IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-02471-PAB-KMT

THOMAS SILVERSTEIN,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS
et. al.,

Defendants.

PLAINTIFF'S MOTION TO SUPPLEMENT HIS MOTION TO ALTER OR AMEND THE JUDGMENT (Doc. 398) OR, IN THE ALTERNATIVE, FOR RELIEF FROM FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

Plaintiff Thomas Silverstein, through counsel, moves to supplement his Motion to Alter or Amend Judgment (Doc. 398), or, in the alternative, submits this Motion pursuant to Rule 60(b) for Relief from Final Judgment from the Court's Order Granting Defendants' Motion for Summary Judgment (Doc. 395). Pursuant to D.C.COLO.LCiv. R. 7.1(A), Plaintiff's counsel has conferred with counsel for Defendants, who represents that Defendants oppose this motion.

PROCEDURAL HISTORY AND STANDARD OF REVIEW

On September 30, 2011, this Court granted Defendants' Motion for Summary Judgment (Doc. 395). On October 31, 2011, Plaintiff filed a Motion to Alter or Amend the Judgment pursuant to Fed. R. Civ. P. 59(e) (Doc. 398). Defendants filed a response to that motion (Doc.

399) and Plaintiff subsequently filed a reply (Doc. 400). The motion is now pending before the Court.

As set forth below, in the time since Plaintiff filed his Motion to Alter or Amend the Judgment (Doc. 395), he has discovered additional new evidence that was previously unavailable and which is material to his Eighth Amendment claim. He therefore submits this supplement to his Motion to Alter or Amend the Judgment (Doc. 395) with the additional evidence and arguments set forth below, or in the alternative, moves for relief from final judgment pursuant to Rule 60(b).

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir.1997) (internal quotation marks omitted); *Miller v. Kansas Highway Patrol*, 383 Fed. Appx. 813, 815 (10th Cir. 2010). When attempting to introduce additional evidence, "the movant must show either (1) that the evidence is newly discovered, or (2) if the evidence was available at the time summary judgment was granted, that counsel made a diligent yet unsuccessful attempt to discover the evidence." *McMahen v. Gaffey*, Inc., 52 Fed. Appx. 90, 92 (10th Cir. 2002) (citation omitted). The first scenario applies to situations where the new evidence arose after the court's ruling—meaning it was not in existence at the time of judgment. *Bell v. Bd. of County Comm'rs*, 451 F.3d 1097, 1101–02 (10th Cir. 2006) (citations omitted).

Similarly, Fed. R. Civ. P. 60(b) provides that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment" where there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." FED. R. CIV. P. 60(b)(2). To be eligible for relief under Rule 60(b)(2), the moving party

must show: "(1) the evidence was newly discovered since the trial; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence [was] not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) that a new trial with the newly discovered evidence would probably produce a different result." *Dronsejko v. Thornton,* 632 F.3d 658, 670 (10th Cir. 2011) (citing *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005) (internal quotation marks and citation omitted)). Although the rule speaks in terms of relief from a trial result, it applies to other final judgments as well. *Dronsejko*, 632 F.2d at 670.

ARGUMENT

I. Plaintiff Seeks to Admit Newly Discovered Evidence Regarding Evolving Standards of Decency With Respect to the Practice of Prolonged Solitary Confinement.

In his lawsuit, Plaintiff asserted that the Bureau of Prisons' practice of keeping him in solitary confinement for over 28 years deprives him of his right to be free from cruel and unusual punishment in violation of the Eighth Amendment. (Plaintiff's Second Amended Complaint, Doc. 158 at ¶¶ 246-51.) As this Court noted in its Order Granting Summary Judgment, "[i]n determining whether conditions are cruel and unusual, courts do not apply a 'static test' but look to 'the evolving standards of decency that mark the progress of a maturing society' to gauge whether conditions are unconstitutional or only 'part of the penalty that criminal offenders pay for their offenses against society.'" (Doc. 395 at 31) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981)). Thus, in cases involving risks to health or safety, courts must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words,

the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

In the six months since this Court dismissed Plaintiff's Eighth Amendment claim, a number of events have occurred—locally, nationally, and internationally—that demonstrate that society considers the risks associated with prolonged solitary confinement to be so grave as to violate contemporary standards of decency. A change in the trend of public opinion against a punishment is sufficient to find it cruel and unusual under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (reversing state supreme court on question of evolving standards of decency in execution of mentally retarded man in part based on trend of state legislatures banning the practice); *accord Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010) (emphasizing the importance of the "climate of international opinion" in determining society's standard of decency).

