UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. No. 11-10432
	)	D.C. No. 11CR0187-TUC LAB
Plaintiff-Appellee,	)	
	)	
v.	)	APPELLANT'S OPPOSITION
	)	TO GOVERNMENT'S
JARED LEE LOUGHNER,	)	MOTION TO DISMISS
	)	
	)	
Defendant-Appellant.	)	
	)	

INTRODUCTION

As the opening brief plainly states, there are two issues raised in this appeal. They are: (1) whether due process entitles a pretrial detainee a prompt post-deprivation hearing after the government starts forcibly administering antipsychotic drugs on the basis of a claimed emergency; and (2) whether that hearing must be held by a court of law and include certain procedural safeguards. *See* AOB at 2 (Statement of Issues).

The existence of the first issue seems to have eluded the government's attention. Rather than addressing both issues on the merits in an answering brief, the government has filed a motion to dismiss the entire appeal as moot. Conceding that the doctrine of "capable of repetition, yet evading review" is applicable here, the government contends that the appeal is moot because the second issue—and *only* the

second issue—is "presently being considered by this Court" in two related but unconsolidated appeals in Case Nos. 11-10339 and 11-10504 and therefore will not "evade review." Gov. Motion at 7-8. It is wrong. But even if it were right, the government's argument is a nonstarter because the first issue—whether due process requires a prompt post-deprivation hearing—is undisputedly justiciable by this Court because it is capable of repetition yet evading review. The government does not dispute this fact. This appeal thus may not be dismissed. *See, e.g.*, *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005) (a case is moot only if all of the "issues presented are no longer live" and the court cannot grant "any effective relief"). The government's motion to dismiss is facially meritless and should be denied.

BACKGROUND

As the government correctly states, this appeal concerns the constitutional requirements arising out of its decision to subject Mr. Loughner to emergency forced medication on July 18, 2011. The existence of an emergency relieved the government of its duty to conduct constitutionally adequate proceedings *before* taking action—but did not, as the defense has argued in this appeal, relieve the government of the duty to conduct such proceedings promptly *after* it deprived Mr. Loughner of his liberty interest in being free from unwanted psychotropic medication. No such prompt hearing occurred.

The government concedes that "capable of repetition, yet evading review" doctrine is the proper framework to evaluate mootness. *Id.* at 6. Under this framework, the government contends, this appeal should be dismissed as moot without full consideration. Its sole argument is that one of the two issues presented in the appeal—"that BOP cannot administratively medicate the defendant as a danger under *Harper* without a judicial determination"—will "not evade review" because it has been raised (but not decided) in two other pending appeals. *Id.* at 7-8.

ARGUMENT

The government's motion to dismiss should be denied. It lacks merit, even taken at face value, and raises the specter of unnecessary delay. *See* Gov. Motion at 8 (urging the Court to engage in delay). There are two main flaws in the government's position. The first one is so obvious that the government's motion borders on frivolous: even if one of the two issues raised in this appeal is "moot"—and the government has claimed no more than this—there necessarily remains at least one live controversy for this Court to adjudicate. The second flaw stems from the government's misunderstanding of the "evading review" analysis.

A. LEGAL FRAMEWORK

Fundamentally, mootness doctrine concerns whether there exists a "case or controversy" for a federal court to decide. *See, e.g., U.S. Parole Comm'n v.*

Geraghty, 445 U.S. 388, 395-96 (1980) (mootness limitation on justiciability arises from Article III limits on federal judicial power). If there is, Article III not only permits but requires a court to decide the case. *See, e.g.*, *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989) ("federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred"). It is axiomatic, then, that if there exists a justiciable controversy as to one or more issues in a case (but perhaps not others), the case cannot be dismissed as moot. *See Geraghty*, 445 U.S. at 401-02 (mootness on "less than all the issues [does not] moot an entire case; other issues in the case may be appealable").

This basic principle requires denial of the government's motion. Even accepting *arguendo* the government's contentions in their entirety, it has never challenged the justiciability of Mr. Loughner's argument that he is entitled to a *prompt* post-deprivation hearing under the Due Process Clause. *See* AOB 12-19. It has thus implicitly conceded that at least one issue is appealable, which means that under *Geraghty* the case cannot be considered moot.

B. THIS CASE IS CAPABLE OF REPETITION, YET EVADING REVIEW

This case is subject to appellate resolution because the dispute is one that is "capable of repetition, yet evading review." Under this line of law, courts retain jurisdiction despite the cessation of the complained-of wrong "when (1) the duration

of the challenged action is too short to be litigated prior to cessation, and (2) there is a 'reasonable expectation' that the same parties will be subjected to the same offending conduct." *Demery v. Arpaio*, 378 F.3d 1020, 1026 (9th Cir. 2004). The burden of proof lies on the party asserting mootness. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 189 (2000).

1. The Duration of the Unlawful Detention Is Too Short to Be Litigated

The controversy here evades review because the relief sought, a prompt post-deprivation hearing following any emergency decision to commence forcible medication must be afforded within a matter of days—not enough time to permit full litigation. A matter is too short in duration if "in its regular course, [it] resolves itself without allowing sufficient time for appellate review." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173-74 (9th Cir. 2002). This Court has held that a period of two years is "not enough time to allow for full litigation." *Id.* (citing *Alaska Ctr. for the Env't*, 189 F.3d at 855).

