Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF EDWIN LOPEZ,

Respondent,

- against –

ANDREA EVANS,

Appellant.

Brief For Amicus-Curiae For Respondent

New York City Bar Association

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Interest of Amicus Curiae

The New York City Bar Association (the "Association"), established in 1870, is a professional organization of more than 23,000 attorneys that seeks to promote integrity in, and public respect for, the justice system. The Association, through its Corrections and Community Reentry Committee, submits this amicus brief to further the Association's mission to identify and address legal and public policy issues in ways that promote law reform, ethics, and the fair and effective administration of justice.

The Association has long recognized the importance of due process protections in the criminal justice system. At the heart of due process is the ability of a person to meaningfully participate in the crafting of his defense. Here, even though respondent Edwin Lopez was found mentally incompetent to stand trial, his parole was revoked and he was reincarcerated. In light of the fundamental questions of due process raised in this case, the Committee submits the following brief as amicus curiae in favor of respondent.

Summary of Argument

Parole is a mechanism to ease a person's transition back into the community. A person on parole enjoys countless freedoms that he did not when incarcerated. He or she is free to live in society, work, enjoy meals with family and friends, attend a preferred place of worship, and, literally, stop and smell the roses. Parole revocation and subsequent reincarceration are, therefore, serious punishments. Because the

justice system recognizes this fact, people accused of violating parole have a constitutional right to due process before their parole is revoked. They have a right to notice of the allegations against them, to appointed counsel, to present a defense, and to cross-examine witnesses. These safeguards, and others, are designed to ensure that a parolee cannot be sent back to prison unless the fact-finding process proves that he committed the alleged violation.

This fact-finding process is critically undermined if the parolee is unable to meaningfully participate in the defense. Under the legal standard, a person is mentally incompetent when he lacks the capacity to understand the factual underpinnings of the proceeding against him, and to assist his attorney in presenting a defense, establishing the facts of the case, or identifying mitigating evidence. If a person cannot tell the attorney whether or not the facts underlying the alleged violation are true, or point the attorney to witnesses, the attorney cannot properly do his or her job. Under such circumstances, the fact-finding process becomes one-sided, the risk of reincarcerating someone who has not actually committed the alleged violation is heightened, and the proceeding as a whole becomes fundamentally unjust.

Additionally, as a matter of public policy, reincarcerating people who have been found mentally incompetent is contrary to the interests of society at large. Jails and prisons are ill-equipped to meet the needs of people with mental illness, and incarceration often exacerbates existing mental health difficulties. Society has an interest in and a duty to provide, proper services to people who have been found

mentally incompetent. Continuing with the parole revocation process when a person has been deemed mentally incompetent, and reincarcerating that person, is contrary to that interest.

It is, therefore, crucial that this Court recognize what many other states already have: that Edwin Lopez and others like him should not have their parole revoked while they are not mentally competent to participate in the fact-finding proceeding. Doing so will continue this Court's long history of protecting due process rights fully, while also preventing the unnecessarily harmful reincarceration of people whose basic mental health needs cannot be addressed by the correctional system.

Statement of Facts

Respondent Edwin Lopez was on parole and living at the South Beach Psychiatric Center when he was charged with misdemeanor assault. Mr. Lopez was adjudicated mentally incompetent pursuant to Article 730 of the Criminal Procedure Law and was committed to the custody of the Office of Mental Health. The charges against him were dismissed.

Nonetheless, the Board of Parole issued a warrant against Mr. Lopez, seeking to revoke his parole for the exact same alleged conduct underlying the dismissed criminal charges. Despite the finding of mental incompetence, and over counsel's objection, the parole revocation hearing continued, Mr. Lopez's parole was revoked, and he was reincarcerated. The Appellate Division, First Department, reversed this decision, reinstated Mr. Lopez's parole, and held that due process bars a parole

revocation proceeding when the parolee is mentally incompetent. The Board of Parole appealed to this Court.

ARGUMENT

POINT I

Because A Person Found Mentally Incompetent to Stand Trial Cannot Meaningfully Participate in the Fact-Finding Process to Determine Whether He Has Violated Parole, Conducting a Parole Revocation Proceeding Against that Person Violates Due Process.

