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VIA LAWYERS SERVICE

May 11, 2016

Joseph Orlando, Clerk
Appellate Division Clerk's Office
Hughes Justice Complex, 5th Floor
25 Market Street
PO Box 006
Trenton, NJ 08625

Re: ***Rigoberto Mejia v. Department of Corrections***
Docket No: A-0710-13T4

Dear Mr. Orlando:

Pursuant to this Court's Order of April 14, 2016, enclosed please find an original and one copy of Plaintiff-Appellant's Supplemental Brief and Certification of Service.

Please file these documents and return one copy stamped "Filed" in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter. If you have any questions or concerns, please contact me at 973-854-1714.

Sincerely,

Alexander Shalom
Senior Staff Attorney

cc: Alex Zowin, Esq.
Hon. Jose L. Fuentes
Hon. Ellen L. Koblitz
Hon. Robert J. Gilson

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RIGOBERTO MEJIA, Plaintiff- Appellant, vs. NEW JERSEY DEPARTMENT OF CORRECTIONS,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000710-13T4 CIVIL ACTION ON APPEAL FROM: A FINAL DECISION OF THE DEPARTMENT OF CORRECTIONS SAT BELOW: DEPARTMENT OF CORRECTIONS **CERTIFICATION OF SERVICE**

I, Alexander Shalom, Esq., hereby certify that on this date, I caused to be served by Lawyers Service one original and one copy of Plaintiff-Appellant's Supplemental Brief:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Alexander Shalom, Esq.

Dated: May 11, 2016

RIGOBERTO MEJIA,

Plaintiff- Appellant,

vs.

NEW JERSEY DEPARTMENT OF CORRECTIONS,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000710-13T4

CIVIL ACTION

ON APPEAL FROM:

A FINAL DECISION OF THE DEPARTMENT OF CORRECTIONS

SAT BELOW:
DEPARTMENT OF CORRECTIONS

BRIEF OF ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This case calls on the Court to address very narrow issues: whether New Jersey prisons may lawfully send mentally ill prisoners to solitary confinement for years on end and what process must occur to assess mental illness prior to imposing such punishment. Appellant seeks review of a determination by the Department of Corrections ("Department") sentencing him to three and a half years in solitary confinement. He does not challenge the sufficiency of the proofs offered to sustain the four disciplinary charges against him; instead he questions the process surrounding the imposition of the sanction of solitary confinement.

Last year, United States Supreme Court Associate Justice Anthony Kennedy predicted that courts would soon need to confront an uncomfortable but overdue question: whether the long-term use of solitary confinement violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Davis v. Ayala*, 135 *S. Ct.* 2187, 2210 (2015) (Kennedy, J., concurring). While Appellant contends that the question must be answered in the affirmative, the Court need not make so broad a pronouncement in this case. Indeed, Appellant would prevail under a far less sweeping rule. Before Justice Kennedy reminded the nation that, in the words of Dostoyevsky, "[t]he degree of civilization in a society can be judged by entering its

prisons," courts throughout the country had repeatedly recognized that placing people with serious mental illnesses in prolonged solitary confinement subjects them to an unreasonable risk of harm and therefore constitutes cruel and unusual punishment.

In this case the Department abdicated its constitutional and regulatory responsibilities when it failed to screen Appellant for mental illness prior to putting him in administrative segregation for nearly three and a half years.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Appellant, Rigoberto Mejia, is a prisoner currently serving a sentence at New Jersey State Prison. RA1.[2] On July 15, 2013, Appellant, claiming that he was fearful that an "officer wanted to jump" him, (RA21) threw a bucket of hot water and bodily fluids on a corrections officer (RA18); another officer, who was sitting below Appellant's cell, was also hit. RA26. Officers attempted to extract Appellant from his cell, but he had tied a bedsheet to the door, requiring the officers to cut the sheet prior to entry. RA69. Officers used a chemical agent to subdue

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[1] Because the Procedural history and Statement of Facts are closely intertwined, they are being combined to avoid repletion and for the convenience of the Court.

[2] RA refers to Respondent's Appendix;
RBr refers to Respondent's brief;
ABr refers to Appellant's initial *pro se* brief.

Appellant. RA54. Appellant was medically evaluated and then placed in prehearing detention. RA66.

Appellant was charged with two counts of *.012, "throwing bodily fluids at any other person or otherwise purposely subjecting such person to contact with bodily fluid" (RA23, RA31); one count of *154, "tampering with a locking device" (RA39); and one count of *306, "conduct which disrupts the security or orderly running of the correctional facility" (RA47).

On July 17, 2013, a hearing was held wherein Appellant pleaded guilty to one of the bodily fluid charges (RA20) and not guilty to the other three charges. RA28, RA36, RA44. Appellant was adjudicated guilty of all four charges. RA22, RA30, RA38, RA46.

For the first bodily fluids charge, Appellant received a sanction of 15 days detention, 365 days loss of commutation time, 365 days of administrative segregation, and 90 days loss of television, phone and radio privileges. RA25. For the second bodily fluids charge: 15 days detention, 365 days loss of commutation time, 365 days of administrative segregation, and 365 days loss of recreation privileges. RA33. For the tampering with a locking device charge: time served in detention, 180 days loss of commutation time, 180 days of administrative segregation, and 30 days loss of recreation privileges. RA41.

For the conduct that disrupts charge: time served in detention and 365 days of administrative segregation. RA49. With the exception of detention, for which the sanction was time-served, the Hearing Officer ran all of the sanctions consecutive to one another. RA33, RA41, RA49.

