Case No. 15-35770

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISABILITY RIGHTS MONTANA, INC., on behalf of all prisoners with serious mental illness confined to the Montana State Prison
Plaintiff-Appellant,

v.

MIKE BATISTA, in his official capacity as Director of the Montana Department of Corrections and LEROY KIRKEGARD, in his official capacity as Warden of the Montana State Prison

Defendants-Appellees

Appeal from the United States District Court for the District of Montana, Butte Division

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BRIEF OF PLAINTIFF-APPELLANT DISABILITY RIGHTS MONTANA, INC.

Jeffrey A. Simmons
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703
608.258.4267

Jon E. Ellingson
ACLU of Montana
241 E. Alder
Missoula, MT 59801
406.546.9084

Anna C. Conley
PO Box 9101
Missoula, MT 59807
406.830.0367

Kyle Gray / Adrian Miller
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
406.252.2166

Attorneys For Plaintiff-Appellant Disability Rights Montana, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned hereby states that Plaintiff-Appellant Disability Rights Montana, Inc. is a non-profit corporation and there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

In this appeal, plaintiff-appellant Disability Rights Montana, Inc. ("DRM") seeks reversal of the District Court's dismissal of its lawsuit on behalf of prisoners with serious mental illness housed at the Montana State Prison ("Prison"). In its Complaint, DRM alleged that defendants-appellees Mike Batista, the Director of the Montana Department of Corrections, and Leroy Kirkegard, the Warden of the Prison (collectively the "DOC Defendants"), are engaged in ongoing violations of the Eighth Amendment by knowingly administering policies and practices that pose a significant risk to the health of prisoners with serious mental illness. The facts alleged by DRM show that these policies and practices have exacerbated prisoners' mental illnesses and have led to extreme self-harm, suicide and murder. Among other things, under the DOC Defendants' administration:

- prisoners with serious mental illness are regularly locked in various forms of solitary confinement for 22 to 24 hours per day for months and years at a time;
- prisoners with serious mental illness are regularly punished for behavior that is a product of their illness;
- the Prison has no standards for determining whether punishments will be harmful to a prisoner's mental health;

- Prison medical staff fail to properly medicate prisoners with serious mental illness; and
- Prison medical staff engage in a pattern of labelling prisoners as "malingering" (*i.e.*, faking) rather than suffering from serious mental illnesses.

DRM's 33-page Complaint backed up these allegations with detailed summaries of the experiences of nine prisoners, showing a pattern of Eighth Amendment violations spanning more than ten years and continuing during the pendency of the lawsuit. Nevertheless, the District Court found that DRM had failed to plead facts sufficient to state a claim for relief and dismissed DRM's case. In its oral ruling, however, it was apparent that the District Court had mistakenly issued a ruling intended for another case at the same hearing. Yet when the error was brought to the District Court's attention, the court refused to correct it and reiterated its ruling dismissing DRM's case. As a result, DRM appeals.

JURISDICTIONAL STATEMENT

This is an action pursuant to 42 U.S.C. § 1983 alleging violations of the Eighth Amendment of the United States Constitution. Subject matter jurisdiction exists pursuant to 28 U.S.C. §§ 1331 and 1343(a).

The order appealed from is the District Court's September 3, 2015 order ("Order") granting the DOC Defendants' June 5, 2015 motion to dismiss DRM's Complaint for failure to state a claim. (E.R.26.)[1]

The District Court's statements indicate that it intended the Order to be a final judgment dismissing DRM's entire case, not just the Complaint. During a previous hearing in a related proceeding at which the District Court ordered DRM to file the present Complaint (*see* "Procedural History," *infra*), the District Court stated: "We are now going to be in the third go round of pleadings in this matter. There is no reason that at this point that there should be a lack of precision in the mind of any pleader as to what the case is that the pleader intends to present." (E.R.228-229.) In the Order and at the hearing at which it granted the motion to dismiss, the District Court did not indicate that DRM could file an amended complaint. (*See* E.R.26, 81-82.) *See also Broam v. Bogan*, 320 F.3d 1023, 1026 (9th Cir. 2003) (district court's order dismissing amended complaint was final judgment where court granted leave to amend when dismissing original complaint, but failed to do so when dismissing amended complaint).

The language used by the District Court in the Order and in a subsequent related order indicate that it intended to dismiss DRM's case, not just the Complaint. In the Order, the District Court stated: "This case is dismissed."

[1] "E.R.___" indicates citations to the Appellant's Excerpts of the Record filed with this brief pursuant to Circuit Rule 30-1.

(E.R.26.) In the subsequent order reiterating its decision, the District Court stated "Cause No. CV 15-22-BU-SEH was dismissed" and, again, made no mention of giving DRM an opportunity to file an amended complaint. (E.R.202.)

The clerk of court's PACER docket for the case states that the case was "terminated" on September 3, 2015, the date of the Order. (E.R.004.) *See Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012) (clerk of court's docket entry "terminating case" was evidence that district court intended dismissal to be a final order).

DRM filed its notice of appeal on October 1, 2015, less than 30 days after the District Court entered the Order on appeal. (E.R.001.) Accordingly, this appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did DRM state a claim for relief pursuant to 42 U.S.C. § 1983 for violations of the Eighth Amendment's prohibition against cruel and unusual punishment where DRM's Complaint alleges facts showing that the DOC Defendants knowingly administer policies and practices at the Montana State Prison that involve, among other things, refusing to diagnose prisoners as having serious mental illness, refusing to provide necessary medications to prisoners with serious mental illness, punishing prisoners with serious mental illness for behavior

that is a product of their illness, and locking prisoners with serious mental illness in solitary confinement for months and years at a time?

The District Court held that DRM had not stated a claim for relief.

2. Should this case be transferred to a different district judge upon remand because the district judge has: expressed skepticism about the viability of DRM's claim and about whether the term "serious mental illness" – which is central to the case – has any meaning; indicated that he does not believe evidence regarding prisoners with serious mental illness who have died as a result of the DOC Defendants' policies and practices is relevant to DRM's Eighth Amendment claim; suggested that DRM attempted to maximize the "shock value" of its pleading; *sua sponte* ordered DRM to file a separate lawsuit against the DOC Defendants more than a year after DRM filed its original suit against multiple defendants; mistakenly switched the rulings intended for the present case and a different case, resulting in this appeal; and refused to correct his obvious error when it was brought to his attention?

The District Court did not address this question.

STATEMENT PURSUANT TO CIRCUIT RULE 28-2.7

The pertinent constitutional provisions and statutes are as follows:

Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Factual Background

A. The Parties

Plaintiff-appellant DRM is the authorized protection and advocacy agency for the State of Montana pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 et seq. ("PAIMI Act"). (E.R.097, ¶ 3.) The PAIMI Act authorizes DRM to pursue legal remedies to ensure that individuals with serious mental illness in state institutions are protected from abuse and neglect. *See Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1113 (9th Cir. 2003). DRM brought the present action on behalf of all prisoners with serious mental illness confined at the Montana State Prison ("Prison"). (E.R.097, ¶ 1.)

The DOC Defendants are the Director of the Montana Department of Corrections and the Warden of the Prison. Both are sued in their official capacities. (E.R.098-099, ¶¶ 5-6.) The DOC Defendants are directly responsible for the administration of the Prison and have authority to direct the housing, discipline, treatment and care of prisoners with serious mental illness at the Prison. (*Id.*) They are both responsible for administering the policies and practices at issue in this case and have the authority to implement the relief sought in this action. (*Id.*)

B. DRM's Complaint

The facts alleged in DRM's Complaint describe a Prison disciplinary system and mental health system that is badly broken and poses a significant risk to the health of prisoners with serious mental illness.

