No. 20-35493

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY STEFFEY,

Petitioner-Appellant,

v.

J. SALAZAR, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Portland Division
No. 3:19-cv-00093-JR
The Honorable Michael W. Mosman

OPENING BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Billy Steffey appeals from the opinion and order denying his petition for writ of habeas corpus, and the ensuing judgment of dismissal, both entered on May 18, 2020. ER 1-3.[1] The district court had jurisdiction over the petition under 28 U.S.C. § 2241. Mr. Steffey filed a timely notice of appeal from the denial of relief pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure on May 28, 2020. ER 4. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

[1] "ER" refers to the Appellants' Excerpt of Record.

STATEMENT OF ISSUES

In this 28 U.S.C. § 2241 petition, federal inmate Billy Steffey challenged the disallowance of 41 days of good conduct time credit following disciplinary proceedings in which he was found in violation of Bureau of Prisons Prohibited Act Code 111 for having introduced narcotics into the prison. The "narcotics" were identified by testing suspect legal paperwork mailed to the institution with a NIK brand chemical field test. The two issues on appeal are:

I. Whether disciplinary proceedings resulting in lost good conduct time credit were supported by "some evidence," as required by *Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985), when the identification of narcotics relied on a chemical field test that has a high rate of false positives and when the testing agent performed the tests incorrectly and misinterpreted the results.

II. Whether the district court erred by denying petitioner's requests for discovery and an evidentiary hearing to assess the reliability of the NIK test results.

STATEMENT OF THE CASE

Nature of the Case

This is the direct appeal from the denial of a petition for writ of habeas corpus under 28 U.S.C. § 2241, entered by the Honorable Michael J. Mosman, Chief United States District Court Judge for the District of Oregon, on May 18, 2020. ER 1-3.

Relevant Factual and Procedural History

Mr. Steffey lost 41 days of good conduct time for allegedly arranging to have narcotics-soaked legal paperwork mailed to another prisoner. The "narcotics" (purportedly amphetamines) were identified based on a NIK brand chemical field test that is known to be unreliable, was conducted improperly, and for which the results were misinterpreted. The district court erred in finding, based on the administrative record, that "some evidence" supported the disciplinary sanction and in declining to permit discovery and an evidentiary hearing regarding the reliability of the test.

A. Disciplinary Action at FCI Lompoc

In December 2017, Mr. Steffey was a federal inmate at the Lompoc Federal Correctional Institution, serving a 108-month sentence imposed in the District of Nevada on August 7, 2014, following his guilty pleas to charges of conspiracy, conspiracy to traffic in and use counterfeit devices, and aggravated identity theft.

Case No. 2:12-cr-00083-APG-GWF (D. Nev.) (ECF 512). On December 5, 2017, a correctional officer working in the mailroom at FCI Lompoc opened legal mail addressed to another inmate, which was sent under tracking number 70171450000084946239. ER 191, 200, 204. The documents inside the envelope appeared to be legal paperwork from an attorney. ER 200, 205. However, according to the officer, the paper felt "unusually thick" and, viewed under a light box, appeared to have stains and discolorations on them. ER 191, 200.

SIS Technician S. Aguilar tested the papers using a NIK brand field testing kit. ER 201. To conduct the test, Aguilar first cut a small piece of paper from the legal paperwork and tested it with NIK Test A. ER 201, 207. According to his report, the Test A result "had an immediate orange rapidly turning brown color, indicating Amphetamines." ER 201, 207. Aguilar then cut another small piece from the paperwork and tested it with NIK Test U. ER 201. That test "turned an immediate dark burgundy color, indicating Amphetamines." ER 201, 207. Aguilar concluded that the "tests indicated a positive result for Amphetamines." ER 201.

Aguilar reviewed emails between Mr. Steffey and "Lisa Rassmussen, ESQ" at "inmateresources@protonmail.com," discussing evictions and other legal work. ER 191, 209-215. Although the emails did not reference any other prisoner or mention illegal substances, Aguilar believed that the emails were in code. ER 191.

The emails linked Mr. Steffey to the incoming package because, on the same day as the package was discovered by the mailroom, Ms. Rassmussen sent Mr. Steffey an email with the package's tracking number, saying, "I reached out. 70171450000084946239." ER 212.

Based on the emails and the NIK tests, Aguilar concluded that Mr. Steffey "facilitated and arranged with an outside person, to have narcotic soaked papers to be sent to another inmate housed at FCC Lompoc-FCI (Low)." ER 191. Aguilar prepared an incident report on January 31, 2018, alleging that Mr. Steffey committed a violation of Prohibited Act Code 111 for the "Introduction or making of any narcotics, marijuana, drugs, or related paraphernalia not prescribed for the individual by medical staff." ER 191. After being provided a copy of the Incident Report, Mr. Steffey told the Unit Discipline Committee, "I have no comment due to possible charges being brought on by outside law enforcement agencies." ER 191. The Unit Discipline Committee referred the matter to the Discipline Hearing Officer (DHO) for further hearing. ER 193.

The disciplinary hearing was held on February 13, 2018, before DHO Chetwood. ER 196. At the hearing, Mr. Steffey "neither admit[ted] nor denie[d] the charge." ER 196. He did not request a staff representative and neither called witnesses nor presented evidence in his defense. ER 196. However, he did provide

a written document making several points about the improper opening of legal mail, the lack of evidence, and errors in the investigation. ER 216.

