No. 19-7922

IN THE

SUPREME COURT OF THE UNITED STATES

Scott Lewis Rendelman — PETITIONER
(Your Name)

ORIGINAL

vs.

William True, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Lewis Rendelman, #24628-037
(Your Name)
USP Marion
PO Box 1000
(Address)

Marion IL 62959
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. In 1985 this Court established that the "some evidence" standard is to be applied to reviews of prison disciplinary cases. In cases where an offense consists of more than one element, and good time credits are at stake, must there be "some evidence" to support a finding on every element of the offense, or is it enough that "some evidence" can be shown to support any single element of the offense?

2. If the answer to Question #1 is that there needs to be "some evidence" to support a finding on every element of the offense, then the appeal was non-frivolous, and the question is did the court of appeals act properly and correctly when it dismissed a non-frivolous appeal from an indigent appellant for failure to pay the docketing fee in a case that would directly affect the length of the term he would have to spend in prison?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Scott Lewis Rendelman v. B. True, No. 19-cv-712-SMY, U.S. District Court for the Southern District of Illinois. Judgment entered October 1, 2019.

- Scott L. Rendelman v. William True, No. 19-3028, U.S. Court of Appeals for the Seventh Circuit. Judgment entered February 4, 2020.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2019 U.S. Dist. LEXIS 170186; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 6, 2020. The order of dismissal was February 4, 2020.

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

At all times relevant to this case, Rendelman was assigned to the Communications Management Unit ("CMU") at the Terre Haute Prison Complex in Indiana. At the time relevant to this case, the CMU housed 36 inmates. The CMU and its inmates are completely segregated from the other 900-plus inmates in the institution such that the CMU is a completely self-contained unit and no one other than the inmates and staff assigned to the unit have access to the CMU.

Inmate cells are unlocked all day from 6:00 am to 9:15 pm except during counts. Inmates cannot lock their cell doors shut when they leave their cells and must leave their cell doors unlocked when they vacate their cells, allowing free access to their empty cells by any inmate. Inmates who leave the housing area and go to the recreation and program areas (this includes the Inmate Dining Room) are unable to see their cells and cannot see if and when another inmate enters their cells, and if so, who that inmate might be.

Rendelman's cell contained 2 lockers. Both lockers were free standing and were stacked one on top of the other. Rendelman's top locker contained his personal property and was locked by Rendelman with a combination lock which had been issued to Rendelman by CMU staff. Rendelman's bottom locker contained only institution issued clothing and had no lock on it. The bottom locker was kept unlocked at all times and could be accessed by any inmate who had access to Rendelman's cell. Between the 2 stacked lockers was an empty space approximately 2 feet by 1½ feet by 3 inches. This space can be viewed only if the lockers were separated enough

so that you could look in and see the space. Rendelman is elderly and not very strong and is unable to lift the top locker from the bottom locker, especially when the top locker is not empty, and is therefore unable to inspect the area between the two lockers or to hide something between the two lockers without assistance from other inmates or staff.

On September 20, 2018, there was a mass shakedown of the CMU. According to the reporting officer, Mr. C. Swift, Case Manager, who shook down Rendelman's cell, he was pushing Rendelman's lockers away from the wall to check behind the lockers. While pushing the lockers, the unlocked doors of the bottom locker containing Rendelman's institutional clothing swung open and a homemade weapon fell out of the locker onto the floor. Swift did not see the weapon fall out from the locker (he was behind it, pushing it) but rather he heard it when it hit the floor. The weapon was a sharpened steel rod which was originally a brace which was taken from the grill of one of the industrial size fans. The weapon was essentially a large ice pick (a foot long) but without a handle.

Rendelman was immediately charged with possession of a weapon and placed in the Special Housing Unit ("SHU") (also known as "the hole"). This is Rendelman's first and only weapons charge in his 33 years of incarceration.

