms of solitary confinement are doubly severe for individuals like Mr. Seth, who have underlying mental health issues or ID and often suffer "severe exacerbation of [those] previously existing mental condition[s]."[53] Further, those with "borderline cognitive

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Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It 224–33 (2017).

[48] *Systematic Critique*, *supra* note 4, at 363

[49] *Mental Health Issues*, *supra* note 41 at 365.

[50] *Id.* at 373.

[51] *Psychiatric Effects*, *supra* note 42, at 336.

[52] *Id.* at 360.

[53] *Id.* at 329.

capabilities," like Mr. Seth, "are especially at risk for severe psychopathologic reactions to" solitary confinement, including a dramatically increased chance of deterioration into various "confusional, agitated, hallucinatory psychoses."[54] Prisoners suffering through such psychoses have been known to "smear[] themselves with feces, mumbl[e] and scream[] incoherently all day and night, [] even descending into the horror of eating parts of their own bodies."[55]

In addition to the horrific psychological consequences of solitary confinement, *amici* are aware of various studies showing that isolation puts prisoners at a dramatically higher risk for self-harm and suicide.[56] A study of prisoners in New York found that prisoners in solitary confinement were 6.9 times more likely to engage in self-harm and 6.3 times more likely to engage in potentially fatal self-harm. These facts are particularly concerning when there is already a high prevalence of this behavior in normal prison settings.[57] Others have found that "close to half of all successful suicides in prison occur among the six to eight percent of the prisoner population that is in isolated confinement at any given time."[58] In 2005, forty-four California prisoners successfully committed suicide—thirty-one of them were held

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[54] *Id.* at 348-49.
[55] *Id.* at 351.
[56] Samarth Gupta, *From Solitary to Society*, Harvard Political Review, Feb. 7, 2016.
[57] *See generally*, Fatos Kaba, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, Am. J. Pub. Health, 442 (2014).
[58] Hans Toch & Terry A. Kupers, *Violence in Prisons, Revisited*, Hans, 45.3 J. of Offender Rehabilitation, 19 (2007).

in solitary confinement.[59] Around eight years later, data in an expert report showed that prisoners in California's solitary confinement units were 33 times more likely to commit suicide.[60]

Recognizing the extensive harm inflicted by solitary confinement, multiple states implemented sweeping reforms to restrict the use of solitary confinement. In fact, over one-third of states have initiated restrictions on solitary confinement. Nine states—Colorado, Idaho, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, and Washington—report system-wide reforms, reducing the population of prisoners in isolation from nearly 100,000 to approximately 60,000 in just four years.[61] Prison officials—including *amici*—have developed strategies to reduce the influx of prisoners into solitary, including eliminating punitive isolation for minor infractions, and creating alternative housing for prisoners who need mental health treatment or protective custody.[62] Unfortunately, these alternative methods of prison management have yet to be implemented in many correctional systems,

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[59] Sal Rodriguez, Solitary Watch, *Fact Sheet: The High Cost of Solitary Confinement* (2011).

[60] Paige St. John, *Court-Appointed Expert Blasts California Effort on Prison Suicides*, Los Angeles Times, Mar. 13, 2013.

[61] The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell*, 7, 10 (2018).

[62] Digard, *supra* note 34, at 28.

meaning that a great many people like Mr. Seth continue to languish in solitary confinement.

Not only does prolonged solitary confinement inflict horrific damage upon prisoners, it also creates counterproductive outcomes for prison administration in the form of increased rates of prison violence and disorder. The use of solitary confinement also exacts a high psychological cost from prison staff working these units, who are already at a high risk for alcoholism, post-traumatic stress disorder, and suicide.[63] The cruelty and harshness inherent in solitary confinement units often results in staff normalizing dehumanization and the infliction of suffering, to the point that "culture of harm" emerges, wherein mutual animosity between prisoners and guards flourishes while the use of force proliferates.[64] Perhaps unsurprisingly, studies show that as the use of solitary confinement increased, "[p]risons with higher rates of restrictive housing had higher levels of facility disorder."[65] Psychologists found that the pathology underlying the increase in disorder was caused by isolation,

[63] Christopher Zoukis, *Prisons Don't Damage Only Prisoners; Guards at Risk of PTSD and Suicide, Too*, Prison Legal News, June 8, 2018; National Institute of Justice, *Topical Working Group on the Use of Administrative Segregation in the U.S.*, 19 Oct. 2015 (a panel of correctional experts noting that correctional officers working in solitary confinement units experience heightened trauma and a higher risk of perpetrating domestic violence).

[64] Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, Crim. Just. & Behavior, 969–71 (2008).

[65] Allen Beck, U.S. Dep't of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, 1 (2015), https://www.bjs.gov/content/pub/pdf/ urhuspj1112.pdf.

which led prisoners to "occupy this idle time by committing themselves to fighting against the system."[66] The result is often the creation of a seemingly never-ending destructive cycle in which any behavioral, mental health, and/or capacity issues are exacerbated, leading to further disciplinary problems triggering extended isolation.[67] For intellectually disabled individuals like Mr. Seth, who are held in solitary confinement as a result of the prison's inability to accommodate the behavioral issues inherent in their disability, succumbing to such a destructive cycle is a virtual certainty. Accordingly, Mr. Seth's civil commitment to BOP custody will "virtually ensure continuing failure and continuing incarceration."[68]

CONCLUSION

Civilly committing intellectually disabled individuals like Mr. Seth to prison is counterproductive, destructive, and burdensome to prison administration. Instead of placing these individuals in an environment designed to accommodate the various complexities of their disability and provide treatment, civil commitment to prison forces intellectually disabled individuals like Mr. Seth into an institutional environment that is ill-suited to address their various individualized needs and is unable to provide them treatment. As a result of a perceived or actual inability to

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[66] *Mental Health Issues*, *supra* note 41, at 140.
[67] Rick Raemisch & Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado*, 2 (2015).
[68] J.A. at 406.

properly house and treat them, prison staff often will relegate people like Mr. Seth to solitary confinement, where their mental state is likely to deteriorate, making compliance with the demands of prison life, and accordingly, their ability to return to society, even more difficult.[69] Ultimately, civilly committing legally incompetent and intellectually disabled people like Mr. Seth to prison traps them in a destructive downward spiral of psychological deterioration in an inherently punitive environment incapable of accommodating or treating their disability.

Dated: December 24, 2019

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[69] *Amici* find these consequences doubly concerning for people like Mr. Seth, for whom a therapeutic alternative outside of prison is available.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 5,975 words, excluding the parts of the brief exempt by FRAP 32(f).

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Dated: December 24, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on December 24, 2019.

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Dated: December 24, 2019

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