18-9191

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JEROME ALLEN BARGO
*Petitioner*

V.

WENDY KELLEY, et al.,
*Respondents*

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Jerome Allen Bargo (hereafter "Bargo"), a state prisoner, was compelled by Respondents to take a Computerized Voice Stress Analysis ("CVSA") test. The results were contradictory on its face. Nevertheless, based *solely* upon the flawed CVSA results, Bargo was charged with and convicted of rule violations and severely punished. Sanctions included, inter alia, assignment to an outdoor punitive detail – in contravention of a medical restriction – where he was deprived of access to toilets, personal hygiene/sanitation, essential safety equipment, subjected to and bullied by inmates placed in positions of power and authority over him, forced to perform labor and maintain pace beyond his physical capacity, suffering excruciating pain and degradation. The questions presented are:

1. Did the Eighth Circuit err in holding that Bargo's CVSA tests results constituted "some evidence" to support disciplinary action, even though the results were contradictory on its face and unsupported by any other evidence?

2. Did the Eighth Circuit err in holding that the work-conditions failed to violate the Eighth Amendment because Bargo was not harmed and there was no precedent specifically "requiring prison officials to provide outdoor toilets, hand sanitizers, or gloves"?

## PARTIES

1. Petitioner Jerome Allen Bargo is a state prisoner at Varner Unit, Arkansas Department of Correction (hereafter "ADC")

2. Respondent Wendy Kelley is Director of ADC.

3. Respondent Randall Watson, at all times relevant to this action, was Warden at Varner Unit, ADC.

4. Respondent Jeremy Andrews, at all times relevant to this action, was Deputy Warden at Varner Unit, ADC.

5. Respondent Raymond Naylor is Disciplinary Hearing Administrator, ADC.

6. Respondent Thomas Roland is Internal Affairs Officer, ADC.

7. Respondent Keith Waddle is Disciplinary Hearing Officer, ADC.

8. Respondent Gladys Evans is supervisor, Varner Unit Library, ADC.

9. Respondent Jimmy Phillips, at all times relevant to this action, was Correctional Captain, Varner Unit Field Utility and Hoe Squad, ADC.

10. Respondent Ojiugo Iko, Medical Doctor, Corizon, Inc., at all times relevant to this action, was medical provider at Varner Unit, ADC.

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Jerome Allen Bargo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Bargo v. Kelley, et al.*, no. 18-1340.

## DECISIONS BELOW

The decision of the court of appeals affirming the district court's granting of summary judgment to Defendants – Respondents is not reported. A copy is attached as Appendix A to this petition. The order of the United States District Court for the Eastern District of Arkansas is not reported. A copy is attached as Appendix B to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 03, 2019. An order denying a petition for rehearing was entered on February 13, 2019, and a copy of that order is attached as Appendix D to this petition. Jurisdiction is conferred by 28 U.S.C. § 1254(1)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

This case also involves Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
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> ******
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> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Amendments are enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or The District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Among other things, Bargo's complaint alleged he was forced to submit to a CVSA test, as a result of unauthorized content (i.e., movies, games, and pornography) found on a prison library computer operated and password protected by a co-worker (Inmate Rodney Harris). At the time, Bargo worked nights in the prison library while Harris worked days. Although Bargo operated a computer (not the one at issue), no unauthorized content was discovered on it. Bargo passed *four* out of five relevant questions on the CVSA test, establishing that he did not know about the content found on Harris' computer, to wit:

4. "Did you know about the porn, games, as well as movies on Inmate Harris' computer?

6. "Did you look at porn of Inmate Harris' computer?"

7. "Did you play games on Inmate Harris' computer?"

11. "Did you watch movies on Inmate Harris' computer?"

The Respondents alleged, however, that Bargo failed the fifth question, no. 14: "Did you know who provided illegal software for Inmate Harris to put on the computer?" As a result, Bargo was charged with two rule violations. Inmate Harris wrote a "Witness Statement" that Bargo had no knowledge of the illicit content. And despite questions 4, 6, 7, and 11, particularly no. 4, confirming he had no knowledge of the content, he was convicted and sentenced to 30 days

punitive isolation, reduced in good-time earning class, and assigned an outdoor punitive detail ("Field Utility") in contravention of a medical restriction,[1] where he remained for four months, hovered over by armed guards on horseback.