As a result, Appellant's aggregate sanctions were: 30 days of detention, 910 days loss of commutation time; 90 days loss of television, telephone, and radio privileges; 60 days loss of recreation privileges; and 1275 days - nearly three years and six months - of administrative segregation.[3]

On July 22, 2013, Appellant filed an administrative appeal in Spanish. RA87. On August 8, 2013, the Assistant

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[3] In New Jersey, both "detention" and "administrative segregation" are used to refer to a practice that is commonly referred to as solitary confinement. The National Alliance on Mental Illness defines solitary confinement as "the placement of individuals in locked, highly restrictive and isolated cells or similar areas of confinement for substantial periods of time with limited or no human contact and few, if any, rehabilitative services." National Alliance on Mental Illness, *NAMI Policy Statement Against the Use of Solitary Confinement on Individuals with Mental Illness* (February 2010), available at: http://www.nami.org/NAMI/media/NAMI-Media/downloads/Public-Policy-Platform 9-22-14.pdf. Throughout this brief, Appellant refers to both detention and administrative segregation as "solitary confinement." Citing scientific studies that have established that lasting mental damage is caused after a few days of social isolation, United Nations Special Rapporteur on Torture Juan Méndez called for a ban on solitary confinement in excess of 15 days. *UN Special Rapporteur on torture warns about abuse of solitary confinement in the Americas*, 3/13/2013, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13134&. As a result, Appellant refers to any isolation of more than 15 days as "long-term" solitary confinement.

Superintendent of New Jersey State Prison upheld the decision with respect to the adjudications and the sanctions received. RA88. After Appellant filed a Notice of Appeal, the Department sought a remand to allow it to reconsider the administrative appeal in English; the Court granted the Department's motion. DA89. On June 6, 2014, New Jersey State Prison's Administrator upheld the sanctions. RA91. This appeal followed.

Appellant filed his *pro se* brief on February 14, 2014. ABr 9. On April 7, 2016, the Clerk of the Appellate Division asked the American Civil Liberties Union of New Jersey Foundation (ACLU-NJ) if it would accept appointment as counsel for Appellant. On April 12, 2016, the ACLU-NJ contacted the Clerk and indicated its wiliness to accept such an assignment. On April 14, 2016, the Court entered a *sua sponte* order setting a schedule for further briefing and oral argument.

ARGUMENT

I. THE COURT SHOULD CONSIDER AN ISSUE NOT RAISED BELOW BECAUSE IT CONCERNS A MATTER OF GREAT PUBLIC INTEREST AND WILL NOT OTHERWISE RECEIVE APPELLATE REVIEW

The Department failed to comply with the regulatory requirement that the Hearing Officer consult with mental health professionals regarding the necessity of a psychological evaluation prior to ordering Appellant to serve three and a half years in solitary confinement. The Department correctly notes

(Rbr 14-16) that Appellant failed to raise that issue before the agency. Appellant also did not raise the claim that ordering a mentally ill prisoner to serve three and a half years in solitary confinement violates the state and federal constitutional protections against cruel and unusual punishment.

As a general rule, issues not raised below - in a trial court or before an administrative agency - should not be addressed on appeal. *Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234 (1973). But there are two exceptions to the general rule announced in *Nieder*: where "the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest," appellate courts can address them. *Id.* (*quoting Reynolds Offset Co., Inc. v. Summer*, 58 *N.J. Super.* 542, 548 (App. Div. 1959), *certif. den.* 31 *N.J.* 554 (1960). Based on the second *Nieder* factor and because the equities demand relaxation of procedural rules, the Court should address the issues presented in this case, despite the failure of Appellant to raise them below.

A. Solitary Confinement is a Matter of Great Public Interest

The issues in this case certainly concern matters of great public interest. While Justice Kennedy may have been correct that "the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest," *Davis*

v. Ayala, 135 *S. Ct.* at 2209 (Kennedy, J, concurring), since he wrote that, times have changed and significant interest in solitary confinement has developed. In the roughly ten months since Justice Kennedy's concurring opinion in *Ayala*, solitary confinement has received significant attention in state, national, and international press; in legal academia; and among professional associations related to corrections.

Some news stories have focused on people who have spent significant time in solitary confinement. *See, e.g.*, "Anders Breivik case: How bad is solitary confinement?" *BBC News*, April 20, 2016, available at: http://www.bbc.com/news/world-europe-35813348 (discussing the European Court of Human Rights' finding that Norwegian mass killer Anders Breivik's human rights had been violated by long-term solitary confinement without appropriate consideration of his mental health); Carrie Johnson, "Solitary Confinement Is What Destroyed My Son, Grieving Mom Says" *NPR*, April 18, 2016, available at: http://www.npr.org/2016/04/18/474397998/solitary-confinement-is-what-destroyed-my-son-grieving-mom-says (addressing case of nineteen-year-old Kalief Browder, who committed suicide after spending more than two years in solitary confinement); David Cole, "Albert Woodfox and the Case Against Solitary Confinement" *The New Yorker*, February 23, 2016, available at: http://www.newyorker.com/news/news-desk/albert-woodfox-and-the-

case-against-solitary-confinement (detailing release of prisoner who serve more than forty four years in solitary confinement).

