APPENDIX A

NOT FOR PUBLICATION

FILED

DEC 6 2022

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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

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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.

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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.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE ANDRADE RICO,

Plaintiff,

v.

JEFFREY BEARD, et al.,

Defendants.

No. 2:17-cv-1402 KJM DB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding through counsel with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges use of the Guard One security check system violated his Eighth Amendment rights. On June 20, 2019, defendants moved for a stay of these proceedings pending the Ninth Circuit's resolution of defendants' interlocutory appeal. After considering the parties' briefs, this court finds it unnecessary to hear argument on defendants' motion. For the reasons set forth below, this court will recommend defendants' motion be granted.

BACKGROUND

This case is proceeding on plaintiff's second amended complaint filed on May 3, 2017. (ECF No. 38.) He alleges use of the Guard One system in the Security Housing Unit at Pelican Bay State Prison caused him severe sleep deprivation in violation of his Eighth Amendment rights. The Guard One system was implemented pursuant to an order issued by Judge Mueller in Coleman v. Brown, No. 2:90-cv-0520 KJM DB (E.D. Cal.). In 2018, Judge Mueller related the

present case, and several other cases regarding use of the Guard One system in California prisons, to Coleman.

In February 2018, defendants moved to dismiss this action. Defendants argued, among other things, that because plaintiff is no longer incarcerated in the Security Housing Unit his claims for injunctive and declaratory relief are moot. Defendants further argued that they are protected from liability for damages by qualified immunity. In March 2019, Judge Mueller dismissed plaintiff's claims for injunctive and declaratory relief as moot, dismissed the high level supervisory defendants based on qualified immunity, and denied the motion to dismiss the remaining defendants, identified as the "appeals review defendants" and the "floor officer defendants."

Defendants appealed Judge Mueller's ruling. (ECF No. 103.) That appeal remains pending before the Ninth Circuit. (See ECF Nos. 104, 107.) On June 20, 2019, defendants made the present motion to stay these proceedings pending the Ninth Circuit's resolution of their appeal. (ECF No. 112.) Plaintiff opposes the stay. (ECF No. 114.) Defendants filed a reply. (ECF No. 115.)

MOTION FOR STAY

Defendants argue the court should stay all proceedings in this case to avoid the potentially unnecessary expense involved in discovery and other pretrial matters. In his opposition, plaintiff argues he will be prejudiced if discovery is stayed.

I. Effect of Interlocutory Appeal

The court first considers defendants' argument that a stay of these proceedings is essentially automatic because the district court is deprived of jurisdiction over the subjects of the interlocutory appeal.

A. Legal Standards

Although circuit courts generally lack jurisdiction to hear an interlocutory appeal from an order denying summary judgment or a motion to dismiss, a narrow exception exists under the collateral order doctrine for appeals of orders denying qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). This exception exists because qualified immunity is an immunity from

suit rather than a mere defense to liability, and that immunity "is effectively lost if a case is erroneously permitted to go to trial." Id. at 526.

Such an appeal "normally divests the district court of jurisdiction to proceed with trial." Padgett v. Wright, 587 F.3d 983, 985 (9th Cir. 2009); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992). Nonetheless, "[r]ecognizing the importance of avoiding uncertainty and waste, but concerned that the appeals process might be abused to run up an adversary's costs or to delay trial, [the Ninth Circuit] ha[s] authorized the district court to go forward in appropriate cases by certifying that an appeal is frivolous or waived." Rodriguez v. Cty. of Los Angeles, 891 F.3d 776, 790-91 (9th Cir. 2018) (citations omitted). "[A] frivolous qualified immunity claim is one that is unfounded, 'so baseless that it does not invoke appellate jurisdiction,' and [ ] a forfeited qualified immunity claim is one that is untimely or dilatory." Marks v. Clarke, 102 F.3d 1012, 1017 n.8 (9th Cir. 1996) (quoting Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989)). For example, an appeal would be frivolous where "the disposition is so plainly correct that nothing can be said on the other side." Dagdagan v. City of Vallejo, 682 F. Supp. 2d 1100, 1116 (E.D. Cal. 2010) (citations omitted), aff'd sub nom., Dagdagan v. Wentz, 428 F. App'x 683 (9th Cir. 2011).

If the appeal is not frivolous or waived,[1] the district court still "retains jurisdiction to address aspects of the case that are not the subject of the appeal." United States v. Pitner, 307 F.3d 1178, 1183 n.5 (9th Cir. 2002) (citing Plotkin v. Pac. Tel. & Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982); see also Alice L. v. Dusek, 492 F.3d 563, 564-65 (5th Cir. 2007) (district court is divested of jurisdiction of only "those aspects of the case on appeal"). What constitutes the "subject of the appeal" requires some consideration. Most courts have construed the "subject of the appeal" to include the claims subject to the immunity defense. The district court thus loses

[1] Plaintiff does not seek to certify defendants' appeal as frivolous under Chuman. Even if he did, this court does not find that "nothing can be said" for defendants' position on appeal. See Dagdagan, 682 F. Supp. 2d at 1116. While this court disagrees with defendants as to the characterization and substance of the arguments underlying their qualified immunity claim, such disagreement does not meet the demanding standard for certifying an appeal as frivolous. Marks, 102 F.3d at 1017 n.8 (appeal is frivolous under Chuman if it is "so baseless that it does not invoke appellate jurisdiction").

jurisdiction of not only the immunity defense but also of those underlying claims. A stay of pretrial proceedings on those claims would therefore be, essentially, automatic.

Judge England made that determination in Cabral v. County of Glenn, No. 2:08-cv-0029 MCE DAD, 2009 WL 1911692 (E.D. Cal. July 1, 2009). There, defendant Dahl sought dismissal of plaintiff's excessive force claim against him on the grounds of qualified immunity. The court determined Dahl was not entitled to qualified immunity and Dahl appealed. Dahl and the other defendants then sought a stay of the proceedings in the district court. Judge England noted that an "interlocutory appeal on the issue of qualified immunity ... does not deprive this court of jurisdiction to address other, unrelated, matters still pending before it." 2009 WL 1911692, at *1 (quoting Beecham v. City of West Sacramento, 2008 WL 4821655, *1 (E.D. Cal. 2008)). He then held that "[b]ecause the excessive force claim against Officer Dahl is clearly related to his appeal, this action should be stayed as to that claim against Officer Dahl." Discovery was permitted on claims that would not be directly affected by the appeal. In conclusion, the court ruled that "no witness may be deposed as to any issues that relate solely to either the excessive force cause of action brought against Officer Dahl and/or Officer Dahl's claim of qualified immunity." Id. at *2.

