

1 EXPEDITE

2 No hearing set.

Hearing set for:

3 Date: _____

Time: _____

4 Judge/Calendar: _____

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10 **SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY**

11 CLIFTON BELL, GREGORY HYDE,
12 GARRISON SCHRUM, and MATTHEW ROSS,
13 on behalf of themselves and all others similarly
situated,

14 Plaintiffs,

15 vs.

16 WASHINGTON STATE DEPARTMENT OF
17 CORRECTIONS, a state agency;

18 Defendant.

CLASS ACTION

NO.

CLASS COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND DAMAGES
(CORRECTED TO INCLUDE
EXHIBITS)

19 **I. PRELIMINARY STATEMENT**

20 1.1 This class action lawsuit challenges the Washington State Department of
21 Corrections' ("DOC") practice of using unreliable, "presumptive" drug tests on paper, mail, and
22 belongings, as a basis for imposing prison discipline. This discipline is being imposed despite the
23 tests' unreliability and manufacturers' warnings.

1 1.2 These types of initial and rapid tests are highly unreliable and intended to be used
2 as an initial screening test *only*. By refusing to corroborate allegedly positive results with
3 confirmatory laboratory testing as a matter of course for every test used, DOC has used these
4 tests in a manner directly contrary to the manufacturer’s instructions.

5 1.3 DOC uses these cheap and inaccurate single-use test kits to swab incarcerated
6 individuals’ incoming mail and other items, allegedly for the purpose of discovering whether
7 those items have illicit drugs on them. If the test shows what is called a “presumptive positive”
8 result, DOC imposes punishment without any confirmatory test. A presumptive test, in the
9 testing industry, refers to a preliminary screening test for substances. The test emphasizes speed
10 over accuracy. It is not supposed to be used, without laboratory confirmation, as evidence of the
11 presence or absence of drugs.

12 1.4 Under threat of litigation, DOC has claimed they will change their presumptive
13 testing policy. A copy of this correspondence between DOC leadership and Plaintiff’s counsel is
14 attached as Exhibit A. However, the proposed policy change is insufficient to prevent
15 punishment based on presumptive positive results, and it continues to fail to follow the
16 manufacturer’s instructions on these tests. Plaintiff’s counsel asked that DOC engage in
17 mediation to negotiate and resolve these issues out of court. DOC declined to do so.

18 1.5 DOC has proposed that the tests can still be used as a factor in imposing
19 punishment, if there is any other information to support discipline. However, in the prison
20 discipline context, little will change with this proposed policy. Incarcerated individuals at DOC
21 “do not have a right to cross examine witnesses, have reporting staff member(s) present at the
22 hearing, have a polygraph or other supplemental test(s), Examine physical evidence, or receive
23

1 confidential information...[or] be provided access to view video (evidence), nor have access to
2 audio from the offender phone system.”¹

3 1.6 DOC also claims it will allow individuals to request confirmatory testing, but
4 DOC has not made confirmatory testing mandatory, and has given no information on whether
5 individuals would be kept in solitary confinement while awaiting the result. Upon information
6 and belief, DOC continues to aggressively use these tests and impose immediate punishment
7 based on presumptive positive results.

8 1.7 While DOC claims they will examine discipline imposed for the last two years
9 and potentially expunge some discipline solely based on the tests, under threat of litigation and
10 without oversight, they refuse to expunge discipline where there is any other factor, like
11 confidential informant information as reported by corrections officers. DOC has also refused to
12 compensate those individuals DOC harmed as described below.

13 1.8 DOC frequently tests for a drug known colloquially as “Spice,” a catch-all term
14 for the class of substances called “synthetic cannabinoids.” These substances can be derived
15 from combinations of hundreds of different chemicals. DOC has been testing paper products and
16 other items its staff allegedly believe may have been sprayed with a liquid form of Spice that
17 could then be consumed in some fashion.

18 1.9 Upon information and belief, because the synthetic composition of Spice is so
19 varied and the compounds produced by manufacturers can change so rapidly, the test kits DOC
20 uses are not capable of accurately detecting Spice.² DOC also uses similar cheap test kits
21

22 1 This information is listed in DOC’s “Disciplinary Hearing Notice/Appearance Waiver” form under the section
23 “Offender Rights.” The form is available on DOC’s website here: <https://www.doc.wa.gov/docs/forms/05-093.pdf>
2 See, e.g., United Nations Office on Drugs and Crime, Recommended Methods for the Identification and Analysis
of Synthetic Cannabinoid Receptor Antagonists in Seized Materials, 2013, at 24,

1 designed to detect other substances, like narcotics or other drugs, including methamphetamine.
2 The test kits DOC uses are believed to be manufactured primarily by DetectaChem and MMC
3 International.

4 1.10 DOC has imposed the following punishments on individuals after using these
5 tests: months-long stints of solitary confinement; delayed release dates³ (which prolong
6 incarceration, costing taxpayers around \$174⁴ per day per person); transfers to facilities with
7 heightened restrictions, more dangerous conditions, and little out of cell time; loss or destruction
8 of mail or personal property; loss of work release or in-prison jobs; loss of access to recreation or
9 education; restrictions on phone use and electronic or written communications with others; and
10 loss of visitation with family and others.

11 1.11 DOC has stripped visitation rights and the ability to call or e-mail their loved ones
12 from family members and friends who have sent mail to incarcerated individuals that have tested
13 “presumptive positive” for Spice or other substances. Their names may remain on DOC records
14 as having introduced illicit substances into correctional institutions. Family members have no
15 right to challenge these findings or to obtain confirmatory testing.

16 1.12 Manufacturers’ warnings on some of these tests explicitly state that they may
17 return false positives, and that they must be verified by subsequent confirmatory laboratory
18 testing, before being used as evidence of the presence of drugs.

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21 https://www.unodc.org/documents/scientific/STNAR48_Synthetic_Cannabinoids_ENG.pdf (“The number and type
of substances vary considerably from sample to sample...Presumptive tests such as colour tests would not be
appropriate.”)

22 3 Incarcerated individuals can be released earlier due to good conduct in prison. This “good conduct” time can be
lost when individuals are disciplined, or infracted, by the prison. When individuals are disciplined by the prison,
their scheduled release dates can be pushed out further, lengthening their time in prison. See WAC 137-30-020.

23 4 See Department of Corrections Washington State, DOC Institutional Costs, Average Daily Population (ADP), and
Cost Per Incarcerated Individual Per Day, 2022, <https://www.doc.wa.gov/docs/publications/reports/200-RE019.pdf>
(average daily cost per incarcerated individual per day statistics).

1 1.13 Upon information and belief, these types of tests are also not designed to be
2 swabbed on paper or mail in the way that DOC is using them—they are only intended to be used
3 on substances like liquids, pills, or powders. Upon information and belief, common items like
4 paper or manila envelopes can falsely test positive, because the reagents in the tests can react to
5 trace chemicals commonly found on paper products, the same way they would react to the
6 chemicals used to create synthetic drugs.

7 1.14 DOC officials know, or should know, that similar test technologies have been
8 found unlawful or problematic in many settings. For example, in 2021, a Massachusetts court
9 enjoined the use of similar types of presumptive tests in prisons. Although the tests used were
10 manufactured by a different company, upon information and belief, they use the same
11 technology as the tests being used by DOC. The plaintiffs in that class lawsuit described the
12 accuracy rate (around 38% false positive) as “less accurate than witchcraft, phrenology, or
13 simply picking a number out of a hat.”⁵ The court agreed, halting their use, and concluding the
14 presumptive tests were “only marginally better than a coin flip[.]”⁶

15 1.15 DOC continues to use these unreliable tests, even though it knows or should know
16 the severe limitations of the tests.

17 1.16 DOC continues to use these tests even though, upon information and belief, items
18 that have tested “presumptive positive” include blank notebook paper and manila envelopes
19 purchased directly from DOC’s commissary or from DOC-approved vendors.
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23 ⁵ *Green et al. v. Massachusetts Department of Corrections* Complaint, <https://www.classaction.org/media/green-et-al-v-massachusetts-department-of-correction-et-al.pdf>.

⁶ Complaint, *Green v. Massachusetts Dep’t of Corrections*, 2184CV02283C, 2021 WL 6335670, at *1 (Mass. Super. Nov. 30, 2021). A copy of the Court’s Decision is included as Exhibit A, Attachment 1 to this complaint.

1 1.17 Upon information and belief, DOC staff members openly joke about the
2 inaccuracy of the tests and sometimes test common items in their possession to see if they will
3 test positive to amuse themselves.

4 1.18 Despite official policy limiting solitary confinement and public press statements
5 by DOC that solitary confinement causes “devastating” and “long-lasting” harm,⁷ DOC places
6 individuals whose mail or other items have tested so-called “presumptive positive” in solitary
7 confinement. Some are in solitary for months at a time.

8 1.19 Solitary confinement is most typically defined as single cell isolation in which a
9 prisoner is deprived of meaningful human contact for 20-24 hours per day. DOC calls this type
10 of placement by various names including: administrative segregation, the intensive management
11 unit, pre-hearing segregation, segregation, restrictive housing, and the intensive treatment unit.⁸
12 While there are some differences in these forms of solitary confinement, all involve time locked
13 in a cell alone and in isolation for at least 20 hours per day. Most forms of solitary confinement
14 allow the person so confined out of their cell just one hour per day. The international community
15 has recognized more than 15 consecutive days in solitary confinement for 22 hours or more per
16 day as torture.⁹

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20 7 Department of Corrections Washington State, Press Release: DOC Pledges to Drastically Reduce Use of Solitary
21 Confinement and Announces Closure of

22 Minimum-Security Prison, <https://www.doc.wa.gov/news/2023/06262023.htm>

23 8 See DOC Policy 320.200 (Administrative Segregation); DOC Policy 320.250 (Maximum Custody), DOC Policy
320.255 (Restrictive Housing); WAC 137-32-030.

9 United Nations Office on Drugs and Crime, The United Nations Standard Minimum Rules for the Treatment of
Prisoners (the Nelson Mandela Rules), 1, 13-14, https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf; see also, United Nations Human Rights Office of the High
Commissioner, United States: Prolonged solitary confinement amounts to psychological torture, says UN expert,
Feb. 28, 2020, <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture>

1 1.20 DOC’s official policy and administrative regulation on disciplinary segregation
2 (solitary confinement based on discipline) is that its usage is limited to 30 days,¹⁰ and prehearing
3 segregation (solitary confinement before a disciplinary hearing) is limited to three business
4 days.¹¹

5 1.21 However, DOC can choose to designate solitary confinement as “administrative
6 segregation” which is subject to no time limits by policy or DOC regulation.¹²

7 1.22 Plaintiff Gregory Hyde was placed in “administrative segregation” with only one
8 hour out of his cell per day for many months, while awaiting a hearing on a “presumptive
9 positive” drug infraction for crossword, word search, and sudoku puzzle books sent to him by his
10 elderly father and stepmother. While the allegedly drug-laced materials were later returned to
11 him, his discipline was not overturned.

12 1.23 In June 2023, Secretary of Corrections Cheryl Strange stated that “[t]he research
13 is clear on solitary confinement. It causes long-lasting harm. While it can be an effective way to
14 deter violence, spending prolonged periods of time in isolation has devastating effects on an
15 individual’s mental and physical health long after they leave our facilities.”¹³ In October 2021,
16 Mike Obenland, then Prisons Assistant Secretary, stated that “the data shows that the use of
17 disciplinary segregation has many shortcomings, including failing to improve negative
18 behavior.” At that same time, DOC’s Deputy Secretary Sean Murphy also stated that “DOC is
19 committed to safe and humane practices, where we address violent behavior when necessary, but
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21
22 10 WAC 137-28-280 (2)(a).

11 WAC 137-28-250 (3)(f).

12 WAC 137-28-190.

23 13 Department of Corrections Washington State, Press Release: *DOC Pledges to Drastically Reduce Use of Solitary Confinement and Announces Closure of Minimum-Security Prison*, <https://www.doc.wa.gov/news/2023/06262023.htm>

1 do not use segregation as a form of discipline.”¹⁴ Secretary Strange, Prisons Assistant Secretary
2 Obenland, and Deputy Secretary Murphy were directly made aware of Plaintiff Clifton Bell and
3 Gregory Hyde’s prolonged solitary confinement, by communication and correspondence from
4 Mr. Bell’s and Mr. Hyde’s loved ones sent to DOC leadership. DOC leadership did nothing.

5 1.24 DOC staff have unfettered discretion as to what items they test for drugs and
6 which individuals’ possessions are selected for testing. Upon information and belief, these tests
7 are sometimes used for retaliatory purposes.

8 1.25 The named Plaintiffs are currently or formerly in DOC custody. All of the
9 Plaintiffs have faced severe punishment after their mail or personal property tested “presumptive
10 positive” for drugs: including solitary confinement, loss of prison employment, destruction of
11 property, physical and emotional distress, loss of contact with loved ones, and more time in
12 prison through delayed release dates.

13 1.26 Defendant Department of Corrections used these tests and then punished Plaintiffs
14 when the tests on mail, personal items, or something in the incarcerated person’s vicinity
15 returned “presumptive positive” results. Defendant knew or should have known that these tests
16 often return false positive results.

17 1.27 Plaintiffs believe that DOC staff have treated numerous other individuals in a
18 similar fashion and that usage of these tests is widespread across every prison.

19 1.28 Every individual in DOC custody is in danger of being falsely accused, denied
20 due process, subjected to solitary confinement, held beyond planned release dates, losing their
21 in-prison employment, being banned from contacting loved ones as a result of these tests, and
22 potentially facing other inhumane consequences.

23

¹⁴ *Id.*

1 1.29 Defendant’s actions have caused individuals in DOC custody physical, emotional,
2 economic, and psychological injuries.

3 1.30 Defendant’s actions violate Article I, Section 14 of the Washington State
4 Constitution, which protects incarcerated individuals from cruel punishment. Defendant’s actions
5 also violate Article I, section 3 of the Washington Constitution, which provides the right to
6 procedural and substantive due process. Defendant has also committed the tort of outrage,
7 breached the State’s duty of care to keep individuals in their care in health and safety, and has
8 negligently and recklessly inflicted emotional distress upon Plaintiffs and those similarly
9 situated.

10 1.31 Defendant will continue to violate the rights of those in its care, absent injunctive
11 and declaratory relief as requested below.

12 1.32 Plaintiffs seek to certify a class of all individuals now held in DOC custody and
13 all individuals who will be held there in the future and ask the Court to grant declaratory and
14 injunctive relief that will end DOC’s unlawful policies and practices (“Plaintiff Injunctive
15 Class”).

16 1.33 Plaintiffs seek to certify a damages class of individuals currently or formerly in
17 DOC custody who have been punished over “presumptive positive” test results and who faced:
18 solitary confinement and/or loss of good time or postponement of release dates, loss of visitation
19 or loved one’s contact, and/or job loss and/or any other physical, economic, or emotional harms
20 due to these tests. (“Plaintiff Damages Class”).

1 **II. PARTIES**

2 **A. Named and Putative Class Plaintiffs**

3 2.1 Plaintiff Clifton Bell is an individual incarcerated at Clallam Bay Corrections
4 Center. He was incarcerated at Airway Heights Corrections Center during the events described
5 herein.

6 2.2 Plaintiff Garrison Schrum is an individual incarcerated at Cedar Creek
7 Corrections Center. He was incarcerated at Airway Heights Corrections Center during the events
8 described herein.

9 2.3 Plaintiff Gregory Hyde is an individual incarcerated at Monroe Correctional
10 Complex. He was incarcerated at Airway Heights Corrections Center during the events described
11 herein.

12 2.4 Plaintiff Matthew Ross is an individual formerly incarcerated at Airway Heights
13 Corrections Center. He was incarcerated at Airway Heights Corrections Center during the events
14 described herein.

15 2.5 Plaintiffs seek to represent a damages class of all people harmed by Defendant’s
16 actions using the tests described above (“Plaintiff Damages Class”), and an injunctive class of all
17 people in DOC custody and who could be in DOC custody in the future (“Plaintiff Injunctive
18 Class”).

19 **B. Defendant**

20 2.6 The Department of Corrections (DOC) operates and manages prison facilities
21 throughout Washington.

22 2.7 All actions described herein were taken or continue to be taken by DOC staff at
23 the explicit direction of Defendant or with its knowledge and consent.

1 5.1 The DOC operates twelve prisons throughout the State of Washington, at any
2 time housing more than 12,000 people.¹⁵

3 5.2 DOC staff at each prison screen and process incarcerated individuals' mail.¹⁶
4 They also conduct random or targeted cell searches of incarcerated individuals' possessions.¹⁷

5 5.3 DOC staff have used test kits on incarcerated individuals' incoming mail or other
6 items that include DetectaChem MobileDetect and other DetectaChem test kits. These test kits
7 involve drawing a swab across a surface believed to contain traces of drug residue, inserting the
8 swab into a test pouch containing a combination of chemical reagents, and waiting to see what
9 color the test strip may turn for a potentially positive reaction. At times corrections officers may
10 also cut up mail or possessions to test them. Some kits also come with a mobile app, the purpose
11 of which is to scan and clarify what "color" the test has turned.

12 5.4 Readily available online on its website, DetectaChem's Mobile Detect Operating
13 Manual¹⁸ states that confirmation of the test kit results is necessary:

- 14 • **Presumptive Detection:** It should also be noted that all results are presumptive in
15 nature. A positive detection indicates that a substance is presumed present and
16 proper procedure should be followed for collecting evidence for further testing
and confirmation with an accredited laboratory.
- 17 • **False Negatives/Positives:** As with any detection test, there is no guarantee that
18 positive results are ultimately defining. False negatives and positives can occur in
19 real-world testing. The National Institute of Justice has published reports of
colorimetric testing and what substances can test positive. As colorimetric

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21 15 Department of Corrections Washington State, Prison Facilities About Page,
<https://www.doc.wa.gov/corrections/incarceration/prisons/default.htm>

22 16 Department of Corrections Washington State, DOC Policy 450.100: Mail for Individuals in Prison,
<https://www.doc.wa.gov/information/policies/files/450100.pdf>

23 17 Department of Corrections Washington State, DOC Policy 420.320: Searches of Facilities,
<https://www.doc.wa.gov/information/policies/showFile.aspx?name=420320>

18 DetectaChem, MobileDetect Pouch Operating Manual: Presumptive Narcotic Analysis Test, 1, 9-10,
<https://www.detectachem.com/wp-content/uploads/2021/06/DetectaChem-MobileDetect-Pouch-Operating-Manual.pdf>.

1 reactions are intended, substances that contain the same basic reactant component
2 will generate a positive detection. These reactions are limited, but a forensic
3 laboratory should be used to identify and confirm unknown substances. False
4 negatives can occur due to improper swabbing, improper pouch operation, or even
5 substance differences.

