

LAW OFFICE OF
LISA NEWMAN-POLK

P.O. BOX 329, AYER, MA 01432
(978) 862-0462 PHONE
LISA@LISANEWMANPOLK.COM EMAIL

Via Email

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Commissioner Carol A. Mici
Massachusetts Department of Correction
50 Maple Street
Milford, MA 01757
Carol.Mici@doc.state.ma.us

**RE: [REDACTED]
False Positive Field Tests on Legal Mail**

Dear Commissioner Mici:

I represent [REDACTED], a juvenile lifer who was granted parole in a unanimous decision dated [REDACTED]. Mr. [REDACTED] is currently serving a consecutive sentence at MCI-Concord. My co-counsel, Ryan Schiff, sent you a letter on September 22, asserting that Mr. [REDACTED] had been falsely accused of receiving drugs infused on legal mail. Attorney Schiff explained that I sent the mail at issue and that I had not sent drugs. He further stated that Mr. [REDACTED] was missing his fall semester of the [REDACTED] college program and requested that you allow Mr. [REDACTED] to resume attending classes while waiting for the laboratory results. No relief was provided to Mr. [REDACTED] in response to Attorney Schiff's letter.

I am writing to inform you that laboratory testing confirmed the assertions in Attorney Schiff's letter. That testing showed that the legal mail I sent to Mr. [REDACTED] was not infused with drugs, and accordingly, the Department of Correction (DOC) has dismissed the disciplinary report alleging that it did. The dismissal of disciplinary charges, however, does not change the fact that Mr. [REDACTED] was effectively punished for a month and a half based on a false allegation of wrongdoing. I also write to highlight, more broadly, the damage done by the DOC's repeated false allegations that lawyers are sending drugs on legal mail to their clients. The current procedure in which clients are subjected to sanctions prior to confirmatory testing violates the Fourteenth Amendment right to due process and obstructs the Sixth Amendment right to counsel.

On August 31, Mr. [REDACTED] received mail from me that included two legal briefs and a card.¹ An IPS officer at MCI-Concord alleged that the documents appeared suspicious and therefore conducted field tests on both the card and at least one page of the legal briefs. Reportedly the card and piece of paper were tested twice with NARK II field tests, and both times the test results allegedly were positive for synthetic cannabinoids (“K2”). As a result, Mr. [REDACTED] was moved to restrictive housing and then the Secure Adjustment Unit (SAU) where he was prohibited from attending the [REDACTED] college program, in which he has been an exceptional student since the fall of 2018. Soon after, the DOC issued a disciplinary ticket based solely on the NARK II test result. Mr. [REDACTED] requested confirmatory testing, and a month and a half later, the laboratory results came back showing **the field test result had been a false positive**. The ticket was therefore dismissed on October 14 and the next day he was finally moved back to his regular unit.

During the month and a half Mr. [REDACTED] spent in disciplinary housing, Attorney Schiff and I repeatedly told DOC employees that I had sent the mail in question and that there were no drugs on it. Nonetheless, the response we received from the DOC was that the mail was only *purported* legal mail, and that Mr. [REDACTED]’s continued detention in the SAU was justified, even if it prevented his continued participation in the [REDACTED] college program.

Notably, the DOC claimed that another incarcerated man in the same legal mail line at MCI-Concord as Mr. [REDACTED] also received correspondence from his lawyer, Joseph Kenneally, that tested positive for synthetic cannabinoids. Attorney Kenneally called the Superintendent’s office to assert that he sent the legal mail in question and that it had no drugs on it. The DOC did not return his call. Instead, just like Mr. [REDACTED], Attorney Kenneally’s client was placed in restrictive housing, then the SAU, and issued a disciplinary ticket. Laboratory results subsequently showed that the field test was a false positive. The mail Attorney Kenneally sent to his client was a highly confidential legal memorandum that DOC seized based on nothing more than the erroneous NARK II test result.

In the aftermath of this allegation, I have learned of at least 17 lawyers and a CPCS social service advocate who have been falsely accused of sending mail to clients tainted with drugs. I have communicated with most of these lawyers, several of whom stated that they told the DOC that they sent the legal mail in question and did not send drugs. In some instances, the attorneys had not even met their clients; they had sent introductory letters or documentation like a HIPAA release.

