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 REPLY BRIEF

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Cases

I. INTRODUCTION

Defendants-Appellees argue that the use of constant illumination, when in support of legitimate penological interests, does not offend the Eighth Amendment, which is what makes their total failure to attempt to apply those interests to Grenning so shocking. Defendants-Appellees concede that the interests they articulate in defending their position do not apply to any one inmate, let alone Grenning specifically. They ignore the testimony of their own witness as to the appropriate level of illumination, relying instead on testimony not discussed by the District Court in its Findings of Fact and Conclusions of Law.

They also attempt to paint a picture of a unified series of cases all showing that constant illumination does not violate the Eighth Amendment. What they fail to acknowledge is that in nearly every case cited the levels of lighting being examined were far below that in use in the SMU at AHCC, the inmates subjected to constant illumination specifically required heightened scrutiny, that harm was not alleged, or some combination of those factors. Defendants-Appellees' failure to identify any legitimate penological interests that apply to Grenning, in

contravention of this Court's clear command, places this case squarely on all fours with *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996).

II. ARGUMENT

A. Grenning has standing and his claims are not moot

The Defendants-Appellees argue that Grenning lacks standing to pursue his claims for two reasons: first, because he was no longer in the SMU at the time his suit was filed and was unlikely to return; and second, they argue that two changes, voluntarily instituted by the prison, have mooted his case: 1) the implementation of an energy savings program, which uses lower wattage bulbs; and 2) the provision of sleep masks to inmates to use while in the SMU. Based on these changes, they argue, Grenning will never again be subjected to the conditions as they were when the suit was initially filed in 2009. (Resp. Br. 22-30). For the reasons outlined below, Grenning had standing to bring this suit in 2009 and the actions voluntarily undertaken by Defendants-Appellees do not meet the high bar required to moot this case.

1. Grenning had standing at the time his suit was filed

Defendants-Appellees argue that in order to have standing, Grenning must show "a concrete injury coupled with a sufficient likelihood that he will again be wronged in a similar way." Resp. Br. at 23. *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The District Court addressed Grenning's standing in its Findings of Fact and Conclusions of Law. ER 002-029. Unlike the cases Defendants-Appellees rely upon, the District Court found that it was "substantially likely" that Grenning would again be placed in segregation in the future. ER 019.

The cases relied upon by the Defendants-Appellees are different in kind than the situation here. In every one of the cases cited, the Court found that the plaintiffs were unlikely to be subjected to the same conditions. *See e.g. Lyons*, 461 U.S. at 109 ("…Lyon's lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as a result of that practice even if continued."); *Brown v. Oregon Dep't of Corrections*, 751 F.3d 983, 990 (9th Cir. 2014) ("We affirm the district court's summary judgment on Brown's claim for declaratory relief,

however, because the record shows that Brown has been released from the IMU and there is no evidence that he is likely to again be subject to the challenged conditions."); *Knox v. McGinnis*, 998 F.2d 1405, 1414 (7th Cir. 1993) ("Similarly, although other segregation prisoners here are still subject to the black box restraint in accordance with prison policy, the possibility that Knox would again be subject to the black box is similarly speculative.").

Furthermore, the courts in *Lyons*, *Knox*, and other cited cases operated under the assumption that it was in the plaintiffs' control whether they returned to the challenged conditions. *See e.g. Knox*, 998 F.2d at 1413 ("Presumably, Knox would be returned to segregation only if he were to violate a prison rule…we must assume that Knox will abide by prison rules and thereby avoid a return to segregation status.") *Lyons*, 461 U.S. at 103 ("It was to be assumed that '[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.'")(quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (alteration in original). Here, that assumption does not hold. Both the district court (ER 019) and this Court have held that

Grenning may be subjected to the SMU due to circumstances entirely outside his control. *Grenning v. Miller-Stout*, 739 F.3d 1235, 1241 (9th Cir. 2014) ("*Grenning I*"). Given the District Court's explicit finding that Grenning is "substantially likely" to be returned to segregation, and this Court's recognition that such a return could be out of his control, Grenning has amply demonstrated that he had standing to bring the suit at the time it was filed.

Defendants-Appellees also advance a mootness argument based on the claim that Grenning did not have standing once he was released from the SMU. Resp. Br. 23-25. However, Grenning's claim falls within the well-recognized exception to mootness for claims which are "capable of repetition, yet evading review." *See e.g. Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000). Under this exception, a case will not be mooted when "(1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* at 1098. Here, Grenning meets both requirements.