6 5.5 A further use disclaimer in DetectaChem’s online manual states that “test results
7 are not guaranteed and color formed can vary with substance, amount, temperature, or other
8 external factors” and that “any screening result should be confirmed through the use of
9 confirmatory testing process.”¹⁹

10 5.6 DetectaChem’s user manual states no less than three times that false positives are
11 possible and that confirmatory testing is required to substantiate presumptive positive results.
12 Despite this, DOC does not, as a matter of course, use confirmatory testing to substantiate
13 presumptive positive results from DetectaChem kits.

14 5.7 DOC staff have also used MMC’s Phenethylamine Test Kit to test mail. Like the
15 DetectaChem kit, the MMC test kit is also a cheap test kit labeled as “presumptive.”²⁰

16 5.8 Law enforcement agencies, forensic experts, policymakers, and courts across the
17 country have been aware for decades that these “presumptive” tests do not provide conclusive
18 evidence of drugs.²¹ Additionally, the inaccuracy of these tests has widely been reported and

19 ¹⁹ *Id.* at 13-14.

20 ²⁰ MMC International B.V. MMC Narcotic Tests.Com, <https://www.mmcenter.com/> (website of MMC International).

21 ²¹ *See, e.g.,* Law Enforcement Standards Program, *Chemical Spot Test Kits for Preliminary Identification of Drugs of Abuse* (Dec. 1978) at 1, 2, <https://s3.documentcloud.org/documents/2939896/Ftstandards-Doj-1978.pdf> (DOJ standards from 1978 that color-test kits “should not be used for evidential purposes unless the results are verified by a qualified forensic scientist in a properly equipped crime laboratory.”); National Institute of Justice Law Enforcement and Corrections Standards and Testing Program, *Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse*, NIJ Standard-0604.01, 1, 7, <https://www.ojp.gov/pdffiles1/nij/183258.pdf> (National Institute of Justice standards saying each test kit should say it is for presumptive and not definitive identification and lab testing must follow); *California v. Randy Chacon*, Superior Court of California, County of Imperial, <http://www.ncstl.org/picture/1023> (prohibiting presumptive tests in grand jury proceedings); Exhibit A, Exhibit 1 (Massachusetts case prohibiting usage in Massachusetts prisons).

1 investigated by ProPublica, an independent nonprofit news organization.²²

2 5.9 Upon information and belief, DOC uses other cheap, colorimetric drug testing kits
3 produced by other companies. All such colorimetric tests are equally unreliable.

4 5.10 In 2019, DOC promulgated Policy 420.385 on “presumptive drug testing,” which
5 Plaintiffs’ infractions state as the relevant policy. However, the policy only refers to testing
6 unknown powdered substances or suspected drugs (e.g., pill form), and not suspected drug
7 residue on paper.²³ The policy is silent about any required rate of accuracy or what types of tests
8 are appropriate for use. The policy does not discuss confirming tests by laboratories. DOC, under
9 threat of litigation, has claimed this policy will be amended, to allow confirming tests “if
10 possible.” The new policy has not yet been published, although DOC later added an attachment
11 to the policy and its website, noting the policy change it planned to make, under threat of
12 litigation.

13 5.11 The Department of Corrections purportedly follows a disciplinary process under
14 WAC 137-28 and DOC policy 460.000 when an individual is accused of violating prison rules.
15 Allegedly “introducing or transferring any unauthorized drug or drug paraphernalia” (Violation
16 603) and “possessing, or receiving a positive test for use of, an unauthorized drug, alcohol, or
17 intoxicating substance” (Violation 752) are both considered serious infractions. The Plaintiffs
18 were each given either 603 violations or 752 violations.

19 5.12 Approved sanctions for violations under 603 or 752 include, but are not limited
20 to, 30 days of cell confinement (meaning solitary confinement in one’s cell, with only one hour
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22 _____
23 *22 Ryan Gabrielson, Roadside Drug Tests Used to Convict People Aren’t Particularly Accurate. Courts are
Beginning to Prevent Their Use, ProPublica, April 25, 2023 (discussing ProPublica’s investigations from 2016-
present).*

23 The Policy is attached to this Complaint as Exhibit B.

1 of out-of-cell-time permitted per day); loss of privileges such as commissary or recreation;
2 change in custody classification, which may entail transfer to a different prison; loss of good
3 time credit, meaning a longer sentence; up to 180-days' termination of phone, mail, and
4 electronic communication privileges; extra work duty; loss of visitation, and loss of in-prison
5 jobs or work release.²⁴ Time spent in pre-hearing confinement or administrative segregation is
6 not subtracted from any further solitary confinement imposed as a result of the disciplinary
7 hearing.

8 5.13 When individuals face lengthier periods of incarceration due to loss of good time,
9 it costs Washington taxpayers. DOC's daily cost to incarcerate an individual in a prison is about
10 \$173.61.²⁵ Anytime DOC lengthens an incarcerated person's prison sentence because DOC used
11 a test that was inaccurate, the taxpayers are likewise victimized.

12 5.14 A change in custody "classification," can occur right after a "presumptive
13 positive" test before a disciplinary hearing has been conducted. This means that individuals are
14 transferred from minimum security or medium security prisons where they have more freedom
15 of movement, more program opportunities, and more job opportunities, to highly restrictive close
16 custody facilities.

17 5.15 None of the plaintiffs were required to undergo urinalysis to determine if they
18 were abusing illicit drugs, despite the fact that DOC has unfettered discretion to force any
19 incarcerated person to undergo urinalysis at any time.

22 ²⁴ DOC's Disciplinary Sanction's Policy, DOC 460.050, is attached as Exhibit C to this Complaint. It details the
full panoply of discipline DOC imposes for infractions.

23 ²⁵ See Department of Corrections Washington State, DOC Institutional Costs, Average Daily Population (ADP),
and Cost Per Incarcerated Individual Per Day, 2022, <https://www.doc.wa.gov/docs/publications/reports/200-RE019.pdf> (average daily cost per incarcerated individual per day statistics).

1 5.16 None of the plaintiffs were offered substance use disorder evaluations or
2 treatment by DOC.

3 5.17 Some of the Plaintiffs were denied visitation and lost employment, even though
4 DOC's own policies recognize the importance of visitation and employment.²⁶ DOC's policies
5 recognize that employment significantly reduces recidivism.

6 5.18 Due to DOC's delays and failures to turn over public records relating to their
7 "presumptive" drug testing, a separate lawsuit over Public Records Act violations was filed in
8 Thurston County Superior Court on September 21, *Columbia Legal Services v. Department of*
9 *Corrections*, 23-2-03060-34.

10 5.19 On August 29, Plaintiffs sent a letter to DOC leadership in an attempt to avoid
11 filing this lawsuit. On September 7, DOC leadership claimed they would revise their policies, in
12 response to this threat of litigation, and provided a letter outlining the changes. On September 11,
13 and in a follow-up call with Tim Lang, attorney general for the Corrections Division, Plaintiffs'
14 counsel explained that DOC's changes were insufficient. Plaintiffs' counsel's proposal to try
15 mediation was refused. A copy of the initial exchanges between Plaintiffs and DOC leadership
16 are attached as Exhibit A.

17 **Facts Relating To Plaintiff Clifton Bell**

18 5.20 Clifton Bell was incarcerated at Airway Heights Corrections Center in 2022.

20 26 See Department of Corrections Washington State, DOC Policy 450.300 Visits for Incarcerated Individuals
21 <https://www.doc.wa.gov/information/policies/files/450300.pdf> ("The Department recognizes the vital role family
22 and friends play in providing meaningful connection during confinement and throughout the reentry process. The
23 Department will support incarcerated individuals in maintaining prosocial ties with family, friends, and the
community by engaging them and setting reasonable criteria for personal visits."); Department of Corrections
Washington State, Correctional Industries ("CI") Website,
<https://www.doc.wa.gov/corrections/programs/correctional-industries.htm#impact> ("stable employment is critical to
successful transition to the community...incarcerated individuals who participate in CI work programs were
significantly less likely to commit new offenses[.]")

1 5.21 On March 30, 2022, Investigators Joshua Largent and Josh Greene, officers at
2 Airway Heights Corrections Center, searched Mr. Bell’s cell and allegedly found a scrap piece of
3 paper near his shoe. They tested this piece of paper for synthetic cannabinoids (Spice). Upon
4 information and belief, the test kit used was DetectaChem’s Mobile Test Kit. The test allegedly
5 returned a “presumptive positive” result.

6 5.22 Due to this test result, Mr. Bell was issued an infraction on April 19, 2022 under
7 “WAC 603 for introduction and Transfer of Synthetic Cannabis/Spice.” Before the infraction
8 was issued, he was placed into administrative segregation, a term used for solitary confinement,
9 on the same day his cell was searched. He received one hour or less out of his cell per day and
10 was isolated from others.

11 5.23 After an infraction hearing on April 21, 2022, Mr. Bell was issued disciplinary
12 sanctions of 180 days suspension of visitation, 180 days of interruption, restriction, and
13 termination of all telephone communication, written correspondence, and electronic
14 communication, 180 days loss of recreation, 75 days loss of good conduct time, 180 days loss of
15 store (commissary), one year denial of attendance at special events, loss of privileges, a change
16 of housing, removal from waiting lists for work or programs, and he was permanently changed to
17 a more restrictive custody level. Mr. Bell spent months in solitary confinement.

18 5.24 Mr. Bell appealed his infraction and discipline on April 25, 2022, and he
19 specifically requested confirmatory testing from a lab. He also requested through public
20 disclosure laws more information about the test DOC used. In his appeal, he also protested that
21 with the loss of phone privileges, he had been cut off from the outside world – unable to speak to
22 an attorney or the Office of the Corrections Ombuds.

1 5.25 Mr. Bell’s infraction was upheld on internal DOC appeal on June 19, 2022. The
2 appeal decision stated: “On behalf of the Superintendent, I have investigated your appeal and
3 find that: Your use of public disclosure does not negate or stay the hearings process. You do not
4 have the right to have an outside lab conduct secondary testing. Testing was done in accordance
5 with Policy 420.385, Presumptive Drug Testing ‘You do not have a right to cross-examine
6 witnesses, have reporting staff members present at hearing, have a polygraph or other
7 supplemental tests.’ This includes lab testing.”

8 5.26 In addition to being placed in prolonged solitary confinement, Mr. Bell was told
9 he could not use the phone for 180 days. He was issued an infraction a month later for using the
10 phone to call the Ombuds office about a previously-filed Prison Rape Elimination Act (PREA)
11 complaint. He was found guilty for using the phone, and he was given additional sanctions,
12 which included losing the right to receive outside packages and 20 hours of extra work duty.

13 5.27 Because of the loss of good conduct time from the presumptive test infraction,
14 Mr. Bell’s time in prison was extended by 75 days.

15 5.28 A month after his first infraction, Mr. Bell was sent three greeting cards by a
16 loved one, Lyndsay Gardiner. Ms. Gardiner resides in England. The greeting cards were sent
17 directly from an online greeting card company in the United Kingdom, with headquarters and
18 printing facilities also in the United States, called Moonpig.²⁷ Moonpig is sometimes called the
19 “Amazon of Greeting Cards” in the United Kingdom for its prevalent usage. For a fee,
20 individuals can go on Moonpig’s website, upload photos, select a greeting card format, type a
21 message, and select the recipient’s address. Moonpig then prints and mails the greeting card to
22
23

²⁷MoonPig’s United States webpage is available here: <https://www.moonpig.com/us/>

1 the selected address. The individuals who pay for the card do not physically touch it. The cards
2 come direct from the company.

3 5.29 On April 25, 2022, DOC staff tested these three Moonpig greeting cards before
4 the cards were delivered to Mr. Bell. This was the same DOC staff who had previously tested the
5 piece of paper allegedly near Mr. Bell's shoe. DOC used a different presumptive test called the
6 MMC International Phenethylamines Test Kit. The cards tested "presumptive positive." Neither
7 Mr. Bell nor Ms. Gardiner had touched the cards. DOC levied a Serious Infraction against Mr.
8 Bell. DOC supported the infraction by claiming one or more confidential sources told DOC that
9 Mr. Bell was "working with his associate (Lyndsay Gardiner) in the UK to send a controlled
10 substance through the U.S. mail and was selling and transferring the substance to other I/Is."
11 DOC also used a recorded conversation between Ms. Gardiner and Mr. Bell to support the
12 infraction although the conversation was not in the least incriminating. These three factors
13 caused DOC to once again accuse Mr. Bell of "introducing or transferring any unauthorized drug
14 or drug paraphernalia" (Violation 603). .

15 5.30 Lyndsay Gardiner repeatedly provided evidence to various DOC officials that the
16 cards had been mailed directly from a company and could in no way contain sprayed drugs.
17 Jeffrey Uttecht, Deputy Assistant Secretary of Prisons East, eventually agreed to send the cards
18 for outside lab testing in June 2022, as confirmed in a letter to Ms. Gardiner. Cheryl Strange
19 (Secretary of DOC), Mike Obenland (Assistant Secretary of DOC), James Key (Airway Heights
20 Superintendent), and Mike Hathaway (Prisons Disciplinary Program Manager) were all cc'd on
21 Mr. Uttecht's letter. E-mails exchanged between multiple DOC staff members showed the
22 infraction was suspended, pending confirmatory lab testing.
23

1 5.31 When Plaintiffs’ counsel requested public records related to this infraction, DOC
2 public records officers did not initially provide the records – or acknowledge they even existed –
3 until counsel produced copies of documentation from Mr. Bell proving the records’ existence.
4 Only then did DOC provide limited information about the infraction to Plaintiffs’ counsel.

5 5.32 Plaintiff’s counsel were later able to obtain the lab test results of Mr. Bell’s cards
6 from the Washington State Patrol (WSP). Those test results showed no unlawful substances
7 present -- the “presumptive” test result was conclusively a false positive.

8 5.33 Mr. Bell was never provided with the results of the WSP confirmatory lab testing
9 on the greeting cards, and the results were not placed in his DOC file. However, his infraction
10 was cleared. Despite this, other notebooks important to Mr. Bell that he had in his possession
11 were seized while he was in solitary confinement and never returned to him, even months later.
12 All told, Mr. Bell spent about four months in solitary confinement.

13 5.34 In an August 3, 2022 e-mail between the hearings officer and DOC staff, the
14 hearing officer dismissed the hearing pending the WSP testing results, stating “that way this
15 infraction will not be holding this offenders [sic] classification up in the interim.” However, Mr.
16 Bell’s records from July 2022 indicate that he had already been recommended to be “demoted”
17 to maximum custody, and eventually was transferred to Clallam Bay Corrections Center, a more
18 restrictive facility, due to the “extended time frames” to get lab testing. This decision to place
19 Mr. Bell in more restrictive custody setting at a different prison was never reversed, even after
20 the WSP laboratory report found no evidence of drugs on the cards. He was therefore still
21 punished because of the false positive test results.

22 5.35 Despite DOC’s knowledge that the test kit on the greeting card had returned a
23 false positive, Mr. Bell’s prior infraction was not investigated further.

1 5.36 Although Secretary Strange and Mr. Obenland, Mr. Key, and Mr. Hathaway were
2 aware of the faulty test results with respect to Mr. Bell, they did nothing. Defendant continued to
3 use the same or similar testing kits on mail and possessions without ever seeking confirmatory
4 testing.

5 5.37 Mr. Bell remains at risk of being punished through the use of these same faulty
6 tests on any mail or personal items in his possession.

7 5.38 Mr. Bell lost 75 days of good conduct time because of the first infraction
8 described above and his release date was delayed. Upon information and belief, his release date
9 was January 19, 2024, and now it is April 19, 2024. Mr. Bell has suffered serious harm because
10 of the delay in his release date.

11 5.39 Mr. Bell suffered serious harm from being in solitary confinement for about four
12 months, personal property loss, transfer to a different prison, and from being cut off from outside
13 contact and phone privileges for six months.

14 **Facts Relating To Plaintiff Garrison Schrum**

15 5.40 Garrison Schrum was a minimum custody inmate incarcerated at Airway Heights
16 Corrections Center when Corrections Officers Deshazer and Maitland conducted a cell search in
17 June 2022. The search included a locker that had recently been assigned to Mr. Schrum. In their
18 search of the locker, the officers found some ripped scraps of paper that had been left by the
19 former occupant. Internal Investigations Unit (“IIU”) Officer Green tested the papers using the
20 DetectaChem Synthetic Cannabinoids Test Kit, and the papers allegedly tested “presumptive
21 positive.”

22 5.41 Mr. Schrum’s disciplinary hearing for the presumptive positive test was delayed
23 for months, from June 2022 until September 2022. Mr. Schrum was placed in the “Special

1 Management Unit” (SMU), a form of solitary confinement, for about two weeks during this time.
2 Two days before his September 1 hearing, Mr. Schrum submitted a Resolution Request
3 (grievance) to DOC asking that the pieces of paper be sent out for outside confirmatory testing.
4 His Resolution Request was refused. At his hearing and in other paperwork, Mr. Schrum
5 protested that he was innocent. He also asked for a urinalysis test to prove that he was not using
6 drugs, but DOC refused this as well.

7 5.42 At his September disciplinary hearing, Hearing Officer Donna Byrnes found Mr.
8 Schrum guilty of a 752 violation. His punishment included 30 days loss of good conduct time, 60
9 days loss of fee-based recreation, 20 hours of extra work duty, 60 days denial of outside mail
10 packages, and 30 days of additional solitary confinement to his cell. Mr. Schrum was also
11 demoted from minimum to medium custody and transferred to a more restrictive prison facility.
12 Because of this infraction, Mr. Schrum also lost the job he had within the prison, where he was
13 making about \$100/month. Mr. Schrum was expecting to soon start a new and better paying job
14 with the Department of Natural Resources ("DNR"), through a contract DOC has with DNR. Mr.
15 Schrum was ineligible for this job because of the infraction he received.

16 5.43 Mr. Schrum appealed his discipline on September 1, 2022. On October 19, 2022
17 his finding of guilt was upheld by Associate Superintendent Frank Rivera.

18 5.44 Mr. Schrum’s release date from prison was delayed for 30 days. After remaining
19 infraction free for a year after the infraction, Mr. Schrum may have received his good conduct
20 time back. However, upon information and belief, the infraction still remains on his record. He
21 remains in a more restrictive facility.

22 5.45 Mr. Schrum suffered serious harm from being in solitary confinement, from job
23 loss, and from loss of other privileges.

1 **Facts Relating To Plaintiff Gregory Hyde**

2 5.46 Gregory Hyde was incarcerated at Airway Height Corrections Center in May
3 2022, when his elderly father and stepmother mailed him multiple sudoku and word search
4 puzzle books, as well as contact information Mr. Hyde had asked for with his attorney's name on
5 it.

6 5.47 On May 12, 2022 DOC employees allegedly tested strips of paper cut from these
7 materials using the Mobile DetectaChem Test Kit for synthetic cannabinoids, according to an
8 infraction report authored by Joshua Greene. These strips of paper allegedly tested "presumptive
9 positive" for Spice.