Other stories have focused on solitary confinement reforms that have been ushered in by court settlements or administrative actions. *See, e.g.*, Corinne Ramey, "Rikers Curbs Use of Solitary Confinement" *Wall Street Journal*, April 20, 2016, available at: http://www.wsj.com/articles/rikers-curbs-use-of-solitary-confinement-1461207601 (discussing reductions in the use of solitary confinement in New York City's jail); Benjamin Weisermarch, "Overhaul of Solitary Confinement Is Approved for New York's Prisons" *The New York Times*, March 31, 2016, available at: http://www.nytimes.com/2016/04/01/nyregion/overhaul-of-solitary-confinement-is-approved-for-new-yorks-prisons.html? r=0

(discussing landmark settlement to reduce the use of solitary confinement in New York State approved by Federal Judge Shira A. Scheindlin); Paige St. John, "State prisons are relying less on solitary confinement as punishment" *The Los Angeles Times*, July 12, 2015, available at: http://www.latimes.com/local/politics/la-me-ff-pol-solitary-confinement-20150713-story.html (addressing reductions in the use of solitary in California state prisons).

Perhaps the issue that received the most attention was the effort by President Barack Obama to change the way solitary is

used in federal prisons. *See* Juliet Eilperin, "Obama bans solitary confinement for juveniles in federal prisons" *The Washington Post*, January 26, 2016, 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(addressing restrictions on solitary for both juveniles and adults). President Obama authored an op-ed piece in the *Washington Post* questioning the use of solitary confinement. *See* Barack Obama, "Barack Obama: Why we must rethink solitary confinement" *The Washington Post*, January 25, 2016, 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. He also issued guidance for all correctional agencies, limiting the use of that sanction. The White House, "FACT SHEET: Department of Justice Review of Solitary Confinement" January 25, 2016, available at: https://www.whitehouse.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement (providing guidance to all correctional facilities and mandating changes for facilities run by the federal Bureau of Prisons).

Discussions of solitary confinement in New Jersey have also increased in the last ten months. *See, e.g.*, Hank Kalet,

"Solitary Confinement in New Jersey's Prisons: Cruel and Usual Punishment" *NJ Spotlight*, August 13, 2015, available at: http://www.njspotlight.com/stories/15/08/12/solitary-confinement-in-new-jersey-s-prisons-cruel-and-usual-punishment/ (lengthy examination of solitary confinement in New Jersey); Keri Blakinger, "Activists Turn to Lawsuits and Legislation to Fight Solitary Confinement in New Jersey" *Solitary Watch*, March 4, 2016, available at: http://solitarywatch.com/2016/03/04/activists-turn-to-lawsuits-and-legislation-to-fight-solitary-confinement-in-new-jersey/ (exploring two lawsuits and proposed legislation in New Jersey); Brian Amaral, "Solitary confinement in Middlesex County 'deplorable,' federal suit claims" *The Star Ledger*, November 13, 2015, available at: http://www.nj.com/middlesex/index.ssf/2015/11/solitary confinement in middlesex county cruel and.html (announcing lawsuit against county jail for solitary confinement practices); "Editorial: Obama got serious on solitary. But is N.J. still torturing people?" *The Star Ledger*, January 31, 2016, available at: http://www.nj.com/opinion/index.ssf/2016/01/obama got serious on solitary but is nj still tort.html (editorial urging reform of New Jersey's use of solitary confinement).

The legal academy has also kept up with the increased attention devoted to solitary confinement. *See, e.g.*, David M.

Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124 (2016); Alex Kozinski, *Worse than Death*, 125 YALE L.J. F. 230 (2016), available at: http://www.yalelawjournal.org/forum/worse-than-death; The Arthur Liman Pub. Interest Program & Ass'n. of State Corr. Adm'rs, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (2015), available at: http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman administrativesegregationreport.pdf. Closer to home, on February 25, 2016, the Seton Hall Law Legislative Journal hosted a symposium titled "Behind Bars: Exploring Ideas for Prison Reform in the 21st Century," which focused on solitary confinement, among other topics. *See* http://law.shu.edu/Students/academics/journals/legislative-journal/Symposium/2016/index.cfm.

How long, and under what circumstances, New Jersey prisons impose solitary confinement is more generally an important issue because of the significant harm it causes, especially to prisoners with mental illnesses. This April, the National Commission on Correctional Health Care (NCCHC), an organization that represents physicians who work in prisons, issued a policy statement on solitary confinement calling for a limitation on its use after 15 days. National Commission on Correctional Health Care, *Policy Statement: Solitary Confinement (Isolation)*,

(April 10, 2016) available at: http://www.ncchc.org/solitary-confinement. In issuing its position statement, the NCCHC reflects the growing national conversation about the overuse of solitary confinement; it also joined countless other national groups that have already called for the abolition, or at least the significant reform, of solitary confinement. *See, e.g.*, American Bar Association, *ABA Criminal Justice Standards on the Treatment of Prisoners,* Standard 23-3.8 (February 2010) available at: http://www.americanbar.org/publications/criminal justice section archive/crimjust standards treatmentprisoners.html ("Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner's separation from the general population"). The harm caused by solitary confinement has been recognized as particularly acute for people with mental illnesses. *See, e.g.,* American Psychiatric Association, *APA Position Statement on Segregation of Prisoners with Mental Illness* (2012), available at: http://www.dhcs.ca.gov/services/MH/Documents/2013 04 AC 06c APA ps2012 PrizSeg.pdf ("Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates"); National Alliance on Mental Illness, *NAMI Policy Statement Against the Use of Solitary Confinement on Individuals*

with Mental Illness ("NAMI opposes the use of solitary confinement and equivalent forms of extended administrative segregation for persons with mental illnesses").

As detailed above, the issue of solitary confinement is one of great public interest, thereby satisfying the second exception to the *Nieder* bar on addressing issues not properly raised below.