A disciplinary hearing officer ("DHO") held a hearing on October 25, 2018 to consider the charges against Rendelman. Rendelman claimed he did not know that there was a weapon in his cell. Indeed, there

was no independent evidence at all that Rendelman had any knowledge of the weapon that was in his cell. This is important because according to the ruling in Austin v. Pazera, 779 F.3d 437 (7th Cir. 2015), an inmate cannot have constructive possession of contraband if he does not know it was there, and a finding that an inmate had constructive possession of contraband, which necessarily includes a finding that the inmate knew the contraband was there, must be supported by "some evidence." Rendelman further claimed the weapon could not have been in his bottom locker because if it was he would have seen it. Rendelman believes the weapon had been hidden in his cell by another inmate in the empty space between his 2 lockers. Rendelman believes that when Swift pushed the lockers away from the wall, the top locker was pushed more forward than the bottom locker, creating a space through which the weapon rolled out. The DHO nevertheless found Rendelman guilty of possessing a weapon under a theory of strict liability which makes Rendelman responsible for all contraband found in his cell regardless of whether or not he knew it was there. The DHO refused Rendelman's request to check the security camera's footage to see who put the weapon in Rendelman's cell.

Rendelman lost 41 days of Good Conduct Time, 180 days of email, and 180 days loss of property. Rendelman remained in SHU until his transfer to USP Marion CMU on February 6, 2019.

The DHO Report can be found in Appendix C, pages 10-12.

Rendelman unsuccessfully appealed his DHO finding using the administrative remedy process. The administrative appeals can be found in Appendix C, pages 17-20. As stated on page C-18, "the weapon was recovered from your assigned cell, where you were the sole occupant. You are responsible for keeping your cell free from contraband." This is a strict liability standard which makes it irrelevant whether I had knowledge of the contraband or not, and is contrary to the ruling in Austin, supra,

which requires knowledge that the contraband is there in order to be guilty of constructive possession.

The Austin court also ruled that there was only a 20% chance that Austin was actually guilty because the contraband could have belonged to Austin or to any one of 4 other inmates. The court ruled that a 20% chance was insufficient. In Rendelman's case, the contraband could have belonged to Rendelman or to any one of 35 other inmates, all of whom had access to Rendelman's unlocked and unwatched cell all day long, every day (and his unlocked bottom locker). This is a chance of only 2.78%. If 20% is legally insufficient, then certainly less than 3% is legally insufficient. Rendelman raised this issue in his administrative appeals but it was trumped by the strict liability standard.

After exhausting his administrative appeals, Rendelman filed the petition which is the subject of this case in the U.S. District Court For the Southern District of Illinois (which is reproduced in full at Appendix C). The district court, applying the "some evidence" standard applicable to reviews of prison disciplanary proceedings, affirmed the DHO action. The district court opinion is reproduced in full at Appendix B. It is evident from the district court's opinion that the district court committed error in its application of 7th Circuit case law to the facts of this case. Jurisdiction in the district court was 28 USC § 2241.

Here in the 7th Circuit, pursuant to Austin, supra, Rendelman cannot be found guilty of constructive possession of contraband unless he has knowledge that the contraband is there. A finding of guilty requires a finding of knowledge, and the finding of knowledge requires that it be supported by "some evidence." The report clearly shows that there is no evidence whatsoever to support a finding that Rendelman knew the contraband was hidden in his cell.

The district court cites the following evidence as meeting the "some evidence" standard to support the DHO finding. First is the reporting officer's documented report, which essentially states that he shook Rendelman's cell down during a mass shakedown of the unit and

found the object in Rendelman's cell. While this is evidence as to the location of the contraband in Rendelman's cell, it is no evidence whatsoever that Rendelman knew it was there, especially in view of the fact that 35 other inmates had access to Rendelman's unlocked cell and could have hidden the object either between his two stacked lockers or in his unlocked clothing locker.

Next, the court cites photographs of the weapon. This is evidence that the item was contraband. It is not evidence that Rendelman knew it was there.

