Case No. 16-35903

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEIL GRENNING
Plaintiff-Appellant

v.

MAGGIE MILLER-STOUT, et al.,
Defendants-Appellees.

Appeal from the United States District Court, Eastern District of Washington,
District Court No. 2:09-CV-389-RMP

PLAINTIFF-APPELLANT NEIL GRENNING'S OPENING BRIEF

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I. INTRODUCTION

Neil Grenning is a Washington State prisoner at Airway Heights Corrections Center (AHCC), near Spokane, Washington. After being assaulted by another inmate, Grenning was confined in the AHCC Special Management Unit ("SMU"), where he was subjected to 24-hour continuous lighting for 13 days in January 2009. Grenning filed suit alleging that this treatment violated the Eighth Amendment to the United States Constitution. The District Court granted a motion for summary judgment in favor of defendants. This Court reversed the district court's decision. *Grenning v. Miller-Stout*, 739 F.3d 1235 (9th Cir. 2014).

The Court identified three problems with the decision – (1) it held that "the role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement." *Id.* at 1240; (2) "[t]here is [] no indication that Defendants' proffered justifications for constant illumination were relevant to Grenning," *Id.* at 1241; and (3) this Court rejected the argument that the Defendants were not deliberately indifferent because

they relied on an earlier district court case upholding the use of continuous lighting. *Id.*

The District Court held a bench trial after which it ruled for defendants. Despite this Court's clear command, the District Court failed to make any findings regarding whether legitimate penological interests should be considered; it failed to address the application of the Defendants' legitimate penological interests to Grenning specifically; and it again relied on the 1996 district court case to hold that the Defendants were not deliberately indifferent to Grenning's complaints, without providing any information about that court's reasoning or the factual circumstances of that case. Grenning appeals the District Court's decision and asks this Court to enforce its prior ruling.

II. STATEMENT OF JURISDICTION

Grenning filed an amended civil rights complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Washington. Dkt. 11. Pursuant to 28 U.S.C. § 1331, the district court had jurisdiction over this action. On October 5, 2016, following a three day bench trial, the District Court entered final judgment in favor of

Defendants. Dkt. 182. On October 31, 2016, Grenning timely filed and served a notice of appeal. Dkt. 185. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over Grenning's appeal from the final judgment in favor of Defendants.

III. ISSUES PRESENTED

1. Whether the District Court erred as a matter of law when it held that the conditions of Grenning's confinement did not violate the Eighth Amendment?
2. Whether the District Court erred as a matter of law in concluding that, despite no evidence in the record, Defendant's had shown that their "legitimate penological interests" applied to Grenning in contravention of this Court's holding in *Grenning v. Miller-Stout*, 739 F.3d 1235 (9th Cir. 2014)?
3. Whether the District Court erred when it determined that the lighting in the SMU did not cause Grenning any injury, despite the unrebutted testimony of Grenning and his expert witness?

Pertinent constitutional and statutory provisions are in the addendum.

IV. STATEMENT OF THE CASE

As noted, in 2010, Grenning filed a *pro se* civil rights action under 42 U.S.C. § 1983 against Defendants-Appellees Maggie Miller-Stout (the Superintendent of Airway Heights Correctional Center, where Grenning is incarcerated) and Fred Fox (a prison official who reviewed a grievance filed by Grenning) (together "Defendants"). Dkt. 11. Grenning claimed that the constant illumination by fluorescent lighting in the Special Management Unit ("SMU") constitutes cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment.

A. Procedural History

Following the filing of his amended complaint, the Defendants filed a motion for summary judgment on November 18, 2010. Dkt. 23. The District Court granted this motion on June 30, 2011, dismissing all of appellant's claims. Dkt. 79. Appellant filed a timely appeal of that ruling to this Court. Dkt. 81. After the appointment of *pro bono* counsel, on January 16, 2014, this Court reversed the District Court's ruling. *Grenning v. Miller-Stout*, 739 F.3d 1235 (9th Cir. 2014).

This Court made four rulings that are relevant to this appeal. First, it noted that "[t]he precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement." *Id.* at 1240. Citing to *Johnson v. California*, 543 U.S. 499 (2005), the Court noted that the Supreme Court has written that the legitimate penological interest test of *Turner v. Safley*, 482 U.S. 78 (1987) does not apply in this context. *Id.*

Second, the Court held that even if the legitimate penological justification could be "used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes" (citing *Rhodes v. Chapman*, 452 U.S. 337 (1981)), the Defendants were not entitled to summary judgment because "there is [] no indication that Defendants' proffered justifications for constant illumination were relevant to Grenning." *Grenning*, 739 F.3d at 1241. The Court recognized that an individual may be placed in the SMU for a number of reasons, "including reasons that do not appear to support a blanket policy of continuous lighting." *Id.*

Third, in discussing whether Defendants had acted with deliberate indifference, this Court rejected their reliance on a 1996

district court decision upholding the use of continuous lighting. *Id.* On appeal, Defendants were unable to tell the Court "about either the factual circumstances or the reasoning of the court in that case…" *Id.* Finally, the Court rejected the Defendants' reliance on "accreditation" by the American Correctional Association ("ACA") because they did not provide the ACA's standards, nor the thoroughness of the testing performed at Airway Heights. *Id.*

The District Court conducted a bench trial on August 15-17, 2016. The District Court issued its Findings of Fact and Conclusions of Law. ER 002-029. The Court made several findings which are relevant here. The Court recognized that there is "no standard for lighting in SMU cells." ER 006. The Court credited the testimony of Defense expert Keith Lane, despite the fact that he did not provide any objective standard for the appropriate level of light needed in the SMU. ER 006-007. The Court also rejected the unrebutted testimony of Grenning's sleep expert, Dr. Amy Aronsky. ER 008-010. The Court noted that the eye masks that have since been made available to inmates must be purchased. ER 011. The District Court relied on this Court's ruling in *Chappell v. Mandeville*, 706 F.3d 1052, 1058 (9th Cir. 2013), where this

Court stated that it had some doubt that an inmate subjected to 7 days of 24-hour lighting was exposed to an Eighth Amendment violation, noting that this Court rested its holding on qualified immunity. ER 012-013.