B. Equitable Factors Compel Allowing Issues To Be Raised For the First Time On Appeal When Prisoners Have No Right To Counsel Below

There is no right to counsel in prison disciplinary proceedings. *Avant v. Clifford*, 67 *N.J.* 496, 537 (1975). It is thus fundamentally unfair to expect prisoners to raise constitutional issues at the agency level or bar subsequent review of them.

United States and New Jersey courts have recognized that procedural rules are more difficult for *pro se* litigants to abide, and *pro se* litigants may be ill-equipped to identify constitutional violations and to understand which issues require factual development. Courts frequently recognize these limitations. *See Haines v. Kerner*, 404 *U.S.* 519, 520 (1972) (a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers. . ."). While *pro se* litigants are not entitled to greater rights than those represented by lawyers, they are

entitled to relief from stringent rules to the same extent as other litigants represented by counsel. *Ridge at Back Brook, L.L.C. v. Klenert*, 437 *N.J. Super.* 90, 98-99 (App. Div. 2014). In New Jersey, courts maintain broad discretion to relax court rules in the interest of justice and fairness. *R.* 1:1-2.

The interest of the Court in relaxing the requirement that an issue be properly raised below exists in any case involving a *pro se* litigant; but where the critical question is whether that litigant suffers from a mental illness, the equities are even stronger. It would border on absurd to require a mentally ill prisoner to raise the issues discussed herein on his own. As Judge Koblitz noted more than two decades ago, "A mentally ill defendant has needs beyond those of other citizens." *State v. P.E.*, 284 *N.J. Super.* 309, 316 (Law Div. 1994). In *P.E.*, Judge Koblitz held that a mentally ill defendant should be provided with counsel to allow full access to the courts, even in situations where counsel would not be mandated for litigants without mental health concerns. *Id.* The same interests are implicated here: mentally ill prisoners require relaxation of the rules to ensure their ability to fully litigate matters of significant public concern. *C.f. N.J. Div. of Child Protection and Permanency v. K.S. and A.L., Sr.,* and *In The Matter Of The Guardianship Of A.L., Jr., And A.K.L.,* No. A-4905-14T2 (App. Div. 2016) (relaxing procedural requirements because mental

health conditions lessened a litigant's blameworthiness for failing to abide by those rules).

Courts have recognized in other contexts that the nature of a petitioner's representation at a given stage of the proceedings, and his corresponding capacity to raise issues there, may require that issues not raised earlier must nevertheless be considered by a reviewing court. In the post-conviction context, for example, the United States Supreme Court has held that where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," procedural default will not bar him from raising the claim for the first time on collateral review. *Trevino v. Thaler*, 133 *S. Ct.* 1911, 1921 (2013).

Similarly, where a petitioner who might be suffering from mental illness must proceed *pro se* at the agency stage, the proceeding, "by reason of its design and operation," makes it unlikely that he will be able to identify and exhaust important constitutional claims.

II. THE DEPARTMENT'S CONCLUSIONS OF FACT AND LAW ARE NOT ENTITLED TO DEFERENCE HERE

Reviewing courts typically afford deference to final agency actions, reversing only if an action is "arbitrary, capricious

or unreasonable or it is not supported by substantial credible evidence in the record as a whole." *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980). Appellant recognizes that where agency decisions are entitled to deference, "courts should take care not to substitute their own views of whether a particular penalty is correct for those of the body charged with making that decision." *In re Carter*, 191 *N.J.* 474, 486 (2007). Instead, the test is "whether [the] punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *In re Polk*, 90 *N.J.* 550, 578 (1982) (quoting *Pell v. Bd. Of Educ., Etc.*, 34 *N.Y.* 2d 222 (1974)).

Even under this deferential standard of review, appellate courts must "undertake a careful and principled consideration of the agency record and findings," and "may not simply rubber stamp an agency's decision." *In re Adoption of Amendments to Northeast, Upper Raritan, Sussex County*, 435 *N.J. Super.* 571, 584 (App. Div. 2014) (quotation marks omitted).

Here, Appellant first contends that the Department's factual and legal conclusions are not entitled to deference. An agency's legal conclusions are always subject to *de novo* review. *SSI Medical Servs. v. HHS, Div. of Medical Assistance & Health Servs.*, 146 *N.J.* 614, 621 (1996). With respect to determinations that depend on factual findings, appellate courts typically

defer to agency decision-making because agencies have subject-matter expertise that reviewing courts do not. *See, e.g., In re License Issued to Zahl*, 186 *N.J.* 341, 353 (2006) ("Deference is appropriate because of the 'expertise and superior knowledge' of agencies in their specialized fields . . . .") (quoting *Greenwood v. State Police Training Center*, 127 *N.J.* 500, 513 (1992));[4] *N.J. State League of Municipalities v. Dep't of Cmty. Affairs*, 158 *N.J.* 211, 222 (1999) (observing that in the rulemaking context, "judicial deference to administrative agencies stems from the recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are 'particularly well equipped to read and understand the massive documents and to evaluate . . . factual and technical issues . . . .'") (quoting *Bergen Pines County Hosp. v. New Jersey Dep't of Human Servs.*, 96 *N.J.* 456,

[4] The Supreme Court in *Zahl* also noted that courts defer to agencies "because agencies are executive actors," *Zahl*, 186 *N.J.* at 353, and "'[c]ourts have only a limited role to play in reviewing the actions of other branches of government.'" *Id.* (quoting *Matturi v. Bd. of Trs. of the Judicial Ret. Sys.*, 173 *N.J.* 368, 381 (2002)). Though the Department is of course an executive agency, courts in New Jersey have nevertheless intervened where executive agencies engage in unconstitutional conduct. *See, e.g., In re Adoption of N.J.A.C.*, 215 *N.J.* 578, 630 (2013) ("Deference to an administrative agency . . . does not extend to arguments that its regulations violate our Constitution."); *In re Hunterdon Cnty. Bd. of Chosen Freeholders*, 116 *N.J.* 322, 328 (1989) ("[C]onstitutional concerns or the dictates of legislative intent have at times compelled us to decline adoption of doctrines or statutory interpretations that have been favored by an agency.") (alterations omitted).

