ORAL ARGUMENT SCHEDULED FOR MAY 17, 2018

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5012

GORDON C. REID, Appellant,

v.

MARK INCH, Director,
Federal Bureau of Prisons, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSIE K. LIU
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

DANIEL P. SCHAEFER
Assistant United States Attorney
555 Fourth Street, NW
Washington, D.C. 20530
Daniel.Schaefer@usdoj.gov
(202) 252-2531

C.A. No. 15-0375

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellee hereby states as follows:

Parties and Amici

The parties to this appeal are Appellant, Plaintiff below, Gordon C. Reid, and Appellee, Defendant below, Mark Inch, Director, Federal Bureau of Prisons. This Court appointed Erica Hashimoto, Director of the Appellate Litigation Program of the Georgetown University Law Center, as Amicus Curiae to present arguments in support of Mr. Reid's appeal.

Rulings Under Review

This is an appeal from a Memorandum Opinion and Order by the Honorable Rosemary M. Collyer, on November 8, 2016, granting Defendant's Motion to Dismiss, denying Plaintiff's Cross-Motion for Summary Judgment, and dismissing the case as moot. Appellant also appeals from Judge Collyer's Order denying Appellant's Motion for Reconsideration. Appellant asks this Court to reverse the District Court's order and remand the case for further proceedings.

Related Cases

Counsel for Appellee is unaware of any related cases.

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), Appellee states that all pertinent statutes and regulations other than those attached hereto are contained in the Addendum to the Brief for Appellant.

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STATEMENT OF JURISDICTION

As explained below, the district court lacked jurisdiction because the case became moot. BOP does not dispute that, but for the mootness of the case, the district court had jurisdiction over the claims under 28 U.S.C. § 1331 and 5 U.S.C. § 702 and this Court has appellate jurisdiction under 28 U.S.C. § 1291. Reid filed a timely notice of appeal.

ISSUES PRESENTED

I. Federal courts have consistently held that the transfer of a prison inmate from a unit or location normally moots the inmate's claims for injunctive and declaratory relief challenging the conditions of his confinement. Reid was transferred to a new facility and also released from the Special Housing Units ("SHUs") into the general prison population where he remained for 15 months before the district court dismissed this action as moot. Did these intervening events moot Reid's claims for injunctive and declaratory relief with regard to the SHUs or did a live controversy remain?

II. After the district court dismissed Reid's petition, he was again transferred to another BOP facility where he was assigned to a Special Management Unit ("SMU"), which is distinct from SHU and is a program for inmates who present unique security and management concerns. Thus, the federal regulations and BOP policies pertaining to SHUs that Reid's petition challenged no longer apply to him. Do these additional subsequent events that occurred following the district court's dismissal warrant affirming the dismissal on mootness grounds?

III. The district court ordered a briefing schedule that included a date by which Reid could file a reply to BOP's opposition to Reid's cross-motion for summary judgment. More than two months after that deadline passed without Reid filing a reply, the district court denied Reid's cross-motion and granted BOP's motion to dismiss. Was it an abuse of discretion for the district court not to issue a separate order after BOP filed a combined reply and opposition with additional evidence in support of its earlier mootness argument again notifying Reid a second time of his opportunity to file a final reply?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Gordon C. Reid, a federal inmate who appeared *pro se* in district court, sued the Director of the Bureau of Prisons ("BOP") for declaratory, injunctive, and mandamus relief. Pet. for Decl. & Inj. Relief ("Pet.") (Mar. 16, 2015) (J.A. 6–11). Reid claimed that at various

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Mark Inch, the current Director of the Federal Bureau of Prisons, is automatically substituted as Appellee.

intervals between 2008 and the filing of his Petition in March 2015 he had been confined in Special Housing Units ("SHUs") at eight BOP facilities. Pet., Part II, ¶ 2. Reid alleged that the conditions of his confinement in the SHUs contravened federal regulations and BOP policies in three respects. First, Reid claimed that BOP refused to deliver him his magazine subscriptions while he was confined in SHUs in violation of 28 C.F.R. § 540.71 and BOP Program Statement 5266.11 (Nov. 9, 2011) (the federal regulation and BOP policy establishing procedures for incoming publications). Pet., Part. III, ¶¶ 1–5. Second, Reid claimed that BOP deprived him of outside exercise while he was confined in SHUs in violation of 28 C.F.R. § 541.31(g) and BOP Program Statement 5270.10 (Aug. 1, 2011) (the federal regulation & BOP policy for the operation of SHUs). *Id.*, Part IV, ¶¶ 1–5. Third, Reid claimed that BOP deprived him of meaningful access to the administrative remedy process while he was confined in SHUs in violation of 28 C.F.R. § 542.10 and BOP Program Statement 1330.18 (the federal regulation and BOP policy regarding the administrative remedy program). *Id.*, Part V, ¶¶ 1–7.

BOP moved for dismissal or, in the alternative, for summary judgment. Def.'s Mot. (Sep. 28, 2015) (ECF No. 14). The district court initially treated BOP's motion as unopposed and conceded and dismissed the case pursuant to Local Civil Rule 7(b). *See* Mem. Op. (Mar. 3, 2016) (ECF No. 18).

Reid moved to vacate the district court's order pursuant to Fed. R. Civ. P. 60(b). *See* Pl.'s Mot. Vacate Jt. (May 6, 2016) (ECF No. 20). The court granted Reid's motion, vacated its dismissal order, and reopened the case. *See* Order (June 2, 2016) (ECF No. 21). The court accepted Reid's opposition to defendant's motion to dismiss or for summary judgment and his cross-motion for summary judgment, among other filings. *Id.*; *see also* Pl.'s Opp. to Def.'s Mot. to Dismiss (June 2, 2016) (ECF No. 22); Pl.'s Cross-Mot. for Summ. Jt. (June 2, 2016) (ECF No. 23). The court ordered BOP to file a combined opposition to Reid's cross-motion for summary judgment and reply to BOP's motion to dismiss by July 21, 2016. ECF No. 21. The court's June 2, 2016, order further provided that "Plaintiff may file a reply in support of his cross motion for summary judgment . . . no later than **August 29, 2016**." *Id.* (emphasis in the original).

BOP filed a combined opposition to Reid's cross-motion for summary judgment and reply in support of its motion to dismiss or in the alternative for summary judgment on July 21, 2016. Def.'s Opp. & Reply (July 21, 2016) (ECF No. 25). Reid evidently opted not to file a reply in support of his cross-motion because the August 29, 2016, deadline came and went. On November 8, 2016, more than two months after the deadline for Reid to file a reply had expired, the district court issued a final order granting BOP's motion to dismiss and denying Reid's cross-motion for summary judgment. Mem. Op., Nov. 8, 2016 (J.A. 118–19). The district court dismissed the Petition as moot. *Id.*

Reid filed another petition for declaratory and injunctive relief on November 23, 2016, in which Reid renewed the same claims and reasserted the same allegations from the original Petition. *See* Pl.'s Pet. for Decl. & Inj. Relief (Nov. 23, 2016) (ECF No. 29). The district court construed the second petition as a motion for reconsideration and denied the motion. Order, Dec. 8, 2016 (J.A. 121). Appellant filed a timely notice of appeal on January 25, 2017.

COUNTERSTATEMENT OF FACTS

A. Reid's Inmate History Prior to Dismissal

Gordon C. Reid was sentenced in 2008 by the U.S. District Court of New Hampshire to an incarceration term of 220 months with a three-year term of supervised release for Interference with Commerce by Threats of Violence. A. Tran Decl. ¶ 2 (July 20, 2016) ("2016 A. Tran Decl.") (J.A. 72). Reid began serving his sentence on May 6, 2008, and was delivered to the U.S. Penitentiary McCreary in Pine Knot, Kentucky. *Id.*

Inmate Reid has committed a number of infractions while in prison for which he has been disciplined many times. His infractions include assaulting another inmate with a weapon; possession of a dangerous weapon; fighting with another inmate; assaulting staff and refusing to submit to restraints; interfering with security devices; refusing to obey orders; indecent exposure; being insolent to BOP staff members; and refusing work program assignments. Reid's Inmate Discipline Data: Chronological Disciplinary Record (Aug. 24, 2015) (J.A. 20–30). As a result of these disciplinary infractions, Reid was confined in Special Housing Units ("SHUs") at each of the BOP facilities in which

he was confined before he filed his Petition in 2015. A. Tran Decl. ¶ 5 (J.A. 73); Reid's Inmate History – Quarters (July 19, 2016) (J.A. 83–90).[2]

When Reid filed his Petition on March 16, 2015, he was confined at the U.S. Penitentiary in Tucson, Arizona ("USP Tucson"). Reid had been confined at USP Tucson since November 1, 2013. A. Tran Decl. ¶ 3 (J.A. 73); *see also* J.A. 83–90. While incarcerated at USP Tucson, Reid was placed in SHU four times for a total of 254 days. J.A. 83–84. Reid was also put into SHU for Administrative Detention ("AD") and Disciplinary Segregation ("DS") at the other BOP facilities in which he was confined prior to his transfer to USP Tucson. J.A. 84–89.[3]

On July 2, 2015, Reid was transferred from USP Tucson to the U.S. Penitentiary in Coleman Florida ("USP Coleman"). A. Tran Decl.

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[2] SHU confinement is designated on the Inmate History, Quarters Report as Housing Unit "Z" in the fourth column from the left. The designations "AD" and "DS" in the seventh column (near the middle of the page) stand for Administrative Detention ("AD") and Disciplinary Segregation ("DS"), respectively.

[3] "Chart 1" of Amicus' Brief contains a summary of the time Reid spent in SHUs. "Chart 2" contains a summary of facility transfers. *See* Amicus' Br. at 8–11. The summaries appear to be accurate. BOP objects to Amicus' assertion that the underlying data is "imprecise" and "unclear." *Id.* at 7, n.6.

¶ 4 (J.A. 73). In the months leading up to his transfer from USP Tucson, Reid had spent a number of months in SHU. *Id.* Reid was then placed in SHU (AD & DS) for 12 days from July 2 to July 14, 2015, while confined at the Federal Transfer Center in Oklahoma City, a facility that holds inmates in transit to other facilities.