1. The DOC Defendants' dangerous policies and practices

The defects in the DOC Defendants' treatment of prisoners with serious mental illness start at the most basic level – defining and identifying who those prisoners are. "Serious mental illness" is a category of mental illnesses that is meaningful and important to mental health professionals and organizations that set standards for prisons. (*See* E.R.101-102, ¶ 15; 104, ¶¶ 19-20.) It includes such illnesses as schizophrenia, delusional disorder, various psychotic disorders, bi-polar disorder, and major depressive disorders. (E.R.101, ¶ 15.) The DOC Defendants, however, use one definition of "serious mental illness" for purposes of administering the behavior management plans they impose as punishment for prisoners (E.R.100), and a different, vaguer, definition of "severe mental health problems," for their written procedures governing "Mental Health Cases in Locked Housing Status." (E.R.100-101, ¶ 14.) "Locked Housing" is the DOC Defendants' term for solitary confinement. (E.R.105, ¶ 23.) Without a consistent definition of "serious mental illness" that applies to all of their policies, the DOC Defendants

cannot ensure that discipline, housing, and medical treatment decisions are not harmful to prisoners with those illnesses.

The threats to the safety of prisoners with serious mental illness go far beyond definitional issues. DRM's Complaint alleges that the DOC Defendants are subjecting prisoners with serious mental illness to cruel and unusual punishment by having deficient policies and engaging in dangerous practices, including:

- placing prisoners with serious mental illness in various forms of solitary confinement for 22 to 24 hours per day for months and years at a time (E.R.102, ¶ 16; 105-108, ¶¶ 23-28);
- punishing prisoners for behavior that is a product of their serious mental illness (E.R.111-112, ¶¶ 42, 43; 114-115, ¶¶ 50, 55; 116-117, ¶¶ 60, 64; 119, ¶ 71; 122, ¶ 84; 123, ¶ 87);
- placing prisoners with serious mental illness on "behavior management plans" that involve solitary confinement and extreme restrictions of privileges (E.R.103, ¶ 16; 107-108, ¶¶ 28-31);
- denying mental health therapy to prisoners with serious mental illness who are placed in solitary confinement (E.R.106, ¶ 25);

- denying mental health therapy and all forms of recreation to prisoners with serious mental illness who are placed in disciplinary detention (E.R.107, ¶ 27);
- having no standards for determining whether placing a prisoner with serious mental illness in solitary confinement or on a behavior management plan will be harmful to the prisoner's mental health (E.R.103, ¶ 16; 108, ¶ 30);
- engaging in a pattern of refusing to properly diagnose prisoners as suffering from serious mental illness and instead diagnosing them as "malingering" (*i.e.*, faking) mental illness for personal gain (E.R.103, ¶ 16; 116, ¶ 59; 118, ¶ 65; 123,¶ 85);
- engaging in a pattern of refusing to provide prisoners with necessary medications for serious mental illness (E.R.103, ¶ 16);
- failing to review and evaluate the diagnosing and prescribing practices of their mental health staff (*id.*);
- failing to classify prisoners according to their mental health needs (*id.*);
- failing to adequately consider prisoners' serious mental illnesses when making decisions about prisoners' housing and custody levels (*id.*); and

- failing to audit, evaluate or ensure the effectiveness of their mental health care program in treating prisoners with serious mental illness. (E.R.104; ¶ 16.)

2. The DOC Defendants' use of solitary confinement to punish prisoners with serious mental illness

The DOC Defendants use at least four forms of solitary confinement to punish prisoners with serious mental illness: administrative segregation, restricted administrative segregation, disciplinary detention, and behavior management plans. (E.R.105, ¶ 23.) All of these forms of solitary confinement involve locking the prisoner in his cell alone for 22 to 24 hours a day, seven days a week. (*Id*.) The DOC Defendants refer to these forms of solitary confinement as "Locked Housing." (*Id.*)

In the least restrictive form of administrative segregation, prisoners are isolated in their cells at least 22 hours a day, five days a week, and 24 hours a day, two days a week. (E.R.105-106, ¶ 24.) The out-of-cell time for prisoners in the least restrictive forms of administrative segregation consists of one hour per day alone in a dayroom adjoining his cell, and one hour per day in a small outdoor caged area by himself. (*Id.*) If there is inclement weather, the one hour of outdoor exercise may be cancelled. (*Id.*) If a prisoner is not feeling well or does not wake up during the designated one-hour outdoor exercise period, which is often the case

for prisoners with serious mental illness, the prisoner may not receive his one hour of outdoor time. (*Id.*)

Prisoners with serious mental illness who are placed in solitary confinement receive no therapy for their mental illness. (E.R.106, ¶ 25.) The primary contact with mental health staff while they are in solitary confinement consists of weekly rounds by mental health technicians. (*Id.*) Each visit during weekly rounds typically lasts no more than a few minutes and is conducted at the prisoner's cell door, where other prisoners and corrections officers can hear what is said. (*Id.*) As a result, prisoners with serious mental illness are often reluctant to share their mental health concerns during those rounds. (*Id.*) The futility of this process causes prisoners with serious mental illness to suffer additional stress. (*Id.*)

In more restrictive forms of administrative segregation and in restricted administrative segregation, prisoners are locked in their cells at least 23 hours per day, five days a week, and 24 hours a day, two days a week. (E.R.106-107, ¶ 26.) Prisoners in these forms of solitary confinement receive one hour of outdoor recreation time five days a week. (*Id.*) Again, if the prisoner is not feeling well or is asleep, or if there is inclement weather, the prisoner may not receive the one hour of outdoor recreation time. (*Id.*)

Disciplinary detention is among the most extreme forms of solitary confinement imposed at the Prison. Disciplinary detention is referred to by both

prisoners and Prison staff as "The Hole." (E.R.107, ¶ 27.) The Hole is total isolation. (*Id*.) Prisoners sent to The Hole are subjected to 24-hour isolation in their cell. (*Id*.) Some cells used for The Hole have blacked-out windows, resulting in a total absence of natural light. (*Id*.) Prisoners placed in The Hole cannot make phone calls or have visitors. (*Id*.) They cannot participate in religious services or rehabilitative treatment programs. (*Id*.) They receive no mental health therapy. (*Id*.) They receive no indoor or outdoor recreation time whatsoever. (*Id*.) The only out-of-cell time allowed to prisoners in The Hole consists of three, ten-minute showers per week. (*Id*.)

Behavior management plans ("BMPs") are a form of punishment that involve a combination of solitary confinement and extreme reduction in privileges. (E.R.107-108, ¶ 28.) Under a BMP, a prisoner is kept in 24-hour isolation. (*Id*.) A prisoner on a BMP starts out by having all of his prison clothing removed and being given just a mattress, blanket, and a suicide smock. (*Id*.) At the start of a BMP all meals consist of a tasteless loaf of food ("nutraloaf") delivered on a paper towel, and the prisoner is not allowed any running water in his cell. (*Id*.) A guard must flush the toilet for the prisoner, and the prisoner must ask for water to drink or wash his hands. (*Id*.) In extreme forms of BMPs, prisoners must urinate and defecate through a grate on the floor. (*Id*.) Staff at the Prison have placed individual prisoners with serious mental illness on BMPs numerous times, without

modifying the BMP to account for the prisoner's mental illness or the failure of previous BMPs to alter the prisoner's behavior. (E.R.108, ¶ 29.)

Prison officials regularly impose BMPs and other forms of solitary confinement on prisoners as punishment for behavior that is a product of serious mental illness. (E.R.111-112, ¶¶ 42, 43; 114-117, ¶¶ 50, 55, 60, 64; 119, ¶ 71; 122-123, ¶¶ 84, 87.) Although the DOC Defendants' written policies call for Prison mental health staff to certify that "[t]he inmate's present behavior is not the direct result of an Axis I serious mental disorder" before placing a prisoner on a BMP, the DOC Defendants have no standards to guide mental health staff in making that determination and do not require mental health staff to document the factual bases for their decisions. (E.R.108, ¶ 30.) Under the DOC Defendants' policies, Prison mental health staff certify prisoners in advance to be subjected to BMPs at any time during the following six months. (*Id.*)

Rather than protect prisoners with serious mental illness from the damaging effects of BMPs, mental health staff sometimes encourage the use of BMPs for such prisoners. (E.R.108, ¶ 31.) In one instance, a Prison mental health staff person wrote to prison staff that two individuals sentenced Guilty But Mentally Ill would be "good candidates" for BMPs at the Prison. (*Id.*)

Prison staff regularly place prisoners with serious mental illness in all of the forms of solitary confinement described above for weeks and months at a time.

