

## The Common Law of Supermax Litigation

David C. Fathi\*

Like chain gangs and boot camps before them, “supermax” prisons were a raging fad in the 1990s—yet another round in the perpetual “tough on crime” political bidding war. According to Chase Riveland, former secretary of corrections in Washington and Colorado, “[t]hey have become political symbols of how ‘tough’ a jurisdiction has become. In some places, the motivation to build a supermax has come not from corrections officials, but from the legislature and—in at least one instance—the governor.”<sup>1</sup>

In a report prepared for the National Institute of Corrections, Riveland defined supermax as:

“a highly restrictive, high-custody *housing unit* within a secure facility, or an *entire secure facility*, that isolates inmates from the general prison population and from each other due to grievous crimes, repetitive assaultive or violent institutional behavior, the threat of escape or actual escape from high-custody facility(s), or inciting or threatening to incite disturbances in a correctional institution.” . . . It is assumed that such a facility would be operated with the majority of services and programs provided at cell front, that movement from the cell would be in restraints with multiple-officer escort, and that overall security would be the highest level available in an institution or the corrections system.<sup>2</sup>

Elsewhere in the report, Riveland more pithily characterizes supermax confinement as “locking an inmate in an isolated cell for an average of twenty-three hours per day with limited

---

\* David C. Fathi is Senior Staff Counsel, National Prison Project of the ACLU Foundation, Washington, DC. The author is co-counsel for the plaintiff class in *Jones 'El v. Berge*, and consulted with plaintiffs' counsel in *Ayers v. Perry*. He thanks Elizabeth Alexander, Peter Cubra, Philip B. Davis, and Raymond Vasvari for their assistance.

1. CHASE RIVELAND, U.S. DEP'T OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 5 (1999), available at <http://nicic.org/pubs/1999/014937.pdf>.

2. *Id.* at 6.

human interaction, little constructive activity, and an environment that assures maximum control over the individual.”<sup>3</sup>

A federal judge described Wisconsin’s supermax prison this way:

Inmates on Level One at the State of Wisconsin’s Supermax Correctional Institution in Boscobel, Wisconsin spend all but four hours a week confined to a cell. The “boxcar” style door on the cell is solid except for a shutter and a trap door that opens into the dead space of a vestibule through which a guard may transfer items to the inmate without interacting with him. The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted: one religious text, one box of legal materials and 25 personal letters. They are permitted no clocks, radios, watches, cassette players or televisions. The temperature fluctuates wildly, reaching extremely high and low temperatures depending on the season. A video camera rather than a human eye monitors the inmate’s movements. Visits other than with lawyers are conducted through video screens.<sup>4</sup>

By one count, more than thirty states were operating a supermax facility or unit by 1999,<sup>5</sup> although not all used the “supermax” terminology. Terms such as “security housing unit,” “special management unit,” “intensive management unit,” and “control unit” are also used to designate these facilities.

The extreme deprivations of supermax confinement have predictably led to litigation. The first major case was *Madrid v. Gomez*,<sup>6</sup> a comprehensive challenge to conditions at California’s Pelican Bay State Prison. In an exhaustive opinion, Chief Judge Thelton E. Henderson found Eighth Amendment violations as to health care and use of force, and due process violations in the procedures used to transfer prisoners to the Security Housing Unit (SHU). The court found that the conditions of extreme social isolation and sensory deprivation found in the SHU, although they “may well hover on the edge of what is humanly tolerable for those with normal resilience,” do not

---

3. *Id.* at 2.

4. *Jones v. Berge*, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).

5. RIVELAND, *supra* note 1, at 1.

6. 889 F. Supp. 1146 (N.D. Cal. 1995).