Reid's transfer was completed and he arrived at USP Coleman on July 14, 2015. *Id.* Upon arrival at USP Coleman, Reid was housed in the general population. *Id.* ¶ 5. Except for one 12-hour stretch overnight from April 14, 2016, to April 15, 2016, when Reid was placed into SHU for AD status (J.A. 73, 83), Reid was housed in the general population at USP Coleman continuously from the date of his arrival at that facility, July 14, 2015, until July 21, 2016, when BOP filed its reply and evidence in support of its motion to dismiss. *Id.* ¶ 5.

B. Reid's Inmate History After Dismissal[4]

Reid continued to be housed in the general population at USP Coleman from July 21, 2016, until November 8, 2016, *i.e.*, the date of

[4] The facts in this section are derived from recent inmate data that BOP provided to the undersigned on March 9, 2018. As the events had not yet occurred, the facts were not part of the record in the district court. Nonetheless, because the recent events are relevant to the mootness

the district court's dismissal order. Following the dismissal, Reid remained in the general population at USP Coleman for another three months.

On February 2, 2017, Reid received two incident reports for being insolent to a staff member and one report for refusing to obey an order and was placed in SHU for AD status pending investigation. BOP held hearings on February 9, 2017, and February 22, 2017. Reid was found guilty and sanctioned for the misconduct, but these incidents did not result in Reid being put in SHU for DS status. Reid was released into the general housing population from February 23, 2017, until April 5, 2017. On April 5, 2017, Reid received two new incident reports for fighting with another inmate and for possessing a dangerous weapon. He was then placed in SHU – initially, for AD status pending investigation and later for DS status as discipline for the weapon and fighting charges – from April 5 until his eventual transfer from USP

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question on appeal, BOP is bringing these matters to the Court's and Amicus' attention. BOP provided a copy of the new inmate data to Amicus on April 2, 2018. BOP can also provide this Court a copy of the inmate data upon request.

Coleman on October 24, 2017. In total, therefore, Reid spent roughly seven months in SHU at USP Coleman between February 2017 and October 2017.[5] His disciplinary report reflects that he was sanctioned for nine separate infractions at USP Coleman between December 2016 and July 2017. Reid did not file any administrative grievances pertaining to his access to magazines or exercise while confined in SHU at USP Coleman. Reid filed one administrative grievance in May 2016 alleging that his counselor was delaying or denying administrative remedies.

Reid was transferred again from USP Coleman on October 24, 2017. Following another brief period of confinement at the Federal Transfer Center in Oklahoma City, Reid arrived at the U.S. Penitentiary in Lewisburg, Pennsylvania ("USP Lewisburg") on November 6, 2017. Upon arrival, Reid was designated to USP Lewisburg's Special Management Unit ("SMU") Program (Level One). As explained below, SMU is a separate program designed to house

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[5] In his Motion for Summary Reversal, Reid asserted that he continued to suffer "most of the same deprivations" in SHU at Coleman, but he did not specify whether this included magazines, exercise, and administrative remedies. *See* Reid's Mot. at 3.

inmates like Reid who present unique security and management concerns. Reid is expected to remain in SMU for at least one year. The only administrative grievance on record that Reid has filed while confined at USP Lewisburg is about incoming and outgoing mail not being delivered. That grievance is about his letters not being delivered, not a magazine.[6] Reid currently has a projected release date of 2022.

C. Regulatory Background

1. Special Housing Units

Each BOP institution has a Special Housing Unit ("SHU") to house inmates separately from the general prison population. *See* 28 C.F.R. § 541.20, *et seq.*; BOP Program Statement 5270.10 (Aug. 1, 2011) ("P.S. 5270.10") (available at https://www.bop.gov/policy/progstat/5270_010.pdf).[7] Unlike the general prison population, inmates placed in the SHU spend their days in their cells, except when released for

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[6] Reid had filed 63 administrative grievances as of August 24, 2015. J.A. 38. As of March 28, 2018, Reid had filed a total of 78 administrative grievances.

[7] P.S. 5270.10 was rescinded on November 23, 2016, when P.S. 5270.11 became effective. *See* P.S. 5270.11 (Nov. 23, 2016) (available at https://www.bop.gov/policy/progstat/ 5270.11.pdf). 'It does not appear any of the changes from P.S. 5270.10 to P.S. 5270.11 are relevant or material to Reid's Petition.

limited periods to engage in permitted activities such as showers or exercise.

The SHU has two categories of cells: Administrative Detention ("AD") and Disciplinary Segregation ("DS"). "Administrative detention status is an administrative status which removes [an inmate] from the general population when necessary to ensure the safety, security, and orderly operation of correctional facilities, or protect the public." 28 C.F.R. § 541.22; P.S. 5270.10 at 2. "Administrative detention status is non-punitive and can occur for a variety of reasons." *Id.*; *see also* 28 C.F.R. § 541.23. By contrast, "disciplinary segregation status is a punitive status imposed only by a Discipline Hearing Officer (DHO) as a sanction for committing a prohibited act(s)." 28 C.F.R. § 541.22; P.S. 5270.10 at 3.

The conditions of confinement for inmates placed in SHU are set forth in 28 C.F.R. § 541.31 & P.S. 5270.10 at 8–11. With regard to exercise, the regulation provides:

> You will receive the opportunity to exercise outside your individual quarters at least five hours per week, ordinarily on different days in one-hour periods. You can be denied these exercise periods for a week at a time by order of the Warden if it is determined that your use of exercise privileges

> threatens safety, security, and orderly operation of a correctional facility, or public safety.

Id. § 541.31(g). BOP's Program Statement states that "restriction or denial of exercise is not used as punishment." P.S. 5270.10 at 9. "If the Warden approves a restriction [of exercise], it must be based on the conclusion that the inmate's actions pose a threat to the safety, security, and orderly operation of a correctional facility or health conditions of the unit." *Id.*

The limitations on an inmate's personal property in SHU depends on whether the inmate is in AD status or DS status. In DS status, which is punitive and therefore more restrictive, an inmate's "personal property will be impounded with the exception of limited reading/writing materials, and religious articles." 28 C.F.R. § 541.31(h)(2). By contrast, an inmate in AD status, which is non-punitive, is ordinarily allowed a reasonable amount of personal property, including reading material such as books, magazines, and newspapers. 28 C.F.R. § 541.31(h)(1); *see also* P.S. 5270.10 at 10 (stating that an inmate in AD status "will receive a reasonable amount of non-legal reading material, not to exceed five books per inmate at any one time, on a circulating basis."). Yet when in AD status "the Warden

may modify the quantity and type of personal property allowed [an inmate] . . . for reasons of security, fire safety, or housekeeping." P.S. 5270.10 at 10. In addition, the "unauthorized use of any authorized item may result in the restriction of the item" in AD. *Id.* Moreover, an inmate in SHU "can submit a formal grievance challenging any aspect of [his or her] confinement in the SHU through the Administrative Remedy Program." 28 C.F.R. § 541.31(o); *see also* 28 C.F.R. § 542.10, *et seq.*; BOP Program Statement 1330.18 (Jan. 6, 2014) ("P.S. 1330.18") (available at https://www.bop.gov/policy/progstat/ 1330_018.pdf).

2. Special Management Units

Special Management Units ("SMUs") is a separate BOP program (not to be confused with SHUs) that permits the designation of BOP prisoners to a more restrictive environment when "enhanced management is necessary to ensure the safety, security, or orderly operation of [BOP] facilities, or protection of the public." BOP Program Statement 5217.02 (Aug. 9, 2016) ("P.S. 5217.02") (available at https://www.bop.gov/policy/progstat/5217_02.pdf). The referral criteria for SMU includes inmates like Reid with "a history of serious or disruptive disciplinary infractions." *Id.* at 3.

Although a SMU designation is non-punitive, the conditions of confinement are more restrictive than for general population inmates. *Id.* at 1. Unlike SHU, however, SMU is a three-phase program that occurs over a period of months, and possibly years. *Id.* at 9; *see also* USP Lewisburg, Institution Supplement, LEW 5217.02B (Nov. 22, 2016) (Ex. 1 hereto). Progression through the SMU program from Level One, to Level Two, to Level Three, and completion of the program and the release of the inmate into the general population is based upon the inmate's demonstrated and sustained compliance with behavioral expectations. P.S. 5217.02 at 9–12. "Inmates are expected to complete the SMU program in approximately 12 months, at which time they may be redesignated to a general population or to another appropriate facility." *Id.* at 1, 9–12.

Inmates in SMU may have reasonable amounts of personal property. *Id.* at 7. Inmates may be entitled to increased privileges, such as access to more personal property, as they advance through the program into Level Two and Level Three. *Id.* at 11. The USP

Lewisburg SMU Inmate Handbook[8] contains a list of approved property for SMU inmates. The approved list includes "one (1) magazine not more than 1 month old." *Id.*, App'x B., at 51. Inmates in SMU at USP Lewisburg have the opportunity to exercise for at least five hours per week, ordinarily in one-hour periods on different days. *Id.* at 7; USP Lewisburg SMU Handbook at 19. "The Warden may deny these exercise periods for up to one week at a time if it is determined that an inmate's recreation itself jeopardizes the safety, security, or orderly operation of the institution." *Id.* SMU inmates at USP Lewisburg also have access to the Administrative Remedy Process. USP Lewisburg SMU Handbook at 35–41.

SUMMARY OF ARGUMENT

In March 2015, Gordon Reid, an inmate confined in SHU at USP Tucson, brought an action alleging generally that his access to his magazine subscriptions, outside exercise, and the administrative remedy process while in SHU violated specified BOP regulations and policies. Reid sought declaratory and injunctive relief, but he did not

[8] USP Lewisburg, SMU Inmate Handbook ("USP Lewisburg SMU Handbook") (May 2013) (available at https://www.bop.gov/locations/institutions/lew/LEW_smu_aohandbook.pdf).

pursue money damages. In July 2015, Reid was transferred from USP Tucson to USP Coleman. He then spent the next fifteen (15) months in the general population at USP Coleman without returning to SHU except for one night in April 2016. In November 2016, more than two months after the parties had completed the briefing on their dispositive motions, the district court dismissed Reid's petition as moot. The district court's opinion noted that Reid had not disputed the fact that he had not been confined in SHU for the past year and that he also had not alleged similar wrongdoing by prison officials at his then-current facility at USP Coleman.