(E.R.109, ¶ 32.) Some prisoners with serious mental illness have spent years in various forms of solitary confinement during their time at the Prison. (*Id.*)

3. The experiences of nine prisoners with serious mental illness

DRM's Complaint demonstrated the substantial risk of harm posed by the DOC Defendants' policies and practices by alleging facts describing in extensive detail the experiences at the Prison of nine prisoners with serious mental illness since 2002. Their experiences are briefly summarized here:

- Cleveland Boyer: Upon arriving at the Prison, Mr. Boyer notified Prison mental health staff that he had previously attempted suicide and suffered from mental illness, including bi-polar disorder and schizophrenia. Shortly thereafter, Prison staff placed him in solitary confinement for 90 days. Prison mental health staff concluded that Mr. Boyer had "no significant" mental health needs and the Prison psychiatrist dismissed the seriousness of his previous suicide attempt. Nine days after his release from solitary, Mr. Boyer was found dead of an apparent drug overdose. (E.R.120-121, ¶¶ 76-80.)
- Matthew Brandemihl: Mr. Brandemihl exhibited signs of suffering from delusions, such as stating that he was the son of God, that he had been alive for 1,000 years, and complaining that

"a device has been drilled into, or implanted into my head." Nevertheless, he was repeatedly placed in solitary confinement for such actions as attempting suicide and drinking out of the toilet in his cell. The Prison psychiatrist dismissed Mr. Brandemihl's behavior and statements, concluding that they were "just frank malingering and being uncooperative," and made no recommendations for mental health treatment or medication. While in solitary confinement, Mr. Brandemihl was found dead on the floor of his cell, lying in a pool of blood under his blankets. (E.R.121-125, ¶¶ 81-92.)

- Marty Hayworth: Mr. Hayworth was diagnosed with several mental illnesses before arriving at the Prison, including schizophrenia. Mr. Hayworth hears the voice of a dog named Gene who directs him to harm himself, and he has repeatedly attempted to take out his own eyes and engaged in other acts of serious self-harm, such as drinking Ajax and swallowing glass. Despite these acts, in 2012 the Prison psychiatrist diagnosed Mr. Hayworth as faking his mental illness. Since 2005, Mr. Hayworth has spent years in solitary confinement at the Prison and has been

repeatedly disciplined for his acts of self-harm. (E.R.115-117, ¶¶ 57-61.)

- James Larson: Mr. Larson suffers from schizophrenia and was sentenced "Guilty But Mentally Ill." Prison mental health staff, however, claimed that Mr. Larson was faking his mental illness and tapered off his antipsychotic medications. Prison staff have repeatedly placed Mr. Larson in solitary confinement and placed him on behavior management plans for threatening self-harm. He describes solitary confinement as "unmitigated hell." (E.R.110-111, ¶ 37-40.)
- Shaun Morrison: Mr. Morrison was sentenced Guilty But Mentally Ill. He suffers from major depressive disorder and engages in serious self-mutilation such as biting through his own skin, ripping out stitches, and reopening wounds with foreign objects. In a "treatment planning worksheet," Mr. Morrison listed the following ways Prison mental health staff could help him: "Be there to talk to me when I'm having problems. Groups with homework. Give me stuff to do so I can keep myself and my mind busy." Instead, Prison staff transferred Mr. Morrison to solitary confinement because they could not manage his self-harm

behavior and repeatedly placed him on behavior management plans. In July 2011, Mr. Morrison stated to Prison mental health staff that "he had been in locked housing for way too long" and was "wound up," "stressed," and worried about doing "something stupid" that would get him into trouble. Shortly after being released from solitary confinement, Mr. Morrison murdered another prisoner. (E.R.113-114, ¶¶ 45-52.)

- Paul Parker: Mr. Parker has long-standing diagnoses of bi-polar disorder, post-traumatic stress disorder, and major depression. He has been housed in solitary confinement at the Prison for more than eight years. While Mr. Parker has been in solitary, Prison mental health staff have observed him decompensating (*i.e.*, suffering an exacerbation of a mental disorder). Nevertheless, Prison mental health staff refuse to acknowledge the existence of Mr. Parker's mental illness, the Prison psychiatrist discontinued Mr. Parker's prescription for lithium to control his bi-polar disorder, and Prison staff have repeatedly placed him in 24-hour isolation in response to acts of actual and threatened self-harm. (E.R.117-118, ¶¶ 62-68.)

- James Patrick: Mr. Patrick has been diagnosed with serious mental illness and was sentenced "Guilty But Mentally Ill." While at the Prison, he has been placed on behavior management plans approximately 25 times for acts including self-harm, smearing feces in his cell, banging his head on his cell door until it bled, attempting suicide, and beating on his cell door and screaming "help me, help me." Despite these incidents, Prison mental health staff discontinued Mr. Patrick's antipsychotic medications. (E.R.111-112, ¶¶ 42-44.)
- Walter Taylor: Mr. Taylor has been diagnosed as suffering from schizophrenia, bi-polar disorder and major depression. He has been been housed in solitary confinement at the Prison for several years. Mr. Taylor has engaged in numerous acts of self-mutilation, including swallowing razor blades, safety pins, nails and tacks. Nevertheless, Prison staff continued to house Mr. Taylor in solitary confinement and placed him on behavior management plans numerous times in response to his acts of serious self-harm. In 2012, the Prison psychiatrist decided that Mr. Taylor was not suffering from a serious mental illness and discontinued all of Mr. Taylor's medications. Yet shortly

thereafter, Mr. Taylor was denied parole in part because his case manager stated: "I am unable to support a release at this time without an extensive mental health component and an updated positive psychological report." (E.R.119-120, ¶¶ 69-75.)

- Cory Weis: Mr. Weis was diagnosed with bipolar disorder and schizophrenia. During his sentencing, the judge recognized Mr. Weis's mental health issues and "highly recommend[ed] that he be considered for placement in the mental health block at the Prison." While at the Prison, Mr. Weis told Prison staff that he was hearing voices telling him to do things to himself, threatened to kill himself, repeatedly spread feces on himself, and banged his head against the wall. Despite that behavior and the sentencing judge's recommendation, Prison mental health staff claimed that he had "no known history of psychiatric problems or symptoms that would preclude Administrative Segregation for inappropriate behavior." As a result, Mr. Weis was placed in solitary confinement for more than half of his time at the Prison. Mr. Weis eventually died in the Prison of an apparent suicide. (E.R.114-115, ¶¶ 53-56.)

4. The DOC Defendants' knowledge that they are subjecting prisoners with serious mental illness to a substantial risk of serious harm

DRM's Complaint alleges that the DOC Defendants have personal knowledge of the fact that they are exposing prisoners with serious mental illness to a substantial risk of serious harm. In particular, the DOC Defendants are aware that solitary confinement is detrimental to the health of prisoners with serious mental illness. (E.R.105, ¶ 22.) They know this because the DOC Defendants have sought certification from the National Commission on Correctional Health Care ("NCCHC"). (*Id*.) NCCHC's Standards for Mental Health Services in Correctional Facilities, MH-E-07, states: "Inmates who are seriously mentally ill should not be confined under conditions of extreme isolation." (E.R.104, ¶ 19.)

