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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Sam Trevino,	)	No. CV-10-393-TUC-FRZ (CRP)
Petitioner,	)	<b>REPORT &amp; RECOMMENDATION</b>
vs.	)	
Craig Apker,	)	
Respondent.	)	

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Petitioner Sam Trevino, while confined in the Federal Prison Camp in Tucson, Arizona, on June 28, 2010 filed this Petition for Writ of Habeas Corpus pursuant to 28 U. S.C. § 2241 (“Habeas Petition”).<sup>1</sup> Trevino alleges the Bureau of Prisons (“BOP”) failed to timely provide him with Residential Re-Entry Center (“RRC”) placement consideration as required by 18 U.S.C. § 3624(c). (Doc. 1, p. 1). As his remedy, Trevino seeks an order that BOP “IMMEDIATELY assure timely consideration pursuant to 18 U.S.C. § 3624(c) AND IMMEDIATELY secure Petitioner’s RRC Placement DATE with any and all required paperwork to be completed accurately and timely.” (Doc. 1, p. 6) (emphasis in original). The

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<sup>1</sup> 28 U.S.C. § 2241 is the federal habeas corpus statute that permits a prisoner to challenge his imprisonment on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. *See generally Peyton v. Rowe*, 391 U.S. 54 (1968).

1 Government alleges Petitioner failed to exhaust his administrative remedies and the Habeas  
2 Petition is moot because Trevino was transferred to Rubidoux Re-entry CCC on August 30,  
3 2010. (Doc. 8, p. 2). Petitioner did not file a reply to the Government's response and the time  
4 for filing a reply has expired.

### 5 **Background**

6 Trevino is serving a 12 month and 1 day sentence, followed by 3 years of supervised  
7 release, after being convicted of racketeer influenced and corrupt organization in violation of  
8 18 U.S.C. § 1962. (Doc. 8-1, p. 1; Doc. 8-3, p. 1).<sup>2</sup> He is projected to be released from prison  
9 via good time conduct on November 25, 2010. (Doc. 8-1, p. 1; Doc. 8-3, p. 2).

10 Trevino argues in his Habeas Petition that prison employees were not completing the  
11 paperwork necessary for the BOP to consider his placement in an RCC. (Doc. 1, p. 7). In its  
12 Motion to Dismiss the Habeas Petition as Moot, the Government shows on August 30, 2010,  
13 the BOP transferred Trevino to Rubidoux Re-entry CCC. (Doc. 8-1, p. 2; Doc. 8-2, p. 1).

14 In his Habeas Petition, Trevino admits that he did not exhaust his administrative  
15 remedies but argues exhaustion would be futile. (Doc. 1, pp. 8-13). In its Motion to Dismiss  
16 the Habeas Petition, the Government argues Trevino should have exhausted his administrative  
17 remedies before bringing his claim to federal court. (Doc. 8, pp. 3-4). The Government further  
18 argues that Trevino's Habeas Petition is moot because this Court can no longer provide him  
19 with the relief sought - his release to an RCC. (Doc. 8, pp. 3-4).

### 20 **Exhaustion**

21 Before filing a petition for writ of habeas corpus, a federal prisoner challenging any  
22 circumstance of imprisonment is required to first exhaust all administrative remedies.  
23 *Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir.1986). The exhaustion prerequisite for  
24 filing a § 2241 petition, however, is judicially created; it is not a statutory requirement.  
25 *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir.1990), *overruled on other grounds*, *Reno v.*

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27 <sup>2</sup> This Report and Recommendation cites to the page numbers of documents as paginated on the  
28 Court's electronic case management system (CM/ECF).

1 *Koray*, 515 U.S. 50, 54–55 (1995). Thus, “[b]ecause exhaustion is not required by statute, it  
2 is not jurisdictional.” *Brown*, 895 F.2d at 535. If a petitioner has not properly exhausted his  
3 claims, the district court, in its discretion, may either “excuse the faulty exhaustion and  
4 reach the merits, or require the petitioner to exhaust his administrative remedies before  
5 proceeding in court.” *Id.*; *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (“Where  
6 Congress specifically mandates, exhaustion is required. . . . But where Congress has not  
7 clearly required exhaustion, sound judicial discretion governs.” (internal citations omitted)),  
8 *superceded on other grounds*, 42 U.S.C. § 1997(e).