On suit, Bargo maintained he did not fail question 14. He asserted instead that the failure was engineered as retaliation for exercising his constitutional right of access to courts,[2] or was simply due to the CVSA's scientifically proven inaccuracy. Furthermore, he highlighted the contradiction between the results of questions 4, 6, 10 & 11 versus 14, and the fact that the *flawed* CVSA test results was *admittedly* the only incriminating evidence available and relied upon by the disciplinary board. Nevertheless, the United States Magistrate Judge found no Fourteenth Amendment due process violation, and his findings and recommendations were adopted. Bargo asked both the District Court and Eighth Circuit (and now this Court) the following question: How could he know who provided something [illegal software] for which the CVSA itself demonstrated he knew nothing about?

Because no toilets were provided at the work site for inmates assigned Field Utility, Bargo was forced to forgo relieving himself or urinate and defecate in plain view of passing motorist (including women and children), and without any means of hand-sanitation. More, he was forced to handle (without gloves)

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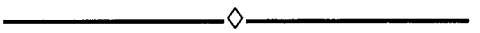
[1] Whether or not Bargo had a valid medical restriction prohibiting his assignment to Field Utility was a disputed *material* factual issue.

[2] At the time, Bargo was engaged in civil litigation against the ADC, and he had been warned (which the record below reveals) that prison officials wanted his library job terminated because of his accessibility to the Law Library and use of computers to draft legal pleadings.

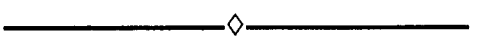
debris contaminated with harmful chemicals and human and animal waste, without any means of hand-sanitation. Despite all this, he was fed meals at the work site, without any means of hand-sanitation. In addition to gloves, he was also denied proper eye protection and a backbrace, and he was subjected to and bullied by inmates placed in positions of power and authority over him. The Magistrate Judge found no Eighth Amendment cruel and unusual punishment violation because Bargo had not been harmed, and there was no precedent specifically requiring "prison officials to provide outdoor toilets, hand sanitizers, or gloves." The United States District Judge wrote separately on the matter of sanitation but also failed to find a constitutional violation, due to lack of Eighth Circuit precedent.

Summary judgment was granted the Respondents. The Court of Appeals affirmed the lower court and denied petition for rehearing.



## BASIS FOR FEDERAL JURISDICTION

This case raises questions of interpretation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the proscription of cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. § 1331.



## REASONS FOR GRANTING THE PETITION

### I. CONFLICTS WITH DECISIONS OF OTHER COURTS

#### A. Federal Courts of Appeals and State Appellate and Supreme Courts Have Reached Conflicting Decisions Regarding Whether CVSA Results, Without More, is Sufficient Evidence to Support Prison Disciplinary Action

Bargo's CVSA results are contradictory, thereby impeaching itself. Paramount is question no. 4, "Did you *know about* the porn, games, as well as movies on Inmate Harris' computer?" (emphasis added). Bargo showed "No Deception" to question 4, establishing that he *did not know about* the illegal content. Question 6, 10, and 11, for which he also showed "No Deception," further confirmed he did not know about the illegal content. In contradiction, question 14 indicated he knew about said content. But how then could he have passed question 4? That he passed questions 6, 10, and 11 corroborates that he responded truthfully to question 4 (and thus passed). So the proper question is, how could he have failed question 14? Bargo submitted two theories as to why or how he allegedly failed question 14: Either the failure was engineered in retaliation for exercising his right of access to courts, which is supported by the record below, or it was simply due to the CVSA's scientifically proven inaccuracy. Either way, and despite the glaring contradiction (which weighted decisively in Bargo's favor), the District Court held that the CVSA results *alone* was adequate evidence to support the disciplinary conviction. This holding conflicts with the decisions of other federal and state courts which hold that the results of a

polygraph or CVSA test *without more* is insufficient to support prison disciplinary action.

In *Lenea v. Lane*, 882 F.2d 1771 (7th Cir. 1989), Lenea filed suit after being found guilty by a prison disciplinary committee of aiding and abetting an escape from the chapel where Lenea worked. The prison officials argued that "some evidence" existed of Lenea's guilt because of (1) Lenea's presence in the chapel on the day of the escape; (2) Lenea's admission that he knew the escapees; (3) material contained in Lenea's master file; and, (4) the results of Lenea's polygraph test (which he had failed). The District Court, however, found that the polygraph results alone was the *only* evidence of guilt relied upon and that such was insufficient to support the disciplinary conviction. Appeal was taken. The appellate court agreed with the district court that polygraph evidence was relevant only on the question of Lenea's credibility and concluded, "Absent any other evidence pointing to Lenea's guilt, this simply was not enough to find him guilty of aiding and abetting the escape." *Id* at 1176.