The District Court further found that both Defendants were aware of complaints from inmates regarding the 24-hour lighting. ER 017-018. The District Court acknowledged that it was substantially likely that Grenning would be placed in segregation again at some point in the future. ER 019. The District Court further relied on testimony of William Stockwell, a former supervisor in the Correctional Unit, to discuss the necessity of 24-hour illumination in SMU cells. ER 021. At no point did the Court make any findings about the application of these legitimate penological purposes to Grenning specifically.

On October 5, 2016, the District Court entered a judgment in favor of Defendants. Dkt. 182. Grenning timely appealed. Dkt. 185. On May 23, 2017, this Court issued an order allowing for appointment of *pro bono* counsel. App. Dkt. 10.[1]

[1] App. Dkt. refers to the Appellate Docket. All other references to Dkt. refer to the trial court docket.

B. Relevant Facts

1. Grenning's 13 day confinement under 24-hour lighting

At all times pertinent to this case, Grenning was confined in the Airway Heights Correctional Center ("AHCC") located near Spokane, Washington. On January 7, 2009, prison officials confined Grenning to a cell in the prison's SMU (cell No. SB-22), pending an investigation into a physical altercation in which Grenning was allegedly involved. ER 320, 322, 428-429. Grenning maintained, and the prison's investigation showed, that Grenning was the victim of an assault. ER 367-374. This determination was made on January 16, 2017. ER 375, 383. A prisoner can be sent to the SMU for a number of reasons, some of them out of the control of the prisoner. ER 181-184. *Grenning v. Miller-Stout,* 739 F.3d at 1241. The SMU is designed for prisoners who pose a risk to themselves or others or who require protective custody. ER 157-158. Prison officials employ more stringent security measures in the SMU, including increased frequency of welfare checks and the use of constant overhead fluorescent lighting in cells to facilitate such welfare checks. ER 160, 199-201. Grenning was confined to the SMU

for 13 consecutive days until his release on January 20, 2009. ER 003, 380.

As noted, Grenning was subject to constant illumination from an overhead fluorescent light during his confinement in the SMU. A ceiling-mounted light fixture with three 32 watt, four-foot long fluorescent light tubes illuminated his cell. ER 168-169, 226, 305. Grenning was able to control the two outer fluorescent tubes via a switch in his cell, but had no control over the center tube, which remained illuminated 24 hours a day. ER 147, 169, 226.

According to light-meter tests conducted by prison officials, the brightness of the light emitted from the center tube, which was covered in a light-diffusing blue sleeve, measured between 9.99 and 12.4 foot candles[2] at bunk level, approximately seven feet away from the center tube. ER 231, 411. In 2013, AHCC embarked on an energy savings program during which it replaced the 32 watt fluorescent tubes in the SMU cells with 28 watt fluorescent tubes. ER 087-088, 093, 232.

[2] A foot candle is a measurement of light intensity and is defined as "the amount of light cast on a 1 square foot surface from a standardized candle one foot away." ER 410.

Following this change, with the light-diffusing sleeve, measurements at bunk level show between 7.1 and 7.7 foot candles of light. ER 233.

Grenning has been diagnosed with photophobia, a sensitivity to light. ER 381-382. As a result of this sensitivity, Grenning has suffered headaches, migraines and other physical symptoms for years. ER 308-312. When he is not confined in the SMU, Grenning is able to take steps to combat the effects of his photophobia, most notably seeking to remove himself from the pain-causing illumination. ER 311-312. However, prisoners in SMU are confined in their cells 23 hours a day and have no means of escaping from the light, other than to cover their faces. ER 109-110, 125. Grenning testified that during his stay in the SMU, he placed a towel, folded four times, over his face with no relief. ER 109-110, 132.

Prison records indicate that Grenning met with a medical provider each day he was confined to the SMU. ER 377-379. Grenning informed prison officials during his stay in the SMU that the 24-hour lighting was causing him severe harm. ER 127-131, 384, 386.

After spending a week in the SMU under constant illumination, Grenning filed a grievance, complaining of headaches and an inability

to sleep. ER 384, 386. Specifically, he complained that the constant light from the center fluorescent tube "illuminates the whole cell quite brightly to the extent the other two are never needed," and that, as a result of the constant illumination, "I can't sleep at night. I'm getting headaches from the 24-hour illumination. The light pounds easily even through a towel wrapped four layers in the front of my eyes." ER 384, 386. Grenning requested that prison officials replace the fluorescent tube with a dimmer bulb "that allows officers to do a well fare [sic] check but does not hose down the cell in sleep inhibiting light." ER 384-386. Prison officials took no action to dim the 24-hour lighting while Grenning was confined to the SMU.[3]

Defendant Fox investigated Grenning's grievance, which was denied after Grenning's release from the SMU. Fox's explanation was that "lighting levels in the SMU are set by the American Correctional Association (ACA). AHCC meets and adheres to those restrictions set forth by the ACA." ER 385-386. The ACA standards do not address 24-

[3] As noted above, they have since switched to 28 watt bulbs and now sell sleep masks to inmates.

hour lighting in segregated housing units.[4] ER 064, 069, 071, 376. Grenning's subsequent appeals were denied. ER 387, 390. The basis for denial was a reference to a previous federal court case. ER 387-389.