## 2004] COMMON LAW OF SUPERMAX LITIGATION 677

violate the Eighth Amendment.<sup>7</sup> However, for certain categories of mentally ill prisoners, SHU confinement was unconstitutional; “[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe.”<sup>8</sup>

*Madrid* was unusual in that multiple issues in the case proceeded to trial and judgment. In most supermax cases since *Madrid*, many or all issues have been settled without trial. While the benefits of settlement may be many, such an outcome deprives the bench and bar of a readily accessible account of the litigation’s result. This paper examines three supermax cases in which most or all issues were settled, and surveys the terms of those settlement agreements.<sup>9</sup>

### The Cases

*Jones ‘El v. Berge*<sup>10</sup> was filed in September 2000 by two prose prisoners at Wisconsin’s Supermax Correctional Institution (SMCI). United States District Judge Barbara B. Crabb appointed counsel, and later certified a class comprising “all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin.”<sup>11</sup> Following expert tours during which it became clear that many prisoners were floridly psychotic or actively suicidal, plaintiffs sought a preliminary injunction removing seriously mentally ill prisoners from SMCI. After an evidentiary hearing, the court granted a preliminary injunction ordering that seven identified seriously mentally ill prisoners be removed from the supermax; the court also ordered that high-risk populations at the prison be evaluated by independent clinicians for serious mental illness, and those found to be seriously mentally ill not be housed

---

7. *Id.* at 1280.

8. *Id.* at 1265.

9. As this article went to press, a comprehensive settlement was reached in litigation challenging conditions in Connecticut’s supermax prison. Office of Prot. and Advocacy v. Choinski, No. 3:03CV1352 (RNC) (D. Conn. Mar. 8, 2004) (settlement agreement) (on file with the author).

10. 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

11. *Jones ‘El v. Berge*, No. 00-C-421-C, slip op. at 13 (W.D. Wis. Feb. 15, 2001) (opinion and order).

at SMCI.<sup>12</sup> In June 2002, the case was settled by entry of a comprehensive consent decree.<sup>13</sup>

*Austin v. Wilkinson*,<sup>14</sup> a challenge to conditions at the Ohio State Penitentiary (OSP) in Youngstown, was filed in January 2001.<sup>15</sup> United States District Judge James Gwin certified a class of:

[A]ll persons who were confined at the Ohio State Penitentiary as of January 9, 2001, or who have come to be confined there since that date, or who may be confined there during the pendency of this litigation, membership in the class once thus established to continue during the pendency of the litigation.<sup>16</sup>

On November 21, 2001, the court granted a preliminary injunction enjoining defendants "from returning any of the seriously mentally ill class members to the Ohio State Penitentiary."<sup>17</sup> All issues were settled by entry of a stipulation for injunctive relief on January 8, 2002,<sup>18</sup> with the exception of plaintiffs' claim that their placement and retention at OSP violated their right to procedural due process. That claim went to trial in January 2002. On February 25, 2002, the court held that plaintiffs were entitled to due process protections in decisions to transfer them to and retain them at OSP.<sup>19</sup> The court later specified the

---

12. 164 F. Supp. 2d at 1125-26. The court rejected defendants' argument that each class member was required to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a)(2002). Rather, the court held, exhaustion by any class member suffices for the class. *Jones 'El v. Berge*, 172 F. Supp. 2d 1128, 1130-31, 1134 (W.D. Wis. 2001).

13. *Jones 'El v. Berge*, No. 00-C-421-C (W.D. Wis. June 24, 2002) (judgment in a civil action). As part of the settlement, defendants agreed to rename the prison and to refrain from referring to it as a "supermax" or to its prisoners as "the worst of the worst." *Id.* Ex. A at 4. It is now the Wisconsin Secure Program Facility.

14. 189 F. Supp. 2d 719 (N.D. Ohio 2002).

15. *Austin v. Wilkinson*, No. 4:01-CV-071, at 2 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief). The website of the Ohio Department of Rehabilitation and Correction describes OSP as "Ohio's first 'supermax' prison." The Institutions, Ohio Department of Rehabilitation and Correction, at <http://www.drc.state.oh.us/web/prisprog.htm> (last visited Sept. 8, 2003).

16. *Austin*, No. 4:01-CV-071, at 2 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief).

17. *Austin v. Wilkinson*, No. 4:01-CV-071, at 27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction).

18. *Austin*, No. 4:01-CV-071, at 2 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief).

19. *Austin*, 189 F. Supp. 2d at 746.