Similarly, where results of first polygraph exam was deemed inconclusive and a second exam indicated inmate was at least "withholding information" concerning the person or persons responsible for assaulting an officer, the court reversed the disciplinary conviction because there was no other incriminating evidence to rely upon. *Brown v. State*, 828 F.2d 1493 (10th Cir. 1987). More, in *Parker v. Oregon State Correctional Institution*, 87 Or. App. 354, 742 P.2d 617

(1987), where polygraph evidence *alone* was relied upon to reach guilty verdict in prison disciplinary hearing, the decision was reversed by court. In likeness, the Alabama Court of Appeals found "no worthwhile corroboration" in polygraph exam that supported hearsay testimony in prison disciplinary hearing. *Johnson v. State*, 576 So.2d 1289, CR-89-1415 (1991)

In this case, the Magistrate Judge cited only two cases that relied upon CVSA results to support a disciplinary conviction.[3] In both cases, however, additional evidence was available and relied upon by the disciplinary hearing committee to reach its decision. See *Reeves v. Mohr*, no. 14:11-CV-2062 (N.D. Ohio), 2012 WL 275166 (Inmate accused Reeves of sexually assaulting him, and Reeves *offered* to take a CVSA test and failed); *Tedesco v. Secretary for Dep't of Corr.*, 190 Fed. Appx. 752 (11th Cir. 2006) (District Court found that "the disciplinary board did not rely solely on the VSA test, but also on other evidence that supported a finding of guilt.").

Indeed, in every case found and researched by Bargo, where polygraph or CVSA evidence was relied upon in a prison disciplinary hearing, and the inmate was found guilty and the decision not overturned by a court, *additional* evidence was also available and relied upon to reach a conviction. E.g., *Moore v. Plaster*, 313 F.3d 442, 444 (8th Cir. 2002); *Snow v. Oregon State Penitentiary, Corr.*, 308 Or. 259, 780 P.2d 215 (Oregon 1989); *Stone-Bey v. Debruyn*, 101 F.3d 704 (7th

[3] See Appendix C, Proposed Revised Findings and Recommendations, submitted herewith.

Cir. 1996); *Hamm v. Lockhart*, 980 F.2d 734 (8th Cir. 1992); *Reeves*, supra; *Tedesco*, supra.

In sum, this case is distinguishable from all others in that Bargo was unable to find one case – like his – where polygraph or CVSA evidence alone was deemed sufficient evidence by a court to support prison disciplinary action. More, not one case was found where polygraph or CVSA results contradicted and discredit itself, as here.

### B. Reliability of the CVSA System Conflicts With Federal Courts of Appeals, Arkansas Supreme Court, and Scientific Community

In *Donahue v. Arkansas Dep't of Health and Human Services*, 99 Ark. App. 330, 333, 260 S.W.3d 334 (2008), the Arkansas Supreme Court wrote that CVSA results "are inherently unreliable." The Court's opinion is consistent with a 2013 study by *Investigative Science Journal* (ISJ) which found, following extensive study, that "the CVSA system operated only at about chance level." This finding, wrote ISJ, "is consistent with those reported by other investigations; it is confirmed by field research." (See DE97, pp. 35-50, *esp. References*; and, DE22, pp. 21-25). See also f.n.[4], below.

In *Lenea*, 882 F.2d at 1176, the Seventh Circuit noted that "the threshold question (when the issue is properly before the court) will be the exam's reliability, *Viens v. Daniels*, 871 F.2d at 1335 (evidence relied upon by

[4] See, e.g., http://www.polygraph.org/section/resources/review-voice-stress-based-technologies-detect (American Polygraphy Association).

disciplinary board 'must bear sufficient indicia of reliability'), which necessarily will entail a detailed inquiry into polygraph examinations." In the instant case, it is incontrovertible that neither the Respondents, the District Court, nor Eighth Circuit addressed Bargo's properly presented claim of the CVSA's unreliability. The matter is now properly before this Court.