474 (1984)). However, when an agency acts outside of that expertise, no deference is due. *See Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 588 (1988) ("[N]o special deference need be paid to the expertise of the Division on Civil Rights [because] . . . as to the factual issues presented here - the diagnosis of alcoholism and evaluation of sales productivity - the agency is no better able to evaluate the evidence than is the reviewing court.") (quoting *Cooley's Anemia Blood and Research Found. For Children, Inc. v. Legalized Games of Chance Control Comm'n*, 78 *N.J. Super.* 128, 140 (App. Div. 1963) for the proposition that "degree of deference to be given by a court 'depends upon the issues and where they are such that we can evaluate them as well as the agency, we do not defer to its expertise to the same degree'"). *See also* Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 337 (courts "will not interpret an ambiguous statutory provision to allow an agency to reach a constitutionally questionable decision on a subject outside its expertise").

The expertise the Department must claim here is knowledge about prison discipline, an area in which this Court has recognized the Department as expert in the past. *See, e.g., Balagun v. New Jersey Dept. of Corrections*, 361 *N.J. Super.* 199, 202 (App. Div. 2003). However, the challenge to the imposition of solitary confinement concerns not the appropriateness of any

particular sanction for misconduct generally, but the appropriateness of the sanction of solitary confinement for a potentially mentally ill prisoner.

The Department has never been recognized as having expertise on mental illness. Though it is likely true that the Department could conduct mental health assessments through psychiatrists and psychologists it contracts with, *see, e.g.*, *Trantino v. N.J. State Parole Bd.*, 166 N.J. 113 (2001) ("courts in determining dangerousness [in the parole context] should take full advantage of expert testimony"),[5] the Department did not conduct a mental health evaluation here. Without an expert evaluation, the Department cannot claim that the Hearing Officer had any expertise entitled to deference. Thus, to the extent the Department determined here that Appellant was not mentally-ill, that factual determination is entitled to no deference.

In the analogous context of reviewing ineffective assistance of counsel claims, courts afford great deference to counsels' decisions and presume them to be strategic. *Strickland v. Washington*, 466 *U.S.* 668, 690 (1984) ("strategic choices made

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[5] *Trantino*'s warning that "the decision [of dangerousness] is not one that can be left wholly to the technical expertise of the psychiatrists and psychologists,'" *id.* at 174 (quoting *State v. Krol*, 68 *N.J.* 236, 289 (1975)), is not to the contrary. The dangerousness determination *Trantino* refers to incorporates both law enforcement and psychological considerations, while the diagnosis of mental illness is exclusively a medical determination.

after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . ."); *State v. Fritz*, 105 *N.J.* 42, 52 (1987) (adopting *Strickland* test, which calls for "extreme deference in evaluating the performance of counsel"). However, if counsel fails to investigate, the presumption is diminished, and "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 *U.S.* 510, 533 (2003). Here, where the Administrative Code required the Department to conduct an investigation, its failure to do so cannot be reasonable, and so decisions it made without conducting the required investigation are entitled to no deference.

III. NEW JERSEY REGULATIONS AS WELL AS THE STATE AND FEDERAL CONSTITUTIONS REQUIRED THE DEPARTMENT TO SCREEN FOR MENTAL ILLNESS

A. The Regulations Required Screening For Mental Illness, and the Department's Failure to Screen Was Arbitrary, Capricious, and Unreasonable

Even under a deferential standard of review, the Department's action here was arbitrary, capricious, and unreasonable, because the Department failed to comply with its regulations. The Department is responsible for considering the mental health of prisoners facing disciplinary sanctions. The New Jersey Administrative Code places certain obligations on

Department staff members investigating disciplinary charges, including:

> (2) Forwarding a list of all inmates who have a pending disciplinary infraction to the Mental Health Unit for a determination as to which inmates should be considered special needs inmates; and (3) Ensuring that Mental Health Unit staff provide said determination to the investigating officer and Disciplinary Hearing Officer/Adjustment Committee.
>
> [*N.J.A.C.* 10A:4-9.5(c).]

Thereafter, "[t]he Disciplinary Hearing Officer/Adjustment Committee shall determine the need to obtain a psychological/psychiatric evaluation based upon the *nature of the infraction*, the determination from the Mental Health Unit regarding whether the inmate is a special needs inmate and/or any other relevant information." *Id.* at 10A:4-9.5(d) (emphasis added).

The Department, in other words, is obligated to take at least two steps to protect the mental health of prisoners. First, it must seek input from the Mental Health Unit to determine whether a prisoner should be afforded different treatment based on his or her mental health condition. Second, the Hearing Officer must make a determination about whether to seek a psychological/psychiatric evaluation based on a series of factors including the nature of the infraction.

Here, the Department violated both of these requirements of

the Code. There is no evidence in the record to suggest that the Disciplinary Hearing Officer ever consulted with the Mental Health Unit, as is required by *N.J.A.C.* 10A:4-9.5(c)(2) and *N.J.A.C.* 10A:4-9.5(c)(3). Instead, the record reveals that the Hearing Officer made a series of conclusory remarks about Appellant's mental health condition and history. RA22 ("No evid. Of MH."); RA25 (same); RA30 (same); RA33 (same); RA38 (same); RA41 (same); RA46 (same); RA49 (same).