Defendants-Appellees acknowledge that the time spent in the SMU at AHCC is short, typically fewer than 47 days. Resp. Br. 4. This is clearly far too short a time to be fully litigated. Furthermore, as noted above, the district court found that it was substantially likely that Grenning would again be placed in segregation, based on his twelve previous trips. ER 019. A substantial likelihood is greater than a reasonable expectation. Thus, to the extent that Defendants-Appellees are arguing that Grenning's case is moot because he is no longer incarcerated in the SMU, the capable of repetition, yet evading review exception to mootness applies.

2. Grenning has standing now

Defendants-Appellees next argue that even if Grenning had standing at the time, his case is now moot due to changes in the conditions in the SMU. This claim is wrong for two reasons. First, the Defendants-Appellees have failed to meet the burden of showing that their voluntary cessation of conduct moots the case. Second, as argued in Grenning's Opening Brief, the current levels of light are still unconstitutionally bright.

a. Grenning's claims fall within the "voluntary cessation" exception to mootness

The courts have recognized three exceptions to the mootness doctrine: 1) "voluntary cessation," 2) "collateral legal consequences," and 3) "capable of repetition, yet evading review." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). "'The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.'" *Id.* at 1024, *quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). To meet this burden, the Defendants-Appellees must demonstrate "that the court is no longer capable of 'affecting the rights of the litigants in the case before it.'" *Id.*, *quoting Lewis v. Cont'l Bank. Corp.*, 494 U.S. 472, 477 (1990) (cleaned up).

When arguing that voluntary compliance moots a case, it is well-settled that the defendant bears a "formidable burden" of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. *Friends of the Earth*, 528 U.S. at 190. Additionally, "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack*, 788 F.3d at 1025. *See also Bell v. City of Boise*, 709 F.3d 890, 898-900 (9th Cir.

2013). Here, Defendants-Appellees made a voluntary decision to switch bulbs in an attempt to save energy. But with new technology, nothing prevents them from instituting the use of brighter, more energy efficient bulbs. The Supreme Court has recognized that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth*, 528 U.S. at 190.[1]

Other courts also recognize the high bar required to demonstrate mootness when the basis for such a claim is the voluntary cessation of allegedly unlawful conduct. For example, the Tenth Circuit will only recognize mootness in such cases when it is satisfied that "1. It is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur;" and "2. Interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Equal Employment Opportunity Commission v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1173-1174 (10th Cir. 2017) (quoting *Already, LLC v.*

[1] As an example, the Court pointed to *Lyons*, in which it recognized that while Lyons lacked standing, a city-wide ban on the use of the chokehold would not have mooted an otherwise valid claim for injunctive relief. *Friends of the Earth*, 528 U.S. at 167. *See also Lyons*, 461 U.S. at 101.

Nike, Inc. 568 U.S. 85, 91 (2013) and *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010)) (cleaned up). Here, Defendants-Appellees have failed to demonstrate that the complained of conditions could not recur.[2]

Finally, Grenning's standing has been definitively established by this Court in *Grenning I.* 739 F.3d 1235. When a court necessarily decides a question of standing, that finding becomes law of the case. *See e.g. Nordstrom v. Ryan*, 856 F.3d 1265, 1270 (9th Cir. 2017). Defendants-Appellees argue that the law of the case doctrine has exceptions, is discretionary, and should be set aside here. Resp. Br. at n. 12. However, they do not identify what those exceptions are or why they apply here. Furthermore, while *Nordstrom* recognized that such exceptions exist, they "'are not exceptions to the rule that, as a three-judge panel, we are bound by the law of the circuit in the absence of a recognized exception to that rule.'" *Id.* at 1271 (*quoting Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1076-77 (9th Cir. 2012). Thus, even

[2] While it is true that the Opening Brief appeared to concede that Grenning would never be subjected to the same conditions as in 2009, that argument was based on the assumption that the conditions as currently instituted would remain the same. However, that assumption cannot be credited as the cases above show. As Defendants-Appellees point out, the Court has an independent obligation to judge justiciability. Resp. Br. at n. 11.

if this case fell within a law-of-the-case exception, this Court would still be bound by law of the circuit. The Defendants-Appellees only argument on this point is that the prior opinion did not take note of the fact that "Grenning can literally never be returned to same conditions again because of the changes that occurred after the lawsuit." Resp. Br. at 27. But this ignores the Court's clear teachings in *McCormack* that executive action alone cannot moot a case, nor the realistic possibility that higher wattage energy-efficient lights could be installed in the SMU.

b. The current levels of illumination in the SMU are still unconstitutionally bright