This Court established the "some evidence" standard for review of the sufficiency of the evidence supporting the conclusion of a prison disciplinary board. *Superintendent v. Hill*, 472 U.S. 445, 105 S.Ct. 2768 (1985). In articulating this standard, the court left the responsibility of the circuit courts to determine the factors that constitute "some evidence." *Id*, at 455-56. Every circuit that has considered this question has determined that the "some evidence" rule establishes a minimal threshold requirement of authenticity or *reliability*. See *Hudson v. Johnson*, 242 F.3d 534 (5th Cir. 2001), at 538, Judge Pogue, concurring. These circuits require that "the evidence relied upon by the disciplinary board must bear sufficient indicia of reliability ..." *Id.* Such a requirement is a "necessary corollary if the 'some evidence' rule is to have meaning," wrote Judge Pogue. See also *Harrison v. Dahn*, 911 F.2d 37 at 41 (8th Cir. 1990) (Given that EMIT urine drug test is roughly 95% accurate, positive results of only one test bares sufficient indicia of reliability to provide some evidence of drug use).

What was not discussed in *Harrison* is that the EMIT's 5% chance of error is on the side of testees. Specifically, the EMIT cannot detect what is not present. So the chance of error is that 5% of testees may actually have drugs in their urine yet the test show they are clean. In other words, EMIT testees cannot be falsely accused. By contrast, as previously discussed, the accuracy of the CVSA is only about 50% – equivalent to a coin toss – because, according to studies, the system can and does detect stress *unrelated to not telling the truth*, indicating deception and, thus, failure of the test. In short, there is a 50% chance of being falsely accused. Such extremely high chance of error does not bare the requisite indicia of reliability to provide some evidence for prison disciplinary hearings.

No reasoned decision convicting Bargo of rule infractions could rest on the flawed and unreliable CVSA evidence presented to the disciplinary board. Bargo is guilty because the prison authorities have said so, not because of evidence.

### C. There Are Conflicting Decisions In The Courts of Appeals and District Court Regarding (1) Inmate Access To Toilets, Personal Hygiene, and Safety Equipment For Outdoor Work-Crews, and (2) Placing Inmates In Positions of Power & Authority Over Others

The Eighth Amendment forbids "unquestioned and serious deprivation of basic human needs," *Rhodes v. Cahpman*, 452 U.S. 337, 347 (1981); accord, *Wilson v. Seiter*, 501 U.S. 294, 308 (1991), as well as treatment that

unjustifiably inflicts pain or injury or is humiliating or "antithetical to human dignity." *Hope v. Pelzer*, 536 U.S. 730, 738, 745 (2002).

There was no dispute that Bargo was deprived of the aforementioned basic human necessities. That he repeatedly suffered painful constipation as a result of not being able to have a bowel movement without a toilet was unchallenged, as was the claim of being forced to defecate and urinate in plain view of passing motorist, without toilet paper and any means of hand-sanitation. That he was forced to handle (without gloves) debris contaminated with harmful chemicals and human and animal waste, and without any means of hand-sanitation was also unchallenged, as was the claim that, despite all this, he was fed meals at the worksite, without any means of hand-sanitation. That he suffered excruciating headaches from long hours of exposure to the sun's harmful rays and glare without proper eye protection was likewise unchallenged, as was the claim that he was required to repeatedly *lift* and carry – without a backbrace – bags of produce weighing up to 50 pounds for up to ¼ mile, in extreme temperature up into triple digit, causing debilitating pain and fatigue both mental and physical. Indeed, the District Court did not rule that Bargo was not subjected to such while assigned Field Utility. Instead, the lower court found no Eighth Amendment violation because Bargo *was not harmed* and there was no precedent specifically requiring prison officials to provide *outdoors* the above-referenced basic human needs. Affirmed by the Eighth Circuit, those

findings are erroneous and conflict with prior decisions of the District Court, as well as the Eighth Circuit and other Federal Courts of Appeals.

Given that prisoners are unquestionably entitled to toilets, personal hygiene and reasonably adequate sanitation while *indoors*,[5] "common sense" and the jurisprudence of equity dictate that the same principle, to some degree, applies outdoors. At least two federal courts agree. *Palmer v. Johnson*, 193 F.3d 346 (5th Cir. 1999) (Deprivation of toilets and personal hygiene and reasonably adequate sanitation for inmates held outdoors overnight violated Eighth Amendment); *Austin v. Hopper*, 15 F. Supp.2d 1210, 1225-26 (M.D. Ala., 1998) (Prison officials agreed to provide outdoor work-crew with soap, water, toilet paper, and portable toilets).