2. The evidence at trial

The evidence at trial showed that Grenning has suffered from headaches since middle school due to his photophobia. ER 308-310. There was further evidence that Grenning's headaches were exacerbated by the 24-hour lighting to which he was subjected while in the SMU. ER 284-285, 310-312. Additionally, Grenning's expert, Dr. Aronsky, testified that Grenning suffered from sleep deprivation as a result of the 24-hour lighting in the SMU. ER 284-285, 292-294. This testimony was unrebutted by the defense.

Plaintiff's electrical expert, Tracy Rapp, testified about the lighting in the SMU. Specifically, he testified that the lighting in the SMU was far in excess of what is necessary to conduct welfare checks through the window of the SMU cell door. ER 222, 255-256, 262-266. He testified that this opinion applied to both the lighting at the time Grenning was in the SMU in 2009 as well as the current state of the

[4] Furthermore, the ACA standards themselves are not mandatory. ER 376.

lighting after the 32 watt bulbs were replaced with 28 watt bulbs. ER 223, 262. Rapp further testified under cross-examination that light between 5 and 6 foot candles would be excessive for the task of conducting welfare checks. ER 255-256.[5]

The Defendants' electrician, Steve McCallum, testified that his light readings were similar to those taken by Rapp. ER 085-086. Specifically, he noted that in 2010, light readings with two meters showed levels of 10.9 and 12.4 foot candles with the dimming sleeve in place. ER 085. He further testified that the ACA standards were designed for reading, not sleeping. ER 086-087, 092-093, 421.

Defendants also called an expert witness, Keith Lane. He provided no testimony regarding the amount of light needed to conduct a welfare check of prisoners, nor did he provide any testimony regarding the amount of light required by the ACA for 24-hour

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[5] For purposes of comparison, Tracy Rapp noted that 5 foot-candles was the OSHA-mandated required lighting level to perform construction activities. ER 246, 256. Earlier, he had testified that both the National Fire Protection Association (NFPA) and Illuminating Engineering Society (IES) provide much lower levels of required lighting for similar purposes. ER 238-241. For example, the IES set a level of 3 foot candles for providing enough light for locations where security is an issue and provided that 1 foot candle was enough to light an area where loitering and criminal activity were likely to occur. ER 240-241.

illumination of segregated cells. On the contrary, he noted that there were no standards for lighting in the SMU. ER 064, 069, 071. In his opinion, the comparable standard was 3 to 6.5 foot candles of light. ER 071-072, 075.

Defendant Fred Fox testified about his handling of Grenning's grievance. Fox testified that his response was based entirely on information from his supervisor, but that he did not make any independent efforts to verify the information. ER 099-100. He stated he had no knowledge of the ACA audit other than the fact that the SMU cleared the audit. ER 097-098.

Defendant Maggie Miller-Stout, the Superintendent responsible for hearing grievance appeals, testified that she had only limited knowledge of the 1996 district court case that was the basis for denying Grenning's grievance.[6] ER 047-050, 054, 058-059. In fact, she stated that she never saw the ruling, was unfamiliar with the specific claims

[6] There is also some confusion in the record as to whether this decision would even apply if Miller-Stout knew every detail. State's witness William Stockwell testified that the SMU at Airway Heights was activated in 2004, eight years after the alleged 1996 district court case which upheld the lighting there. ER 153-154.

at issue, and did not even know "for sure" that it discussed AHCC.[7] ER 048-049, 054, 058-059. She further testified that the reason someone was placed in SMU was irrelevant to whether they were subjected to constant illumination. ER 049-050. She noted that even people who are part of the community corrections program, that is, individuals released to the outside world, can be placed in the SMU and subjected to constant illumination. ER 036-037.

V. SUMMARY OF ARGUMENT

1. The 24-hour lighting to which Grenning was subjected in 2009, and which he is likely to be subjected to in the future, violates the Eighth Amendment to the United States Constitution. The Ninth Circuit has previously held that subjecting prisoners to constant illumination serves no legitimate penological purpose, and every case, both in the Ninth Circuit and elsewhere, which has upheld 24-hour lighting has addressed light levels that are far below those present at the Airway Heights Correctional Center SMU.

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[7] Grenning's grievance appeal was actually signed by James Key, the Associate Superintendent, who was acting for Miller-Stout. ER 209-211, 387. He also could provide no details on the federal court case on which his signature relied. ER 211-212.

2. The Defendants' actions in this case amounted to "deliberate indifference" in violation of the Eighth Amendment. Defendants were aware of the risk posed by the excessive lighting and they took no appropriate steps to mitigate that risk. To the extent any actions taken to reduce the levels of lighting in the SMU have occurred since Grenning's stay in the SMU, this merely demonstrates the Defendants' awareness of the harms to which Grenning was subjected.

3. The Supreme Court has held that the "legitimate penological interests" do not apply to conditions of confinement claims under the Eighth Amendment. Furthermore, to the extent it is appropriate for a court to look to such interests, this Court has held that they must be found to apply to Grenning specifically. *Grenning v. Miller-Stout*, 739 F.3d 1235 (9th Cir. 2014). Since the district court failed to make such a finding, it committed reversible error.

VI. ARGUMENT

A. Standard of Review

The question of whether a prison's conditions violate the Eighth Amendment is a mixed question of law and fact. *Hallett v. Morgan*, 296

F.3d 732, 744 (9th Cir. 2002); *see also Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir. 1984) (en banc). "However, its conclusion that the facts do not demonstrate an Eighth Amendment violation is a question of law" that is reviewed de novo. *Hallet*, 296 F.3d at 744; *Campbell*, 18 F.3d at 681. The district court's factual findings regarding conditions at the Prison are reviewed for clear error. *Id.*

B. Exposure to 24-hour lighting at the levels present in the AHCC SMU constitutes cruel and unusual punishment in violation of the Eighth Amendment.