After Reid's case was dismissed, Reid committed some new infractions that resulted in him being put back in SHU for another extended period, and almost continuously, from February 2017 to October 2017. He was then transferred again in late October/early November 2017 from USP Coleman to the USP Lewisburg SMU program. Reid is expected to remain in SMU for at least a year, if not longer, depending on whether he can demonstrate compliance and proceed through the three levels of the SMU program. Thus, the federal regulations and BOP policies that Reid challenged pertaining to

an inmate's access to magazines, exercise, and administrative remedies while in SHU no longer apply to Reid.

Moreover, the chance of the SHU regulations, policies, or practices at the BOP facilities in which Reid was previously confined affecting Reid's confinement in the future is purely speculative at this juncture. Reid would have to first complete the SMU program with demonstrated and sustained compliance. He would then need to be released into the general prison population, and then he would have to backslide again into bad behavior and be put back into SHU. Even assuming that all of those events happen, there is still no indication that he would be returned to one of those same facilities or subjected to the same SHU conditions of which he complained at USP Lewisburg or some other new facility. Notably, Reid spent seven months in SHU at USP Coleman in 2017, but he did not file a single administrative grievance pertaining to his access to magazines and exercise. Likewise, he has not filed any grievances while confined at USP Lewisburg in the SMU program pertaining to any of the three deprivations of which he complained previously while incarcerated in SHU at USP Tucson. Because there is no reasonable expectation that Reid will again be subjected to any of

the conditions, practices, or policies pertaining to his confinement in SHU, he does not stand to benefit from the declaratory and injunctive relief that he sought in his Petition, and the action is moot.

The exception to mootness for cases capable of repetition yet evading review does not apply. Although Reid's case is *capable* of repetition, he has not demonstrated that his case has in fact evaded review. Fifteen months was sufficiently long for the district court to conclude that there was no reasonable expectation of re-confinement in SHU. The voluntary-cessation exception does not apply because Reid's confinement in SHU is dependent upon his own behavior. If Reid does not commit disciplinary infractions, he need not be disciplined. For the Court to apply the voluntary-cessation exception, the Court would have to assume that Reid will engage in misconduct again, which is not appropriate in this context.

Finally, Amicus' procedural challenges regarding Reid's supposed lack of notice and opportunity to file a reply are without merit. As Amicus is aware, the court provided Reid an opportunity to file a final reply. Reid chose not to do so. It is not an abuse of discretion for a district not to provide a *pro se* litigant a reminder of an impending

deadline. The district court also waited a sufficient amount of time after the deadline for Reid's reply passed – more than two months – before dismissing the Petition. Accordingly, the Court should affirm the district court's dismissal.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal for lack of subject-matter jurisdiction on mootness grounds. *Schmidt v. United States*, 749 F.3d 1064, 1068 (D.C. Cir. 2014); *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009).

This Court reviews the district court's management of the briefing schedule, its lenient treatment of a *pro se* plaintiff, and its purported failure to provide notice and an opportunity to file a sur-reply only for abuse of discretion. *See Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, No. 15-5243, 2015 WL 9310036, at *1 (D.C. Cir. Dec. 21, 2015); *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003). This Court also recognizes the "considerable flexibility" and "wide range of alternatives" available to district courts in dealing with *pro se* prisoners and choosing which procedures to utilize so as "'to assure that a prisoner's claims receive fair, adequate,

and meaningful consideration.'" *Hudson v. Hardy*, 412 F.2d 1091, 1095 (D.C. Cir. 1968) (quoting *U. S. ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715–716 (2d Cir. 1960)).

ARGUMENT

I. Reid's Claims for Injunctive and Declaratory Relief Are Moot.

"A case is moot when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated in circumstances where it becomes impossible for the court to grant any effectual relief whatever to the prevailing party." *Del Monte Fresh Produce Co.*, 570 F.3d at 321 (internal quotation marks and citation omitted); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("The requisite personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence."); *Aref v. Lynch*, 833 F.3d 242, 250 (D.C. Cir. 2016) (quoting *Am. Bar Ass'n v. F.T.C.*, 636 F.3d 641, 645 (D.C. Cir. 2011)) ("A case is moot if our decision 'will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.").

"An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S.

87, 92 (2009); *see also Aref*, 833 F.3d at 250; *American Bar Ass'n*, 636 F.3d at 645–46; *21st Century Telesis Joint Venture v. F.C.C.*, 318 F.3d 192, 198 (D.C. Cir. 2003); *Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1170 (D.C. Cir. 1984). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed," for federal courts have "no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks omitted); *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("[A]n appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant."); *Sellers v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C. Cir. 1992) (an intervening event renders a case moot if it completely and irrevocably eradicates the effects of the alleged violation and there is no reasonable expectation that the alleged violations will recur).

A. Reid's Case Was Moot When the District Court Dismissed His Action.

"Normally, a prisoner's transfer or release from a prison moots any claim he might have for equitable relief arising out of the conditions of his confinement in that prison." *Scott v. District of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998); *see also Incumaa v. Ozmint*, 507 F.3d 281, 286 (4th Cir. 2007) (collecting cases in which federal courts of appeals have "have held that the transfer of an inmate from a unit or location where he is subject to the challenged policy, practice, or condition, to a different unit or location where he is no longer subject to the challenged policy, practice, or condition moots his claims for injunctive and declaratory relief"); *Ford v. Bender*, 768 F.3d 15, 29 (1st Cir. 2014) ("A prisoner's challenge to prison conditions or policies is generally rendered moot by his transfer or release.").[9]

> Once an inmate is removed from the environment in which he is subjected to the challenged policy or practice, absent a claim for damages, he no longer has a legally cognizable interest in a judicial decision on the merits of his claim. Any declaratory or injunctive relief ordered in the inmate's favor in such situations would have no practical impact on the inmate's

[9] *See also Rendelman v. Rouse*, 569 F.3d 182, 186 (4th Cir. 2009); *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002).

> rights and would not redress in any way the injury he originally asserted.

Incumaa, 507 F.3d at 287.

Following this reasoning, a number of federal appellate courts in at least nine Circuits, including the D.C. Circuit, have held that an inmate's transfer from a prison or unit rendered moot the inmate's claims for declaratory and injunctive relief. Many of these cases involved the present situation in which an inmate was released from administrative segregation into the general prison population:

- *Cameron v. Thornburgh*, 983 F.3d 253, 257 (D.C. Cir. 1993): Prisoner's transfer to another prison rendered moot his injunction claim arising from the BOP's refusal to provide medically prescribed low-sodium diet at Indiana prison; moreover, the District of Columbia was not a proper venue for the prisoner's claims;

- *United States v. Ciccone*, 312 F.3d 535, 544 (2d Cir. 2002): Inmate's release from administrative confinement and his return to the general prison population mooted the government's appeal from district court's declaration that mandatory administrative exhaustion requirement of the Prison Litigation Reform Act ("PLRA") was unconstitutional as applied to the defendant;

- *Abdul-Akbar v. Watson*, 4 F.3d 195, 206 (3d Cir. 1993): Prisoner's challenge to court access in maximum security unit was mooted by his release from the MSU. "[F]rom that date forward it is plain that [Abdul–Akbar could] have no interest [in the library and legal resources provided at the MSU]. . . . It is equally plain that, from that date forward, the district court could not provide Abdul–Akbar with meaningful relief

by entering an injunctive order respecting the MSU in which Abdul–Akbar no longer was incarcerated."

- *Incumaa v. Ozmint*, 507 F.3d 281, 286–89 (4th Cir. 2007): Inmate's appeal in § 1983 action alleging that BOP policy barring inmates in a Maximum Security Unit ("MSU") from receiving publications via mail was rendered moot by his release from MSU and transfer to a Special Management Unit ("SMU");

- *Selby v. Caruso*, 734 F.3d 554, 561 (6th Cir. 2013): State prisoner's requests for declaratory judgment and injunctive relief under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") became moot when he was released into general prison population.

- *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996): Inmate's transfer from prison at which segregation unit was located rendered his claims for injunctive relief moot, despite inmate's contention that the actions of prison officials with regard to his placement in that unit were capable of repetition yet evading review;

- *Zajrael v. Harmon*, 677 F.3d 353, 355 (8th Cir. 2012): Inmate's claim for injunctive relief under RLUIPA against correction officials was moot because the inmate was no longer subject to the challenged policies as he had been transferred to a new facility and inmate failed to show that he was likely to be transferred back to facility where he challenged policies;

- *Nesbit v. Dep't of Pub. Safety*, 283 F. App'x 531, 533 (9th Cir. 2008): Inmates' claims for injunctive relief in civil rights action regarding their housing assignment in state high security prison became moot when they were transferred to a contract prison, absent any reasonable possibility that they would be returned to unit;

- *Jordan v. Sosa*, 654 F.3d 1012, 1029–38 (10th Cir. 2011): Inmate's action against BOP officials challenging the constitutionality of a statutory and regulatory ban on the use of federal funds to distribute to federal prisoners commercially published materials that were sexually explicit or featured nudity was rendered moot by his transfer to another facility.

A prisoner's transfer to another facility or unit will not moot a claim for equitable relief, however, if the very same policy, practice, or condition continues to apply to the same prisoner's confinement following his or her transfer to another unit or facility. *See Scott*, 139 F.3d at 941 (finding that prisoners' transfers did not moot District's appeal of injunction ordering the prison to provide prisoners with a smoke-free environment; the injunction appeared to apply regardless of where the prisoners were incarcerated, so long as they were under the District's jurisdiction).

Reid's Petition alleged that the conditions of his confinement in SHU – his access to his magazine subscriptions, to outside exercise, and to the administrative remedy process – contradicted specified federal regulations and BOP policies. *See* Pet., Parts III–V (J.A. 7–10). Reid sought both injunctive and declaratory relief. *See* Pet., Part VI (J.A. 10–11). Reid asked for an order declaring that he should have access to

these three things while in SHU and also compelling BOP to comply with applicable regulations and policies as regards to Reid's confinement in SHU. *Id.*

Reid was transferred from USP Tucson to USP Coleman and at the same time released from SHU into the general prison population. He then spent the next 15 months in the general prison population at USP Coleman, apparently with sufficient exercise, reading materials, and access to the administrative grievance process. J.A. 73, 83. The facts of this case are not unique or unlike those in the many cases in which federal appellate courts all across the country, including this Court, have concluded that an inmate's transfer from a prison or unit mooted the inmate's requests for declaratory and injunctive relief because the condition or policy that the inmate challenged no longer applied to his or her confinement. *See, e.g.*, *Cameron*, 983 F.3d at 257. On this record, the chance that Reid would again be subjected to the three deprivations in SHU that he challenged was entirely speculative.