Next, the court cites TRUSCOPE logs of prior searches. While this may tend to prove that the contraband was not left behind by a former occupant (although officers can very well miss finding a well hidden object) it does not rule out that the object may have been hidden in Rendelman's cell shortly before the search, and it is no evidence whatsoever that Rendelman knew the object was there.

Finally, the court cites Rendelman's failure to provide any specific evidence to demonstrate that someone else planted the weapon. If Rendelman did not know the contraband was there, it is not surprising that he would not know who hid it or have any evidence to show who hid it. To the extent this is "some evidence," it is evidence that Rendelman did not know the contraband was there. It is no evidence whatsoever to prove Rendelman knew it was there.

The court further errs by ruling (on page B5) that the Austin case does not apply here because the weapon was found in Rendelman's bottom (unlocked) locker. (Case manager's testimony that the weapon was in the locker more credible than Rendelman's contention that the weapon was hidden between the two lockers.) The court misses the point. Regardless of where in Rendelman's cell the object was found, there was less than a 3% chance the object actually belonged to Rendelman, well below the 20% the court ruled to be insufficient. And in any event, Austin requires knowledge that the object was there.

In summary, the district court found that there was "some evidence" in the record to support the conclusion reached by the DHO. Photographs supported the finding that the object was contraband. The reporting officer's documented report supported the finding that the contraband was found in Rendelman's

cell. Similar evidence existed in Austin. This is indeed "some evidence." But Austin requires knowledge that the contraband was there in order to be guilty of constructive possession, and there was no evidence whatsoever to support the conclusion reached by the DHO that Rendelman knew the contraband was in his cell.

Rendelman appealed the ruling of the district court to the U.S. Court of Appeals for the Seventh Circuit. Rendelman, who is indigent, also filed a motion to proceed on appeal in forma pauperis. Rendelman's ground for appeal was that the evidence was insufficient and did not meet the "some evidence" standard. This motion is reproduced in full at Appendix E.

Rendelman's motion to proceed on appeal in forma pauperis went before the same judge who had ruled against his original petition. The judge refused to admit error and denied the motion, stating that the low threshold of the "some evidence" standard was met by the several pieces of evidence relied on by the DHO. This opinion is reproduced in full at Appendix F. The court erred in that there was no evidence in the record to support a finding that Rendelman knew the contraband was in his cell.

Rendelman refiled his motion to proceed on appeal in forma pauperis with the court of appeals. This motion is reproduced in full at Appendix G. By this time, Rendelman had also filed his pro se brief, which is reproduced in full at Appendix H. Rendelman's motion, together with his brief, again makes clear that Rendelman is claiming that there is insufficient evidence to affirm the ruling of the district court in that there is no evidence whatsoever in the record to support a finding that Rendelman knew the contraband was in his cell, which is a fact of consequence required under the seventh circuit case law of Austin, supra.

The court of appeals denied Rendelman's motion and dismissed his appeal. The opinion and the order of dismissal (which were on different dates) are reproduced in full at Appendix A and constitute the judgment sought to be reviewed in this Court. The whole of the opinion consists of a single sentence which states that Rendelman did not identify a

potentially meritorious argument that the district court erred. The argument Rendelman had identified was that the district court erroneously ruled that the conclusion reached by the DHO was supported by "some evidence" when, in fact, there was no evidence in the record that Rendelman had any knowledge that the contraband was in his cell, and under seventh circuit case law, knowledge is required in order for an inmate to be found guilty of constructive possession of contraband. By so ruling, the court is saying that not every element of the offense needs to be supported by "some evidence." As long as there is "some evidence" in the record pertaining to any element of the offense (such as the identification of the object as contraband, or the location where the object was found), the standard is met, even if an element of consequence remains unsupported by any evidence whatsoever. This is wrong, especially where the element is an essential item of consequence. The issue was fully briefed by Rendelman in the appellate court (see Appendix H) and we may presume the court of appeals would have rendered the same decision on the merits had the case not been dismissed. This case is now ripe for review in this Court.