## 2004] COMMON LAW OF SUPERMAX LITIGATION 679

procedural protections required for transfer to and retention at OSP.<sup>20</sup>

*Ayers v. Perry*<sup>21</sup> was filed in New Mexico state court in October 2002, but was removed by defendants to federal court. The lawsuit challenged conditions in “Special Controls Facilities” (SCF) at the Penitentiary of New Mexico in Santa Fe and the Southern New Mexico Correctional Facility in Las Cruces.<sup>22</sup> According to the New Mexico Corrections Department, the mission of the SCF is to “isolat[e] and separat[e] the disruptive, violent, uncooperative and predatory inmates,” to “exert[] strict security and inmate control procedures,” and to “restrict[] inmate privileges.”<sup>23</sup>

Although the complaint in *Ayers* included class allegations, no class was certified before the case was settled on May 20, 2003. The settlement also resolved a number of individual habeas actions pending in New Mexico state courts. The *Ayers* settlement is not a consent decree, but provides that it may be enforced by a suit brought in state court for specific performance.<sup>24</sup>

### The Settlement Agreements

#### *Exclusion of the Seriously Mentally Ill*

The negative mental health effects of isolated confinement have long been well known. More than a century ago, the United States Supreme Court acknowledged the devastating effects of prolonged isolation even on “normal” prisoners:

---

20. *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026-29 (N.D. Ohio 2002).

21. Complaint, *Ayers v. Perry*, No. D-0101-CV-200202294 (N.M. County Ct. Oct. 21, 2002).

22. *Id.* at 2.

23. N.M. CORR. DEP'T., INFORMATIONAL BROCHURE: SPECIAL CONTROLS FACILITY, PENITENTIARY OF NEW MEXICO NORTH/SOUTH UNITS 3 (2000), available at <http://web.archive.org/web/20020915180051/http://corrections.state.nm.us/what-snew/SpecialControlFacilities.pdf> (on file with author) [hereinafter SPECIAL CONTROLS FACILITY].

24. Letter Agreement from Joe R. Williams, Secretary of Corrections for the State of New Mexico, Nick D'Angelo, General Counsel, and Robert T. Booms, Counsel for Defendants to Mark Donatelli, Peter Cubra, Sophie Cooper, and Jane Yee, Counsel for Petitioners in *Ayers v. Perry* and other individual habeas actions pending in New Mexico State Court 18-19 (May 20, 2003) (on file with author) [hereinafter *Ayers* Letter Agreement].

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.<sup>25</sup>

Half a century later, the Court referred to “solitary confinement” as one of the techniques of “physical and mental torture” that have been used by governments to coerce confessions.<sup>26</sup> The pathological effects of isolated confinement are also well documented in the psychiatric literature.<sup>27</sup>

Federal courts continue to recognize as established fact that isolated confinement inflicts serious psychological harm on many prisoners.<sup>28</sup> However, only one court has approached a holding that isolated confinement per se violates the Eighth

---

25. *In re Medley*, 134 U.S. 160, 168 (1890) (describing effects of solitary confinement as practiced in the early days of the United States).

26. *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940).

27. *See, e.g.*, TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 56-64 (1999) (describing “SHU syndrome”); Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

28. *See, e.g.*, *Miller ex. rel. Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000) (“it is well accepted that conditions such as those present in the SMU II . . . can cause psychological decompensation to the point that individuals may become incompetent”); *Comer v. Stewart*, 215 F.3d 910, 915 (9th Cir. 2000) (“we and other courts have recognized that prison conditions remarkably similar to [SMU II] can adversely affect a person’s mental health”); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) (“the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total”); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (“[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies”); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) (“[the notion that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science”); *Madrid v. Gomez*, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (“many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in SHU”); *Bono v. Saxbe*, 450 F. Supp. 934, 946 (E.D. Ill. 1978) (“[p]laintiffs’ uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit”), *aff’d in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980).