DHO Chetwood concluded that Mr. Steffey committed the Prohibited Act as charged. ER 199. In reaching that conclusion, the DHO relied on an "Inmate Investigative Report" describing the investigation, photographs of the mail items and NIK test pouches, memoranda from the mailroom officer and from SIS Technician Aguilar describing the discovery and testing of the paperwork, Mr. Steffey's e-mails with Lisa Rassmussen ESQ, and Mr. Steffey's statements. ER 198, 201-16.[2]

Among other sanctions, the DHO imposed 41 days loss of good conduct time credits. ER 199.

B. Proceedings on 28 U.S.C. § 2241 Petition

After exhausting his administrative remedies, Mr. Steffey filed a 28 U.S.C. § 2241 petition in the District Court for the District of Oregon, where he was then confined, asking that the disciplinary action be expunged from his record and that his 41 days of good conduct time be restored. ER 225-42. In his pro se petition, Mr. Steffey raised a variety of procedural issues and challenged the reliability of the NIK test results. ER 231-32, 239-42.

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[2] The Inmate Investigative Report "describe[d] in detail the investigation leading up to the incident report," but it was deemed exempt from disclosure to Mr. Steffey. ER 198.

The district court appointed counsel. ER 244 (CR 4). Through counsel, Mr. Steffey filed a brief in support of the habeas corpus petition, requesting an evidentiary hearing, an unopposed motion for additional time to supplement the record, and a motion for discovery. ER 109-127. In the motion to supplement the record, Mr. Steffey informed the Court that he intended to supplement his pleadings "with the declaration of an expert in the field of chemical test analysis." ER 109.

The discovery motion requested the following information bearing on the reliability of the NIK test results:

> 7. Any and all Bureau of Prisons manuals, training materials, program statements, operations memorandums, or other writings of any sort regarding the agency's acquisition, storage, and use of narcotics identification tests for disciplinary or other purposes.
>
> 8. All records establishing the training and certification of the individual who conducted the NIK tests in this case, which appears to be SIS Aguilar, regarding how to use NIK tests, including training specifically as to how to test different types of substances (e.g., powder, liquids, paper), how to interpret test results, and whether confirmatory laboratory testing is required.
>
> 9. All records identifying the manufacturer of the NIK test used here, its date of purchase, and the manner of storage.
>
> 10. Any and all Bureau of Prisons documents establishing the procedure for confirmatory laboratory testing of chemical test results.
>
> 11. Records establishing the frequency of use of narcotics identification tests at FCI Lompoc, the number of disciplinary violations in which NIK test results were used, specifying the number of such violations that were verified by laboratory testing, the number

of known instances of false positive results or erroneous results for NIK Test A or Test U.

ER 112-13. Petitioner's motion also requested physical inspection of the suspect papers to assess the mailroom officer's report that it appeared thick and discolored and for independent testing. ER 112.

The government objected to Mr. Steffey's motion for discovery, arguing that Mr. Steffey had not established a prima facie case for relief and that his claims could be resolved based on the existing administrative record. ER 92-102. The government pointed out that there were other reasons to be suspicious about the legal paperwork and argued that "the NIK test provides sufficiently reliable evidence in conjunction with the other evidence and circumstances to render any shortcoming harmless error." ER 96.

The magistrate judge took the motion for discovery under advisement. ER 244 (CR 26). As to the request for additional time to supplement the record, the magistrate judge ordered that "upon resolution of the motion for Discovery, the Court will set further briefing deadlines as necessary." *Id.*

On February 25, 2020, the magistrate judge issued a Findings and Recommendation, concluding that the habeas corpus petition and motion for discovery should be denied without further hearing. ER 66. The magistrate judge framed Mr. Steffey's petition as arguing, "[i]n essence, . . . [that] the lack of

confirmation testing renders the initial test results void." ER 75. Without addressing the reliability of the NIK test itself, the magistrate judge rejected that challenge because "DHO Chetwood relied upon multiple sources of evidence [including the NIK test results] to determine Petitioner violated prison rules[.]" ER 75. ER 75. The magistrate judge concluded that, considering the test results in context, "this Court finds some evidence in the record to support DHO Chetwood's finding that Petitioner committed the prohibited act." ER 75. The magistrate judge further recommended denial of discovery and denial of an evidentiary hearing because "Petitioner has not presented allegations demonstrating that he is entitled to relief." ER 76.

Mr. Steffey filed objections to the Findings and Recommendation. ER 10-21. Mr. Steffey asserted that the NIK test results should have been disregarded in full as unreliable, and that, without them, the remaining evidence did not establish "some evidence" that the papers contained narcotics for purposes of upholding the disciplinary violation. *Id.*

Thereafter, the district court judge adopted the magistrate judge's findings and recommendation without further analysis. ER 2-3. The district court entered an order denying Mr. Steffey's petition for writ of habeas corpus and his motion for discovery, ER 2-3, followed by a judgment of dismissal. ER 1.