Therefore, the district court properly concluded, based on the allegations and evidence before it, that Reid's case no longer presented a live case or controversy for injunctive or declaratory relief. The court

could not provide Reid any meaningful relief as regards the conditions, policies, and practices for confinement in SHU that he challenged. *See Banks v. Sec'y Penn. Dep't of Corr.*, 601 F. App'x 101, 103 (3d Cir. 2015). The mere fact that Reid spent *one night* in SHU in April 2016 was insufficient to maintain a live case or controversy about Reid's access to magazines, exercise, and administrative remedies. This Court should affirm the district court's decision finding Reid's claims for injunctive and declaratory relief moot.

B. In the Alternative, the Case and Appeal Became Moot When Reid Was Transferred to SMU.

In the alternative, even if this Court finds that the action was not moot when the district court dismissed it in November 2016, this Court should nonetheless dismiss the appeal as moot based on events after the dismissal involving Reid's placement in SMU at USP Lewisburg. *See Church of Scientology of California*, 506 U.S. at 12 (stating that an appeal must be dismissed as moot if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief to a prevailing party).

After Reid's case was dismissed, he was again placed into SHU at USP Coleman for approximately seven months from February 2017 to

October 2017. The Court could find that Reid's re-confinement in SHU casts doubt on the district court's predictive judgment and suggests that the controversy is capable repetition yet evading review. In fact, these developments, though similar, do not undercut the district court's decision because there is no indication that prison officials at USP Coleman subjected Reid to the same three deprivations of which he had previously complained at the other facilities. Reid filed no administrative grievances relating to his access to magazines and exercise while confined in SHU at USP Coleman.

In any event, his subsequent transfer from SHU at USP Coleman to the SMU program at USP Lewisburg weighs in favor of upholding mootness because Reid is expected to be in SMU for months and then to return to the general population. Thus, the regulations and BOP policies and practices that Reid challenged relating to his access to magazines, exercise, and administrative remedies in SHU no longer apply to him.

In a case with similar facts, *Incumaa*, the Fourth Circuit held that an inmate's action challenging a policy that barred inmates in a maximum security unit ("MSU") from receiving publications via the

mail was rendered moot upon his release from MSU to a Special Management Unit ("SMU"). 507 F.3d 281. The *Incumaa* court reasoned that the action was moot because the publications policy in SMU was different from and served a distinct purpose from the publications policy in MSU:

> Incumaa's challenge to the MSU policy is of the as-applied variety, but, critically, the publications ban no longer applies to him. 'As applied' does not mean 'as it used to apply.' Now that he has progressed out of the MSU, Incumaa would no more benefit from our declaration that the publications ban was unconstitutional as it applied (past tense) to him and enjoining its enforcement than he would benefit from our declaring any other aspect of MSU policy (or, for that matter, any aspect of the former Alcatraz prison's policy) unconstitutional and enjoining its enforcement.

Id. at 287. The court also noted that the inmate controlled his own fate as to whether he would ever be returned to MSU. *Id.* at 289. That the inmate remained subject to a similar publications ban in the SMU (which Reid or Amicus may argue here) was of no moment. *Id.* at 287.

The Court should reach the same conclusion here. Although there are some similarities between the SMU and SHU policies,[10] the policies

[10] *Compare* P.S. 5270.10 at 9 (stating that inmates in SHU in administrative detention status "are ordinarily allowed a reasonable amount of personal property" including up to three magazines), *with*

for SMU and SHU "are not one in the same." *See id.* And in any event, Reid's action challenged only the SHU policies. Because Reid no longer has a personal stake in the outcome, the appeal is not a live controversy and any decision by this Court now, or the district court upon remand, pertaining to BOP's SHU policies and practices as regards to Reid's confinement would be purely advisory.

C. Reid's Claim for Declaratory Relief Does Not Sustain a Live Controversy.

Amicus asserts that Reid's Petition presents a live case and controversy because he "seeks declaratory relief as to BOP's ongoing policy or practice that deprives [him] of his claimed regulatory rights to exercise and to receive his subscription magazines." Amicus Br. at 13, 22–26. Although there is no dispute that Reid's Petition sought declaratory relief, the district court specifically addressed that claim and properly concluded that it, too, was moot. J.A. 119.

"It is a 'well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction.'" *Ali v. Rumsfeld*, 649

P.S. 5217.02 at 7 (stating that inmates in SMU "may have reasonable amounts of personal property", *and* USP Lewisburg SMU Handbook at 51 (approved properly list for SMU inmates includes "one (1) magazine not more than 1 month old").

F.3d 762, 778 (D.C. Cir. 2011) (quoting *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002)). "Rather, 'the availability of [declaratory] relief presupposes the existence of a judicially remediable right.'" *Id.* (quoting *C&E Servs.*, 310 F.3d at 201) (alteration in the original); *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("The operation of the Declaratory Judgment Act is procedural only. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.") (internal quotation marks and citation omitted).

In an action for declaratory relief, a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant. *Jordan*, 654 F.3d at 1025. Where, as here, a plaintiff seeks both declaratory and injunctive relief, a district court has a duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of an injunction. *Id.* at 1025 (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121 (1974)). Yet, declaratory judgment actions must be sustainable under the same mootness criteria that apply to any other lawsuit. *Id.* (citing *Rio Grande Silvery Minnow v. Bureau of*

Reclamation, 601 F.3d 1096, 1109–10 (10th Cir. 2010)); *see also Hickman v. State of Mo.*, 144 F.3d 1141, 1142 (8th Cir. 1998) (observing that mootness principles "appl[y] to all stages of the litigation . . . and appl[y] with equal force to actions for declaratory judgment" as they do to other forms of relief). That is, the declaratory judgment must not merely be an advisory opinion and must resolve some dispute that affects the behavior of the defendant toward the plaintiff. *Id.* at 1025.[11]

Although the mootness of a claim for injunctive relief is not necessarily dispositive regarding the mootness of a claim for a declaratory judgment, *id.* at 1025, on this record Reid's claims for declaratory relief were also moot. Amicus characterizes the Petition as challenging an "ongoing policy" or an "ongoing practice." Amicus Br. at 5, 13, 22–25.[12] A petitioner with a mooted individual controversy may

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[11] *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *North Carolina v. Rice*, 404 U.S. 244, 246 (U.S. 1971).

[12] *See also* Reid's Mot. Summ. Reversal at 3 (Doc. 1680472) ("The very fact that so many facilities under Respondent's supervision violate the three legislative rules at issue continuously over at least a seven year period in precisely the same manner, is a strong indication that what one is dealing with is a *de facto* ongoing policy not of an isolated Special Housing Unit, but of the Federal Bureau of Prisons, itself.").

at times have standing to challenge an ongoing policy. *Entergy Servs., Inc. v. F.E.R.C.*, 391 F.3d 1240, 1246 (D.C. Cir. 2004)). But in such cases, the petitioner must still demonstrate both that "'the request for declaratory relief is ripe'" and that he has "'standing to bring such a forward-looking challenge.'" *Conserv. Force, Inc. v. Jewell*, 733 F.3d 1200, 1206 (D.C. Cir. 2013) (quoting *United States v. Adefehinti*, 510 F.3d 319, 321 (D.C. Cir. 2007)). Here, Reid can demonstrate neither.

First, Amicus' characterization of the action as a challenge to an "ongoing policy" and "ongoing practice" is contradicted by the allegations set forth in the Petition. In fact, all of Reid's claims were specific and limited to USP Tucson and the other BOP institutions in which he had been confined previously. *See, e.g.*, Pet., Part III, ¶ 2 (asserting that Reid was confined in eight separate BOP facilities); *id.* ¶ 3 ("At each of the above specified institutions prison officials refused to deliver magazines sent from the publisher to Petitioner.").

As the district court observed, Reid had not been confined to SHUs for the past straight year and "ha[d] not alleged similar wrongdoing by prison officials at his current facility in Coleman, Florida." Mem. Op. at 2 (J.A. 118–19). Consequently, any decision by the district court then,

or by this Court now, "would involve the very sort of speculative, hypothetical factual scenario that would render such a judgment a prohibited advisory opinion." *Jordan*, 654 F.3d at 1026 (internal quotation marks omitted) (explaining that prison-specific claims are moot on transfer because a declaration that a prisoner was wronged at institution where he no longer resides has no effect on a defendant's behavior toward him);[13] *see also Banks*, 601 F. App'x at 103; *Incumaa*, 507 F.3d at 282.

A number of events would need to occur before Reid could be confined again in SHU. Reid would first need to complete the SMU program and be moved to the general population. Then he would presumably need to relapse into bad behavior. The Court would also need to assume that Reid would be subjected to the very same

[13] Notably, it made no difference in *Jordan* that the challenged statute and regulation were applied throughout the BOP system in which he remained incarcerated. *Id.* at 1029. In *Jordan*, as here, the inmate never sought relief on a system-wide basis against BOP, but only sought injunctive and declaratory relief with respect to individual BOP officials at specific penal institution. *Id.* Moreover, the *Jordon* court found "no concrete prospect that Mr. Jordan will be returned to any of those facilities [in which the violations had allegedly occurred] in the foreseeable future." *Id.* at 1032.

conditions in SHU at USP Lewisburg or at some other facility to which he might be transferred in the future. Reid's claim for declaratory relief is thus not ripe for review because the adjudication would rest upon "contingent future events that may not occur as anticipated or may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

Consideration of the issue would also benefit from a more concrete setting tailored to the circumstances Reid encountered at his new facility. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 464 (D.C. Cir. 2006). Reid would also first need to exhaust his ability to challenge any future restrictions or conditions of his confinement through the administrative remedy program. *See Askins v. District of Columbia*, 877 F.2d 94, 97–99 (D.C. Cir. 1989) (prisoner's challenge to a potential transfer to a different prison unit was not ripe, since prison officials had not yet determined whether to make the transfer).[14] Moreover, a plaintiff cannot obtain declaratory relief in a challenge to an ongoing agency policy if, as here,

[14] As noted above, to date Reid has filed no administrative grievances pertaining to his magazines, exercise, or administrative remedies while confined in SMU at USP Lewisburg.

the plaintiff's specific claim is moot and the plaintiff lacks standing to attack future applications of the policy. *See City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1430 (D.C. Cir. 1994); *Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000). For all of these reasons, Reid is not a suitable litigant on these issues because he has made no showing that there is a reasonable likelihood that he will be subjected again to the deprivations of which he complained.