These events break down into three main categories: 1) actions taken by governments to reduce the use of long-term solitary confinement, including legislative action and agency actions; 2) statements issued by international bodies condemning the use of long-term isolation; and 3) articles in the news illustrating the trend of public opinion against the use of long-term solitary confinement. Evidence in these three categories is listed below and is included as attachments to Exhibit 1 (Decl. of J. Doyle):

1) Actions Taken by State Legislatures and Agencies[1]

- Attachment 1 – November 4, 2011: Maine's new Corrections Commissioner reduces its use of solitary confinement by 70% in response to abuse and overuse of solitary confinement (http://goo.gl/b4QBy);

- Attachment 2 -December 1, 2011: The Justice Department opens an investigations into two western Pennsylvania correctional institutions, examining a pattern of abuse and overuse of solitary confinement (http://goo.gl/kIOYg);

- Attachment 3 - January 11, 2012: After visiting solitary confinement units across the state, Virginia lawmakers introduce bill to urge the General Assembly to study ways to reduce the use of solitary confinement in state prisons amid fears of abuse and overuse; (http://goo.gl/lYv6A);

- Attachment 4 - January 13, 2012: Texas Lt. Governor Dewhurst orders a legislative study on the overuse and abuse of solitary confinement in Texas prisons (http://goo.gl/hhYhg);

- Attachment 5 - January 21, 2012: The Colorado Department of Corrections, following a recommendation from correctional experts including the Department of Justice, reduces the number of individuals held in solitary confinement by more than 20% (http://goo.gl/jsj6e);

- Attachment 6 - March 9, 2012: The California Department of Corrections and Rehabilitation announces plans to reform the policies of the controversial Security Housing Units (SHUs), home to thousands of inmates held in solitary confinement for an average of 6.8 years amid protests across the state (http://goo.gl/JNYWf);

- Attachment 7 - March 20, 2012: Virginia state legislators, characterizing solitary confinement as "torture," call for a federal probe into the state prison system's use of solitary confinement and potential abuses (http://goo.gl/0Rflj);

[1] Pursuant to Fed. R. Evid. 803(8), when statements made by a public office or officer (1) set out the office's activities and (2) "neither the source of information nor other circumstances indicate a lack of trustworthiness," the statement constitutes an exception to the rule barring hearsay. FED. R. EVID. 803(8). Here, the documents in subsection 1 contain the statements of public officials describing the activities of their respective offices. Because there is nothing about the statements or the sources that indicate a lack of trustworthiness, the statements are excluded from the rule barring hearsay.

2) International Statements Against the Use of Prolonged Solitary Confinement[2]

- Attachment 8 - November 10, 2011: Council of Europe declares prisons should rarely use solitary confinement and limit the length to 14 days, amid concern for prisoners' mental health, (http://goo.gl/QVax3);

3) Articles Demonstrating a Trend in Public Opinion Against Long-Term Isolation[3]

- Attachment 9 - November 5, 2011: New York Times editorial, "Tortured By Solitude," describing Sarah Shourd's experience of solitary confinement in Evin prison in Tehran and urging elimination of its use in the US, (http://goo.gl/l0Bgm);

- Attachment 10 - January 15, 2012: Washington Post editorial, "Solitary Confinement in Virginia," calls for greater scrutiny into Virginia supermax prisons in order to combat overuse and abuse, (http://goo.gl/g0uIN);

- Attachment 11 - January 22, 2012: Washington Post editorial by three Virginia legislators, "Why All Virginians Should Care About the Overuse of Solitary Confinement," describes the unbridled duration of torture imposed on Virginia inmates (http://goo.gl/w57WL);

---

[2] Fed. R. Evid. 803(8) also encompasses statements made by foreign officials and commissions. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.238, 275 (3d Cir. 1983) (allowing investigative findings of Japanese Fair Trade Commission in antitrust case); *accord* Kevin F. Berry & David M. Lockwood, *Admission of Foreign Public Records and Reports Under Federal Rule of Evidence 803(8)(C)*, 21 TORTS & INS. L.J. 137, 170 (1985) ("Admission of factual findings from reports prepared by foreign government agencies appears to be a natural step in the evolution of exceptions to the hearsay rule"). The statements made by the UN Special Rapporteur on Torture and the Council of Europe both meet the requirements of Fed. R. Evid. 803(8). These foreign bodies made statements through their respective officers and neither statement indicates a lack of trustworthiness. Thus, these statements are excluded from the rule barring hearsay.

[3] Evidence of an out of court statement used to show the truth of the matter asserted is hearsay. FED. R. EVID. 801(C)(2). Here, however, the evidence is not being submitted to show the truth of the matter asserted in the various articles, but rather to show the increased public consensus on the harmful effects of solitary confinement, and it is therefore not hearsay. Additionally, the Court could simply take judicial notice of the increased social and professional trend condemning the use of prolonged solitary confinement: "Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true. Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1022 (9th Cir. 2009) (internal quotation marks and citation omitted) (quoting *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2001)); *accord Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.118 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants.").