## 2004] COMMON LAW OF SUPERMAX LITIGATION 681

Amendment. In *Ruiz v. Johnson*,<sup>29</sup> the court held that conditions in Texas' administrative segregation units were unconstitutional:

Before the court are levels of psychological deprivation that violate the United States Constitution's prohibition against cruel and unusual punishment. It has been shown that defendants are deliberately indifferent to a systemic pattern of extreme social isolation and reduced environmental stimulation. These deprivations are the cause of cruel and unusual pain and suffering by inmates in administrative segregation, particularly in Levels II and III.<sup>30</sup>

By contrast, the *Madrid* court held that,

while the conditions in the SHU may press the outer bounds of what most humans can psychologically tolerate, the record does not satisfactorily demonstrate that there is a sufficiently high risk to all inmates of incurring a serious mental illness from exposure to conditions in the SHU to find that the conditions constitute a per se deprivation of a basic necessity of life.<sup>31</sup>

However, there is an increasingly clear judicial consensus that the Eighth Amendment is violated when the seriously mentally ill or developmentally disabled are held in supermax confinement. "Most inmates have a difficult time handling these conditions of extreme social isolation and sensory deprivation, but for seriously mentally ill inmates, the conditions can be devastating."<sup>32</sup> Indeed, every federal court to consider the question has held that "supermax" confinement of the seriously mentally ill is unconstitutional.<sup>33</sup>

---

29. 37 F. Supp. 2d 855 (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).

30. *Ruiz*, 37 F. Supp. 2d at 914-15.

31. *Madrid*, 889 F. Supp. at 1267. *Cf.* *Koch v. Lewis*, 216 F. Supp. 2d 994, 1002 n.12 (D. Ariz. 2001) (observing that "[d]etention in SMU II for five and one-half years borders on cruel and unusual punishment" but not deciding the issue).

32. *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).

33. *See, e.g., Ruiz*, 37 F. Supp. 2d at 915 ("[c]onditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995); *Madrid*, 889 F. Supp. at 1265-66; *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence that prison officials fail 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).

A similar consensus is emerging among corrections professionals. "Insofar as possible, mentally ill inmates should be excluded from extended control facilities. . . . [M]uch of the regime common to extended control facilities may be unnecessary, and even counterproductive, for this population."<sup>34</sup> The *Jones 'El* court cited the testimony of former Wisconsin Corrections Secretary Michael Sullivan that:

[h]e believes that Supermax cannot provide an adequate placement for mentally ill inmates because it lacks the staffing to care for them and because it has little if any space for programming. He acknowledges that he is not familiar with the staffing ratios at the institution at the present time or with the program offerings but believes that no amount of programming could compensate for the physical isolation imposed on Alpha Unit.<sup>35</sup>

Perhaps in recognition of this consensus, the settlements in *Jones 'El*, *Austin*, and *Ayers* all provide for the permanent exclusion of seriously mentally ill prisoners from the supermax facilities in question. Of course, much turns on the definition of "seriously mentally ill." In *Jones 'El*, for example, the consent decree provides that "[n]o seriously mentally ill prisoners will be sent to SMCI nor will seriously mentally ill prisoners at the facility be permitted to remain there."<sup>36</sup> Defendants initially proposed a definition of "serious mental illness" that closely paralleled the state law definition of not guilty by reason of insanity. The court rejected defendants' proposal, and instead provided the following definition of "serious mental illness:"

- a. Inmates found to have current symptoms or who are currently receiving treatment for the following types of Diagnostic and Statistical Manual IV (DSM-IV) Axis I diagnosis:
  - (1) Schizophrenia (all sub-types)
  - (2) Delusional Disorder
  - (3) Schizophreniform Disorder
  - (4) Schizoaffective Disorder
  - (5) Brief Psychotic Disorder
  - (6) Substance-Induced Psychotic Disorder (excluding intoxication and withdrawal)

---

34. RIVELAND, *supra* note 1, at 12.

35. *Jones 'El*, 164 F. Supp. 2d at 1102.