10 5.48 Mr. Hyde was held in pre-hearing solitary confinement (solitary with only one
11 hour out of his cell per day) for nearly five months, allegedly for "investigation." Mr. Hyde
12 protested his placement in isolation by filing a Resolution Request. DOC avoided its own three-
13 day restriction by labeling this pre-hearing solitary confinement as "administrative segregation,"
14 in their response to Mr. Hyde.

15 5.49 At Mr. Hyde's disciplinary hearing, which was not conducted until July 13, 2022,
16 Mr. Hyde requested video evidence of the testing and mail confiscation, in-person testimony
17 from his father regarding the books he had mailed, and that the evidence be sent for confirmatory
18 lab testing. The hearing officer denied all these requests.

19 5.50 Mr. Hyde provided a list of questions to a corrections officer regarding the testing
20 of the mail and how the testing was conducted. The officer wrote back: "No---you do not have
21 the right to cross-examine witnesses/staff."

22 5.51 Mr. Hyde had also been subject to criticism by corrections officers and a hearing
23 officer in a prior infraction for trying to ask questions of witnesses. When he tried to send a

1 corrections officer a list of questions to answer in writing for an earlier hearing, the officer e-
2 mailed the hearings officer: “When did this become the process?.I’m not on a witness stand [.]”
3 The hearings officer appeared irritated at Mr. Hyde insisting on his due process rights and
4 replied:

5 Yes it is the process and has been in policy for a long time. We just haven’t seen a lot of
6 it here up until now. It goes in spurts. We have a couple of legal beagles that are pushing
7 it hard right now in a couple of the units. I am being told that they are being encouraged
8 by the OMBUDS to utilize this process that they have available to them as a resource. It
9 is really bogging us down as well, and I am also not thrilled with it...If you could get it
10 back to me as soon as possible, I can get this infraction closed out.

11 5.52 Although they were denied the opportunity to provide testimony at the hearing,
12 Mr. Hyde’s father and stepmother wrote to Department of Corrections officials on May 23, 2022
13 and June 6, 2022, maintaining their innocence. DOC continued to deny them any opportunity to
14 refute that they have been accused on record of mailing drugs disguised as commercially
15 available large print puzzle books to a prison. In his response letter to Ms. Harmon-Hyde dated
16 July 22, 2022, Deputy Assistant Secretary Jeffrey Uttecht indicated that DOC staff had told them
17 they could request public records copies, and that DOC had no other information. Mr. Hyde’s
18 father and stepmother were still denied the ability to submit witness statements or testify at Mr.
19 Hyde’s hearing.

20 5.53 Mr. Hyde was found guilty of a 603 violation after a hearing conducted by
21 Hearings Officer Don DeShazer. The discipline imposed was: 180 days suspended visitation, 180
22 days of restricted telephone communication, 180 days of loss of fee-based recreation, 75 days
23 loss of good conduct time, one year denial of attendance at special events, removal from waiting
lists for work and program assignments, and a review of his custody classification level.

5.54 During the disciplinary process, Mr. Hyde also filed an internal appeal requesting
the return of his rejected mail. Although DOC had upheld his infraction and punished him for

1 allegedly introducing drugs, the puzzle books that its staff had supposedly found to be laced with
2 drugs were returned to him through the mail rejection appeal process, with no explanation.

3 5.55 Although Plaintiffs' counsel requested public records for Mr. Hyde on October 3,
4 2022, portions of the records request remains pending as of the date of the filing of this
5 Complaint.

6 5.56 On July 25, 2022, Mr. Hyde was assigned to be transferred to a different facility
7 due to "drug distribution infraction behavior", even though his infraction appeal was still
8 pending at that time. Mr. Hyde was moved further away from his family, and he was also placed
9 in solitary confinement again after his transfer.

10 5.57 After an administrative appeal, Mr. Hyde's guilty finding and discipline were
11 upheld by Associate Superintendent Frank Rivera on September 15, 2022. In his infraction
12 appeal, Mr. Hyde noted that the mail materials alleged to have been drugs had been returned to
13 him, but this was not addressed by the Associate Superintendent.

14 5.58 Mr. Hyde suffered serious harm from being in solitary confinement, from being
15 transferred, from his loss of good conduct time, and from a loss of other privileges and phone
16 access.

17 **Facts Relating to Matthew Ross**

18 5.59 Matthew Ross was a minimum custody inmate incarcerated at Airway Heights
19 Corrections Center on November 2, 2022, when Corrections Officers Fournier and Maitland
20 conducted a cell search. The officers found a handwritten letter located in Mr. Ross' property
21 box.

22 5.60 Mr. Ross had received this letter months prior from his friend, a college librarian,
23

1 while he was incarcerated at the Washington State Penitentiary in Walla Walla. Mr. Ross
2 brought the letter with him when he was transferred to Airway Heights Corrections Center.

3 5.61 The letter was tested by IIU Officer Largent with a DetectaChem Mobile Detect
4 Test Kit. It allegedly tested “presumptively positive” for synthetic cannabinoids, according to
5 Officer Largent’s report.

6 5.62 At his disciplinary hearing on November 29, 2022, Mr. Ross asked for a copy of
7 the letter and photos of the test results or lab results, but he was told that he would not get copies
8 of evidence. Mr. Ross was ultimately found guilty of a 752 infraction for “possessing, or
9 receiving a positive test for use of an unauthorized drug, alcohol, or intoxicating substance.” The
10 hearing officer, Donna Byrnes, imposed 30 days confinement to his cell (a form of solitary
11 confinement), 90 days loss of fee-based recreation, 45 days loss of good conduct time, 40 hours
12 of extra work duty, and a six-month loss of monthly packages.

13 5.63 Mr. Ross filed an appeal on December 2, 2022. His appeal was denied on January
14 23, 2023 by Associate Superintendent Frank Rivera who wrote: “On behalf of the
15 Superintendent, I have investigated your appeal and find that: The letter was clearly addressed to
16 you and found in your possession. You are responsible for your possessions. It does not make
17 sense that someone would contaminate anything with Synthetic drugs and send it in to a prison
18 without the recipient knowing. Your hearing is an administrative hearing and not a court of law...
19 A positive test from the DetectaChem Mobile Detect Test Kit of Synthetic Cannabinoids. I
20 affirm WAC 752.”

21 5.64 Mr. Ross’s early release date was scheduled for September 2, 2023, but DOC
22 moved his release date to October 17, 2023 because of this infraction.

1 5.65 On August 15, 2023, another search was conducted of Mr. Ross’s cell. All his
2 paperwork was seized, including a stack of all his legal mail and representation documents from
3 Columbia Legal Services and one of his attorneys, Alison Bilow, which concerned this planned
4 case. He was later told that something hit “positive” in his papers, and that it was potentially his
5 legal paperwork that was sent by Columbia Legal Services.

6 5.66 Mr. Ross’s counsel, Amy Crewdson of Columbia Legal Services, and Tim Lang,
7 Attorney General for the Corrections Division, spoke on September 1, about Mr. Ross’s new
8 infraction. Ms. Crewdson sought clarification of whether Columbia Legal Services, a long
9 established nonprofit legal services organization, was now being accused by Washington State of
10 sending in drugged legal mail to its clients.

11 5.67 On September 6, Ms. Crewdson called Mr. Lang to follow up on the September 1
12 telephone call. Mr. Lang denied that Mr. Ross’s legal papers had been seized by DOC. Mr. Lang
13 sent an infraction report to Ms. Crewdson that same day. The report said that Corrections
14 Officers Fournier and Largent had seized papers from Mr. Ross’s cell that looked “suspicious.”
15 DOC tested two of those pieces of paper using the Mobile DetectaChem Test Kit and those
16 papers tested “presumptive positive” for “Spice.” Those pieces of paper were copies of Mr.
17 Ross’s immunization records and high school transcript that his mother had sent to DOC at
18 DOC’s request. Mr. Ross was told his release date would be pushed out further than October 17,
19 2023.

20 5.68 The immunization and school transcript papers that allegedly tested “presumptive
21 positive” had been in Mr. Ross’s possession for more than a year.

22 5.69 DOC abruptly decided to release Mr. Ross from prison on September 7.
23

EXHIBIT A



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August 29, 2023

Cheryl Strange, Secretary
Department of Corrections
7345 Linderson Way SW
Tumwater, WA 98501-6504

Sent via e-mail: Cheryl.strange@doc1.wa.gov
Doccorrespondenceunit@doc1.wa.gov
Tim.Lang@atg.wa.gov

Dear Secretary Strange:

We represent four men incarcerated in DOC prisons: Clifton Bell, Matthew Ross, Gregory Hyde, and Garrison Schrum. Our clients have suffered unfair and unlawful consequences, including solitary confinement, loss of visitation and family contact, delayed release dates, loss of jobs, and destruction of property, due to DOC's use of highly inaccurate presumptive drug tests on their mail or belongings. We have also been in contact with many other individuals harmed by these presumptive drug tests. The use of these tests as a basis for imposing discipline on incarcerated people violates their rights under the law. We demand that DOC immediately cease using these tests to impose discipline based on a presumptive positive result.

We intend to file a class action lawsuit no later than September 12 on behalf of our clients. We have previously filed tort claims with the Department of Enterprise Services, review of which was closed on August 27th. We write to request a meeting with DOC leadership, or their counsel, regarding the use of these tests, in the hope of resolving this matter without litigation.

Background

We are aware that DOC staff use colorimetric drug-testing kits to test mail and other paper surfaces for drugs, including "K2" or "spice," colloquial terms for synthetic cannabinoids in liquid form. The test kits DOC uses, which include kits manufactured by DetectaChem and MMC International, among others, can be purchased online for \$2-4 apiece. All such tests are designed to work similarly: The substance to be tested interacts with one or more chemical reagents, which change color based on the chemical makeup of the substance. If the resulting color corresponds to a compound used in an illicit drug, the test is "presumptive positive."



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for Equal Justice

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Wenatchee
300 Okanogan Ave, Suite 2A
Wenatchee, WA 98801
(800) 572-9615

Yakima
600 Larson Building
6 South Second Street
Yakima, WA 98901
(800) 631-1323

The types of test kits DOC uses are notoriously inaccurate, with an unacceptably high rate of both false positive and false negative results.¹ Because of the known risk of inaccurate results, manufacturers' warnings on many of these tests, including those known to be in use by DOC, explicitly state that presumptive results must be verified by more accurate laboratory testing before being used as evidence of the presence or absence of drugs.²

False positives are particularly common in the case of synthetic drugs, because these drugs can be made from a wide range of different chemicals, many of which have innocuous uses in everyday products, including use in paper products.³ False negatives are common because single-use test kits cannot test for all of the potential chemical components of synthetic drugs, of which there are dozens, and which drug manufacturers frequently change.⁴

Law enforcement agencies, forensics experts, policymakers, and courts across the country have been aware for years that presumptive tests do not provide conclusive evidence of the presence of drugs. In 1978, the U.S. Department of Justice published standards stating that color-test kits "should not be used for evidential purposes unless the results are verified by a qualified forensic scientist in a properly equipped crime laboratory."⁵ In 2017, the Houston Police Department ceased all use of presumptive roadside drug tests, following a *ProPublica* investigation that found hundreds of convictions made based on presumptive positive test results involved no illicit substances whatsoever.⁶ In 2018, an investigation team in Georgia found that over the course of one year, more than 140 people in the state had been charged

¹ For example, please see the judicial decision in the recent case, *Green et al. v. Massachusetts Department of Correction*. A copy of this decision is included as Attachment 1 to this letter. This case dealt with similar colorimetric tests on mail in the Massachusetts prison system.

² Detectachem's webpage links to the National Institute of Justice standardization for presumptive drug testing. The webpage is available here: <https://www.detectachem.com/product/synthetic-drug-test-cannabinoids/>. This standard recommends at page 7 that the kit state it "is intended to be used for presumptive identification purposes only, and that all substances tested should be subjected to more definitive examination by qualified scientists in a properly equipped crime laboratory." The standard, available here, <https://www.ojp.gov/pdffiles1/nij/183258.pdf>, is also included as Attachment 2 to this letter.

³ See, among hundreds of other examples, reported instances of bird droppings testing presumptive positive for cocaine, and doughnut crumbs and cotton candy testing presumptive positive for methamphetamine. Links to these articles are here: <https://www.fox5atlanta.com/news/georgia-southern-qb-says-false-positive-field-test-showed-bird-droppings-as-cocaine>; <https://www.cbsnews.com/news/man-arrested-after-doughnut-glaze-mistaken-for-meth-gets-settlement/>; <https://reason.com/2018/12/04/ga-leos-confuse-cotton-candy-for-meth/>

⁴ "The number and type of substances vary considerably from sample to sample.... Presumptive tests such as colour tests would not be appropriate." United Nations Office on Drugs and Crime, "Recommended Methods for the Identification and Analysis of Synthetic Cannabinoid Receptor Agonists in Seized Materials," p. 24 (2013), at https://www.unodc.org/documents/scientific/STNAR48_Synthetic_Cannabinoids_ENG.pdf.

⁵ Law Enforcement Standards Program, *Chemical Spot Test Kits for Preliminary Identification of Drugs of Abuse* (Dec. 1978) at 1, 2, <https://s3.documentcloud.org/documents/2939896/Ftstandards-Doj-1978.pdf>

⁶ *ProPublica's* reporting on these issues is available at the following links: <https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives> ; <https://www.propublica.org/article/houston-police-end-drug-tests-that-helped-produce-wrongful-convictions>

with felonies, and served jail time, based on presumptive drug test results that proved to be false positives.⁷

In 2021, a Massachusetts court granted a preliminary injunction to incarcerated plaintiffs, preventing the Massachusetts Department of Corrections from imposing *any* disciplinary or punitive measures based on the results of drug tests on mail that had not been confirmed by secondary laboratory testing.⁸ The court noted that the Department's own tests revealed that their drug tests returned a false result 38% of the time - an accuracy rate that the plaintiffs described as "less accurate than witchcraft, phrenology, or simply picking a number out of a hat," and the court characterized these tests as a "only marginally better than a coin flip."⁹

The Washington State Department of Corrections has been made aware of the risk of false positives even more recently. In 2022, a friend of Clifton Bell used Moonpig, a UK-based personalized greeting card service, to send him greeting cards. The cards were mailed directly by Moonpig, a third-party company, and neither Mr. Bell nor his correspondent ever handled the cards. Prison staff tested the cards, and the cards tested presumptively positive for drugs. Mr. Bell's correspondent was able, over the course of a month of emails to top officials at DOC, to convince DOC to send the cards for confirmatory lab testing. Records obtained by Columbia Legal Services from the Washington State Patrol show that confirmatory testing revealed a false positive. Mr. Bell's infraction was suspended, though he was never shown the results of the testing and DOC did not place the results in his file.

Despite being aware that the presumptive positive result was false, top officials at DOC did nothing to change policies, suspend any other discipline, or seek confirmatory testing of any other person's presumptive positive result following this incident.

DOC continues to use these tests and continues to punish people based on presumptive positive results.

Consequences of presumptive positive test results

Clifton Bell, Garrison Schrum, Gregory Hyde, and Matthew Ross all faced extreme consequences over items that tested presumptive positive (items that included scraps of paper, mailed sudoku and crossword puzzle books from elderly family members, and a handwritten letter from a college librarian). All told, our clients faced months in solitary confinement, delays in release from custody due to a loss of more than 200 days of good conduct time, emotional distress and other harms, job loss, visitation loss, and restrictions from contacting their loved ones.

⁷ Randy Travis, Fox 5 Atlanta, *Look How Often Field Drug Tests Send Innocent Georgians to Jail* (Oct. 29, 2018), <https://www.fox5atlanta.com/news/look-how-often-field-drug-tests-send-innocent-georgians-to-jail>

⁸ A copy of the complaint in *Green et al v. Massachusetts Department of Corrections* is available here: <https://www.classaction.org/media/green-et-al-v-massachusetts-department-of-correction-et-al.pdf>

⁹ *Id.* at 1; Attachment 1 at page 8 (court decision).

DOC officials have made clear their stance on the harms of solitary confinement: Secretary Cheryl Strange said in June of this year that “[t]he research is clear on solitary confinement. It causes long-lasting harm... [S]pending prolonged periods of time in isolation has devastating effects on an individual’s mental and physical health long after they leave our facilities.”¹⁰

DOC’s own policy on visitation “recognizes the vital role family and friends play in providing meaningful connection during confinement and throughout the reentry process.”¹¹

DOC incarcerates people at an average cost of \$174 per person, per day.¹² Every additional day a person spends in prison because of a loss of good time following a presumptive positive test result represents a significant cost to taxpayers based on tests that are “less accurate than witchcraft.”

Despite this, all of these men, and countless others in DOC custody, have been held in solitary confinement, denied connections with their families and loved ones, and had their sentences extended at taxpayer cost based on the results of tests that DOC knows are unreliable.¹³

Requested action to resolve this matter

Columbia Legal Services requests a meeting with DOC leadership and/or the Attorney General’s Office to discuss immediate changes to DOC policies and practices concerning use of presumptive tests as a basis for discipline and to discuss monetary relief for those harmed by these tests. We intend to file a lawsuit on September 12, 2023 seeking relief on behalf of our four clients. We will also seek to certify a class to obtain relief for anyone else who has been subject to discipline on the basis of presumptive positive results. Finally, we will seek to permanently enjoin DOC’s use of these tests.

If DOC would like to resolve this matter without litigation, please contact us by September 10. You can contact Alison Bilow at Alison.Bilow@Columbialegal.org. If we do not hear from you by September 10, we will proceed to file.

¹⁰ DOC Press Release: *DOC Pledges to Drastically Reduce Use of Solitary Confinement and Announces Closure of Minimum-Security Prison*, available here: <https://www.doc.wa.gov/news/2023/06262023.htm>

¹¹ DOC Policy 450.300, “Visits for Incarcerated Individuals,” available at <https://www.doc.wa.gov/information/policies/files/450300.pdf>

¹² DOC Publication: *FY2022 Cost per Incarcerated Individual per Day -- All Institution Costs*, available at <https://www.doc.wa.gov/docs/publications/reports/200-RE019.pdf>

¹³ Though people in prisons face the harshest consequences, family members and loved ones on the outside are also punished when their mail tests presumptively positive for drugs. People like Mr. Hyde’s elderly father and stepmother have no right to contest DOC’s findings that they are guilty of introducing drugs into DOC facilities, a potential felony. Any secondary testing done at their request is at DOC’s sole discretion. They, too, suffer from the loss of contact with their loved ones inside.

Sincerely,

COLUMBIA LEGAL SERVICES

Alison Bilow, WSBA No. 49823
Amy Crewdson, WSBA No. 9468
Sarah Nagy, WSBA No. 52806

Attachments

Attachment 1: Copy of Decision in *Green et al. v. Massachusetts Department of Corrections*

Attachment 2: Copy of National Institute of Justice Standard 0604.01 *Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse*

ATTACHMENT 1

NOTIFY

Green v. Massachusetts Department of Correction, et al.¹

Suffolk Superior Court Action No. 2184CV02283-C

Memorandum of Decision and Order Regarding Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry No. 3), and Defendants' Motion to Stay (Docket Entry No. 12).