- Attachment 12 - February 22, 2012: Boston Globe editorial, "Ending Solitary Confinement," describes inmate suicides in Massachusetts supermax prisons and calls for an independent permanent advisory board to oversee prisons and prevent abuses (http://goo.gl/hvAes);

- Attachment 13 - March 15, 2012: New York Times editorial, "The Abuse of Solitary Confinement," describes the overuse and abuse of the practice and explains the growing trend nationally to limit solitary confinement (http://goo.gl/GghFp);

- Attachment 14 - March 25, 2012: Public Radio International publishes a story, "Use of Solitary Confinement in America's Prisons Criticized," discussing the various national and international agencies that condemn the use of long-term solitary confinement (http://goo.gl/gKJJV).

In sum, the above evidence shows a growing trend against the use of solitary confinement across the country and abroad. Because a reasonable factfinder viewing this evidence could determine that Plaintiff's conditions of confinement pose a risk of harm that is sufficiently serious in light of society's evolving standards of decency, Plaintiff is entitled to relief from the Court's order granting summary judgment.

II. Plaintiff Is Entitled to Relief from Judgment Because He Meets the Standards Under 59(e) and 60(b) For the Consideration of Newly-Discovered Evidence.

The Federal Rules of Civil Procedure are clear that courts can consider newly discovered evidence to determine whether a judgment should be set aside. *See generally* FED. R. CIV. P. 59 & 60. Rule 59(e) permits evidence discovered within 28 days of a judgment to be considered in a motion to alter or amend the judgment; Rule 60(b) allows for a party to be relieved from a judgment on the basis of evidence discovered and submitted after this 28 day period.

Plaintiff submits the above newly-discovered evidence for the Court's consideration. As there is a Rule 59(e) motion pending (Doc. 398), the Court could construe this evidence as a supplement to that motion; alternatively, the Court could consider the new evidence as a separate

Rule 60(b) motion. Either way, this evidence is properly considered; it was discovered after the Court entered judgment and is not cumulative. Moreover, the evidence is material and dispositive of Plaintiff's Eighth Amendment claim. Under either Fed. R. Civ. P. 59(e) or 60(b), this new evidence warrants relief from the Court's previous order granting summary judgment.

A. The Evidence Was Newly-Discovered Since the Judgment Was Entered, and Plaintiff Was Diligent In Discovering That Evidence.[4]

Pursuant to Fed. R. Civ. Pro. 60(b)(2), a court may relieve a party from a final judgment where there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(e)." The Tenth Circuit has articulated two factors to aid courts in determining whether this standard is satisfied: first, that the evidence was "newly discovered since the trial," and second, that "the moving party was diligent in discovering the new evidence." *Dronsejko v. Thornton,* 632 F.3d 658, 670 (10th Cir. 2011). Additionally, "[n]ewly discovered evidence has to be newly discovered after the twenty-eight-day deadline for moving for a new trial under Fed.R.Civ.P. 59(b) has expired." *Duhall v. Lennar Family of Builders*, 382 Fed. Appx. 751, 754 (10th Cir. 2010) (internal citation omitted).

Here, the new evidence that Plaintiff seeks to introduce of society's evolving standards of decency with respect to the use of prolonged and indefinite solitary confinement was discovered after the Court issued its order granting summary judgment. Indeed, as the dates of the above-listed media reports demonstrate, all of the events that Plaintiff cites to as further evidence of

[4] While the new evidence could be considered under Rule 59(e) or 60(b), Plaintiff considers the evidence pursuant to the Rule 60 factors. Should this Court determine that the evidence is properly raised under Rule 59, and is a supplement to the prior motion, the Court has discretion to consider the evidence without considering the listed factors. Courts have discretion to grant Rule 59(e) motions "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

society's evolution of contemporary standards of decency regarding the use of prolonged isolation did not even occur until after the deadline for filing a motion pursuant to Fed. R. Civ. P. 59(e) had expired.

B. The Newly-Discovered Evidence is Not Merely Cumulative.

Under Fed. R. Civ. P. 60(b)(2), newly discovered evidence that a party seeks to admit must not be merely cumulative or impeaching of evidence presently before the court. *Dronsejko*, 632 F.2d at 670. Cumulative evidence seeks to "prove what has already been established by other evidence." *Smith v. Sec'y of New Mexico Dept. of Corr.*, 50 F.3d 801, 829 (10th Cir. 1995) (quoting BLACK'S LAW DICTIONARY 343 (5th ed. 1979)).