Other courts have similarly held that the interlocutory appeal on the issue of immunity requires the district court to stay pretrial proceedings on claims subject to that immunity. See, e.g., J.P. by and through Villanueva v. Cty. of Alameda, No. 17-cv-5679-YGR, 2018 WL 3845890, at *2 (N.D. Cal. Aug. 13, 2018) (pending resolution of appeal, defendants are entitled to a stay of all pretrial proceedings on claims for which immunity defense applicable).

A stay of pretrial proceedings on the underlying claims is necessary to give effect to the purposes of the qualified immunity doctrine. As noted by the Supreme Court, the purpose of qualified immunity is "not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery . . . , as [i]nquiries of this kind can be peculiarly disruptive of effective government.'" Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (quoting Mitchell, 472 U.S. at 526) (some internal quotations marks omitted). Courts in this and other circuits have recognized that pretrial proceedings on the merits of a claim should be delayed until the qualified

immunity issue is resolved. See Dahlia v. Stehr, 491 F. App'x 799, 801 (9th Cir. 2012) ("[A] denial of summary judgment without prejudice is sufficiently final to support jurisdiction over an interlocutory appeal . . . because the purpose of qualified immunity is 'not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery.'" (quoting Behrens, 516 U.S. at 308)); Dunn v. Castro, 621 F.3d 1196, 1199 (9th Cir. 2010) (recognizing the importance of resolving qualified immunity issue early in the case because such immunity permits government officials to avoid the burdens of pretrial matters such as discovery); Ganwich v. Knapp, 319 F.3d 1115, 1119 (9th Cir. 2003) (same); Holloway v.City of Pasadena, No. 2:15-cv-3867-CAS(JCx), 2016 WL 11522304, at *2 (C.D. Cal. Mar. 14, 2016) (same); Congdon v. Lenke, No. CIV 08-1065RJB, 2010 WL 489677, at *8 (E.D. Cal. Feb. 5, 2010) (same); Wolfenbarger v. Black, No. CIV S-03-2417 MCE EFB P, 2008 WL 590477, at *2 (E.D. Cal. Feb. 29, 2008) (district court should resolve immunity issue before allowing discovery), rep. and reco. adopted, 2008 WL 838721 (E.D. Cal. Mar. 28, 2008); see also District of Columbia v. Trump, 930 F.3d 209 (4th Cir. 2019) (an entitlement to immunity is an entitlement "'not to stand trial or face the other burdens of litigation'" (quoting Mitchell, 472 U.S. at 526)); Oliver v. Roquet, 858 F.3d 180, 188 (3rd Cir. 2017) ("'[A] defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.'" (quoting Mitchell, 472 U.S. at 526)); Marksmeier v. Davis, 622 F.3d 896, 903 (8th Cir. 2010) (same); Barron v. Livingston, 42 F. App'x 793, 794 (6th Cir. 2002) ("Qualified immunity provides government officials the right to avoid the pre-trial burden of discovery." (citing Behrens, 516 U.S. at 314)).

In fact, courts have also held that an order permitting discovery on the merits prior to a ruling on an immunity defense is itself grounds for an interlocutory appeal. See Oliver, 858 F.3d at 188 (subjecting a government official to the burdens of pretrial matters such as discovery is an "implicit denial" of qualified immunity); Nee v. Byrne, 35 F. App'x 296 (8th Cir. 2002).

B. Does the Interlocutory Appeal in this Case Require a Stay of all Proceedings?

In the present case, plaintiff's remaining claims are all subject to the qualified immunity defense. Therefore, just as in Cabral, they should be considered "subjects" of the appeal. As

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such, further proceedings on those claims should be stayed. This stay would permit defendants the full benefits of immunity, should the Ninth Circuit find they are entitled to it.

Plaintiff argues that some courts did not "automatically" stay the entire case when a party filed an interlocutory appeal. However, plaintiff ignores the fact that the weight of authority requires this court to conclude that proceedings on the claims that would be affected by the appeal should be stayed. In almost every case found, the court denying a stay has done so only with respect to claims that would not be affected by the immunity issues on appeal.

In a few cases, courts have permitted discovery to proceed on the claims underlying the assertions of immunity. However, in each one, the court found that the issues on appeal were distinct from the merits of the claims. In the interlocutory appeal at issue in Castaneda, the defendants challenged the district court's order denying them immunity from suit under the Federal Tort Claims Act. Castaneda v. Molinar, No. CV 07-7241 DDP(JCx), 2008 WL 9449576 (C.D. Cal. May 20, 2008). If defendants were successful on appeal, that immunity would have barred plaintiff Castaneda's entire suit against them. However, the district court found a stay unnecessary because the factual issues in the underlying claims were distinct from the statutory construction issue in the appeal. Id. at *5-6. Therefore, discovery on the plaintiff's claims would not affect the record before the appellate court. In addition to this distinction, the court stressed that it found the defendants' interlocutory appeal meritless. Id. at *4.

The court in Castaneda relied, in part, on Schering Corp. v. First DataBank, Inc., No. C 07-1142 WHA, 2007 WL 1747115 (N.D. Cal. June 18, 2007). There, the district court noted that the issue of the appeal was "completely separate from the merits" of the action. The action in Schering involved product disparagement - trade libel, negligent publication and tortious interference with economic advantage. The defendant moved to dismiss the case based on California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The district court denied that motion, finding that the anti-SLAPP statute did not apply. Holding that the issues regarding the applicability of the statute had no bearing on the plaintiff's tort claims, and vice versa, the court declined to stay discovery on those claims. 2007 WL 1747115, at *4.

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Plaintiff points to a third case in which the district court also permitted discovery to proceed. However, again, the court carved out the immunity issue, noting that it was "separate from the merits of the underlying litigation." Donahoe v. Arpaio, No. CV 10-2756 PHX NVW, 2012 WL 2063455, at *2 (D. Ariz. June 7, 2012). The court also relied on the complications involved in attempting to separate, for discovery purposes, the claim which was potentially subject to immunity from the other claims in the case. Id. at *3.