This Circuit has previously held that exposure to 24-hour lighting is a violation of the Eighth Amendment. *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). The District Court erred when it determined that Grenning failed to show that his confinement in the SMU violated the two-part test recognized by this Court in *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002).

Under the Eighth Amendment, in order to demonstrate "deliberate indifference," the Plaintiff "must satisfy both the objective and subjective components of a two part test." *Hallett v. Morgan*, 296 F.3d at 744, (citing *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991)).

When challenging the conditions of confinement, rather than the confinement itself, the plaintiff must first make "an 'objective' showing that the deprivation was 'sufficiently serious' to form the basis for an Eighth Amendment violation." *Johnson v. Stewart*, 217 F.3d 726, 731 (9th Cir. 2000) (quoting *Wilson*, 501 U.S. at 298). Second, plaintiff must make "a 'subjective' showing that the prison official acted 'with a sufficiently culpable state of mind.'" *Id.*

This second, subjective showing, itself is comprised of two parts. "First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." *Id.* (quoting *Farmer*, 511 U.S. 844).[8] *See also Johnson*, 217 F.3d at 734 ("plaintiffs must show that the defendant officials had actual knowledge of the plaintiffs' basic human needs and deliberately refused to meet those needs."). The plaintiff may meet this burden by demonstrating that the risk was obvious.

[8] A discussion of the justifications is located in part D, *supra*.

Farmer, 511 U.S. at 842. Furthermore, a prison official may not avoid liability by refusing to verify underlying facts or declining to confirm inferences of risk. *Id.* at 842, n. 8. In other words, failing to make a diligent investigation into the claims of harm can itself be evidence of deliberate indifference. *See e.g. Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

1. Constant illumination is sufficiently serious as to violate the Eighth Amendment

Since 1996, the Ninth Circuit has recognized that constant illumination of a prisoner's cell can be a violation of the Eighth Amendment. *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), (quoting *LeMaire v. Maass*, 745 F.Supp. 623, 636 (D. Or. 1990), *vacated on other grounds*, 12 F.3d 1444, 1458-59 (9th Cir. 1993)). The Court recognized that adequate lighting is a fundamental attribute of "adequate shelter" which is required by the Eighth Amendment. *Keenan*, 83 F.3d at 1090 (quoting *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1984)). Finally, the Court noted that there was "no legitimate penological justification for requiring inmates to suffer

physical and psychological harm by living in constant illumination." *Id.*, quoting *LeMaire* (cleaned up).[9]

In *LeMaire*, the District Court examined a claim that the 24 hour lighting in the "quiet cells" of the Oregon State Penitentiary disturbed prisoners' sleep, caused psychological effects, and aggravated pre-existing mental disorders. *LeMaire*, 745 F.Supp. 623, 636. The Court found credible the testimony of plaintiff's expert that in addition, such lighting makes sleep difficult and exacerbates the harm. *Id.* As a result, it found that the constant illumination violated LeMaire's Eighth Amendment rights.

This Court again addressed this question in *Chappell v. Mandeville*, 706 F.3d 1052 (9th Cir. 2013). There, the Court dismissed a claim that spending seven days subjected to constant illumination violated the Eighth Amendment. *Id.* However, two facts distinguish *Chappell* from this case: first, unlike Grenning, Chappell did not claim he was sleep deprived. *Id.* at 1058. Second, the Court dismissed the

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[9] The parenthetical "cleaned up" indicates that internal quotation marks, alterations, or citations have been omitted from the quoted passage. See Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018), available at http://ssrn.com/abstract=2935374; *e.g. United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. Aug. 1, 2017) (Reavley, J.).

case on the grounds of qualified immunity, specifically holding that the right to be free of constant illumination, in the face of an articulated legitimate penological interest, was not clearly established in 2002, when Chappell was subjected to 24-hour lighting. *Id.* The Court acknowledged that continuous lighting claims are fact driven. *Id.* (quoting *Shepherd v. Ault*, 982 F.Supp. 643, 645 (N.D. Iowa 1997)). Therefore, *Chappell* provides little guidance to whether the lighting scheme in the SMU at Airway Heights Correctional Center violates the Eighth Amendment.

The *Chappell* court explicitly rested its decision on the fact that the defendants had articulated a clear penological purpose, which specifically applied to Chappell. *Id.* ("the record here reflects a clear penological purpose. Prison officials suspected that Chappell had secreted contraband in his body and kept the lights on so that they could monitor Chappell 24 hours a day to prevent him from disposing of the contraband.").[10] Here, there has been no showing that the prison

[10] *Cf. LeMaire*, 745 F.Supp. 623. The trial court determined that 24-hour lighting violated LeMaire's Eighth Amendment rights in spite of the fact the prison articulated numerous instances of behavior by LeMaire himself, which they argued justified their sanctions. For a list

officials had a specific concern about Grenning. Indeed, as this Court acknowledged in his earlier appeal, the Defendants had failed to provide any indications that their proffered justifications were relevant to Grenning. *Grenning v. Miller-Stout*, 739 F.3d at 1241. Nothing provided at trial remedied this error. Indeed, Defendant Miller-Stout, as well as numerous state witnesses, reiterated again and again that the mere fact of placement in the SMU justified the use of constant illumination, rather than any facts specific to Grenning. ER 049-050. See also, ER 168-174 (Stockwell testimony), ER 196-204 (Quinn testimony).