As noted in the opening brief, Grenning has standing to challenge the current conditions because they are still unconstitutionally bright. Opening Br. 24-28. The Defendants-Appellees argue that Grenning has failed to identify a lower level of light that would be constitutional and that his return to the SMU is speculative at best. Resp. Br. at 27-28. However, they ignore both the findings of the District Court, that Grenning is substantially likely to be returned to the SMU, ER 019, and the arguments that Grenning made regarding the lighting levels propounded by the Defendants-Appellees' own expert. Opening Br. 24-

28. That expert testified that the appropriate amount of light to meet the penological interests advanced by Defendants-Appellants was between 3 and 6.5 foot-candles. ER 071-072, 075.[3] To the extent the current lighting levels exceed those that even the Defense expert testified to, Grenning maintains they are without a legitimate penological justification in violation of *Keenan*.[4]

B. The conditions in the Secured Management Unit violate the Eighth Amendment

The conditions in the SMU violate the Eighth Amendment because they expose Grenning to constant illumination, of a very high level, without any legitimate penological purpose. While Defendants-Appellees attempt to paint a picture of a wide consensus that exposure to constant illumination does not violate the Eighth Amendment, an examination of the cases they rely upon demonstrates that the alleged consensus is an illusion.

The Supreme Court has held that unnecessary and wanton inflictions of pain are those without penological justification. *Rhodes v.*

[3] He noted that 6.5 foot-candles is appropriate for a critical care patient. ER 71. There was no explanation why an otherwise healthy prisoner would require the same level of scrutiny as a critical care patient.

[4] The legitimate penological justifications themselves are addressed more fully in part II(D), below.

Chapman, 452 U.S. 337, 346 (1981). Furthermore, the Court has noted that "wantonness does not have a fixed meaning but must be determined 'with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.'" *Wilson v. Seiter*, 501 U.S. 294, 302 (1981) (*quoting Whitley v. Albers*, 475 U.S. 312, 320 (1986)). Here, the officials failed to show a legitimate penological justification for applying constant illumination to Grenning, specifically. Further, they can operate with much lower levels of light, as even their own expert testified.

1. Exposure to constant illumination violates the Eighth Amendment

This Court has held that exposure to constant illumination in the absence of any legitimate penological interest is unconstitutional. *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996).[5] Other circuit courts which have examined the question have cited *Keenan* with approval. *See e.g. Spencer v. Sec'y Dep't of Corrections*, 618 Fed. Appx. 85, 87 (3rd Cir. 2015); *Obama v. Burl*, 477 Fed. Appx. 409, 411 (8th Cir. 2012).

[5] For the reasons outlined in the opening brief, Plaintiff-Appellant maintains that an analysis of legitimate penological interests remains inappropriate in a conditions of confinement case, as this Court noted in *Grenning I.* 739 F.3d at 1240.

Nothing in *Chappell v. Mandeville* changes this holding. 706 F.3d 1052 (9th Cir. 2013).

As noted in the Opening Brief, *Chappell* was concerned with the question of whether it was clearly established in 2002 that the use of constant illumination violated the Eighth Amendment when legitimate penological interests were identified. Opening Br. 20-21. The Court merely held that it was not. Furthermore, Chappell himself was placed in administrative segregation under constant illumination after items in his cell tested positive for cocaine and methamphetamines. *Chappell*, 706 F.3d at 1055. Therefore, the Defendants articulated a legitimate penological interest that applied to Chappell specifically.

This Court reaffirmed *Chappell's* holding regarding legitimate penological interests in *Grenning I*, when it held that summary judgment was inappropriate because, while the Defendants-Appellees had identified numerous legitimate penological interests, they had failed to demonstrate that any of them applied to Grenning specifically. 739 F.3d at 1240-41. At trial, the Defendants-Appellees failed to remedy this error. Resp. Br. at 21, 39. They point only to findings by the District Court that there exist legitimate reasons for 24 hour

lighting, but do not explain, as this Court required, why those reasons applied to Grenning. This failure illustrates that there was no legitimate reason to apply constant illumination to Grenning, thus this case is on par with *Keenan*.[6]

They then point to a series of non-binding and unpublished cases to attempt to paint a picture that there is some broad consensus that the use of constant illumination does not offend the Eighth Amendment. What they fail to recognize is that the cases they rely upon are all distinguishable. Of the ten cases cited on pages 36-37 of the Response Brief, five involve prisoners who had demonstrated reasons for requiring constant illumination. *See Scarver v. Litscher*, 434 F.3d 972, 973 (7th Cir. 2006) (Scarver was a dangerous schizophrenic who had murdered two fellow prisoners); *Ferguson v. Cape Girardeau County*, 88 F.3d 647, 650 (8th Cir. 1996) (Ferguson complained of chest pains); *Hampton v. Ryan*, 288 Fed. Appx. 404, 405 (9th Cir. 2008) (Hampton was a member of the Aryan Brotherhood); *O'Donnell v. Thomas*, 826