This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

This case is a prime example of how an inmate, under the current law, can be completely innocent of violating an institution rule, and yet he can be charged, found guilty, and the finding of guilt will be upheld on appeal.

The initial problem is that virtually all institution rules carry "strict liability," where the inmate's mental state is irrelevant. In this case, where one inmate hides contraband in another inmate's cell, the first inmate gets away clean, while the other inmate in whose cell the contraband was found is guilty even though he knew nothing about the contraband, because strict liability makes him responsible for all contraband found in his cell whether he knew the contraband was in his cell or not. It is then almost impossible to correct the injustice on appeal due to the fact the meager "some evidence" standard virtually requires the court to uphold the DHO conclusion if there is any evidence in the record that can support it.

This case presents the particularly egregious situation where the inmate is totally innocent of the charge, and there is no evidence whatsoever to support a finding by the DHO that the inmate constructively possessed contraband, yet because there is "some evidence" on other aspects of the case (photographs to prove the object was contraband; a written report documenting where the object was found) the inmate is found guilty and the case is affirmed on appeal. The system has failed him.

Now, it is totally understandable why the "some evidence" standard was chosen for reviewing prison disciplinary cases. Situations in prison may change quickly; certain inmates may become dangerous or may find themselves placed in danger; and prison administrators find that they have to act quickly to ensure the safety of inmates and the orderly running of the institution. An inmate may need to be disciplinary transfered from his job quickly, or he may need to be moved to a new cell, or a new unit, or disciplinary transfered to a new institution. Prison administrators

need the flexibility to be able to act quickly on simple evidence that usually needs to be gathered quickly for everyone's safety. Ordinarily, the stakes are not usually very high: an inmate may lose commissary privileges for 30 days, or lose telephone privileges for 2 weeks, or be placed in disciplinary segregation for 30 days. There's very little to be gained by the complexities that would accompany the requirement of gathering evidence of mens rea and a requirement of a greater degree of proof (such as "clear and convincing"). It is enough to require that the prison administrators don't act arbitrarily, but rather are responding reasonably to the best evidence they can get quickly and simply. The "some evidence" standard of review ensures that prison administrators are not acting arbitrarily but are basing their actions on actual evidence and gives them the flexibility needed to act quickly for everyone's safety, and while this may leave open a wide margin for error, prison management and safety requires it.

But when the stakes include the loss of good time credits, then it becomes a big deal. Lost good time credits increase the amount of time you must spend in prison, day for day. Prison time is ordinarily reserved for punishment for a crime, and lost good time is tantamount to an additional prison sentence, something you ordinarily can't get out in the real world unless there is evidence to prove guilt (and mens rea) beyond a reasonable doubt. There is rarely a need to revoke good time quickly and on scanty evidence. Loss of good time credits is a different animal, and should require something more than just "some evidence." Certainly, Rendelman doesn't deserve any less.

This petition presents the question of whether or not Rendelman did, in fact, receive less.

When reviewing prison disciplinary cases, "the relevant question is whether there is <u>any</u> evidence in the record that could support the conclusion reached by the disciplinary board." (emphasis added) <u>Superintendent v. Hill</u>, 472 US 445, 86 L Ed 2d 356, 105 S Ct 2768 (1985). Taken on its face, even a modicum of evidence found in the record is enough to affirm a finding by a disciplinary board. The judge in Rendelman's case called it a "meager threshold" (page B4). It would seem that once <u>any</u> evidence in the record

is found, there is no longer any need to continue the search, and the disciplinary board's conclusion is upheld. Presumably, this is the point at which the board's action is shown not to be arbitrary, which is all that the Court demanded.

However, a question of fairness arises in cases where an offense has more than one element to it. When some evidence of one element is found in the record, is it okay to end the search, or must the search continue until some evidence is found on each of the others? The Tenth Circuit said it this way: "The Court (Hill at 472 US at 456) did not imply that there need not be 'some evidence' for each element necessary to establish a violation of the particular criminal statute used as a basis of a disciplinary conviction." Gamble v. Calbone, 375 F.3d 1021, 1032 (10th Cir. 2004). The Tenth Circuit prefers "some evidence" on each element of the offense.

