IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SEBASTIAN RICHARDSON,	**:**	**Civil No. 3:11-CV-2266**
	:	
Plaintiff	**:**	**(Judge Nealon)**
	:	
v.	**:**	**(Magistrate Judge Carlson)**
	:	
THOMAS R. KANE, et al.,	**:**	
	:	
Defendants	**:**	

REPORT AND RECOMMENDATION

I. Introduction and Statement of the Case

This is a putative class action brought by Sebastian Richardson, an inmate in the custody of the Federal Bureau of Prisons who was formerly incarcerated within the Special Management Unit ("SMU") at the United States Penitentiary in Lewisburg, Pennsylvania.[1] The action, styled as a *Bivens*[2] action, presents constitutional claims arising out of the defendants' alleged practice of forcing inmates to accept dangerous cell assignments with known hostile inmates without employing sufficient institutional safeguards, or otherwise be punished for refusing

[1] When this action was initiated on December 7, 2011, Richardson asserted that he was an inmate in the SMU at USP Lewisburg. He was subsequently transferred to another facility during the pendency of the litigation, and after he asserted class-based civil rights claims that are the subject of this report and recommendation on class certification.

[2] *Bivens v. v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

such cell arrangements by being subjected to painful and extended placement in hard restraints. Richardson also alleges that the defendants subject inmates to unreasonably dangerous prison conditions within the SMU by refusing to intervene in inmate-on-inmate attacks within cells or recreation cages. He claims that all of these practices are systemic and pervasive, and he seeks, *inter alia*, injunctive relief to prohibit these practices.

Now pending before the Court is Richardson's motion to certify the following class:

> All persons who are now currently or will be imprisoned in the SMU program at USP Lewisburg. The class period commenced from the time of the filing of the Amended Complaint in this action, and continues so long as USP Lewisburg Officials and Corrections Officers persist in the unconstitutional patterns, practices, or policies of (1) placing hostile inmates together in cells or recreation cages, and enforcing this placement through the use of punitive restraints, and (2) failing to take any reasonable measures to protect inmates from inmate-on-inmate violence by hostile inmates.

The motion is fully briefed and is ripe for disposition.

As the Court takes up this threshold issue, we most assuredly do not write upon a blank slate. Quite the contrary, we are constrained to examine this question in light of the express guidance that the United States Court of Appeals for the Third Circuit provided in a companion case that also seeks certification of an identical class of federal inmates at the SMU, and which challenges substantially

the same practices, procedures and policies that are at issue in the instant action. As Richardson notes, the Third Circuit has discussed in detail substantially similar issues regarding the proposed certification of a nearly identical class in a companion case filed by a USP Lewisburg inmate in *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015), which warrants mention at the outset of this report.

The proposed class in *Shelton* was defined as follows:

> All persons who are currently or will be imprisoned in the SMU program at USP Lewisburg. The class period commences from the time of this filing, and continues so long as USP Lewisburg Officials and Corrections Officers persist in the unconstitutional patterns, practices, or policies of (1) placing hostile inmates together in cell or recreation cages, and enforcing this placement through the use of punitive restraints, and (2) failing to take any reasonable measures to protect the inmates from inmate-on-inmate violence by hostile inmates.

775 F.3d at 563. This proposed class is essentially identical to the proposed class in this case, and is based on substantially similar factual allegations and legal claims. The defendants correctly note that the Third Circuit did not certify this proposed class, instead ruling that the district court misapplied the legal standards to the claims in that case, and remanding for further consideration of whether the putative class "meets the remaining Rule 23 requirements for class certification." *Id.* at 565. In that ruling, however, the Court specifically held that "ascertainability is not a requirement for class certification of a 23(b)(2) class seeking only injunctive and declaratory relief." *Id.* at 563. The Third Circuit's further

discussion of the relevant issues in *Shelton* suggested that the Court believed that the proposed class may be appropriate. In reversing the district court's denial of class certification, the Court of Appeals provided some indication of its views of the putative class and the relevant Rule 23 factors. Although the Court did not certify the class in *Shelton*, the defendants' characterization of the Court's decision as a "limited decision" with a "narrow holding" in our view minimizes the breadth of the rulings announced in the case, their relevance to the certification issues presented here and the degree to which this prior ruling guides the exercise of our discretion. (Doc. 74, at 9)

