

NOS. S-17-000577, 000657

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IN THE  
NEBRASKA SUPREME COURT

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STATE OF NEBRASKA,

Appellee,

v.

NIKKO JENKINS,

Appellant.

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APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA  
Honorable Peter Bataillon, District Judge

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BRIEF OF AMICI NATIONAL ALLIANCE ON MENTAL ILLNESS, NATIONAL  
DISABILITY RIGHTS NETWORK AND NINE MENTAL HEALTH EXPERTS

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## INTRODUCTION

The Nebraska Department of Correctional Services first imprisoned Nikko Jenkins in solitary confinement before his 19<sup>th</sup> birthday, in July of 2005. (E115, 3). As the sentencing panel acknowledged, “from October 17, 2003 through July 30, 2013, when he was serving his sentence, of the 97 months Nikko Jenkins was in the physical custody of the Nebraska Department of Corrections, he spent 58 months or nearly 60% of his time in ‘segregation’ i.e. solitary confinement.” (T729). During this time period, his serious mental illness was well documented, and included, among other diagnoses, bipolar disorder, psychotic disorder, schizophrenia, and schizoaffective disorder, as well as accompanying troubling symptoms. App. Br. 31, 38-40 (citing to record). Within two weeks of Mr. Jenkins’ release from solitary confinement directly to the community in Omaha, he killed four people. (581-87).

This tragic crime was a wake-up call for Nebraska. The Legislature held hearings to find out how this could have happened, issued a report, and then passed legislation to curb the state’s use of prolonged segregation. *See* Department of Correctional Services Special Investigative Committee Report to the Legislature, December 15, 2014 (“Committee Report”); Neb. Rev. Stat. §§ 83-4,114; 83-173.02. The legislation specifically bars “solitary confinement” and tightens controls on what the Legislature termed “restrictive housing.” Neb. Rev. Stat. § 83-4,114.

In turn, at the Legislature’s direction, the head of the Department of Correctional Services issued a lengthy administrative regulation restricting the use of “restrictive housing,” requiring safeguards for persons with mental illness, and creating reporting requirements for oversight. *See generally* 72 Neb. Admin. Code Ch. 1, §§ 001, 003.05, 004.03, 006.01, 010 et seq. Meanwhile, the Ombudsman of the Department of Correctional Services issued his own

detailed report, exploring the problems within the prison system and the conditions of confinement that contributed to this crime. (E115 (Ombudsman's Report)).

The sentencing panel formed to determine Mr. Jenkins' sentence found that his solitary confinement held no mitigating weight whatsoever. The entirety of the panel's reasoning reads:

The evidence before this Panel was that the Defendant was placed in solitary confinement for the protection of others and himself. Defendant's solitary confinement was as a result of his own actions and threats. Exhibit 123 sets forth his extensive history of misconduct in the State Penitentiary. As a result, this Panel finds that there is insufficient evidence to support this nonstatutory mitigator.

*Id.* The panel then sentenced Mr. Jenkins to death.

Given the horrible damage solitary confinement imposes on all persons, and particularly those with serious mental illness such as Nikko Jenkins, this perfunctory analysis fell woefully short of what the law requires. As shown below, the State created the debilitating environment of segregation, placed a known mentally ill person in it with predictable effects, released him into society, and then ignored all of the above during a penalty hearing resulting in a death sentence. The Eighth Amendment and basic fairness demand much more.

As *Amici* show below, the record contains significant evidence not only of Jenkins' incarceration in solitary confinement but also of the debilitating effects such confinement has on individual prisoners. Further, medical experts, professional organizations and policy makers are unanimous in finding conditions of isolation have particularly deleterious effects on prisoners with preexisting mental illness such as Mr. Jenkins, who are far more likely to be sent to solitary confinement. The related maladaptive behaviors solitary confinement causes, including dangerous behaviors, are precisely what the sentencing panel cited as a basis for disregarding the impacts of solitary confinement as a mitigating factor. As the record shows, solitary confinement was particularly damaging for Mr. Jenkins. *Amici* are mental health professionals and

organizations with direct experience working with incarcerated people in solitary confinement and once they return to the community. We know first-hand the devastating impact of isolation on individuals, especially those with mental illness. Based on this experience, we believe that the sentencing panel violated Mr. Jenkins' constitutional rights when it failed to give meaningful consideration to the impact of his time in solitary confinement as sentencing mitigation.

