IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSIN MUHIDDIN AREF, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0539 (RMU)
ERIC HOLDER, *et al.*	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS ON MOOTNESS GROUNDS

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and the Court's November 2, 2010 Minute Order, Defendants hereby respectfully request that the Court dismiss all of the claims in the Complaint brought by Avon Twitty and Daniel McGowan regarding their designation to and confinement in a Communications Management Unit ("CMU"). Twitty and McGowan have recently been released from the CMU and thus are no longer subject to the CMU's communication restrictions. As a consequence, their constitutional claims for declaratory and injunctive relief arising out of their designation to and confinement in a CMU are now moot. For the same reason, their claims that Defendants violated the Administrative Procedure Act by establishing the CMUs without notice and comment rulemaking are also moot. Finally, the claims of Jenny Synan are moot because her claims are based entirely on the impact of the CMU's communication restrictions on her ability to communicate with her husband, Daniel McGowan. The reasons in support of Defendants' Supplemental Motion are further set forth in the attached Memorandum of Points and Authorities.

Dated: November 9, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

_____/s/_____
NICHOLAS CARTIER
(D.C. Bar # 495850)
Trial Attorney
U.S. Department of Justice
Civil Division/Federal Programs
Mail: P.O. Box 883
Washington, D.C. 20044
Street: 20 Massachusetts Ave., N.W.
Washington, DC 20001
Ph: (202) 616-8351
Fax: (202) 616-8470
Email: nicholas.cartier@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSIN MUHIDDIN AREF, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0539 (RMU)
ERIC HOLDER, *et al.*	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR SUPPLEMENTAL MOTION TO DISMISS ON MOOTNESS GROUNDS

INTRODUCTION

This action is brought by five federal prison inmates ("Plaintiffs") and two spouses ("Family Plaintiffs") arising out of Plaintiffs' designation to a "Communications Management Unit" (CMU), which is a self-contained general prison population unit that is used by the Bureau of Prisons ("Bureau" or "BOP") to monitor the communications of high-risk prisoners. *See* Defendants' Memorandum In Support of Their Motion Dismiss ("MTD") at 4-7 (Dkt No. 19). Defendants have filed a motion to dismiss the complaint based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.[1] *See generally* MTD.

[1] Plaintiffs allege that their transfer to the CMU violated their procedural due process rights, and that they were designated to a CMU in retaliation for engaging in protected First Amendment activities, such as filing grievances, and/or because they are Muslim. Compl.¶¶ 253, 273. They also allege that the restrictions on communications imposed in the CMU violate their substantive due process rights to family integrity, their First Amendment rights to freedom of speech and association, and constitute cruel and unusual punishment. *Id.* ¶¶ 258, 261, 268. Finally, they allege that the Bureau was required under the Administrative Procedure Act ("APA") to provide notice and comment rulemaking before establishing the CMUs. *Id.* ¶¶ 276-281.

Since the completion of the briefing on Defendants' motion to dismiss, subsequent events have provided further grounds for dismissing the claims of two of the Plaintiffs on mootness grounds.

On October 19, 2010, Daniel McGowan was released from the CMU at the United States Penitentiary in Marion, Illinois ("USP Marion"), and was transferred to the non-CMU general prison population at USP Marion. Declaration of Milt Neuman ¶ 3 (Exhibit A). McGowan's release arose in connection with a routine program review and was based on "the length of time he had been confined within the unit without incident, having maintained clear conduct, and his overall positive activities and program participation." *Id.* at ¶ 4 ; *see also* MTD at 7-8 (explaining that CMU's Unit Team conducts regular reviews of an inmate's designation to the CMU to determine whether continued placement is appropriate).

In addition, on October 20, 2010, Avon Twitty was transferred from the CMU at the Federal Correctional Complex in Terre Haute, Indiana ("FCC Terre Haute") to a halfway house known as a Community Corrections Center ("CCC") in the Washington, D.C. area. *See* Declaration of Cory Shepherd ("Shepherd Decl.") ¶ 3 (Exhibit B).[2] Twitty became eligible for placement in a CCC because he completed the majority of his sentence, and is currently scheduled to be released from BOP custody in January 2011. *Id.* (citing 18 U.S.C. § 3624(c)(1)).[3]

[2] The Court may consider the attached declarations of BOP Case Managers Milt Neuman and Cory Shepherd for purposes of determining whether the claims of Twitty and McGowan are moot. *See Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992) (In reviewing a motion to dismiss for lack of subject matter jurisdiction, the court may, where necessary, "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts").