In the present case, the merits issues and immunity issues are intertwined. Here, defendants have appealed the denial of qualified immunity. Defendants are protected by qualified immunity if: (1) the facts, if proved, do not establish that they violated a constitutional right, or (2) the plaintiff does sufficiently allege a violation of a constitutional right, but that right was not clearly established by law. See Saucier v. Katz, 533 U.S. 194, 201 (2001); cf. Marks, 102 F.3d at 1018 (recognizing that "it is often impossible to separate the court's reasoning or decisions regarding qualified immunity from those regarding liability;" "[t]he issues are generally analyzed together and are sometimes simply not susceptible to independent review").

Here, plaintiff alleges that defendants intentionally deprived him of sleep in violation of the Eighth Amendment. In the interlocutory appeal, in examining the first factor in the qualified immunity analysis, the Ninth Circuit could determine that plaintiff fails to state facts which, if proved, would establish that a defendant or defendants violated his Eighth Amendment rights. That determination would both establish that a defendant is entitled to qualified immunity and further establish that plaintiff has failed to state a claim for relief under the Eighth Amendment. Accordingly, this court does not find the opinions in Castaneda, Schering, and Donahoe persuasive authority for a stay in the present case. The court should hold that a stay is necessary because plaintiff's claims are a subject of the pending interlocutory appeal.

Even if the decisions in Castaneda, Schering, and Donahoe demonstrate that the district court has the authority to proceed with pretrial matters on the merits of claims subject to immunity, the court should not exercise that discretion in this case. As set out below, under applicable legal standards, a stay is appropriate.

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II. Application of Stay Standards

A. Appropriate Legal Standard

"District courts have inherent authority to stay proceedings before them." Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 817 (9th Cir. 2003), abrogated on other grounds by Ryan v. Gonzales, 568 U.S. 57 (2013). The power to stay is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants." Landis v. North Am. Co., 299 U.S. 248, 254 (1936). Further, every court has the power "to manage the cases on its docket and to ensure a fair and efficient adjudication of the matter at hand." Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (citing Gold v. Johns-Manville Sales Corp., 723 F.2d 1068, 1077 (3d Cir. 1983)). The decision whether to stay a civil action is left to the sound discretion of the district court. Rohan, 334 F.3d at 817.

The parties put forth two different sets of standards for determining the propriety of a stay. Plaintiff contends this court is required to apply the stay standards set out by the Supreme Court in Hilton v. Braunskill, 481 U.S. 770 (1987) and Nken v. Holder, 556 U.S. 418 (2009). Those standards are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " Id. at 434 (quoting).

Nken, 556 U.S. at 433–34 (quoting Hilton, 481 U.S. at 776).

Defendants, on the other hand, argue that the standards described by the Supreme Court in Landis are applicable here. In Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005), the Ninth Circuit noted that a district court "has discretionary power to stay proceedings in its own court under *Landis*." The court then described those standards:

> "Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of

> the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay."

Lockyer, 398 F.3d at 1110 (quoting CMAX Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962)).

Determining which standards apply is important because they have significant distinctions. Under Hilton/Nken, defendants must show both a strong likelihood of success on the merits of the appeal and irreparable injury if a stay is not issued. The Landis standards do not require these two showings.

Plaintiff has little support for his argument that the Hilton/Nken standards should apply. The few courts that have applied those standards when considering a stay pending an interlocutory appeal did so without any discussion of the Landis standards. See In re World Trade Ctr. Disaster Site Lit., 503 F.3d 167, 170 (2nd Cir. 2007); Castaneda, 2008 WL 9449576, at *2; Davila v. County of San Joaquin, No. CIV S-06-2691 LKK/EFB, 2008 WL 4426669 (E.D. Cal. Sept. 26, 2008).

A judge in the Northern District of California recently considered the issue raised here – whether the Hilton/Nken or Landis stay standards should apply to a request for a stay pending an interlocutory appeal. Kuang v. U.S. Dep't of Defense, No. 18-cv-3698-JST, 2019 WL 1597495 (N.D. Cal. Apr. 15, 2019). In Kuang, the district court considered a request for a stay pending an appeal of its grant of a preliminary injunction. The Kuang court reviewed the authority applying the Hilton/Nken test and applying the Landis test in this situation. Id. at *2-3 The court found that courts applying the Hilton/Nken test had not discussed the Landis test "or offered a reasoned analysis as to why the *Nken* test applied." On the other hand, the Kuang court found that district courts that have directly confronted the question have "overwhelmingly concluded that the *Landis* test or something similar governs." Id. at *3 (collecting cases).

The Kuang court then went on to examine the reasons why it makes sense to apply the Landis test to a stay of ongoing proceedings and the Hilton/Nken test to a stay of a final judgment. The purpose of a stay under Landis is to permit the court to "'control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" Id. at *3 (quoting 23andMe, Inc. v. Ancestry.com DNA, LLC, No. 18-CV-02791-EMC, 2018 WL

5793473, at *3 (N.D. Cal. Nov. 2, 2018)). The Kuang court noted that "[t]hese same concerns exist where, as here, a court 'considers whether it should proceed forward on discovery ... and pre-trial litigation in [an] action in light of the potential that the appellate court will determine that a large portion of the action should be dismissed, rendering much of the work to be completed meaningless.'" Id. (quoting Finder v. Leprino Foods Co., No. 1:13-cv-2059 AWI BAM, 2017 WL 1355104, at *2 (E.D. Cal. Jan. 20, 2017)[2]).

The purpose of a stay under Hilton/Nken, by contrast, is not whether going forward with the litigation "will be inefficient for the parties and the court" but rather whether "equity demands that the court 'preserve the pre-judicial-relief status quo pending the appellate court's determination of the correctness of that relief.'" 2019 WL 1597495, at *3 (citing Finder, 2017 WL 1344104, at *2.) In Hilton, the government sought a stay of a district court's judgment granting habeas relief. In Nken, the applicant sought a stay of a district court's order requiring his deportation.

This court finds the reasoning in Kuang and Finder compelling. The question here is one of efficiency. While the court should certainly consider issues of fairness and prejudice as well, the point of a stay is avoiding potentially unnecessary work by all those involved. And, use of the Landis standard is, in this case, even more appropriate than its use in Kuang and Finder. In those cases, interlocutory appeals on specific issues were pending. Those cases did not involve interlocutory appeals on immunity issues. Therefore, the courts in Kuang and Finder could have reasonably decided to proceed with discovery on other issues that were not the subject of the appeal. In the present case, this court has been divested of jurisdiction to consider the issues regarding qualified immunity and, should defendants prevail on appeal, plaintiff's entire action would be dismissed.

