

No. 17-53

IN THE
Supreme Court of the United States

SHAWN T. WALKER,
Petitioner,

v.

MICHAEL A. FARNAN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR THE FAIR PUNISHMENT PROJECT
AS AMICUS CURIAE SUPPORTING PETITIONER**

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INTEREST OF AMICUS CURIAE

The Fair Punishment Project, or FPP, is a joint project of Harvard Law School's Criminal Justice Institute and Charles Hamilton Houston Institute for Race and Justice. FPP's mission is to address ways in which America's laws and criminal-justice system contribute to excessive punishment for offenders. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe while still affirming the inherent dignity that all people possess.¹

INTRODUCTION

This brief addresses the need for certiorari in this case by summarizing the overwhelming evidence that solitary confinement devastates prisoners' mental health, approaching a form of psychological torture. There is essentially complete consensus in the medical and scientific communities that solitary confinement inflicts severe psychological damage, particularly on vulnerable groups such as juveniles and the mentally ill. Because such devastating harms implicate a fundamental liberty interest, they may not be imposed without meaningful review.

¹ No counsel for a party authored this brief in whole or in part, and no entity or person other than amicus curiae, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief at least 10 days prior to its due date. Letters from the parties consenting to the filing of this brief are on file with the Clerk. This brief does not purport to convey the position of Harvard Law School.

BACKGROUND

After being sentenced to death in 1992, petitioner Shawn Walker was placed in solitary confinement in a windowless 7-by-12 foot cell, where he was required to remain almost 24 hours a day, seven days a week. Pet. App. 8a. Mr. Walker was permitted to leave his cell only five times a week for two-hour intervals of exercise in a restricted area known as the “dog cage.” *Id.* To enter the “cage,” Mr. Walker had to undergo a full-body search. Pet. App. 8a-9a. To avoid the intrusion of these searches, Mr. Walker did not leave his cell for open-air exercise for almost seven years. Pet. App. 9a.

Mr. Walker’s death sentence was vacated in 2004—by which time he had spent twelve years in solitary confinement. Pet. App. 8a, 12a, 59a. Although he promptly challenged his continued solitary confinement, he remained there for an additional *eight years*, until he was resentenced to life imprisonment without the possibility of parole in 2012. Pet. App. 12a.

ARGUMENT

I. EXTENSIVE RESEARCH HAS PRODUCED A SCIENTIFIC CONSENSUS ON THE UNIQUE AND DEVASTATING HARMS OF SOLITARY CONFINEMENT

A. The Rise Of Solitary Confinement In The United States

Solitary confinement became common in this country in the early nineteenth century, with the rise of a modern penitentiary system. *See* Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol’y 325, 328 (2006); Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 441-442 (2006). Although solitary confinement was imposed in

that era in a spirit of social optimism and with the goal of rehabilitation, it resulted in a sharp rise in the incidence and severity of mental disturbance among prisoners. Grassian, 22 Wash. U. J.L. & Pol’y at 328-329; Smith, 34 Crime & Just. at 442, 456-461; Cloud et al, *Public Health and Solitary Confinement in the United States*, 105 Am. J. Pub. Health 18, 19 (2015). This Court itself recognized the severe harms inflicted by solitary confinement, in *In re Medley*, 134 U.S. 160 (1890):

A considerable number of the prisoners fell, after even a short confinement, into a semifatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

Id. at 168. At least in part due to these harsh effects, solitary confinement was mostly abandoned in the United States by the early twentieth century. Smith, 34 Crime & Just. at 465-467.

In the last three decades, however, solitary confinement has again become common, in part through the rise of “supermax” prisons, in which prisoners are kept in “near-total isolation” for periods of time that previously “were unprecedented in modern corrections.” Haney, *Mental Health Issues in Longer-Term Solitary and “Supermax” Confinement*, 49 Crime & Delinquency 124, 126 (2003); see also Human Rights Watch, *Out of Sight: Super-Maximum Security Con-*

finement in the United States (Feb. 2000);² Smith, 34 Crime & Just. at 442-443.

