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Nevada Attorneys for Criminal Justice

TO: Senate Judiciary Committee

FROM: Nevada Attorneys for Criminal Justice (NACJ)

DATE: April 4, 2017

RE: SB 402—Hearing April 5, 2017

Support for SB 402

NACJ Supports SB 402

Basis for Support

“I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.” – Charles Dickensⁱ

Solitary confinement, as noted by Charles Dickens, is a monstrous punishment. There is an extensive medical literature demonstrating its bad effects, and writers from Alexis de Tocqueville to Nelson Mandela have spoken out against it. However, NACJ is a legal organization, and so this letter briefly focuses on the legal argument against solitary confinement. In short, the passage of SB 402 is necessary to bring Nevada in line with the emerging legal

consensus in the US and the world that widespread use of solitary confinement is immoral and illegal.

The Eighth Amendment to the U.S. Constitution forbids cruel and unusual punishment.ⁱⁱ The U.S. Supreme Court has not definitively ruled on the constitutionality of solitary confinement *per se*. However, it wrote about the punishment as early as 1890. “But experience demonstrated that there were serious objections to it [solitary confinement]. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous 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.”ⁱⁱⁱ

American courts have placed substantial limits on the use of solitary confinement. For instance, courts have banned the long-term segregation of prisoners.^{iv} Other courts have banned the placement of mentally ill prisoners into solitary, likening it to “putting an asthmatic in a place with little air to breathe.”^v This trend is likely to soon extend to a ban on juvenile solitary confinement as well, given the Supreme Court’s admonishment that there are “fundamental differences between juvenile and adult minds” which render children uniquely vulnerable to the psychological trauma inflicted by solitary confinement.^{vi}

Even in situations where solitary confinement is still practiced, states are taking voluntary action to place limits on it. Last year, California, New Jersey, and North Carolina all enacted legislation or regulations to ban or limit the use of solitary confinement for juveniles and other vulnerable populations. Within the past few years, seventeen other states have taken action to place lesser limits on the practice. And if a state does not take voluntary action, the misuse of solitary confinement can lead to substantial civil liability, as New York found when it settled a case for \$62 million.^{vii}

There is also a growing consensus against the widespread use of solitary confinement in international law. The past two UN Special Rapporteurs on Torture have both condemned the practice. As one noted in 2011, “Considering the severe mental pain or suffering solitary confinement may cause, it can amount to torture or cruel, inhuman or degrading treatment or punishment when used as a punishment, during pre-trial detention, indefinitely or for a prolonged period, for persons with mental disabilities or juveniles.”^{viii} And in 2013, the European Court of Human Rights blocked the extradition of a suspected terrorist to the US, because the man was mentally ill and the Court unanimously agreed that the prospect of solitary confinement would constitute torture.^{ix}

There are also a number of policy reasons to oppose the widespread use of solitary confinement. In the first instance, it is counterproductive as a penological strategy. Prisoners who have been held in solitary confinement are more likely to reoffend upon release.^x They are also more difficult for guards to manage while in prison, and more dangerous, as noted by a letter from Texas prison guards supporting a reform effort there.^{xi} And they are substantially more likely to attempt self-harm. In a 2014 study from New York, only 7.3% of inmates were placed into solitary confinement, but this small group accounted for 55.3% of all incidents of self-harm.^{xii}

Solitary confinement also has specific bad effects on particularly vulnerable prisoners. The danger to mentally ill inmates and children has already been discussed. However, long periods of cramped confinement are uniquely bad for individuals with physical disabilities, and arguably violate the Americans with Disabilities Act.^{xiii} In addition, many LGBT inmates are placed in solitary confinement in order to protect them from violence by other inmates. However, this then leads them to greater risk of mental health problems. Solitary confinement for LGBT people is thus a form of further discrimination.^{xiv} Finally, a recent Yale study found that solitary confinement is disproportionately imposed on black and Latino prisoners compared to the general population.^{xv} The overuse of solitary

confinement is like a magnifying glass, focusing and sharpening discriminatory practices that already exist outside the prison walls.

In a recent Supreme Court case, Justice Kennedy did something unprecedented. He concurred with the judgment on the relevant legal question (which had nothing to do with solitary confinement), but then spent five pages waxing eloquent about the problems with solitary confinement.^{xvi} Within the legal commentariat, this was widely understood as an invitation to challenge the legality of solitary confinement. This Committee should take up Justice Kennedy's challenge, and recognize that "the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." NACJ supports stepping back from this system of madness, and so supports SB 402.

Jim Hoffman

Jim Hoffman
NACJ Legislative Committee

ⁱ AMERICAN NOTES FOR GENERAL CIRCULATION (Chapman & Hall 1842) 146.

ⁱⁱ A similar proscription is in the Nevada Constitution at Article 1, Section 6.

ⁱⁱⁱ *In re Medley*, 134 U.S. 160, 168 (1890) (striking down Colorado's solitary confinement law, though not on Eighth Amendment grounds).

^{iv} *E.g.*, *United States v. Johnson*, 223 F.2d 665, 673 (7th Cir. 2000) (banning permanent solitary confinement of federal prisoners); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 914 (S.D. Tex. 1999), *rev'd on other grounds by Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001) ("It goes without question that an incarceration that inflicts daily, permanently damaging, physical injury and pain is unconstitutional. Such a practice would be designated as torture. Given the relatively recent understanding of the primal necessity of psychological well-being, the same standards that protect against physical torture prohibit mental torture as well-including the mental torture of excessive deprivation.").

^v *E.g.*, *Madrid v. Gomez*, 889 F.Supp. 1146, 1265-66 (N.D. Cal. 1995) ("The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly "unreasonable." [...] Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief."); *Jones 'El v. Berge*, 164 F.Supp.2d 1096 (W.D. Wis. 2001).

^{vi} *Miller v. Alabama*, 567 U.S. ___, slip op. at 8-9 (2012).

^{vii} <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/21/is-solitary-confinement-on-the-way-out>

^{viii} <http://www.un.org/apps/news/story.asp?NewsID=40097>

^{ix} *Aswat v. United Kingdom*, Eur. Ct. H.R. 17299/12 (2013).

^x David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME AND DELINQUENCY 633, 644 (2007).

^{xi} <https://www.texasobserver.org/texas-prison-guard-union-calls-curtailement-solitary-confinement-death-row/>

^{xii} Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 A. J. PUB. HEALTH 442 (March 2014).

^{xiii} https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf

^{xiv} <http://www.hrc.org/blog/doj-releases-data-on-use-of-segregation-solitary-confinement-in-prisons-and>

^{xv} <https://www.theatlantic.com/politics/archive/2016/12/race-solitary-confinement/509456/>

^{xvi} *Davis v. Ayala*, 576 U.S. ___, concurrence of Kennedy, J. (2015).