The United States Magistrate Judge in reaching his *Revised* findings and recommendations erroneously determined that Jimmy Phillips did not act with deliberate indifference because Bargo failed to provide "evidence that the job requirements were not commensurate with his medical classification and restrictions, or that he attempted to have his restrictions changed by the medical department. ... *or that he suffered any injury*."[6] On the contrary, the record below chronicles Bargo's failed attempts at seeking medical attention,

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[5] *Howard v. Adkinson*, 887 F.2d 134, 137 (8th Cir. 1989)

[6] This was a significant departure from the *initial* findings and recommendations where the Magistrate Judge mistakenly concluded that Bargo failed to provide proof "that he was forced to carry squash in excessive heat which would support a finding that Phillips acted with deliberate indifference..." After demonstrating that Phillips had *admitted* to the foregoing, the Magistrate Judge revised the standard, setting the bar much higher.

reclassification and restrictions, during the time in question, and how his efforts were thwarted by security personnel. For instance, shortly after being assigned Field Utility, Bargo was issued a one-year "No Stairs" medical restriction, automatically precluding field labor. However, just three days later, May 31, 2014, the restriction was rescinded (*admittedly*) due to intervention by security. Besides visits to the Infirmary, Bargo filed a total of five (5) administrative grievances regarding medical issues, during the time in question. Then, only seven days after finally being released or given a job change from Field Utility, he was referred to an orthopedist – as requested all along – who issued a permanent restriction, stating: "Restrict from assignment requiring strenuous physical activity in excess of 0 hours per day," and from "prolong crawling, stooping, running, jumping, walking, or standing, in excess of 0 hours per day."[7] But more importantly, Bargo did in fact provide evidence that he had a valid up-to-date medical restriction, issued for the express purpose of precluding assignment to Field Utility or Hoe Squad, stating: "Restrict work assignment which requires wearing safety shoes." Respondents *admitted* that said restriction was in Bargo's medical file at the time in question and was valid, and that Field Utility and Hoe Squad workers are required to wear "brogans," which is ADC safety shoes.

[7] DE97, Ex. P, p. 79

Similarly, the Magistrate Judge erroneously determined that Bargo worked only a limited number of days, based on records composed on a computer and provided by Respondents. Bargo refuted the records and requested that the court conduct and evidentiary hearing and compel Respondents to produce, inter alia, the *original* Daily Activity and Movement Logs, which could prove the reports false. The request was ignored.

That Bargo was reigned over by inmates assigned positions of Lead, Tail and Gouger was *admitted* by Respondents, and that said inmates were permitted to "holler" at other inmates, as well as set the work-pace that others must follow and keep up with. And despite additional evidence that he was bullied (pushed, shoved and cursed) by said inmates, the Magistrate Judge found no constitutional violation because Bargo *was not harmed.* This finding is contrary to *McLaurin; Royal; and, Kemp.* Infra. But irregardless, Respondents violated clearly established law and direct injunctions. See *Finney v. Hutto*, 410 F. Supp. 251, 272 (E.D. Ark. 1976), aff'd 548 F.2d 740 (8th Cir. 1977); and *Finney v. Mabry*, 534 F. Supp. 1026, 1037-38 (1982), where ADC officials were permanently enjoined from verbally abusing prisoners and from placing inmates "in positions of authority over other inmates," and from giving inmates "power to exercise discretion in the control of other inmates in any way."

That inmates are entitled to the necessary clothing and safety equipment to execute their work assignment without jeopardizing their health and safety is

well established. *Fruit v. Norris*, 905 F.2d 1147-1150-51 (8th Cir. 1990). The *Fruit* court also implied that prison officials should use "common sense" in these matters. Here, "common sense" suggests the Respondents should have known that the totality of the working conditions to which Bargo – age **59**, at the time, and the oldest man in the field – was subjected to posed substantial risk to his health and safety and undoubtedly caused great pain. It is well established that "[t]here are circumstances in which prison work requirements constitute cruel and unusual punishment." *Johnson v. Clinton*, 763 F.2d 326, 328 (8th Cir. 1985). The case at bar is such a circumstance.