Finally, the District Court relied on *Chappell*'s dicta that "we have some doubt that the conditions Chappell experienced under contraband watch even amounted to [an] Eighth Amendment violation…." ER 13, quoting *Chappell*, 706 F.3d at 1059. However, the *Chappell* court explicitly noted it was not reaching that question. 706 F.3d at 1059. It is well settled that "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having so decided as to constitute precedents." *Larry's*

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of such behavior, see *LeMaire v. Maass*, 12 F.3d 1444, 1447-1449 (9th Cir. 1993).

Apartment v. Carmel, 249 F.3d 832, 839 (9th Cir. 2001) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1952)).

2. Grenning was injured by the constant illumination

The District Court's finding that Grenning was not injured by the constant illumination to which he was exposed was clear error. A factual finding is clearly erroneous when it is "illogical, implausible, or without support in the record." *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010). Clear error occurs when the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The undisputed testimony in this case shows that Grenning suffered injury as a result of his exposure to constant illumination in the SMU. ER 127-132, 284-286, 292-294. Grenning testified that he suffered recurring migraine headaches, sleep deprivation, and had difficulty distinguishing night from day. ER 112-116, 123-126, Dkt. 11. The District Court also received copies of a grievance filed by Grenning in which he complained of headaches and an inability to sleep. ER 384, 386.

Additionally, Dr. Amy Aronsky, testified that Grenning's symptoms were "classic for sleep deprivation." ER 282. Dr. Aronsky was recognized as an expert in sleep medicine and behavioral sleep medicine. ER 272-279. She further testified that the "lighting conditions in the SMU, in particular 24 hour lighting, poses a definite risk of sleep deprivation." ER 284. Dr. Aronsky testified that her opinions were based on her review of the medical literature, as well as her own expertise. ER 287-289. The Defense offered no testimony to rebut Dr. Aronsky's findings. As a result, the District Court committed clear error when it found that Grenning was not injured by his exposure to the 24-hour lighting in the SMU. ER 014-015.

3. Grenning will be injured in the future

The District Court ruled that Grenning was unlikely to be exposed to the same conditions of confinement as he faced in 2009, because the lights in the SMU had been changed from 32 watt bulbs to 28 watt bulbs. ER 019. However, this fails to account for the fact that, as both plaintiff and defense experts testified, the lower wattage bulbs still put out an unconstitutional amount of light. ER 071-072, 075, 223, 231, 262. Specifically, Plaintiff's expert testified that the lights in the SMU

still produce light measuring at greater than 7 foot-candles.[11] ER 233. This far exceeds the levels of light which have been upheld in other cases. *See e.g. Walker v. Woodford*, 454 F.Supp.2d 1007, 1020, 1027 (S.D. Cal. 2006) (denying summary judgment even where the constant light was from a 7-watt compact fluorescent bulb equivalent to 40-60 watts of incandescent lighting); *Wills v. Terhune*, 404 F.Supp.2d 1226, 1229 (E.D. Cal. 2005) *adopted in whole by* 404 F.Supp.2d. 1226, 2005 LEXIS 29538 ("security light" was a six inch elongated 13 watt security bulb, which is not bright enough to allow a person to read or write); *King v. Frank*, 371 F.Supp.2d 977, 981 (W.D. WI 2005) (nightlight comprised of 9-watt fluorescent tube). It is also far greater than the levels found comparable by the Defendants' own expert witness, Keith Lane. ER 071-072, 075. (Stating that the appropriate level of light for the SMU was between 3 and 6.5 foot candles).

The Defendants provided no evidence that the changes to the lighting in the SMU were constitutionally permissible, while Grenning's expert testified that 7 foot-candles of light was far in excess of what was

[11] The Defendants' electrician, Stephen McCallum, did not testify about the specific post-retrofit light levels.

needed on a construction site.[12] ER 222, 255-256, 262, 265-266. It is undisputed that Grenning will be resident in AHCC for at least the next eight decades and that he has little control over whether he is sent to the SMU. *Grenning v. Miller-Stout*, 739 F.3d at 1241. The District Court found that Grenning faced the likelihood of being returned to the SMU during his incarceration. ER 19. Indeed, Grenning has been sent to the SMU on multiple occasions since 2009, including after the change in the lighting. ER 139. While it is strictly true that Grenning will not be subjected to the conditions he faced in 2009, he is still at substantial risk of being subjected to unconstitutional constant illumination.

Furthermore, Defendants argued below that they have made sleep masks available for purchase to Grenning and other inmates. ER 037-039, 174-175. There are two flaws with this argument: first, Defendants have an obligation under the Constitution to provide adequate food, shelter, and other constitutional necessities, without requiring inmates to make any additional purchases. *See e.g. Visintine v. Zickefoose*, No. 11-4678, 2014 U.S. Dist. LEXIS 123742, *28-29 (D. N.J. 2014) ("Plaintiff's right to have his medical needs addressed cannot

[12] OSHA standards call for 5 foot-candles, forty percent less light than in the modified SMU.

turn on his ability or inability to purchase food."); *Id.* at *83-84 ("The prison system is obligated to provide for *the most basic needs* of the inmates – such as food and shelter – without charge to the inmates accounts." (quoting *Montanez v. Sec'y Pa. Dep't of Corr.*, 763 F.3d 257 (3rd Cir. 2014)(emphasis in original)(cleaned up)); *Smith v. Washington Dept. of Corrections*, No. C11-5731, 2013 U.S. Dist. LEXIS 52625 (W. D. Wa. 2013) (Recognizing duty of state to provide nutritionally adequate food despite plaintiff's ability to buy commissary items); *Zatko v. Rowland*, 835 F.Supp. 1174, 1180 (N.D. Cal. 1993) ("Prisoners must be provided with the basic necessities of life, *i.e.*, adequate food, clothing, shelter, sanitation, medical care, and personal safety." (*citing Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982))); and *Fillmore v. Ordonez*, 829 F.Supp. 1544, 1565 (D. Kan. 1993) (citing *Bounds v. Smith*, 430 U.S. 817 (1977) for the proposition that inmates have a right of access to legal materials at government expense).[13]