Custody Status

Mr. Steffey was released from his term of imprisonment on July 8, 2020, following a grant of compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). Case No. 2:12-cr-00083-APG-GWF (D. Nev. July 8, 2020) (ECF 539). He is presently serving a three-year term of supervised release. This case is not moot because a partial remedy of early termination of supervised release remains available. *See*, *e.g.*, *Allen v. Ives*, 950 F.3d 1184, 1187-88 (9th Cir. 2020) (holding § 2241 petition is not moot while the petitioner remains on supervised release); *Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (2008) (same).

Standard of Review

This Court reviews a district court's denial of a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 de novo, including the district court's legal conclusion that the disciplinary sanction is supported by some evidence. *Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989), *overruled on other grounds by Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016) (en banc).

SUMMARY OF ARGUMENT

This 28 U.S.C. § 2241 petition alleges that the Bureau of Prisons (BOP) unconstitutionally deprived petitioner, Billy F. Steffey, of 41 days of good conduct time credits with procedures that violated due process and without sufficiently reliable evidence that he committed the charged prohibited act of introducing narcotics into the prison. The principle contention is that the NIK test results were unreliable and should have been disregarded by the disciplinary hearing officer, without which the disciplinary sanction was not supported by sufficient evidence.

Prisoners have a constitutionally protected liberty interest in good conduct time credits. *Wolff v. McDonnell*, 418 U.S. 539 (1974). To comport with due process, a decision to revoke good time credits must be supported by "some evidence" establishing a disciplinary violation. *Superintendent v. Hill*, 472 U.S. 445, 453-54 (1985). While minimally stringent, the "some evidence" standard must be based solely on reliable sources of information. NIK tests do not meet that standard—at least not as they were used here.

NIK tests are known to provide false positive results, they have no established error rate to assess their reliability, and they are not designed to test for the actual presence of controlled substances. Moreover, the tests conducted here were both performed incorrectly and interpreted incorrectly by an officer whose training and

expertise were never considered as part of the administrative record. Under these circumstances, the results should have been disregarded in the “some evidence” analysis. The district court erred by relying on the NIK tests, along with other sources of evidence, to uphold the disciplinary sanction.

Without considering the NIK test results, the remaining evidence could not satisfy the “some evidence” standard. The evidence established a link between Mr. Steffey and the suspect mail, but absent the NIK testing, neither the appearance of the paperwork nor any other circumstances warranted the conclusion that the paper contained a narcotic substance. If the suspect paper did not contain narcotics, then no violation occurred. Accordingly, the unreliability of the NIK tests invalidates the discipline.

In the alternative, the district court erred in denying discovery and an evidentiary for further factual development regarding the reliability of the NIK test results. The discovery requests were reasonably tailored to address the particular issues in this case, and, without discovery, Mr. Steffey was hampered in developing evidence needed to support his petition.

This Court should reverse the judgment of dismissal and remand this case to the district court for the grant of relief and for an order directing the Bureau of Prisons to expunge the disciplinary action and restore Mr. Steffey’s 41 days of good

conduct time credit. Alternatively, the Court should reverse and remand for discovery and an evidentiary hearing.

ARGUMENT

I. The District Court Erred In Denying Relief Because, Disregarding The Misleading And Unreliable NIK Test Results, The Remaining Evidence Failed To Establish A Disciplinary Violation.

In the district court, Mr. Steffey set forth substantial evidence and argument establishing that the NIK test results offered against him at his disciplinary hearing were unreliable. Neither the government, nor the magistrate judge, nor the district court judge offered any rebuttal to those contentions. Yet the court upheld the disciplinary sanction, asserting that the test results plus other sources evidence established "some evidence" to support the violation. This Court should reverse. Analytically, when evidence is unreliable, it is entitled to zero weight. It must be disregarded in its entirety, and it cannot be used to prop up other, more ambiguous evidence. In this case, the NIK test results were the only evidence specifically pointing to the presence of narcotics. Without those results, the disciplinary sanction against Mr. Steffey violated due process.

A. The "Some Evidence" Standard For Substantive Due Process Requires Reliable Evidence.

Prisoners have a constitutionally protected liberty interest in good conduct time credits. *Wolff v. McDonnell*, 418 U.S. 539 (1974). That interest cannot be

infringed without appropriate procedural protections and a sufficient quantum of proof. *Superintendent v. Hill*, 472 U.S. 445, 453-54 (1985). Substantively, the requirements of due process are satisfied only when the decision to revoke good time credits is supported by "some evidence." *Id.* at 455.

The "some evidence" standard articulated in *Hill* is not toothless. While the BOP has a strong interest in "avoiding burdensome administrative requirements that might be susceptible to manipulation" and in "act[ing] swiftly on the basis of evidence that might be insufficient in less exigent circumstances," *id.* at 455-56, those interests must be balanced against the prisoner's important liberty interest in good conduct time. A prisoner's loss of good conduct time credits "threatens his prospective freedom from confinement by extending the length of imprisonment." *Id.* at 445. Under the Administrative Procedures Act, applicable to the BOP, agency action cannot be arbitrary, capricious, or an abuse of discretion. *See Tablada*, 533 F.3d at 805 (citing 5 U.S.C. § 706(2)(A)).

