ORIGINAL

ORIGINAL

No. 19-5015

In The
Supreme Court of the United States

MICHAEL D. KELLEY,

Petitioner,

v.

COLETTE S. PETERS, being sued in her individual capacity; MICHAEL F. GOWER, being sued in his individual capacity; CRAIG PRINS, being sued in his individual capacity; D. YANCY, being sued in his individual capacity; J. NOIZIGER, being sued in his individual capacity,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael D. Kelley #8704552
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301

Petitioner *pro se*

Questions Presented

(1) Whether the "some evidence" standard announced in *Superintendent v. Hill*, 472 US 445 (1985), is satisfied in a prison administrative hearing setting when the only evidence in the record is a statement of the accused inmate's belief that a confidential informant had offered statements against his interests.

(2) Whether the "some evidence" standard announced in *Superintendent v. Hill*, 472 US 455 (1985), is satisfied in a prison administrative segregation hearing setting when the only evidence in the record is a statement from a confidential informant.

(3) Whether due process requires corroboration of a confidential informant's information before the "some evidence" standard announced in *Superintendent v. Hill*, 472 US 455 (1985), can be satisfied in a prison administration hearing setting.

LIST OF PARTIES

Petitioner: Pro se	MICHAEL D. KELLEY #16222317 Oregon State Correctional Institution 3405 Deer Park Drive, SE Salem, Oregon 97301
Respondent: Represented by:	COLETTE S. PETERS ELLEN F. ROSENBLUM Attorney General State of Oregon BENJAMIN N. GUTMAN Solicitor General SAMUEL A. KUBERNICK Assistant Attorney General 1162 Court St. NE Salem, Oregon 97301-4096 Benjamin.N.Gutman@doj.state.or.us Samuel A. Kubernick@doj.state.or.us Tel: (503) 378-4402 SOLICITOR GENERAL OF THE UNITED STATES Room 5614 U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-000

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Michael D. Kelley respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

PROCEDURAL HISTORY AND RELEVANT FACTS

1. Opinion Below

The Magistrate Judge issued Findings and Recommendations on December 15, 2017, granting Defendant's Motion for Summary Judgment. (Appendix F). The Opinion and Order and Judgment of the District Court adopting the Findings and Recommendations of the Magistrate Judge were filed on March 30, 2018. (Appendix E). The decision of the Ninth Circuit affirming the District Court's denial of relief was filed January 4, 2019. (Appendix D). The Ninth Circuit's Order denying the Petition for Rehearing and Rehearing *En Banc* was issued on March 22, 2019. (Appendix C).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 USC §1254(1).

3. Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . .

4. Statement of the Case

a. District Court Proceedings

On September 27, 2016, Mr. Kelley, in *pro se*, filed his 42 USC § 1983 complaint. Mr. Kelley alleged in his first claim for relief that Defendant Yancey was deliberately indifferent when he placed Mr. Kelley in administrative segregation based on false, slanderous, and misleading allegations violating Mr. Kelley's Eighth and Fourteenth Amendment rights. Mr. Kelley alleged in his second claim for relief that Defendant Nofziger denied Mr. Kelley due process by acting in concert with Yancey as a hearings officer to find substantial evidence supporting Mr. Kelley's placement in administrative segregation. Finally, Mr. Kelley alleged that Defendants Gower, Peters, and Prins failed to take the steps necessary to ensure that Mr. Kelley's constitutional rights were not violated by Defendants Nofziger and Yancey.

After briefing, Magistrate Judge John V. Acosta issued Findings and Recommendations on December 15, 2017 recommending Mr. Kelley's Motion for Summary Judgment be denied and that Defendant's Motion for Summary Judgment be granted. In those Findings and Recommendations, Magistrate Acosta made findings related to Defendants Peters, Gower, and Prins' personal involvement:

> Kelley has failed to allege any affirmative conduct of Peters, Gower, or Prins resulting in constitutional violations. Rather, Kelley alleges these defendants failed to investigate Kelley's complaints that Yancey and Nofziger engaged in conduct that violated Kelley's constitutions rights. While Kelley has not alleged Peters, Gower or Prins directed or participates in the alleged constitutional violations, he does alleges that they had knowledge of Yancey and Nofziger's offensive conduct

> and failed to act to prevent, or remedy, them. Viewing the evidence and allegations in a light most favorable to Kelley, it appears Kelley has asserted viable claims against Peters, Gower[], and Prins based on their failure to act. Defendants' motion for summary judgment in favor of Peters, Gower, and Prins based on the absence of personal participation should be denied.