They also know this because Prison officials have previously been sued about their mistreatment of prisoners with mental illness. (E.R.125-126, ¶¶ 93-94.) In its 2003 decision in *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872, the Montana Supreme Court discussed the Prison's constitutional obligation to provide prisoners with appropriate mental health treatment and to eliminate disciplinary practices that exacerbate prisoners' mental illnesses. (E.R.125-126, ¶ 93.) The *Walker* court concluded that the Prison's behavior management plans and living conditions constitute cruel and unusual punishment when they exacerbate the prisoner's mental health condition. (*Id*.) Similarly, in a 2009

lawsuit challenging the Prison's treatment and discipline practices for juveniles with mental illness, *Katka v. State*, No. BDV 2009-1163 (1st Jud. Dist. Ct., Lewis and Clark Co.), Prison officials heard from mental health experts addressing the deficiencies in the Prison's use of solitary confinement and inadequate mental health treatment. (E.R.125-126, ¶ 94.)

The DOC Defendants are also aware of the risks to which they are subjecting prisoners with serious mental illness because those prisoners regularly file grievances regarding the level of mental health care they receive and mental health-related practices, including the negative impact of isolation, mental health staff discontinuing their needed medications and mental health staff ignoring previous diagnoses. (E.R.126, ¶ 95.) Several prisoners have appealed the inadequacy of the mental health treatment they receive to the Prison's warden and ultimately to the DOC's director. (*Id*.) In particular, one of the prisoners profiled in DRM's Complaint, James Larson, exhausted his administrative remedies regarding inadequate mental health care at the Prison through an appeal to the DOC's director. (E.R.111, ¶ 41.)

Finally, the DOC Defendants are aware of these risks because DRM has repeatedly informed Prison officials of the serious deficiencies in the Prison's treatment of prisoners with serious mental illness. (E.R.126, ¶ 96.) Prior to filing this lawsuit, on February 26, 2014, DRM sent Defendant Batista a letter describing

many of the facts alleged in DRM's Complaint. (*Id*. ¶ 97.) A copy of that letter is attached to a declaration that DRM filed as part of its opposition to the motion to dismiss.[2] (E.R.131-171.) Yet to date, the DOC Defendants have made no modifications to their treatment of prisoners with serious mental illness. (E.R.126, ¶ 97.)

DRM's Complaint sought among other things: i) a declaratory judgment that the DOC Defendants' acts and omissions violate the Eighth Amendment to the U.S. Constitution and that their acts and omissions give rise to an ongoing violation of the rights of prisoners with serious mental illness, and ii) an injunction prohibiting the DOC Defendants from placing prisoners with serious mental illness in solitary confinement and requiring the DOC Defendants to take immediate steps to ensure that prisoners with serious mental illness receive constitutionally adequate mental health care. (E.R.127.)

II. Procedural History

This case has an unusual procedural history. What began as a single case became two related cases. The District Court confused the legal and factual issues in the two cases and, as a result, issued the Order by mistake and then refused to correct its error.

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[2] On a motion to dismiss pursuant to Rule 12(b)(6), "courts ordinarily examine . . . documents incorporated into the complaint by reference . . . ." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). *See also Davis v. HSBC Bank Nev.*, 691 F.3d 1152, 1160 (9th Cir. 2012).

A. The original complaint included a procedural due process claim against officials at the Montana Department of Public Health and Human Services.

DRM originally filed its Eighth Amendment claims against the DOC Defendants as part of a different action, Case No. 2:14-cv-25-SEH (the "DPHHS Case"), that included a claim against officials at the Montana Department of Public Health and Human Services ("DPHHS").[3] (*See* DPHHS Case Dkt. No. 1.) DRM alleged that the DPHHS officials (the "DPHHS Defendants") were denying individuals sentenced Guilty But Mentally Ill their right to procedural due process by transferring those individuals from the care of the Montana State Hospital to the Prison without notice, a hearing, or any other requisites of due process. (*Id.*) That case was filed on March 31, 2014. (E.R.16.)

On July 24, 2014, the District Court granted the DPHHS Defendants' motion to dismiss for failure to state a claim, finding that DRM's complaint had not alleged the existence of a "liberty interest" protected by due process. (DPHHS Case Dkt. No. 33.) DRM responded by filing an amended complaint adding new factual allegations supporting its claim against the DPHHS Defendants. (*Id.*, Dkt. No. 42.) On November 21, 2014, the DPHHS Defendants filed another motion to

[3] The District Court ordered that portions of the record from the DPHHS Case be included in the record on appeal for this case. (E.R.204-205.) The District Court's docket sheet for the DPHHS Case is included at E.R.011-025.

dismiss for failure to state a claim. (*Id.*, Dkt. No. 46.) Briefing on the motion was completed on January 16, 2015. (*Id.*, Dkt. No. 51.)

B. The District Court ordered DRM to file separate complaints against the DOC Defendants and the DPHHS Defendants.

Rather than decide that motion, the District Court scheduled a status conference "to develop a program for address [sic] and resolution of various pre-trial issues." (E.R.209.) At that conference, on April 24, 2015, the District Court appeared to have difficulty appreciating the differences between the due process claim against the DPHHS Defendants and the Eighth Amendment claim against the DOC Defendants, and why prisoners *sentenced* "Guilty But Mentally Ill" pursuant to Montana law might also be *diagnosed* as having a "serious mental illness." The District Court said: "The facts, frankly, are all over the map. Some, as I've noted, relate to those persons said to be guilty but mentally ill; some of the allegations are more or less directed to other inmates said to be seriously mentally ill." (E.R.213.)

The District Court stated that it was "convinced at this point . . . that the term serious mental illness really tells the Court or anyone else nothing in terms of what sort of treatment should be accorded to such a person." (E.R.222.) The District Court also stated that it believed certain allegations in DRM's Complaint "may be said to have been isolated events, not shown to have been a pattern of conduct or a part of some policy or practice that was ongoing." (E.R.220.) In addition, the District Court did not understand why prisoners with serious mental illness who

had died as a result of the DOC Defendants' policies and practices would be relevant to DRM's claims. (E.R.214, 215-216.) The District Court stated: "I, for the life of me, have been unable to get the Court's mind around how prospective relief for ongoing conduct can have any impact upon persons who are deceased." (E.R.228.)

The District Court also commented that DRM's amended complaint "may have been crafted in such a way as to maximize what might be characterized as the shock effect of the pleadings" (E.R.212) and that "this court is not to be a forum for engaging in some sort of public influence practice." (E.R.222.)

The District Court believed DRM's amended complaint was "inappropriate for a meaningful and reasoned address to bring these various issues to resolution." (E.R.214.) As a result, the District Court ordered DRM to refile its claims as "at least three separate lawsuits," one addressing prisoners sentenced Guilty But Mentally Ill, a second addressing prisoners with serious mental illness, and a third addressing prisoners who had died while at the Prison. (E.R.224.)

On May 8, 2015, DRM filed a second amended complaint in the DPHHS Case re-alleging its claim against the DPHHS Defendants for failing to provide procedural due process to individuals sentenced Guilty But Mentally Ill when transferring those individuals from the Montana State Hospital to the Prison. (DPHHS Case, Dkt. No. 67.) On May 15, 2015, DRM refiled its Eighth

Amendment claim against the DOC Defendants as a separate lawsuit, Case No. 2:15-cv-22-SEH (the "DOC Case"). (E.R.96.) DRM did not file a separate lawsuit addressing prisoners who had died as a result of the DOC Defendants' policies and practices, because the harm suffered by those prisoners is evidence supporting DRM's Eighth Amendment claim.

C. The defendants in both cases filed motions to dismiss for failure to state a claim.

On June 5, 2015, the defendants in both cases filed motions to dismiss DRM's new complaints for failure to state claims for which relief can be granted. (DOC Case Dkt. No. 10; DPHHS Case Dkt. No. 71.) The District Court held a hearing on both motions on September 3, 2015, more than seventeen months after DRM had filed its original complaint. (E.R.027-095.)