Unlike traditional prisons, supermax facilities impose solitary confinement “as part of a long-term strategy of correctional management and control rather than as an immediate sanction for discrete rule violations.” Haney, 49 Crime & Delinquency at 126. Supermax prisoners:

live almost entirely within the confines of a [60-to-80-square] foot cell, can exist for many years separated from the natural world around them and removed from the natural rhythms of social life, are denied access to vocational or education training programs or other meaningful activities in which to engage, get out of their cells no more than a few hours a week, ... are rarely if ever in the presence of another person without being heavily chained and restrained, [and] have no opportunities for normal conversation or social interaction.

Id. at 127. Supermax prisoners thus “experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past.” *Id.*

This Court has itself recognized the severe conditions of supermax prisons. In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Court described the “harsh conditions” in an Ohio supermax facility where “all human contact is prohibited...; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room.” *Id.* at 223-224.

² Available at <https://www.hrw.org/legacy/reports/2000/supermax/>.

Supermax is one of a number of forms of solitary confinement in use in the United States today. While they differ in certain details, the essential features of all these various forms are consistent. *See* Liman Program & Ass’n of State Correctional Administrators, *Time-in-Cell: the ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* ii (Aug. 2015).³ As of 2014, there were an estimated 80,000 to 100,000 prisoners in some form of solitary confinement in the United States. *Id.*; *see also* Amnesty International, *Entombed: Isolation in the US Federal Prison System* (July 16, 2014).⁴ These numbers mean that the United States “exposes more of its citizenry to solitary confinement than any other nation.” Cloud, 105 Am. J. Pub. Health at 18.

Solitary confinement is particularly prevalent among capital inmates. Of the approximately 2800 state prisoners currently on death row in the United States, an estimated 61 percent are isolated for 20 hours or more a day—as Mr. Walker was in this case. *See* Robles, The Marshall Project, *Condemned to Death—and Solitary Confinement* (July 23, 2017).⁵ The Third Circuit recognized that the conditions of Mr. Walker’s confinement were analogous to the “extreme deprivation” of the supermax prison described by this Court in *Wilkinson*. Pet. App. 24a.

³ Available at https://law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

⁴ Available at <https://www.amnestyusa.org/reports/entombed-isolation-in-the-us-federal-prison-system/>.

⁵ Available at <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement#.TlhqbzPaK>.

B. The Scientific Consensus On Solitary Confinement

A large body of medical and scientific literature demonstrates the devastating effects that prolonged social isolation has on the human psyche. *See, e.g.*, Grassian, 22 Wash. U. J.L. & Pol’y at 325, 330, 343-346 & Appendices (collecting sources); Haney, 49 Crime & Delinquency at 130 (same). For example, a study in the 1950s and early 1960s described subjects who were exposed to sensory isolation experiencing “cognitive impairment, massive free-floating anxiety; extreme motor restlessness; emergence of primitive aggressive fantasies which were often accompanied by fearful hallucinations; and a decreased capacity to maintain an observing, reality-testing ego function.” Grassian, 22 Wash. U. J.L. & Pol’y at 345 (citing Brownfield, *Isolation: Clinical and Experimental Approaches* (1965); and *Sensory Deprivation: A Symposium Held at Harvard Medical School* (Solomon et al. eds., 1961)). EEG recordings “confirmed the presence of [brain] abnormalities typical of stupor and delirium.” *Id.* Another study from the same period, of pilots in the British Royal Air Force exposed to in-flight restricted auditory and visual stimulation, reported that anxiety was common, and that “feelings of detachment from reality, and perceptual distortions were described.” *Id.* at 356 (citing Bennett, *Sensory Deprivation in Aviation*, in *Sensory Deprivation: A Symposium Held at Harvard Medical School* 161-173 (Solomon et al. eds., 1961)). Some researchers have recognized extreme social isolation as a form of torture. *See* Başoğlu et al, *Torture vs Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent*, 64 Archives Gen. Psychiatry 277, 284 (2007) (in survey of survivors of torture, isola-

tion was associated with at least as much if not more distress than certain forms of physical torture).