(Appendix F, p 12). And in relation to Mr. Kelley's due process allegations, Magistrate Acosta found the following:

> Yancey advised Kelley of the reasons for his placement in administrative segregation. Kelley received notice of an administrative hearing and participated, both orally and in writing, in such hearing, which occurred within thirty days of Kelley's initial placement. Yancey and Kelley had some evidence to support their decision to place Kelley in administrative segregation—he was the subject of an investigation by the Unit and police into the sale of Spice in the Prison. The record establishes Kelley received the due process to which he was entitled. [fn] To the extent Kelley relies on Defendant's refusal to disclose the identity of the informant to Kelley as a due process violation, this argument is equally without merit. The Ninth Circuit has held "that due process does not require disclosure of the identity of any person providing information leading to the placement of a prisoner in administrative segregation." *Toussaint [v. McCarthy,]* 801 F2d [1080,] 1101 [(9th Cir 1986)]. Summary judgment on Kelley's due process claims should be granted.
>
> > [fn] Moreover. Kelley's due process rights were arguably not violated because temporary placement in administrative segregation does not implicate a protected liberty interest. *Serrano v. Francis*, 345 F3d 1071, 1078 (9th Cir 2003)("Typically, administrative segregation in and of itself does not implicate a protected liberty interest").

(*Id.*, p 14). And in relation to Mr. Kelley's deliberate indifference allegations, Magistrate Acosta found the following:

> Kelley relies solely on his administrative segregation placement to support his claim of deliberate indifference under the Eighth Amendment. He does not allege his placement in administrative segregation subjected him to a substantial, or even increased, risk of serious harm either from other inmates, untreated medical conditions,

> or the conditions found in administrative segregation or isolation does not violate the Eighth Amendment. *Salstrom v. Summer*, 959 F2d 241, at *1 (9th Cir 1992). Consequently, Kelley has failed to establish an actionable Eighth Amendment claim and Defendants' motion for summary judgment should be granted.

(*Id.*). And in relation to Defendant's qualified immunity defenses, Magistrate Acosta found the following:

> Because Kelley has failed to show a violation of the Eighth or Fourteenth Amendments, the court need not consider whether the constitutional rights at issue were clearly established when Yancey placed Kelley in administrative segregation or when Nofziger recommended continuing the placement. Defendants are alternatively entitled to qualified immunity, Defendant's motion for summary judgment should be granted, and Kelley's claims should be dismissed.

(*Id.*).

Mr. Kelley timely submitted objections to Magistrate Acosta's Findings and Recommendations objecting to:

- "The record establishes Kelley received the due process to which he was entitled." (See F&R, at 10-11).
- Defendants did not violate due process by refusing to "identify [] the informant. (See F&R, at 11).
- Defendants did not violate the Due Process Clause. (See F&R, at 7-9).
- That Plaintiff did "not allege his placement in administrative segregation subjected him to substantial, or even increased, risk of serious harm either from other inmates, untreated medical conditions, or the conditions found in administrative segregation. (See F&R, at 12).
- Plaintiff was not provided notice of deficiencies in the Complaint and an opportunity to amend.

(Plaintiff's Objections To Findings & Recommendations, pp 1-2).

On March 30, 2018, Chief United States District Judge Michael W. Mosman issued an Opinion and Order stating in relevant part:

> . . . .
>
> Upon review, I agree with judge Acosta's recommendation and I ADOPT the F&R [55] as my own opinion. Mr. Kelley's Motion for Summary Judgment [14] is DENIED, Defendants' motion for summary judgment [34] is GRANTED, and this action is dismissed with prejudice.
>
> I write separately to clarify that the fact that Mr. Kelley was under investigation is not, on its own, sufficient to satisfy the "some evidence" standard. One might come under investigation for any reason or no reason at all, so the fact by itself cannot satisfy the requirement that decisions by prison officials have "some basis in fact." *Superintendent v. Hill*, 472 US 445, 455 (1985).
>
> Nevertheless, the records show that here there was some basis in fact: investigators had received information from a source that Mr. Kelley sold spice. Kelley Decl. [18] at 2. Defendant Yancey told Mr. Kelley as much, and Mr. Kelley introduced this fact on the record at his administrative hearing. Nofzinger Decl. [36] Ex. 2. Case law does not require that hearing findings specify the evidence they rely on; instead, the Supreme Court has suggested that the findings need only be "supported by some evidence in the record." Hill, 472 US at 454. Because a factual basis for the investigation was in the record, the "some evidence" requirement was satisfied in this case.