## **ARGUMENT**

### **I. Prisoners in Solitary Confinement Often Suffer Damaging Mental Effects.**

Nebraska held Nikko Jenkins in debilitating solitary confinement for nearly five years, including the 24 months immediately preceding his release. (E115, 1-2). As the Ombudsman explained, "Mr. Jenkins was locked up alone in a cell for 23 hours per day, and was, by definition, separated from most normal human contact with others for many months at a time." *Id.* Mr. Jenkins was also "isolated from all but the most rudimentary programming that might otherwise have been made available to him." *Id.* As Dr. Kirk Newring explained, prisoners in solitary exercise in a fenced-in cage referred to as a "dog run" or "kennel." (1642). They do not interact with other human beings in any meaningful way. Dr. Newring explained that this isolation exacerbates any existing mental health diagnoses or condition. (1643). He emphasized that his profession recommends against solitary confinement for people with mental illness. *Id.*

It is uncontroversial that solitary confinement causes mental health consequences. As U.S. Supreme Court Justice Anthony Kennedy has recognized, "[y]ears on end of near-total isolation exact a terrible price." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). Nor are such observations novel: more than a century ago, the Supreme Court found that prisoners subject to solitary confinement "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[. ]” *In re Medley*, 134 U. S. 160, 168 (1890).

Because of these consequences, the United Nations has issued rules governing the treatment of prisoners, which prohibits “prolonged” solitary confinement, defined as over fifteen consecutive days. G. A. Res. 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Rules 43 (b), 44.

Dr. Craig Haney has written and researched extensively on this subject. He observes that “[t]he effects of being housed in solitary confinement are now well understood and documented in the scientific literature. There are numerous empirical studies that report robust findings — that is, consistent and corroborative data collected by researchers and clinicians from diverse backgrounds and perspectives, amassed over a period of many decades.” Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 286 (2018). Furthermore, nearly all “of these studies [have] found that isolated prisoners experience negative psychological effects and are at a significant risk of serious harm.” *Id.*

Studying the effects of solitary confinement on more than 200 prisoners in various state and federal facilities, psychiatrist Stuart Grassian saw prisoners suffering multiple serious and debilitating mental effects, including hyperresponsivity to external stimuli; perceptual distortions, illusions, and hallucinations; severe panic attacks; difficulty with thinking, concentration, and memory; intrusive obsessional (and often violent) thoughts that prisoners resist but cannot block out; overt paranoia; and problems with impulse control. Stuart Grassian, M. D., *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POLICY 325 (2006). See also Disability Rights Nebraska, *Selected Issues in Mental Health and Corrections* (2014), [http://www.disabilityrightsnebraska.org/file\\_download/2a01f60d-448a-4e69-a7ac-ef439085ec49](http://www.disabilityrightsnebraska.org/file_download/2a01f60d-448a-4e69-a7ac-ef439085ec49), at 5 (hereafter “Selected Issues”) (documenting similar list of symptoms); Vera

Institute, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Nebraska Dep't of Corr. Servs.* (Nov. 1, 2016), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/legacy\\_downloads/safe-alternatives-segregation-initiative-findings-recommendations-ndcs.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/legacy_downloads/safe-alternatives-segregation-initiative-findings-recommendations-ndcs.pdf), at 7 (citing “mounting evidence. . . [of] potentially devastating psychological effects on individuals placed there, the harmful safety outcomes within institutions and in the communities to which [they] . . . will return”).