Results of studies of solitary confinement in prisons, both inside and outside the United States, are consistent with these findings. One researcher described “isolation panic” in prisoners confined to solitary. Toch, *Mosaic of Despair: Human Breakdowns in Prison* 48-54 (rev. ed. 1992). And a review of the literature found that “[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social and physical pathologies.” Cloud, 105 Am. J. Pub. Health at 21; *see also* Haney, 49 Crime & Delinquency at 130-132 (collecting sources); Smith, 34 Crime & Just. at 471-497 (same); Metzner et al, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry Law 104 (2010).

One psychiatrist who evaluated the effects of solitary confinement in over 200 prisoners observed that “[t]he restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances.” Grassian, 22 Wash. U. J.L. & Pol’y at 354. “[F]or many of the inmates so housed,” he elaborated, “incarceration in solitary caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.” *Id.* at 333. In particular, prisoners developed hyperresponsivity; panic attacks; difficulty with thinking, concentration and memory; obsessive

thoughts, paranoia, and problems with impulse control. *Id.* at 335-336.

Other authorities or experts have reached similar conclusions. In another report, prisoners in solitary:

recounted struggling daily to maintain their sanity. They spoke of longing to catch sight of a tree or a bird. Many responded to their isolation by shutting down their emotions and withdrawing even further, shunning even the meager human conversation and company they were afforded.

Goode, *Solitary Confinement: Punished for Life*, N.Y. Times, Aug. 3, 2015;⁶ see also Skibba, *Solitary Confinement Screws Up the Brains of Prisoners*, Newsweek, Apr. 18, 2017.⁷ An official appointed by the United Nations Commission on Human Rights similarly concluded that “solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions.” U.N. Secretary-General, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment* 21-22, U.N. Doc. A/66/268 (Aug. 5, 2011) (“U.N. Special Rapporteur”).⁸ And the American Bar Association, in a statement submitted to Congress, noted “that isolation decreases brain activity and can provoke serious psychiatric

⁶ Available at https://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html?_r=0.

⁷ Available at <http://www.newsweek.com/2017/04/28/solitary-confinement-prisoners-behave-badly-screws-brains-585541.html>.

⁸ Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>.

harms—including severe depression, hallucination, withdrawal, panic attacks, and paranoia—some of which may be longlasting.” *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 116 (2012) (statement of the American Bar Association).

Studies show that inmates in solitary confinement experience symptoms of psychological trauma and psychopathology at an extremely high rate. Haney, 49 *Crime & Delinquency* at 134-137. They are also more likely to commit suicide than other prisoners. Metzner, 38 *J. Am. Acad. Psychiatry Law* at 105; *see also* Kaba et al, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 *Am. J. Pub. Health* 442, 445 (2014) (in a study of New York City jail system, “acts of self-harm were strongly associated with assignment of inmates to solitary confinement”).

Serious symptoms caused by solitary confinement may appear in as quickly as a few days to a few weeks, with the health risks rising as the duration of confinement increases. Smith, 34 *Crime & Just.* at 494-495. Prisoners who are eventually released from solitary, moreover, may never recover; they “have accommodated so profoundly to the supermax environment that they may be unable to live anywhere else.” Haney, 49 *Crime & Delinquency* at 138. As one report put it, many prisoners released from solitary “still carried the psychological legacy of their confinement. They startled easily, avoided crowds, sought out confined spaces and were overwhelmed by sensory stimulation.” Goode, *Solitary Confinement: Punished for Life*.