The purpose of a parole revocation hearing is to determine whether or not the parolee has violated the conditions of parole. The right to due process at a revocation hearing – providing notice of the alleged violation, an attorney, and the right to cross-examine witnesses – is designed to ensure the accuracy of this fact-finding process. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). The person's competency to participate in the proceeding is the support beam on which all the other rights rely. Without that piece, the structure falls. If the parolee cannot understand the alleged violation, notice of the charges is useless. If the parolee cannot tell the attorney the relevant facts, that attorney will be unable to argue the charges are wrong. And, if the parolee cannot articulate to his attorney when a witness's testimony is mistaken, cross-examination may fail to draw out any inaccuracies. When a parolee who is not guilty of the conduct charged cannot participate in the parole revocation process, the parolee is at risk of being returned to prison regardless of his innocence of the alleged parole violation. To avoid this unconscionable result, basic due process rights must necessarily include

that a person be mentally competent at the revocation proceeding. *See* U.S. Const. Amends. V, XIV; N.Y. Const. art. 1, § 6.

The federal constitutional right to due process at parole revocation hearings is well established. *See Morrissey*, 408 U.S. at 482. Over 40 years ago, the Supreme Court held that, at a minimum, a parolee must "have an opportunity to be heard," to show that he did not violate the conditions of parole, and to point to any "circumstances in mitigation" that suggest that a "violation does not warrant revocation." *Id.* at 488. These minimum rights also include "written notice of the claimed violations of parole," "disclosure" of the evidence against him, an "opportunity to . . . present witnesses and documentary evidence," and the "right to confront and cross-examine adverse witnesses." *Id.* at 489. These standards ensure that a decision to revoke parole is based on "verified facts" and an "accurate knowledge" of the parolee's behavior. *Id.* at 484.

This Court recognized these minimum due process rights even before the Supreme Court, *see People ex rel. Menechino v. Warden, Green Haven State Prison*, 27 N.Y.2d 376, 383 (1971) (finding that parolees were entitled to the assistance of counsel), and has historically been more protective of parolees' due process rights. In particular, a New York parolee always has the right to counsel at a final parole revocation hearing,

which is not true in the federal context.[1] *Compare Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (adopting case-by-case test by which a parolee is entitled to counsel only if he (1) requests counsel in a timely fashion, and (2) asserts that he did not commit the violation or that substantial mitigating circumstances exist), *with People v. ex rel. Donohoe v. Montanye*, 35 N.Y.2d 221, 225-26 (1974) (reaffirming a broader right to counsel in New York, where parolees are, without exception, guaranteed the right to counsel at final revocation hearings).

The New York right to counsel hinges on the value of attorneys in assisting the fact-finding process – counsel has an important role in "developing and probing factual and legal situations which may determine on which side of the prison walls [the person] will be residing." *Menechino*, 27 N.Y.2d at 382 (internal citation omitted). Based on similar reasoning, New York strictly enforces the right to confront adverse witnesses. *People ex rel. McGee v. Walters*, 62 N.Y.2d 317, 322 (1984) (right to confront adverse witnesses significantly enhances fact-finding process).[2] Just because the parole board is "an administrative body rather than a judicial tribunal," does not allow it to make a determination based on a "possibly mistaken view of the facts owing to the parolee's inability to make a proper factual presentation." *Menechino*, N.Y.2d at 382.

[1] While federal law now also provides for counsel at parole revocation proceedings, New York's right to counsel, codified in N.Y. Exec. Law § 259-i(3)(f)(v), goes further than the corresponding federal right, which calls for counsel in some, but not all, circumstances.

[2] Individuals facing parole revocation in New York are also entitled by statute to notice, a speedy hearing, the right to appear and speak on their own behalf, the right to present a defense, and the right to introduce exhibits. N.Y. Exec. Law §§ 259-i(3)(c)(iii)-(iv), (f)(i), (f)(iii)-(iv), (xi). In addition, all testimony at revocation proceedings must be under oath. N.Y. Exec. Law § 259-i(3)(f)(vii).

Parole should only be revoked if the government proves the person committed the alleged violation. *Morrissey*, 408 U.S. at 479-80 (a parole violation can only be determined with a "retrospective factual" analysis); *Menechino*, 27 N.Y.2d at 382 (parole revocation "is dependent upon the board's factual determination as to the truth of specific allegations of misconduct").