[6] Defendants-Appellees argue that neither they, nor Grenning, can point to a single case in which a district court determined that constant illumination violated the Eighth Amendment. Resp. Br. 38. But they ignore both *Keenan* and *LeMaire v. Haas*, 745 F. Supp. 623 (D. Or. 1990), *overturned on other grounds*, 12 F.3d 1444 (9th Cir. 1993). They also argue that *LeMaire* was overturned, but ignore that this Court still relied on it in deciding *Keenan*, noting that it was overturned on other grounds. Resp. Br. at n. 17.

F.2d 788, 790 (8th Cir. 1987) (O'Donnell attempted suicide); and *Chavarria v. Stacks*, 102 Fed. Appx. 433, 434 (5th Cir. 2004) (administrative segregation reserved for the most dangerous prisoners). The other cases either involve much lower levels of light, *Spencer v. Sec'y of Dep't of Corr.*, 618 Fed. Appx. at 86 (9 watt bulb); *Vazquez v. Frank*, 290 Fed. Appx. 927, 928 (7th Cir. 2008) (9 watt nightlight); were decided due to a lack of evidence, *Hull v. Reynolds*, 696 Fed. Appx. 273, 274 (9th Cir. 2017) (lack of genuine dispute that defendants were deliberately indifferent), *Walker v. Woodford*, 393 Fed. Appx. 513, 515-16 (9th Cir. 2010) (uncontradicted medical evidence showed the amount of illumination could not cause insomnia or other sleep problems); or did not deal with constant illumination in the cell. *Murray v. Edwards Cnty. Sheriff's Dep't.*, 248 Fed. Appx. 993, 994-995 (10th Cir. 2007) (Edwards complained of lights located outside the cell and failed to make any claim of injury other than mental and emotional distress). The cases pointed to in Addendum A fair no better. See Resp. Br. Addendum A. Like the above cases, they involve penological interests specific to the inmates, much lower levels of light, do not deal with

constant illumination, fail to allege physical injury, or some combination of the above.[7]

Defendants-Appellees complain that in the Opening Brief, Grenning points to cases at other prisons to argue the light here is too bright, while noting that these cases are fact-specific. Resp. Br. at 45. They also argue that these cases are inapposite because they do not contain any discussion of foot-candles. Id. at 45-46. However, there are several cases, some of them cited by the Defendants-Appellees, which do discuss foot-candle measurements. *See e.g. Walker v. Woodford*, 593 F.Supp.2d. 1140, 1153 (S.D. Cal. 2008), *affirmed Walker v. Woodford*, 393 Fed. Appx. 513 (9th Cir. 2010) (7-watt bulb measuring .08-.12 foot-candles); *Hull v. Aranas*, 2016 U.S. Dist. LEXIS 181061 at *11 (D. Nev. Nov. 4, 2016) (0.3 foot-candles at night); *Jacobs v. Quinones*, 2015 U.S. Dist. LEXIS 105505 at *19 (E.D. Cal. 2015) (13-watt bulb putting out 1 foot-candle of light); *Mable v. Beard*, 2011 U.S. Dist. LEXIS 44801 at *7 (M.D. Pa. 2011) (9-watt bulb measured between 1 and 2 foot-candles); *Cole v. Caul*, 2010 U.S. Dist. LEXIS 105226 at *5 (E.D. Wisc. 2010)

[7] Rather than a providing several lengthy footnotes or string citations to the 41 cases cited in Addendum A, a breakdown of the differences in the cases is provided in an Addendum to this Reply Brief. The Addendum was included in the word count.

(safety light measured at one foot-candle); *Hampton v. Ryan*, 2006 U.S. Dist. LEXIS 88062 at *36 (D. Ariz. 2006) *affirmed by Hampton v. Ryan*, 288 Fed. Appx. 404 (9th Cir. 2008) (7 watt bulb putting out between 0.21 to 0.29 foot-candles at bunk level); and *Shanks v. Litscher*, 2003 U.S. Dist. LEXIS 24590 at *11 (W.D. Wis. 2003) (7-watt night light measuring between 1.6 and 2.1 foot-candles).[8]