Notably, in addition its findings regarding any requirement that the class be ascertainable for certification of a class seeking injunctive relief pursuant to Rule 23(b)(2), the Court also observed that the class in *Shelton* was "easily capable of the type of description demanded by Rule 23(c)(1)(B)." *Id.* at 563. The Court then suggested that the class was not overly broad simply because some of the putative class members had not yet suffered an injury – something that is also true in this case. *Id.* at 564. Indeed, the Court noted that "there is no requirement that every class member suffer an injury before a class is certifiable under Rule 23" and that the threat of injury alone is sufficient, something that the Court found to be "particularly true in the context of a claim under the Eighth Amendment, which protects against the risk – not merely the manifestation – of harm." *Id.* at 564-65.

Thus, the Court found that the proposed class in *Shelton* was neither overbroad nor improperly defined for purposes of Rule 23, and, therefore, instructed on remand that the district court consider "whether the properly-defined putative class meets the remaining Rule 23 requirements for class certification." *Id.* at 565. We are not free to discount this prior appellate court guidance in a parallel case. Nor may we substitute our judgment for the carefully considered opinion of the court of appeals on virtually identical legal issues. In short, we believe that these rulings now also provide important and binding guidance in this case, and these rulings now limit and focus the Court's inquiry in this case to whether Richardson's complaint adequately satisfies the remaining requirements prescribed by Rule 23(a) for certification of the class, since the *Shelton* ruling in our view would also apply directly to Richardson's efforts to certify a Rule 23(b)(2) class.

With our judgment guided in this fashion by the prior rulings of the Court of Appeals, upon consideration of the parties' briefs and the Third Circuit's guidance in *Shelton* under substantially similar allegations regarding an identical class of plaintiff-inmates at the same institution, it will be recommended that the motion for class certification be granted, and the proposed class certified pursuant to Rule 23 of the Federal Rules of Civil Procedure.

II. Discussion

A. Factual Allegations

This action presents a constitutional challenge to the BOP's and USP Lewisburg's alleged practice of ignoring individual SMU prisoners' objections to being celled with inmates they believe or know to be hostile to them, and the concomitant practice of using punitive restraints to compel dangerous cell assignments on inmates who resist them. The lawsuit also challenges the policy and practice at USP Lewisburg of refusing to intervene in violent episodes that regularly occur within the SMU. (Am. Compl. ¶¶ 15-16.)

The amended complaint alleges that the BOP created the SMU program in 2008 in order to house inmates who present "unique security and management" concerns. *Id*. The plaintiff alleges that the prison cells at the SMU were originally designed to hold one inmate, *id*. at ¶ 18, but have since been used to house two inmates who are confined together within the cell for 23 out of 24 hours per day, something that the plaintiff alleges creates dangerous conditions where inmates with histories of violent behavior and gang affiliation are held in close proximity virtually around the clock. (*Id*. ¶¶ 18-23.)

According to Richardson, although the BOP uses a screening process that is designed to make celling decisions based upon inmates' respective separation

needs, inmates are often housed with others who are known to be hostile to them, thereby creating a dangerous environment where cellmate-on-cellmate violence is a real and recurring possibility. The plaintiff avers that this practice is pervasive within the SMU, and has resulted in frequent violent episodes. (*Id*. ¶¶ 37-40.)

Richardson asserts that when inmates refuse to accept cell assignments with inmates that they know or believe to be hostile to them, they are placed in hard metal restraints, which are applied in a manner intended to cause pain and restrict movement. (*Id.* ¶¶ 47-49, 59-60.) Richardson states that while in these restraints, inmates are substantially restricted in their ability to eat, drink, or use the toilet, and suffer intense pain and other physical ailments. (*Id*. ¶¶ 61, 76-76.) He also claims that the SMU uses restraint rooms, where inmates who are placed in restraints are left on the floors of cells that are unhygienic. (*Id*. ¶¶ 76-80.)