36. *Jones 'El v. Berge*, No. 00-C-421-C, Ex. A at 5 (W.D. Wis. June 24, 2002). The decree also provides that no prisoners in protective custody status will be assigned to the supermax. *Id.*



2004] *COMMON LAW OF SUPERMAX LITIGATION* 683

- (7) Psychotic Disorder Not Otherwise Specified
- (8) Major Depressive Disorders
- (9) Bipolar Disorder I and II;
- b. Inmates diagnosed with a mental disorder that includes being actively suicidal;
- c. Inmates diagnosed with a serious mental illness that is frequently characterized either by breaks with reality or by perceptions of reality that lead the individual to significant functional impairment;
- d. Inmates diagnosed with organic brain syndrome that results in a significant functional impairment if not treated;
- e. Inmates diagnosed with a severe personality disorder that is manifested by frequent episodes of psychosis or depression and results in significant functional impairment; or
- f. Inmates diagnosed with any other serious mental illness or disorder that is worsened by confinement at Supermax.<sup>37</sup>

Similarly, in the New Mexico litigation, the parties agreed to remove from the SCF, and house in a mental health facility known as the Alternative Placement Area (APA), all prisoners who meet the following criteria:

1. Schizophrenia and other psychotic disorders (schizophreniform disorder, schizoaffective disorder, delusional disorder, brief psychotic disorder, shared psychotic disorder, psychotic disorder due to a general medical condition, substance-induced psychotic disorder, psychotic disorder NOS, psychotic features due to any Mood Disorder).
2. Major depression (current) with GAF below 60.
3. History of major depression within the last six months that is currently in remission with a current GAF of 60 or below.
4. Bipolar I disorder, Bipolar II disorder, Bipolar disorder NOS.
5. Dementia, Delirium, Amnestic Disorder.
6. Mental retardation (by DSM-IV criteria) or an IQ of 70 or below and demonstrated impairment in at least two (2) areas of adaptive behavior.
7. Personality Disorder with significant and/or chronic self-injury within the past 12 months (include all bona fide suicide attempts).
8. Anxiety Disorders with a GAF of 60 or below.
9. Global Assessment of Functioning (GAF) scale of 60 or less, with any DSM-IV Axis I or II diagnosis.
10. History of bona fide suicide attempts within the last year.

---

37. *Id.* at Ex. B.

11. Cyclothymia, Dysthymia, Depressive Disorder NOS, Mood Disorder secondary to a medical condition, or substance induced Mood Disorder with a GAF of 60 or below.
12. Cognitive Disorder or Mental Disorder related to a medical condition or cognitive disorder NOS with a GAF below 60 (substantiated by neuro-psychological testing).
13. Personality Disorder with psychotic decompensation and/or serious affective symptoms with a GAF of less than 60.
14. Bona fide active suicidal ideation within the last six months.
15. Inmates that discontinue psychiatric or mental health treatment against medical advice and continue to have a GAF of 60 or below.
16. Other exceptional cases approved by the Clinical Director of Psychiatry.<sup>38</sup>

The *Austin* consent decree provides that prisoners with “serious mental illness” are to be excluded from the Ohio State Penitentiary. For the definition of that term the decree refers to ODRC Policy 111-07 and Standard Operating Procedure—SOP 2.<sup>39</sup> Those documents provide as follows:

Serious mental illness means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and is manifested by substantial pain or disability. Serious mental illness requires a mental health diagnosis, prognosis and treatment, as appropriate, by mental health staff. For purposes of this policy only, “seriously mentally ill” shall also include persons whose condition meets the criteria of the department’s standard operating procedure for exclusion from OSP.<sup>40</sup>

Inmates assessed and diagnosed with the following conditions are excluded from transfer to OSP:

1. Serious mental illness (categorized as C-1 on the Mental Health Level of Care Determination, DRC form 5268)

---

38. *Ayers* Letter Agreement, *supra* note 24, at 3-4. The agreement applies these exclusionary criteria to “[i]nmates in levels V and VI.” *Id.* at 3. It is prisoners on these levels who are normally housed in the Special Controls Facilities. SPECIAL CONTROLS FACILITY, *supra* note 23, at 2-3.

39. *Austin v. Wilkinson*, No. 4:01-CV-071, at 4 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief).