The United States Department of Justice (“DOJ”) has recognized the destructive mental effects of solitary confinement. In revising the federal Bureau of Prisons’ (“BOP”) policies, DOJ noted that “the frequency, duration, and conditions of confinement of restrictive housing, even for short periods of time, can cause psychological harm and significant adverse effects on these inmates’ mental health.” Office of the Inspector Gen., U. S. Dep’t of Justice, *Review of the Federal Bureau of Prisons’ Use of Restrictive Hous. for Inmates With Mental Illness* 1 (2017), <https://oig.justice.gov/reports/2017/e1705.pdf> (internal quotations omitted). It further acknowledged that “isolation can be psychologically harmful to any prisoner — psychological effects can include anxiety, depression, anger, cognitive disturbances, perceptual disorders, obsessive thoughts, paranoia, and psychosis — some of which may be long lasting.” *Id.*

Courts examining the evidence have noted this consensus. For example, in *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F. 3d 549, 566-67 (3d Cir. 2017), the Court carefully reviewed the “robust body of scientific research on the effects of solitary confinement[.]” including the authorities cited above. *Id.* The Court noted the ample research concerning the profound effects of solitary even on formerly healthy prisoners, including psychological pain, trauma, stupor,

difficulties in thinking, depression, anxiety, psychosis, hallucinations, paranoia, and the maladaptive responses of self-mutilation and suicide. *Id.*

## **II. Preexisting Mental Illness is Exacerbated by Solitary Confinement.**

Mr. Jenkins has suffered from serious mental illness since he was eight years old. Appellant's Br. 30. Solitary confinement is particularly harmful for prisoners with such preexisting mental illness. The literature reviewed by the Ombudsman and the Legislative Committee studying the tragedy of the Jenkins killings more than supports this conclusion. *See* Ex. 115 at 36-39 (reviewing this literature); Committee Report to the Legislature, at 36. For example, "as a position paper for the American Association of Community Psychiatrists ("AACCP") position paper explains, for mentally ill prisoners, 'isolation and sensory deprivation make decompensation the rule.'" (E115, 36).

The negative impact of solitary confinement on individuals with preexisting mental illness is a pressing concern, so much so that a subcommittee of the United States Senate held two hearings to assess its use in both federal and state prisons. Many doctors and professional organizations that provided testimony before Congress emphasized the damage solitary confinement causes to prisoners with preexisting mental illnesses. Witnesses emphasized that the extreme conditions that prisoners face "in solitary confinement can be harmful for anyone, but they particularly expose individuals with mental illness to substantial risks of future serious harm." *Reassessing Solitary Confinement, Panel 1: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the Sen. Comm. on the Judiciary, 112th Cong. (2012)*, <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg87630/pdf/CHRG-112shrg87630.pdf>, (hereinafter "Reassessing Solitary Confinement Hearing").

In its statement, the American Psychiatric Association (“APA”), the main professional organization of psychiatrists in the United States and the largest psychiatric organization in the world, observed that “prolonged solitary confinement may be detrimental to persons with serious mental illness.” *Reassessing Solitary Confinement Hearing* . All the more troubling, prisoners such as Jenkins with preexisting mental illness “face greater challenges in adapting to prison life and are consequently at higher risk for disciplinary action and segregation” in the first place. *Id.*

The APA congressional statement further noted that “[f]or persons with serious mental illness, these effects may exacerbate underlying psychiatric conditions, such as schizophrenia, bipolar disorder, and major depressive disorder. Segregated prisoners with serious mental illness often require costly psychiatric hospitalization or crisis intervention services, and generally face bleak prospects of any medical improvement.” *Id.*

The clear consensus of the mental health and public health community is further supported by decisions of federal and state courts which have repeatedly held that placing individuals with serious mental illness in such conditions is cruel and unusual punishment under the Eighth Amendment to the Constitution. *See, e. g., Indiana Prot. & Advocacy Servs. Comm’n v. Comm’r, Indiana Dep’t of Corr.*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S. D. Ind. Dec. 31, 2012) (holding that the Indiana Department of Correction’s practice of placing prisoners with serious mental illness in segregation constituted cruel and unusual treatment in violation of the Eighth Amendment); *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W. D. Wis. 2001) (granting a preliminary injunction using same rationale); *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); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E. D. Cal. 1995); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993) ;

*H. B. v. Lewis*, 803 F. Supp. 246, 257 (D. Ariz. 1992); *T. R. v. S. C. Dept. of Corr.*, C/A No. 2005-CP-40-2925 (S. C. Ct. Comm. Pleas 5th J. Cir. Jan. 8, 2014).