Richardson alleges that officials at the SMU and within the BOP are aware of the conditions alleged in the amended complaint, and that they deliberately place inmates in restraints in order to coerce them to accept cell assignments that the inmates maintain are hostile and dangerous. (*Id*. ¶¶ 82-83.) According to the amended complaint, there is no meaningful oversight process to which inmates may resort in order to challenge the use of restraints, which are part of an ongoing practice to which all inmates at the institution are subjected. (*Id*. ¶¶ 83-84, 189-91.) In addition, Richardson contends that the BOP has implemented a policy that

prevents SMU staff from intervening and stopping violent incidents when they arise or occur within the prison and recreation cages, something he claims as a further violation of the SMU inmates' rights under the Eighth Amendment.

Richardson alleges that as of the date this action was commenced, the SMU housed between 1,050 and 1,100 inmates – all of whom would be part of the class of inmates Richardson seeks to represent in this case.

B. Class Certification: Legal Requirements

Richardson seeks class certification in order to resolve the putative class's Fifth and Eighth Amendment claims for declaratory and injunctive relief, in order to end the BOP's alleged practice of placing inmates in double cells or recreation cages with hostile inmates, without meaningful measures to protect inmates from inmate-on-inmate violence, the punitive use of restraints used to enforce the allegedly unconstitutional policy, and the institution's alleged policy of not intervening to stop inmate-on-inmate attacks when they occur.

Rule 23(a) provides that a plaintiff seeking to represent a class must demonstrate that:

> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;
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> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Richardson seeks class certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, which provides that a class action may be maintained if the requirements of Rule 23(a) are satisfied and if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). As Richardson notes, and as the Third Circuit explained in *Shelton*, Rule 23(b)(2) of the Federal Rules of Civil Procedure is intended to permit plaintiffs to pursue injunctive relief on behalf of a group of similarly situated individuals against a general course of conduct. *Shelton*, 775 F.3d at 561 ("[T]he key to the (b)(2) class is the 'indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)); *see also Baby Neal for and by Kanter v. Kasey*, 43 F.3d 48, 64 (3d Cir. 1994) (noting that the "proper role" of a Rule 23(b)(2) class is to "remedy[] systemic violations of basic rights of large and often amorphous classes"); *Hassine v. Jeffes*, 846 F.2d 169, 178 n.6 (3d Cir. 1988) (a Rule 23(b)(2)

class is "an especially appropriate vehicle for civil rights actions seeking . . . declaratory relief for prison reform.").

As the rule states, a Rule 23(b)(2) class must satisfy the prerequisites prescribed by Rule 23(a) and must comply with the Rule 23(b)(2)'s requirement that final injunctive or declaratory relief is appropriate for the class as a whole. *Shelton*, 775 F.3d at 563; *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011). In other words, a Rule 23(b)(2) class is appropriate where "a single injunction or declaratory judgment would provide relief to each member of the class." *Gates v. Rohm and Haas Co.*, 655 F.3d 255, at *4 (3d Cir. 2011) (internal quotation marks omitted).

In this case, it is submitted that the Third Circuit's ruling in *Shelton* with respect to the suitability of Rule 23(b)(2) to the very same claims that are being made in this case compel a finding that the claims for declaratory and injunctive relief are equally suitable for class litigation under Rule 23(b)(2), provided that Richardson has satisfied the requirements of Rule 23(a), which we address below.

C. The Class Satisfies the Requirements of Rule 23(a)

1. Numerosity

Under Rule 23(a), a proposed class representative may only sue on behalf of a class that is so numerous that joinder is impractical. "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named

plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Richardson has proposed a class of all inmates housed in the SMU at USP Lewisburg, which number exceeds 1,000 inmates, and the defendants have not challenged certification on grounds that the class is insufficiently numerous. As Richardson notes, in other prison class-action litigation in this circuit, courts have found that far smaller prisoner populations satisfy the requirement. *See, e.g,. Logory v. Cty. of Susquehanna*, 277 F.R.D. 135, 140-41 (M.D. Pa. 2011) (class of 170 pre-trial detainees sufficient); *Death Row Prisoners of Pa. v Ridge*, 169 F.R.D. 618, 621 (E.D. Pa. 1996) (185 inmates satisfied numerosity); *Pabon v. McIntosh*, 546 F. Supp. 1328, 1333 (E.D. Pa. 1982) (finding that joinder of 30 to 40 inmates would be impractical).