There is also no evidence that the Department undertook the probing analysis in determining whether to seek the psychiatric or psychological examination that *N.J.A.C.* 10A:4-9.5(d) requires. The Department appears to have merely relied on the fact that Appellant had not been previously designated as a special needs inmate, RBr 17, but this inquiry falls far short of the required investigation.

As discussed below, Appellant contends that the Eighth Amendment precludes the use of solitary confinement for mentally ill prisoners; but even putting aside Eighth Amendment concerns, the Department failed to comply with the regulation as written by not consulting with the Mental Health Unit or engaging in *any* inquiry into the need for a psychological/psychiatric evaluation. As a result of the Department's failure to abide by its own regulations, the sanction must be reversed. This conclusion would be required under *de novo* review, and it is

required even if the Court adopts a more deferential review, because acting outside of the Department's regulations was arbitrary, capricious, and unreasonable.

B. The Eighth Amendment and the New Jersey Constitution Prohibit Long-Term Solitary Confinement for Prisoners With Serious mental Illness

While the process the Department followed here was infirm, this matter also raises the question of whether a person can *ever* be sanctioned with solitary confinement, if, pursuant to regulations, he is found to suffer from a serious mental illness. Appellant urges the Court to hold that under the Eighth Amendment and the New Jersey constitution, he may not. Such a holding would be consistent with the holdings of many courts around the county. *See infra* pages 25-28.[6]

1. The Eighth Amendment Prohibition

While, as Justice Kennedy predicted in *Ayala*, there may come a time soon where courts will be forced to determine whether placing any prisoner in solitary confinement violates the Eighth Amendment, *Ayala*, 135 *S. Ct.* at 2210 (Kennedy, J., concurring), this Court need not reach such a broad conclusion.[7]

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[6] Indeed, this issue underscores why the regulations' procedural requirements (of identifying people with mental illnesses) are of such import and mandate strict compliance.

[7] It is nevertheless Appellant's position that any use of long-term solitary confinement violates the Eighth Amendment's prohibition on cruel and unusual punishment. The "touchstone" of the Eighth Amendment analysis is "the health of the inmate. While the prison administration may punish, it must not do so in

a manner that threatens the physical and mental health of prisoners." *Young v. Quinlan*, 960 *F.*2d 351, 364 (3d Cir. 1992). There is a growing consensus in the medical community that long-term solitary confinement has deleterious effects on physical and mental health, even for prisoners without preexisting mental health conditions. *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006). A review of that literature indicates that people subject to solitary confinement exhibit a variety of negative physiological and psychological reactions, including: **hypersensitivity to external stimuli**, Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450, 1452 (1983); **perceptual distortions and hallucinations**, *id.*, Craig Haney, *Mental Health issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130, 134 (2003), *see generally* Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); **increased anxiety and nervousness**, Grassian, 140 AM. J. OF PSYCHIATRY at 1452-53; Haney, 49 CRIME & DELINQ. at 130, 133; Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. OF CORRECTIONAL HEALTHCARE 39, 48 (1994); *see generally* Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); **revenge fantasies, rage, and irrational anger**, Grassian, 140 AM. J. OF PSYCHIATRY at 1453; Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. AND MENTAL HEALTH 85, 91 (1997); Haney, 49 CRIME & DELINQ. at 130, 134; **fear of persecution**, Grassian, 140 AM. J. OF PSYCHIATRY AT 1453; **lack of impulse control**, *id.* Miller & Young, 7 CRIM. BEHAV. AND MENTAL HEALTH at 92; **severe and chronic depression**, Grassian, 140 AM. J. OF PSYCHIATRY at 1453; Miller & Young, 7 CRIM. BEHAV. AND MENTAL HEALTH at 92; Haney, 49 CRIME & DELINQ. at 131; **appetite and weight loss**, Haney, 49 CRIME & DELINQ. at 130; *see generally* Korn, 15 SOC. JUST. 8; **heart palpitations**, Haney, 49 CRIME & DELINQ. at 131; **withdrawal**, Miller & Young, 7 CRIM. BEHAV. AND MENTAL HEALTH at 91; *see generally* Korn, 15 SOC. JUST. 8; **blunting of affect and apathy**, Miller & Young, 7 CRIM. BEHAV. AND MENTAL HEALTH at 91; *see generally* Korn, 15 SOC. JUST. 8; **talking to oneself**, Haney, 49 CRIME & DELINQ. at 134; *see generally* Brodsky & Scogin, 1 FORENSIC REP. 267; **headaches**, Haney, 49 Crime & Delinq. at 133; **problems sleeping**, *id.*; **confusing thought processes**, *id.* at 137; *see generally* Brodsky & Scogin, 1 FORENSIC REP. 267; **nightmares**, Haney, 49 CRIME & DELINQ. at 133; **dizziness**, *id.*; **self-mutilation**, Grassian, 140 AM. J. OF PSYCHIATRY at 1453; Eric Lanes, *The Association of Administrative Segregation Placement and Other*

The Court can make a far less sweeping pronouncement: Subjecting people with serious mental illnesses to prolonged solitary confinement – that is, any condition of confinement that results in a prisoner being held in his cell for approximately 23 hours per day – creates an unreasonable risk of harm and therefore constitutes cruel and unusual punishment.