Second, since Grenning has no constitutional right to purchase items from the commissary, it is inappropriate for the Defendants to

[13] Of note, the *Fillmore* court recognized that this affirmative duty does not depend on a showing of indigency. 829 F.Supp. 1544, 1565, n. 28 (citing *Straub v. Monge*, 815 F.2d 1467, 1469-70 (11th Cir. 1987) *cert denied*, 484 U.S. 946 (1987).

rely on his ability to purchase a sleep mask in order to receive the minimal protections the Constitution requires. *See e.g. Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002) ("there is no constitutional right to purchase food from the canteen."); *Betar v. Advance Correctional*, No. 4:17CV-P37, 2017 U.S. Dist. LEXIS 103960, *15 (W.D. Ky. 2017) ("Plaintiff has no federal constitutional right to purchase items (food or non-food) from a commissary at all.") (cleaned up); *Burke v. Rudnick*, No. 3:97cv77, 2000 U.S. Dist. LEXIS 23257, *6 (D. N.D. 2000) (noting there is no constitutional right of access to a prison gift or snack shop, citing *Tokar v. Armontrout*, 97 F.3d 1078, 1083 (8th Cir. 1996)).

C. The Defendants' behavior rises to the level of "Deliberate Indifference."

As noted above, in order to meet the subjective prong of the "Deliberate Indifference" test, Grenning was required to show both that the Defendants were aware of the risk of harm and that the Defendants had no reasonable justification for the deprivation, in spite of that risk. Grenning has met those requirements.

1. Defendants were aware of the risk of constant illumination to Grenning

It is undisputed that Defendants were aware of the risk to Grenning. The District Court made a specific finding that Defendants were aware of the risk. ER 017-018. The Defendants did not challenge this finding. Furthermore, Grenning filed a grievance with the prison, while housed in the SMU, complaining that the constant lighting was causing him migraines and preventing him from sleeping. ER 384, 386. Finally, Grenning was not the only inmate to complain about the lighting. Fifteen other prisoners had also filed grievances about constant illumination in the SMU. ER 323-366.

2. Defendants' actions were inadequate to address the risk

Here, the defendants' actions to address the risk presented by the 24-hour lighting were wholly inadequate. Defendant Fox did not even speak with Grenning. ER 103-105, 133. Instead, he relied on hearsay that the prison's SMU met American Correctional Association ("ACA") standards for lighting.[14] ER 103-105. He testified he had no

[14] This defense is particularly inadequate in light of the fact the Defendants have not produced any evidence that the ACA has standards for 24-hour lighting.

independent knowledge of the ACA audit other than that the SMU "cleared" it. ER 097-098. He took no independent steps to verify the existence of any ACA standards, nor did he follow up on the information provided by his supervisor. He merely parroted back what was told to him. This Court already rejected reliance on ACA "accreditation" when there were no details about the ACA's standards or the thoroughness of the testing performed at AHCC. *Grenning*, 739 F.3d at 1241. Here, the record is devoid of this very information. Therefore, it was error for the District Court to find that Defendant Fox acted appropriately and without deliberate indifference.

Defendant Miller-Stout's actions were similarly wanting. Both she and her designee relied on a 1996 district court case, *Ridley v. Walter*, 2:96-cv-0203-WFN (E.D. Wa.), but neither Assistant Superintendent James Key nor Miller-Stout could recall any details about the case. ER 209-212 (Testimony of Key); 047-049, 054, 058-059 (Testimony of Miller-Stout). She took no steps to educate herself about that case, despite relying on it entirely in making her determination that no action was necessary to address Grenning's concerns. She could not identify the claims that were raised in the case. Indeed, she

testified she could not even be sure that the case dealt with AHCC. ER 058-059. She merely assumed it did. A more inadequate response is hard to imagine. Given this complete failure to investigate the basis on which Grenning's grievance was rejected, it was error to hold that Defendant Miller-Stout did not act with deliberate indifference to the harms suffered by Grenning.

D. "Legitimate Penological Interests" do not justify Eighth Amendment violations and the interests proffered by Defendants do not apply to Grenning.

The District Court determined that Defendants articulated "legitimate penological interests" which justified the use of the continuous lighting at issue. ER 021-022. This was error in three different ways: first, "legitimate penological interests" do not apply to conditions of confinement claims; second, to the extent they may be relevant, the District Court did not find that those interests were applicable to Grenning specifically; and third, as other cases have shown, even if relevant, Defendants' interests can be served with much lower levels of constant illumination.

1. "Legitimate Penological Interests" do not apply to conditions of confinement claims under the Eighth Amendment

The Supreme Court articulated the "legitimate penological interests" test in *Turner v. Safely*, 482 U.S. 78 (1987). There, the Court rejected an argument by prisoners that regulations should be subject to strict scrutiny, asking instead whether a regulation which burdened fundamental rights was "reasonably related" to "legitimate penological interests." *Id.* at 89. However, eighteen years later, the Court noted that the "legitimate penological interests" test was limited "*only* to rights that are 'inconsistent with proper incarceration.'" *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)) (emphasis in original). In *Johnson*, the Court noted that it has "not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner*'s 'reasonably related' standard." *Id.* at 511. The Court cited with approval then Judge Kennedy's opinion in *Spain v. Procunier*, 600 F.2d 189, 193-194 (9th Cir. 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons

convicted of crimes…. Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary."). Put another way, a penological interest that requires violation of the Eighth Amendment is *per se* illegitimate.