40. OHIO DEPT OF REHAB. & CORR., LEVEL 4/LEVEL 5 CLASSIFICATION FOR INMATES, 111-07, at 2 (2002).

## 2004] COMMON LAW OF SUPERMAX LITIGATION 685

2. Mental Retardation (categorized as MR/DD on the Mental Health Level of Care Determination, DRC form 5268)
3. Mental disorder that includes:
  - a. Being actively suicidal
  - b. Severe cognitive disorder (organic mental disorder) that results in significant functional impairment
  - c. Severe personality disorder that is manifested by frequent episodes of psychosis, depression or self-injurious behavior, and results in significant functional impairment<sup>41</sup>

Given this professional and judicial consensus, it seems unlikely that prison officials in future litigation will vigorously defend their right to house mentally ill prisoners in the conditions of extreme deprivation that characterize supermax facilities. Rather, litigation in this area is likely to focus on where to draw the line, or just how sick a prisoner must be before he or she is categorically excluded from supermax confinement.

*Out-of-Cell Time*

Prisoners are constitutionally entitled to out-of-cell exercise.<sup>42</sup> Most courts have held that five hours a week is the constitutional minimum.<sup>43</sup> Courts have reached conflicting results on whether prisoners are entitled to outdoor exercise.<sup>44</sup>

The *Austin*, *Ayers*, and *Jones 'El* settlements all provide for enhanced exercise opportunities, including outdoor exercise. The *Austin* decree provides for construction of eight ground-

---

41. OHIO DEP'T OF REHAB. & CORR., BUREAU OF MENTAL HEALTH SERVICE, STANDARD OPERATING PROCEDURES, EXCLUSION CRITERIA FOR INMATES RECOMMENDED FOR OHIO STATE PENITENTIARY, SOP 2 (2001).

42. *Delaney v. DeTella*, 256 F.3d 679 (7th Cir. 2001) (denial of all out-of-cell exercise for six months violates the Eighth Amendment); *Perkins v. Kansas Dept. of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999); *Divers v. Dept. of Corr.*, 921 F.2d 191, 194 (8th Cir. 1990) (recreation of only 45 minutes per week stated a claim).

43. *See, e.g.*, *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (five hours); *Spain v. Procunier*, 600 F.2d 189, 199-200 (9th Cir. 1979) (five hours); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1402, 1412 (N.D. Cal. 1984) (eight hours), *aff'd in part and rev'd in part on other grounds*, 801 F.2d 1080 (9th Cir. 1986).

44. *See Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994) (yes); *Toussaint v. Yockey*, 722 F.2d 1490, 1492-93 (9th Cir. 1984) (yes); *Martin v. Tyson*, 845 F.2d 1451, 1456 (7th Cir. 1988) (no); *Clay v. Miller*, 626 F.2d 345, 347 (4th Cir. 1980) (no).

level outdoor exercise spaces at OSP.<sup>45</sup> Similarly, the *Ayers* agreement requires defendants to implement outdoor recreation for prisoners on Levels V and VI, to construct outdoor recreation areas, and to place one recreational item (such as a basketball hoop or a chin-up bar) in each recreation area.<sup>46</sup>

In *Jones 'El*, the consent decree provides that each prisoner shall have at least five hours per week out-of-cell time, with prisoners on higher levels entitled to at least ten hours per week. Defendants agree to provide an outdoor recreation area for prisoners on Levels III, IV, and V. Defendants also agree to heat and cool the existing indoor recreation areas as seasonally appropriate.<sup>47</sup>

### *Visiting*

It is beyond dispute that the opportunity to visit with family and friends is not only extremely important to prisoners, but also contributes to better behavior in prison and more successful reintegration upon release.<sup>48</sup> But even after the Supreme Court's decision in *Overton v. Bazzetta*,<sup>49</sup> it remains unclear whether prisoners have any constitutional right to visit with their family members or other intimate associates. The *Bazzetta* court found it unnecessary to decide whether such a right survives incarceration, because it found that the visiting restrictions challenged in that case were reasonably related to legitimate penological objectives.<sup>50</sup>

Despite the uncertain legal landscape, all three agreements provide for improved visiting conditions. The *Ayers* agreement provides for the end of "video visiting," in which the prisoner and his visitor are in different locations, and interact via television monitors. "Video visiting" has been criticized as failing to allow meaningful interaction between the prisoner and his visitor. For example, the *Jones 'El* court found that "the audio quality is poor" and that "the poor quality of the visits has led

---

45. *Austin v. Wilkinson*, No. 4:01-CV-071, at 5-6 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief).