Because the plaintiff has proposed a class in this action that far exceeds the 40 potential plaintiffs that would satisfy the rule, and because the defendants have not argued that the proposed class is insufficiently large for purposes of Rule 23(a)(1), it is submitted that Richardson has satisfied the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Third Circuit has explained that "concepts of commonality and typicality are broadly defined and tend to merge. Both criteria

seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented. Despite their similarity, however, commonality and typicality are distinct requirements under Rule 23." *Baby Neal*, 43 F.3d at 56 (internal citations omitted). The commonality requirement itself will be satisfied if the representative plaintiff shares at least *one* question of fact or law with the grievances of the prospective class." *Stewart*, 275 F.3d at 227 (quoting *Baby Neal*, 43 F.3d at 56) (emphasis in *Stewart*). On this score, we have been specifically cautioned by the Court of Appeals in the companion case of *Shelton v. Bledsoe, supra*, that the commonality requirement of Rule 23(a)(2) does not require that the representative plaintiff "ha[s] endured precisely the same injuries that have been sustained by the class members, only that the harm complained of be common to the class." *Shelton*, 775 F.3d at 564 (quoting *Hassine*, 846 F.3d at 177) (emphasis in *Hassine)*.

Because the requirement is satisfied by demonstrating even a single common issue, it is often easily met. *Baby Neal*, 43 F.3d at 56. Class members, therefore, can assert a single common complaint even if they have not all suffered the same injury since "demonstrating that all class members are *subject* to the same harm will suffice." *Id.* (citing *Hassine*, 846 F.2d at 177-78) (original emphasis). Moreover, the alleged constitutional violation may be the threat of violence and assault, which need not actually occur before prisoners can maintain a class suit.

See Riley v. Jeffes, 777 F.2d 143, 147 (3d Cir. 1985) (finding constitutional violation where prisoners were subjected to constant threat of violence and sexual assault, and rejecting the argument that a plaintiff must actually be assaulted before he can obtain relief). Indeed, the Third Circuit has found that actions seeking to enjoin a common policy imposed on prison inmates satisfy the commonality requirement. *See Hagan v. Rogers*, 570 F.3d 146, 158 (3d Cir. 2009) (reversing district court's denial of class certification for lack of commonality and typicality, finding that the plaintiff alleged a common threat of injury to the inmate population as a whole).

Guided by this legal framework, it is submitted that Richardson also satisfies that commonality requirement in this case. Here, Richardson proposes a class made up of all current and future inmates in the SMU at USP Lewisburg, all of whom are allegedly subject to the same offending policies and practices that allegedly have been implemented at that institution, and which are the subject of Richardson's claim for injunctive and declaratory relief. Richardson has alleged that the inmates within the SMU are all subject to the same threat of harm as a result of the defendants' celling policies and practices. In particular, Richardson alleges a common threat of harm from inmate-on-inmate violence that is predictable in this setting, and the increased risk of injury because of SMU policy that prevents prison staff from intervening in violence after it erupts, as well as

injuries that result from the use of restraints that are employed against inmates who refuse to accept celling assignments they believe to be dangerous.

These allegations represent common issues of both law and fact, and turn on the overarching contention that the threat of violence at the United States Penitentiary, Lewisburg, is increased to an unconstitutional degree by the defendants' alleged policies and practices. With the class allegations cast in these broad terms, there appears to be the requisite degree of commonality to these claims given that all class members face the same potential risk of harm due to these cell placement policies while they are held within the SMU at USP Lewisburg. It may be that the class will include some inmates who have not yet suffered actual injury, and others who have suffered injury, and there may be some differences in the types of injuries that may have been suffered as the result of alleged policies and practices. However, in *Shelton*, the Court of Appeals did not find this fact dispositive on the question of class certification. Therefore, while these factual distinctions that may exist, they do not defeat a finding of commonality, at least with regard to the broad injunctive and declaratory relief that R8chardson seeks with respect to what alleged to be a common policy and threat of violence to which all inmates at the SMU are subject. As the Third Circuit has explained, in such cases these potential differences in the factual background of

each class member's claims are unlikely to affect the broad prospective relief sought here:

> This is especially true where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, and there is, therefore, no need for individualized determinations of the propriety of injunctive relief. Indeed, (b)(2) classes [such as that proposed in this case] have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct.