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[2] In Finder, the district court certified a question for appeal regarding the construction of terms in the California Labor Code. See 2017 WL 1355104, at *1. The district court noted that resolution of that legal question would "dramatically simplify the questions of law and potentially the questions of proof now pending before the court." Id. at *4. Therefore, applying the Landis standards, the court found a stay appropriate. Id. at *3-4.

For these reasons, this court will consider defendants' request for a stay under the Landis factors described by the Ninth Circuit in Lockyer: (1) "the possible damage which may result from the granting of a stay;" (2) "the hardship or inequity which a party may suffer [if the case is allowed] to go forward;" and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." Lockyer, 398 F.3d at 1110. Thus, this court need not, as plaintiff strenuously argues, consider the likelihood that defendants will succeed on the merits of their appeal or whether they will be irreparably harmed if these proceedings are not stayed.

B. Analysis

1. Potential Damage Resulting from a Stay

Plaintiff argues he will be prejudiced by a stay of "several years" because memories will fade. Plaintiff does not identify whose memory he is concerned about, just what issues in his case will hinge on memories, or why he feels it may be several years before the Ninth Circuit renders a decision. This court does accept, however, that it is not possible to know how long it may be before the interlocutory appeal is concluded.

Plaintiff cites a number of cases warning of the harms significant delays in litigation may create. Few are relevant to the present case. In several cases, courts denied stays because the plaintiffs sought redress other than damages that would be prejudiced by a stay. See Yong v. I.N.S., 208 F.3d 1116, 1120 (9th Cir. 2000) (indefinite stay of habeas proceeding inappropriate because "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy"); I.K. ex rel. E.K. v. Sylvan Union School Dist., 681 F. Supp. 2d 1179 (E.D. Cal. 2010) (stay of federal proceedings for resolution of state tort proceedings inappropriate in part because plaintiff sought funds to remediate the educational deficits he suffered and delay would impair his academic advancement). These cases are inapplicable to the present case because, in plaintiff's remaining claims, he seeks only damages.

In other cases, plaintiff simply cites general language about potential harm from indefinite stays. Those cases do not directly address the issue here. See Blue Cross and Blue Shield of Ala.

v. Unity Outpatient Surgery Ctr., Inc., 490 F.3d 718 (9th Cir. 2007) (court expresses concern about potential length of stay – "easily" as long as five or six years – but, because the district court failed to provide a reasoned decision for the stay, vacates and remands for a reasoned decision); United States v. Aerojet Rocketdyne Holdings, Inc., 381 F. Supp. 3d 1240, 1250 (E.D. Cal. 2019) (arbitrable claims should be stayed under Federal Arbitration Act, but court would proceed on separable non-arbitrable claims to avoid significant delay); Greer v. Dick's Sporting Goods, Inc., No. 2:15-cv-1063 KJM CKD, 2018 WL 372753 (E.D. Cal. Jan. 10, 2018) district court applies Landis standard to determine that parties should be able to proceed on claims unrelated to the subject of the appeal).

In the present case, plaintiff fails to show the delay involved in the appeal will likely be lengthy. In addition, he fails to show just what prejudice he may suffer from a delay. Parties successfully arguing that delay will be prejudicial due to fading memories have provided greater specificity regarding the potential for prejudice. See Greer, 2018 WL 372753, at *3 (plaintiff class members unlikely to be able to remember with specificity the length of time they were subjected to security checks, an important issue in the case). This court finds that plaintiff has failed to demonstrate he will face significant hardship if this case is stayed pending the resolution of the interlocutory appeal.

2. Hardship to Moving Party

Defendants argue that discovery in this case has been, and will be, burdensome and time consuming. As described above, these issues are just the sort of hardships for which the Landis analysis applies. The court finds this factor weighs in favor of a stay.

3. Orderly Course of Justice

This third and final factor also weighs in favor of granting a stay. If the Ninth Circuit rules that defendants are protected by qualified immunity, this case will be dismissed. In that event, if this case is not stayed, both parties will have spent time and resources unnecessarily. In addition, the court's limited resources may have been spent on issues that need not have been resolved. This court finds the equities weigh in favor of granting a stay.

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C. Conclusion

This court finds a stay of these proceedings appropriate on two bases. First, because defendants' qualified immunity defense applies to all plaintiff's remaining claims, the court lacks jurisdiction to conduct proceedings on those claims during the interlocutory appeal of the immunity issues. Second, even if this court retains jurisdiction over plaintiff's claims, a stay is appropriate under Landis.

Accordingly, IT IS HEREBY RECOMMENDED that defendants' motion to stay these proceedings until the Ninth Circuit renders a decision on defendants' interlocutory appeal (ECF No. 112) be granted.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, either party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: August 29, 2019

DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

DLB:9
DLB1/prisoner-civil rights/rico1402.stay fr2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

JORGE ANDRADE RICO,

CASE NO: **2:17-CV-01402-KJM-DB**

v.

CLARK E. DUCART, ET AL.,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 10/5/2021

Keith Holland
Clerk of Court

ENTERED: **October 5, 2021**

by: /s/ A. Coll
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE ANDRADE RICO,

Plaintiff,

v.

JEFFREY BEARD, et al.,

Defendants.

No. 2:17-cv-1402-KJM-DB-P

ORDER

Plaintiff, a prisoner proceeding pro se, brings this civil rights action under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by Eastern District of California local rules, and the matter is now back before this court as explained below.

Plaintiff initiated this action by filing a complaint in the Northern District of California on August 2, 2016, ECF No. 1, in which he alleged use of the Guard One security check system in the Security Housing Unit ("SHU") at Pelican Bay State Prison ("PBSP") violated his Eighth Amendment rights. On July 6, 2017, the assigned Northern District judge ordered the case transferred to this district because the Guard One system at issue implemented this court's order in *Coleman v. Brown*, No. 2:90-cv-520-KJM-DB (E.D. Cal.). *See* ECF No. 51.

On February 2, 2018, the undersigned issued an order relating this case and two others to *Coleman*. *See* ECF No. 60.