When the parolee is unable to participate effectively in the parole revocation proceeding because of mental incompetency, the due process buttressing crumbles. In the criminal trial context, both federal and New York courts have long held that the entire panoply of due process and fair trial rights depends on the person having a basic understanding of the proceedings against him. *See, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring) (calling competence to stand trial "rudimentary" because "upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel . . ."); *Youtsey v. U.S.*, 97 Fed. 937, 940-46 (1899). This principle is fundamental because, by definition, individuals found incompetent to stand trial are unable to assist in their defense or effectively aid counsel. *See U.S. v. Dusky*, 362 U.S. 402 (1960) (defendant must possess "a rational as well as factual understanding of the proceedings" and have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"); *People v. Phillips*, 16 N.Y.3d 510, 517 (2011) (defining competency as a legal, not a medical, determination); *compare People v. Mendez*, 1 N.Y.3d 15, 20 (2003) (defendant who is "adequately oriented," "grasp[s] the nature and thrust

of the proceedings," and "could assist in her own defense," fit to stand trial), *with People v. Francabandera*, 33 N.Y.2d 429, 435-36 (1974) (someone who "because of a current inability to comprehend, or at least a severe impairment to that existing mental state, cannot with a modicum of intelligence assist counsel," is not fit). *See also* C.P.L. § 730.10(1) (defining an "incapacitated person" as "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense"). Competency is just as connected to the other due process rights in the parole revocation process as in the trial context.

This Court has historically been in the vanguard of protecting the rights of individuals involved in the criminal justice system. Ensuring that mentally incompetent parolees are not sent back to prison as a result of their inability to contest the charges against them would be in keeping with this Court's long and proud tradition of extending greater criminal justice rights to defendants under the New York State Constitution. *See, e.g.*, *People v. Vilardi*, 76 N.Y.2d 67, 76 (1990) (prosecutorial misconduct and *Brady* violations); *People v. Hawkins*, 55 N.Y.2d 474, 483-84 (1982) (right to counsel); *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979) (due process); *People v. Singer*, 44 N.Y.2d 241, 253-54 (1978) (due process and speedy trial); *see also People v. Isaacson*, 44 N.Y.2d 511, 519-25 (1978) (noting that New York can impose higher standards under its own due process clause than are applicable under federal standards).

The right not to have parole revoked while mentally incompetent to participate in the proceedings is a basic due process right for people facing reincarceration, and recognizing it as such would fit directly into the Court's strong history of protecting individuals' rights within the criminal justice system. Failure to do so would undermine the due process safeguards this Court has long embraced for parole revocation proceedings. If the parolee is not mentally competent; if he cannot tell counsel whether the allegations against him are inaccurate; if he cannot point counsel towards witnesses who help the defense; if he cannot provide counsel documents supporting his innocence, counsel is hampered; the fact-finding process becomes one-sided; and there is an amplified risk of inaccuracy. Reincarcerating an individual after this type of perfunctory proceeding violates the most fundamental due process ideals articulated in *Morrissey* and repeatedly reaffirmed by this Court.

POINT II

Revoking Parole and Reincarcerating People Found Incompetent to Stand Trial is Counter to Public Policy, Public Safety, and Rehabilitation.

Incarcerating individuals who have been found incompetent to stand trial is incompatible with the State's duty to "provide[ ] care to its citizens who are unable to care for themselves because of mental illness." *Rivers v. Katz*, 67 N.Y.2d 485, 496 (1986). Currently, correctional facilities are staffed primarily by correctional officers, tasked with maintaining the facilities' order and safety. Such institutions are fundamentally not mental health facilities. People who are incarcerated frequently do

not receive the mental health treatment they need and are often released from prison suffering from symptoms of mental illness that incarceration has exacerbated. People with mental illness who are incarcerated face disproportionate risks of physical harm, are punished for disciplinary sanctions at a much greater rate than the rest of the population, and make up a disproportionate percentage of people in isolated confinement. Reincarcerating people for parole violations despite a legal finding of mental incompetency does not serve the State's interest in protecting people suffering from mental illness,[3] society's interest in public safety, or the parolee's interest in receiving treatment. Instead, revoking parole of a person who is incompetent runs a strong risk of harm to both the parolee and society as a whole.

Unlike hospitals and mental health facilities that are designed to care for people with mental illness, jails and prisons are ill-suited to provide such care and frequently hinder any hope of successful treatment. A wealth of research shows that the correctional system is inherently at odds with the particularized treatment needs of those who suffer from mental illness. *See, e.g.*, Thomas L. Hafemeister, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 173 (2012)

[3] Although a legal finding of mental incompetency is not necessarily synonymous with a diagnosis of mental illness, the same concerns implicated by the imprisonment of the mentally ill are triggered by the incarceration of a person who, by reason of "mental disease or defect," is unable to understand criminal proceedings. Those who are legally incompetent are more likely to have a medical diagnosis of mental illness. Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCH. PUB. POLICY & LAW 1, 16 (2011). Therefore, for the purpose of this discussion, we do not distinguish between mental illness and mental incompetency.