Thus, "some evidence" does not mean "any evidence." *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987); *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987). Rather, the law is well established that evidence must bear "some indicia of reliability" to satisfy due process. *Castro v. Terhune*, 712 F.3d 1304, 1314 (9th Cir. 2013) (quoting *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990)); *Sira v.*

Morton, 380 F.3d 57, 82 (2d Cir. 2004) (due process requires an independent assessment of a confidential informant's credibility). When evidence is not shown to be reliable, the court must disregard that evidence to determine whether the disciplinary action is supported. *Broussard v. Johnson*, 253 F.3d 874, 877 (5th Cir. 2001) (disregarding informant's tip and holding that bolt cutters found in area where prisoner worked with others, standing alone, did not provide some evidence that the prisoner intended to escape).

B. NIK Tests Are Not Reliable Indicators Of The Presence Of Controlled Substances.

Although the magistrate judge in this case framed the question as a challenge to the lack of confirmatory testing, the real issue is whether the NIK tests themselves offered any reliable evidence that the hearing officer could consider. In other contexts, courts have required some indicia of reliability before permitting similar tests to be used as a basis for prison discipline. In *Spence v. Farrier*, for example, the Eighth Circuit considered the fact that urinalysis testing has a low margin of error before holding that it can be considered in prison disciplinary hearings: "Although it is conceivable that an inmate could be unjustly disciplined as a result of EMIT tests, *the margin of error is insignificant in light of institutional goals*." 807 F.2d 753, 756-57 (8th Cir. 1986) (emphasis added).

Case law confirms that, even under the "some evidence" standard, prison officials cannot blindly rely on unreliable testing procedures. *See, e.g.*, *Higgs v. Bland*, 888 F.2d 443, 449 (6th Cir. 1989) (noting that "a test which produced frequent incorrect results could fail to constitute 'some evidence' under the *Hill* standard"); *Henson v. U.S. Bureau of Prisons*, 213 F.3d 897, 898 (5th Cir. 2000) (denying claim that BOP must retest suspected marijuana pipe because the defendant had not shown "that the test is unreliable or that it was improperly administered"); *see also Peer v. Denham*, No. 15-CV-00754-GPG, 2015 WL 5579654, at *6 (D. Colo. Sept. 23, 2015) ("The Court recognizes that, in the context of a prison disciplinary hearing, prison officials generally are entitled to rely on institutional test results, such as the NIK field test, *absent any evidence of unreliability or irregularity in conducting the tests*." (emphasis added)).

Yet, chemical field tests like the NIK tests used here are not reliable indicators of the presence of controlled substances. NIK tests are generally understood to lack evidentiary value when used without a confirmatory laboratory test because they are merely screening tests that alert to the presence of a broad range of substances—both controlled substances and other substances that have a similar chemical structure to controlled substances. Thus, the tests produce a high rate of false positives. A 2016 investigation by ProPublica and The New York Times found that

chemical field tests “routinely” generate false positives. Ryan Gabrielson & Topher Sanders, *Busted*, PROPUBLICA (Jul 7, 2016), https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives. According to the reporting, “There are no established error rates for the field tests, in part because their accuracy varies so widely depending on who is using them and how.” *Id.* Anecdotally, the article indicates that a Florida laboratory found 21 percent of evidence police identified with field tests as methamphetamine was not methamphetamine. In Harris County, Texas, hundreds of drug convictions were determined to be wrongful after laboratory testing revealed faulty chemical tests. *Id.* Because of their unreliability, the Department of Justice prohibited the use of chemical field tests for evidentiary purposes in 1978. *Id.*

Even the Safariland manufacturer of NIK brand tests states that false positives are known to occur: “False positives are possible in field tests due to the limitations of the science, which is why we also clearly state in our training materials and instructions that they are not a substitute for laboratory testing.” Ryan Gabrielson, *Unreliable and Unchallenged*, PROPUBLICA (Oct. 28, 2016), https://www.propublica.org/article/unreliable-and-unchallenged). “In a trial or other criminal procedure setting . . . field tests should not be used as evidence of the presence, or lack thereof, of any substance.” *Id.*

The high incidence of false positives for NIK tests is partially due to the subjective nature of the tests and the high risk of user error, but it is also attributable to the fact that NIK tests are not intended to provide any evidence of the presence of controlled substances. NIK tests simply indicate the presence of chemical structures that exist within the same family of compounds. *Michel v. United States*, No. 16CV277-GPC(AGS), 2017 WL 4922831, at *3 (S.D. Cal. Oct. 31, 2017). These families can include both controlled and non-controlled substances. If the chemical reaction with a substance produces a color change, it means that the testing reagent has reacted with a similar chemical structure within the targeted family of compounds. According to the Safariland NIK test training materials, "all test results, positive or negative should be confirmed by the crime laboratory." *Id.* at *5 (internal citations omitted). The instructions direct users to "[a]lways retain sufficient sample of suspect material for evidential analysis by the forensic laboratory." *Id.* at *5.

In *People v. Chacon*, No. JCF36904 (Apr. 24, 2018) (Sup. Ct. Cal.), the Superior Court of California for Imperial County, after a thorough scientific review, concluded that NIK test results are not sufficiently reliable to be offered as evidence before the grand jury. Among other things, the court found that NIK test are not presumptive evidence of the presence of a controlled substance because they identify other substances as well. ER 45-46. "An unfortunate consequence of the term

'presumptive' in the legal system and in this case in particular is that its use created a false sense that an identification of a seized drug was made and that it was valid and accepted in the forensic science discipline of forensic chemistry; it's not." ER 46; *see also id.* at 48 (stating that, by the same logic, the NIK heroin test could be considered a presumptive test for chocolate and the NIK methamphetamine test could be a presumptive test for Equal sugar substitute, because those substances both trigger positive results).

