

## Justice Kennedy Takes On Solitary Confinement In The Correctional System

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"Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for

them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: 'In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.' Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference."

So wrote Justice Kennedy in a concurring opinion in *Davis v. Ayala*<sup>1</sup>. Ayala was found guilty of and was sentenced to death for a triple homicide. The Court held that any federal constitutional error that may have occurred by excluding Ayala's attorney from part of a Batson hearing was harmless error. While Justice Kennedy joined the majority opinion in all respects, he wrote separately on an issue that had, "no direct bearing on the precise legal questions presented" in the case. Based on Ayala's counsel's statement during oral argument that his client had "served the great majority of his more than 25 years in custody in 'administrative segregation' or, as it is better known, solitary confinement," Justice Kennedy went on to describe the history of solitary confinement. Justice Kennedy reviewed the existing legal and scientific literature, including Metzner & Fellner's work in JAAPL<sup>2</sup>. While acknowledging that solitary confinement may be nec-

essary temporarily in some instances he concluded that, "the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."

Although clearly dicta, Kennedy's thinking around the use of long term segregation in correctional settings is instructive for all of us who practice in correctional settings and/or who are interested in public policy.

In 2012 the APA published its Position Statement on Segregation of Prisoners with Mental Illness. The Position Statement and its back-

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ground material support Kennedy's opinion. The Position Statement notes that prolonged segregation for inmates with severe mental illness should be avoided, and that if an inmate with severe mental illness requires segregation access to out of cell mental health treatment and unstructured recreation time should be provided<sup>3</sup>.

A recent study by O'Keefe, *et al.* not cited in Kennedy's concurring opinion, tends to disprove Kennedy's reasoning, at least for segregation of inmates for one year or less. Noting that past studies on the deleterious mental health effects of segregation have been cross sectional studies that

had many technical defects, O'Keefe *et al.* designed a randomized trial to study "to parse out the effects of segregation from those of other prison environments."<sup>4</sup> The researchers followed four groups for one year: inmates in general population and inmates in segregation, each group further divided into those with and without severe mental illness. Results disproved the researcher's hypothesis that inmates, with or without mental illness, would experience significant psychological decline in segregation. Instead both the mentally ill and non-mentally ill segregation groups showed a reduction in symptom severity. The author's emphasized several flaws in their own study, including problems with generalizability across correctional systems writing, "We do not claim, nor believe, that these data definitively answer the question of whether long-term segregation causes psychological harm."

Study of best practices for segregation of prison inmates remains an important issue that is difficult to study. Future work on this issue is crucial, however, in order to allow Justice Kennedy and other jurists to determine whether workable alternative systems for segregation exist, and, if so, whether a correctional system should be required by the Court to adopt them. ☺

### References:

1. *Davis v. Ayala* 576 U. S. \_\_\_\_ (2015). <http://www.scotusblog.com/case-files/cases/chappell-v-ayala/> (accessed July 2, 2015)
2. Metzner & Fellner: Solitary Confinement and Mental Illness in U. S. Prisons: A Challenge for Medical Ethics, 38 JAAPL 104-108, 2010
3. American Psychiatric Association Position Statement on Segregation of Prisoners with Mental Illness. <http://www.psychiatry.org/File%20Library/Learn/Archives/Position-2012-Prisoners-Segregation.pdf> (accessed July 2, 2015)
4. O'Keefe ML, Klebe KJ, Metzner J, Dvoskin J, Fellner J, Stucker A.: A longitudinal study of administrative segregation. 41 JAAPL 49-60, 2013.