II. This Case Does Not Fall Within Any Exception to the Mootness Doctrine.

Amicus argues that Reid's case falls within the two primary exceptions to the mootness doctrine – (1) voluntary cessation, and (2) capable of repetition, yet evading review. *See* Amicus' Br. at 26–34. For the following reasons, neither exception applies here.

A. The Capable-of-Repetition-Yet-Evading-Review Exception Does Not Apply.

Although the "capable of repetition, yet evading review" doctrine is frequently invoked, it applies only in "exceptional situations." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). The exception applies only "'where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,

and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Cierco v. Mnuchin*, 857 F.3d 407, 415 (D.C. Cir. 2017) (quoting *Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 735 (2008)). Moreover, "there must be a reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the *same* complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)) (emphasis added); *see also Del Monte Fresh Produce Co.*, 570 F.3d at 322; *Aamer v. Obama*, 742 F.3d 1023, 1042–43 (D.C. Cir. 2014). Reid bears the burden of demonstrating that the exception applies. *See Incumaa*, 507 F.3d at 289.[15]

This exception does not apply to Reid's Petition. As to the first element, the challenged action is not too short in duration to be fully litigated. Amicus argues that no single, isolated instance of deprivation in SHU will ever last long enough to be fully litigated. *See* Amicus' Br. at 15, 26. While that may be true, BOP never argued, and the district court did not hold, that Reid had to remain in SHU continuously and for

[15] The capable-of-repetition doctrine applies "without discriminating between claims for declaratory relief and claims for injunctive relief." *Higgason*, 83 F.3d at 811.

the entirety of the litigation for his case to remain a live controversy. Instead, BOP's evidence established, and the district court found, that Reid was transferred and had not been confined in SHU for 15 months straight. *See Medberry v. Crosby*, 135 F. App'x 333, 334–35 (11th Cir. 2005) (finding that state prisoner's otherwise moot habeas petition challenging his completed term of administrative segregation due to disciplinary problems did not come within "capable of repetition but evading review" exception to mootness doctrine; fifteen month segregation period was not too short to be litigated); *Jordan*, 654 F.3d 1012 (federal inmate's action seeking injunctive and declaratory relief did not fall within capable-of-repetition exception to mootness doctrine after inmate was transferred to another facility, where there was no evidence that allegedly unconstitutional behavior was necessarily of short duration); *Abdul-Akbar*, 4 F.3d 195 (concluding that prisoner's challenge to court access in maximum security unit did not present issue capable of repetition yet evading review, and, thus, exception to mootness doctrine did not apply; prisoner never asserted that inmates at MSU failed to remain confined in facility for sufficient length of time to fully litigate claim, current plan eliminated deficiencies alleged by

prisoner, and, thus, there was no reasonable likelihood of prisoner again requiring access to library and legal resources as they existed during incarceration).

In other words, even though Reid's confinement in SHU is "capable of repetition" (and indeed he was confined in SHU repeatedly during certain periods), Reid "ha[d] not . . . shown [his action] to be of the type that necessarily evades review." *Hickman*, 144 F.3d at 1143 (internal quotation marks omitted). If the alleged conditions had persisted or been repeated at all during the fifteen months that preceded the district court's dismissal, which they had not, the district court could have addressed the alleged violations (assuming other prerequisites were met, including sufficient administrative exhaustion, for example). *Id.*

As to the second element, Reid failed to establish during the proceedings below (and Amicus fails to show here), that there was (or is) a reasonable expectation that he will be subjected to the same conditions in SHU again. *See Medberry*, 135 F. App'x at 335 (finding that inmate's evidence did not establish that the same circumstances about which the inmate complained in his habeas petition would result

in his later placement in administrative segregation); *Zajrael*, 677 F.3d at 355 (finding that inmate had not established that capable-of-repetition exception applied because he made no showing that a retransfer to the facility with the policies and practices of which he complained was likely); *Higgason*, 83 F.3d at 811 (finding that inmate's assertion that it was a "virtual certainty" that he would be returned to the institution from whence he came "does not amount to a 'showing' or a 'demonstration' of the likelihood of retransfer"; the capable-of-repetition exception only applies in "exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subject to the alleged illegality"); *Smith v. Hundley*, 190 F.3d 852, 855 (8th Cir. 1999) (citing *Preiser*, 422 U.S. at 402–03) ("Nor, do we do think that the mere possibility of transfer to another prison within the Iowa correctional system, of which ISP is one, is sufficient to bring Smith's claim within the narrow exception to the mootness doctrine."). Once the conditions of confinement that an inmate challenges cease completely at *some* point an expectation of recurrence is no longer reasonable. The district court reasonably

concluded, based on the available record, that this case had surpassed that point.

Moreover, as the *Incumaa* court reasoned persuasively in a similar case, Reid cannot show that there is a "reasonable expectation" or "demonstrated probability" because Reid will only find himself back in SHU again if he engages in bad behavior, which the Court should not presume:

> For us to find the exception for cases capable of repetition, yet evading review applicable here, then, we would have to forecast bad behavior on Incumaa's part. We surely cannot base our mootness jurisprudence in this context on the likelihood that an inmate will fail to follow prison rules. Such conjecture as to the likelihood of repetition has no place in the application of this exceptional and narrow grant of judicial power to hear cases for which there is in fact a reasonable expectation of repetition.
>
> There must be a demonstrated probability that the challenged action will recur again, and to the same complainant. Because Incumaa will only find himself in [the maximum security unit] again if he bucks prison policy, and because we presume that he will abide by those policies, we conclude that the capable of repetition, yet evading review exception to mootness does not apply in this case.

507 F.3d at 289 (citations and quotation marks omitted); *accord* *Hickman*, 144 F.3d at 1143 (quoting *Honig v. Doe*, 484 U.S. 305, 320 (1988)) ("'[Courts] generally have been unwilling to assume that the

party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.'"); *Ind v. Colorado Dep't of Corr.*, 801 F.3d 1209 (10th Cir. 2015) (capable-of-repetition exception did not apply to state prisoner's claim that prison's enforcement of two-book policy while he was in administrative segregation was in violation of his rights under RLUIPA, because prisoner was no longer in administrative segregation and court would not assume that prisoner would repeat misconduct that previously sent him to administrative segregation). Therefore, Amicus has not established that the capable-of-repetition exception applies to this case.

B. The Voluntary-Cessation Exception Does Not Apply.[16]

"A defendant's voluntary cessation of allegedly unlawful conduct can moot a case only if (i) 'there is no reasonable expectation . . . that the alleged violation will recur,' and (ii) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged

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[16] As Amicus acknowledges, Reid never argued below that the voluntary-cessation exception applied. Amicus' Br. at 22, 26, n.11; *see also Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 605–06 (D.C. Cir. 1998) (court of appeals has some discretion to consider new arguments on appeal, but should not do so in absence of "exceptional circumstances" "to achieve a just resolution").

violation.'" *Aref*, 833 F.3d at 251 (quoting *Am. Bar Ass'n*, 636 F.3d at 648). To overcome the voluntary-cessation exception, the "government bears the 'heavy' burden of showing it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis in the original)).

This Court recently examined the voluntary-cessation exception in another case involving prisoners' claims for equitable relief arising out of the conditions of their confinement in *Aref*, 833 F.3d at 250–51.[17] In *Aref*, seven federal prisoners brought an action against BOP claiming that their placement in Communications Management Units ("CMUs") violated their substantive and procedural due process rights by restricting their ability to communicate with the outside world and was cruel and unusual punishment. *Id.* at 249. The plaintiffs sought declaratory and injunctive relief, transfer out of the CMUs, and an order requiring that they be allowed the same communication privileges as other prisoners. *Id.* at 249–50. The plaintiffs also sought damages

[17] *Aref* was decided after BOP filed its combined opposition and reply, but before the district court decided the mootness issue.

under the Prison Litigation Reform Act ("PLRA") for injuries arising out of their confinement in CMUs. *Id.* at 246.

The government argued in *Aref* that the plaintiffs could not identify any current injury for which the court could provide relief because it had been years since any plaintiff was housed in CMU. *Id.* at 251. The *Aref* court rejected the argument and held that the government had not met the high bar of showing that it was "absolutely clear" that the allegedly wrongful behavior tied to the plaintiffs' previous confinement in the CMUs could not reasonably be expected to recur. *Id.* The *Aref* court concluded that the government's voluntary cessation of the challenged conduct did not make the case moot and proceeded to consider the plaintiffs' claims on the merits.[18] *Id.*

The *Aref* case is distinguishable for a number of reasons and Amicus has not demonstrated that the voluntary-cessation exception

[18] The *Aref* court also rejected the government's argument that the voluntary cessation exception only applied if the cessation came about "because of" the litigation. *Id.* at 251, n.6. Other circuits have reached the opposite conclusion. *See ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) ("The voluntary cessation doctrine does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation.").

should preclude a finding that the action is moot. First, the claims at issue in the two cases are different. Reid is not alleging that any BOP policy is unconstitutional; rather, he is asserting that BOP prison officials did not properly apply the policies to the conditions of his own confinement. Reid's challenge is "of the as-applied variety" like the claims in *Incumaa*. *See* 507 F.3d at 287. In *Aref*, by contrast, the prisoners challenged as constitutionally inadequate the procedures used to designate them to CMUs.

Although the overriding purpose of SHUs and CMUs is similar in that both programs aim to ensure the safety, security, and orderly operation of BOP facilities and to protect the public, the specific purpose and criteria for designation to CMU is not the same as for SHU (or SMU). *See Aref*, 833 F.3d at 246–48. "CMUs . . . house inmates who require communications monitoring beyond that which can feasibly be provided in the general population." *Id.* at 246. An inmate can be designated to CMU for several reasons, such as having a conviction offense related to international or domestic terrorism. *Id.* at 247 (citing 28 C.F.R. § 540.201). Placement is CMU is non-punitive. *Id.* at 247. In contrast, placement in SHU for DS status is a disciplinary sanction for

an inmate's misconduct. *See* 28 C.F.R. § 541.22(b). An inmate is placed in SHU for AD status when the inmate's presence in the general population poses a threat to the security and orderly running of the institution, when the inmate is under investigation or awaiting a hearing for possibly violating a BOP regulation or criminal law, and for several other specified reasons that have nothing to do with communications monitoring. *Id.* § 541.23.