[3] 18 U.S.C. § 3624(c)(1) provides that "[t]he Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a

As set forth below, because Twitty and McGowan seek only future-looking equitable remedies, and have neither sought damages nor purport to represent a class of CMU inmates, their release from the CMU moots their claims. In addition, because the claims of one of the Family Plaintiffs, Jenny Synan, are based entirely on the alleged impact the CMU communication restrictions have on her marital relationship with Plaintiff McGowan, her claims must be dismissed as well.[4]

ARGUMENT

I. Plaintiffs' Constitutional Claims Seeking Equitable Relief Arising Out of Their Transfer To And Confinement In A CMU Are Moot In Light Of Their Release From The CMU.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). The case-or-controversy requirement demands that, at all stages of the case, "the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and *likely to be redressed by a favorable judicial decision*." *Id.* (internal quotation marks omitted) (emphasis added). Thus, where intervening events after the filing of a lawsuit prevent a court from ordering any relief, the case is moot. *See Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982) (plaintiff's constitutional challenge to the lack of pretrial bail that sought declaratory and injunctive relief was moot following his conviction, since at that point the "question was no longer live because even a favorable decision on it would not have entitled [Plaintiff] to bail").

Applying these mootness principles, decisions in this Circuit hold that lawsuits challenging prison conditions and that seek only equitable relief become moot once the prisoner

---

reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility."

[4] Family Plaintiffs join in Plaintiffs' claims that the CMU's communication restrictions violate the Due Process Clause and the First Amendment. Compl. ¶¶ 256-265.

is transferred to a facility with different conditions. According to the D.C. Circuit, "[n]ormally, 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); *Cameron v. Thornburgh*, 983 F.2d 253, 254-257 (D.C. Cir. 1993) (transfer from one federal prison to another mooted prisoner's claim for injunctive relief with respect to conditions at pre-transfer prison); *see also Dorman v. Thornburgh*, 955 F.2d 57, 58 (D.C. Cir. 1992) (prisoner's claim for injunctive or declaratory relief regarding prison conditions "becomes moot once prisoner is no longer subject to those conditions").

In this case, the equitable claims of Plaintiffs Twitty and McGowan are moot because their alleged prior constitutional injuries cannot be remedied by the future-looking injunctive and declaratory relief they seek. In Twitty's case, he has been transferred to a CCC, or halfway house, in Washington, D.C., *see* Shepherd Decl.¶ 3, while McGowan has been transferred to the main general prison population at USP Marion, Neuman Decl. ¶ 3. Therefore, because they have been transferred out of the CMU and are no longer subject to the CMU's communication restrictions, they have already received the injunctive relief sought in their Complaint.[5] *Id.*

Likewise, Plaintiffs do not possess a cognizable interest in receiving a declaratory judgment that their transfer to and confinement in a CMU violated the Constitution. *See* Compl.,

[5] The Complaint's prayer for relief requests that the Court "[o]rder Defendants to transfer each Plaintiff from the CMU to the general population at a federal prison appropriate for each Plaintiffs' security classification *or* provide each Plaintiff with due process to ensure their designation to the CMU was appropriate and devoid of discriminatory animus . . . ." Compl., Prayer for Relief (b) (emphasis in original). In addition, the Complaint requests that the Court "[o]rder Defendants to award Plaintiffs the same opportunities for communication as all other general population prisoners in the BOP, i.e. 300 phone minutes a month, and contact visitation pursuant to the rules of the facility to which they are designated . . . ." *Id.*, Prayer for Relief(c). Plaintiffs have received the requested relief since they have been transferred from the CMU and are no longer subject to the CMU's communication restrictions. *See* Shepherd Decl. ¶ 3; Neuman Decl. ¶ 3.

Prayer for Relief (a) (seeking declaratory order that, *inter alia*, "Defendants' actions violate Plaintiffs' First, Fifth and Eighth Amendment rights . . ."); *see also* supra note 1 (describing nature of Plaintiffs' claims). The D.C. Circuit has made clear that *all* equitable claims, including claims for declaratory relief, are mooted once a prisoner is no longer subject to the conditions that formed the basis of her lawsuit. *See Dorman*, 955 F.2d at 58 (prisoner's claim for injunctive or declaratory relief regarding prison conditions "becomes moot once prisoner is no longer subject to those conditions"); *Scott*, 139 F.3d at 941 (transfer of prisoner to different facility normally moots "any claim he might have for equitable relief" relating to conditions of confinement at pre-transfer facility).