As a result, defendants' motion to dismiss is before the court. Defendants argue they are entitled to qualified immunity, in part because they were following the *Coleman* court order to implement the Guard One security checks. *See* Mot., ECF No. 68 at 6. In addition, defendants argue granting injunctive relief would violate principles of judicial comity, and plaintiff has failed to state a cognizable claim for an Eighth Amendment violation. *Id.* at 6–7. In their supplemental briefing, defendants also argue that, because plaintiff is no longer incarcerated in the SHU at PBSP, his claims for injunctive and declaratory relief are moot. ECF No. 77 at 1.

On August 2, 2018, the magistrate judge filed findings and recommendations, recommending the court grant defendants' motion, dismissing (1) the injunctive and declaratory relief claims as moot, and (2) the claims for damages against the "high-level supervisory defendants" on the basis of qualified immunity. Findings & Recommendations ("Findings"), ECF No. 86 at 7–14. The magistrate judge recommended denying the motion to dismiss with respect to the remaining claims for damages against the "appeals review defendants" and the "floor officer defendants," finding they are not entitled to qualified immunity. *Id.* at 18.

Plaintiff and defendants filed objections to the Findings, and responses to the other parties' objections. ECF Nos. 87–89 & 91. In light of the court's standing order encouraging argument by new attorneys, plaintiff filed a request for oral argument on his objections, to be argued by a new attorney. ECF No. 90; *see also* Standing Order ("If a written request for oral argument is filed before a hearing, stating an attorney of four or fewer years out of law school will argue the oral argument, then the court will hold the hearing."). The court heard oral argument on the parties' objections on October 19, 2018. ECF No. 94.

On January 16, 2019, defendants filed a letter regarding a new Supreme Court case on qualified immunity, and plaintiff responded. ECF Nos. 96, 97 (citing *City of Escondido, California, et al. v. Emmons*, 139 S. Ct. 500, 2019 WL 113027, at *3 (Jan. 7, 2019) (per curiam)). Defendants filed a second letter soon after, regarding a new Ninth Circuit case on qualified

immunity, and plaintiff responded. ECF Nos. 98, 100 (citing *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. Feb. 1, 2019)).

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file, considered the parties' briefing and arguments, and good cause appearing, the court finds the findings and recommendations with respect to qualified immunity to be supported by the record and by the proper analysis, with the clarification below. The court also agrees with the magistrate judge that plaintiff's claims for injunctive and declaratory relief are moot, without adopting the magistrate judge's reasoning regarding the distinction between the Administrative Segregation Unit ("ASU") at PBSP and the SHU at PBSP. Instead, as explained below, the court finds plaintiff has not met his burden of showing a reasonable expectation that he will return to ASU for non-punitive reasons.

I. QUALIFIED IMMUNITY

A. High-Level Supervisory Defendants

At oral argument, plaintiff's counsel clarified that plaintiff's claims against the "high-level supervisory defendants" do not arise from their implementation of the Guard One system, but from the Guard One system itself, which plaintiff argues is inherently unconstitutional even if implemented without human error. The court therefore accepts the magistrate judge's recommendation that the "high-level supervisory defendants," defendants Beard, Kernan, Stainer, Harrington and Allison, are entitled to qualified immunity because they were carrying out a facially valid court order in instituting the Guard One system. *See* Findings at 16–18; *see also Hines*, 914 F.3d at 1230–31 (state officials entitled to qualified immunity for exposing inmates to Valley Fever in part because officials reported to federal receiver charged with managing state prison system's response to Valley Fever); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979) (recognizing that government officers would be immune from civil rights liability for actions authorized by court order); *Kulas v. Valdez*, 159 F.3d 453, 456 (9th Cir. 1998) (prison doctor entitled to qualified immunity for forcibly administering drugs to inmate pursuant to facially valid court order).

B. Other Defendants

By contrast, plaintiff's claims against the "appeals review defendants," Ducart, Abernathy, Marulli, Cuske and Parry, and the "floor officer defendants," Nelson, Garcia, Escamilla and Shaver, arise out of those defendants' allegedly flawed implementation of the court order. *See* Findings at 18; Pl.'s Opp'n to Defs.' Mot. to Dismiss at 18 ("[T]he *Coleman* Order does not shield the Defendants from liability for their actions beyond the scope of the Order . . . . [Plaintiff] alleges that the checks were even louder due to the Defendants' actions beyond the scope of the Order, such as hitting the buttons with extra force and multiple times."). Because the appeals review defendants' and floor officer defendants' alleged actions go beyond the bounds of the court's order, the court adopts the magistrate judge's recommendation that these defendants are not entitled to qualified immunity, as supplemented below.

1. Qualified Immunity: Clearly Established Law

The court's conclusion turns on application of the second prong of the two-pronged test used in assessing whether qualified immunity applies. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Under the second prong, "the court [] decide[s] whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct"; if it was not, a defendant is entitled to qualified immunity. *Id.* (citing *Saucier*, 533 U.S. at 201).

The Supreme Court has assumed without deciding that the law as determined by a Circuit court may constitute clearly established law. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) ("[E]ven if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here.") (quoting *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1165, 1176 (2015)); *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *see also Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1221 & n.13 (9th Cir. 2015) (noting that in *Hope v. Pelzer*, 536 U.S. 730, 741–45 (2002), the Court looked to "binding circuit precedent" to determine clearly established law and has not yet "overruled *Hope* or called its exclusive reliance on circuit precedent into question").

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The Ninth Circuit makes clear it "first look[s] to binding precedent to determine whether a law was clearly established." *Ioane v. Hodges*, 903 F.3d 929, 937 (9th Cir. 2018) (citing *Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013)); *see Carrillo*, 798 F.3d at 1221 ("clearly established law" includes "controlling authority in [the defendants'] jurisdiction" (alteration in original) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). If no binding precedent "is on point, [the Ninth Circuit] may consider other decisional law." *Chappell*, 706 F.3d at 1056. Ultimately, "the prior precedent must be 'controlling'—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Sharp v. Cty. of Orange*, 871 F.3d 901, 911 (9th Cir. 2017) (citing *Wilson*, 526 U.S. at 617). That said, the Ninth Circuit has approved of the use of unpublished and district court decisions to inform qualified immunity analysis in conjunction with controlling authority. *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002) ("We have held that unpublished decisions of district courts may inform our qualified immunity analysis.").

i. Level of Specificity

Clearly established law must be defined with a "high 'degree of specificity,'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)), and this standard is "demanding," *id.* at 589. The "legal principle [at issue] must have a sufficiently clear foundation in then-existing precedent." *Id.* It "must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority," rather than merely "suggested by then-existing precedent." *Id.* at 589–90 (citations and internal quotation marks omitted).