1. Effects of solitary confinement on particularly vulnerable groups

Certain groups are especially susceptible to harm from solitary confinement. For example, “solitary confinement of persons with mental illnesses causes extreme suffering, has adverse long-term consequences for cognitive and adaptive functioning, disrupts treatment and exacerbates illness.” Public Policy Platform of The National Alliance on Mental Illness 68 (12th ed. Dec. 2016).⁹ The American College of Correctional Physicians has likewise concluded that “prolonged segregation of inmates with serious mental illness, with rare exceptions, violates basic tenets of mental health treatment There is a consensus among clinicians that placement of many or most inmates with serious mental illness in these settings is contraindicated because their psychiatric conditions will clinically deteriorate or not improve.” *Restricted Housing of Mentally Ill Inmates*.¹⁰ Similarly, the American Psychiatric Association has concluded that extended solitary confinement of prisoners with serious mental illness should be avoided with rare exceptions, “due to the potential for harm to such inmates.” *Position Statement on Segregation of Prisoners with Mental Illness* (Dec. 2012);¹¹ see also Mental Health America, *Position Statement 24: Seclusion and Restraints* (“Seclusion exacerbates the

⁹ Available at [https://www.nami.org/getattachment/Learn-More/Mental-Health-Public-Policy/Public-Policy-Platform-December-2016-\(1\).pdf](https://www.nami.org/getattachment/Learn-More/Mental-Health-Public-Policy/Public-Policy-Platform-December-2016-(1).pdf).

¹⁰ Available at http://accpmed.org/restricted_housing_of_mentally.php (visited Aug. 9, 2017).

¹¹ Available at <https://www.psychiatry.org/home/policy-finder?g=6c46630a-43ee-46f6-a079-ec0f9e6c9038&Page=10>.

suffering of people with mental health conditions....”);¹² Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* 149-153 (2003) (“Human Rights Watch 2003”);¹³ U.N. Special Rapporteur at 19.

Despite their special vulnerability to harm from solitary confinement, mentally ill prisoners—who usually have more difficulty following strict prison rules than other prisoners—are disproportionately subjected to such confinement. *See* Human Rights Watch 2003 at 147. For example, as of July 2002, 31.85% of administrative segregation population in California prisons were on the mental-health caseload. *Id.* at 148; *see also* Cloud, 105 Am. J. Pub. Health at 20. Once in solitary confinement, moreover, mentally ill prisoners are substantially less likely to receive appropriate treatment than those in the general prison population. *See* Human Rights Watch 2003 at 154. In fact, “[i]n many segregation units, mental health services are so poor that even floridly psychotic prisoners receive scant attention, abandoned in their cells accompanied only by their hallucinations.” *Id.* at 157; *see also* Metzner, 38 J. Am. Acad. Psychiatry Law at 105. Prisoners with mental illness are also often subject to a cycle of being transferred to a psychiatric facility, where they improve, and then back to solitary confinement, where they experience mental breakdown, over and over. *See* Human Rights Watch 2003 at 161-163.

Juveniles are a second group especially vulnerable to harm from solitary confinement. Indeed, “nowhere

¹² Available at <http://www.mentalhealthamerica.net/positions/seclusion-restraints> (visited Aug. 9, 2017).

¹³ Available at <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

is the damaging impact of incarceration on vulnerable children more obvious than when it involves solitary confinement.” ACLU, *Alone & Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities* 23 n.85 (rev. June 2014).¹⁴ The American Academy of Child and Adolescent Psychiatry opposes any period of solitary confinement for juveniles because they are particularly at risk for adverse reactions “[d]ue to their developmental vulnerability.” *Solitary Confinement of Juvenile Offenders* (Apr. 2012);¹⁵ see also United Nations Rules for the Protection of Juveniles Deprived of their Liberty ¶ 67, G.A. Res. 45/113 (Dec. 14, 1990) (solitary confinement for juveniles should be “strictly prohibited”);¹⁶ U.S. Department of Justice, *Report of the Attorney General’s National Task Force on Children Exposed to Violence* 178 (Dec. 12, 2012);¹⁷ Dimon, *How Solitary Confinement Hurts the Teenage Brain*, *The Atlantic*, June 30, 2014.¹⁸

¹⁴ Available at <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf>.

¹⁵ Available at http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

¹⁶ Available at <http://www.un.org/documents/ga/res/45/a45r113.htm>.

¹⁷ Available at <https://www.justice.gov/defendingchildhood/ev-rpt-full.pdf>.

¹⁸ Available at <https://www.theatlantic.com/health/archive/2014/06/how-solitary-confinement-hurts-the-teenage-brain/373002/>.