The rationale supporting the voluntary-cessation exception is that without an order from the Court preventing the defendant from continuing the illegal practice "the defendant is 'free to return to [its] old ways'—thereby subjecting the plaintiff to the same harm but, at the same time, avoiding judicial review." *Qassim v. Bush*, 466 F.3d 1073, 1075 (D.C. Cir. 2006) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). The exception does not apply to the facts of this case because BOP did not "voluntarily" cease to do anything within the meaning of the mootness doctrine.

"Prison officials face the unenviable task of ensuring the safety and security of large populations of people convicted of crimes and frequently are confronted with novel challenges in doing so." *Aref*, 833

F.3d at 252. Courts "therefore afford them 'broad administrative and discretionary authority over the institutions they manage.'" *Id.* (quoting *Hewitt v. Helms*, 459 U.S. 460, 467 (1983)). BOP has an obligation to maintain the safe, secure, and orderly operation of the prison. *See* 18 U.S.C. § 4042(a)(2)-(3); 28 C.F.R. § 541.23-541.24. A decision to put an inmate who is a threat to other inmates and staff into SHU is hardly, as Amicus contends, a "voluntary action[] within BOP's exclusive control." Amicus' Br. at 27. Instead, the record establishes that Reid's placement in SHU (other than in connection with transfers between facilities) resulted from his own misconduct. If Reid had not committed so many infractions, he would not have spent so much time in SHU.

Likewise, if Reid is ever returned to SHU it will likely be of his own doing and certainly not because BOP believes that the specter of litigation has passed. *See Incumaa*, 507 F.3d at 288–89 ("Clearly, this is not the kind of 'voluntary cessation' that the exception covers."). There is no evidence that BOP officials engaged in subterfuge or sought to evade the court's jurisdiction by transferring Reid or returning him from SHU to the general population. *See Jordan*, 654 F.3d at 1037

(citing *McKinnon v. Talladega Cty., Ala.*, 745 F.2d 1360, 1362 (11th Cir. 1984)) ("It is patent and beyond peradventure that the BOP defendants did not transfer Mr. Jordan from the ADX in an effort to escape our jurisdiction.").

The Tenth Circuit's decision in *Ind*, 801 F.3d 1209, is instructive. The *Ind* court found that the voluntary-cessation exception did not apply to a state prisoner's claim that the prison's enforcement of a two-book policy while he was in administrative segregation was in violation of his rights under RLUIPA. The prisoner had been returned to the general population after he successfully completed the required phases of the administrative segregation program (not unlike the SMU program at USP Lewisburg to which Reid was transferred), the prisoner had remained in the general population for more than four years since his last release from administrative segregation. *Id.* at 1214. Moreover, there was no indication that his return was a ploy by the prison to deprive the court of jurisdiction. *Id.*[19]

[19] *Accord Campbell v. Clinton*, 203 F.3d 19, 34 n.14 (D.C. Cir. 2000); *Am. Bar Ass'n*, 636 F.3d at 648; *Mokdad v. Sessions*, 876 F.3d 167, 171 (6th Cir. 2017); *Sze v. I.N.S.*, 153 F.3d 1005, 1008 (9th Cir. 1998); *Sea-*

Even assuming Reid's release from SHU or his transfers can be construed as a voluntary cessation of activity by BOP, BOP can meet its evidentiary burden here, which further distinguishes this case from *Aref*. The voluntary-cessation exception does not apply when "there is no reasonable expectation that the wrong will be repeated." *Incumaa*, 507 F.3d at 288 (citing *W. T. Grant Co.*, 345 U.S. at 632–33). Reid was transferred first to USP Coleman and then again to USP Lewisburg, whereas in *Aref* the prisoners were only released from the CMUs into the general population, but apparently remained at the same facility. *See Aref*, 833 F.3d at 250. And unlike the prisoners in *Aref*, Reid was also put into SMU, a multi-level program that is expected to last at least 12 months. Reid's development through SMU and his completion of that program are within Reid's control. If he demonstrates good conduct over a sustained period, he will obtain additional privileges, such as access to more reading material and personal property. All of these factors make it less likely, as compared to the circumstances in *Aref*, that the wrongs of which Reid complained will be repeated.

Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's & Warehousemen's Union, Locals 13, 63, & 94, 939 F.2d 866, 870 (9th Cir. 1991).

Therefore, the voluntary-cessation exception does not apply to the facts of this case.

III. The District Court Did Not Err By Considering the Arguments and Evidence in BOP's Combined Opposition and Reply.

Amicus contends that the district court erred by considering new arguments and evidence in BOP's combined reply in support of its motion to dismiss and its opposition to Reid's cross-motion for summary judgment without notifying Reid or providing him an opportunity to submit a final reply. The Court should reject Amicus' procedurally focused attack for several reasons.

First, contrary to Amicus' contention, the district court provided Reid actual notice that he had an opportunity to respond to the arguments and evidence in BOP's combined opposition and reply. The court's order vacating the dismissal and reopening the case, dated June 2, 2016, provided that "Plaintiff may file a reply in support of his cross motion for summary judgment [ECF No. 23] combined with a reply in support of his motions to strike no later than August 29, 2016." Order, June 2, 2016 (ECF No. 21); *see also* Order, Oct. 1, 2015 (ECF No. 15) (*Neal* order notifying Reid that BOP's motion could potentially dispose

of the case, advising Reid of his obligations, and notifying Reid that the Court "may treat as conceded any unopposed arguments Defendant has advanced in support of the motion to dismiss"). The district court gave Reid the chance to have the last word on reply. Reid chose not to avail himself of that opportunity. The court also waited a reasonable amount of time after the deadline expired – more than two months – before dismissing Reid's complaint and denying his cross-motion for summary judgment.

Second, BOP's mootness argument was not new. BOP filed its motion to dismiss in September 2015, which was six months after Reid filed the Petition, and two months after Reid was transferred from USP Tucson to USP Coleman. BOP argued in its motion to dismiss that the district court lacked jurisdiction and the case was moot because Reid was no longer confined at USP Tucson or any of the other facilities where the alleged incidents had occurred. *See* Def.'s Mem. at 15–16 (ECF No. 14-1). Indeed, Reid argued in his opposition and cross-motion for summary judgment that his claims were not moot. Although Reid did not dispute the fact of his transfer or assert that the conditions still applied to his confinement at USP Coleman, he argued that his case

was capable of repetition yet evading review. *See* Reid's Mem. at 10–13 (June 2, 2016) (ECF No. 23).

It was entirely appropriate for BOP to respond to the arguments and allegations that Reid made in the brief he filed in support of his opposition and cross-motion. The declaration BOP submitted with its reply and opposition to Reid's cross-motion appropriately brought the district court up to date on Reid's housing situation at USP Coleman since the filing of its motion. *See Bd. of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (articulating a duty of candor toward the court as a "continuing duty to inform the court of any development which may conceivably affect the outcome of the litigation"). That evidence established that, except for one night, Reid had not been in SHU at all during the previous 12 months while confined at USP Coleman. J.A. 73, 83.

Third, an objection to the court's subject matter jurisdiction, of which mootness is one type of objection, can be made at any time. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011).

Even if BOP had not raised the issue at all,[20] the district court had an obligation to examine for subject matter jurisdiction on its own initiative. *Id.* at 434; *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 196 (D.C. Cir. 1992) (stating that both this Court and the District Court may consider, or even raise *sua sponte*, arguments ignored or left undeveloped when the issue pertains to the court's subject-matter jurisdiction); Fed. R. Civ. P. 12(h)(3) (requiring dismissal of a case "at any time" subject matter jurisdiction is found wanting). For this reason, too, BOP's mootness argument was timely asserted and properly considered.

Fourth, Amicus fails to demonstrate that Reid was prejudiced by not filing a reply. They fail to identify any other argument or evidence that the district court would have been presented by Reid. Therefore, at most any procedural error the district court committed in not providing Reid additional notice was harmless. *See Colbert v. Potter*, 471 F.3d 158, 165 (D.C. Cir. 2006) (citing *Holy Land Found. for Relief & Dev. v.*

[20] Amicus' cases providing that a party may not raise a new argument for the first time in an appellate reply brief do not apply because BOP asserted this jurisdictional challenge to the district court. *See, e.g.*, *Penn. Elec. Co. v. F.E.R.C.*, 11 F.3d 207, 209 (D.C. Cir. 1993).

Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003)) ("[I]f the District Court errs in applying the requirements of Rule 12(b), we will not reverse if the complaining party has suffered no prejudice and the error is determined to be harmless."). It does not appear that Reid actually disputes, or that he can reasonably dispute, that he was not confined in SHU during the fifteen months that preceded the district court's ruling (except for the one night in April 2016). These were the material facts relevant to BOP's mootness argument in its reply and the district court's decision.[21]

Further, the cases cited by Amicus do not lend any support for an argument that the district court erred by considering new arguments and evidence in BOP's without providing notice to Reid of his opportunity to further respond. In *Neal v. Kelly*, 963 F.2d 453, 456–57 (D.C. Cir. 1992) (*see* Amicus Br. at 20–22), this court ruled that a

[21] Amicus asserts in a footnote that BOP's records appear "imprecise" and "unclear." *See* Br. at 7, n.6. Neither Reid nor Amicus have offered any legitimate reason for doubting the authenticity or the accuracy of BOP's evidence. Amicus' claim that there is a five-month span in 2007–2008 for which Reid's location is unaccounted is immaterial to BOP's mootness argument. That was seven to eight years before Reid filed his Complaint. It is undisputed that Reid was confined in SHU many times and at a number of facilities prior to filing his Petition.

district court could not convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment without giving the opposing party a reasonable opportunity to submit affidavits that contradict affidavits submitted by the movant and to demonstrate that there is a genuine issue of material fact. That rule, now codified in Fed. R. Civ. P. 12(d),[22] does not apply because BOP moved to dismiss on mootness grounds pursuant to Fed. R. Civ. P. 12(b)(1). In such a jurisdictional challenge, considering extrinsic materials does not require that the court treat the motion as one seeking summary judgment. *See Ord v. District of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009). Therefore, the notice requirements of Fed. R. Civ. P. 12(d) are not implicated.