The day before the hearing, lead counsel for DRM, who is based in Wisconsin, filed an emergency motion with the District Court requesting to appear by telephone because mechanical problems with his plane had made it impossible to arrive in Montana in time for the hearing. (E.R.172-175.) DRM's lead counsel explained that he, rather than DRM's Montana-based counsel, had prepared to argue the DOC Defendants' motion and that oral argument would likely be more informative for the District Court if he were permitted to appear by phone and present DRM's argument. (*Id.*; E.R.177-179.) The District Court, however, only permitted DRM's lead counsel to listen to the hearing by phone, and refused to

permit him to speak because, the District Court stated, it was "unable for the Court [sic] to make any evaluation of the presentation in person." (E.R.065-066.)

D. At the hearing on the motions to dismiss, the District Court mistakenly issued the wrong ruling in each case.

At the hearing, the differences between the claims in the two cases were made clear during oral argument. The District Court first heard argument on the DPHHS Defendants' motion. (E.R.030.) Counsel for the DPHHS Defendants began by explaining that DRM's claim against her clients sought "to provide an extensive array of procedural due process before transferring prisoners sentenced to its custody between Montana State Hospital and Montana State Prison." (E.R.031-032.) During the parties' arguments, the phrases "due process" and "liberty interest" were mentioned 26 times, and the phrases "Eighth Amendment" and "deliberate indifference" were never mentioned. (*See generally* E.R.030-045.)

1. The ruling in the DPHHS Case

When the District Court gave its oral ruling it was clear that the court had confused the due process claim in the DPHHS Case with the Eighth Amendment claim in the DOC Case. The District Court first stated that "[t]he claims that are asserted in this case are, in substance, that the Defendants . . . first violated the procedural due process rights of the group of Plaintiffs identified under the 5th and 14th Amendments," but then incorrectly stated that "[c]ertain policies of the Department of *Corrections* . . . are the subject of direct attack by the Plaintiffs in

the pleadings." (E.R.047 (emphasis added).) The District Court incorrectly stated: "There is also argument made by the Plaintiff that whatever the standards applicable by the *prison* are or may be, those standards are not specific enough to pass constitutional challenge . . . ." (E.R.048 (emphasis added).) The District Court went on to state "[t]hat in this case, . . . there must be a showing . . . that the Defendants . . . acted with the necessary culpable state of mind to allow this case to go forward." (E.R.050.) The issue of the Defendants' state of mind, however, was an issue argued in the parties' briefs and oral arguments for the DOC Defendants' motion (*see, e.g.*, DOC Case Dkt. No. 11 at 11-12), not the DPHHS Defendants' motion.

The District Court concluded the DPHHS Case portion of the hearing by stating, "I have reached the conclusion that the facts pleaded are sufficient to allow the case to go forward and to withstand the Defendants' Motion to Dismiss" (E.R.050) – the opposite of what it had ruled when confronted with a nearly identical motion more than a year before. (*See* DPHHS Case Dkt. No. 33.)

2. The ruling in the DOC Case

The District Court then turned to oral argument in the DOC Case. The arguments by the parties' counsel made it clear that the DOC Case and the DOC Defendants' motion involved a claim under the Eighth Amendment, not a claim for denial of procedural due process. The DOC Defendants' counsel began by

"addressing the element of deliberate indifference." (E.R.053.) Counsel for the parties mentioned the phrases "Eighth Amendment" and "deliberate indifference" 26 times during their arguments, and never mentioned the phrases "due process" or "liberty interest". (*See* E.R.053-075.)

The District Court, however, again had difficulty distinguishing DRM's Eighth Amendment claim in the DOC Case – which involves the treatment of prisoners with serious mental illness at the Prison – from DRM's procedural due process claim in the DPHHS Case – which involves the transfer of prisoners sentenced Guilty But Mentally Ill from the Montana State Hospital to the Prison. The District Court stated:

> All right. Well, Counsel, let's see if we can appropriately address and make a decision about this particular matter.
>
> I will start by going back to the proposition stated earlier today, and that is that these claims, the claims asserted in this lawsuit, are on behalf of what are characterized as *seriously mentally ill* persons and the claim relates to . . . the *transfer of those individuals from the Montana State Hospital to the Montana State Prison*.
>
> The claims are said to be *8th Amendment* violation claims . . . .
>
> The Plaintiffs, in essence, assert that these individuals have not been provided with appropriate *due process, procedural due process*, and that the conditions to which these individuals have been subjected are atypical and constitute a significant hardship."
>
> . . . .

> So the questions that are presented, as the Court sees them, are, number one, is there a state-created *liberty interest* and the attendant *due process* requirements that is in issue here? Do we have such a protected *liberty interest* to be evaluated.

(E.R.075-076 (emphasis added).) The District Court went on to engage in an extended discussion of procedural due process and Montana Code Ann. § 46-14-312, the statute at issue in the DPHHS Case. (*See* E.R.077-082.)

In its conclusion, the District Court stated that it was "questionable at best" whether DRM's claim against the DOC Defendants involved "a protected liberty interest" – a legal concept relevant only to DRM's due process claim in the DPHHS Case – and that, regardless, DRM had not pled facts sufficient to state a claim. (E.R.081-082.) The District Court failed to identify those perceived factual shortcomings. (*Id.*)

Later that day, the District Court issued written orders in both cases confirming that it had denied the DPHHS Defendants' motion to dismiss and had granted the DOC Defendants' motion to dismiss, and had dismissed DRM's case against the DOC Defendants in its entirety. (E.R.026; DPHHS Case Dkt. No. 85.)

E. The District Court denied the DPHHS Defendants' motion requesting that the court correct its mistakes.

On September 21, 2015, the DPHHS Defendants filed a motion requesting that the District Court correct the mistaken rulings. (E.R.182-184.) The DPHHS Defendants filed a 16-page brief in support of their motion, explaining in detail

their basis for believing that the District Court had mistakenly switched the rulings intended for each case.[4] (E.R.185-200.) The next day, the District Court issued an order denying the motion and making clear that it did not believe it had committed an error. That order states:

> In the interest of clarification of any confusion by counsel as to the rulings the Court made at the hearing on September 3, 2015:
>
> 1. Defendants' motion to dismiss the Complaint in Cause No. CV 15-22-BU-SEH was granted.
>
> 2. Defendants' motion to dismiss the Complaint in Cause No. CV 14-25-BU-SEH was denied.
>
> This case, Cause No. CV 14-25-BU-SEH, survived the motion to dismiss. Cause No. CV 15-22-BU-SEH was dismissed.

(E.R.201-203.)

SUMMARY OF THE ARGUMENT

The District Court erred in granting the DOC Defendants' motion to dismiss for failure to state a claim. To survive a motion to dismiss, a plaintiff's complaint need only contain factual allegations that plausibly suggest the plaintiff is entitled

[4] As the DPHHS Defendants explained in their brief, DRM opposed the motion, not because it disagreed that the District Court had made a mistake, but solely to avoid any possibility that DRM might waive its right to appeal the merits of the dismissal of its case against the DPHHS Defendants in event the District Court corrected his ruling. (E.R.184.) DRM had intended to file its own motion to correct the District Court's ruling in the present case on the day that the District Court denied the DPHHS Defendants' motion. The District Court's denial of the DPHHS Defendants' motion made it clear that DRM's motion in this case would have been futile.

to relief. DRM's Complaint contained extensive allegations showing systemic deficiencies in the DOC Defendants' mental health care and discipline policies and practices with respect to prisoners with serious mental illness. In particular, the DOC Defendants' practice of placing prisoners with serious mental illness in solitary confinement for extended periods of time is detrimental to the health of those prisoners. Viewed objectively, those acts of the DOC Defendants' place prisoners with serious mental illness at a significant risk of serious harm. The DOC Defendants are subjectively aware of that risk to prisoners with serious mental illness because, among other things, the risks associated with their solitary confinement practices are obvious, they have been sued in the past about their challenged policies and practices, and DRM specifically informed the DOC Defendants about many of the facts and risks alleged in its Complaint prior to filing suit. Thus, DRM's Complaint plausibly suggested that the DOC Defendants are violating the Eighth Amendment by exposing prisoners with serious mental illness to a substantial risk of serious harm.