Recognizing the irrefutable risk of harm solitary confinement poses for those with serious mental health problems, the federal government has changed its policy under DOJ's guidance in an effort to divert prisoners with mental illness away from solitary confinement. In 2017, "[t]he Department recommended that the BOP expand its ability to divert inmates with serious mental illness to mental health treatment programs, by increasing the capacity of existing secure mental health units, and provided the BOP with an estimated cost of this expansion." Office of the Inspector Gen., U. S. Dep't of Justice, *supra* at 13. Similarly, Nebraska, in the wake of this tragedy, has acknowledged solitary's damaging impacts and attempted to make changes. *See* 72 Neb. Admin. Code § 006.01(diverting prisoners with serious mental illness "to the least restrictive environment" consistent with safety, security, and therapeutic needs).

Here, despite the evidence of Jenkins' mental illness – for which he received only limited, cell-side mental-health visits (E115, 35, 60-61) – the sentencing panel refused to assign any weight to the nearly five years Jenkins spent, as a mentally ill person, in solitary confinement. This decision was not only a violation of Jenkins' Eighth Amendment rights, see Point V, *infra*, it also revealed a failure to appreciate the deeply damaging effects of solitary confinement on individuals with preexisting mental illness recognized by experts, physicians, professional associations, the federal government, and the State of Nebraska itself.

### **III. Solitary Confinement Ultimately Makes People More Likely to Recidivate.**

The sentencing panel declined to recognize Mr. Jenkins' confinement as a non-statutory mitigator on a theory that his imprisonment in isolation was as a result of his own actions and threats. But here the sentencing panel failed to understand not only that persons with mental

illness like Mr. Jenkins are more likely to be placed in solitary confinement because of their inability to conform to the rules, but also the damaging impact solitary confinement causes, especially for this population. Solitary confinement conditions a person to develop thoughts and behaviors that he would not exhibit but for his lack of social interaction.

Lack of social interaction with others is so toxic that it leads prisoners to change themselves in order to survive.”[T]o exist and function in the socially pathological environment of solitary confinement, where their day-to-day life is devoid of meaningful interaction and closeness with others, prisoners have little choice but to adapt in socially pathological ways.” Haney, *Restricting*, *supra*, at 296-97. This damage builds over time as prisoners “gradually change their patterns of thinking, acting, and feeling to cope with the profoundly asocial world in which they are forced to live, as they attempt to adapt to the absence of social support and the routine feedback that comes from normal, meaningful social contact.” *Id.* at 297. These conditions “can create or exacerbate serious psychological change in some inmates that is so negative and severe that it make[s] it difficult for them to return to the general population[.]” *Id.* at 299. (internal quotations omitted). As another expert in the field has explained, “Many prisoners who have spent years in solitary also report to me that the anger they feel all the time keeps building in intensity, and they worry that they will lose control of it and get in more trouble.” Terry Kupers, *SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT* 92 (2017).

As a result, solitary confinement begets recidivism. Regardless of the reasons for placement in solitary confinement, it is the conditions themselves that can “result in negative outcomes for institutional safety, and increase the risk of recidivism after release.” *Reassessing Solitary Confinement Hearing* (statement of Michael Jacobson of Vera Institute of Justice).

The long-term effects often include not only “post traumatic stress (such as flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness), but also lasting personality changes—especially including a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction.” Grassian, *Psychiatric Effects of Solitary Confinement*, *supra*, at 353. *See also* Terry Kupers, *The SHU Post-Release Syndrome*, Correctional Mental Health Report, 17(6) (2016) (documenting long-term effects of those held in segregation).

The symptoms of “[l]ong-term placement in solitary confinement inevitably [have] an adverse impact on a person’s capacity to successfully reenter society[.]” *Reassessing Solitary Confinement Hearing* at 552 (statement of National Alliance on Mental Illness). These observations raise red flags when a person, such as Mr. Jenkins, is held in isolation, month after month, and year after year until he was directly released to the community from a solitary confinement unit.