Because the list of impacted lawyers was gathered based on casual conversations and word-of-mouth, I suspect even more people have been impacted.

¹ The card included a quote I had inscribed by C.S. Lewis: “You can’t go back to change the beginning, but you can start where you are and change the ending.”

The DOC placed all of these lawyers' clients in disciplinary units, including solitary confinement, prior to confirmatory testing. DOC employees repeatedly told Mr. [REDACTED] that he would have to wait out "the process" for the laboratory results before he could return to his unit and programming. Even after the disciplinary ticket was dismissed, Mr. [REDACTED] has remained unemployed because his job in the unit was reassigned during the month and a half he was in disciplinary housing. But Mr. [REDACTED] was "lucky" compared to some other people who have waited several months longer for the return of exonerating confirmatory testing.

Punishing individuals based on unreliable field tests—especially where lawyers have said they sent the mail in question and they did not send drugs—is an egregious violation of due process. The manufacturer of the NARK II field test makes clear that results of the test "are merely presumptive" and that its "results must be confirmed by an approved analytical laboratory." Notably, the New York Department of Corrections suspended the use of the NARK II field tests in August and ordered that "no misbehavior report will be issued, nor any adverse action against an incarcerated individual" based on a positive NARK II test result.²

Every lawyer I spoke with stated that to the best of their knowledge, the disciplinary reports against their clients were ultimately dismissed, and nobody was criminally charged. Still, lawyers have felt scared and confused by these false accusations, unable to provide help to their clients. Lawyers also report that these allegations have interfered with their ability to do their jobs. Some attorneys had to withdraw from their cases.

To say that this experience has been highly upsetting is an understatement. It has had a negative impact on my health and my family, as any accusation against Mr. [REDACTED] was effectively an accusation that I committed a serious criminal offense. Although I did nothing wrong, I felt responsible for Mr. [REDACTED]'s circumstances since I was the one who sent the mail.

Of course, what I endured is nothing compared to the fear and frustration Mr. [REDACTED] experienced. He was moved to a disciplinary housing unit, lost his job, and was prohibited from attending his college courses. Additionally, he feared the worst-case scenario—that the Parole Board would find that he violated his parole and return him to his life sentence.

I understand more than most the importance of keeping drugs out of our prisons. I worked as a mental health clinician at Souza-Baranowski Correctional Center from 2013 to 2014 and learned from that experience that substance use disorder is the most prevalent and under-treated mental health problem in our prisons. I saw firsthand—every single day—the devastating impact of addiction. Since leaving SBCC, advocating for the health and well-

² George Joseph, "NY State Prisons Abruptly Suspend Drug Tests for Contraband," Gothamist. Aug. 26, 2020. See <https://gothamist.com/news/ny-state-prisons-abruptly-suspend-drug-tests-contraband>.


being of people suffering from addiction in our criminal justice system has been a cornerstone of my work.

But the effort to keep drugs out of our prisons must be balanced with due process and the right to counsel. Although Mr. [REDACTED] and I have been cleared of wrongdoing, I remain concerned that this will happen again with him or another client. The DOC cannot continue to make these kinds of serious allegations against attorneys and their incarcerated clients based on nothing more than positive field tests. Not only have those test results been inaccurate in many cases, but the test's own manufacturer has warned that it should not be used for this purpose. I and other lawyers cannot do our jobs effectively when we are afraid to correspond with our clients.

The DOC's use of field tests on legal mail has led to serious constitutional problems. These practices should be changed immediately so it does not falsely accuse more people and interfere with more attorney-client relationships.

Thank you in advance for your time and consideration.

Most sincerely,


Lisa Newman-Polk

cc: Andrew Peck, Undersecretary, Executive Office of Public Safety and Security
Gregory J. Dorchak, Assistant U.S. Attorney, Civil Rights Unit
Anthony J. Benedetti, Chief Counsel, Committee for Public Counsel Services
Joseph Kenneally, Esq.
Ryan Schiff, Esq.