"[C]orrectional facilities have frequently proven inadequate to meet the needs of [mentally ill] individuals, although this is perhaps not surprising in that they were established for a very different purpose"); Dr. E. Fuller Torrey, et al., *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States* (May 2010) at 9 (prisons are not "structurally appropriate for patients, and the staffs are not recruited as psychiatric caretakers"); Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 411 (2006) ("[w]hatever improvements are made, prisons will never be a good place for the mentally ill"); Hon. Abraham G. Gerges, *The Faceless Mentally Ill in Our Jails*, 71 N.Y.S. B.J. 52, 52 (1999) ("[p]rison resources are limited; and the primary function of a jail is housing offenders, not treating the mentally ill").

Unsurprisingly, it is widely recognized that prisoners with mental illness often do not receive the treatment they need. *See* President's New Freedom Commission on Mental Health, *Achieving the Promise: Transforming Mental Health Care in America* (July 2003) at 32 (*available at* http://goo.gl/HPoKh0); Hafemeister at 174-75 ("In addition to providing a potentially harmful environment for persons with mental illness, jails and prisons are also often ill equipped to provide them with needed treatment"). Simply put, "prisons cannot provide the range of services mentally ill prisoners need in the necessary quantity and quality." Fellner at 394. *See also* Michael Schwirtz, *Rikers Island Struggles with Surge in Violence and Mental Illness*, N.Y. TIMES, March 18, 2014, at A1 (hereinafter "Schwirtz March 2014") (quoting Norman Seabrook, the President of

the Correction Officers' Benevolent Association, acknowledging that incarceration is inappropriate for people with mental illness: "They need medication, treatment, psychological help. They don't need a corrections officer"); Correctional Association of New York, *Mental Health In The House Of Corrections: A Study of Mental Health Care in New York State Prisons* (2004), *available at* http://www.correctional association.org/wp-content/uploads/2004/06/Mental-Health.pdf.

Even worse, incarceration frequently exacerbates symptoms of mental illness. Far from being successfully treated, individuals often end up leaving the prison system with more severe symptoms than when they entered. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1934 (2011) ("Living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Crowding may also impede efforts to improve delivery of care."); Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic*, 5 HOUS. J. HEALTH L. & POL'Y 1, 3 (2005) ("[C]onfinement in regular prisons is inappropriate – i.e., harmful – to people with mental illness and may well violate their Eighth Amendment right to be free of 'cruel and unusual punishment'").

Not only do those with mental illness receive inadequate treatment in prison, they are also at greater risk of violence and abuse than the rest of the prison population. In many cases, people with mental illness exhibit behaviors that are perceived as bizarre to other inmates, and, as a result, become targets for violent attacks, abuse, and rape. *See, e.g.*, Treatment Advocacy Center, Briefing Paper,

Criminalization of Individuals with Severe Psychiatric Disorders (2007). Additionally, the rigid, punitive nature of jails and prisons is frequently difficult to navigate for people suffering from mental illness, and these inmates may lack capacity to conform to prison life or the ability to advocate for themselves while incarcerated. *See* Fellner at 395, 406-07. People with mental illness who are incarcerated "often respond defiantly or erratically to the harsh, zero-tolerance disciplinary measures" meted out by correctional officers, and are consequently vulnerable to abuse from other prisoners and staff in the facilities. *See* Schwirtz March 2014, at A1; Michael Winerip and Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES, July 14, 2014, at A1 (inmates with mental illness are "especially vulnerable . . . preyed upon by correction officers and other inmates"); Paul F. Stavis, *Why Prisons Are Brim Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?,* 11 GEO. MASON U. C.R. L.J. 157, 183-84 (2000) ("rigid formal rules" in jails and prisons are difficult for people with mental illness to comprehend, making them "inherently vulnerable to abuse" from other prisoners and prison guards); Doris J. James and Lauren E. Glaze, U.S. Dep't of Just., Bureau of Just. Statistics, *Mental Health Problems of Prison and Jail Inmates*, at 10 (Sept. 2006) (state prisoners with mental illness were twice as likely to have been injured in a fight than those without mental health problems).