The Defendants-Appellees further argue that there is no information to disclose if the security needs are similar or if the cells are similarly designed. But it is hard to imagine a cell design so different that guards can make due with, at most, twenty percent of the light used in 2009 and less than a third of what is currently in use at Airway Heights. As for concerns about similar security needs, Defendants-Appellees note themselves that the SMU at Airway Heights is a short-term segregation unit. Resp. Br. at 3. Some of the prisons discussed above and in other cases are Supermax facilities. *See e.g. Walker v. Hurd*, 593 F. Supp. 2d 1140, 1143, 1147 (S.D. Cal. 2008) (describing Calipatria State Prison as a Level IV facility. The 7-watt

[8] Defendants-Appellees make reference to minimum-to-maximum ratios in the Response Brief, at 17, but the District Court did not make any findings regarding these ratios, thus it is not apparent that they factored into the decision.

night light measured between .08 and .12 foot-candles);[9] *Baptisto v. Ryan*, 2006 U.S. Dist. LEXIS 99276 at *1-2, *29-30 (D. Ariz. 2006) (Plaintiffs were housed in Special Management Unit 2, a maximum security prison in Arizona reserved for death row inmates, inmates with the highest security classifications and validated members of a Security Threat Group and classified as a Supermax facility. Use of security lights measured between 0.20 and 0.85 foot-candles). Thus, even in the most secure facilities in this Circuit, dealing with the most violent and dangerous prisoners, prisons meet their legitimate penological interests with far lower levels of light than at issue here.

This difference is material because, as the Supreme Court has held, "[a]n alternative that fully accommodates the prisoner's rights at de minimus cost to valid penological interests may indicate a regulation is not reasonable." *Turner v. Safley*, 482 U.S. 78, 91 (1987).[10] This is the case here. Grenning's claim is that the Defendants-Appellees could achieve their goals with much lower levels of light. The evidence from

[9] Level IV is the highest security level within the California State prison system. *Franklin v. Smalls*, 2013 U.S. Dist. LEXIS 33450 at *8 (S.D. Cal. 2013) .

[10] Plaintiff-Appellant maintains that *Turner*'s legitimate penological interest test has no place in a conditions of confinement claim. See Opening Br. at 32-34. However, to the extent such interests apply, *Turner* provides guidance on their application.

every other prison to use constant illumination shows that he is correct. *See e.g. Stewart v. Beard*, 417 Fed. Appx. 117, 120, n.1 (3rd Cir. 2011) (9-watt bulbs that give off less than two foot-candles of light); *Cole v. Caul*, 2010 U.S. Dist. LEXIS 105226 at *22 (E.D. Wis. 2010) (lights measured at 1 foot candle).[11]

The Defendants-Appellees argue that Grenning has never "posited any standard or constitutional measurement of appropriate lighting." Resp. Br. at 46. But this shifts the burden. In addressing a conditions of confinement claim, it is up to the state to demonstrate that the challenged condition is necessary. Opening Br. 39-40. Defendants-Appellees do not deny that, to the extent they are relevant, legitimate penological interests are an affirmative defense. *See e.g. Marshall v. Knight*, 445 F.3d 965, 969 n.2 (7th Cir. 2006); *Crofton v. Roe*, 170 F.3d 957, 958 (9th Cir. 1999). Additionally, Grenning has noted repeatedly in his Opening Brief that the light levels in the SMU exceed even those suggested by Defendants-Appellees' own expert. Opening Br. at 24-25, 37-38. Thus, subjecting Grenning to this level of light, without a specific penological interest, violates the Eighth Amendment.

[11] See also cases discussed above at 16-17 and in the Addendum.

2. The District Court clearly erred when it determined Grenning was not injured by exposure to constant illumination

The District Court, and Defendants-Appellees, both argue that Grenning could not have been injured by the 24 hour lighting in the SMU because he experienced similar headaches in other situations. ER 019, Resp. Br. 32, 34. This ignores the wealth of caselaw that has recognized Eighth Amendment violations that exacerbate pre-existing conditions. *See e.g. Franklin v. Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981) (overturning dismissal of a claim that placing an inmate with a throat tumor in a cell with a heavy smoker could damage inmate's health); *Henry v. Melching*, 2005 U.S. Dist. LEXIS 43107 at *28 (E.D. Cal. 2005) (Finding that inmate can state a cause of action by showing that exposing him to environmental tobacco smoke aggravated his preexisting condition); *Reilly v. Grayson*, 157 F. Supp. 2d 762, 770 (E.D. Mich. 2001) (finding violation of the Eighth Amendment by placing asthmatic in a smoke-filled environment).