Here, over five months will elapse before briefing is complete in this Court. More time is certain to elapse before the matter is decided. By the time an appellate decision is rendered, Mr. Loughner's due process right to a prompt hearing (and those of any other pretrial detainee subjected to emergency forcible medication) will have been subjected to prolonged violation.

The government contends that one of the issues (whether a judicial hearing with certain procedural safeguards is necessary) will not evade review—not because appellate review can be had here, but because it is currently one of several issues being considered in other pending appeals in this Court. Gov. Motion at 7-8. The government misses the point. What it fails to mention is that this Court's case law has made clear that the "evading review" prong is at heart a question concerning the "duration of the challenged action"—not a scouting mission to find some pending lawsuit in a controlling jurisdiction that might result in a binding decision on the relevant issue. *See, e.g.*, *Biodiversity Legal Foundation*, 309 F.3d at 1173 ("we find the duration component of the repetition/evasion exception satisfied because . . . disputes are routinely too short in duration to receive full judicial review"). As this line of cases makes clear, the proper focus is on the nature of the *actual* issue challenged—the procedural requirements for a post-deprivation hearing after the government has taken emergency action infringing on the liberty interest—not a different issue that happens to have arisen in a related context.

But even accepting the government's scouting-mission view of the "evading review" test, its argument fails to meet the burden of establishing mootness. It is not at all clear, and the government does not claim, that the appeals in Cases 11-10339 and 11-10504 will, in fact, yield a controlling opinion on the question of whether a

judicial hearing with adequate safeguards is required by due process. Both appeals raise other, potentially dispositive issues—a point that the government altogether fails to address. Moreover, if a decision on the merits is reached in one of these cases, the result would be the creation of case law subject to interpretation and analysis in this case, and perhaps a conclusive resolution of the issue—but not "mootness," no matter which direction the ultimate ruling takes. In other words, an on-point decision in Mr. Loughner's favor would result in a *granting* of this appeal, not dismissal as moot. An on-point decision against him, conversely, would result in *denial* of his appeal (and an opportunity to seek further review), not dismissal as moot.

2. There Is a Reasonable Expectation of Repetition

In the ordinary case, the "capable of repetition" test asks whether the conduct will again affect the "same parties" in the future. *See Demery*, 378 F.3d at 1026. Under this test, this case satisfies the "capable of repetition" prong because there exists a reasonable expectation of recurrence as to Mr. Loughner. "Reasonable expectation" of recurrence is a low standard that is easily met. *See Honig v. Doe*, 484 U.S. 305, 318-20 (1988) (there was a reasonable expectation of future adverse school board action against plaintiff in civil rights suit by disabled students, even though he no longer resided within the local school district and was not enrolled in school). There need not be a demonstrated probability of recurrence; the question focuses on

whether the harm is "*capable*" of repetition. *See id.* at 318 n.6; *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (the standard for recurrence is lower for mootness than standing).

The government does not dispute that the issues raised here are capable of repetition. A "reasonable expectation" of recurrence is as present here as it was in *Honig* and *Demery*, where this Court looked to the fact that the plaintiff had experienced numerous previous detentions in the local jail whose "Jail Cam" webcast was under review, and concluded that there was "compelling evidence that the plaintiffs likely will be reincarcerated at the Madison Street Jail." *Demery*, 378 F.3d at 1027. As past behavior and explicit admissions by prison staff have made clear, prison officials believe that Mr. Loughner *must* be subjected to continuing forcible medication for the rest of his life.

Thus, it is a "virtual[] certain[ty]" that, should the prison be deprived of other justifications for medication (or if medication is stayed by court order, for example) it is more than likely to claim an emergency justification to either recommence or simply continue medicating Mr. Loughner. *Accord Doe v. Gallinot*, 657 F.2d 1017, 1021 n.1 (9th Cir. 1981) (civil rights suit challenging California's statutory scheme for emergency psychiatric commitment was not moot even though plaintiff was no longer committed). Indeed, cessation of forced medication at some point during

Mr. Loughner's pretrial proceedings, and thus the possibility that the prison will claim an "emergency" justification to medication again, is highly likely even if the prison is allowed to continue on its present course of forced medication. If Mr. Loughner is found competent at some point and proceeds to trial, he will be transferred to a facility that, through the government's own admissions, lacks the ability engage in long-term forced medication. *See* Case No. 11-10504, Doc. No. 4-6, at 4-5 (Talplacido Dec., Exhibit 7 (Sealed) to Gov. Resp. to Emergency Stay Motion) (admitting that USP Tucson lacks the resources to provide for Mr. Loughner's long-term mental health care); *see also United States v. Grape*, 549 F.3d 591, 597-98 (3d Cir. 2008) (pretrial detainee who was medicated at FMC Springfield ceased taking antipsychotic medications after being found competent, discharged from Springfield, and brought to the district having venue over his criminal case). Just as in *Grape*, the government here is "free to return to its old ways" and the appeal is "therefore is not moot." *Id.* at 598.

CONCLUSION

The government's motion should be denied and the briefing schedule set forth in the Court's August 30, 2011, order should be reinstated.

Respectfully submitted,

/s/ Judy Clarke

DATED: December 2, 2011

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