These safety concerns for people with mental illness in jail and prison has recently come to the attention of the public, as well as various agencies, with numerous reports documenting the validity and severity of these concerns in New

York City's Rikers Island jail. According to internal reports, during an 11-month period in 2013, 77 percent of the 129 serious injuries reported by people incarcerated at Rikers Island following altercations with correctional officers were suffered by people with mental illness. Winerip & Schwirtz, at A1 (explaining that correctional officers are "often poorly trained to deal with mental illness, and rely on pepper spray, take-down holds and fists to subdue [inmates with mental illness]"). The New York City Board of Correction issued a 2013 report describing the experiences of three mentally ill adolescents, all of whom received sentences of upwards of 200 days in punitive segregation, where they were locked in their cells for 23 hours a day. *See* The City of New York Board of Correction, *Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island*, October 2013, at ii. More recently, the Department of Justice released a report finding a "deep-seated culture of violence" at Rikers. U.S. Dep't of Just., U.S. Attorney, S.D.N.Y., *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*, Aug. 4, 2014. The Department expressed "serious concerns about the quality of [the facility's] mental health services" which, according to the report, may violate the Americans with Disabilities Act. *Id.*

This struggle to adapt to prison life not only means that incarcerated individuals who suffer from mental illness are vulnerable to physical assault and exploitation, but also that they are more likely to be charged with breaking facility rules than other inmates and make up a disproportionate percentage of the individuals in solitary confinement. *See* American Psychological Association, *Position Statement on*

Segregation of Prisoners with Mental Illness, December 2012, *available at* http://goo.gl/UVq8ux (inmates with pre-existing severe mental illness commit three times as many infractions as the general prison population). Solitary confinement can be "as clinically distressing as physical torture," even for mentally stable inmates, but it is especially detrimental to individuals who already suffer from mental illness. Jeffrey L. Metzner, M.D. and Jamie Fellner, Esq., *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, J. AM. ACAD. PSYCHIATRY & L., vol. 38, n. 1, 2010, *available at* http://goo.gl/hXfs10.

As of March 2012, more than 600 prisoners in solitary confinement statewide (approximately 14% of the solitary population) were on the mental health caseload, and 35% had been diagnosed with "major or serious mental illness." New York Civil Liberties Union, *Boxed In: The True Cost of Extreme Isolation in New York's Prisons*, 2012, at 24 *available at* http://goo.gl/JBkbo6 (citing statistics from Office of Mental Health) (hereinafter "NYCLU"). The statistics at Rikers Island are similar: as of November 2013, over half of the inmates in isolation were mentally ill. ABC Local News, Nov. 7, 2013, *available at* http://7online.com/archive/9316726/.[4] The mentally ill also remain

[4] Reform efforts are ongoing. For example, the SHU Exclusion Law requires prisoners who are "seriously mentally ill" to be diverted to therapeutic units rather than solitary confinement, but a loophole for "exceptional circumstances" has enabled DOCCS to exclude many people who would otherwise fall into this category. N.Y. Corr. L. § 137. *FAQ*, Solitary Watch, *available at* http://solitarywatch.com/facts/ faq.

In January 2014, DOCCS announced that it would no longer punish mentally ill inmates with solitary confinement; yet, according to oversight officials, isolation remains a widespread punitive tool. Similarly, in a February 19, 2014 stipulation in litigation regarding solitary confinement,

in isolation for far longer periods than those without mental illness. James Gilligan and Bandy Lee, Report to the New York City Board of Correction, at 8 (Sept. 5, 2013). The failure to divert people to therapeutic treatment increases the likelihood that they will engage in acts that pose a threat to themselves or others both in prison and upon release. *Id.* at 6-7.

Despite the high percentage of people with mental illness in solitary or isolated confinement, psychiatric services in solitary confinement are even more limited and restricted than in the general prison population. Treatment is often simply medication, while visits with health care clinicians and therapeutic services are infrequent. *See* NYCLU at 41 (people in isolated confinement only met with psychiatrists approximately every 90 days, and even then, some prisoners did so via teleconference). For those who suffer from serious mental illnesses, such as schizophrenia, bipolar disorder, or a major depressive disorder, medication alone, without social contact and access to therapy and entertainment, can exacerbate their symptoms. *See* Metzner & Fellner at 104-05. Prisoners in solitary confinement,