The impact of placing mentally ill prisoners in solitary confinement was vividly described by a federal district court as "the mental equivalent of putting an asthmatic in a place with little air to breathe." *Madrid v. Gomez*, 889 *F. Supp.* 1146, 1265-66 (N.D. Cal. 1995). While the conditions in Administrative Segregation in New Jersey State Prison may not be exceptional among solitary confinement units, "[e]ven if a person is confined to an air conditioned suite at the Waldorf Astoria, denial of meaningful human contact for such an extended period

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Risk Factors with the Self-Injury-Free Time of Male Prisoners, 48 J. OF OFFENDER REHABILITATION 529, 532 (2009); an **intolerance of social interaction**, Grassian, 22 WASH. U. J.L. & POL'Y at 383-84; *see also* Patricia B. Sutker, et al., *Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict*, 148(1) AM. J. OF PSYCHIATRY 67, 67-72 (1991); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 495-496 (2006); **persistent rage**, Joane Martel, *Telling the Story: A Study in the Segregation of Women Prisoners*, 28 SOC. JUST. 196, 209 (2001); **suspiciousness, confusion, and chronic depression**, Grassian, 22 WASH. U. J.L. & POL'Y at 382-83; *see also* Sutker, et al., 148 AM. J. OF PSYCHIATRY at 67-72; and **ongoing fear of open or public spaces**, Martel, 28 SOC. JUST. at 209 (2001).

may very well cause severe psychological injury." *Morris v. Travisono*, 499 *F. Supp.* 149, 160 (D.R.I. 1980).

Indeed, several courts have already found that the imposition of solitary confinement to severely mentally ill prisoners violates constitutional prohibitions against cruel and unusual punishment. *See, e.g., Ruiz v. Johnson*, 37 *F. Supp.* 2d. 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 *F.*3d 941 (5th Cir. 2001), *adhered to on remand*, 154 *F. Supp.* 2d 975 (S.D. Tex. 2001) ("Conditions in . . . administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiff's class made up of mentally-ill prisoners."); *Coleman v. Wilson*, 912 *F. Supp.* 1282, 1320-21 (E.D. Cal. 1995) (use of solitary confinement to house mentally ill inmates violates the Eighth Amendment because, *inter alia*, mentally ill inmates are placed in solitary confinement "without any evaluation of their mental status" and "because such placement will cause further decompensation. . ."); *Casey v. Lewis*, 834 *F. Supp.* 1477, 1549-50 (D. Ariz. 1993) (noting that "lockdown damages, rather than helps, mentally ill inmates," and that often "inmates are locked down because of the behavior resulting from their mental illness," and finding the inappropriate use of lockdown to violate the Eighth Amendment); *Langley v. Coughlin*, 715 *F. Supp.* 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen

out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim); *see also Scarver v. Litscher*, 371 *F. Supp.* 2d 986, 988 (W.D. Wis. 2005) (granting summary judgment for monetary damages because claim was not clearly established, but noting that the mentally ill "[p]laintiff's claim that he was subject to inhumane conditions of confinement [in solitary confinement] is more compelling.").

Courts have so held because preexisting mental illnesses make the risks associated with solitary confinement particularly acute. Prisoners with preexisting mental illnesses are at an even greater risk of having symptoms deepen and become permanent and disabling. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 142 (2003); Jeffrey L. Metzner, *et al.*, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. OF AM. ACAD. OF PSYCHIATRY & THE LAW 104, 105 (2010) (solitary confinement may exacerbate preexisting symptoms of mental illness or provoke recurrence); *see also* Diana Aria, et al., *Defining the Scope of Sensory Deprivation for Long Duration Space Missions*, NASA, 8-9 (2011), available at: http://www.medirelax.com/v2/wp-content/uploads/2013/11/F.-Scope-of-Sensory-Deprivation-for-Long-Duration-Space-Missions.pdf. (stress from sensory deprivation places a person at significant

risk for future psychiatric deterioration, which includes the potential development of irreversible psychiatric conditions).

In short, while solitary confinement places anyone subjected to it at great risk of harm, when the subject has a preexisting mental illness, the risk of harm is exacerbated. The Eighth Amendment forbids subjecting prisoners to such a serious risk of the grave harm described above.

2. The New Jersey Constitutional Prohibition

The test under Article I, Paragraph 12 is generally the same as the test under the Eighth Amendment. *See, e.g., State v. Josephs*, 174 *N.J.* 44, 137-142 (2002) (evaluating challenge to the death penalty statute under both the State and Federal Constitutions using evolving standards of decency test). The State Constitution, however, provides greater protection than its federal counterpart in some contexts. It is well established that the United States Supreme Court's interpretation of the Federal Constitution "establish[es] not the ceiling but only 'the floor of minimum constitutional protections'" that this state's residents enjoy. *State v. Eckel*, 185 *N.J.* 523, 538 (2006) (*quoting State v. Gilmore*, 103 *N.J.* 508, 524 (1986)). The function of the State Constitution, then, is to serve both "as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law." *State v. Hunt*, 91 *N.J.* 338, 346

(1982) (internal quotation marks omitted). *See also State v. Baker*, 81 *N.J.* 99, 126, n.8 (1979) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.") (internal quotation marks omitted).