In light of this precedent, the constitutional claims of Plaintiffs Twitty and McGowan, as well as the claims of McGowan's wife, Jenny Synan, are now moot.

II. Plaintiffs' APA Claim Is Also Moot Given Their Release From The CMU.

Plaintiffs' Complaint contends that the BOP violated the APA by establishing the CMUs without providing for a period of notice and comment rulemaking. Compl. ¶¶ 276-282. Even if the Court were to find a procedural defect under the APA with respect to the establishment of the CMUs, however, it could not redress any alleged injuries to Twitty and McGowan for the simple reason that they are no longer confined to the CMUs. [6] Any finding by the Court with respect to their APA claim would have no practical effect on these two Plaintiffs. *See Renal Physicians Ass'n v. Dep't of Health and Human Serv.*, 422 F. Supp. 2d 75, 85 (D.D.C. 2006) (to establish standing to challenge lack of notice and comment rulemaking under APA, plaintiff "must still

[6] Defendants have previously explained why the BOP was not required to engage in notice and comment rulemaking under the APA before establishing the CMUs, and why this claim is moot in light of the fact that the BOP has published a proposed rule in the Federal Register, has received comments from interested parties, and is now analyzing those comments in anticipation of publishing a final rule. *See* MTD at 39-43 (Dkt. No. 19); Defendants' Reply In Support of Their Motion to Dismiss at 34-39 (Dkt. No. 27).

demonstrate that it is likely, not speculative, that the [C]ourt can redress the injury") (internal quotation marks and citation omitted), *aff'd Renal Physicians Ass'n v. Dep't of Health and Human Serv.*, 489 F.3d 1267, 1278-79 (D.C. Cir. 2007) (stating that, in a procedural-injury case involving an alleged failure to provide notice and comment rulemaking under the APA, "the plaintiff must still show that the agency action was the cause of some redressable injury to the plaintiff"); *see also Spencer*, 523 U.S. at 7 (to avoid mootness, "plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision") (internal quotation marks omitted). As a result, their APA claim is moot as well.[7]

CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court grant their Supplemental Motion To Dismiss all of the claims of Avon Twitty, Daniel McGowan and Jenny Synan with prejudice.

[7] None of the claims in this case fall within the exception to mootness for claims "capable of repetition, yet evading review." *See Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975). First, Plaintiffs cannot show that confinement in a CMU is "in its duration too short to be fully litigated prior to its cessation or expiration." *Spencer*, 523 U.S. at 17 (internal quotation marks omitted). Here, two of the five Plaintiffs remain in the CMU where they have been, respectively, since May 2007 (Aref, Compl. ¶16) and June 2007 (Jayyousi, Compl. ¶ 22). Second, there is no "reasonable expectation" or "demonstrated probability" that Twitty and McGowan will be returned to the CMU. *Spencer*, 523 U.S. at 17; *Murphy*, 455 U.S. at 482 (internal quotation marks omitted). In addition, Plaintiffs' claims do not fall within the exception to mootness for cases involving a "voluntary cessation of allegedly illegal conduct," where the defendant remains "free to return to his old ways" once the case is dismissed. *United States v. W.T. Grant Co.*, 345 U.S. 629, 630-632 (1953). This exception has no applicability here because Defendants have not ceased to operate the CMUs. Furthermore, Twitty and McGowan were released from the CMU in accordance with normal prison procedures, *see supra* at 2, not to escape legal scrutiny. Thus, the concerns underlying the voluntary cessation doctrine are inapplicable in this case. *See City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (explaining that voluntary cessation exception to mootness "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior").

Dated: November 9, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

_____/s/_____
NICHOLAS CARTIER
(D.C. Bar # 495850)
Trial Attorney
U.S. Department of Justice
Civil Division/Federal Programs
Mail: P.O. Box 883
Washington, D.C. 20044
Street: 20 Massachusetts Ave., N.W.
Washington, DC 20001
Ph: (202) 616-8351
Fax: (202) 616-8470
Email: nicholas.cartier@usdoj.gov

Attorneys for Defendants