This Court has also noted that "[t]he precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement." *Grenning*, 739 F.3d at 1240. At best, this Court has noted that "[t]he existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." *Id.* Furthermore, this Court has previously held that there is no legitimate penological interest in subjecting an inmate to constant illumination. *Keenan*, 83 F.3d at 1090; *Chappell*, 706 F.3d at 1070 (Berzon, J. dissenting).

The only time this Court has expressed the opinion that legitimate penological interests bear on a constant illumination claim was in *Chappell*, which relied solely on cases decided before *Johnson*. *See* 706

F.3d 1058-1059. Additionally, the *Chappell* court was asking whether it was clear in April-May 2002 that 24-hour illumination was unconstitutional, even when the defendants had articulated a legitimate penological purpose. Since *Johnson* was not decided until 2005, it is not surprising that the question was unclear three years earlier. However, since the actions that were under review in *Chappell*, the Supreme Court has made it clear that "legitimate penological purposes" have no place in a conditions of confinement claim under the Eighth Amendment. Therefore, it was error for the District Court to consider the question, and to rely on the articulated security concerns as a basis for ruling against Grenning.

2. The Defendants failed to articulate any "Legitimate Penological Interests" that applied to Grenning

Even assuming that legitimate penological interests *could* overcome an Eighth Amendment claim, Defendants here failed to provide any testimony that the interests articulated applied to Grenning specifically. At best, they testified that prisoners in the SMU present a greater risk, which requires heightened security standards. ER 049-050, 168-174. This argument was explicitly rejected by this Court. *Grenning*, 739 F.3d 1241 ("[t]here is thus no indication that

Defendants' proffered justifications for constant illumination were relevant to Grenning."). *See also*, *Chappell*, 706 F.3d at 1071 (Berzon, J. dissenting) ("that some courts – unlike ours – have recognized that there can be a legitimate penological justification for constant lighting does not mean that *any* asserted penological purpose will justify such illumination.") (emphasis in original). It is undisputed that inmates can be placed in the SMU through no fault of their own. Indeed, Grenning was subjected to the 24-hour lighting not because he violated prison rules, but because he was the victim of a vicious, unprovoked assault by a fellow inmate. *Compare LeMaire*, 745 F.Supp. 623 (finding constant illumination an Eighth Amendment violation despite a long history of bad behavior by the inmate); *with O'Donnell v. Thomas*, 826 F.2d 788 (8th Cir. 1987) (upholding constant illumination for inmate who had attempted suicide).

Despite this Court's clear command, the District Court failed to make any findings regarding the applicability of the proffered legitimate interests to Grenning. ER 21. ("the inmates within the SMU are at a higher risk of attempting suicide; inflicting self-harm; having seizures; trying to stage attacks on passing guards; or hiding weapons,

drugs, or other contraband…the continuous lighting is maintained as a safety measure for the guards as well as the inmates and is not imposed as any sort of punishment."). See also ER 157-158, 161-163 (testimony of William Stockwell) (same) and ER 049-050 (testimony of Maggie Miller-Stout) (same).

The Court based these findings on the testimony of two witnesses, William Stockwell, a former supervisor in the Correctional Unit and Defendant Miller-Stout.[15] ER 021-022. However, Miller-Stout had produced a declaration in support of the Motion for Summary Judgment which this Court overturned, articulating reasons which were substantially similar in terms of the interests identified.[16] ER 433-437. Thus, the very testimony the District Court relied upon had already been rejected by this Court as adequate to demonstrate that the penological interests applied to Grenning. Instead of making specific

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[15] Another State witness, Michael Quinn, testified that he believed these justifications applied to Grenning, but he did not explain why. ER 196-200. Furthermore, the District Court did not cite the testimony of Quinn in its findings.

[16] Stockwell did not supply a declaration in support of the Motion for Summary Judgment, but another state employee, Terry Propeck, did. ER 425-432. Propeck's justifications mirrored the testimony of Stockwell. Compare ER 426-428 (declaration of Propeck) with ER 157-163, 169-171 (testimony of Stockwell).

findings that Grenning was at a higher risk of suicide, self-harm, seizures, attacking guards, or hiding contraband, it appears that the District Court provided the very "mechanical deference to the findings of prison officials" that this court rejected in *Spain*. This was error.

3. To the extent they are relevant, Defendants' interests can be served with much lower lighting levels

Finally, even assuming that Defendants' interests were relevant and somehow applied to Grenning, the Defendants can achieve those interests with a much lower level of light. Defendants have already conceded as much concerning the lighting levels in the SMU in 2009, which are the basis of Grenning's lawsuit. After this case was filed, AHCC underwent an energy savings program in which the 32 watt bulbs were replaced with 28 watt bulbs, lowering the level of light in the SMU cells from between 9.99 to 12.4 foot-candles, to between 7.1 to 7.7 foot-candles. ER 231, 233. If the concerns identified by Defendants are indeed legitimate, one imagines they would not introduce lighting which was insufficient to the task. Since they can operate under these new conditions, the conditions as they existed in 2009 were clearly unnecessarily bright. This is further bolstered by the testimony of the Defendants' own expert witness, Keith Lane, who stated that the proper

comparison is to situations calling for between 3 and 6.5 foot-candles of light. On the lower end, this is less than half the light documented in the SMU.