The court found that the "only scientifically valid use" for NIK tests "is for assisting laboratory chemists evaluate a substance for more definitive testing." ER 46, 48. Accordingly, "[t]he NIK color testing methods fall far short of meeting minimum scientifically acceptable criteria" for identifying a controlled substance. ER 49. These limitations, the court noted, are "well known" to the manufacturer, Safariland, which has cautioned against using NIK tests in any criminal procedure setting:

> [F]ield tests are specifically not intended to be used as a factor in the decision to prosecute or convict a suspect, and our training materials and instructions make it clear that every test kit, whether positive or negative, should be confirmed by an independent laboratory. . . In a trial or other criminal procedure setting, field tests should not be used as evidence of the presence, or lack thereof, of any substance.

ER 51.

Because of how NIK tests work, the court determined that they are not reliable: "[C]olor drug identification testing by its inherent design is quite fallible, when a critical analysis and understanding of the reliability of the technique is understood." ER 52. The Court found that "The NIK test satisfies neither [the scientific or legal] definition of reliability." ER 47.

Case law and news reports amply support the *Chacon* analysis by establishing that NIK tests and other similar colorimetric field tests produce false positive results with regularity:

Case Reports

- In *Peer v. Denham*, No. 15-CV-00754-GPG, 2015 WL 5579654 (D. Colo. Sept. 23, 2015), a federal prisoner was disciplined for dietary supplements that tested "positive" for amphetamines with a NIK test. Based on confirmatory laboratory testing, "[c]ontrolled substances were not detected." *Id.* at *3.

- In *Terry v. Dep't of Pub. Safety & Corr. Servs.*, No. 11-CV-01686, 2012 WL 2564779 (D. Md. June 29, 2012), *aff'd sub nom. Terry v. Middleton*, 499 F. App'x 64 (4th Cir. 2012), a Maryland state prisoner was disciplined after correctional officers found a "black [tar like] substance wrapped in saran wrap" that the prisoner claimed was coffee. *Id.* at *1. The NIK field test "first change[d] to orange and then further change[d] from orange to brown" indicating a "positive" result for the presence of amphetamines. *Id.* The officer "ha[d] been trained and certified to perform NIK field tests since 2006, [and] averred that 'he followed the NIK kit directions.'" *Id.* Yet confirmatory testing found "[n]o [Controlled Dangerous Substances] Detected." *Id.* at *2.

- In *Blasirue v. Jones*, No. 1:16-cv-00288-TH-KFG (E.D. Tex.) (2017), an inmate lost 41 days good time credit after plant material in a package

around his neck yielded a "positive" result on a NIK test. However, confirmatory laboratory testing showed it was simply organic plant material, not controlled substances. The BOP expunged Blasirue's disciplinary violation and restored his good conduct time credit.

- In *Michel v. United States*, No. 16CV277-GPC(AGS), 2017 WL 4922831, (S.D. Cal. Oct. 31, 2017), Customs and Border Protection officers obtained a "positive" NarcoPouch result for methamphetamine from suspicious liquids that the plaintiff attempted to bring over the border. *Id.* at *2. She asserted that the liquid was "cuajo," a substance used to make cheese. *Id.* at *3. Later laboratory testing on the liquids was "negative for methamphetamine." *Id.* at *1.

- In *Fincher v. Monroe Cty. Bd. of Commissioners*, No. 5:18-CV-00424-TES, 2019 WL 510448, at *1 (M.D. Ga. Feb. 8, 2019), plaintiff Dasha Fincher spent 94 days in jail after being arrested for allegedly trafficking methamphetamines after a field drug test yielded a "positive" result. *Id.* The substance in question turned out to be nothing more than blue cotton candy, not controlled substances. *Id.* at *2.

- In *Jenkins v. Fed. Bureau of Prisons*, No. 2:17-CV-1951-AKK-JEO, 2018 WL 992057, at *1 (N.D. Ala. Jan. 11, 2018), *report and recommendation adopted*, No. 2:17-CV-1951-AKK-JEO, 2018 WL 985763 (N.D. Ala. Feb. 20, 2018), a federal prisoner was disciplined based on a "NIK" test performed on a piece of brown paper soaked in some substance, which was discovered during a random search of his cell. The prisoner claimed that the substance was merely Vaseline. Although the case does not report any confirmatory laboratory testing, the BOP later moved to expunge the disciplinary violation and restore the good conduct time credits, rendering the prisoner's § 2241 petition moot.

News Reports

- A woman was wrongfully jailed after a field drug test indicated a "positive" test result for crack cocaine; the actual substance—a small crumb of an over-the-counter pain relief medicine. Tim Cushing, *Field Drug Tests: The $2 Tool That Can Destroy Lives*, TECHDIRT (Jul 18,

2016), https://www.techdirt.com/articles/20160712/15543134951/field-drug-tests-2-tool-that-can-destroy-lives.shtml.