Yet according to the District Court's logic, if Grenning suffered from asthma and had been placed in a smoke-filled room and later suffered an attack, he could not show causation because he had suffered

asthma attacks in other situations. That is error. Grenning has a diagnosed history of photophobia. ER 381-382. As a result of this condition, he is particularly susceptible to being placed under bright lights. The fact that his condition can be caused in non-constant illumination situations does nothing to deny that his injuries here were caused by his stay in the SMU. Grenning complained that his headaches were constant the entire time he was in the SMU. ER 114.[12] There is no evidence in the record of Grenning suffering headaches for an extended period of time when not exposed to constant illumination. Thus, the District Court erred when it found that Grenning was not injured as a result of his confinement in the SMU.[13]

C. The Defendants-Appellees were deliberately indifferent to Grenning's injuries

There is no dispute that both Defendants-Appellees were aware of complaints about the 24-hour lighting. ER 017-018. It is further beyond dispute that exposure to constant illumination can violate the

[12] Moreover, contrary to the stipulation cited by Defendants-Appellees, (Resp. Br. at 9) Grenning testified he informed the nurses of migraine headaches and received daily medication. ER 112-113.

[13] Additionally, while it could have been clearer, Grenning did take issue with the District Court's credibility determination in his opening brief. Opening Br. 24. He noted that Dr. Aronsky was recognized as an expert and that she based her opinion on the medical literature as well as her own expertise.

Eighth Amendment. *Keenan*, 83 F.3d 1083. Thus, Grenning has met the objective prong of the deliberate indifference test.

The District Court clearly erred when it determined that the Defendants-Appellees took reasonable steps in response to this known risk. Tellingly, they no longer rely upon the American Corrections Association (ACA) standards that formed the basis of Fred Fox's claims that he took appropriate steps to investigate Grenning's complaint. The Response Brief specifically notes that

> [u]nbeknownst to Fox, the ACA standard related to the lighting simply sets a minimum for the amount of light needed in a cell for conducting daily activities, such as reading, and there is no specific ACA standard related to the twenty-four-hour lighting in segregation.

Resp. Br. at 11. This is a shocking concession, given that Fox's whole defense is that he checked with his supervisor and was told that receiving ACA accreditation was an adequate response to the grievance. At the very least, one would expect Fox to check and see if the very standard he is relying upon applies in the situation he claims to be investigating. He also failed to consult the ACA audit to see if it had any comments about the SMU, relying instead on the "common knowledge" that the ACA had accredited the facility. Id. Finally, Fox

could have asked a prison electrician to determine how bright the SMU cells were and compared them to conditions at other prisons. It was this complete failure to verify anything he was told, or to take any independent steps to investigate Grenning's claims, which shows that Fox was deliberately indifferent to the injuries suffered by Grenning. As the Supreme Court held in *Farmer v. Brennan*, a prison official may not avoid liability by refusing to verify underlying facts or declining to confirm inferences of risk. 511 U.S. 825, 842 n.8 (1994). *See also Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1135-36 (9th Cir. 2003) (finding deliberate indifference where school officials failed to investigate complaints of harassment); *Haygood v. Younger*, 769 F.2d 1350, 1355 (9th Cir. 1985) (en banc) (failure to investigate is evidence of deliberate indifference).

Defendant-Appellee Miller-Stout relied solely on her vague recollection of *Ridley v. Walter*, No. CS-96-0203-WFN (W.D. Wash) to justify denying Grenning's grievance. However, as she testified at trial, she could remember no pertinent details of the case or even whether it applied to Airway Heights. ER 048-049, 054, 058-059. She made no attempts to refresh her recollection or speak with a state attorney.

None of this is disputed by the Response Brief. Again, her failure to take any steps to verify her understanding amounts to deliberate indifference.

D. Defendants-Appellees have not shown that any alleged legitimate penological interests apply to Grenning specifically

The record is devoid of any evidence that the legitimate penological interests identified by the Defendants-Appellees applied to Grenning specifically, as the law of this Circuit requires. This Court has made clear that, to the extent legitimate penological interests apply in a conditions of confinement case, they must apply specifically to the inmate being subjected to them. *Grenning I*, 739 F.3d 1235. Here, the Defendants-Appellees provided only general concerns about inmate safety and security to support a "'blanket policy,'" which this Court had previously rejected as sufficient to meet their burden. *Id.* at 1240-41. While it is true the Defendants-Appellees could have supplemented the evidence at trial, they failed to do so. The District Court cited the testimony of two Defense witnesses, Miller-Stout and Stockwell, (ER 021-022) who testified solely to generic security interests that did not

apply to Grenning.[14] ER 049-050, 157-158, 161-163. Defendant-Appellee Miller-Stout testified that the reason for being in the SMU was irrelevant to the need for lighting. ER 049. This testimony flies in the face of this Circuit's requirement that, to be legitimate, a penological interest must apply specifically to the inmate.