Reassigning this case to a different district judge upon remand is necessary to preserve the appearance of justice. Based solely on his review of DRM's Complaint, the District Court repeatedly expressed skepticism about the viability of DRM's claim, suggested that the term "serious mental illness" – a crucial term in this case – has little meaning, and stated its belief that DRM was attempting to

"maximize . . . the shock value" of its claim. The District Court repeatedly had difficulty distinguishing DRM's due process claim in the DPHHS Case from DRM's Eighth Amendment claim in this case, and adamantly refused to correct its clear error when ruling on the DOC Defendants' motion to dismiss. Under these circumstances, it is reasonable to assume that on remand the court would have substantial difficulty both in putting its skepticism of DRM's claim out of its mind and in properly evaluating the legal and factual issues relevant to prisoners with serious mental illness. Given that this case implicates important issues of government policy, it is especially important to avoid any potential for doubt about the perceived fairness of the judicial process.

ARGUMENT

I. DRM'S Complaint Contains Extensive And Detailed Factual Allegations That Plausibly Suggest The DOC Defendants Are Exposing Prisoners With Serious Mental Illness To A Substantial Risk Of Serious Harm In Violation Of The Eighth Amendment.

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *See Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011). Here, the District Court erred by mistakenly issuing a ruling intended for the DPHHS Case, not the present case. As will be shown, the District Court's finding that DRM had not pled facts sufficient to state a claim has no support in the record.

A. On a motion to dismiss, DRM is required only to allege facts that plausibly suggest the existence of an Eighth Amendment violation.

"[U]nder the federal rules a complaint is required only to give notice of the claim such that the opposing party may defend himself or herself effectively." *Starr*, 652 F.3d at 1212. When considering a motion to dismiss, the "[f]actual allegations of the complaint are accepted as true and construed in the light most favorable to the plaintiff." *Mason-Ealy v. City of Pomona*, 557 F. App'x 675, 676 (9th Cir. 2014). A plaintiff is not required to "demonstrate" the truth of its allegations. *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011). Nor is a complaint required to "contain 'detailed factual allegations.'" *Sheppard v. David Evans & Assocs.*, 694 F.3d 1045, 1048-49 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To survive a motion to dismiss, a complaint need only contain "factual allegations that . . . plausibly suggest an entitlement to relief." *Starr*, 652 F.3d at 1216.

B. DRM alleged facts showing that the DOC Defendants are exposing prisoners with serious mental illness to a substantial risk of serious harm.

The Supreme Court has made clear that the mental health care and conditions of confinement that corrections officials provide to prisoners with serious mental illness is subject to Eighth Amendment scrutiny. *See Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011) (affirming order reducing California prison population to remedy Eighth Amendment violations and stating, "[p]risoners in

California with serious mental illness do not receive minimal, adequate care"); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (prison officials must provide adequate mental health care), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

Eighth Amendment claims involving a failure to provide proper medical treatment or otherwise prevent harm to a prisoner have objective and subjective components. First, a plaintiff must allege facts showing that prison officials are incarcerating prisoners under circumstances that, viewed objectively, pose "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Second, the plaintiff must allege facts showing that those prison officials are "deliberately indifferent," meaning they are subjectively "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference." *Id*. at 837; *see also Helling v. McKinney*, 509 U.S. 25, 29-30 (1993). "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration . . . [by] inference from circumstantial evidence . . . ." *Farmer*, 511 U.S. at 842; *see also Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995). "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842.

1. DRM has alleged systemic deficiencies in the DOC Defendants' mental health care and disciplinary policies and practices that, viewed objectively, place prisoners with serious mental illness at substantial risk of serious harm.

There can be little question that, viewed objectively, the numerous, fundamental deficiencies in the DOC Defendants' mental health care, disciplinary, and housing policies and practices described in DRM's Complaint place prisoners with serious mental illness at substantial risk of serious harm.

a. The DOC Defendants' mental health care system fails to provide proper treatment to prisoners with serious mental illness.

The allegations in DRM's Complaint describe a Prison mental health care system that is so fundamentally flawed it appears to be purposefully ignoring the needs of prisoners with serious mental illness. The DOC Defendants cannot properly identify prisoners with "serious mental illness" because their written policies contain inconsistent definitions of who might fall within that category. (E.R.100-101.) Prison medical staff engage in a pattern of refusing to properly diagnose prisoners as having mental illness and instead label them as "malingering." (E.R.103, ¶ 16; 116, ¶ 59.) Prison medical staff refuse to provide necessary medicine to prisoners with serious mental illness. (E.R.103, ¶ 16.) These practices have resulted in numerous incidents of prisoners engaging in self-harm, committing suicide, and harming others. (*See* E.R.117-118, ¶¶ 62-68; 120-121, ¶¶76-80.) And the dangerous practices go unchecked because the DOC

Defendants have no system in place for reviewing the diagnosing and prescribing practices of their mental health staff. (E.R.103, ¶ 16.)

These allegations of serious, systemic deficiencies in the Prison's mental health care system are more than sufficient to meet the objective component of an Eighth Amendment claim. *See Brown*, 131 S. Ct. at 1924-28 (discussing systemic deficiencies in prison mental health care that supported Eighth Amendment violation); *Hoptowit*, 682 F.2d at 1252-53 (affirming finding of Eighth Amendment violation where plaintiff showed systemic deficiencies in prison health care system); *Steele v. Shah*, 87 F.3d 1266, 1269-70 (11th Cir. 1996) (abrupt unsupported discontinuation of medications could constitute deliberate indifference); *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1990) (affirming denial of summary judgment on Eighth Amendment claim where psychiatrist refused to restart prisoner's Lithium prescription); *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (psychiatric "[m]edical care so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care violates the eighth amendment"); *Cody v. Hillard*, 599 F. Supp. 1025, 1058 (D.S.D. 1984) (prison's lack of "quality control program" constituted a "deficienc[y] of constitutional dimension in the [South Dakota State Prison] health care system"); *Lightfoot v. Walker*, 486 F. Supp. 504, 517-18 (S.D. Ill. 1980) ("[A] primary component of a

minimally acceptable correctional health care system is the implementation of procedures to review the quality of medical care being provided.").

2. The DOC Defendants' disciplinary practices place prisoners with serious mental illness at a substantial risk of serious harm.

a. The DOC Defendants discipline prisoners for behavior that is a product of serious mental illness.

The flaws in the mental health care system at the Prison are compounded by the DOC Defendants' disciplinary practices. The DOC Defendants oversee a disciplinary system in which prisoners with serious mental illness are regularly subjected to behavior management plans and solitary confinement as punishment for behavior that results from their illness. (E.R.111-117, ¶¶ 42, 43, 50, 55, 60, 64; 119, ¶ 71; 122, ¶¶ 84, 87.) That practice, by itself, states a claim for violation of the Eighth Amendment. *See Johnson v. Beard*, No. CIV. A. 3:CV-08-0593, 2008 WL 2594034, at *1 (M.D. Pa. June 27, 2008) (prisoner stated claim for relief by asserting that he was placed "in punitive segregation for behavior that is a result of his mental illness"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-22 (E.D. Cal. 1995) (punitive treatment of prisoners acting out because of their mental illness held unconstitutional); *Arnold v. Lewis*, 803 F. Supp. 246, 256 (D. Ariz. 1992) *rev'd in part on other grounds, Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993) (placement in lockdown "as punishment for the symptoms of [the plaintiff's]

mental illness and as an alternative to providing mental health care" was unconstitutional).

b. The DOC Defendants discipline prisoners with serious mental illness by locking them in solitary confinement for months and years at a time, a practice that courts and medical experts agree is significantly harmful to the prisoners' mental health.