(Appendix E). Subsequently Chief Judge Mosman issued a Judgment on March 30, 2018, (*Id.*), and Mr. Kelley timely appealed to the Ninth Circuit Court of Appeals.

b. Ninth Circuit Proceedings

On January 4, 2019, a panel of the Ninth Circuit Court Appeals issued a Memorandum decision affirming the District Court's decision to dismiss Mr. Kelley's 42 USC § 1983 action for failure to state a claim. (Appendix D). The memorandum states in full:

> Michael D. Kelly, an Oregon state prisoner, appeals pro se from the district court's summary judgment in his 42 USC § 1983 action alleging due process violations in connection with his confinement in administrative segregation. We have jurisdiction under 28 USC § 1291. We review *de novo*. *Guatay Christian Fellowship v. County of San Diego*, 670 F3d 957, 970 (9th Cir 2011). We affirm.
>
> The district court properly granted summary judgment for defendants because Kelley failed to raise a genuine dispute of material fact as to whether defendants provided insufficient notice of the reasons for retaining him in administrative segregation, or as to whether the "some evidence" standard was met. *See Bruce v. Ylst*, 351 F3d 1283, 1287-88 (9th Cir 2003)(explaining that due process claims based on administrative segregation are subject to the "some evidence" standard); *Toussaint v. McCarthy*, 926 F2d 800, 803 (9th Cir 1990)(discussing "indicia of reliability" of evidence); *Toussaint v. McCarthy*, 801 F2d 1080, 1100-1101 (9th Cir 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 US 472 (1995)(describing due process notice and hearing requirements in the administrative segregation context).
>
> AFFIRMED

(*Id.*).

After filing a Petition for Rehearing and Rehearing *En Banc* invoking *Cato v. Rushen*, 824 F2d 703 (9th Cir 1987),[1] for the proposition that uncorroborated, lone confidential informant evidence in a prison administrative hearing setting requires corroboration to satisfy due process as announced in *Superintendent v. Hill*, 472 US 445, 455 (1985), and that standard had not been met because as there is nothing in the record about alleged confidential informant's reliability, the Ninth Circuit Court of Appeals issued an order requesting additional briefing. (Appendix C).Subsequently, the Court denied Mr. Kelley's request on March 22, 2019.

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[1] The *Cato* Court reversed the District Court's summary judgment decision in favor of the defendant prison officials holding that the Defendants violated plaintiff's due process rights by placing him into administrative segregation based only upon a prison informant's hearsay statement.

(Appendix B). On April 1, 2019, the Ninth Circuit Court of Appeals filed a Judgment Mandate. (Appendix A).

5. Reasons for Granting the Writ

a. The "some evidence" standard in prison administrative hearing cases.

Superintendent v. Hill, 472 US 445 (1985), requires "some evidence from which the conclusion of the administrative tribunal could be deduced" in a prison disciplinary hearing. *Hill* 472 US at 455-456.[2] There "must be some indicia of reliability of the information that forms the basis for prison disciplinary actions." *Cato v. Rushen*, 824 F2d 703, 705 (9th Cir 1987).[3] Uncorroborated hearsay by a confidential informant is not reliable information. *Id.* In other words, there must be some evidence in the record and that evidence, particularly from a confidential informant, must bear some indicia of reliability.

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[2] This Court has consistently held that the some evidence standard applies in administrative segregation hearing cases. *See e.g., Hewitt v. Helms*, 459 US 460, 476 (1983)(due process requirements for placement in administrative segregation); *see also Dorrough v. Ruff*, 552 Fed Appx 728 (9th Cir 2014).

[3] Every circuit which has considered this question has determined that the "some evidence" rule establishes a minimal threshold requirement of authenticity or reliability. These circuits require that "the evidence relied upon by the disciplinary board must bear sufficient indicia of reliability . . ." Viens v. Daniels, 871 F2d 1328, 1335 (7th Cir 1989); see also Harrison v. Dahm, 911 F2d 37, 41 (8th Cir 1990); *Hudson v. Johnson*, 242 F3d 534 (5th Cir 2001); *Williams v. Fountain*, 77 F3d 372, 375 (11th Cir 1996)(failure to evaluate credibility of informant statements bars reliance on such statements); *Hensley v. Wilson*, 850 F2d 269, 276 (6th Cir 1988)(same); *Brown v. Smith*, 828 F2d 1493, 1495 (10th Cir 1987)(same); *Gaston v. Coughlin*, 249 F3d 156, 163 (2nd Cir 2001)(testimony of confidential informant sufficient where circumstances of testimony and informant's history provided indicia of reliability); *Goff v. Burton*, 91 F3d 1188, 1192 (8th cir 1996)(informant's testimony did not meet even minimal standards); *Cf Bridges v. Wixon*, 326 US 135, 151, 155-56 (1945)(deportation order could not be sustained under some evidence standard when the Attorney General's decision rested on unsworn statements by cooperating witness who denied making them).