9 In the case before this Court, Trevino admits he did not exhaust his administrative  
10 remedies. He argues, however, requiring that he exhaust his administrative remedies prior to  
11 bringing his Habeas Petition would be futile and cause irreparable harm given the limited  
12 time available for consideration of his RRC placement. (Doc. 1, p. 8). Trevino is scheduled  
13 for release from incarceration on November 25, 2010 via good conduct time. As of June 28,  
14 2010 when Trevino filed his Habeas Petition, he alleges prison officials had not yet  
15 completed the paperwork necessary for the BOP to consider his transfer to an RRC. The  
16 Government argues Trevino should be required to exhaust his administrative remedies  
17 because the BOP was not given the opportunity to resolve Trevino’s complaint. (Doc. 8, p.  
18 3). Because exhaustion is not jurisdictional and it appears the BOP has resolved Trevino’s  
19 complaint, the Magistrate Judge recommends the District Court excuse Trevino’s failure to  
20 exhaust and address whether his claim is moot.

### 21 Mootness

22 Under Article III of the United States Constitution, the jurisdiction of federal courts is  
23 limited to “cases” or “controversies.” U.S.Const. Art. III, § 2, cl. 1. A federal court may not  
24 review a moot claim, because “the exercise of federal judicial power is conditioned on the  
25 existence of an [Article III] case or controversy.” *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.  
26 3 (1964), *Wilson v. Terhune*, 319 F.3d 477, 479 (9th Cir.2003) (*quoting Spencer v. Kemna*,  
27 523 U.S. 1, 7 (1998)). Mootness is a jurisdictional issue, and “federal courts have no  
28 jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists.”

1 *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir.2003) (quoting *Cook Inlet Treaty Tribes v.*  
2 *Shalala*, 166 F.3d 986, 989 (9th Cir.1999) (internal quotation marks omitted)). If there is no  
3 longer any possibility that relief can be obtained for a claim, that claim is moot and must be  
4 dismissed for lack of jurisdiction. See *Foster*, 347 F.3d at 745.

5 “[T]he function of the writ [of habeas corpus] is to secure immediate release from  
6 illegal physical custody,” and that is the only relief a court has the power to grant. *Picrin-*  
7 *Peron v. Rison*, 930 F.2d 773, 775 (9th Cir.1991). Thus, when a habeas petitioner is  
8 released from the confinement of which he complains, the complaint must be dismissed as  
9 moot because the court can no longer provide the requested relief. *Id.* at 776 (dismissing §  
10 2241 petition because petitioner was granted immigration parole and released from custody);  
11 *Munoz v. Rowland*, 104 F.3d 1096, 1097-98 (9th Cir.1997) (finding § 2241 petition  
12 challenging conditions of confinement moot because petitioner was paroled, thus, relief  
13 sought was unavailable).

14 Trevino’s requested relief is immediate consideration of a transfer to an RRC facility.  
15 Subsequent to filing his Habeas Petition, Trevino was granted an RRC placement and  
16 transferred on August 30, 2010 to Rubidoux Re-entry CCC. Because Trevino was  
17 transferred to the RRC, this Court can no longer provide him with the relief sought in his  
18 Habeas Petition. Even if this Court reviewed Trevino’s arguments and found in his favor, it  
19 would be unable to afford him any effective relief as a result of his transfer to the RRC.  
20 Additionally, because no reasonable expectation exists that Trevino will again be subjected  
21 to this same set of circumstances, “this is not a situation ‘capable of repetition, yet evading  
22 review’ to which the doctrine of mootness may not apply.” *Reimers v. Oregon*, 863 F.2d  
23 630, 632 (9th Cir.1988) (quoting *Cox v. McCarthy*, 829 F.2d 800, 803 (9th Cir.1987)).  
24 Therefore, the Court finds that the claim is moot and must be dismissed for lack of  
25 jurisdiction. *Foster*, 347 F.3d at 745.

#### 26 **Recommendation**

27 Based on the foregoing, the Magistrate Judge recommends that the District Court  
28 DENY AS MOOT the Petition for Writ of Habeas Corpus. (Doc. 1).

1 Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file  
2 written objections within fourteen days of being served with a copy of the Report and  
3 Recommendation. If objections are not timely filed, they may be deemed waived. If  
4 objections are filed, the parties should use the following case number: **CV 10-393-TUC-**  
5 **FRZ.**

6 The Clerk of the Court shall mail a copy of this Report and Recommendation to Sam  
7 Trevino # 55407-112 at Rubidoux Re-entry CCC; 3263 Rubidoux Blvd; Rubidoux, CA  
8 92509.

9 DATED this 3<sup>rd</sup> day of November, 2010.

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**CHARLES R. PYLE**  
**UNITED STATES MAGISTRATE JUDGE**