Recognizing the damage and danger solitary confinement creates, the United States Department of Justice has concluded that “inmates who have spent long periods in isolation are more likely to recidivate and have a more difficult time creating the lasting social bonds that are necessary for reintegration into society.” Office of the Inspector Gen., U. S. Dep’t of Justice, *supra* at 1. The BOP’s policies also recognize that “an inmate’s mental health may deteriorate during restrictive housing placement.” *Id.* Overall, the lack of social interaction in solitary confinement precipitates a difficult adjustment into society upon release.

Mr. Jenkins killed within two weeks of the State releasing him directly from two straight years in solitary confinement to the public – with only a generic list of community resources listing mental-health among other needs such as food and clothing. (E115, 26). His case

exemplifies the risk former solitary confinement prisoners face “of making the transition from prison to home with a more significant set of psychological problems and challenges to overcome.” Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 12 (“From Prison to Home” Conference, The Urban Inst., U. S. Dep't of Health & Human Servs., Working Paper, Jan. 30-31, 2002), <http://img2.tapuz.co.il/CommunaFiles/19852476.pdf>. The mental instability of isolated prisoners upon release has led Professor Haney to conclude that “[n]o prisoner should be released directly out of supermax or solitary confinement back into the free world. Supermax prisons must provide long periods of decompression, with adequate time for prisoners to be treated for the adverse effects of long-term isolation and reacquaint themselves with the social norms of the world to which they will return.” *Id.* at 18. *See also Selected Issues, supra*, at 2 (noting recidivism risk post release).

Failures to heed this advice have led to repeated tragedy. In Colorado, on release in 2013 from segregation to the community, a man killed Tom Clement, the head of that state’s Department of Corrections. *Committee Report, supra*, at 29-30. In New York City, a man held in prolonged solitary confinement in the jail attempted suicide multiple times, until he succeeded two years after his release. Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

Mr. Jenkins’ release from segregation to the public predictably led to yet more tragedy. For the sentencing panel to conclude that Mr. Jenkins was the cause of his own confinement in isolation is to fail to meaningfully grapple with the debilitating impact of solitary confinement.

#### **IV. Solitary Confinement Was Particularly Harmful for Mr. Jenkins.**

Solitary confinement poured gasoline on the flames of Mr. Jenkins’ mental illness, trapping him in a vicious cycle that ensured he would remain in isolation. Over time, he suffered

self-harm, counterproductive behavior, and permanent mental and physical harm. His doctors logged several instances of his self-harm. In 2015, Dr. Obatusin documented his “self harming with the intention to get out of isolation.” Ex. 103, at 19. In one instance before his release, he ate cortisone cream in an effort to escape solitary confinement, Ex. 51, at 12.

Mr. Jenkins pled no contest, and waived his right to a jury, to speed up his trial and get released from solitary confinement despite facing the death penalty. (612, 620-22). He told the trial court, “Please Your Honor, as we’ve just had this, no contest pleas, I’ve been in Douglas County Corrections without any offense in 23-hour-a-day confinement for no reason. I have not agressed [sic] on any of their guards.” *Id.* He pleaded: I’m in 23-hour-a-day lockdown . . . [and] would like to be removed from that facility immediately. . . . I’ve just pled to this and, as you know, the only thing we’re waiting on is the delivery.” *Id.* Mr. Jenkins then asked to waive his right to a jury trial on sentencing issues, (620-21), going so far as to ask “to waive my presence and just be notified through letter.” (622). Mr. Jenkins thus preferred cursory capital-sentencing proceedings to being forced to spend more time in solitary confinement.

Mr. Jenkins had spent the majority of his years from age 18 to the time of the crime in debilitating solitary confinement, and the damage showed. The sentencing panel’s failure to meaningfully consider this evidence was not only error, it demonstrates an absolute disregard of the well-known impact of solitary confinement on human beings.

**V. The Sentencing Panel’s Failure to Meaningfully Consider this Mitigation Denied Mr. Jenkins His Constitutional Rights.**

In its leading case on the subject, the U. S. Supreme Court defined mitigating evidence as “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U. S. 586, 604 (1978). In considering the types of mitigating evidence the Ohio capital sentencing statute

allowed to be considered (factors included the victim facilitating the crime, duress, coercion or provocation of the accused, or psychosis not rising to the level of insanity), the Court found the statute's "limited range. . . incompatible with the Eighth and Fourteenth Amendments." *Id.* at 608. The Court has since repeatedly emphasized the right of defendants facing execution to present mitigation evidence as broadly defined by *Lockett* and have it considered. *See, e. g., Penry v. Lynaugh*, 492 U. S. 302, 318 (1989) (reversing death sentence because "the jury could not fully consider and give effect to the mitigating evidence of [defendant's] mental retardation and abused childhood in rendering its sentencing decision"), *abrogated on other grounds Atkins v. Virginia*, 536 U. S. 304 (2002).