In their response brief, they provide no better. Resp. Br. 4-5. The Defendants-Appellees state "[t]he need for such scrutiny does not vary based on the reason that inmates are placed in the SMU." Id. at 4. They identify several reasons that certain inmates may require constant lighting, such as possession of contraband, making "milkshakes" out of human excrement, or to detect medical emergencies. Id. 4-5. But nowhere do they argue that any of these reasons applied to Grenning.[15] There is no allegation in the record that Grenning possessed contraband or that he ever made a "milkshake." And the only medical issues Grenning suffered were caused by the very illumination Defendants-Appellees argue is necessary for his medical well-being. The District Court similarly failed to make any findings

[14] Stockwell was not even working in the SMU at the time Grenning was housed there, not starting there until December 2012. ER 154.
[15] Nor do they provide any evidence that contraband was found during standard welfare checks, as opposed to cell searches.

that these interests applied to Grenning specifically. ER 021. Given this failure, subjecting him to constant illumination, at levels far exceeding those used at any other prison, was wanton and unnecessary. *See e.g. Turner v. Safley*, 482 U.S. 78, 91 ("An alternative that fully accommodates the prisoner's rights at de minimus cost to valid penological interests may indicate a regulation is not reasonable.").

E. The District Court erred in not granting a permanent injunction

Because of the errors identified in the Opening Brief and above, the District Court's decision to deny an injunction was error. Grenning has demonstrated that he has suffered an irreparable injury; that remedies available at law are inadequate to compensate for that injury; that the balance of hardships weighs in his favor; and that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The relief he proposes, lowering the level of lighting in the SMU, is narrowly drawn, extends no further than necessary to correct the constitutional violation, is the least intrusive means to vindicate his constitutional right, and as demonstrated at several Supermax prisons, will not have an adverse impact on public safety.

III. CONCLUSION

Plaintiff-Appellant respectfully requests that this Court vacate the decision below and issue a judgment in his favor.

Respectfully submitted,

Dated: February 2, 2018

/s/ Alan Mygatt-Tauber

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ADDENDUM

In Addendum A of the Response Brief, Defendants-Appellees point to forty-one cases that they allege indicate that the majority of courts do not view constant illumination as violative of the Eighth Amendment. However, an examination of the cases demonstrates that they involve either penological interests specific to the inmates, much lower levels of light, do not deal with constant illumination, involve a failure to allege physical injury, or some combination of the above.

The following cases involve penological interests specific to the inmates:

Lindsey v. Hubbard, 2017 U.S. Dist. LEXIS 97112 at *5 (assaulted an officer); *Grender v. Wall*, 2016 U.S. Dist. LEXIS 71323 at *3 (attacked another inmate); *Holmes v. Fischer*, 2016 U.S. Dist. LEXIS 16357 at *13-14 (fighting with other inmates); *Quick v. Graham*, 2016 U.S. Dist. LEXIS 3122 at *19 (on suicide watch after numerous threats of self harm); *Booker v. Maly*, 2014 U.S. Dist. LEXIS 44086 at *4-5 (violation of prison anti-gang rules); *Tafari v. McCarthy*, 714 F. Supp. 2d 317, 368 (N.D.N.Y. 2010) (inmates only in SHU if the staff have determined they

are a security threat); *Franklin v. Smalls*, 2013 U.S. Dist. LEXIS 33450 at *5 (numerous rule violations); *Silverstein v. Fed. Bureau of Prisons*, 2011 U.S. Dist. LEXIS 112937 at *3-8 (murdered fellow inmates, assaulted staff members, attempted escape, threatened staff, possession of contraband); *Wiles v. Ozmint*, 2010 U.S. Dist. LEXIS 141230 at *7 (numerous escape attempts); *Warren v. Kolender*, 2009 U.S. Dist. LEXIS 4817 at *7-8 (determined to be a sexually violent predator); *Burns v. Smith*, 2009 U.S. Dist. LEXIS 79525 at *23-24 (on suicide watch and watch due to numerous health conditions); *Brown v. James*, 2009 U.S. Dist. LEXIS 22360 at *10-14 (issued threats and refused to follow orders); *Singh v. Czerniak*, CV 07-1906-PK at *2-3 (repeated rule violations, assaulted another inmate); *Dubois v. McDonald*, 2007 U.S. Dist. LEXIS 40994 at *4-5 (gang activity); *Williams v. Bays*, 2007 U.S. Dist. LEXIS 41306 at *3-4 (suicide attempts and mental illness); *Hampton v. Ryan*, 2006 U.S. Dist. LEXIS 88062 at *2 (member of the Aryan Brotherhood, a Security Threat Group); *Wills v. Terhune*, 404 F. Supp. 2d 1226, 1228 (E.D. Cal. 2005) (assaulted another inmate); *Shanks v. Litscher*, 2003 U.S. Dist. LEXIS 24590 at *5 (unwillingness to comply with prison rules)