While "a case directly on point" is not required "for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate," *Kisela*, 138 S. Ct. at 1152 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)), and must "'squarely govern[]' the specific facts at issue." *Id.* at 1153 (citing *Mullenix*, 136 S. Ct. at 309); *see also Pike v. Hester*, 891 F.3d 1131, 1141 (9th Cir. 2018) ("An exact factual match is not required . . . ."). "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Wesby*, 138 S. Ct. at 590

(quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Thus, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Mullenix*, 136 S. Ct. at 308) (emphasis and alteration in original).

"This requirement—that an official loses qualified immunity only for violating clearly established law—protects officials accused of violating 'extremely abstract rights.'" *Ziglar*, 137 S. Ct. at 1866 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). In one oft-quoted summation of these principles, the Court has said qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

ii. Notice/Fair Warning

Specificity is required to provide officials with notice of what conduct runs afoul of the law. "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Kisela*, 138 S. Ct. at 1152 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) ("'[T]he salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'") (quoting *Hope*, 536 U.S. at 741) (alterations in original).

Although "'general statements of the law are not inherently incapable of giving fair and clear warning to officers,' . . . . constitutional guidelines [that] seem inapplicable or too remote" will not suffice. *Kisela*, 138 S. Ct. at 1153 (quoting *White*, 137 S. Ct. at 552). Put another way, "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Id.* (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). Accordingly, "a court must ask whether it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar*, 137 S. Ct. at 1867 (quoting *Saucier*, 533 U.S. at 202).

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2. Discussion

Applying these principles here, by 2016 it was clearly established that forcing an inmate to live in an environment with excessive noise is a violation of the Eighth Amendment. *See* Findings at 15–16. The magistrate judge comes to the same conclusion, but cites *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998) and *Chappell,* 706 F.3d at 1070, for the proposition that "the law is clearly established that excessive noise causing sleep deprivation may violate the Eighth Amendment." Findings at 18. Though these two cases do not directly address sleep deprivation caused by noise. *See Keenan*, 83 F.3d at 1090–91 (addressing sleep deprivation caused by excess light and separate claim for excessive noise); *Chappell*, 706 F.3d at 1057–58 ("Chappell's claim is based on seven days of contraband watch, and he did not claim that he was sleep deprived."). Nonetheless, the court agrees that it was clearly established that both excess noise and excess sleep deprivation could violate the Eighth Amendment.

In *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998), the panel majority opined that "[p]ublic conceptions of decency inherent in the Eighth Amendment require that [inmates] be housed in an environment that, if not quiet, is at least reasonably free of excess noise." *Keenan*, 83 F.3d at 1090 (quoting *Toussaint v. McCarthy,* 597 F. Supp. 1388, 1397, 1410 (N.D. Cal. 1984)). And in *Jones v. Neven*, an unpublished decision, the Ninth Circuit vacated a finding that qualified immunity applied because "the Eighth Amendment rights [plaintiff] claims defendants violated," including the right to be free from "excess noise," were "clearly established." 399 F. App'x 203, 205 (9th Cir. 2010).[1]

It also was clearly established that causing an inmate excessive sleep deprivation is an Eighth Amendment violation. *Keenan v. Hall*, 83 F.3d at 1090 (constant illumination

[1] On appeal after remand in *Jones*, the Circuit ultimately found defendants were entitled to qualified immunity on plaintiff's conditions of confinement claims based on (1) deprivation of a mattress and (2) "constant lighting in his cell for a period of ninety-six hours." *Jones v. Neven*, 678 F. App'x 490, 493 (9th Cir. 2017), *cert. denied*, 137 S. Ct. 2279 (2017). The court did not address the question of qualified immunity with respect to plaintiff's claim of excessive noise. *See id.*

interfering with sleep, with no legitimate penological purpose, can be an Eighth Amendment violation); *Chappell,* 706 F.3d at 1070 (dissent observing, although majority did not reach question, "it was clearly established law that conditions having the mutually reinforcing effect of depriving a prisoner of a single basic need, such as sleep, may violate the Eighth Amendment."). District court decisions provide further support for this proposition. *Harris v. Sexton*, No. 1:18-cv-00080-DAD-SAB, 2018 WL 6338730, at *1 (E.D. Cal. Dec. 5, 2018) ("[T]he Ninth Circuit has concluded that conditions of confinement involving excessive noise that result in sleep deprivation for inmates may violate the Eighth Amendment.") (citing *Jones*, 399 F. App'x at 205; *Keenan*, 83 F.3d at 1090); *Matthews v. Holland*, No. 114CV01959SKOPC, 2017 WL 1093847, at *8 (E.D. Cal. Mar. 23, 2017) ("It has been clearly established in the Ninth Circuit, since the 1990s, that inmates are entitled to conditions of confinement which do not result in chronic, long term sleep deprivation.") (citing *Keenan*, 83 F.3d at 1090–91) (other citations omitted); *Williams v. Anderson*, No. 1:10-CV-01250-SAB, 2015 WL 1044629, at *10 (E.D. Cal. Mar. 10, 2015) (officer not entitled to qualified immunity because, "[v]iewed in Plaintiff's favor, the Court finds that it would have been clear to a reasonable officer that subjecting Plaintiff to excessive noise causing sleep deprivation for several months would pose a substantial risk of serious harm.").

Given the clearly established law regarding excessive noise and excessive sleep deprivation, a reasonable officer would have known it was unlawful to create a racket by running "loudly up and down the metal stairs" and hitting "the Guard One buttons with more force than necessary," "multiple times, making extra unnecessary noise" once an hour during the night, thereby causing inmates severe sleep deprivation. *See* First Am. Compl., ECF No. 38, ¶¶ 35–38. For the same reasons, a reasonable officer would have known it was unconstitutional to ignore an inmate's complaint detailing such allegations. Therefore, the appeals review defendants and the floor level defendants are not entitled to qualified immunity.