Procedural Background

This is a putative class action filed by two individuals who are, or previously were, incarcerated in correctional facilities operated by defendant Massachusetts Department of Correction ("DOC" or, collectively with Commissioner Carol Mici, "Defendants"). Plaintiff Julian Green ("Mr. Green") currently is incarcerated at DOC's MCI-Norfolk facility. Plaintiff Eugene Ivey ("Mr. Ivey" or, collectively with Mr. Green, "Plaintiffs") previously was incarcerated at DOC's Northeastern Correctional Center, but was released on parole in August 2021. Plaintiffs allege that they and other incarcerated persons have been deprived of their due process rights and right to counsel by DOC's use of the NARK 20023 chemical test (the "NARK II Test" or just the "Test") -- which Plaintiffs describe as a "highly inaccurate" and "unreliable" field drug test -- to purportedly detect the presence of illegal "synthetic cannabinoids" on incoming mail from incarcerated individuals' legal counsel (hereinafter "legal mail" or "privileged mail"). According to Plaintiffs, DOC uses a positive result from a NARK II Test as the *sole* basis for imposing punishment upon incarcerated individuals and for actually (or effectively) denying them access to their privileged mail. Plaintiffs have asserted claims under the Massachusetts Civil Rights Act, G.L. c. 12, § 11I (the "MCRA"), and for declaratory relief.

DOC, for its part, generally admits using the NARK II Test as alleged by Plaintiffs, and further admits that it does not really know how reliable the Test is or how frequently it generates inaccurate results.² Nevertheless, Defendants deny any wrongdoing or unlawful infringement of Plaintiffs' rights.

Plaintiffs filed their Complaint in this case on October 5, 2021. See Docket Entry No. 1. Plaintiffs' Complaint was accompanied by a Motion for Temporary Restraining Order and Preliminary Injunction (the "P.I. Motion"). See Docket Entry No. 3. By means of the

¹ The other defendant identified in Plaintiffs' Class Complaint is Carol Mici, the Commissioner of the Massachusetts Department of Correction, in her official capacity. See Class Complaint (the "Complaint," Docket Entry No. 1).

² Counsel for DOC initially suggested at the hearing on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction that DOC has stopped using the NARK II Test as the sole basis for imposing punishment upon incarcerated persons housed in its facilities, and for denying them access to their privileged mail. Upon further questioning by the Court, that suggestion proved to be chimeric.

NOTICE
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P.I. Motion, Plaintiffs seek a court order preliminarily enjoining DOC from “imposing any punitive, disciplinary, or other measures against incarcerated people” based on “positive” NARK II Test results obtained from their privileged mail. Defendants have submitted a written opposition to Plaintiffs’ P.I. Motion, along with an affidavit and various other materials. Defendants also have filed a Motion to Stay this action while a parallel federal court action that Plaintiffs recently commenced against Sirchie Acquisition Co. LLC (“Sirchie”), the manufacturer and distributor of the NARK II Test, to which Defendants are not parties, is litigated.³ See Docket Entry No. 12. Plaintiffs oppose Defendants’ Motion to Stay. All parties have thoroughly briefed the question of whether a preliminary injunction and/or a stay should issue.

The Court conducted a hearing on Plaintiffs’ Motion on October 20, 2021. Upon consideration of the written submissions and the oral arguments of the parties, the Court will **ALLOW** Plaintiffs’ P.I. Motion and **DENY** Defendants’ Motion to Stay for the reasons summarized, briefly, below.

The Facts

The following facts, most of which are undisputed, are taken from the allegations contained in Plaintiffs’ Complaint, the affidavits and other written materials submitted by the parties, and the admissions made by counsel during oral argument. See *Doe v. Superintendent of Schools of Weston*, 461 Mass. 159, 160 (2011) (recounting facts taken from plaintiff’s complaint and attached exhibits in reviewing trial court’s decision on preliminary injunction motion).

The transportation of illegal drugs into prisons and other correctional institutions operated by DOC presents a “major security concern.” See Defendants’ Opposition to Plaintiffs’ Motion for Restraining Order and Preliminary Injunction and In Support of Defendants’ Motion to Stay (“Defendants’ Opp.,” Docket Entry No. 13) at 4. According to DOC, it “has seen a dramatic increase in attempts to introduce illicit substances” into DOC facilities “through fraudulent legal mail.” Affidavit of Timothy Gotovich (“Gotovich Aff.”), ¶ 6. Some of the “illicit substances” of particular concern to DOC are “synthetic cannabinoids,” which are a type of “unregulated, mind-altering substance that can be found in many forms,” including as a liquid that can be “sprayed onto ... [a] mail article (e.g. paper documents) in the effort to absorb the illicit substance into the paper to be smoked.” *Id.*, Exhibit B

³ Defendants initially were parties to the parallel federal court action, captioned *Green v. Sirchie Acquisition Co. LLC*, Case No. 1:21-cv-11504-GAO (the “Related Federal Action”), but were voluntarily dismissed from that case by Plaintiffs on October 4, 2021, after Sirchie removed the case to federal court from Massachusetts Superior Court, where it originally was filed. Plaintiffs commenced this separate Superior Court case solely against Defendants the following day.

(DOC internal bulletin titled "Illicit Substance Introductions (Legal and Non-Legal Mail)," disseminated December 8, 2020) at 1.⁴

Since at least 2018, DOC has used colorimetric NARK II Tests manufactured by Sirchie to purportedly detect synthetic cannabinoids on mail sent by attorneys and other legal professionals to their incarcerated clients at DOC facilities around the Commonwealth.⁵ The NARK II Test, however, is "merely presumptive." See Plaintiffs' Consolidated Reply ("Plaintiffs' Reply," Docket Entry No. 22), Exhibit A (Memorandum in Support of Sirchie's Motion to Dismiss in Related Federal Action) at 4. As plainly stated by Sirchie on the NARK II Test product packaging,

NARK only tests for the *possible* presence of certain chemical compounds. Reactions may occur with, and such compounds can be found in, both legal and illegal products.

Id. (emphasis added). Accordingly, Sirchie expressly warns that "ALL [NARK II] TEST RESULTS MUST BE CONFIRMED BY AN APPROVED ANALYTICAL LABORATORY!" *Id.* (emphasis in original).

DOC uses the NARK II Test to test incoming legal mail in a manner different than that recommended by Sirchie, the test manufacturer. When the DOC receives legal mail addressed to an incarcerated person, an Inner Perimeter Security Officer or other DOC employee ("CO") brings the mail to the person to whom it is addressed. Declaration of Ellen Leonida ("Leonida Decl."), ¶ 5(d); Declaration of Eugene Ivey ("Ivey Decl."), ¶ 7. Before the CO permits the incarcerated person to receive the mail item, he or she requires the incarcerated person to confirm, in writing, that the incarcerated person is willing to accept the item. *Id.* Assuming the incarcerated person agrees to accept the mail item, the CO opens the item in the incarcerated person's presence. *Id.* If the CO finds the mail item to be "suspicious" for any reason, the CO will take away the item for field testing using the NARK II Test. *Id.* If the NARK Test returns a "positive" result, DOC confiscates the mail item and imposes immediate punitive measures on the incarcerated person to whom the mail was addressed, notwithstanding the lack of a confirmatory lab test. Leonida Decl., ¶¶ 5(e)-(h); Ivey Decl., ¶¶ 9-11; Declaration of Rebecca A. Jacobstein ("Jacobstein Decl."), ¶¶ 10-12. The immediate punitive measures imposed by DOC include, among other things, placement of the incarcerated person in solitary confinement or a restrictive housing unit ("RHU"), curtailment of the person's eligibility for parole or transfer, limitations on the person's ability to communicate with his or her attorneys and

⁴ The Gotovich Affidavit can be found appended to Defendants' Opp. as Exhibit 6.

⁵ A colorimetric test uses "reagents ... that are intended to react with a specific molecular group found in the target drug, producing a specific color or pattern of colors from which a presumptive positive identification may be inferred." Declaration of Professor Heather L. Harris ("Harris Decl."), ¶ 11.

family members, and termination of the person's ability to hold a job or participate in educational and other programming. Leonida Decl., ¶¶ 5(f)-(h); Ivey Decl., ¶¶ 10-12; Jacobstein Decl., ¶¶ 10-12. DOC keeps the punitive measures in place until a confirmatory test can be conducted by an analytical laboratory, which often takes months. Leonida Decl., ¶¶ 5(g)-(i); Jacobstein Decl., ¶¶ 11-12.

Plaintiffs have alleged, with substantial evidentiary support, that the NARK II Test, even when used properly, returns an extremely high rate of false positive test results. According to data produced by DOC in response to a Public Records Act request, at least 122 items tested by DOC personnel between July 2019 and March 2021, which had tested positive for synthetic cannabinoids using the NARK II Test, proved not to contain any illicit substances when eventually subjected to a confirmatory lab test. Declaration of Eric Schlabs ("Schlabs Decl."), Exhibit E. Converting this data into a precise *rate* of false positive test results is difficult to do because DOC did not include information concerning the total confirmatory test population for the corresponding time period in its response, and DOC itself admits that it does not, in fact, know the actual rate of false positive results generated by the NARK II Test. Other, more limited data provided by DOC, however, indicates that confirmatory laboratory testing of suspected legal mail conducted in the August 2019 to August 2020 time period reveals that DOC's positive drug field tests during that period (presumably obtained using the NARK II Test) were accurate only sixty-two percent (62%) of the time.⁶ Gotovich Aff., Exhibit B at 7. Or, put another way, the limited data provided by DOC for the August 2019 to August 2020 time period reveals that DOC's field tests during that period had a false positive rate of approximately thirty-eight percent (38%). *Id.* For perspective, that false positive rate is more than *three times* the maximum false positive rate DOC itself said would be acceptable when it issued its official "Request for Response," by which it first began purchasing the NARK II Test in 2017. Schlabs Decl., Exhibit A (DOC Request for Response for "Drug Testing Materials, Services and Supplies," issued May 5, 2017, at 8 ("False positives exceeding 10% will result in contract termination.")).

The high false positive rate associated with the NARK II Test is attributable to a number of factors, including the fact that some of the hundreds of different types of synthetic cannabinoids are structurally similar to chemical compounds that can be found in many common, innocuous products, such as commercial inks and other chemicals found in and on paper. Harris Decl., ¶ 12. The large number of different types of synthetic cannabinoids also means that the NARK II Test, which purports to detect only eight synthetic cannabinoid formulas, is incapable of detecting the most common types of synthetic cannabinoids in circulation over the last five years. *Id.*, ¶¶ 19-23. Indeed,

⁶ The Gotovich Affidavit states that "DOC currently uses the NARK [II] test as a field test." Gotovich Affidavit, ¶ 8.

Plaintiffs have submitted evidence, which has not been rebutted or even addressed by DOC, that the NARK II Test detects *none* of the fifteen most common synthetic cannabinoid formulations in circulation as of 2019-2020. Schlabs Decl., Exhibit G (National Forensic Laboratory Information System reports identifying most common synthetic cannabinoids from 2016 to 2020).

Sirchie, in the Related Federal Action, has been critical of the manner in which DOC currently uses the results of its NARK II Test to make disciplinary decisions involving incarcerated persons. In moving to dismiss Plaintiffs' claims in that proceeding, Sirchie stated,

[i]t is undisputed that the DOC received [Sirchie's] documentation and warnings of the presumptive nature of the NARK II Test Kit. On this basis alone, it is clear that the superseding cause of Plaintiffs' alleged harm was the alleged failure of the DOC to acknowledge the presumptive nature of the NARK II Test Kit and/or follow the written instructions directing laboratory confirmation of any results obtained from the NARK II Test Kit.

Plaintiffs' Reply at 13.

DOC's ongoing practice of using questionable field test results obtained from the NARK II Test to impose immediate punitive measures on incarcerated persons and to deny them access to their legal correspondence has an adverse impact not only on the particular individuals who are punished, but also on other incarcerated persons who know of DOC's practice and live in fear that they may be subject to unjustified punishment if they accept incoming legal mail that falsely tests positive for synthetic cannabinoids. As a result, many incarcerated people are either refusing to sign for their incoming mail, or are directing their legal counsel not to send any mail into DOC facilities. Leonida Decl., ¶ 6; Ivey Decl., ¶ 15; Jacobstein Decl., ¶ 10. Thus, the net effect of DOC's continuing use of the NARK II Test is to both subject a significant number of incarcerated persons to unwarranted punishment, and to broadly chill and inhibit the rights and ability of all incarcerated person within DOC facilities to meaningfully participate in their own legal defense.

Plaintiffs' Related Federal Action against Sirchie remains pending. Defendants acknowledge that the reliability (or unreliability) of Sirchie's NARK II Test is a "central allegation" in this action, but claim that "[a]ll of the documents and data relating to the reliability of the NARK [II] test ... are in the possession of Sirchie" and may not be accessible in this case. Defendants' Opp. at 22-23. Defendants also claim that allowing this action to go forward, while the Related Federal Action is pending, "is a waste of

judicial resources and has the potential to lead to conflicting results.” *Id.* at 23. On these grounds, Defendants request that the Court stay this action, in its entirety, “until such time as [the Related Federal Action] is decided.” Defendants’ Motion to Stay at 1.

Discussion

The Court first addresses whether a stay of this action is appropriate. The Court then turns to the question of whether Plaintiffs are entitled to the preliminary injunctive relief they seek.

I. Defendants’ Motion to Stay.

“[A] motion to stay proceedings is ordinarily a matter addressed to the sound discretion of the trial judge.” *Travenol Laboratories, Inc. v. Zotal, Ltd.*, 394 Mass. 95, 97 (1985) (“*Travenol*”). Where two related lawsuits overlap only in part, the question of whether to stay one action in favor of the other must take into account all the relevant circumstances, including “the extent of overlap, the likelihood of conflict, the comparative advantage and the interest of each forum in resolving the dispute.” *TPM Holdings, Inc. v. Intra-Gold Industries, Inc.*, 91 F.3d 1, 4 (1st Cir. 1996). A stay is not justified, however, where “[t]here is no commonality of parties and interests between the two cases.” *State Farm Fire & Casualty Co. v. Brown*, 2009 WL 10690016, at *2 (D. Conn. Nov. 4, 2009). See also *Bandit Industries, Inc. v. Woodsman, Inc.*, 2007 WL 2773567, at *3 (E.D. Mich. Sept. 21, 2007) (declining to stay federal court action in favor of previously-filed state court actions “where the actions do not involve, nearly identical parties and issues”).

No stay is warranted in this case. While some of the plaintiffs in this action and in the Related Federal Action are the same, the defendants are not. Moreover, the plaintiffs’ single claim against Sirchie in the Related Federal Action sounds in negligence and raises issues that are, in many respects, decidedly different from the issues presented in this case. An examination of the plaintiffs’ complaint in the Related Federal Action discloses that the extent of the substantive overlap between that action and this one is, in fact, quite small.⁷ See Defendants’ Opp., Exhibit 2 (Class Complaint in Related Federal Action). Accordingly, the Court declines to exercise its discretion to stay this case pending the resolution of the Related Federal Action. See *Travenol*, 394 Mass. at 97.

⁷ For example, the plaintiffs’ negligence claim against Sirchie in the Related Federal Action is based, in significant part, on Sirchie’s purported failure to properly warn DOC and train DOC employees regarding the alleged “limitations and risks” of its NARK II Test. Defendants’ Opp., Exhibit 2 at 25-26. Sirchie’s alleged conduct in this respect has no bearing on any of the issues to be decided in this case.

II. Plaintiffs' Motion for a Preliminary Injunction.

a. *The Preliminary Injunction Standard.*

In order to obtain preliminary injunctive relief, Plaintiffs must show that: "(1) success is likely on the merits; (2) irreparable harm will result from denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 357 (2006) (Spina, J., concurring), citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980). Where, as here, a preliminary injunction proceeding involves public entities, the court also must consider whether the "requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984) ("*Mass. CRINC*"). In all instances, the decision whether to grant a preliminary injunction is a matter within the discretion of the presiding judge. See *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733, 741 (2008) ("We review the grant or denial of a preliminary injunction to determine whether the [motion] judge abused his discretion, that is, whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions.").

b. *Likelihood of Success.*

Plaintiffs have demonstrated a likelihood of success on their claims that DOC's use of the NARK II Test as the sole basis for imposing punishment and for actually, or effectively, denying incarcerated individuals access to their privileged mail violates Section 11I of the MCRA. To prevail under the MCRA, Plaintiffs must prove that: "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier v. National Bd. of Medical Examiners*, 462 Mass. 1, 12 (2012) ("*Currier*"). The Court is persuaded that Plaintiffs have satisfied all three of these elements.

First, Plaintiffs possess a fundamental constitutional right to the assistance of counsel. See, e.g., *Lavellee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 234 (2004) ("*Lavellee*") ("There is no question that the right to counsel is a fundamental constitutional right...."). In addition, incarcerated persons possess a constitutional right of access to the courts, which requires prison authorities to assist inmates in the preparation and filing of legal papers by, among other things, providing prisoners with adequate assistance from persons trained in the law. *Bounds v. Smith*, 430 U.S. 817, 828 (1977), abrogated on other grounds by *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (disclaiming statements in *Bounds* suggesting state must enable prisoner to discover grievances and to litigate

effectively once in court). See also *Procunier v. Martinez*, 416 U.S. 410, 419 (1974) (noting that prison “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid”).

Plaintiffs also possess a fundamental right “not [to] be deprived of life, liberty, or property without due process of law.” *O’Malley v. Sheriff of Worcester County*, 415 Mass. 132, 135 (1993) (“*O’Malley*”), quoting *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). The fundamental right to due process means, *inter alia*, that “isolation may not be imposed [upon an incarcerated person] arbitrarily or at the unbridled discretion of prison officials.” *Id.* at 137.

Second, it is apparent in this case that DOC is using field test results obtained from the NARK II Test, by themselves, to “interfere” with Plaintiffs’ right to counsel and their right to be free from placement in isolation “arbitrarily or at the unbridled discretion of prison officials.” *Id.* There is no dispute that DOC currently is using the NARK II Test in a manner that contravenes the express warnings and instructions provided by the test’s manufacturer, Sirchie. See Plaintiffs’ Reply, Exhibit A at 4. Sirchie’s warnings and instructions reflect its explicit acknowledgement that results generated by the NARK II Test are not sufficiently reliable, in-and-of-themselves, to be used for any purpose without “CONFIRM[ATION] BY AN APPROVED ANALYTICAL LABORATORY!” *Id.* (emphasis in original).