The following cases involve much lower levels of light than in the AHCC SMU:

Walker v. Woodford, 593 F. Supp. 2d. 1140, 1147 (.08-.12 footcandles); *Hull v. Aranas*, 2016 U.S. Dist. LEXIS 181061 at *11 (0.3 foot-candles); *Jacobs v. Quinones*, 2015 U.S. Dist. LEXIS 105505 at *19 (13-watt bulb putting out 1 foot-candle); *King v. Frank*, 371 F. Supp. 2d. 977, 981 (9-watt fluorescent tube); *McBride v. Frank*, 2009 U.S. Dist. LEXIS 74284 *3 (9-watt fluorescent tube); *Cadet v. Owners of Berks Cnty. Jail*, 2017 U.S. Dist. LEXIS 170235 at *10 (five-to-seven watt fluorescent bulbs); *Murray v. Keen*, 2017 U.S. Dist. LEXIS 146296 at*6 (7-watt bulb with non-reflective paint in cells); *Wilson v. Wetzel*, 2017 U.S. Dist. LEXIS 9011 at *16 (5-watt red bulb); *Matthews v. Raemisch*, 2012 U.S. Dist. LEXIS 188804 at *13 (5-watt bulb); *Cole v. Litscher*, 2005 U.S. Dist. LEXIS 4160 at *41-42 (5 to 7-watt bulbs)

The following cases do not allege exposure to constant illumination:

Grizzle v. Cnty of San Diego, 2017 U.S. Dist. LEXIS 185474 at *17-18 ("Plaintiff was not subjected to 24 hours of bright illumination.");

Halfacre v. Watson, 2014 U.S. Dist. LEXIS 84211 at *3-4 ("[A]t 10:30 p.m.…the lights located directly above the inmate-bunks are turned off so that the inmates can rest without constant illumination from the overhead lights. (#21-1 at p.2) The lights in the day room, hallway, and bathroom, however, remain on 24-hours a day so that the inmates can be continuously monitored."); *Gregory v. Danberg*, 2011 U.S. Dist. LEXIS 109392 at *5 ("Baine also testified that the lights in MHU/SHU are on from 8:00 a.m. and 11:30 p.m."); *O'Brien v. Butler Cnty. Prison*, 2013 U.S. Dist. LEXIS 105020 at *15 ("Plaintiff has not alleged that he was subjected to constant illumination….").

In the following cases, no harm was alleged:

Singleton v. Harry, 2016 U.S. Dist. LEXIS 103339 at *21 ("Singleton does not allege that the lighting was more than security lights, and he has not alleged that the lighting caused him medical or psychological problems."); *Dalenko v. Stephens*, 2014 U.S. Dist. LEXIS 25166 at *29 ("Plaintiff here has not alleged that the (at most) seven days she spent under 24-hour lights caused her any injury."); *Allen v. Hardy*, 2012 U.S. Dist. LEXIS 156163 at *10 ("Plaintiff gets approximately six hours of

sleep per night. (*Id.*) However, the light makes it take longer to fall asleep. (*Id.*) Once asleep, the light does not prevent Plaintiff from staying asleep. (*Id.*)"); *Palermo v. Wrenn*, 2012 U.S. Dist. LEXIS 19154 at *8 ("Palermo does not state how long he was deprived of sleep (except to say that on at least one occasion, the noise preventing him from sleeping lasted for thirty hours), or whether he suffered, or was at risk of suffering, any ill effects to his mental or physical health as a result."); *Bull v. Beard*, 2013 U.S. Dist. LEXIS 154545 at *24 ("Petitioner does not claim that the lighting has impacted his health at all.")

In the following cases, there are no details to make any sort of reasonable comparison:

Arizmendi v. Seman, 2015 U.S. Dist. LEXIS 99890; *Rue v. Gusman*, 2010 U.S. Dist. LEXIS 46162; *Powell v. Fed. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 89417; *Treece v. Andrews*, 2005 U.S. Dist. LEXIS 43601.

Finally, as noted, many of these cases involve a combination of the above factors, *see e.g. Wills v. Terhune*, 404 F.Supp. 2d. 1226, in which

there was a specific action justifying illumination (assaulted another inmate), a much lower level of light (13 watt bulb), and a failure to allege sufficient harm (did not allege sleep deprivation).

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

Date: Feb 2, 2018

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