Baby Neal, 43 F.3d at 57. In consideration of the fact that all of the proposed class members are currently or will in the future be subject to the defendants' alleged policies regarding the celling of dangerous inmates, and the punitive steps taken when inmates' refuse cell assignments that they believe present a danger, it is submitted that the commonality requirement is met here.[3]

[3] The defendants argue that Richardson has not demonstrated commonality, and argue that issues of celling inmates, meting out discipline in instances where inmates fail to comply with orders, the use of ambulatory restraints, and the alleged refusal of SMU staff to intervene when violence breaks out are so fact-bound relative to each inmate's individual circumstances that the claims are not only not common, they are incapable of adjudication in a class action. The defendants also urge the Court to examine the merits of each of these claims in considerable depth, citing the court to decisions in non-class actions, including cases where substantial evidence was already in the record, and conclude that none of the plaintiff's claims even makes out a constitutional violation. We recommend that the Court focus on Richardson's claims more broadly at this stage, where he is seeking to certify a class that challenges specific alleged policies that he claims create an unreasonably dangerous environment for inmates, and which unfairly punish and harm inmates

3. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As with commonality, courts have set a "low threshold" for satisfying typicality. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001). This requirement focuses on "whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-96 (3d Cir. 2006). A class representative's claims do not need to be identical to the claims of other class members to be considered typical. *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 184 (3d Cir. 2001). Instead, "[i]f the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton*, 259 F.3d at 183-84.

Despite the defendants' insistence that Richardson's claims are atypical, and plainly different than those other inmates, the Court notes that in cases where the named plaintiff's claims arise out of the same policies and practices that give rise to claims of other class members, who rely on the same legal theories, the claims

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who are subject to them with no effective means of recourse. As noted, insofar as Richardson is seeking class certification under Rule 23(b)(2) to pursue this injunctive and declaratory relief, the case law that has been cited supports certification for such claims.

are usually considered to be typical. *See Stewart*, 275 F.3d at 227-28; *Newton*, 259 F.3d at 183; *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998). Although the defendants argue vigorously that there will be factual differences in the class members' claims, the Third Circuit has observed that "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal*, 43 F.3d at 58.

As with commonality, it is submitted that the typicality requirement is satisfied here, in large measure because Richardson's claims are predicated on the alleged unconstitutional practices and policies employed within the SMU, to which all inmates are allegedly subjected. The overarching similarity the legal theories that would be offered as support for the class' claims are sufficient to meet Rule 23(a)(3)'s typicality requirement.

4. Adequacy

Finally, Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The typicality and adequacy requirements "tend[] to merge because both look to potential conflicts and to whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Beck*, 457 F.3d at 296 (quoting *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (internal quotation marks

omitted)). The adequacy requirement "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Baby Neal*, 43 F.3d at 55.

The defendants do not challenge counsel's experience or competency to prosecute claims on behalf of the class, but they do argue that Richardson is an inadequate representative because he is no longer housed at the SMU and thus has little at stake in the claims for injunctive or declaratory relief in contrast to current SMU inmates. The defendants also argue that Richardson would necessarily be adverse to some of the inmates who make up the class. In making this last argument, the defendants are essentially claiming that no SMU inmate could adequately represent the interests of the class in a case where inmates within the class were alleged to have been hostile to one another – something that is at the heart of this litigation about the practice of celling dangerous and hostile inmates together within the SMU, and the sufficiency of institutional safeguards to prevent inmate-on-inmate violence..