Sirchie’s pronouncements in this regard are well justified. The overwhelming evidence before this Court is that the NARK II Test, by itself, is a highly unreliable means of determining whether a particular mail item actually contains any illicit synthetic cannabinoids. The best information offered is that the NARK II Test returns false positive results approximately thirty-eight percent of the time, which is only marginally better than a coin-flip, and exponentially worse than the false positive rate that DOC itself has indicated is acceptable.⁸ See Gotovich Aff., Exhibit B at 7; Schlabs Decl., Exhibit A at 8. Alternatively, if the Court accepts DOC’s assertion that the reliability of the NARK II Test is, in fact, unknown, then DOC is effectively flying blind when it uses that test as the sole basis for imposing punitive measures on incarcerated persons and/or denying them

⁸ DOC took the position at oral argument that the thirty-eight percent false positive rate listed in its December 2020 internal bulletin may be *overstated* because it does not reflect positive field test results that were not challenged by the relevant incarcerated person and, therefore, not subjected to confirmatory laboratory testing. The Court acknowledges that such a possibility exists, but also recognizes that the false positive rate may be *understated* because it does not reflect any inaccurate, positive field test results that were not challenged by the relevant incarcerated person solely out of that person’s desire to avoid an extended period of isolation while awaiting the results of a confirmatory test. Speculation as to the true facts, however, does not qualify as admissible evidence. See, e.g., *Commonwealth v. Ruell*, 459 Mass. 126, 135 (2011) (acknowledging that “speculative and remote evidence” offered at trial was properly excluded as “not admissible”).

access to their privileged mail. In either case, the Court's conclusion is the same: DOC's use of the unreliable NARK II Test as the sole basis for imposing punitive measures on incarcerated persons housed in its facilities and/or denying them access to their privileged mail constitutes an arbitrary and unlawful interference with Plaintiffs' right to counsel, as well as their right to due process.⁹ See *Lavallee*, 442 Mass. at 234; *O'Malley*, 415 Mass. at 137. Cf. *Querubin v. Commonwealth*, 440 Mass. 108, 118 (2003) (recognizing that, in deciding whether to admit defendant to bail, evidence considered by court "must be sufficiently reliable to avoid any significant risk of an erroneous deprivation of liberty.").

Third, Plaintiffs have established that DOC's interference with Plaintiffs' right to counsel and right to due process is undertaken "by threats, intimidation, or coercion." *Currier*, 462 Mass. at 12. For purposes of the MCRA, a "threat" consists of "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm"; "intimidation" involves "putting in fear for the purpose of compelling or deterring conduct"; and "coercion" is "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." *Hauffer v. Zotos*, 446 Mass. 489, 505 (2006) ("*Hauffer*") (internal quotation marks and citations omitted). Plaintiffs have submitted evidence, which DOC has not disputed, that, when an incarcerated person's legal mail tests positive for synthetic cannabinoids using the NARK II Test, that person is,

given a choice....; they can either request a confirmatory test and wait in the RHU until the test results come back, which can take months, or they can admit to receiving contraband and return to general population after a short period of time (generally around ten days).

Jacobstein Decl., ¶ 11.

⁹ In this context, the Court rejects the rather novel argument presented by DOC at the hearing on Plaintiffs' P.I. Motion that the Massachusetts Supreme Judicial Court's ("SJC") decision in *LaChance v. Comm'r of Correction*, 463 Mass. 767, 777 (2012) ("*LaChance*"), authorizes DOC to place incarcerated persons in isolation "arbitrarily," so long as the period of isolation lasts no longer than ninety days. *LaChance* includes no such holding. Rather, the SJC held in *LaChance* that, "in no circumstances may an inmate be held in segregated confinement on awaiting action status for longer than ninety days without a hearing." *Id.* at 777. The SJC fashioned the ninety-day limitation in an express effort to "balance the inmate's interest -- to challenge potentially arbitrary detention in severe conditions -- with that of prison officials -- to secure the reclassification or transfer of an inmate who poses a threat to himself, to fellow inmates, or to the security of the facility." *Id.* Nowhere in *LaChance* did the SJC state or rule that "arbitrary detention" is permissible in-and-of-itself, nor did it overrule its prior holding in *O'Malley* that "isolation may not be imposed [upon an incarcerated person] arbitrarily or at the unbridled discretion of prison officials." 415 Mass. at 137. To the contrary, the SJC's decision in *LaChance* explicitly recognizes an incarcerated person's right to "challenge potentially arbitrary detention in severe conditions..." *Id.* Thus, the Court is confident that the SJC never has authorized DOC to treat incarcerated persons "arbitrarily."

DOC's practice of placing an incarcerated person in a Restrictive Housing Unit (effectively isolation) based solely on the results of a NARK II Test on his or her incoming legal mail, unless the person admits that the mail item at issue contains illegal contraband, undeniably constitutes: (1) "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm" (*i.e.*, a "threat"); (2) "putting in fear for the purpose of compelling or deterring conduct" (*i.e.*, "intimidation"); and (3) "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done" (*i.e.*, "coercion"). See *Haufler*, 446 Mass. at 505. The arguable effect of this practice, whether or not intended by DOC, is to arbitrarily impose punitive sanctions on selected incarcerated persons based on patently unreliable test data without due process of law, and to chill and otherwise interfere with the right to counsel enjoyed by all incarcerated persons. Accordingly, all of the elements necessary to establish viable claims against DOC for violating the MCRA, as alleged in Plaintiffs' Complaint, have been satisfied in this case. See *Currier*, 462 Mass. at 12.

c. *Irreparable Harm.*

Plaintiffs' risk of irreparable harm also is established. The implication of constitutional rights in Plaintiffs' MCRA claims is sufficient to satisfy the requirement of proof of irreparable harm.¹⁰ See, e.g., *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996) (irreparable harm requirement satisfied when constitutional rights are implied in the analysis); *Basank v. Decker*, 449 F. Supp. 3d 205, 213 (S.D.N.Y. 2020) ("Petitioners have also shown irreparable injury because ... they face a violation of their constitutional rights.").

d. *Balance of the Harms.*

The balance of the harms decidedly favors Plaintiffs. Enjoining DOC from using NARK II test results as the sole basis for imposing punishment upon incarcerated persons and for denying them access to their privileged mail will serve to protect those persons from the continued loss of their constitutional rights to counsel and to due process. DOC, on the other hand, will suffer little, if any, harm should the Court issue such an injunction because

¹⁰ To the extent DOC argues that loss of the ability to communicate with legal counsel by mail does not actually impair an incarcerated person's right to counsel because he or she still can "confer with [his or her] attorney through private telephone calls, Zoom video calls, in-person contact visits in a private room, and non-privileged email communication" (see Defendants' Opp. at 15-16), that argument was disproven by DOC's concession during oral argument that legal counsel are not permitted to share confidential documents with their incarcerated clients via email, and by the testimony of Plaintiffs' counsel that most "in-person" meetings with clients in the RHU are non-contact visits conducted "either through a mesh barrier, through which it is difficult to hear, or over a phone." Jacobstein Decl., ¶ 13. Neither of these alternatives permits counsel to share documents, in confidence, with their incarcerated clients.

DOC still will be able to use the NARK II test and impose punishment upon incarcerated persons based on any positive test results, *so long as DOC first verifies the NARK II test results through a confirmatory lab test*. DOC possesses ample opportunity to undertake confirmatory testing before taking action because neither the incarcerated person, nor the original suspect mail item can be expected to go anywhere in the interim. Thus, if an injunction enters, DOC will retain the ability to deter the transportation of illegal drugs into its correctional institutions and punish wrongdoers in appropriate cases. The only difference will be that DOC will be required to do so based on demonstrable facts, and not on arbitrary and unlawful guesswork.

e. *The Public Interest.*

Issuance of the requested injunction also “promotes the public interest.” *Mass. CRINC*, 392 Mass. at 89. Protecting the constitutional rights of incarcerated persons is in the public interest. See, e.g., *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (“[I]t is always in the public interest to protect constitutional rights.”). See also *Prison Legal News v. County of Sacramento*, 2012 WL 1075852, at *1 (E.D. Cal. Mar. 8, 2012) (holding that it “promotes the public interest” to preliminarily enjoin county sheriff, on First Amendment grounds, from preventing incarcerated persons from receiving plaintiff’s publication, “Prison Legal News”). Enjoining arbitrary conduct on the part of DOC personnel further promotes the public interest by avoiding the associated unfairness and loss of confidence in the Commonwealth’s correctional system that otherwise may result. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-509 (1984) (recognizing that the “appearance of fairness ... [is] essential to public confidence in the criminal justice system”).

Order

For the foregoing reasons, Defendants' Motion to Stay (Docket Entry No. 12) is **DENIED**, and Plaintiffs' Motion for Preliminary Injunction (Docket Entry No. 3) is **ALLOWED**.

IT IS HEREBY ORDERED THAT, effective immediately, and until further written order of this Court, defendants Massachusetts Department of Correction ("DOC") and Commissioner Carol Mici, and their officers, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with them, are enjoined and restrained from imposing any punitive, disciplinary, or other measures against incarcerated persons in the custody of DOC based solely on "positive" NARK 20023 test results.¹¹



Brian A. Davis
Associate Justice of the Superior Court

Date: November 30, 2021

¹¹ See *Commonwealth v. Adams*, 416 Mass. 558, 566 (1993) (recognizing that as to injunctive relief, "[t]he law leaves to the sound discretion of the trial judge the issuance and scope of equitable relief"); *Johnson v. Martignetti*, 374 Mass. 784, 794 (1978) ("It is a well settled principle that, in fashioning appropriate relief, the issuance and scope of equitable relief rests within the sound discretion of the judge ... who may phrase the court's order so as to afford a full, complete remedy.... The judge possesses a particularly broad latitude of discretion where the public interest is involved ... and may mould each decree to the necessities of each case.").

ATTACHMENT 2



National Institute of Justice

Law Enforcement and Corrections Standards and Testing Program

Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse

NIJ Standard-0604.01

ABOUT THE LAW ENFORCEMENT AND CORRECTIONS STANDARDS AND TESTING PROGRAM

The Law Enforcement and Corrections Standards and Testing Program is sponsored by the Office of Science and Technology of the National Institute of Justice (NIJ), U.S. Department of Justice. The program responds to the mandate of the Justice System Improvement Act of 1979, which directed NIJ to encourage research and development to improve the criminal justice system and to disseminate the results to Federal, State, and local agencies.

The Law Enforcement and Corrections Standards and Testing Program is an applied research effort that determines the technological needs of justice system agencies, sets minimum performance standards for specific devices, tests commercially available equipment against those standards, and disseminates the standards and the test results to criminal justice agencies nationally and internationally.

The program operates through:

The *Law Enforcement and Corrections Technology Advisory Council* (LECTAC), consisting of nationally recognized criminal justice practitioners from Federal, State, and local agencies, which assesses technological needs and sets priorities for research programs and items to be evaluated and tested.

The *Office of Law Enforcement Standards* (OLES) at the National Institute of Standards and Technology, which develops voluntary national performance standards for compliance testing to ensure that individual items of equipment are suitable for use by criminal justice agencies. The standards are based upon laboratory testing and evaluation of representative samples of each item of equipment to determine the key attributes, develop test methods, and establish minimum performance requirements for each essential attribute. In addition to the highly technical standards, OLES also produces technical reports and user guidelines that explain in nontechnical terms the capabilities of available equipment.

The *National Law Enforcement and Corrections Technology Center* (NLECTC), operated by a grantee, which supervises a national compliance testing program conducted by independent laboratories. The standards developed by OLES serve as performance benchmarks against which commercial equipment is measured. The facilities, personnel, and testing capabilities of the independent laboratories are evaluated by OLES prior to testing each item of equipment, and OLES helps the NLECTC staff review and analyze data. Test results are published in Equipment Performance Reports designed to help justice system procurement officials make informed purchasing decisions.

Publications are available at no charge through the National Law Enforcement and Corrections Technology Center. Some documents are also available online through the Internet/World Wide Web. To request a document or additional information, call 800-248-2742 or 301-519-5060, or write:

National Law Enforcement and Corrections Technology Center
P.O. Box 1160
Rockville, MD 20849-1160
E-Mail: asknlectc@nlectc.org
World Wide Web address: <http://www.nlectc.org>

The National Institute of Justice is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse

NIJ Standard? 0604.01

Supersedes NILECJ-STD-0604.01, Chemical Spot Test Kits for Preliminary Identification of Drugs of Abuse, dated December 1978, and NIJ Standard-0605.00, Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse, dated July 1981

Coordination by:
National Institute of Standards and Technology
Office of Law Enforcement Standards
Gaithersburg, MD 20899-8102

Prepared for:
National Institute of Justice
Office of Science and Technology
Washington, DC 20531

July 2000

NCJ 183258

National Institute of Justice

Julie E. Samuels
Acting Director

The technical effort to develop this report was conducted under Interagency Agreement 94-IJ-R-004, Project No. 97-028-CTT.

This standard was formulated by the Office of Law Enforcement Standards (OLES) of the National Institute of Standards and Technology (NIST) under the direction of Alim A. Fatah, Program Manager for Chemical Systems and Materials, and Kathleen M. Higgins, Director of OLES. Revision of this standard was performed at the University of Utah, Center for Human Toxicology (CHT) by Dennis J. Crouch, Interim Director of CHT.

The work resulting from this report was sponsored by the National Institute of Justice (NIJ), David G. Boyd, Director, Office of Science and Technology.

FOREWORD

This document, NIJ Standard 0604.01, Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse, is an equipment standard developed by the Office of Law Enforcement Standards of the National Institute of Standards and Technology. It was produced as part of the Law Enforcement and Corrections Standards and Testing Program of the National Institute of Justice. A brief description of the program appears on the inside front cover.

This standard is a technical document that specifies performance and other requirements equipment should meet to satisfy the needs of criminal justice agencies for high-quality service. Purchasers can use the test methods described in this standard to determine whether a particular piece of equipment meets the essential requirements, or they may have the tests conducted on their behalf by a qualified testing laboratory. Procurement officials may also refer to this standard in their purchasing documents and require that equipment offered for purchase meet the requirements. Compliance with the requirements of the standard may be attested to by an independent laboratory or guaranteed by the vendor.

Because this NIJ standard is designed as a procurement aid, it is necessarily highly technical. For those who seek general guidance concerning the selection and application of law enforcement equipment, user guides have also been published. The guides explain in nontechnical language how to select equipment capable of the performance required by an agency.

NIJ standards are subjected to continuing review. Technical comments and recommended revisions are welcome. Please send suggestions to the Director, Office of Science and Technology, National Institute of Justice, U.S. Department of Justice, Washington, DC 20531.

Before citing this or any other NIJ standard in a contract document, users should verify that the most recent edition of the standard is used. Write to: Director, Office of Law Enforcement Standards, National Institute of Standards and Technology, Gaithersburg, MD 20899-8102.

David G. Boyd, Director
Office of Science and Technology
National Institute of Justice

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COMMONLY USED SYMBOLS AND ABBREVIATIONS

A	ampere	H	henry	nm	nanometer
ac	alternating current	h	hour	No.	number
AM	amplitude modulation	hf	high frequency	o.d.	outside diameter
cd	candela	Hz	hertz	Ω	ohm
cm	centimeter	i.d.	inside diameter	p.	page
CP	chemically pure	in	inch	Pa	pascal
c/s	cycle per second	IR	infrared	pe	probable error
d	day	J	joule	pp.	pages
dB	decibel	L	lambert	ppm	parts per million
dc	direct current	L	liter	qt	quart
°C	degree Celsius	lb	pound	rad	radian
°F	degree Fahrenheit	lbf	pound-force	rf	radio frequency
dia	diameter	lbf-in	pound-force inch	rh	relative humidity
emf	electromotive force	lm	lumen	s	second
eq	equation	ln	logarithm (base e)	SD	standard deviation
F	farad	log	logarithm (base 10)	sec.	section
fc	footcandle	M	molar	SWR	standing wave ratio
fig.	figure	m	meter	uhf	ultrahigh frequency
FM	frequency modulation	min	minute	UV	ultraviolet
ft	foot	mm	millimeter	V	volt
ft/s	foot per second	mph	miles per hour	vhf	very high frequency
g	acceleration	m/s	meter per second	W	watt
g	gram	N	newton	λ	wavelength
gr	grain	N·m	newton meter	wt	weight

area=unit² (e.g., ft², in², etc.); volume=unit³ (e.g., ft³, m³, etc.)

PREFIXES

d	deci (10 ⁻¹)	da	deka (10)
c	centi (10 ⁻²)	h	hecto (10 ²)
m	milli (10 ⁻³)	k	kilo (10 ³)
μ	micro (10 ⁻⁶)	M	mega (10 ⁶)
n	nano (10 ⁻⁹)	G	giga (10 ⁹)
p	pico (10 ⁻¹²)	T	tera (10 ¹²)

COMMON CONVERSIONS

(See ASTM E380)

0.30480 m = 1 ft	4.448222 N = lbf
2.54 cm = 1 in	1.355818 J = 1 ft·lbf
0.4535924 kg = 1 lb	0.1129848 N m = lbf·in
0.06479891 g = 1 gr	14.59390 N/m = 1 lbf/ft
0.9463529 L = 1 qt	6894.757 Pa = 1 lbf/in ²
3600000 J = 1 kW·hr	1.609344 km/h = mph

Temperature: T_C = (T_F-32)×5/9

Temperature: T_F = (T_C×9/5)+32

**NIJ STANDARD
FOR
COLOR TEST REAGENTS/KITS FOR
PRELIMINARY IDENTIFICATION
OF DRUGS OF ABUSE**

1. PURPOSE

The purpose of this standard is to establish minimum requirements for color test reagent/kits to detect drugs of abuse and methods of testing the reagents to determine compliance with those requirements.

2. SCOPE

This standard applies to field-testing kits that consist of color test reagents for the preliminary identification of drugs of abuse (hereinafter referred to simply as drugs) in their pure and/or diluted forms. It does not apply to kits that use thin layer chromatography as the identification procedure nor to kits that identify drugs in body fluids.

This standard supersedes NILECJ–STD–0604.00, “Chemical Spot Test Kits for Preliminary Identification of Drugs of Abuse,” December 1978, and NIJ Standard–0605.00, “Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse,” July 1981. The standard is concerned with single reagents (or reagent combinations) used to give a preliminary identification of a suspected drug or class of drugs in their pure and/or diluted forms.

Note that this standard does not mandate the identities of the reagents to be included in a test kit. Since they are among the reagents currently in most common use, the 12 reagents listed in appendix A and their color reactions listed in table 1 are included for informational purposes only. A kit may contain any reagent or group of reagents that meet(s) the requirements of this standard.