2. Government recognition of the harms of solitary confinement

The executive and legislative branches have begun to recognize the scientific consensus on solitary confinement. In 2012 and 2014, the Senate Judiciary Committee held hearings on the topic, taking testimony from psychologists, professional organizations, former inmates, and others about the harms of the practice. *See Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, 112th-113th Congs.* And last year, President Obama wrote an editorial describing the potential of solitary confinement “to lead to devastating, lasting psychological consequences.” *Barack Obama: Why We Must Rethink Solitary Confinement*, Wash. Post, Jan. 25, 2016.¹⁹ On the same day, he also adopted a series of Justice Department recommendations to limit the use of solitary confinement in federal prisons. *See* Press Release, The White House, Office of the Press Secretary, *FACT SHEET: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016).²⁰ Among other things, he ended solitary confinement for juveniles and expanded alternative facilities for mentally ill patients. *Id.* These policy changes—which remain in place—were of course not binding on state prisons, however.

¹⁹ Available at https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.0a40340db775.

²⁰ Available at <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>.

See Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, Wash. Post, Jan. 25, 2016.²¹

II. THE SEVERE HARMS OF SOLITARY CONFINEMENT MAY NOT BE IMPOSED WITHOUT MEANINGFUL PERIODIC REVIEW

Prolonged solitary confinement plainly implicates fundamental liberty interests. The scientific research just described makes clear that the imposition of solitary confinement is not merely a “transfer from one institution to another within the state prison system.” *Meachum v. Fano*, 427 U.S. 215, 225 (1976). It is a severe deprivation of an entirely different level, often altering the prisoner’s personality, extinguishing all hope, and robbing the prisoner of the solace of ordered thoughts—in some cases endangering the prisoner’s very sanity. See *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (“Years on end of near-total isolation [in solitary confinement] exact a terrible price.”).

As noted, this Court recognized the harms imposed by solitary confinement over a century ago. See *Medley*, 134 U.S. at 168. Since *Medley*, the body of evidence demonstrating the severe harms of solitary confinement has grown by leaps and bounds, while prisons in the United States now subject prisoners to solitary confinement for far longer than before. Whether for that reason or otherwise, this Court has recognized that solitary confinement implicates due process con-

²¹ Available at https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html?utm_term=.201229dae33a.

cerns. *See Wilkinson*, 545 U.S. at 224 (prisoners have a constitutionally protected liberty interest in avoiding supermax prison).

Given the extensive use of solitary confinement in the criminal-justice system today and the overwhelming evidence of its unique harms, this Court should reaffirm a prisoner's liberty interest in avoiding solitary confinement. *Cf. Vitek v. Jones*, 445 U.S. 480, 493 (1980) (prisoner's involuntary transfer to mental hospital implicates due process because the "consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime").

The Court should further affirm that because of this liberty interest, prisoners are entitled to meaningful review of the initial decision to impose solitary confinement, as well as to periodic review of continued confinement. "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Indeed, the "opportunity to be heard" is a "fundamental requirement of due process," one that "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also Morrissey v. Brewer*, 408 U.S. 471, 487-488 (1972) (parolee entitled to hearing before revocation of parole). Finally, due process also requires that any solitary confinement not continue beyond the period during which the basis for it exists—hence the need for ongoing periodic review. *See Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (where basis for holding insanity acquittee in mental hospital disappeared, state was no longer entitled to hold him on that basis and insanity acquittee

was entitled to “constitutionally adequate procedures to establish the grounds for his confinement”). As explained in the petition, that standard was not met in this case.²²

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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²² The Department of Justice agrees that frequent, meaningful review of solitary confinement is necessary: In a report last year, it stated that “[a]n inmate’s initial and ongoing placement in restrictive housing should be regularly reviewed by a multi-disciplinary staff committee, which should include not only the leadership of the institution where the inmate is housed, but also medical and mental health professionals.” U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing, Final Report* 95, 106 (Jan. 2016), available at <https://www.justice.gov/archives/dag/file/815551/download>.