Four times on four separate issues the Magistrate Judge articulated that the facts alleged failed to demonstrate a constitutional violation or deliberate indifference because Bargo had not sustained injury. Although Bargo was unable to show actual physical injury, he did, however, show that he suffered severe pain – both mental and physical. And pain has been determined to be "sufficient injury to allow for recovery under the Eighth Amendment." *McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Kemp v. Hobbs*, 2014 WL 505473 (E.D. Ark. 2014). See also *Hudson v. McMillian*, 503 U.S. 1, 7-9 (1992) (holding that "sufficient injury" is not necessary for an Eighth Amendment excessive force claim).

That Bargo was required to show physical injury in order to establish an Eighth Amendment claim in unsupported by statutory or case law. Although

the Prison Litigation Reform Act (PLRA) precludes compensatory damages without a showing of physical injury, Bargo was still free to seek nominal damages, punitive damages, injunctive relief and a declaratory judgment. *Royal*; and *Kemp*. Id

## II. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF PUBLIC IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION

In the context of prisons, the "public" includes other prisoners, particularly those similarly situated with Bargo in the ADC.

### A. CVSA EVIDENCE

Essentially this case presents a fundamental question of the interpretation of this court's decision in *Hill*, supra. The question is of great public importance because use of the CVSA is common throughout the ADC and presumably affects the operations of the prison systems in all other states, the District of Columbia, and hundreds of city and county jails. In view of the frequency to which CVSA evidence is used in prison disciplinary proceedings, guidance on the question is also of great importance to prisoners because it affects their ability to receive a fair decision in proceedings that may result in months or years of additional incarceration and/or harsh punitive confinement.

The issue's importance is enhanced by the fact that (1) federal courts are in discord about the use of polygraph and CVSA evidence in prison disciplinary proceedings, (2) scientific studies show that the CVSA system is unreliable, and

(3) the Arkansas Supreme Court deemed it "inherently unreliable." Furthermore, in this case, the CVSA results – on its face – are flawed by contradiction.

Thus the courts below seriously misinterpreted *Hill* in holding that the discredited CVSA results *alone* constituted "some evidence" to support the disciplinary action.[8] This Court should correct that misinterpretation and make it clear that CVSA evidence, without more, is insufficient to support disciplinary action against prisoners, especially where the CVSA test results are flawed, as here.

### B. WORK CONDITIONS

Here, this case presents two fundamental questions: (1) whether the Constitution allows prisoners to be deprived of the basic human necessities such as toilets, personal hygiene, and safety equipment simply because of working outdoors, so long as they do not sustain injury, and (2) whether the Constitution allows select inmates to be placed in positions of power and authority over other prisoners, so long as those under them do not sustain injury. The questions are of great practical importance and Constitutional significance meriting this Court's intervention because these issues occur nearly every workday

[8] Noteworthy is that ADC policy prohibits its employees from being sanctioned based solely upon CVSA evidence. "There must be at least one additional items of corroborating evidence." DE4, Ex. B, pp. 43-44 at (4).

throughout the ADC and potentially affect the operations of prisons and jails all across the nation.

The importance of the issues is enhanced by the fact that federal courts are in discord about inmate access to toilets, personal hygiene/sanitation, and safety equipment for outdoor work crews, and the fact that prior injunctions against inmates in positions of power and authority over others are disregarded. Actually, it appears the injunctions were amended to include "actual injury" as a requisite to stating a claim. That holding does not square with the principle reasoning behind the injunctions, which is, the *risk* of violence and exploitation. See *McDuffie v. Estette*, 935 F.2d 682, 686, n. 6 (5th Cir. 1991). Bargo provided unrefuted evidence of substantial risk and exploitation, as well as personal experience and abuse at the hands of inmates in power and authority over others. (DE97, Ex. L 1-9, pp. 51-79).

In view of the ongoing conditions heretofore complained of, and the lower courts' misinterpretation of relevant laws, or lack thereof, this Court should intervene and make it clear that toilets, personal hygiene/sanitation, and essential safety equipment is mandatory for outdoor work-crews, and placing prisoners in positions of power and authority over others in any way is prohibited.

## CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

Jerome Bargo

May 2, 2019
Date

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