The Seventh Circuit, where this case took place, requires a mens rea element not required in any other circuit. As noted, the object was not found on Rendelman's person, so clearly, he was not in actual possession. Rendelman was found guilty based on a theory of "constructive possession." In cases of constructive possession, the Seventh Circuit requires that the inmate had knowledge that the contraband was there. Clark v. Veltri, 2005 U.S. Dist. LEXIS 15368 (S.D. Ill. 2005) (DHO finding resting on the mere fact that the shank was found in Clark's cell, and nothing more, cannot stand. Inmate not guilty of possession because he did not know it was there.) Austin v. Pazera, 779 F.3d 437 (7th Cir. 2015) (Inmate could not have been "in possession" of contraband he did not know was there.) The Seventh Circuit also requires that the inmate have more than a 20% chance of guilt, ruling that 20% is insufficient regardless of "some evidence." Austin, supra.

Rendelman's charge, in the Seventh Circuit, has three elements: 1) the object was contraband, 2) the object was found in Rendelman's cell, and 3) Rendelman knew the object was there. Additionally, Rendelman's chance of guilt was less than 3%, far below the 20% established in Austin. Rendelman would be not guilty irrespective of "some evidence."

There was no evidence whatsoever to support a finding that Rendelman knew the object was in his cell. Yet Rendelman was found guilty, and in spite

of the Seventh Circuit case law, the DHO's finding was upheld on review because there was "some evidence" to support the finding of the DHO.

The "some evidence" in the record pertained only to the first element of the offense (that the object was contraband) and the second (that the object was found in Rendelman's cell). There was no evidence at all in support of the third element (that Rendelman knew the object was there), but this did not stop the district court from saying there was "some evidence" to support the decision of the DHO, nor did it stop the court of appeals from saying that Rendelman's complaint about the lack of evidence did not point to any errors made by the district court.

The system failed Rendelman because there is no requirement under the law that there be "some evidence" to support every element of the offense. As long as there is a modicum of evidence to support <u>any</u> element of consequence, the DHO decision will be upheld. The Tenth Circuit would have it the other way. The Tenth Circuit would want some evidence to support every element of the offense. However, the Tenth Circuit does not require a mens rea element. The Seventh Circuit requires the mens rea element but does not require "some evidence" on every element (which makes the mens rea "requirement" illusionary at best). This difference between the way a case such as this would be treated in the two different circuits counsels for the granting of certiorari to resolve these differences. This Court should rule that the Seventh Circuit's mens rea requirement is the better way, while the Tenth Circuit's desire for "some evidence" to support every element of the offense is the better way.

The results of prison disciplinary hearings are notoriously unreliable. You would not want your son or daughter sentenced to prison based on such a hearing, and yet that is what happens every day these hearings are held. Inmates lose good time credits as a result of these hearings which increase, day for day, the time they must spend in prison. These losses of good time are tantamount to additional prison sentences based on these unreliable hearings. In the balance of things it may be tolerable to sacrifice accuracy in a prison setting where speed and safety are paramount. But when it comes to good time credits, there is usually no need for speed, and prison safety is usually unaffected.

A ruling on this issue will have far reaching implications that go beyond the facts of this case. The Federal Bureau of Prisons operates nationally, and as of August 22, 2019, housed 177,388 federal inmates. And since this rule of law applies also to the states, a ruling on this issue will affect the more than two million state inmates housed in every state of the union. Virtually every inmate comes in contact with the inmate disciplinary process at some point in his or her prison sentence. A ruling will touch virtually every inmate, state and federal, in the United States, at some point.

The law governing the review of prison disciplinary hearings came into effect in 1985 and has remained unchanged for 35 years. It's shortfalls are now apparent, and it is now time to bring the law up to date.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott Lewis Rendelman

Date: February 12, 2020