46. *Ayers* Letter Agreement, *supra* note 24, at 11.

47. *Jones 'El v. Berge*, No. 00-C-421-C, at 6-7 (W.D. Wis. June 24, 2002).

48. See KUPERS, *supra* note 27, at 157-60.

49. 539 U.S. 126 (2003).

50. *Id.* at 131.

## 2004] COMMON LAW OF SUPERMAX LITIGATION 687

some mentally ill inmates to believe that the images on the video screens are manipulated and to refuse visitors.”<sup>51</sup> Under the *Ayers* agreement, prisoners on Levels V and VI are entitled to face-to-face noncontact visiting, unless an exception is made on an individualized basis. The defendants also agree to construct noncontact visiting areas.<sup>52</sup>

The *Jones ‘El* consent decree similarly provides for face-to-face noncontact visiting for prisoners on Levels IV and V, with the possibility that this privilege will be extended to those on Level III. Moreover, the agreement attempts to take advantage of one benefit of “video visiting”—the elimination of long travel distances for visitors. Given the prison’s remote location in western Wisconsin, defendants agree to make video visiting available from at least Milwaukee and Racine.<sup>53</sup>

The *Austin* decree does not directly address the mode of visitation, but requires that defendants discontinue use of the “black box” and belly chains as required security restraints during all visits, “except where an inmate has demonstrated a history justifying the utilization of such restraints.”<sup>54</sup>

### Other Issues

Many supermax facilities employ a “level” or “phase” system, in which a prisoner begins at the most restrictive level and then, through good behavior, can earn his way to a less restrictive level, and perhaps out of the supermax altogether. These systems have been criticized for the arbitrary and standardless

---

51. *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1101, 1113 (W.D. Wis. 2001) (noting that a mentally ill prisoner “does not participate in visits with his family via video monitors because ‘they could be faking the images’”).

52. *Ayers* Letter Agreement, *supra* note 24, at 10.

53. *See Jones ‘El v. Berge*, No. 00-C-421-C, at 7-8 (W.D. Wis. June 24, 2002).

54. *Austin v. Wilkinson*, No. 4:01-CV-071, at 6 (N.D. Ohio Jan. 8, 2002) (stipulation for injunctive relief). “The ‘black box’ is a hard plastic box placed over the lock apparatus that runs between the prisoner’s handcuffs.” The box is attached to the belly chain, holding the prisoner’s hands against his stomach. *Knox v. McGinnis*, 998 F.2d 1405, 1407 (7th Cir. 1993); *see also* *May v. Baldwin*, 109 F.3d 557, 564 (9th Cir. 1997). This apparatus can be extremely painful, and makes it all but impossible to move the hands or arms. *See Benjamin v. Fraser*, 264 F.3d 175, 181-82 (2d Cir. 2001); *Knox*, 998 F.2d at 1407 n.5. Because of this discomfort, prisoners sometimes forego out-of-cell activities that require use of the “black box.” *See Nami v. Fauver*, 82 F.3d 63, 66, 68 (3d Cir. 1996). In any event, a prisoner thus restrained would have great difficulty holding a telephone receiver to speak with his visitor during a non-contact visit.

nature of staff decisions to promote or demote a prisoner. Moreover, some prisoners, particularly the mentally ill, become “stuck” at the most restrictive level for months or even years. In the Wisconsin litigation, the court found that “[s]eriously mentally ill inmates have difficulty following the rules necessary to advance up the level system and, as a result, find themselves ‘stuck’ in Levels One, sometimes Two and only rarely Three.”<sup>55</sup> The *Jones ‘El* decree attempts to address this problem by providing that a prisoner shall not be retained on Level I (the most restrictive level) for more than fourteen days unless he has been found guilty of a major conduct report or multiple minor conduct reports while in Level I. Moreover, the court-appointed monitor is to be notified whenever a prisoner is retained on Level I for more than fourteen days.<sup>56</sup>