- A man received a settlement for an arrest predicated on a drug field test that indicated a "positive" result for methamphetamine; the actual substance—Krispy Kreme donut crumbs. Tim Cushing, *Man Gets $37,500 Payout After Field Drug Test Says Donut Crumbs Are Methamphetamines*, TECHDIRT (Oct 31, 2017), https://www.techdirt.com/articles/20171024/16042838475/man-gets-37500-payout-after-field-drug-test-says-donut-crumbs-are-methamphetamines.shtml.

- A man was arrested after a drug field test indicated a "positive" result for cocaine; the actual substance—drywall residue. Laurel Wamsley, *Florida Man Awarded $37,500 After Cops Mistake Glazed Doughnut Crumbs for Meth*, NPR: THE TWO WAY (Oct 16, 2017), https://www.npr.org/sections/thetwo-way/2017/10/16/558147669/florida-man-awarded-37-500-after-cops-mistake-glazed-doughnut-crumbs-for-meth.

- In August 2019, Georgia college football player Shai Werts was arrested after a substance on the hood of his car tested "positive" for cocaine. Confirmatory laboratory testing was conducted with the result: no controlled substances. Charges were dropped and the player was reinstated to the team after submitting to drug testing. Radley Balko, *Opinion: A Young Black Football Player Was Arrested After Claiming 'Cocaine' on His Car Was Bird Poop. It Was Bird Poop*, THE WASHINGTON POST (Aug. 9, 2019), https://www.washingtonpost.com/opinions/2019/08/09/young-black-football-player-was-arrested-after-claiming-cocaine-his-car-was-bird-poop-it-was-bird-poop/.

- A school resource officer tested suspiciously-packaged gumballs handed out on Halloween with a "positive" result for PCP. Confirmatory testing at the state crime lab determined the candy did not contain any controlled substances. Police explained the mistake as due to the unreliability of the test: "[F]alse positives can happen with sugar-laced items because of the chemical reaction." *'Suspicious' Candy Handed Out in Lake Stevens Did Not Contain PCP, Tests Confirm*, KING 5 NEWS (Nov. 1, 2019), https://www.king5.com/article/news/

local/lake-stevens-halloween-candy-preliminary-test-results-pcp/281-1897f704-8365-491d-bc8c-5345f899d6fd.

These are among countless nationwide reports of false positive field test results harming citizens and prisoners alike. Based on these examples, the NIK test results should have been excluded from consideration under the "some evidence" standard as the test is not designed to detect, nor is it a scientifically reliable means of detecting, the presence of any controlled substance.

In assessing whether NIK tests are sufficiently reliable for use at prison disciplinary proceedings, courts should also consider the administrative burden attendant on requiring confirmatory testing. *See, e.g.*, *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992) (retest not required for some evidence standard because of significant administrative burden). Confirmatory laboratory testing of disputed NIK test results would not place an undue administrative burden on the BOP. In fact, the BOP already requires such confirmation for all urine testing. *See* BOP Program Statement 6060.08*, Urine Surveillance and Narcotic Identification* at 5 (updated Mar. 8, 2001) (stating that the urinalysis contractor must screen samples and that "[a]n initial positive test [must be] confirmed by a second test before it is reported to the institution"). This despite the fact that urine testing methods are much more reliable than colorimetric field tests. *See Spence*, 807 F.2d at 756 (discussing error rate); *Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug*

Testing Programs, 69 Fed. Reg. 19673-01 (Apr. 13, 2004) (describing validation). Requiring identical laboratory confirmation of NIK screening tests as is required for urine screening tests would not be unduly burdensome nor would it unduly delay the exigencies of prison discipline.

Yet, by contrast to the careful procedures for urine testing, the program statement addressing narcotics identification does nothing to safeguard against arbitrary and erroneous deprivation of liberty interests. It states simply, "All lieutenants will be proficient in using the Narcotic Identification Kit and ordinarily are responsible for testing unknown substances." BOP Program Statement 6060.08 at 8. The policy does not state what tests shall be used, how those tests shall be stored, what training and certification is required to demonstrate "proficiency," and what procedures will be used to mitigate instances of false positives. It appears that the Bureau of Prisons regularly deprives prisoners of good conduct time credit, thereby lengthening their time in prison, based on a testing protocol known for its high rate of error, without even minimal procedures to ensure that the tests are conducted correctly and that questionable test results are subject to confirmation.

Because NIK tests are known to provide false positive results, have no established error rate to assess their reliability, and in fact are not designed to test for the actual presence of controlled substances, the NIK test results did not have

sufficient indicia of reliability and should have been excluded from consideration in the "some evidence" analysis.

C. The NIK Tests Were Not Performed In Conformance With The Manufacturer's Directions, And The Results Were Misinterpreted.

Even if NIK color tests were generally reliable for the identification of narcotics, which they are not, the results in this case should have been disregarded because the administrative record establishes that the tests were conducted in contravention of the manufacturer's instructions and the results were misinterpreted.

The testing instructions—as reflected in the SIS investigation report and Safariland manufacturing instructions—state that "it is important to classify the material" to be tested before testing can begin. ER 202; *see also* ER 58-59 (excerpt from NIK self-training course). The approved types of material are: tablets, capsules, powders, plant material, and suspected brown or black tar heroin. *Id.* The tests kits are not approved for testing paper. In fact, paper is only mentioned at all as a means for testing liquid, which the NIK tests are "not designed for." ER 65. When testing liquids, "[t]he choice of paper is critical." ER 65.