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DOCCS acknowledged that seriously mentally ill inmates continue to be housed in solitary confinement for up to thirty days, but maintained that it would begin to implement a similar policy of limited duration solitary confinement for inmates with special needs. *Peoples v. Fischer*, No. 2:11-cv-02694, at 2 (S.D.N.Y Feb. 19, 2014). However, only seriously mentally ill or special needs inmates given sanctions of more than 30 days in solitary would be diverted to "Correctional Alternative Rehabilitation" (CAR). *Id.* Notably, CAR, while intended to be therapeutic, only permits inmates to leave their cells for two hours a day, five days a week for programming during the first "phase" of their time in CAR. *Id.* at 4. Moreover, this diversion program will continue to be unavailable to inmates with certain types of mental illness, and the severity of a person's mental illness may vacillate over time, making it difficult to distinguish the "mentally ill" from the "seriously mentally ill." Gilligan & Lee at 9-10, *available at* http://goo.gl/xiw9VI.

including those with pre-existing mental health needs, often complain that they are neglected and routinely "brushed off" by mental health staff. NYCLU at 40. *See also* The City of New York Board of Correction at 20 (the young men with whom they spoke "received limited access to appropriate and timely mental health or dental care while in punitive segregation."). The lack of access to human contact, reading materials, exercise, nutrition, basic hygiene, and light, even for a short time, has psychological impacts on all prisoners, including the mentally stable, potentially leading to issues such as anxiety, depression, anger, paranoia, hallucination, delusions, and psychosis, but those with pre-existing mental illness often suffer more and resort to self-mutilation and suicide. NYCLU at 27-28; Metzner & Fellner at 11; Torrey at 9; *see* Gilligan & Lee at 9.

Finally, imprisoning people who have been found mentally incompetent does not serve any other compelling interest. The primary penal objectives of deterrence, rehabilitation, retribution, and isolation, *see People v. Notey*, 72 A.D.2d 279, 282 (2d Dep't 1980), have limited, if any, applicability where the individual's incapacity prevents him from linking the reason for his incarceration to the conduct for which he is incarcerated. *See State v. Daniel OO.*, 88 A.D.3d 212, 220 (3d Dep't 2011) (noting that incompetent individuals "cannot be held responsible for criminal acts" and, consequently, that civil confinement of incompetent sex offenders cannot be retributive); Bard at 62 (2005) ("no amount of actual punishment will deter the next impulse to do harm"); Fellner at 401 ("If punishment is supposed to help deter future

misconduct, that goal is clearly misplaced when individuals have no meaningful control over their conduct"); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (rationale of retribution requires that the criminal sentence be directly related to personal culpability); *U.S. v. Blake*, 89 F. Supp. 2d 328, 338-39, 345 (E.D.N.Y. 2000) (finding that incarceration would be "ill suited to facilitate rehabilitation" in light of the defendant's "significantly reduced mental capacity"); *People v. Andrea FF.*, 185 A.D.2d 557, 558 (3d Dep't 1992) ("much needed psychiatric care is not available to defendant in prison," and "a period of probation with continued psychiatric counseling will be more helpful in rehabilitating this troubled young woman than will a return to incarceration").

Instead, society has a "stake in whatever may be the chance of restoring [a person subject to parole supervision] to normal and useful life within the law." *Morrissey*, 408 U.S. at 484. That people with mental illness need treatment in lieu of imprisonment has been codified in international law for over half a century. *See* Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, Annex 1, at 11. And, New York State already includes the laudable goal of offering "opportunities" for parolees "to improve their skills, and to receive individual treatment services," and providing "appropriate medical and psychiatric services necessary to those requiring such treatment." *See* DOCCS, Community Supervision—About, https://www.parole.ny.gov/aboutus.html. People

on parole who are found mentally incompetent need this treatment. They do not need punishment.

This Court should, therefore, put an end to the inhumane and counter-productive practice of reincarcerating incompetent individuals.

Conclusion

It shocks the conscience that people could be deprived of their liberty and returned to prison, despite an inability to understand the allegations against them, much less defend themselves, or assist their attorneys in doing so. Such a holding would keep in place a practice that severely curbs the constitutional rights of people on parole supervision and significantly undermines the most basic notion of due process, by which "every person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice." *People v. Isaacson*, 44 N.Y.2d 511, 520 (1978). Accordingly, this Court should uphold the Appellate Division decision and find that basic due process guarantees the right to mental competency at a parole revocation proceeding.

Dated: December 16, 2014
New York, New York

Respectfully submitted,

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