It is recommended that the Court decline the defendants' invitation to find that Richardson – or, in effect, any – inmate who has been, is, or will be housed at the SMU at USP Lewisburg would be incapable of serving as a class representative in a lawsuit challenging as unconstitutional prison conditions involving inmate-on-

inmate violence and institutional policies relating to that violence. Granted, Richardson acknowledges that gang affiliations or other separation needs result in some inmates being "hostile" to one another, but this does not mean that no inmate could effectively serve as a class representative to advance the class' overarching interest in challenging conditions that allegedly put them all at risk of violence, punitive restraints, unsanitary and dangerous conditions, and serious risk of physical injury. To find otherwise would be tantamount to concluding that inmates in the SMU could never collectively challenge celling practices in the manner that Richardson and Shelton seek to do.

With respect to the defendants' argument that Richardson is inadequate to serve as a class representative because he is no longer housed at the SMU, the Court disagrees.

Although their argument seems very close to asserting that Richardson's transfer from USP Lewisburg precludes his ability to serve as a class representative on grounds of mootness, the defendants are careful not to frame the argument in this way, since the Third Circuit considered and rejected that very argument in a decision issued last July. In that appeal, the defendants presented the court of appeals with the question of "whether Richardson's class-wide claims for injunctive relief are moot because Richardson was transferred out of USP Lewisburg after he filed an amended class action complaint but before he moved

for class certification." *Richardson v. Bledsoe*, 829 F.3d 273, 276 (3d Cir 2016). In a lengthy precedential decision that clarified the law in this area with respect to mootness in class litigation, the court of appeals found that Richardson's claims were not moot, noting that while individual claims for relief are "acutely susceptible to mootness, a would-be class representative may, in some circumstances, continue to seek class certification after losing his personal stake in the case." *Id.* The court also found that even though Richardson had not filed a motion for class certification before he was transferred, he had clearly presented the class-claims to the district court, and his claims, therefore, were deemed to relate back to the date on which he filed the amended complaint. *Id.* "Accordingly," the court stated, "he may continue to seek class certification in this case." *Id.*

Notwithstanding this ruling and the court's guidance, the defendants have argued that the fact of Richardson's transfer means that "he does not have a personal stake in the class litigation . . . [and therefore] Richardson cannot adequately or fairly represent a class of current and future inmates at USP Lewisburg which challenges the on-going conditions at the prison facility to which he has no recent knowledge or experience." (Doc. 74, at 23) The defendants do not cite to any persuasive authority in support of this argument, and we view this argument as largely foreclosed at this time since the argument runs substantially

contrary to the Third Circuit's reasoning and holding in this case last year. Indeed, to embrace the defendants' argument would mean that the Court would be bound to find that Richardson was entitled to pursue class-action certification, while nonetheless being inadequate as a class representative because he is no longer held at USP Lewisburg. This would directly contradict the Third Circuit's teaching in this very case. There is, therefore, nothing in the record of this case that would support a finding that Richardson falls short of what is required by Rule 23(a)(4), and there is a ruling from the court of appeals that sets the stage for Richardson to seek certification on behalf of the class notwithstanding his transfer.

For these reasons, it is submitted that both Richardson and his counsel are adequate to represent the interests of the putative class in this action seeking declaratory and injunctive relief.

In sum, we conclude where we began, by noting that the prior rulings of the Court of Appeals in this case, and a closely parallel case define and prescribe the scope of our discretion in addressing this motion for class certification. *Richardson v. Bledsoe*, 829 F.3d 273, 276 (3d Cir 2016); *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015). Viewing this motion for class certification through the analytical lens of these prior appellate court decisions, we conclude that the prudent and prudential path would be to grant the motion for class certification. While we reach this view on the threshold question of class certification, of course

nothing in this Report and Recommendation should be construed as addressing in any fashion the ultimate merits of any putative class claims. That task must await another day.

III. Recommendation

Accordingly, having found that the Third Circuit's ruling in *Shelton* compels a finding that the claims in this case are well-suited for class certification under Rule 23(b) (2), and finding that the requirements of Rule 23(a) are otherwise satisfied, IT IS RECOMMENDED THAT the district court enter an order provisionally certifying the proposed class, and appointing Richardson's counsel as class counsel.

The parties are further advised that:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive

further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

Dated: June 26, 2017