In *Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 876 (D.C. Cir. 1993), another case Amicus relies upon (Br. at 17, 21), this Court recognized that the *Neal* decision "discussed the importance of providing *pro se* litigants with the necessary knowledge to participate

[22] *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

effectively in the trial process." In *Moore*, the Court extended that principle to a different context, namely, the extent to which *pro se* litigants should be allowed more latitude to correct defects in service of process and pleadings. Thus, *Moore*, too, is distinguishable.

In any event, the district court's decision does not run afoul of the spirit of *Moore*, *Neal*, and the other cases Amicus cites in which the Supreme Court and this Court have encouraged lower courts to provide *pro se* litigants more assistance, guidance, and latitude with procedural rules than parties represented by counsel. As explained above, Amicus entirely overlooks the fact that the district court provided notice to Reid in its June 2, 2016, order, of his opportunity to further respond. *See* ECF No. 21. Moreover, the district court had significant discretion in deciding just how much latitude to give Reid as a *pro se* litigant. Amicus has not demonstrated that the court abused its discretion, or that the court's dismissal orders violated any procedural rule, or that any procedural error by the district court prejudiced Reid.

For all of these reasons, Amicus' procedural challenges concerning the supposed lack of notice and opportunity to file a sur-reply and the

district court's treatment of Reid as a *pro se* litigant are without merit and do not constitute grounds for reversal.

IV. Remand to Allow Reid to Amend His Complaint Is Unwarranted.

Finally, this Court should affirm the district court's dismissal and decline Amicus' suggestion to remand the case to provide Reid an opportunity to amend his complaint. First of all, Reid never sought leave to amend his complaint. *See Schmidt v. United States*, 749 F.3d 1064, 1069 (D.C. Cir. 2014) (*Belizan v. Hershon*, 434 F.3d 579, 582 (D.C. Cir. 2006) ("'Rule 15(a)—even as liberally construed—applies only when the plaintiff actually has moved for leave to amend the complaint; absent a motion, there is nothing to be freely given.'"). Amicus offers no support for its assertion that the district court should have notified Reid of his supposed "right" to amend his complaint before ruling on the purportedly new arguments and new evidence in BOP's reply. If, as here, the pleading is one that requires a responsive pleading, the pleading may only be amended of right once within "21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(B). In the present situation in which a party's right to amend has lapsed, Rule 15(a)(2)

provides a potential opportunity to obtain *leave* to amend from either the opposing party or the court. Thus, Amicus is incorrect that the district court was required to notify Reid of his opportunity to amend prior to ruling on the parties' dispositive motions. *See Myles v. United States*, 416 F.3d 551, 552 (7th Cir. 2005) (no need for district judge to tell *pro se* plaintiff "he *ought* to amend; even *pro se* litigants are masters of their own complaints. . . . Fomenting litigation is not part of the judicial function").

Moreover, a remand to allow Reid to amend his complaint is unwarranted because "[w]hen a plaintiff fails to seek leave from the District Court to amend its complaint, either before or after its complaint is dismissed, it forfeits the right to seek leave to amend on appeal." *Molina v. Ocwen Loan Servicing*, 545 F. App'x 1, 2 (D.C. Cir. 2013) (quoting *City of Harper Woods Employees' Ret. Sys. v. Olver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009)).

Finally, a dismissal for lack of subject matter jurisdiction is usually not a decision on the merits and generally will not preclude the plaintiff from filing the claim in a court that may properly hear the dispute. *See Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 736 (1st Cir.

2016). Such was the case here. As the district court noted in its decision, "should Mr. Reid suffer deprivations in the future, the more appropriate judicial forum for adjudicating any new claim is the federal district court in the State where he is incarcerated." Mem. Op. at 2, n.2.[23] This would apply, for example, to any new challenges Reid might raise about conditions in the SMU.

For these reasons, this Court should reject Amicus' invitation to remand the case to provide Reid an opportunity to amend his complaint. If he is ever again subjected to the deprivations of which he complained in SHU, Reid should be required to file a new action in the district in which he is presently confined after properly exhausting his administrative remedies.[24]

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[23] *See also Cameron v. Thornburgh*, 983 F.2d 253, 256 (D.C. Cir. 1993) (concluding that venue was improper in this District in action for prisoner's claims against Warden, BOP officials, and Attorney General for BOP's refusal to provide medically prescribed low-sodium diet at Indiana prison; rather, proper venue was the district in which the prison was located).

[24] Alternatively, if the Court were to find that remand is appropriate under these circumstances, it could include instructions to grant Defendant's motion to dismiss for lack of venue and transfer the case to the U.S. District Court for the Middle District of Pennsylvania. If the Court concludes that the action is not moot and also that it *should*

CONCLUSION

WHEREFORE, BOP respectfully requests this Court to affirm the judgment of the district court.

April 2, 2018

Respectfully submitted,

JESSIE K. LIU
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

DANIEL P. SCHAEFER
Assistant United States Attorney
555 Fourth Street, NW
Washington, D.C. 20530
Daniel.Schaefer@usdoj.gov
(202) 252-2531

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proceed in this District, then it would be appropriate for the Court to remand for further proceedings, including consideration of any request to amend or supplement the complaint.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief contains 12,449 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/ Daniel P. Schaefer
DANIEL P. SCHAEFER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2018, I have caused a copy of the foregoing BRIEF FOR APPELLEE to be served upon Amicus by electronic means, through the Court's CM/ECF system, and upon Petitioner, Gordon C. Reid, by first class United States mail, marked for delivery to:

GORDON C. REID
R02540-049
U.S. Penitentiary Lewisburg
PO Box 1000
Lewisburg, PA 17837

/s/ Daniel P. Schaefer
DANIEL P. SCHAEFER
Assistant United States Attorney

Addendum of Statutes and Regulations

Code of Federal Regulations
Title 28. Judicial Administration
Chapter V. Bureau of Prisons, Department of Justice
Subchapter C. Institutional Management
Part 541. Inmate Discipline and Special Housing Units (Refs & Annos)
Subpart B. Special Housing Units (Refs & Annos)

28 C.F.R. § 541.20

§ 541.20 Purpose.

Effective: June 20, 2011
Currentness

This subpart describes the Federal Bureau of Prisons' (Bureau) operation of special housing units (SHU) at Bureau institutions. The Bureau's operation of SHUs is authorized by 18 U.S.C. 4042(a)(2) and (3).

SOURCE: 52 FR 37730, Oct. 8, 1987; 54 FR 11323, March 17, 1989; 56 FR 4159, Feb. 1, 1991; 56 FR 31530, July 10, 1991; 67 FR 77428, Dec. 18, 2002; 75 FR 76267, Dec. 8, 2010; 75 FR 76273, Dec. 8, 2010; 76 FR 11079, March 1, 2011, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Notes of Decisions (1)

Current through March 29, 2018; 83 FR 13620.

End of Document

Code of Federal Regulations
Title 28. Judicial Administration
Chapter V. Bureau of Prisons, Department of Justice
Subchapter C. Institutional Management
Part 541. Inmate Discipline and Special Housing Units (Refs & Annos)
Subpart B. Special Housing Units (Refs & Annos)

28 C.F.R. § 541.24

§ 541.24 Disciplinary segregation status.

Effective: June 20, 2011
Currentness

You may be placed in disciplinary segregation status only by the DHO as a disciplinary sanction.

SOURCE: 52 FR 37730, Oct. 8, 1987; 54 FR 11323, March 17, 1989; 56 FR 4159, Feb. 1, 1991; 56 FR 31530, July 10, 1991; 67 FR 77428, Dec. 18, 2002; 75 FR 76267, Dec. 8, 2010; 75 FR 76273, Dec. 8, 2010; 76 FR 11079, March 1, 2011, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Current through March 29, 2018; 83 FR 13620.

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Code of Federal Regulations
Title 28. Judicial Administration
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Subpart B. Special Housing Units (Refs & Annos)

28 C.F.R. § 541.31

§ 541.31 Conditions of confinement in the SHU.

Effective: June 20, 2011
Currentness

Your living conditions in the SHU will meet or exceed standards for healthy and humane treatment, including, but not limited to, the following specific conditions:

(a) Environment. Your living quarters will be well-ventilated, adequately lighted, appropriately heated, and maintained in a sanitary condition.

(b) Cell Occupancy. Your living quarters will ordinarily house only the amount of occupants for which it is designed. The Warden, however, may authorize more occupants so long as adequate standards can be maintained.

(c) Clothing. You will receive adequate institution clothing, including footwear, while housed in the SHU. You will be provided necessary opportunities to exchange clothing and/or have it washed.

(d) Bedding. You will receive a mattress, blankets, a pillow, and linens for sleeping. You will receive necessary opportunities to exchange linens.

(e) Food. You will receive nutritionally adequate meals.

(f) Personal hygiene. You will have access to a wash basin and toilet. You will receive personal items necessary to maintain an acceptable level of personal hygiene, for example, toilet tissue, soap, toothbrush and cleanser, shaving utensils, etc. You will ordinarily have an opportunity to shower and shave at least three times per week. You will have access to hair care services as necessary.

(g) Exercise. You will receive the opportunity to exercise outside your individual quarters at least five hours per week, ordinarily on different days in one-hour periods. You can be denied these exercise periods for a week at a time by order of the Warden if it is determined that your use of exercise privileges threatens safety, security, and orderly operation of a correctional facility, or public safety.

(h) Personal property. In either status, your amount of personal property may be limited for reasons of fire safety or sanitation.

(1) In administrative detention status you are ordinarily allowed a reasonable amount of personal property and reasonable access to the commissary.

(2) In disciplinary segregation status your personal property will be impounded, with the exception of limited reading/writing materials, and religious articles. Also, your commissary privileges may be limited.

(i) Correspondence. You will receive correspondence privileges according to part 540, subpart B.

(j) Telephone. You will receive telephone privileges according to part 540, subpart I.

(k) Visiting. You will receive visiting privileges according to part 540, subpart D.

(l) Legal Activities. You will receive an opportunity to perform personal legal activities according to part 543, subpart B.

(m) Staff monitoring. You will be monitored by staff assigned to the SHU, including program and unit team staff.

(n) Programming Activities. In administrative detention status, you will have access to programming activities to the extent safety, security, orderly operation of a correctional facility, or public safety are not jeopardized. In disciplinary segregation status, your participation in programming activities, e.g., educational programs, may be suspended.