In New Mexico, progress through the level system was linked to the prisoner’s participation in a program known as “cognitive restructuring.” According to the Corrections Department, “[a] major component of the program is the ‘Corrective Thinking’ course,” in which “[i]t is the inmates’ responsibility to alter their thinking and behavior patterns, which will ultimately determine the period of commitment to the SCF . . . .”<sup>57</sup> More specifically, the prisoner’s failure to give the “correct” answer on cognitive restructuring assignments could lead to his retention at a given level, or demotion to a more restrictive level. This predictably led to charges of brainwashing and mind control. The *Ayers* settlement decouples the prisoner’s participation in cognitive restructuring from his progress through the level system.<sup>58</sup>

One of the greatest concerns about supermax incarceration, particularly as it affects the mentally ill and other fragile persons, is the extreme deprivation of social contact and environmental stimulation. In addition to the restrictions on visiting and out-of-cell time discussed above, prisoners are typically allowed very little personal property, and their access to the telephone is highly restricted. The lack of physical and social points of reference to ground them in reality can be devastating

---

55. *Jones ‘El*, 164 F. Supp. 2d at 1101.

56. *Jones ‘El*, No. 00-C-421-C, at 5 (W.D. Wis. June 24, 2002).

57. SPECIAL CONTROLS FACILITY, *supra* note 23, at 8.

58. *Ayers* Letter Agreement, *supra* note 24, at 9-10.

## 2004] COMMON LAW OF SUPERMAX LITIGATION 689

to both “normal” and mentally ill prisoners. For example, in the Wisconsin supermax, in which some prisoners were not allowed even to possess a clock or a watch, the court found that difficulty in knowing the time of day was disorienting to prisoners.<sup>59</sup>

Both the *Jones ‘El* decree and the *Ayers* settlement contain detailed provisions addressing these issues. For example, the *Ayers* settlement provides that prisoners in Levels V and VI are allowed increased numbers of cassettes, photographs, letters, religious items, and other property, as well as increased telephone access.<sup>60</sup> Similarly, the *Jones ‘El* decree provides that additional reading material and video programming shall be provided for prisoners on Level I, all prisoners above Level I shall be allowed to have televisions, and calendar clocks shall be installed in all cells.<sup>61</sup> Increased religious property and telephone access are also provided.<sup>62</sup> Finally, the decree includes a catch-all provision that prisoners at the supermax shall have the same rights and privileges as prisoners in administrative segregation in other Wisconsin maximum-security prisons.<sup>63</sup>

### Conclusion

There are unmistakable signs that the bloom is off the supermax experiment. Few states have opened supermax facilities in recent years, and Virginia recently reduced its supermax capacity by more than 75%, converting the facilities to regular maximum-security prisons.<sup>64</sup> As states face record budget deficits, supermax facilities, which are far more expensive to build and operate than conventional prisons, seem to have lost much of their appeal. Nevertheless, thousands of prisoners remain confined in supermax facilities throughout the United States, and litigation continues to challenge their conditions of confinement. As long as these facilities exist, the settle-

---

59. *Jones ‘El*, 164 F. Supp. 2d at 1099-100, 1118.

60. *Ayers* Letter Agreement, *supra* note 24, at 11-12.

61. *Jones ‘El*, No. 00-C-421-C, at 6, 10 (W.D. Wis. June 24, 2002).

62. *Id.* at 9-10.

63. *Id.* at 4.

64. Laurence Hammack, *Supermaxes at Minimum Capacity*, ROANOKE TIMES, May 18, 2003, at B1. Maryland has announced plans to demolish its supermax. David Nitkin, *Md. Wants to Demolish Supermax as Obsolete at 14: State Shifts from Lockup to Rehabilitation in Prison*, BALTIMORE SUN, Oct. 16, 2003, at 1A.

ment agreements in *Jones 'El*, *Austin*, and *Ayers* provide a roadmap for mitigating the most inhumane and oppressive features of supermax confinement.