The DOC Defendants also have no standards for determining whether placing a prisoner with serious mental illness in solitary confinement or on a behavior management plan will be harmful to the prisoner's mental health. (E.R.103, ¶ 16; 108, ¶ 30.) As a result, the Prison regularly places prisoners with serious mental illness in various forms of solitary confinement for 22 to 24 hours per day for months and years at a time. (E.R.103, ¶ 16; 105-108, ¶¶ 23-28.) Locking prisoners with serious mental illness – such as schizophrenia, delusional disorder, various psychotic disorders, bi-polar disorder, and major depressive disorders – in solitary confinement, where they are deprived of virtually all social interaction, exercise, and mental health therapy, necessarily exposes those prisoners to a substantial risk of serious harm to their mental health.

i. The Supreme Court has noted the harmful effects of solitary confinement on prisoners' mental health.

There is a growing national consensus that solitary confinement is harmful to the mental health of prisoners, especially those with serious mental illness.

More than a century ago, the Supreme Court described solitary confinement as a "punishment of the most important and painful character." *In re Medley*, 134 U.S. 160, 171 (1890). Surveying the use of solitary confinement by various state prisons, the *Medley* Court noted:

> 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.

Id. at 168.

More recently, Justices Kennedy, Breyer and Ginsburg have all denounced the use of solitary confinement because of the serious negative effects it has on prisoners' mental health. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) ("[T]he penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.") (Kennedy, J. concurring); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) ("[N]early all death penalty States keep death row inmates in isolation for 22 or more hours per day. . . . And it is well documented that such prolonged solitary confinement produces numerous deleterious harms.") (Breyer, J., joined by Ginsburg, J., dissenting); *see also Brown*, 131 S. Ct. at 1924 (affirming remedial measures for Eighth Amendment violations where prisoners with serious mental illness "awaiting care may be held for months in

administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services").

ii. Numerous district courts have noted the harmful effects of solitary confinement on prisoners' mental health.

District courts around the country have also repeatedly recognized the harmful effects that solitary confinement can have on prisoners' mental health, especially those with serious mental illness. *See Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1335 (D. Ariz. 2014) ("Holding inmates with serious mental illness in prolonged isolated confinement may cause serious illness and needless suffering in violation of the Eighth Amendment."), *aff'd*, *Graves v. Arpaio*, 623 F.3d 1043 (9th Cir. 2010); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001) ("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."); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) ("administrative segregation is being utilized unconstitutionally to house mentally ill inmates – inmates whose illness can only be exacerbated by the depravity of their confinement"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) ("For [mentally ill prisoners], placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe.").

One district court recently explained:

> [T]here are three ways in which segregation is harmful to prisoners with serious mental illness. The first is the lack of social interaction, such that the isolation itself creates problems. The second is that the isolation involves significant sensory deprivation. The third is the enforced idleness, permitting no activities or distractions. These factors can exacerbate the prisoners' symptoms of serious mental illness. This condition is known as decompensation, an exacerbation or worsening of symptoms and illness.

Indiana Prot. & Advoc. Servs. Comm'n v. Comm'r, Indiana Dep't of Corr., No. 1:08-cv-01317-TWP, 2012 WL 6738517, at *15 (S.D. Ind. Dec. 31, 2012).

iii. Research shows that solitary confinement has serious negative effects on prisoners with serious mental illness.

There is also a growing body of scientific literature concluding that solitary confinement has a significant detrimental effect on the mental health of prisoners with preexisting mental illnesses. Researchers analyzing data from medical records for 244,699 incarcerations in New York showed that "[p]otentially fatal self-harm was . . . significantly associated with having [serious mental illness] and solitary confinement." Fatos Kaba, et al., *Solitary Confinement and the Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 442, 445 (2014). Similarly, in studies of California prisoners, "[t]he data demonstrated that the most severe, florid psychiatric illnesses resulting from solitary confinement tend to be suffered by those individuals with preexisting brain dysfunction." Stuart Grassian,

Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Policy 325, 349 (2006). *See also* Jeffrey Metzner, M.D. & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, J. Am. Acad. Psychiatry & L. 104, 104-05 (2006) ("The adverse effects of solitary confinement are especially significant for persons with serious mental illness, commonly defined as a major mental disorder (*e.g.*, schizophrenia, bipolar disorder, major depressive disorder) this is usually characterized by psychotic symptoms and/or significant functional impairments."). One researcher explained: "[T]he harm caused by such confinement may result in prolonged or permanent disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community upon release from prison." Grassian, *Psychiatric Effects of Solitary Confinement* at 354.

iv. Numerous correctional, legal, and medical associations agree that solitary confinement is not appropriate for prisoners with serious mental illness.

The court decisions and research described above have led legal, correctional, and medical associations to recommend against placing prisoners with serious mental illness in solitary confinement. The National Commission on Correctional Health Care's Standards for Mental Health Services in Correctional Facilities, MH-E-07, states: "Inmates who are seriously mentally ill should not be confined under conditions of extreme isolation." (E.R.104, ¶ 19.) The American

Bar Association Standards 23-2.8(a) state: "No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing."[5] The American Psychiatric Association Position Statement on Segregation of Prisoners With Mental Illness (2012) states: "Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates."[6] The American Public Health Association Policy 201310 states: "Prisoners with serious mental illnesses should be excluded from placement in solitary confinement."[7] The Society of Correctional Physicians' Position Statement on Restricted Housing of Mentally Ill Inmates states:

> [P]rolonged segregation of inmates with serious mental illness, with rare exceptions, violates basic tenets of mental health treatment. Inmates who are seriously mentally ill should be either excluded from prolonged segregation (*i.e.*, beyond 4 weeks) or the conditions of their confinement should be modified in a manner that allows for adequate out-of-cell structured therapeutic activities and adequate time in an appropriately designed outdoor exercise area.[8]

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[5] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-2.8.

[6] Available at http://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-prisoners-segregation.pdf.

[7] Available at https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue.

[8] Available at http://societyofcorrectionalphysicians.org/resources/position-statements/restricted-housing-of-mentally-ill-inmates.

In sum, there is no legitimate basis for locking prisoners with serious mental illness in solitary confinement for extended periods of time. The practice is both counterproductive and dangerous. By doing so, the DOC Defendants and the Prison are placing prisoners with serious mental illness at a significant, if not certain, risk of serious mental and physical harm.

The discussion above shows that the extensive factual allegations in DRM's Complaint plausibly suggest that, viewed objectively, the DOC Defendants are exposing prisoners with serious mental illness to a substantial risk of serious harm.

C. DRM has alleged facts showing that the DOC Defendants are subjectively aware that they are exposing prisoners with serious mental illness to a substantial risk of serious harm.

DRM's Complaint alleges facts showing that the DOC Defendants are subjectively aware that they are exposing prisoners with serious mental illness to these health risks. First, DRM sent Defendant Batista a letter describing many of the facts alleged in the Complaint prior to filing suit. (E.R.126, ¶ 97.) Yet the DOC Defendants failed to make any modifications to the policies and practices at issue even after this suit was filed. (*Id.*) *See Farmer*, 511 U.S. at 846 (prisoner may rely "on developments that postdate the pleadings" to establish Eighth Amendment violation).

Second, the DOC Defendants knew about these risks long before DRM sent them that letter and filed this suit. The DOC Defendants were sued about similar

practices more than a decade ago, in a case that resulted in an adverse decision by the Montana Supreme Court, *see Walker*, 2003 MT 134, 316 Mont. 103, 68 P.3d, and they heard some of these same issues addressed by mental health experts in another suit in 2009. (E.R.125, ¶ 94.) They also knew about these risks because prisoners regularly grieve about them and have appealed decisions about these up to the DOC Director. (E.R.111, ¶ 41; 126, ¶ 95.)

Third, they know that solitary confinement is detrimental to the health of prisoners with serious mental illness because they have sought certification from the NCCHC, an organization that specifically recommends against the DOC Defendants' practices. (E.R.104-105, ¶¶ 19, 22.)