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II. MOOTNESS

Because plaintiff is no longer in the SHU, and therefore no longer subject to the Guard One checks, the magistrate judge found plaintiff's claims for injunctive and declaratory relief ("the claims") moot unless they fall under one of two exceptions to the mootness doctrine. Findings at 7–8. The magistrate judge found that neither of the exceptions applied, and the court adopts this finding, as explained here.

First, the voluntary cessation exception to mootness does not apply, because defendants did not unilaterally cease their illegal activity in response to the instant litigation when they released plaintiff from the SHU after his SHU term expired. *See* Findings at 12; *see also Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("[D]efendant's voluntary cessation must have arisen *because* of the litigation.") (emphasis in original) (citing *Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 816 (9th Cir. 1995)).

The second mootness exception applies if "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." Findings at 8 (quoting *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018)). This is often referred to as the "capable of repetition yet evading review" exception. *See, e.g., Pub. Utilities Comm'n of State of Cal.*, 100 F.3d at 1459. The magistrate judge concludes plaintiff has not met his burden to establish the second prong of this test is satisfied, and the court agrees. *See* Findings at 8–11.

However, the magistrate judge also construes plaintiff's complaint as "limited to his challenge to the use of Guard One in the SHU at PBSP"; therefore, she says the actions challenged are capable of repetition only if there is a reasonable expectation that plaintiff will be incarcerated in that SHU again. *Id.* at 9. Plaintiff objects, explaining the Guard One system is being implemented in both the ASU and the SHU at PBSP, and cites declarations from PBSP prisoners who complain of the same sleep deprivation caused by use of Guard One in the ASU. Pl.'s Objs. at 7–9 (citing Pl.'s Mootness Br. Ex. B–Ex. D (ECF Nos. 84-2–84-4)) (other citations omitted). The court need not reach the question of whether the conditions in the ASU and the

conditions in the SHU are sufficiently factually distinct to render plaintiff's potential future incarceration in the ASU irrelevant for mootness purposes. *See* Findings at 9.

Assuming without deciding that the ASU conditions as relevant here are equivalent to those in the SHU, the court finds plaintiff has not met his burden of showing a reasonable expectation he will be reincarcerated in either the SHU or the ASU for non-punitive reasons. *See Sanchez-Gomez*, 138 S. Ct. at 1541. Because the "capable of repetition" prong cannot be satisfied by a reasonable expectation that plaintiff will commit future misconduct, the exception cannot be satisfied here by plaintiff's mere expectation that he will be reincarcerated in the SHU or in the ASU for punitive reasons. *See* Findings at 10–11; *see also Sanchez-Gomez*, 138 S. Ct. at 1541 ("cable of repetition yet evading review" exception not satisfied by "possibility that a party will be prosecuted for violating valid criminal laws") (citation omitted).

A. Returning to the SHU

Because the SHU is used to punish inmates who have committed misconduct, plaintiff is not able to show that he is likely to return there for a non-punitive reason. In fact, as defendants point out, Rico "does not dispute that he 'holds the keys' to remaining free from the Guard One checks in the SHU because SHU placement is tied directly to Rico's behavior." Defs.' Response to Pl.'s Objs. at 9 (citing Cal. Code Regs., tit. 15 § 3341.3 ("An inmate whose conduct endangers the safety of others or the security of the institution shall be housed in a [SHU] to complete an administrative SHU term or for a determinate period of time, if found guilty for serious misconduct pursuant to section 3341.9(e).")). Moreover, defendants offer evidence to show plaintiff has only ever been placed in the SHU for punitive reasons in the past. *Id.* (citing ECF No. 83-1 at 2).

Therefore, the magistrate judge is correct that plaintiff cannot meet his burden to show he is likely to return to the SHU for non-punitive reasons.

B. Returning to the ASU

Plaintiff also does not meet his burden to show there is a reasonable possibility he will return to the ASU for non-punitive reasons. To make this showing, plaintiff relies on: (1) his unsupported representation that he "has already been released from and returned to solitary

confinement during the course of this lawsuit," Pl.'s Objs. at 13 (emphasis omitted), and (2) case law in which courts generally have observed that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration," *id.* at 14 (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983)). The court rejects both arguments.

As to the first point, plaintiff does not clarify whether he has been placed in any form of solitary confinement for non-punitive reasons. *See id.* at 13. Defendants argue, with support, that plaintiff has only ever been housed in the ASU for punitive reasons. Defs.', Response to Pl.'s Objs., ECF No. 91 at 12 ("[Plaintiff] has never been placed in ASU for any of [the governing regulations' list of] non-punitive reasons."). In fact, "the only two times he was housed in ASU were pending the adjudication of his Rules Violation Reports . . . ." *Id.* (citing Reynolds Decl., ECF No 83-1, ¶ 2). Plaintiff does not dispute or rebut defendants' representations and so has not met his burden of showing he will likely be placed in the ASU in the future for non-punitive reasons.

As to plaintiff's second point, the cases he cites do not establish that all prisoners are repeatedly held in administrative segregation for non-punitive reasons throughout their sentences. The Court in *Hewitt* at most observes quite generally that administrative segregation is "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), *receded from on other grounds*, *Sandin v. Conner*, 515 U.S. 472, 472 (1995). The Ninth Circuit similarly has noted only broadly that placement in the SHU was "within the range of confinement to be normally expected" by prison inmates and therefore plaintiff "had no protected liberty interest in being free from confinement in the SHU pending his disciplinary hearing." *Resnick v. Hayes,* 213 F.3d 443, 448 (9th Cir. 2000). Because *Resnick* addresses detention in special housing for punitive reasons only, it does not support an argument that plaintiff is reasonably likely to return to the ASU or SHU for non-punitive reasons. *See Sanchez-Gomez*, 138 S. Ct. at 1541. Plaintiff has identified no authority supporting his argument that he has a reasonable expectation of returning to ASU in the future.

For the foregoing reasons, the court finds plaintiff has not met his burden of showing a reasonable expectation of returning to the SHU or the ASU for non-punitive reasons, and therefore his claims for injunctive and declaratory relief are moot.