Furthermore, Defendants introduced no testimony that SMU inmates at AHCC are somehow more dangerous or harder to monitor than prisoners at any other isolation unit. Yet other prisons which use constant illumination are able to function with much dimmer bulbs. *See e.g. Walker v. Woodford*, 454 F.Supp.2d 1007, 1020, 1027 (S.D. Cal. 2006) (constant lighting from a 7-watt compact fluorescent bulb equivalent to 40-60 watts of incandescent lighting); *Wills v. Terhune*, 404 F.Supp.2d 1226, 1229 (E.D. Cal. 2005) *adopted in whole by* 404 F.Supp.2d. 1226, 2005 LEXIS 29538 ("security light" was a six inch elongated 13 watt security bulb, which is not bright enough to allow a person to read or write); *King v. Frank*, 371 F.Supp.2d 977, 981 (W.D. WI 2005) (nightlight comprised of 9-watt fluorescent tube). Absent evidence that inmates at AHCC are more dangerous than inmates in Calipatra State Prison, California State Prison Corcoran, or Waupun Correctional Institution, it is unclear why guards at AHCC cannot perform their security functions adequately, while guards in the

isolation units at these prisons can.[17] Since claims of "legitimate penological purpose" are an affirmative defense, it is incumbent upon the Defendants to explain why the lights must be as bright as they are. *See Marshall v. Knight*, 445 F.3d 965, 969, n.2 (7th Cir. 2006)("Knight argues that the prison's library access policy did not violate Marshall's constitutional rights in any event because it was 'reasonably related to legitimate penological interests.' But this is an affirmative defense to be litigated at the summary judgment stage or trial." (cleaned up)); *Crofton v. Roe*, 170 F.3d 957, 958 (9th Cir. 1999)("The district court properly held that the state of Washington has failed to show that the prison's blanket prohibition of gift publications, even publications sent directly by the publisher, is reasonably related to any valid penological interests.")[18] This Court adopted this interpretation by implication in

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[17] Tellingly, the Defense did not introduce any evidence or testimony that the lighting in the Airway Heights SMU is even in line with other isolation or secure housing units at other Washington State correctional facilities.

[18] *Crofton* was decided before *Johnson* and cited *Turner*. However, it shows that even under that test, the assertion of legitimate penological interests was an affirmative defense. Given this Court's holding that legitimate penological interests are an affirmative defense, it was further error by the District Court to hold that Grenning "did not provide credible evidence regarding any specific remedy or benchmark by which the Court could determine whether the current brightness is

Grenning's earlier appeal, when it noted that the Defendants had failed to provide any evidence that the "legitimate penological interests" applied to Grenning specifically. *Grenning*, 739 F.3d at 1241. By requiring the State to demonstrate that its interests applied to Grenning, this Court recognized that those interests were being asserted as an affirmative defense against Grenning's claims, thus affirming *Crofton*'s holding in a post-*Johnson* context.[19] Because the State failed to meet its burden, this Court determined that summary judgment was inappropriate. *Id.* On remand, the State again failed to meet its burden.

E. The District Court erred when it denied Grenning's injunction

The District Court denied Grenning's request for an injunction for three reasons: 1) it determined that Grenning would not be irreparably injured; 2) the balance of hardships favored the State; and 3) the public

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excessive." ER 15. The Defendants are the ones asserting they need the lights to perform their tasks. Thus, the burden is on them to explain how much light is necessary, which they failed to do here.

[19] Grenning continues to maintain that "legitimate penological interests" do not apply to conditions of confinement claims under the Eighth Amendment. However, to the extent the Court considers them, the burden is on the State to prove their legitimacy.

would be disserved by an injunction. ER 025-028. For the reasons outlined above, this was error.

1. Standard of Review

When reviewing the denial of a permanent injunction, the Court applies a tripartite system of review: it reviews factual findings for clear error, legal conclusions de novo, and the scope of the injunction for abuse of discretion. *United States v. Washington*, 853 F.2d 946, 961 (9th Cir. 2017).

2. Because of the District Court's earlier errors, its conclusion denying an injunction was erroneous.

The District Court concluded that Grenning would not be irreparably injured absent an injunction because 1) he had not been injured by the lighting in the SMU at all; and 2) he would not face similar conditions again. ER 025-027. For the reasons stated above, in parts V(B)(2) and V(B)(3), this finding was erroneous. Thus, the District Court's ultimate conclusion on this factor was legally incorrect.

The District Court similarly held that the balance of hardships weighed in favor of the State. ER 027-028. It concluded that Grenning had failed to show a hardship, while the State would have difficulties conducting welfare checks with lower lighting. Again, it held that

Grenning had failed to provide evidence of a level of brightness that would both satisfy Grenning and allow correctional officers to carry out their duties. ER 027. This conclusion relies on four errors identified above: 1) Grenning was injured; 2) the State's penological interests do not apply to a conditions of confinement claim, see parts V(D)(1) and V(D)(2); 3) the State is capable of conducting their welfare checks with much lower lighting levels, see part V(D)(3); and 4) the burden is on the State to prove its affirmative defense, see part V(D)(3).

VII. CONCLUSION

For the foregoing reasons, the Court should vacate the District Court's findings of fact and conclusions of law and issue a judgment in favor of the plaintiff.

Respectfully submitted,

Dated: October 16, 2017

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant states that the following case in the Ninth Circuit raises issues related to his claims regarding the Eighth Amendment previously decided by this Court:

Grenning v. Miller-Stout, No. 11-35579, decided January 16, 2014 (739 F.3d 1235 (9th Cir. 2014)).

Dated: October 16, 2017

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-35903

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Signature of Attorney or Unrepresented Litigant: s/ Alan Mygatt-Tauber

Date: 10/16/2017

("s/" plus typed name is acceptable for electronically-filed documents)

9th Circuit Case Number(s) 16-35903

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Case No. 16-35903

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEIL GRENNING
Plaintiff-Appellant

v.

MAGGIE MILLER-STOUT, et al.,
Defendants-Appellees.

Appeal from the United States District Court, Eastern District of Washington,
District Court No. 2:09-CV-389-RMP

ADDENDUM TO PLAINTIFF-APPELLANT NEIL GRENNING'S OPENING BRIEF

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ADDENDUM TABLE OF CONTENTS

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Pub L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)