3. DEFINITIONS

3.1 Munsell Color Charts

The Munsell Book of Color (Volumes 1 and 2) is a master atlas of color. Munsell color standards are made by applying a stable coating to a paper or polymer substrate using the most

stable colorants available. The colors are made according to the specifications contained in the final report of the subcommittee of the Optical Society of America on the spacing of Munsell colors, J. Opt. Soc. Am., 33, 385–418 (1943). Samples of each production lot are measured by spectrophotometry and are visually inspected at the time of production. The collection displays nearly 1 600 color chips, arranged according to the Munsell color-order system. Each page presents one hue, and there are 40 pages, each 2.5 hue steps apart. On each page, the chips are arranged by Munsell value and chroma. The standard way to describe a color using Munsell notations is to write the numeric designation for the Munsell hue (H) and the numeric designation for value (V) and chroma (C) in the form of H V/C.

3.2 Centroid Color Charts

The Centroid Color Charts are a collection of charts, published by the Inter-Society Color Council (ISCC) and the National Institute of Standards and Technology (NIST), formally, the National Bureau of Standards (NBS), that logically group and illustrate colors. There is a chart for each color hue. On each chart, color saturation increases from left to right and color lightness increases from bottom to top. The charts are identified as NBS Standard Reference Material 2106. These charts are no longer available for purchase and have been replaced by the Munsell Color Charts. The numbers and color descriptions listed in table 1 of NILECJ-STD-0604.00 and NIJ Standard-0605.00 were taken from this chart. The NBS numbers are obsolete and are no longer considered to be the international standard for color. Therefore, these numbers are listed for historical purposes only.

3.3 Final Color

The final color was defined as the color (generally formed within 1 min or 2 min) that remained after any intermediate colors, produced by the addition of a reagent to a drug or other substance, have disappeared.

4. REQUIREMENTS

4.1 User Information

The kit shall include the following information.

4.1.1 Drugs Detected

A list of the drugs for which each reagent in the kit can be used to make a tentative identification.

4.1.2 Instructions

Clear instructions for performing the chemical test and for interpreting the results, including the time for the final color to appear.

Table 1. Final colors produced by reagents A.1 through A.12 with various drugs and other substances

	Analyte	Solvent	ISCC-NIST**	Color	Munsell
A.1	Benzphetamine HCl	CHCl ₃	168	Brilliant greenish blue	5B 7/8
A.1	Brompheniramine Maleate	CHCl ₃	168	Brilliant greenish blue	5B 6/10
A.1	Chlordiazepoxide HCl	CHCl ₃	168	Brilliant greenish blue	2.5B 6/8
A.1	Chlorpromazine HCl	CHCl ₃	168	Brilliant greenish blue	5B 6/10
A.1	Cocaine HCl	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Diacetylmorphine HCl	CHCl ₃	169	Strong greenish blue	7.5B 6/10
A.1	Doxepin HCl	CHCl ₃	168	Brilliant greenish blue	5B 6/10
A.1	Ephedrine HCl	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Hydrocodone tartrate	CHCl ₃	168	Brilliant greenish blue	5B 6/8
A.1	Meperidine HCl	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Methadone HCl*	CHCl ₃	168	Brilliant greenish blue	5B 6/10
A.1	Methylphenidate HCl	CHCl ₃	168	Brilliant greenish blue	10BG 6/8
A.1	Phencyclidine HCl	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Procaine HCl*	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Propoxyphene HCl*	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Pseudoephedrine HCl	CHCl ₃	169	Strong greenish blue	5B 5/10
A.1	Quinine HCl	CHCl ₃	178	Strong blue	2.5PB 5/12
A.2	Amobarbital	CHCl ₃	222	Light purple	5P 7/8
A.2	Pentobarbital*	CHCl ₃	222	Light purple	5P 7/8
A.2	Phenobarbital*	CHCl ₃	222	Light purple	5P 7/8
A.2	Secobarbital*	CHCl ₃	222	Light purple	5P 7/8
A.3	Mace ⁵	crystals	237 ¹ 237 ² 221 ³	Strong reddish purple Strong reddish purple Very light purple	2.5RP 5/12 2.5RP 5/12 5P 8/4
A.3	Nutmeg	extract	244 ¹ 244 ² 261 ³	Pale reddish purple Pale reddish purple Light gray purplish red	10P 6/4 10P 6/4 5RP 7/4
A.3	Tea	extract	119 ⁴	Light yellow green	5GY 8/6
A.3	THC*	EtOH	204 ¹ 199 ² 219 ³	Gray purplish blue Light purplish blue Deep purple	7.5PB 4/4 7.5PB 7/8 7.5P 4/12
A.4	Acetaminophen	CHCl ₃	107	Moderate olive	10Y 5/8
A.4	Aspirin	powder	127	Grayish olive green	2.5GY 4/2
A.4	Benzphetamine HCl*	CHCl ₃	116	Brilliant yellow green	2.5GY 8/10
A.4	Brompheniramine Maleate	CHCl ₃	50	Strong orange	7.5YR 7/14
A.4	Chlorpromazine HCl	CHCl ₃	108	Dark olive	10Y 3/4
A.4	Cocaine HCl*	CHCl ₃	69	Deep orange yellow	10YR 7/14
A.4	Codeine*	CHCl ₃	108	Dark olive	10Y 3/4
A.4	Contac	powder	84	Strong yellow	2.5Y 6/10
A.4	d-Amphetamine HCl*	CHCl ₃	164	Moderate bluish green	5BG 5/6
A.4	d-Methamphetamine HCl*	CHCl ₃	137	Dark yellowish green	10GY 4/6
A.4	Diacetylmorphine HCl*	CHCl ₃	43	Moderate reddish brown	10R 3/6

Table 1. Final colors produced by reagents A.1 through A.12 with various drugs and other substances-Continued

	Analyte	Solvent	ISCC-NIST**	Color	Munsell
A.4	Dimethoxy-meth HCl	CHCl ₃	96	Dark olive brown	5Y 2/2
A.4	Doxepin HCl	CHCl ₃	44	Dark reddish brown	10R 2/4
A.4	Dristan	powder	110	Grayish olive	7.5Y 4/4
A.4	Exedrine	powder	108	Dark olive	7.5Y 3/4
A.4	Mace ⁵	crystals	125	Moderate olive green	5GY 4/8
A.4	MDA HCl	CHCl ₃	193	Bluish black	10B 2/2
A.4	Mescaline HCl*	CHCl ₃	78	Dark yellowish brown	10YR 3/4
A.4	Methadone HCl	CHCl ₃	187	Dark grayish blue	5B 3/2
A.4	Methaqualone	CHCl ₃	66	Very orange yellow	10YR 8/14
A.4	Methylphenidate HCl	CHCl ₃	67	Brilliant orange yellow	2.5Y 8/10
A.4	Morphine monohydrate*	CHCl ₃	47	Dark grayish reddish Brown	10R 3/2
A.4	Opium*	CHCl ₃	59	Dark brown	7.5YR 2/4
A.4	Oxycodone HCl	CHCl ₃	103	Dark greenish yellow	10Y 6/6
A.4	Procaine HCl	CHCl ₃	51	Deep orange	5YR 5/12
A.4	Propoxyphene HCl	CHCl ₃	44	Dark reddish brown	10R 2/4
A.4	Quinine HCl	CHCl ₃	100	Deep greenish yellow	10Y 9/6
A.4	Salt	crystals	50	Strong orange	5YR 7/12
A.5	Aspirin	powder	13	Deep red	5R 3/10
A.5	Benzphetamine HCl*	CHCl ₃	41	Deep reddish brown	7.5R 2/6
A.5	Chlorpromazine HCl	CHCl ₃	256	Deep purplish red	2.5RP 3/8
A.5	Codeine*	CHCl ₃	225	Very dark purple	7.5P 2/4
A.5	d-Amphetamine HCl*	CHCl ₃	35 to 44	Strong reddish orange Dark reddish brown	10R 6/12 to 7.5R 2/4
A.5	d-Methamphetamine HCl*	CHCl ₃	36 to 44	Deep reddish orange Dark reddish brown	10R 4/12 to 7.5R 2/4
A.5	Diacetylmorphine HCl*	CHCl ₃	256	Deep purplish red	7.5RP 3/10
A.5	Dimethoxy-meth HCl	CHCl ₃	107	Moderate olive	7.5Y 5/8
A.5	Doxepin HCl	CHCl ₃	21	Blackish red	7.5R 2/2
A.5	Dristan	powder	20	Dark grayish red	5R 3/2
A.5	Exedrine	powder	16	Dark red	5R 3/8
A.5	LSD	CHCl ₃	114	Olive black	10Y 2/2
A.5	Mace ⁵	crystals	87	Moderate yellow	7Y 7/8
A.5	MDA HCl*	CHCl ₃	267	Black	Black
A.5	Meperidine HCl	CHCl ₃	56	Deep brown	5YR 3/6
A.5	Mescaline HCl*	CHCl ₃	50	Strong orange	5YR 6/12
A.5	Methadone HCl	CHCl ₃	28	Light yellowish pink	2.5YR 8/4
A.5	Methylphenidate HCl	CHCl ₃	71	Moderate orange yellow	10YR 8/8
A.5	Morphine monohydrate*	CHCl ₃	239	Very deep reddish purple	10P 3/6
A.5	Opium*	Powder	47	Dark grayish reddish Brown	10R 3/2
A.5	Oxycodone HCl*	CHCl ₃	214	Pale violet	2.5P 6/4
A.5	Propoxyphene HCl	CHCl ₃	230	Blackish purple	2.5RP 2/2
A.5	Sugar	crystals	59	Dark brown	5YR 2/4

Table 1. Final colors produced by reagents A.1 through A.12 with various drugs and other substances-Continued

	Analyte	Solvent	ISCC-NIST**	Color	Munsell
A.6	Acetaminophen	CHCl ₃	67	Brilliant orange yellow	2.5Y 8/12
A.6	Codeine*	CHCl ₃	101	Light greenish yellow	7.5Y 9/6
A.6	Diacetylmorphine HCl*	CHCl ₃	89	Pale yellow	5Y 9/6
A.6	Dimethoxy-meth HCl	CHCl ₃	82	Very yellow	2.5Y 8/14
A.6	Doxepin HCl	CHCl ₃	83	Brilliant yellow	5Y 8.5/8
A.6	Dristan	powder	51	Deep orange	5YR 6/12
A.6	Exedrine	powder	67	Brilliant orange yellow	2.5Y 8/12
A.6	LSD	CHCl ₃	55	Strong brown	5YR 5/10
A.6	Mace ⁵	crystals	102	Moderate greenish yellow	10Y 7/6
A.6	MDA HCl	CHCl ₃	101	Light greenish yellow	7.5Y 9/6
A.6	Mescaline HCl*	CHCl ₃	16	Dark red	5R 3/6
A.6	Morphine monohydrate*	CHCl ₃	67	Brilliant orange yellow	2.5Y 8/12
A.6	Opium*	Powder	72	Dark orange yellow	10YR 6/10
A.6	Oxycodone HCl	CHCl ₃	83	Brilliant yellow	5Y 8.5/8
A.7	LSD*	CHCl ₃	219	Deep purple	7.5P 3/10
A.8	Acetaminophen	MEOH	103	Dark greenish yellow	10Y 6/10
A.8	Baking Soda	powder	51	Deep orange	5YR 6/14
A.8	Chlorpromazine HCl	MEOH	48	Very orange	5YR 7/14
A.8	Dristan	powder	200	Moderate purplish blue	10PB 4/2
A.8	Exedrine	powder	200	Moderate purplish blue	10PB 4/2
A.8	Morphine monohydrate*	MEOH	146	Dark green	5G 3/6
A.9	Aspirin	powder	228	Grayish purple	7.5P 5/2
A.9	Chlorpromazine HCl	CHCl ₃	14	Very deep red	5R 3/10
A.9	Codeine*	CHCl ₃	147	Very dark green	7.5G 2/6
A.9	Contac	powder	95	Moderate olive brown	2.5Y 4/6
A.9	Diacetylmorphine HCl*	CHCl ₃	256	Deep purplish red	5RP 3/10
A.9	Dimethoxy-meth HCl	CHCl ₃	115	Very yellow green	5GY 6/10
A.9	Doxepin HCl	CHCl ₃	41	Deep reddish brown	7.5R 2/8
A.9	Dristan	powder	163	Light bluish green	5BG 7/6
A.9	Exedrine	powder	177	Brilliant blue	10B 6/10
A.9	LSD	CHCl ₃	120	Moderate yellow green	5GY 6/6
A.9	Mace ⁵	crystals	70	Light olive yellow	10YR 8/8
A.9	MDA HCl*	CHCl ₃	157	Greenish black	7.5G 2/2
A.9	Morphine monohydrate*	CHCl ₃	256	Deep purplish red	5RP 3/10
A.9	Opium*	Powder	65	Brownish black	7.5R 2/2
A.9	Oxycodone HCl	CHCl ₃	84	Strong yellow	2.5Y 7/10
A.9	Propoxyphene HCl	CHCl ₃	20	Dark grayish red	2.5R 3/2
A.9	Sugar	crystals	83	Brilliant yellow	5Y 8.5/8
A.10	Chlorpromazine HCl	CHCl ₃	21	Blackish red	5R 2/2
A.10	Codeine*	CHCl ₃	166	Very dark bluish green	2.5BG 2/4
A.10	Contac	powder	95	Moderate olive brown	2.5Y 4/6

Table 1. Final colors produced by reagents A.1 through A.12 with various drugs and other substances-Continued

Analyte	Solvent	ISCC-NIST**	Color	Munsell	
A.10	Diacetylmorphine HCl*	CHCl ₃	161	Deep bluish green	2.5BG 3/8
A.10	Dimethoxy-meth HCl	CHCl ₃	59	Dark brown	5YR 2/4
A.10	Doxepin HCl	CHCl ₃	17	Very dark red	5R 2/4
A.10	Dristan	powder	94	Light olive brown	2.5Y 6/10
A.10	Exedrine	powder	91	Dark grayish yellow	5Y 6/4
A.10	Hydrocodone tartrate	CHCl ₃	165	Dark bluish green	5BG 3/6
A.10	LSD	CHCl ₃	157	Greenish black	7.5G 2/2
A.10	Mace ⁵	crystals	111	Dark grayish olive	10Y 3/4
A.10	MDA HCl*	CHCl ₃	166	Very dark bluish green	2.5BG 2/4
A.10	Mescaline HCl*	CHCl ₃	107	Moderate olive	7.5Y 5/8
A.10	Morphine monohydrate*	CHCl ₃	166	Very dark bluish green	2.5BG 2/4
A.10	Nutmeg	leaves	65	Brownish black	10YR 2/2
A.10	Opium*	Powder	114	Olive black	10Y 2/2
A.10	Oxycodone HCl	CHCl ₃	107	Moderate olive	7.5Y 5/8
A.10	Propoxyphene HCl	CHCl ₃	41	Deep reddish brown	10R 2/6
A.10	Sugar	crystals	98	Brilliant greenish yellow	10Y 8.5/10
A.11	Baking Soda	powder	181	Light blue	2.5PB 7/6
A.11	Exedrine	powder	144	Light green	5G 7/6
A.11	Pentobarbital*	CHCl ₃	222	Light purple	7.5P 7/6
A.11	Phenobarbital*	CHCl ₃	222	Light purple	7.5P 7/6
A.11	Secobarbital*	CHCl ₃	222	Light purple	7.5P 7/6
A.11	Tea	leaves	120	Moderate yellow green	2.5GY 7/8
A.11	Tobacco	leaves	136	Moderate yellowish green	10GY 6/6
A.12	d-Methamphetamine HCl*	CHCl ₃	183	Dark blue	2.5PB 2/6
A.12	Dimethoxy-meth HCl*	CHCl ₃	179	Deep blue	2.5PB 3/8
A.12	MDMA HCl	CHCl ₃	183	Dark blue	2.5PB 2/6
A.12	Methylphenidate HCl	CHCl ₃	214	Pale violet	2.5P 6/4

* Usual kit reagent for that particular drug.

** Inter-Society Color Council and the National Institute of Standards and Technology (ISCC-NIST), formerly ISCC/NBS, National Bureau of Standards (NBS).

¹Aqueous phase.

²Aqueous phase after chloroform extraction.

³Chloroform phase (marijuana extraction usually rapid compared to other materials).

⁴Not extracted into chloroform.

⁵2-Chloroacetophenone.

4.1.3 Safety Precautions

- a) Warning of the hazards of the flammable and corrosive chemicals contained in the kit.
- b) Steps to follow and antidotes to use if hazardous reagents are taken internally or come in contact with parts of the body or clothes.
- c) Procedures for safely discarding used reagents and containers.

4.1.4 General

- a) A statement that the kit is intended to be used for presumptive identification purposes only, and that all substances tested should be subjected to more definitive examination by qualified scientists in a properly equipped crime laboratory.
- b) A statement that users of the kit should receive appropriate training in its use and should be taught that the reagents can give false-positive as well as false-negative results.
- c) A discussion of the possibility of reagent and/or sample contamination and consequent misleading results.
- d) A discussion of proper kit storage in buildings and vehicles.

4.2 Labeling

Each reagent container shall have a label that either directly or by reference:

- a) Identifies the reagent.
- b) Identifies the drug or drugs it can detect.
- c) Is prominently marked "Danger" where appropriate.
- d) Gives a discard date where appropriate.

4.3 Workmanship

Visual inspection of the kit shall show no broken or inoperative catches, hinges, or containers. There shall be no evidence of reagent leakage.

4.4 Safe-Disposal Materials

The kit shall contain chemicals for neutralizing strongly acidic and basic reagents and/or acid/base-resistant containers into which used reagents and containers can be deposited and safely disposed of at a later time in accordance with section 4.1.3.c.

4.5 Color Samples

The kit shall include samples or reproductions of the color or colors produced by each reagent in the kit when reacted with each drug listed on the reagent container label.

4.6 Test Color and Sensitivity

Each reagent in the kit shall produce the color or colors specified by the manufacturer in the form of color samples (sec. 4.5) or have the same color hue and color saturation as those colors, for each of five replicate tests, performed in accordance with section 5.2 at the drug detection limit listed in table 2 or specified by the manufacturer in accordance with section 4.7. If a reagent produces the same color with more than one drug, this test should be performed from only one of those reagent/drug combinations.

4.7 Drug Detection Limit

The manufacturer shall specify the drug detection limit, determined in accordance with section 5.3, for each drug/reagent combination listed on a reagent container label, other than those listed in table 2.

4.8 Specificity

The kit shall include sufficient reagents to permit differentiation between each drug listed in accordance with section 4.1.1 and the other substances listed in table 3. The differentiation may be accomplished by the use of a single reagent or by a combination of reagents. Acceptable differentiation occurs if the final colors of the test are not in the color vicinity of one another when checked in accordance with section 5.4.

5. TEST METHODS

5.1 General Test Conditions

At the time of the tests, the ambient temperature shall be between 10°C and 40 °C (50 °F and 104 °F); the relative humidity shall be between 10 percent and 90 percent. Recommended Safety Precautions (see app. B) and Storage Precautions (see app. C) shall be followed.

