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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE ANDRADE RICO, Plaintiff-Appellant, v. JAMES ROBERTSON, in his capacity as Warden, Pelican Bay State Prison, et al., Defendants-Appellees, and MICHAEL STAINER; et al., Defendants.	No. 21-16880 D.C. No. 2:17-cv-01402-KJM-DB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted November 14, 2022
San Jose, California

Before: GRABER, TALLMAN, and FRIEDLAND, Circuit Judges.
Dissent by Judge FRIEDLAND.

Plaintiff-Appellant Jorge Rico is an inmate in the custody of the California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Department of Corrections and Rehabilitation at Pelican Bay State Penitentiary ("Pelican Bay") in Northern California, where he is serving a life sentence. He seeks declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that Pelican Bay's court-ordered suicide-prevention system for inmates in segregated housing ("Guard One") makes so much noise that it deprives him of sleep, in violation of the Eighth Amendment. The district court dismissed Rico's claims as moot because he has been released from administrative segregation and is no longer subject to Guard One welfare checks. We affirm.

For a federal court to exercise jurisdiction under Article III, an "actual and concrete dispute[]" must exist between the parties throughout the litigation. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013)). If, during proceedings, the dispute ceases to exist, the case is moot and falls "outside the jurisdiction of the federal courts." *Id*. Rico admits that he is no longer subject to the challenged suicide prevention checks, but he argues that this case falls within an exception to mootness for controversies that are capable of repetition yet evading review because he could be sent back to administrative segregation in the future. Under that exception, a court is not deprived of jurisdiction if "there is a reasonable expectation that the same complaining party will be subjected to the same action again" and "the challenged action is in its duration too short to be fully litigated

prior to its cessation or expiration." *Id*. at 1540 (quoting *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011)).

In considering whether a party "reasonably" expects he will be subject to the challenged conduct again, courts must assume that "[litigants] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct." *Id*. at 1541 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)); *see also Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995) (finding no reasonable expectation that a prisoner would be transferred back to a high-security facility because he would be transferred "only if he were to commit a serious violation of prison rules"). Here, the record shows that Rico has been sent to administrative segregation only for disciplinary reasons: First, on May 20, 2014, Rico was placed in segregation for attempting to murder another inmate. Second, on July 13, 2017, Rico was sent to segregation for assaulting a correctional officer. No evidence suggests that Rico has been or will be placed in administrative segregation (and therefore exposed to the challenged welfare checks) for a non-disciplinary reason.

Rico argues that in evaluating whether this controversy is capable of repetition, we also should consider the reasons why *other* inmates have been placed in administrative segregation. But, given the limited reasons for non-disciplinary administrative segregation, such evidence cannot establish that Rico—

as opposed to some other inmate—will be placed in administrative segregation for a non-disciplinary reason. Because Article III jurisdiction requires that the plaintiff "show a personal stake in the outcome of the action," a controversy is not capable of repetition unless "there is a reasonable expectation that *the same complaining party* will be subjected to the *same action*." *Sanchez-Gomez*, 138 S. Ct. at 1537, 1540 (emphasis added) (cleaned up); *Sample v. Johnson*, 771 F.2d 1335, 1339 (9th Cir. 1985) ("The question then is whether the practices to which appellants object are capable of repetition *as to them*."). Evidence about other inmates may show that Rico could, in theory, be held in administrative segregation for non-disciplinary reasons—but the "mere possibility" of involuntary recurrence is not enough to avoid mootness. *Sample*, 771 F.2d at 1342 (citation omitted).

If Rico is held in administrative segregation in the future for a reason other than his own misconduct, he is of course free to bring a new action, which could very well fall within the exception to mootness for cases capable of repetition yet evading review. But on this record, the district court correctly ruled that his claim is moot.

AFFIRMED.

Rico v. Robertson

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Friedland, J., dissenting:

I would vacate dismissal and remand to the district court with instructions to grant Rico's request for jurisdictional discovery. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). Without more information about prison practices, it is impossible to assess the likelihood that Rico would be placed in administrative segregation in the future for reasons other than his own misconduct—and thus it is impossible to assess whether this case falls within the "capable of repetition, yet evading review" exception to mootness. Despite his not having been moved to administrative segregation for non-disciplinary reasons in the past,[1] if Rico could show that all prisoners face a reasonable likelihood of being moved to administrative segregation for non-disciplinary reasons at some point, Rico would be able to satisfy the "capable of repetition" prong of the mootness exception. *See Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (explaining that "capable of repetition" does not require that the recurrence be more probable than not but only that it be reasonably likely). Information about the frequency of

[1] To fall within the "capable of repetition, yet evading review" exception to mootness, the repeated conduct need not occur for exactly the same reason or in the exact same way as it did in the past. *See, e.g.*, *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 859 (9th Cir. 2022).

placements in administrative segregation for non-disciplinary reasons is in the prison's sole possession, and Rico should have been given the opportunity to obtain that information in discovery before responding to Defendants' argument that the case should be dismissed on mootness grounds.