Not only does the Eighth Amendment scrupulously protect the right of defendants to present mitigating evidence, but it also requires the sentencer to *meaningfully* consider it. *See, e. g., Eddings v. Oklahoma*, 455 U. S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original). As the Court explained in *Abdul-Kabir v. Quarterman*, 550 U. S. 233, 246 (2007), the law is "firmly established" that a sentencer "must be able to give *meaningful consideration* and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Id.* (emphasis added). *See also Buchanan v. Angelone*, 522 U. S. 269, 276 (1998) (sentencing authority "may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence"); *Parker v. Dugger*, 498 U. S. 308, 315 (1991) ("[T]he trial judge could not refuse to consider any mitigating evidence."). Given this Court's precedent holding that Article I, section 9 of the Nebraska Constitution can provide

greater protection than the Eighth Amendment, *State v. Mata*, 275 Neb. 1, 67 (Neb. 2008), these precedents carry if anything even greater force under the Nebraska Constitution.

Emphasizing the right of capital defendants to have mitigation considered at sentencing, the U. S. Supreme Court has stated that “[v]irtually *no limits* are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard v. Dretke*, 542 U. S. 274, 285 (2004) (emphasis added). Following this guidance, this Court has found “there is no burden of proof with respect to mitigating circumstances, and the defendant may present evidence which is probative of the existence of a statutory or *nonstatutory* mitigating circumstance.” *State v. Gales*, 269 Neb. 443, 459 (2005) (emphasis added). A defendant’s time in solitary confinement preceding a capital crime is indeed mitigating evidence, *United States v. Fields*, 761 F. 3d 443, 456 n.5 (5th Cir. 2014) (listing the non-statutory mitigation found). There is no more powerful example than this case.

Nebraska placed a known mentally-ill person in debilitating solitary confinement, kept him there for years, and released him directly from solitary to the public, without any provision for treatment – two weeks before this capital crime. This is classic mitigation. This combination of events was the most significant factor precipitating this crime. *See, e. g., Selected Issues, supra*, at 7 (quoting study finding “inmates released directly from segregation to the streets had dramatically higher rates and severity of detected recidivism than AS [Administrative Segregation] inmates who first released to GP [General Population]”), 2 (noting heightened risk of recidivism and mental health problems during the first two weeks after release). The sentencing panel’s treatment of what is likely the most salient mitigating circumstance in this case, and in Mr. Jenkins’ short life, fell far short of the Supreme Court’s standards concerning mitigation. While the Nebraska Legislature and the Department of Correctional Services have

recognized the link between Mr. Jenkins' mental illness, placement in solitary confinement and direct release to the community and this crime, the sentencing panel dismissed these critical factors in a brief paragraph. (T729).

The panel failed to give Mr. Jenkins' mitigation the meaningful consideration the Constitution requires. *Abdul-Kabir*, 550 U. S. at 246. Nikko Jenkins was first placed in solitary confinement when he was only 18 and already seriously mentally ill (E115, 3); App. Br. 31, 38-40 (citing to record). The confinement itself became a significant contributing factor to the decompensation in his mental state and the subsequent maladaptive behavior and aggression relied upon by prison authorities to continue his confinement, creating a vicious cycle from which he could not escape. The lasting damage that solitary confinement inflicted on Mr. Jenkins cannot be so perfunctorily dismissed.

#### CONCLUSION

The sentencing panel's error requires reversal of Jenkins' death sentence.

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## CERTIFICATE OF SERVICE

The undersigned attorney of record hereby certifies that she served a true and correct copy of the foregoing MOTION TO FILE BRIEF OF AMICI CURIAE upon the following parties of record by emailing same on this 10th day of September, 2018:

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