5.2 Test Color

Place 500 µg of the drug, either as powder or dissolved in chloroform, in each of three wells of the porcelain test plate (except for app. A.3, where glass culture tubes are used). If the kit is packaged with the reagents in sealed glass tubes for single test field purposes, break the reagent tubes in suitable individual containers such as small beakers or test tubes. Use a disposable pasteur-type pipette to transfer one drop (approximately 0.1 mL) of each reagent being tested, in the sequence specified by the manufacturer if appropriate, to each of the three wells¹. Compare the color or colors produced within the specified time limits to those provided by the

¹ When two or more reagents are used sequentially, transfer the minimum number of drops of each reagent equivalent to the ratio specified by the manufacturer (i.e., three drops to one drop, etc.).

manufacturer in accordance with section 4.5, and determine whether the colors are essentially the same.

If the colors do not match, check the drug solution and test procedure by repeating the above procedure using fresh reagent prepared as directed in appendix A or by the manufacturer. This paragraph is not applicable to reagents not listed in appendix A unless information similar to that in appendix A is supplied by the manufacturer.

5.3 Drug Detection Limit Determination

Prepare a 1.0 $\mu\text{g}/\mu\text{L}$ solution (or lower if necessary) of the selected drug in chloroform or methanol. Using a micropipette, transfer five samples of this solution to the test wells or tubes. Add reagent as described in section 5.2. Change the quantity of drug transferred by varying either the solution concentration or the volume transferred, and repeat the test until the smallest mass of transferred drug is determined, to one significant figure, for which five out of five color changes are observed. As a safety factor, multiply this quantity by 10, and use the product as the operational drug detection limit.

5.4 Specificity Test

For each reagent in the kit other than those listed in appendix A, determine the final color, if any, when mixed with each substance listed in table 3.

Table 2. Drug detection limits

Reagent	Analyte	Drug Detection Limit (µg)
A.1	Cocaine HCl	60
A.1	Methadone HCl	250
A.2	Amobarbital	25
A.2	Pentobarbital	10
A.2	Phenobarbital	15
A.2	Secobarbital	25
A.3	THC	5
A.4	d-Amphetamine HCl	20
A.4	d-Methamphetamine HCl	100
A.4	Codeine	20
A.4	Diacetylmorphine HCl	20
A.4	Morphine monohydrate	5
A.5	d-Amphetamine HCl	10
A.5	Codeine	1
A.5	Diacetylmorphine HCl	10
A.5	LSD	5
A.5	Mescaline HCl	10
A.5	Methadone HCl	20
A.5	d-Methamphet HCl	5
A.5	Morphine monohydrate	5
A.6	Mescaline HCl	1
A.7	LSD	6
A.8	Morphine monohydrate	200
A.9	Codeine	50
A.9	Diacetylmorphine HCl	200
A.9	LSD	50
A.9	Mescaline HCl	100
A.9	Morphine monohydrate	25
A.10	Codeine	25
A.10	Diacetylmorphine HCl	200
A.10	LSD	50
A.10	Mescaline HCl	50
A.10	Morphine monohydrate	50
A.11	Phenobarb	1000
A.12	d-Methamphetamine HCl	10
A.12	Methylphenidate HCl	300

*The solvent is CHCl₃ except for A.8, which is methanol.

Table 3. Specificity of color tests

(+) Indicates that a color reaction occurs¹

	REAGENT											
	A.1	A.2	A.3	A.4	A.5	A.6	A.7	A.8	A.9	A.10	A.11	A.12
Acetaminophen	-	-	-	+	-	+	-	+	-	-	-	-
Alprazolam	-	-	-	-	-	-	-	-	-	-	-	-
Aspirin	-	-	-	+	+	-	-	-	+	-	-	-
Baking Soda	-	-	-	-	-	-	-	+	-	-	+	-
Brompheniramine Maleate	+	-	-	+	-	-	-	-	-	-	-	-
Chlordiazepoxide HCl	+	-	-	-	-	-	-	-	-	-	-	-
Chlorpromazine HCl	+	-	-	+	+	+	-	+	+	+	-	-
Contac	-	-	-	+	-	-	-	-	+	+	-	-
Diazepam	-	-	-	-	-	-	-	-	-	-	-	-
Doxepin HCl	+	-	-	+	+	+	-	-	+	+	-	-
Dristan	-	-	-	+	+	+	-	+	+	+	-	-
Ephedrine HCl	+	-	-	-	-	-	-	-	-	-	-	-
Exedrine	-	-	-	+	+	+	-	+	+	+	+	-
Hydrocodone tartrate	+	-	-	-	-	-	-	-	-	+	-	-
Mace ²	-	-	+	+	+	+	-	-	+	+	-	-
Meperidine HCl	+	-	-	-	+	-	-	-	-	-	-	-
Methaqualone	-	-	-	+	-	-	-	-	-	-	-	-
Methylphenidate HCl	+	-	-	+	+	-	-	-	-	-	-	+
Nutmeg ²	-	-	+	-	-	-	-	-	-	+	-	-
Phencyclidine HCl	+	-	-	-	-	-	-	-	-	-	-	-
Propoxyphene HCl	+	-	-	+	+	-	-	-	+	+	-	-
Pseudoephedrine HCl	+	-	-	-	-	-	-	-	-	-	-	-
Quinine HCl	+	-	-	+	-	-	-	-	-	-	-	-
Salt	-	-	-	+	-	-	-	-	-	-	-	-
Sugar	-	-	-	-	+	-	-	-	+	+	-	-
Tea ²	-	-	+	-	-	-	-	-	-	-	+	-
Tobacco	-	-	-	-	-	-	-	-	-	-	+	-

¹Substances that gave no colors with these reagents are: D-galactose, glucose, mannitol, oregano, rosemary, and thyme.

²Tea, mace, and nutmeg may interfere with the Duquenois test but not the Duquenois-Levine modified test (A.3).

APPENDIX A–REAGENTS

A.1 Cobalt Thiocyanate

Dissolve 2.0 g of cobalt (II) thiocyanate in 100 mL of distilled water.

A.2 Dille-Koppanyi Reagent, Modified

Solution A: Dissolve 0.1 g of cobalt (II) acetate dihydrate in 100 mL of methanol. Add 0.2 mL of glacial acetic acid and mix.

Solution B: Add 5 mL of isopropylamine to 95 mL of methanol.

Procedure: Add 2 volumes of solution A to the drug, followed by 1 volume of solution B.

A.3 Duquenois-Levine Reagent, Modified

Solution A: Add 2.5 mL of acetaldehyde and 2.0 g of vanillin to 100 mL of 95 percent ethanol.

Solution B: Concentrated hydrochloric acid.

Solution C: Chloroform.

Procedure: Add 1 volume of solution A to the drug and shake for 1 min. Then add 1 volume of solution B. Agitate gently, and determine the color produced. Add 3 volumes of solution C and note whether the color is extracted from the mixture to A and B.

A.4 Mandelin Reagent

Dissolve 1.0 g of ammonium vanadate in 100 mL of concentrated sulfuric acid.

A.5 Marquis Reagent

Carefully add 100 mL of concentrated sulfuric acid to 5 mL of 40 percent formaldehyde (v:v, formaldehyde:water).

A.6 Nitric Acid

Concentrated nitric acid.

A.7 *Para*-Dimethylaminobenzaldehyde (*p*-DMAB)

Add 2.0 g of *p*-DMAB to 50 mL of 95 percent ethanol and 50 mL of concentrated hydrochloric acid.

A.8 Ferric Chloride

Dissolve 2.0 g of anhydrous ferric chloride or 3.3 g of ferric chloride hexahydrate in 100 mL of distilled water.

A.9 Froede Reagent

Dissolve 0.5 g of molybdic acid or sodium molybdate in 100 mL of hot concentrated sulfuric acid.

A.10 Mecke Reagent

Dissolve 1.0 g of selenious acid in 100 mL of concentrated sulfuric acid.

A.11 Zwikker Reagent

Solution A: Dissolve 0.5 g of copper (II) sulfate pentahydrate in 100 mL of distilled water.

Solution B: Add 5 mL of pyridine to 95 mL of chloroform.

Procedure: Add 1 volume of solution A to the drug, followed by 1 volume of solution B.

A.12 Simon's Reagent

Solution A: Dissolve 1 g of sodium nitroprusside in 50 mL of distilled water and add 2 mL of acetaldehyde to the solution with thorough mixing.

Solution B: 2 percent sodium carbonate in distilled water.

Procedure: Add 1 volume of solution A to the drug, followed by 2 volumes of solution B.

APPENDIX B—SAFETY PRECAUTIONS

A.1 Cobalt Thiocyanate

1. Cobalt Thiocyanate – HARMFUL. Harmful if swallowed. Readily absorbed through the skin. Target organs: lungs, thyroid. Wear suitable protective clothing and gloves.

A.2 Dille-Koppanyi Reagent, Modified

1. Cobalt (II) acetate dihydrate – TOXIC. May cause cancer. May cause heritable genetic damage. Harmful by inhalation, contact with skin, and if swallowed. May cause sensitization by skin contact. Causes irritation. Target organs: lungs, thyroid. In case of accident or if you feel unwell, seek medical advice immediately. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection. Do not breathe dust.

2. Methanol - POISON, FLAMMABLE.² Flammable liquid and vapor. Cumulative poison. Harmful if inhaled. May be fatal or cause blindness if swallowed. Can cause eye, skin, or respiratory system irritation. Wear suitable protective clothing and gloves.

3. Glacial acetic acid – ACID.³ Combustible, flammable, corrosive, organic acid. Causes severe burns. Harmful in contact with skin. Lachrymator. Target organs: teeth, kidneys. Keep away from sources of ignition. In case of accident or if you feel unwell, seek medical advice immediately. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection. Incompatible with carbonates, hydroxides, many oxides and phosphates, etc.

4. Isopropylamine – FLAMMABLE.² Corrosive. Causes burns. Toxic by inhalation, in contact with skin, and if swallowed. Keep away from sources of ignition. Take precautionary measures against static discharges. In case of accident or if you feel unwell, seek medical advice immediately. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection.

A.3 Duquenois-Levine Reagent, Modified

1. Acetaldehyde - EXTREMELY FLAMMABLE,² TOXIC. May cause cancer. May cause heritable genetic damage. Harmful by inhalation, in contact with skin, and if swallowed. May cause sensitization by inhalation and skin contact. Possible risk of harm to unborn child. Causes severe irritation. Lachrymator. Photosensitizer. Target organs: kidneys, liver. May develop pressure. Keep away from sources of ignition. In case of contact with eyes, rinse immediately

with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection.

2. Vanilin – none.
3. Ethanol – FLAMMABLE.² May irritate in body tissues. Use with adequate ventilation. Avoid breathing vapor. Do not get on eyes, skin, or clothing. Wash thoroughly after handling. Do not swallow or inhale. Wear suitable protective clothing and gloves.
4. Hydrochloric acid – ACID,³ TOXIC, CORROSIVE. Liquid and mist cause severe burns to all body tissue. May be fatal if swallowed or inhaled. Inhalation may cause lung damage. Do not get on skin or clothing. Wash thoroughly after handling. Wear suitable protective clothing, gloves, and eye/face protection. Use only with adequate ventilation.
5. Chloroform – FLAMMABLE,² TOXIC, POISON. Suspected cancer hazard. Exposure can cause damage to liver, kidneys, and central nervous system (CNS). Harmful if swallowed. Causes eye irritation. Harmful to skin and respiratory system. Toxic and corrosive gases are formed on contact with flames or hot glowing surfaces. Wear suitable protective clothing and gloves.

A.4 Mandelin Reagent

1. Ammonium vanadate - TOXIC. Toxic by inhalation, in contact with skin, and if swallowed. Irritating to eyes and respiratory system. Risk of serious damage to eyes. Possible risk of irreversible effects. Possiblenutagen. In case of accident or if you feel unwell, seek medical advice immediately. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection.

2. Sulfuric acid – OXIDIZER,¹ ACID,³ TOXIC, CORROSIVE. Liquid and mist cause severe burns to all body tissue. May be fatal if swallowed. Harmful if inhaled. Inhalation may case lung damage. Do not get liquid in eyes, on skin, or clothing. Wash thoroughly after handling. Avoid breathing vapors. Use with adequate ventilation. Do not add water to contents while in container because of violent reaction. Store in tightly closed container. Wear suitable protective clothing and gloves.

A.5 Marquis Reagent

1. Sulfuric Acid - see A.4.

2. Formaldehyde - TOXIC. May cause cancer. May cause heritable genetic damage. Toxic by inhalation, in contact with skin, and if swallowed. Causes burns. May cause sensitization by inhalation and skin contact. Readily absorbed through skin.Lachrymator.

Combustible. Target organs: eyes, kidneys. Wear suitable protective clothing and gloves.

A.6 Nitric Acid

1. Nitric acid – OXIDIZER,¹ ACID.³ Do not breathe vapor. Do not get in eyes or on skin or clothing. Keep in tightly closed, light-resistant container. In case of contact, immediately flush eyes or skin with plenty of water for at least 15 min. Causes severe burns. Vapor extremely hazardous. May cause nitrous gas poisoning. Spillage may cause fire or liberate dangerous gas. May be fatal if swallowed.

A.7 Para-Dimethylaminobenzaldehyde (*p*-DMAB)

1. *p*-DMAB - HARMFUL. Harmful if swallowed, irritating to eyes, respiratory system, and skin. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection.

2. Ethanol - See A-3.

3. Hydrochloric acid - See A.3.

A.8 Ferric Chloride

1. Ferric chloride – OXIDIZER,¹ CORROSIVE. Causes burns. Harmful by inhalation, contact with skin, and if swallowed. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Take off all contaminated clothing immediately. Wear suitable protective clothing, gloves, and eye/face protection.

A.9 Froede Reagent

1. Sodium molybdate - IRRITANT. Irritating to eyes, respiratory system, and skin. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection.

2. Sulfuric acid - See A.5.

A.10 Mecke Reagent

1. Selenious acid – OXIDIZER,¹ TOXIC. Highly toxic. Contact with combustible material may cause fire. Toxic by inhalation, in contact with skin, and if swallowed. Irritating to eyes, respiratory system, and skin. Target organs: liver, heart. Keep away from combustible material. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Take off immediately all contaminated clothing. Wear suitable protective clothing, gloves, and eye/face protection.

2. Sulfuric acid - See A.5.

A.11 Zwikker Reagent

1. Copper (II) sulfate pentahydrate - HARMFUL, TOXIC. May impair fertility. Possible risk of harm to unborn child. Harmful if swallowed. Risk of serious damage to eyes. Irritating to respiratory system, and skin. May cause sensitization by skin contact. Target organs: liver, kidneys. In case of accident or if you feel unwell, seek medical advice immediately. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection. Do not breathe dust.

2. Pyridine – FLAMMABLE.² Keep away from heat, sparks, and flames. Use only with adequate ventilation. Vapors may be explosive. Wear suitable protective clothing. Harmful if inhaled. Liquid causes eye irritation. May be harmful if swallowed or absorbed through the skin. Avoid breathing vapors. Avoid contact with eyes, and skin. Wash thoroughly after handling.

3. Chloroform - See A.3.

A.12 Simon's Reagent

1. Sodium nitroprusside - VERY TOXIC. Very toxic by inhalation, contact with skin, and if swallowed. Target organs: blood. In case of accident or if you feel unwell, seek medical advice immediately. In case of contact with eyes, rinse immediately with plenty of water and seek medical advice. Wear suitable protective clothing, gloves, and eye/face protection. Do not breathe dust.

2. Pyridine - See A.11.

3. Acetaldehyde - See A.3.

4. Sodium carbonate – BASE.⁴ Harmful if swallowed. May cause skin irritation. Harmful if inhaled. Wash thoroughly after handling.

APPENDIX C—STORAGE PRECAUTIONS

¹OXIDIZERS:

Store in a cool, dry place.

Keep away from flammable and combustible materials (paper, wood, etc.)

Keep away from reducing agents such as zinc, alkaline metals, and formic acid.

²FLAMMABLES:

Store in approved safety cans or cabinets.

Segregate from oxidizing acids and oxidizers.

Keep away any source of ignition: flames, localized heat, or sparks.

Safety cans or drums containing flammable liquids should be grounded and bonded when being used.

Keep firefighting equipment readily available.

Have spill cleanup materials handy.

Store highly volatile flammable liquids in a specially equipped refrigerator.

³ACIDS:

Store large bottles of acids on low shelf or in acid cabinets.

Segregate oxidizing acids from organic acids, flammable and combustible materials.

Segregate acids from bases and active metals such as sodium, potassium, magnesium, etc.

Segregate acids from chemicals that could generate toxic gases upon contact such as sodium cyanide, iron sulfide, etc.

Use bottle carriers for transporting acid bottles.

Have spill control pillows or acid neutralizers available in case of acid spills.

⁴BASES:

Segregate bases from acids.

Store solutions of inorganic hydroxides in polyethylene containers.

Have spill control pillows or caustic neutralizers available for caustic spills.

U.S. Department of Justice
Office of Justice Programs
810 Seventh Street N.W.
Washington, DC 20531

Janet Reno
Attorney General

Daniel Marcus
Acting Associate Attorney General

Mary Lou Leary
Acting Assistant Attorney General

Julie E. Samuels
Acting Director, National Institute of Justice

Office of Justice Programs
World Wide Web Site:
<http://www.ojp.usdoj.gov>

National Institute of Justice
World Wide Web Site:
<http://www.ojp.usdoj.gov/nij>



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100

September 7, 2023

Columbia Legal Services
101 Yester Way, Suite 300
Seattle, WA 98104

Dear Counsel:

Thank you for your August 29, 2023, letter concerning the Department of Correction's use of presumptive drug testing kits as a basis for disciplinary action, and stating your intent to file a lawsuit challenging that use on September 12, 2023. We hope that you will reconsider your plan to sue DOC in light of this response.

Like prisons nationally, the Department continues to experience a substantial increase in dangerous drugs being introduced, or attempted to be introduced into all 12 prisons statewide. A substantial portion of these substances is coming through the U.S. Mail. The highest percentage of suspected/confirmed drug contraband is dangerous, illegal narcotics, including spice, methamphetamine, suboxone, and fentanyl. Synthetic cannabinoids (spice), methamphetamines, and fentanyl can be liquefied and sprayed onto paper, incorporated into ink and crayon wax, and disguised as an innocent piece of correspondence. Suboxone is commonly hidden under stamps or within pages of books and magazines. When received, the drug-soaked material can be subdivided into many doses and distributed for consumption.

To provide perspective on the scope and seriousness of the problem, there were 159 instances where the Department discovered substances in mail coming into facilities that were confirmed or suspected to be illegal narcotics. Through the first half of 2023, there were an additional 63 instances. The presence of these dangerous substances within the prisons causes real harm. In 2022 and the first half of 2023, there were 26 situations where drug use led to medical emergencies, including use of Narcan, emergency medical transports, and overdoses. In addition, staff are exposed to these dangerous substances when they come in through the mailroom or are discovered during cell searches.