Thus, New Jersey's courts have routinely invoked the State Constitution where federal law has been insufficiently protective of the rights of its citizens. *See, e.g., New Jersey Coalition Against The War In The Middle East v. J.M.B Realty*, 138 *N.J.* 326 (1994) (State constitutional free speech protections broader than the First Amendment); *State v. Pierce*, 136 *N.J.* 184, 208-13 (1994) (pat-down search permissible under the Fourth Amendment violated the State Constitution); *State v. Hempele*, 120 *N.J.* 182, 196-97 (1990) (State Constitution prohibits warrantless searches of garbage bags left on curb for collection, notwithstanding their permissibility under the Fourth Amendment); *State v. Novembrino*, 105 *N.J.* 95 (1987) (refusing to adopt good faith exception to exclusionary rule as the United States Supreme Court had done); *State v. Gilmore*, 103 *N.J.* at 522-23 (State Constitution imposes greater restriction than the federal Equal Protection Clause on using peremptory challenges to dismiss potential jurors for race-based reasons);

Right to Choose v. Byrne, 91 *N.J.* 287 (1982) (State Constitution safeguards greater individual rights to health and privacy); *State v. Alston*, 88 *N.J.* 211 (1981) (recognizing greater standing to challenge validity of car search under the State Constitution); *In re Grady*, 85 *N.J.* 235, 249 (1981) (recognizing greater right to privacy under the State Constitution); *State v. Schmid*, 84 *N.J.* 535, 560 (1980) (recognizing a greater right of free speech on private university campus); *State v. Baker*, 81 *N.J.* at 112-13 (deviating from United States Supreme Court precedent and finding that the State Constitution prohibits zoning regulations which limit residency based upon the number of unrelated individuals present in a unit); *In re Quinlan*, 70 *N.J.* 10, 19, 40-41, 51 (1976) (finding a right of choice to terminate life support systems as aspect of right of privacy); *State v. Johnson*, 68 *N.J.* 349, 353 (1975) (requiring a higher standard for waiver of right to withhold consent to a search); *Robinson v. Cahill*, 62 *N.J.* 473, 482 (1973) (finding a right to education under the State Constitution). *See generally* S. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).[8]

[8] This is so, even where the text of the state and federal constitutional provisions are identical. *See, e.g., Eckel*, 185

Here, there are several factors that favor holding that the State Constitution independently restricts the solitary confinement of people with mental illnesses, even if its federal counterpart does not.

First, this case involves two matters of particular state interest and local concern that implicate the state's traditions and public attitudes - the treatment of vulnerable people and criminal justice more generally. *See, e.g., In re Grady*, 85 *N.J.* at 259 ("The *parens patriae* power of our courts derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability."); *In re D.C.*, 146 *N.J.* 31, 47-48 (1996) ("Under the *parens patriae* theory, the state draws on the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves . . . ."") (quotation marks omitted); *see also State v. Gerald*, 113 *N.J.* 40, 76 (1988) ("Resort to a state-constitutional analysis is especially appropriate" in criminal justice matters because they are "of particular state interest or local concern and do[] not require a uniform national

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N.J. at 538 ("Although that paragraph is almost identical to the text of the Fourth Amendment to the Federal Constitution, we have not hesitated in the past to afford our citizens greater protection against unreasonable searches and seizures under Article I, Paragraph 7 than would be the case under its federal counterpart.").

policy.'") (*quoting State v. Ramseur*, 106 *N.J.* 123, 167 (1987)).

Indeed, the New Jersey Supreme Court has often parted ways with the United States Supreme Court and interpreted the State Constitution to provide broader constitutional protections for criminal defendants. *See, e.g., State v. Norman*, 151 *N.J.* 5, 25 (1997) (finding greater state constitutional protection for criminal defendants from attorney conflicts of interest); *State v. Hogan*, 144 *N.J.* 216, 231 (1995) (finding greater state constitutional guarantee of indictment by a grand jury); *Doe v. Poritz*, 142 *N.J.* 1, 104 (1995) (state constitution more protective of convicted sex offenders' reputation); *Pierce*, 136 *N.J.* at 208-13 (recognizing greater state constitutional protection against unreasonable searches and seizures); *State v. Marshall*, 130 *N.J.* 109, 208-10 (1992) (state constitution provides greater equal protection rights to criminal defendants facing the death penalty); *Gilmore*, 103 *N.J.* at 523-24 (recognizing greater rights to a jury representative of the community with respect to peremptory challenges); *Schmid*, 84 *N.J.* at 560 (State Constitution provides greater privacy rights of a criminal defendant).

Second, New Jersey's courts give a broader construction to state constitutional provisions where federal case law fails to "pay[] due regard to precedent and the policies underlying specific constitutional guarantees." *State v. Baker*, 81 *N.J.* 99,

112 n.8 (1979) (quoting Brennan, *State Constitutions*, 90 HARV. L. REV. at 502). Here, as explained above (*supra*, Point III, B) the serious health consequences that flow from subjecting mentally ill people to solitary confinement lead inexorably to the conclusion that any use of this disciplinary sanction for mentally ill prisoners amounts to cruel and unusual punishment.

This is, in short, a paradigmatic example of a case in which the Court should rely on the State Constitution to protect the rights of New Jerseyans. Because criminal justice in general, and the protection of vulnerable populations in particular, are core areas of state concern, resort to the State Constitution is especially appropriate. Finally, insofar as the United States Supreme Court has thus far not fully heeded the science by failing to announce a wholesale ban on solitary confinement of persons with mental illness, this Court should not hesitate to follow the State Constitution, which independently requires a categorical bar on such a sanction.

CONCLUSION

For the foregoing reasons the Appellant asks that the Court hold that long-term solitary confinement of prisoners with serious mental illness violates the Eighth Amendment's and the New Jersey Constitution's prohibition on cruel and unusual punishment. As such, solitary confinement cannot be imposed without a prior determination as to a prisoner's mental health. Because Appellant was sentenced to solitary confinement without such an assessment, his sanction should be reversed.

Respectfully submitted,

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