(o) Administrative remedy program. You can submit a formal grievance challenging any aspect of your confinement in the SHU through the Administrative Remedy Program, 28 CFR part 542, subpart B.

SOURCE: 52 FR 37730, Oct. 8, 1987; 54 FR 11323, March 17, 1989; 56 FR 4159, Feb. 1, 1991; 56 FR 31530, July 10, 1991; 67 FR 77428, Dec. 18, 2002; 75 FR 76267, Dec. 8, 2010; 75 FR 76273, Dec. 8, 2010; 76 FR 11079, March 1, 2011, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Current through March 29, 2018; 83 FR 13620.

End of Document

Code of Federal Regulations
Title 28. Judicial Administration
Chapter V. Bureau of Prisons, Department of Justice
Subchapter C. Institutional Management
Part 542. Administrative Remedy (Refs & Annos)
Subpart B. Administrative Remedy Program

28 C.F.R. § 542.10

§ 542.10 Purpose and scope.

Currentness

(a) Purpose. The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

(b) Scope. This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

(c) Statutorily-mandated procedures. There are statutorily-mandated procedures in place for tort claims (28 CFR part 543, subpart C), Inmate Accident Compensation claims (28 CFR part 301), and Freedom of Information Act or Privacy Act requests (28 CFR part 513, subpart D). If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.

Credits
[67 FR 50805, Aug. 6, 2002]

SOURCE: 61 FR 87, Jan. 2, 1996; 67 FR 50805, Aug. 6, 2002, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Notes of Decisions (255)

Current through March 29, 2018; 83 FR 13620.

End of Document

28 C.F.R. § 540.201

§ 540.201 Designation criteria.

Effective: February 23, 2015
Currentness

Inmates may be designated to a CMU if evidence of the following criteria exists:

(a) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;

(b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a substantial likelihood that the inmate will encourage, coordinate, facilitate, or otherwise act in furtherance of illegal activity through communication with persons in the community;

(c) The inmate has attempted, or indicates a substantial likelihood that the inmate will contact victims of the inmate's current offense(s) of conviction;

(d) The inmate committed prohibited activity related to misuse or abuse of approved communication methods while incarcerated; or

(e) There is any other substantiated/credible evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community.

SOURCE: 50 FR 40108, Oct. 1, 1985; 56 FR 4159, Feb. 1, 1991; 58 FR 39095, July 21, 1993; 59 FR 15824, April 4, 1994; 60 FR 65204, Dec. 18, 1995; 61 FR 57568, Nov. 6, 1996; 62 FR 65185, Dec. 10, 1997; 67 FR 77164, Dec. 17, 2002; 67 FR 77427, Dec. 18, 2002; 68 FR 10658, March 6, 2003; 69 FR 40317, July 2, 2004; 75 FR 21164, April 23, 2010; 77 FR 19933, April 3, 2012; 80 FR 3177, Jan. 22, 2015, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

Current through March 29, 2018; 83 FR 13620.

End of Document

EXHIBIT 1

The attached USP Lewisburg Supplement:
LEW 5217.02B, Special Management Units,
was certified as current: August 8, 2017

David J. Ebbert, Warden

U.S. Department of Justice
Federal Bureau of Prisons
U.S. Penitentiary
Lewisburg, PA 17837

Institution Supplement

1. PURPOSE AND SCOPE To implement local procedures for addressing operations and conditions for the Special Management Unit (SMU) at USP Lewisburg, Pennsylvania, pursuant to the Program Statement 5217.02, Special Management Units, dated August 9, 2016.

2. PROGRAM OBJECTIVE To establish operating procedures for the implementation of an efficient, safe and secure SMU program through the enforcement of sound correctional decisions to be carried out by staff at USP Lewisburg. This is a three phase program which begins with Level One and continues through Level Three. Advancement through the program will depend on the inmate's progression, with positive adjustment, resulting in the movement to the next level. With advancement through the levels, more privileges will become available to the inmate.

3. DIRECTIVES AFFECTED

   a. Directive Referenced: Program Statement 5217.02, Special Management Units, (08/09/2016).

   b. Directive Rescinded: Institution Supplement 5217.02, (09/22/2016).

4. STANDARDS REFERENCED: American Correctional Association, Standards for Adult Correctional Institutions, 4th Edition: 4-4276, 4-4277, 4-4283, 4-4287, 4-4288, 4-4290, 4-4292, 4-4295, 4-4296, 4-4297, 4-4299, 4-4300, 4-4301, 4-4363M, 4-4368M, 4-4491, 4-4497, 4-4498, 4-4510, and 4-4517. Performance Based Standards for Adult Local Detention facilities, 4th Edition: None. 2nd Edition Standards for Administration of Correctional Agencies: 2-CO-4A-01, 2-CO-4B-01, 2-CO-4B-04, 2-CO-4E-01, 2-CO-4F-01, 2-CO-5B-01, 2-CO-5C-01, 2-CO-5D-01, 2-CO-5E-01, 2-CO-5F-01. Standards for Correctional Training Academies: None.

5. ADMISSION AND ORIENTATION PROCEDURES:
During the intake screening process, inmates designated to the SMU will receive a SMU Inmate Admission & Orientation (A&O) handbook. This handbook contains information specific to the SMU program, as well as information traditionally covered in A&O lectures. Additionally, A&O lectures are broadcast on FM frequency 88.5 every Wednesday at 8:30 a.m.

6. PROCEDURES

a. Conditions of Confinement: Inmates will be assigned to a cell which ordinarily houses two occupants. Cell assignments will be the responsibility of the Unit Team, with direct oversight provided by the Unit Manager. Inmates will be accountable for maintaining acceptable levels of sanitation in their cells and or living areas.

b. Personal Hygiene Items: Inmates have access to a wash basin and toilet. Hygiene items are provided to inmates; however, limited hygiene items are available for purchase through the inmate commissary. Inmates have the opportunity to shower at least three times per week.

c. Other Supplies: Writing paper, writing instruments, and envelopes will be issued by Correctional Services staff.

d. Linen Exchange: Inmates will be issued a laundry bag with an adequate supply of clothing, towels and linens. Specific procedures for linen exchange are addressed in the SMU Handbook which is issued upon arrival. The Warden may impose alternative clothing and/or linen for seven days, for inmates who destroy or alter institutional clothing or linen.

e. Meals: Inmates in Level One through Level Three will receive three meals per day, via satellite feeding.

f. Recreation: Inmates will be offered the opportunity to exercise outside their individual quarters for at least five hours per week,

ordinarily in one-hour periods on different days. The Warden may deny these exercise periods for up to one week at a time if it is determined that an inmate's recreation jeopardizes the safety, security, or orderly operation of the institution.

g. Personal Property: Inmates in Level One through Level Three will have limited personal property. Additional personal property limitations may be imposed by the Warden to maintain institution security.

h. Commissary: Commissary items will be available to inmates on all three levels of the program. The East and West side housing units will shop commissary on a bi-weekly basis. Inmates on commissary restrictions will only be permitted to purchase postage stamps, certain hygiene items, and over the counter medications.

i. Visiting: Inmates must submit a written request to the Unit Manager at least two weeks in advance of the expected visit. Visiting request forms must be requested through the Unit Counselor.

Provided there are no visiting restrictions as the result of disciplinary or other reasons, visitation for inmates in Levels One through Three will be facilitated via video visiting and will only be available to immediate family members which include parents or (legal guardians which must be verified), siblings, offspring, spouses, and grandparents. The relationship must be verified.

As the availability of video equipment is limited, visits will be limited to one hour per inmate. Visits will be scheduled in accordance with availability. All SMU visiting will be conducted on the weekends with a memorandum of approval.

j. Correspondence and Telephones: Written correspondence as outlined in Program Statement 5265.14, Correspondence, dated

April 5, 2011, will be permitted. Incoming special mail will be delivered by Unit Team staff. Outgoing special mail will be collected by staff for mailing on a daily basis. Inmates in the SMU may use the telephones in their assigned housing unit from 6:00 a.m. until 10:00 p.m., provided they are not on telephone restrictions. Inmates in Level One will be permitted two 15-minute telephone calls per month. Inmates in Level Two will be permitted four 15-minute telephone calls per month. Inmates in Level Three will be permitted fifteen phone calls per month not to exceed 150 minutes.

k. Legal Phone Calls: Unit Staff will facilitate legal phone calls according to national policy.

l. Legal Activities: Housing Units will be equipped with an Electronic Law Library (ELL). Inmates must submit a written request to staff to use the ELL. Priority will be given to inmates who demonstrate an imminent court deadline. Otherwise, use of the ELL will be based on the order of each request. A log will be maintained in each housing unit equipped with an ELL for accountability. Requested materials will be completed and delivered based upon the needs of the inmate population and the availability of staff and other resources.

m. Medical Care: Medical staff will make rounds in each SMU housing units on a daily basis. Inmates have the ability to sign up for sick call Monday through Friday (excluding holidays), and have access to emergency medical care 24 hours a day, seven days a week.

n. Mental Health Care: Inmates will be seen at least once every 30 days by Psychology Services Staff for a mental health review. Inmates with psychiatric or other mental health needs will be seen as needed to meet their needs.

o. Religious Activities: Chaplains will be available for counseling and accommodation of religious needs on a one-on-one basis.

p. 30-Day Condition Review: The Unit Correctional Counselor will conduct 30-day reviews in accordance with National Policy utilizing form BP-A0951, Special Management Unit (SMU) 30 Day Conditions Review. The Unit Manager will be responsible for oversight of this review.

q. Housing Unit Daily Record: The housing unit officer completes Form BP-A0950, Housing Unit Daily Record, daily. All inmates being removed from a secure area and/or escorted between secure areas will be pat searched to include the use of a metal detector and will be subjected to visual searches as outlined in Program Statement 5521.06, Searches of Housing Units, Inmates, and Inmate Work Areas.

7. SMU PROGRESSION AND PROGRAM COMPLETION: Inmates must complete SMU programming for the level they are assigned regardless of their housing unit assignment. Inmates who successfully complete the program will be managed in accordance with the Level Three - Level Progression / Redesignation Criteria set forth in the SMU Program Statement.

8. OFFICE OF PRIMARY INTEREST: Correctional Services and Correctional Programs.

9. EFFECTIVE DATE: Supplement is effective upon issuance.

David J. Ebbert, Warden