Here, Plaintiff seeks to introduce a significant increase in the trend – both nationally and internationally – against the use of prolonged solitary confinement. This evidence shows society's increasing antipathy for the use of prolonged solitary confinement, such as that imposed upon Plaintiff for nearly three decades. As mentioned above, the Supreme Court uses evidence of trends against a particular form of punishment in determining society's evolving standards of decency. *Graham*, 130 S. Ct. at 2022; *Atkins*, 536 U.S. at 321. While Plaintiff introduced evidence of this trend in his response to Defendants' Motion for Summary Judgment (Doc. 319 at ¶¶165-68), the trend against solitary confinement has continued to grow in the intervening months. By virtue of the fact that the evidence that Plaintiff seeks to submit is evidence of a trend, it cannot, by definition, be cumulative.

C. The Newly-Discovered Evidence Is Material to Plaintiff's Eighth Amendment Claim And A New Trial Would Probably Produce a Different Result.

In order for the Court to grant a party's Fed. R. Civ. P. 60(b) motion, the moving party also must show the new evidence is material. *Dronsejko*, 632 F.2d at 670. Evidence is material when

it potentially affects the outcome of a trial. *Occusafe, Inc. v. EG&G Rocky Flats, Inc.*, 54 F.3d 618, 621 (10th Cir. 1995). Moreover, the moving party must show the evidence is so significant that a new trial would produce a different result. *Dronsejko*, 632 F.2d at 670.

Evidence of a trend describing society's views on a particular punishment materially affects Eighth Amendment claims. *Graham*, 130 S. Ct. at 2022; *Atkins*, 536 U.S. at 321. To prove an Eighth Amendment violation, a plaintiff must first show a deprivation that is "objectively, sufficiently serious" or poses a risk of serious harm. *Farmer v. Brennan*, 511 U.S.825, 834 (1994). "In determining whether conditions are cruel and unusual, courts do not apply a 'static test' but look to 'the evolving standards of decency that mark the progress of a maturing society' to gauge whether conditions are unconstitutional or only 'part of the penalty that criminal offenders pay for their offenses against society.'" (Doc. 395 at 31) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981). Second, the plaintiff must show the government acted with "deliberate indifference" in inflicting the condition because it was aware of the deprivation but failed to take reasonable action to prevent the harm. *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005); *accord Farmer*, 511 U.S. at 842.

Here, the evidence submitted by Plaintiff is sufficient to raise a material issue of fact as to Plaintiff's Eighth Amendment claim. In other words, based on the evidence of the trend of governments and the public against long-term solitary confinement, a reasonable factfinder could determine that Defendants' conduct in holding Mr. Silverstein in isolation for nearly thirty years is a "sufficiently serious" practice that violates "evolving standards of decency." *Graham*, 130 S. Ct. at 2022; *Atkins*, 536 U.S. at 321. Plaintiff's evidence demonstrates a growing societal

trend against the use of solitary confinement. State legislative bodies, foreign governing bodies, and correctional agencies no longer tolerate the type of punishment imposed on Plaintiff.

Second, in light of this new evidence—in particular that many other correctional departments are substantially reducing their use of solitary confinement—a factfinder could determine that the BOP acted with deliberate indifference. Despite his having clear conduct for over 20 years, the BOP continues to hold Plaintiff in the same extreme conditions now abandoned or reduced by other correctional agencies. In light of the ever-growing trend against the use of prolonged solitary confinement, a reasonable factfinder could conclude that the BOP's conduct in continuing to hold Mr. Silverstein in isolation is unreasonable.

In sum, the material evidence Plaintiff submits here would likely produce a different result in that a reasonable factfinder considering this evidence could conclude that the risks of continuing to hold Mr. Silverstein in solitary confinement for nearly three decades are so grave that it violates contemporary standards of decency to expose anyone unwillingly to such risks. *Helling,* 509 U.S. at 36. As discussed *infra*, the evidence Plaintiff seeks to introduce materially affects both prongs of his Eighth Amendment claim. Simply put, a trial will likely produce a opposite result in favor of Plaintiff.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court consider this supplement to Plaintiff's Motion to Alter or Amend the Judgment pursuant to Rule 59(e) (Doc. 395) to include the newly-discovered evidence cited above, or, in the alternative, to grant him relief from the Court's order granting summary judgment pursuant to Rule 60(b).

Dated: March 27, 2012

Respectfully submitted,

STUDENT LAW OFFICE

/s/ Laura Rovner
Laura Rovner
Brittany Glidden
Lindsey Dusti, Student Attorney
Lauren Shapiro, Student Attorney
2255 E. Evans Ave., Suite 335
Denver, CO 80208
Tel: (303) 871-6140
Fax: (303) 871-6847
Email: lrovner@law.du.edu

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following email address.

March Elizabeth Cook
Marcy.Cook@usdoj.gov

Juan Villasenor
Juan.Villasenor@usdoj.gov

s/ Laura Rovner
Laura Rovner