> Liquid samples - NIK tests are NOT designed for use with liquid samples. However, liquids may be tested by placing the tip of an [*sic*] NIK SUBSTANCE LOADING DEVICE or a 1cm square (roughly ½" square) piece of paper into the liquid. Remove and allow to air dry. Place the dry paper into the test pack and proceed with the test as

> instructed. *The choice of paper is critical.* Unscented, uncolored filter paper is ideal. NEVER use brown paper, hand towels or newsprint.

Id. (emphasis added).

Although the instructions do not explain why paper is not suitable for testing, the fact that NIK tests are not specific for controlled substances and have a high rate of false positives suggests that the problem is the risk of cross-contamination. Paper manufacturing involves a large number of chemicals, *see* https://en.wikipedia.org/wiki/Paper_chemicals (identifying 42 chemicals used in paper manufacturing), not to mention chemicals present in printer toner and ink, as well as other substances that paper comes in contact with in the ordinary course of its handling and mailing. The potential reaction of any of those substances with the NIK testing kits is unknown.

The undisputed facts here establish that the disciplinary action was based on a NIK test conducted on paper of unknown origin. The testing officer tested a small square cut from legal papers that had been sent from an unknown source through the postal service and that had been processed through the institution's mail processing room, offering numerous sources of potential contamination. There was no attempt to duplicate the result. Nor did the officer conduct a "control" test of the same type of paper from a different source to rule out the possibility that the paper itself causes

the same NIK test reaction. Because NIK tests are not authorized for use in that manner, and for good reason, the "positive" result obtained here was invalid.

Based on the administrative record, it is clear that SIS Technician Aguilar never told DHO Chetwood that the testing procedures contravened the manufacturer's express instructions, if Aguilar was even aware of that fact himself. Not only that, but it appears that Aguilar affirmatively misinterpreted the results of both Test A and Test U. ER 201. In the report, Aguilar stated that Test A's results—"an immediate orange rapidly turning brown color"—indicated Amphetamines. ER 201. Aguilar further stated that Test U's results—"an immediate dark burgundy color"—also indicated Amphetamines. ER 201. Aguilar interpreted the results together as "indicat[ing] a positive result for Amphetamines." ER 201.

The manufacturer's instructions refute that interpretation. Test A is a screening tests for "Amphetamine-Type compounds." ER 203. Not all amphetamine-type compounds are controlled substances. The class includes "a broad range of chemicals that contain amphetamine as a 'backbone,'" including "decongestants like ephedrine, among other subgroups." https://en.wikipedia.org/wiki/Amphetamine.

Test U, the follow-up test, is not even a test for amphetamine-type compounds. ER 201. The Test U instructions and the NIK self-training course

clearly state that Test U solely identifies the presence of methamphetamines or MDMA. ER 60-63, 203. In this case, the Test U pouch turned "dark burgundy," ER 201, which is the result expected when methamphetamine and MDMA are *not* present. ER 62 ("Test U will turn a burgundy color all by itself when the ampoules are broken with substance placed in the pouch. This is the nature of the chemicals."). The result did not indicate the presence of amphetamines.

In other words, Test A is not specific to any illegal substance, and Test U produced a negative result. Neither test indicated amphetamines specifically. By claiming that the tests both individually and together were positive for "Amphetamines," Aguilar' did not correctly report the results, further undermining the disciplinary action.

The multiple errors in the use and reliance on the NIK testing system in this case underscores the fact that the BOP has offered no evidence regarding the training or expertise of the personnel who are charged with conducting and interpreting the results of NIK chemical tests or the hearing officers who are charged with applying those results to infringe on prisoners' liberty interests. In other cases, courts have specifically considered the training and certification of the testing agent in upholding reliance on NIK test results. *Cf. Baker v. Lake*, No. 118CV01642SKOHC, 2019 WL 1455326, at *2 (E.D. Cal. Apr. 2, 2019), *recons. denied*, No. 118CV01642SKOHC,

2019 WL 2125458 (E.D. Cal. May 15, 2019). Here, SIS Technician Aguilar's training and expertise is not set out in either the administrative record or in the district court, and there is reason to question his expertise, given that he performed the tests incorrectly and misunderstood the results.

A chemical test that has been performed incorrectly and interpreted incorrectly by officers of unknown expertise does not have any "indicia of reliability." Here, the NIK test results were unreliable and should have been disregarded in their entirety in the "some evidence" analysis.

D. The Remaining Evidence Was Insufficient To Support The Disciplinary Violation.

Neither the magistrate judge nor the district court judge considered whether, without the NIK test results, the remaining evidence was sufficient to support the disciplinary sanction under the "some evidence" standard. In the Findings and Recommendation, the magistrate judge expressly included the test results in the equation:

> DHO Chetwood relied upon multiple sources of evidence to determine Petitioner violated prison rules: detailed communications between Petitioner and the supplier of the contraband which included a message from the supplier containing the exact tracking number of the s[e]ized envelope; photographs documenting the appearance of the papers in question *and evidencing the testing process*; *staff memoranda*; *the positive test results*; and statements from Petitioner confirming his relationship with the sender.