As a tool to address this significant problem, and mitigate harm to the incarcerated population and staff, the Department has been using field or presumptive drug testing kits used by law enforcement to identify whether suspicious appearing mail and other paper items may be contaminated with narcotics. Often times, these tests will be used in conjunction with other drug interdiction methods, including surveillance, UAs, and intelligence gathering. However, as you note, there are occasions where presumptive drug test results have been used as the sole basis for disciplinary action. We understand that your clients challenge this practice, including that presumptive test results may serve as evidence sufficient to support disciplinary action.

Effective immediately, the Department has discontinued the use of presumptive drug test results as a sole basis for disciplinary action. DOC Policy 420.385 will be revised to allow an incarcerated individual the opportunity to request laboratory confirmation, if possible, for presumptive positive tests before an infraction hearing for drug possession. In this way, Policy 420.385 will mirror Policy 420.380 with respect to UAs and other forms of drug testing.

Further, without conceding that disciplinary action based solely on presumptive test results is not permissible, the Department will be developing a process to identify individuals who have lost good/earned time due to discipline based solely on presumptive drug test results, and to restore the good time to those individuals who meet this criteria. We understand that for one of your clients, Mr. Ross, this may accelerate his planned October release date and so we are prioritizing a review of his case.

Attached is a memorandum that has been distributed to all DOC prisons staff about these changes.

We are happy to get together to discuss these changes if you have questions.

Respectfully,



Cheryl Strange
Secretary

Attachment

cc: Timothy Lang, Senior Assistant Attorney General
Tim Feulner, Assistant Attorney General
Sean Murphy, Deputy Secretary
Tom Fithian, Senior Director



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1110

September 6, 2023

TO: All DOC Prisons Staff

FROM: Don Holbrook, Assistant Secretary Men's Prison Division *Don Holbrook*
Jeannie Darneille, Assistant Secretary Women's Prison Division *Jeannie Darneille*

SUBJECT: Presumptive Drug Testing

Effectively immediately, the use of Presumptive Drug Testing as described in [DOC Policy 420.385](#) will **NOT** be the sole determining factor of guilt in WAC violations (infractions) for drug possession.

[DOC Policy 402.380](#), Drug/Alcohol Testing, currently permits incarcerated individuals to request confirmation testing from a contracted laboratory of urinalysis, breathalyzer, and oral swab tests. That practice has not traditionally been applied to presumptive drug tests under [DOC Policy 420.385](#). The Department has determined that incarcerated individuals should have an option to request a confirmation test in circumstances similar to confirmation testing for urinalysis, breathalyzer, and oral swab tests.

As a result of this change in policy, the Department will review drug possession infractions issued over the last two years to determine whether any infractions should be expunged along with restoration of any resulting loss of good conduct/ earned time. Infractions supported by other corroborating evidence should be sustained.

This policy change and review of past infractions applies only to infractions for which the sole evidence is the presumptive positive drug test. It does not apply to infractions that are supported by other corroborating evidence. Other evidence, in combination with presumptive drug testing, includes, but is not limited to phone records, confidential informants, witness statements, K9 response, urinalysis, laboratory confirmation testing, etc.

[DOC Policy 420.385](#), Presumptive Drug Testing, will be revised through the urgent revision process to include the above requirements as well as allow an incarcerated individual the opportunity to request laboratory confirmation, if possible, for presumptive positive tests prior to an infraction hearing for drug possession.

Incarcerated individuals impacted by this decision will be informed of any changes to their infraction(s) and associated good conduct/earned time and release date calculations through normal classification/records communication channels. Individuals will be prioritized by release date.

Thank you.

TF:cr

Presumptive Drug Testing

September 6, 2023

Page 2

cc: Cheryl Strange, Secretary
Sean Murphy, Deputy Secretary
Danielle Armbruster, Assistant Secretary, Reentry Division
Scott Edwards, Assistant Secretary, Budget/Strategy/Technology
Dianne Ashlock, Senior Director, Records/Hearings/Resentencing
Tomas Fithian, Senior Director, Correctional Operations
John Campbell, Senior Director, Comprehensive Case Management
Jeff Uttecht, Deputy Assistant Secretary
Eric Jackson, Deputy Assistant Secretary
James Key, Deputy Assistant Secretary
Deborah “Jo” Wofford, Deputy Assistant Secretary

September 11, 2023

Cheryl Strange, Secretary
Department of Corrections
7345 Linderson Way SW
Tumwater, WA 98501-6504

Sent via e-mail: Cheryl.Strange@doc1.wa.gov
Sean.Murphy@doc1.wa.gov
TpFithian@doc1.wa.gov
MjDistefano@doc1.wa.gov
Jennifer.Peterson@doc1.wa.gov
Tim.Lang@atg.wa.gov
Tim.Feulner@atg.wa.gov

Dear Secretary Strange:

Thank you for your letter dated September 7. However, DOC's newly announced policy is insufficient to protect the rights of those in custody, nor does the policy compensate those in custody (and those now released) who were punished because DOC used these unreliable tests.

We understand DOC's desire to avoid litigation. We propose the following path forward:

- DOC will agree to engage in mediation, with a mediator chosen and agreed to by the parties. The purpose of mediation will be to negotiate:
 - DOC's presumptive drug testing policy;
 - how that policy is implemented in prisons; and
 - damages for those harmed by DOC's unlawful past conduct.¹
- The parties will enter into a statute of limitations tolling agreement, effective as of the date tort claims were filed by our named plaintiffs. A proposed draft is enclosed.
- DOC will agree to allow limited discovery to, among other things, allow CLS to assess the size of the class, learn about the infractions and discipline imposed upon the class, and get more information about DOC's use of the presumptive drug testing kits. The parties

¹ CLS and DOC will split the costs of mediation. If a settlement is reached, DOC will reimburse CLS for the costs of mediation, as part of settlement.

September 11, 2023

Page 2 of 2

would enter into an agreement to protect otherwise confidential information from disclosure by plaintiffs' counsel.

- Should the parties reach a proposed settlement agreement, a joint motion for settlement class certification and a joint motion for class settlement approval will be filed in Thurston County Superior Court.
- A settlement agreement would require a period of monitoring to ensure that DOC's implementation of the drug testing policy in its prisons was being followed. The terms of the monitoring will be negotiated during mediation.

For mediation to be successful, we ask that you be directly involved. DOC would need to agree to commence mediation no later than November 1, 2023.

Please let us know if you agree by the end of the business day on September 18. You can respond via e-mail to: alison.bilow@columbialegal.org. Otherwise, we plan to proceed with class action litigation.

Sincerely,

/s/Alison Bilow
Staff Attorney, Seattle Office
Columbia Legal Services

EXHIBIT B



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

APPLICABILITY
DEPARTMENT WIDE

EFFECTIVE DATE
9/3/19

PAGE NUMBER
1 of 4

NUMBER
DOC 420.385

POLICY

TITLE
PRESUMPTIVE DRUG TESTING

REVIEW/REVISION HISTORY:

Effective: 9/3/19

SUMMARY OF REVISION/REVIEW:

New policy. Read carefully!

APPROVED:

Signature on file

STEPHEN SINCLAIR, Secretary
Department of Corrections

7/31/19

Date Signed

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	<p>APPLICABILITY DEPARTMENT WIDE</p>		
	<p>EFFECTIVE DATE 9/3/19</p>	<p>PAGE NUMBER 2 of 4</p>	<p>NUMBER DOC 420.385</p>
	<p>TITLE PRESUMPTIVE DRUG TESTING</p>		

REFERENCES:

DOC 100.100 is hereby incorporated into this policy; [DOC 890.000 Safety Program](#); [DOC 890.030 Hazardous/Dangerous Waste Management](#); [DOC 890.070 Chemical Control and HAZCOM](#); [DOC 890.130 Job Safety Analysis, Hazard Assessments, and Personal Protective Equipment](#); [Records Retention Schedule](#)

POLICY:

- I. The Department has established guidelines for the use of presumptive drug testing kits for suspected illegal/unauthorized drugs.

DIRECTIVE:

- I. General Requirements
 - A. The Chief of Investigative Operations/Community Corrections Supervisor/designee will identify positions/assignments authorized to use presumptive drug testing kits.
 1. Employees/contract staff will complete the manufacturer's certification and DOC 21-916 Presumptive Drug Testing Agreement before using kits.
 - B. Only suspected drugs will be tested using the appropriate kit. Employees/contract staff will only use kits they have current certification to use.
 - C. Documentation for certified employees/contract staff will be maintained in the personnel file per the Records Retention Schedule by the:
 1. Chief Investigator at major facilities (i.e., Level 3 or higher).
 2. Superintendent/designee at stand-alone Level 2 facilities.
 3. Community Corrections Supervisor in Work/Training Release or the Field.
 4. Chief of Investigative Operations for Special Investigative Services employees.
 - D. Audits will be completed at least annually to ensure employees/contract staff have current certification in compliance with the manufacturer's certification.
- II. Substance Identification and Testing
 - A. When a substance is found and believed to contain illegal/unauthorized drugs, certified employees/contract staff will attempt to identify the substance using a presumptive drug testing kit.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p>	APPLICABILITY DEPARTMENT WIDE		
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POLICY			

1. Unknown powdered substances or suspected drugs without a sufficient testing quantity will not be tested and will be sent to Washington State Patrol for identification/disposal.
- B. When conducting a test and handling substances, certified employees/contract staff will:
1. Use appropriate personal protective equipment per DOC 890.130 Job Safety Analysis, Hazard Assessments, and Personal Protective Equipment.
 2. Follow manufacturer recommendations for proper handling and disposal. Safety Officers may recommend additional precautions based on testing location(s). No eating or drinking will be allowed while testing.
 3. Photograph/video record suspected illegal/unauthorized drugs and maintain in a secure location designated by the Superintendent/CCS/designee.
 4. Handle suspected illegal/unauthorized drugs as evidence per the appropriate policy. Evidence reports will describe the substance's location and characteristics (e.g., color, obvious odor, texture).
 5. Positive test results will be documented:
 - a. In Prisons or Work/Training Releases, as a report in the Incident Management Reporting System.
 - b. In the Field, as a chronological entry in the electronic file.

III. Chemical Exposure

- A. When an employee/contract staff experiences an exposure:
1. The following will be provided:
 - a. Resources to clean up and conduct as assessment to determine the extent of exposure.
 - b. Clean clothing, if needed.
 - c. The opportunity to seek immediate medical care.
 2. The supervisor will be notified as soon as possible of the exposure and DOC 03-133 Accident/Injury Report will be completed per DOC 890.000

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY DEPARTMENT WIDE		
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Safety Program.

- B. Contaminated materials will be disposed of per DOC 890.030 Hazardous/ Dangerous Waste Management.
- C. Questions about post-exposure follow-up should be directed to the Occupational Nurse Consultant or the exposed person's health care provider.

IV. Storage

- A. Test kits will be stored and maintained in a secure location designated by the Superintendent/CCS/designee or Chief of Investigative Operations for Special Investigative Services.
 - 1. Kits will be stored in the Intelligence and Investigations Unit (IIU) at major facilities.
- B. Safety Data Sheets (SDSs) will be maintained for each type of test kit per DOC 890.070 Chemical Control and HAZCOM.

DEFINITIONS:

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

ATTACHMENTS:

None

DOC FORMS:

- [DOC 03-133 Accident/Injury Report](#)
- [DOC 21-916 Presumptive Drug Testing Agreement](#)

EXHIBIT C



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REVIEW/REVISION HISTORY:

Effective: 11/6/95 DOC 320.150	Revised: 3/17/09
Revised: 11/5/99	Revised: 1/24/11
Revised: 9/16/02	Revised: 12/1/12
Revised: 2/14/03	Revised: 4/1/13
Revised: 6/18/03	Revised: 7/1/14
Revised: 3/26/04	Revised: 1/12/15
Revised: 10/3/05	Revised: 1/8/16 DOC 460.050
Revised: 12/11/06	Revised: 6/1/18
Revised: 3/29/07 AB 07-010	Revised: 1/1/19
Revised: 3/11/08	Revised: 3/4/22
Revised: 8/4/08	

SUMMARY OF REVISION/REVIEW:

Adjusted terminology throughout. Read carefully!
Attachment 1 & 2 - Adjusted 762 violation to align with WAC 137-25-030 and removed segregation as a sanction
Added II.B. that loss of visitation may only be a sanction for the same type of visit in which the violation occurred
III.A. - Adjusted language for clarification

APPROVED:

Signature on file

CHERYL STRANGE, Secretary
Department of Corrections

2/25/22

Date Signed

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REFERENCES:

DOC 100.100 is hereby incorporated into this policy; [RCW 9.94.010](#); [RCW 9.94.070](#); [RCW 9.94A.645](#); [RCW 72.09.130](#); [RCW 72.09.500](#); [WAC 137-24](#); [WAC 137-25](#); [WAC 137-28](#); [WAC 137-48-020](#); DOC 460.000 Disciplinary Process for Prisons; DOC 490.860 Prison Rape Elimination Act (PREA) Investigation; DOC 540.105 Recreation Program for Offenders

POLICY:

- I. The Department has established written rules of conduct for individuals in Prisons that specify acts prohibited within the facility and penalties that will be imposed for various degrees of violation.
- II. The Department will conduct hearings for general and serious violations per WAC 137-25, WAC 137-28, and DOC 460.000 Disciplinary Process for Prisons.
- III. Sanctions are intended to impact and guide behavior rather than to punish, and will be determined based on the circumstances, seriousness of the offense, and the individual's previous conduct record.

DIRECTIVE:

- I. General Requirements
 - A. The Disciplinary Hearing Officer will determine the appropriate sanction(s) when an individual is found guilty of a violation.
 1. The following will be used to determine appropriate sanctions:
 - a. Disciplinary Violations (Attachment 1) provides the categories and levels of violations, including loss of classification points.
 - b. Sanctioning Guidelines (Attachment 2) provides guidelines for imposing sanctions based on the number and frequency of violations received during a designated time period.
 2. The individual's disciplinary record, prior conduct, mental status, overall facility adjustment, and employee/contract staff recommendations may be considered.
 3. For any offense, up to the maximum sanction allowed may be imposed per WAC 137-28-240, WAC 137-28-350, and Attachment 2, regardless of whether it is a first or subsequent offense.



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- B. For all but the most serious violations, Disciplinary Hearing Officers are encouraged to use alternative sanctions (e.g., loss of privileges, extra duty, change in housing assignment) in lieu of extending the Earned Release Date.
- C. If more than one violation arises out of a single incident, the Disciplinary Hearing Officer should be guided by the sanction range for the most serious category of offense with a finding of guilt listed on the infraction report.
- D. Suspended sanctions may be imposed if the individual is found guilty of a violation or for violating conditions of the original sanction. Mandatory sanctions will not be suspended or revoked.
 - 1. The sanction may be suspended for a fixed period of time, not to exceed 365 days, subject to good behavior or meeting other imposed conditions.
 - 2. If the individual's subsequent behavior is appropriate, the Disciplinary Hearing Officer may revoke the sanction at or before the end of the fixed time period.
- E. The Disciplinary Hearing Officer may reduce/modify downward any previously imposed sanction.

II. Loss of Privileges

- A. Loss of privilege sanctions include, but are not limited to:
 - 1. Denial of attendance at special events
 - 2. Denial of participation in organization functions for individuals
 - 3. Removal from waiting lists for work or other program assignments
 - 4. Loss of:
 - a. Visitation
 - b. Recreation
 - c. Fee-based recreation
 - d. Telephone
 - e. Television/radio
 - f. Mobile electronic device and other electronic media
 - g. Commissary privileges, which may be limited with the exception of indigent items and postage
 - h. Library privileges, excluding law library when a documented court deadline has been imposed
 - i. Dayroom access
 - j. Personal property, which may be limited
 - k. Housing assignment



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- l. Packages
- m. In-cell hobby
- n. Hobby craft
- o. Weightlifting

B. An individual may only be sanctioned to a loss of visitation for the same type of visit in which the violation occurred (e.g., if the individual received a violation during a video visit, the individual may only be sanctioned to a loss of video visits).

III. Loss of Good Conduct Time Credits

A. If the circumstances of an offense require a sanction beyond the maximum range for loss of good conduct time per Attachment 2, the Disciplinary Hearing Officer will submit a written recommendation to the Superintendent.

- 1. Sanction recommendations for loss of good conduct time in excess of the guidelines established must have final approval by the Assistant Secretary for Prisons.

IV. Loss of Earned Time Credits

A. An individual serving a sentence for an offense committed on or after August 1, 1995:

- 1. May have earned time credits taken away as part of a disciplinary sanction if the individual has lost all good conduct time credits for the current commitment.
- 2. May have earned or future Earned Release Time (ERT) credits reduced.

B. An individual will be referred for prosecution for the crime of Persistent Prison Misbehavior when found guilty of a serious violation that is not a Class A or B felony after losing all potential ERT credits per RCW 9.94.070.

- 1. The Disciplinary Hearing Officer will:
 - a. Notify the Superintendent/designee by email when the criteria for referral is met.
 - b. Enter a Non-Sanction Recommendation in the Prison Discipline section of the electronic file.

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2. A single violation may result in both disciplinary action by the Department and filing of criminal charges.
3. Referrals for prosecution will occur within 30 days of an affirmed appeal decision.

V. Mandatory Sanctions

A. Individuals found guilty of a:

1. 501, 502, 505, 511, 604, 633, 704, or 711 violation will be prohibited from participating in any form of weightlifting for a period of 2 years, which may be extended by the Superintendent, per RCW 72.09.500 and DOC 540.105 Recreation Program for Offenders.
2. 557 or 810 violation will lose mandatory good conduct time, all available earned time credits for the month in which the violation occurred, and specified privileges determined by the Disciplinary Hearing Officer.
3. 603 violation will be subject to mandatory administrative actions and lose mandatory good conduct time and specified privileges. Multiple violations will result in consecutive mandatory sanctions.
4. 882 violation will lose mandatory telephone privileges, except legal calls.
5. 899 violation will lose mandatory good conduct time and specified privileges determined by the Disciplinary Hearing Officer.

- B. The period for determining the number and frequency of violations is established by the date of the guilty finding.

VI. Prison Rape Elimination Act (PREA) Violations

- A. For substantiated PREA allegations against an individual, an infraction report must be written against the accused per DOC 490.860 Prison Rape Elimination Act (PREA) Investigation.
- B. An individual who is found guilty of a 611, 613, 635, or 637 violation may be sanctioned to a multidisciplinary Facility Risk Management Team review for consideration of available interventions (e.g., Mental Health therapy, Sex Offender Treatment and Assessment Program, Anger Management).

DEFINITIONS:



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ATTACHMENTS:

Disciplinary Violations (Attachment 1)
Sanctioning Guidelines (Attachment 2)

DOC FORMS:

None