confidential informant theory.[6] First, the confidential informant noted by Mr. Kelley at his administrative hearing was nothing more than a theory. That is, Mr. Kelley had been informed his placement in administrative segregation was based solely on an investigation into introduction of contraband into the prison. In an attempt to flesh that basis out further, Mr. Kelley mentioned the possibility of a confidential informant to the hearings officer. Rather than discounting that theory, the hearing's officer let that theory rest. In turn, that theory begat a life of its own until the District Court Magistrate cited Mr. Kelley's theory as satisfying the "some evidence"standard.

Second, there is not any supporting evidence in the record supporting or corroborating the confidential informant, if one existed, rendering any confidential informant evidence inadequate. *See Toussaint v. McCarthy*, 926 F2d 800, 803 (9th Cir 1990)("Uncorroborated hearsay by a confidential informant is not reliable information")(Internal citation omitted); *Cota v. Scribner*, 2010 US Dist LEXIS 129687 (SD Cal 2010).

It appears that the panel overlooked these factors in affirming the District Court's judgment, which relieved the Defendants of their burden of showing "some evidence in the record" before depriving Mr. Kelley of his liberty interests. *Hill*, 472 US at 455. Due process under the circumstances of this case was not satisfied rendering the conclusion of the administrative hearing devoid of evidence, without

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6 Mr. Kelley himself placed the source of any confidential informant into the record here there. He hypothesized that the reason he was placed in administrative segregation was based on confidential information, prison officials never placed the possibility of a confidential informant in the record at any time.

support, or otherwise arbitrary.[7] *Id.* at 457; *see also Cato v. Rushen*, 824 F2d 703, 705 (9th Cir 1987). Here, no reliable evidence supported a suspicion that Mr. Kelly conspired to introduce contraband into the prison, and there was no reliable evidence to support Mr. Kelley's placement into administrative segregation because, if there was a confidential informant, it was not corroborated by any evidence in the record. Due process must be invoked to preserve the "some evidence" standard."

c. The Ninth Circuit's "some evidence" decision involves a question of exceptional importance – to wit, whether due process is satisfied when a prison hearing's officer concludes placement in administrative segregation is necessary based on uncorroborated confidential informant testimony.

While it is true that "federal courts rarely involve[] themselves in the administration of state prisons, 'adopt[ing] a broad hands-off attitude toward problems of prison administration[,]'" *Johnson v. California*, 543 US 499, 528 (2005)(citing *Procunier v. Martinez*, 416 US 396, 404 (1974), prisoners do not entirely surrender their constitutional rights at the prison gates. *Bell v. Wolfish*, 441 US 520, 545 (1979).

This Court has made clear that at least one of those rights still enjoyed is the "some evidence" standard, and as most of the circuits have agreed upon to a large extent; a necessary corollary requirement to the "some evidence" rule is

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[7] A hallmark of due process protections is curtailing arbitrary government actions. *Hicks v. Oklahoma*, 447 US 343, 346 (1980)("liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State"); A finding that a right merits substantive due process protection means to right is protected "against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 US 115, 126 (1992)(quoting *Daniels v. Williams*, 474 US 327, 331 (1986)); *Reno v. Flores*, 507 US 292, 302 (1993)(Due Process Clause limits the extent to which government can substantively regulate certain "fundamental" rights, "no matter what process is provided").

corroboration of, and credible reliable evidence if the rule is to have any meaning at all. Credible, reliable testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account. The obvious corollary is that corroboration is necessary if the testimony of a prison confidential informant does not appear credible. Where, as here, it is reasonable and constitutionally required to expect corroborating evidence, the absence of such corroborating evidence should lead to a finding that the prison hearing's officer failed to meet the burden of proof for Mr. Kelley's placement in administrative segregation. In other words, without any corroboration of a prison confidential informant, reviewing courts are unable to adequately consider whether "some evidence" supports the administrative segregation placement. Without the necessary corroboration fundamental fairness, integrity, and public confidence is eroded, requiring protection from the Due Process Clause of the Fourteenth Amendment.

Further instruction from this Court is needed to offer lower courts a brighter-line guidance on the issues presented herein.

CONCLUSION

For those reasons, this Court should issue its writ.

Dated this 20th day of June, 2019.

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