ER 75.

Excluding the invalid testing process and the unreliable results, the remaining sources of evidence were not specific to the presence of any controlled substance. This is not a case where a baggie with a powdery substance was exchanged in a hand-to-hand transaction or found near scales and packaging materials. This case involved legal paperwork. While it is true that the tracking number linked Mr. Steffey to the mail, the email correspondence referenced legal work, not drugs, and Mr. Steffey never denied that he knew the sender. The appearance of the paperwork—allegedly thick and discolored—likewise fails to point to the presence of a narcotic. Regardless of whether the paperwork appeared suspicious—which is difficult to discern from the photographs—it would take a leap of logic to conclude that it probably contained narcotics absent testing. Discolored legal paperwork is not "some evidence" of the introduction of narcotics.

If the suspect paper did not contain narcotics, then no violation occurred. Since the NIK test was the only evidence that the papers contained narcotics, the unreliability of the NIK test invalidates the disciplinary sanction.

II. The District Court Erred In Denying Mr. Steffey's Motion For Discovery And Denying Relief Without An Evidentiary Hearing.

In the alternative, if the Court finds that that further factual development is warranted, this Court should remand this case for discovery and for an evidentiary

hearing. In *Harris v. Nelson*, 394 U.S. 286, 299 (1969), a mandamus case, the Supreme Court held that the All Writs Act, 28 U.S.C. § 1651, confers on lower courts authority to order discovery when suitable to the proper disposition of a petition for habeas corpus under 28 U.S.C. § 2241. The All Writs Act empowers courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The purpose and function of the All Writs Act is "to supply the courts with the instruments needed to perform their duty, as prescribed by Congress and the Constitution[.]" *Harris*, 394 U.S. at 299-300 (citing *Price v. Johnston*, 334 U.S. 266, 269 (1948)).

In permitting discovery for habeas corpus proceedings, the Supreme Court emphasized the historic importance of the writ of habeas corpus, which is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris*, 394 U.S. at 291-92. The Court instructed that the writ must be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Id.* at 292. Because of its importance, the Court made clear that habeas petitioners "are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts." *Id.* at 298. And the Court noted the need for court intervention in this regard because "the petitioner, being in

custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition[.]" *Id.* at 292. Therefore, permitting discovery helps prevent habeas corpus proceedings from "founder[ing] in a 'procedural morass[.]'" *Id.* at 292 (quoting *Price v. Johnston*, 334 U.S. 266, 269 (1948)).

The Court in *Harris* held that, under the All Writs Act, district courts can "fashion appropriate modes of procedure" for discovery in habeas corpus proceedings "by analogy to existing rules or otherwise in conformity with judicial usage." The Court concluded:

> [I]n appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243.

394 U.S. at 290.

In this case, the district court erred in denying discovery. Each of Mr. Steffey's discovery requests, other than those related to his procedural due process claims, was reasonably fashioned to elicit facts related to whether the reliance on the NIK test results in this case adequately guarded against the erroneous deprivation of Mr. Steffey's liberty:

- Access to the suspect legal paperwork would have allowed Mr. Steffey to independently test the paper with reliable laboratory protocols, at his own expense, and would put to rest any question about the NIK test results in this case. Moreover, allowing petitioner's counsel and the district court to see the paper would have permitted independent assessment of the subjective claims that the paper felt unusually thick and appeared discolored, all with minimal administrative burden to the BOP.

- Bureau of Prisons training manuals and program statements regarding how the agency acquired, stored, and used NIK tests would have confirmed whether protocols ensuring reliability were in place and whether they were followed in this case.

- Records establishing SIS Technician Aguilar's NIK training would have helped ascertain whether Aguilar's errors in conducting the tests and reporting the results were intentional or inadvertent and whether Aguilar knew that the results lacked evidentiary value without confirmatory laboratory testing.

- Records regarding NIK testing at FCI Lompoc, including known false positive results, would have helped to ascertain the reliability of the results and the administrative burden of confirmatory laboratory testing.

The requests for discovery were not unreasonably broad or intrusive. The requests asked only for items that were directly relevant to the issues raised in this case, and they were only for items within the sole custody of the BOP that could not have been obtained by petitioner through other means. The requests were necessary to provide Mr. Steffey a full opportunity to present all of the facts relevant to his claim that the BOP disciplined him based on the result of a test that BOP staff knew or had reason to know was unreliable.

Moreover, the district court erred in denying Mr. Steffey's request for an evidentiary hearing, which would have permitted the reliability of the NIK test results to be fully litigated and for Mr. Steffey to adequately rebut the government's assertions that other sources of evidence supported the finding of a disciplinary violation.

Conclusion

This Court should reverse the judgment of dismissal and remand this case to the district court to grant the habeas corpus petition and issue an order directing the Bureau of Prisons to expunge the disciplinary action and restore Mr. Steffey's 41 days of good conduct time credit. In the alternative, the Court should reverse and remand this case for discovery and an evidentiary hearing.

Respectfully submitted this 5th day of August, 2020.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Petitioner-Appellant

STATEMENT OF RELATED CASES

I, Elizabeth G. Daily, undersigned counsel of record for petitioner-appellant, Billy Steffey, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

Dated this 5th day of August, 2020.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Petitioner-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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