These repeated notices to the DOC Defendants about the deficiencies and dangers of their treatment of prisoners with serious mental illness are more than sufficient to satisfy the subjective prong of the Eighth Amendment analysis. *See Alsina-Ortiz v. Laboy*, 400 F.3d 77, 81-82 (1st Cir. 2005) (high-level prison officials could be found deliberately indifferent where they knew of continuing pattern of culpable failures by prison staff); *Bass v. Wallenstein*, 769 F.2d 1173, 1184-86 (7th Cir. 1985) (administrators could be found deliberately indifferent based on their knowledge of deficiencies in medical care system).

Moreover, the health risks associated with placing prisoners with serious mental illness in solitary confinement for extended periods of time are so obvious

that no further evidence is needed to establish that the DOC Defendants were subjectively aware of those risks. *See Farmer*, 511 U.S. at 842 ("a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious").

These allegations in DRM's Complaint plausibly suggest that the DOC Defendants have violated the Eighth Amendment and, therefore, the District Court erred in granting the DOC Defendants' motion to dismiss.

II. This Case Should Be Remanded To A Different Trial Judge.

As shown above, the extensive and detailed allegations contained in DRM's Complaint are more than sufficient to state a claim for relief for violations of the Eighth Amendment. The District Court's dismissal of DRM's case had no basis in law or fact. More troubling, the dismissal was the result of an obvious error that the court refused to correct: the district judge appeared to have mistakenly switched the rulings intended for each of the cases being considered at the hearing. The District Court's mistake and its adamant refusal to correct it is part of a pattern of judicial actions during these proceedings that affects the ability of the District Court to preserve the appearance of justice. As a result, DRM respectfully requests that this case be assigned to a different district judge upon remand.

This Court considers three factors when deciding whether to assign a case to a different district judge on remand:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Reyes, 313 F.3d 1152, 1159 (9th Cir. 2002). "'The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge.'" *Id.* (quoting *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986). In this instance, all three factors weigh in favor of reassignment.

The history of the District Court proceedings suggests that the court would have substantial difficulty putting out of its mind its previously-expressed erroneous views about DRM's claims. The District Court has repeatedly expressed difficulty in distinguishing DRM's claims in the DPHHS Case from DRM's claims in this case. During the April 2015 status conference, the district judge stated: "The facts, frankly, are all over the map. Some, as I've noted, relate to those persons said to be guilty but mentally ill; some of the allegations are more or less directed to other inmates said to be seriously mentally ill." (E.R.213.) This difficulty led to the court's unusual *sua sponte* order that DRM refile its claims against the DPHHS Defendants and the DOC Defendants as separate actions, more

than a year after DRM initiated the suit. (E.R.224.) Separating the cases, however, did not lead to clarity in the court's mind, as evidenced by its rulings at the September 3, 2015 hearing.

In addition, despite DRM's extensive and detailed factual allegations, the District Court repeatedly expressed significant skepticism about the viability of DRM's claim and the allegations in its Complaint. (*See, e.g.*, E.R.214-216, 220, 222, 228.) The District Court commented that DRM's Complaint "may have been crafted in such a way as to maximize what might be characterized as the shock effect of the pleadings." (E.R.212.) The District Court expressed its belief that some of DRM's allegations may relate only to "isolated events." (E.R.220.) The District Court also did not understand why the fact that inmates may have died as a result of the DOC Defendants' practices would be relevant to DRM's Eighth Amendment claim, stating: "I, for the life of me, have been unable to get the Court's mind around how prospective relief for ongoing conduct can have any impact upon persons who are deceased." (E.R.228.) And perhaps most important for purposes of any future proceedings, the District Court suggested that the term "serious mental illness" – a term describing the category of prisoners on whose behalf DRM is pursuing this action – has little meaning (E.R.222), despite it being recognized by the Supreme Court and numerous other legal and medical authorities. *See*, *e.g.*, *Brown*, 131 S. Ct. at 1924; *Graves*, 48 F. Supp. 3d at 1318;

Jones 'El, 164 F. Supp. 2d at 1098; *Indiana Prot. & Advoc. Servs. Comm'n*, 2012 WL 6738517, at *15; *see also discussion* sec. I.B.2.b.iv *supra*.

Despite his admitted difficulty in understanding the nature of DRM's claims, the District Court resisted DRM's efforts to have them explained: when DRM's lead counsel, who had prepared to argue the DOC Defendants' motion, was unable to attend the hearing in person due to airline mechanical difficulties, the District Court refused to permit him to speak by phone because the court was "unable . . . . to make any evaluation of the presentation in person." (E.R.065-066.) Similarly, the District Court adamantly refused to correct its obvious error in mixing up the two rulings at the hearing on the motions to dismiss, despite the DPHHS Defendants filing a motion and lengthy brief bringing that error to his attention. (E.R.182-200.) The end result was that after seventeen months of litigation, DRM's case was mistakenly dismissed at the pleadings stage, without DRM ever being afforded the opportunity to develop and present the factual record relevant to its claim, and now being required to endure the additional delay associated with this appeal.

Given the District Court's repeated expressed skepticism about the viability of DRM's claim, its belief that DRM was attempting to "maximize . . . the shock value" of its claim, and its adamant refusal to correct its clear error when ruling on the DOC Defendants' motion to dismiss, it is reasonable to assume that on remand

the court would have substantial difficulty both in putting that skepticism out of its mind and in distinguishing between the issues relevant to prisoners with "serious mental illness" and those sentenced "Guilty But Mentally Ill." *See Reyes*, 313 F.3d at 1160 (reassigning case on remand due to district court's belief that defendants "were attempting to manipulate the system" and its "adamancy" in adhering to an incorrect rule of law).

Moreover, this case involves serious allegations relating to important matters of government policy that have ramifications far beyond the nine prisoners identified in the Complaint. To preserve the appearance of justice, it is important that these issues be resolved without potential for doubt about the perceived fairness of the judicial process. Finally, because this case is still at the pleadings stage, reassignment to a new trial judge upon remand would not entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. Accordingly, assignment to a different trial judge is warranted.

CONCLUSION

DRM's Complaint alleged extensive and detailed facts supporting its claim that the DOC Defendants are violating the Eighth Amendment by knowingly administering policies and practices at the Montana State Prison that place prisoners with serious mental illness at a significant risk of serious harm.

Accordingly, the judgment of the District Court dismissing DRM's case should be reversed, and this case assigned to a different trial judge on remand.

Dated: February 26, 2016

Respectfully submitted,

Disability Rights Montana, Inc.

By: /s/ Jeffrey A. Simmons
One of their attorneys

Jeffrey A. Simmons
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703
608.258.4267

Jon E. Ellingson
ACLU of Montana
241 E. Alder
Missoula, MT 59801
406.546.9084

Anna C. Conley
PO Box 9101
Missoula, MT 59807
406.830.0367

Kyle Gray / Adrian Miller
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
406.252.2166

STATEMENT OF RELATED CASE

Appellant is not aware of any related case pending before this Court.

Dated: February 26, 2016

Respectfully submitted,

Disability Rights Montana, Inc.

By: /s/ Jeffrey A. Simmons
One of their attorneys

Jeffrey A. Simmons
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703
Telephone: 608.258.4216

CERTIFICATE PURSUANT TO FED. R. APP. P. 32(a)(7)(B)(ii)

This appellate brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B)(ii) because this brief contains 11,603 words, excluding the part of the brief exempted by Fed. R. App. P. 32(1)(7)(B)(iii).

This appellate brief complies with the typeface requirements of Circuit Rule 32(b) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

February 26, 2016 /s/ Jeffrey A. Simmons

CERTIFICATE OF SERVICE

I, Jeffrey A. Simmons, an attorney, hereby certify that on February 26, 2016, I caused true and correct copies of the foregoing **Brief of Plaintiff-Appellee** to be served on Appellee's counsel via the Court's ECF system.

/s/ Jeffrey A. Simmons