Accordingly, IT IS HEREBY ORDERED:

1. The findings and recommendations filed August 2, 2018, are ADOPTED to the extent they are consistent with the explanations above;
2. Plaintiff's claims for injunctive and declaratory relief are DISMISSED as moot;
3. Plaintiff's claims against defendants Beard, Kernan, Stainer, Harrington and Allison are DISMISSED based on qualified immunity;
4. The case will proceed on plaintiff's claims for damages against the appeals review defendants (Ducart, Marulli, Abernathy, Cuske and Parry) and the floor officer defendants (Nelson, Garcia, Shaver and Escamilla); and
5. The case is referred back to the magistrate judge for further proceedings in light of this order and as provided by the Local Rules.

DATED: March 4, 2019.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE ANDRADE RICO,

Plaintiff,

v.

JEFFREY BEARD, et al.,

Defendants.

No. 2:17-cv-1402 KJM DB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding through counsel with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges use of the Guard One security check system in the Security Housing Unit ("SHU") at Pelican Bay State Prison ("PBSP") violated his Eighth Amendment rights. Before the court is defendants' motion to dismiss. For the reasons set forth below, the court recommends defendants' motion be granted in part and denied in part.

BACKGROUND

I. Allegations of the Second Amended Complaint

Plaintiff is an inmate at PBSP. He was incarcerated in the Administrative Housing Unit ("ASU") at PBSP from May 20, 2014 until October 2014 and then in the SHU from October 2014 until August 24, 2016. (ECF No. 38, ¶ 7.)

Plaintiff states that PBSP instituted the Guard One security system in the SHU on August 3, 2015. (Id. ¶ 28.) The Guard One system was authorized by defendants Beard, Kernan,

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Earnest Harris, Plaintiff, v. Sexton, at al., Defendants.	No. 1:18-cv-00080 KJM-DB P
Ivan Lee Matthews, Plaintiff, v. Holland, et al., Defendants.	No. 1:14-cv-01959-KJM-DB

Jorge Andrade Rico, Plaintiff, v. Beard, et al., Defendants.	No. 2:17-cv-01402-KJM-DB
Maher Conrad Suarez, Plaintiff, v. Beard, et al., Defendants.	No. 2:18-cv-00340-KJM-DB
Jasper F. Wilson, Plaintiff, v. Beard, et al., Defendants.	No. 1:15-cv-01424-KJM-DB
Christopher Lipsey, Plaintiff, v. Dr. Norum et al., Defendants.	No. 2:18-cv-00362 KJM DB P

Jorge Andrade Rico, Plaintiff, v. Clarke E. Ducart, et al., Defendants.	No. 2:19-cv-01989 KJM DB P ORDER

The plaintiffs in the cases captioned above all are state prisoners. Each filed a civil rights action seeking relief under 42 U.S.C. § 1983. Each plaintiff challenges the operation of the Guard One Security Check system implemented in specific units in California's prisons as a suicide prevention measure. *See Coleman v. Newsom, et al.*, 2:90-cv-0520 KJM DB P (E.D. Cal.) (hereafter *Coleman*), ECF No. 5271. Each claims defendants' use of the Guard One system has caused him to suffer sleep deprivation in violation of his rights to be free from cruel and unusual punishment under the Eighth Amendment. Each plaintiff seeks money damages and injunctive relief in the form of orders requiring correctional staff to stop making loud noises when doing Guard One checks.

The defendants moved to stay these proceedings pending the resolution of an appeal in one of these cases, *Rico v. Beard*, Case No. 2:17-cv-1402 KJM DB (E.D. Cal.) (*Rico*). On November 20, 2020, the United States Court of Appeals for the Ninth Circuit issued a decision in *Rico*, with one judge concurring in part and dissenting in part, holding defendants were entitled to qualified immunity for their implementation of suicide prevention welfare checks and remanding the case for entry of an order of dismissal granting qualified immunity as to all remaining defendants in that case. *Rico v. Ducart*, 980 F.3d 1292 (9th Cir. 2020).[1] On January 8, 2021, the plaintiff-

[1] On March 5, 2019, this court dismissed defendant Beard and four other defendants. Order (March 5, 2019), ECF No. 102. On appeal, the first named defendant was Clark E. Ducart and the case was styled *Rico v. Ducart*. *See generally Rico v. Ducart*, No. 19-15541 (9th Cir.). This case is different from the other case of *Rico v. Ducart*, No. 19-cv-1989, captioned above and cited in this order.

appellee in *Rico* petitioned the Ninth Circuit for rehearing en banc. By an order filed in each case on March 31, 2021, this court stayed the proceedings in each of the actions above pending the outcome of the plaintiff-appellee's petition for rehearing en banc in *Rico*. In each order, the court authorized any party to "file, as appropriate, a motion to reopen this action, to dismiss this action, or to extend the stay within thirty days of the resolution of motion for rehearing. . . ." *See, e.g., Harris v. Sexton, et al.*, Case No. 1:18-cv-00080 (E.D. Cal.) at ECF No. 70. On April 28, 2021, the Ninth Circuit denied the petition for rehearing en banc and on May 6, 2021, it issued the court's mandate, making the panel's decision final. *Rico v. Ducart*, No. 19-15541, Dkt. No. 55.

Lower courts are bound to execute the terms of the Ninth Circuit's mandate. In other words, the district court must follow the appellate ruling. *See United States v. Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008). The rule of mandate is jurisdictional and "limit[s] the district court's authority on remand." *United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007). While there is some flexibility in following the mandate, *United States v. Kellington*, 217 F.3d 1084, 1095 n.12 (9th Cir. 2000), that flexibility does not include acting contrary to terms expressly mandated by the Ninth Circuit's decision.

Since the mandate issued, the parties in the above cases have taken various actions, described below, followed by a discussion of this court's resolution.

On April 22, 2021, the plaintiff in *Matthews v. Holland, et al.*, Case No. 1:14-cv-01959 (E.D. Cal.) moved to reopen that case. ECF No. 73. In the motion, plaintiff sought clarification as to whether *Rico* was still pending on appeal and represented that he was not opposed to a stay of these pending resolution of the motion for rehearing en banc in *Rico*. On May 20, 2021, the court directed service of relevant documents on plaintiff and service was accomplished. Minute Order, ECF No. 87. Plaintiff was granted until July 30, 2021 to file supplement documents concerning his motion to reopen. *Id.* Neither party has filed anything further. On August 20, 2021, the court submitted plaintiff's motion without oral arguments. ECF No. 88.

On May 7, 2021, defendants in *Rico v. Beard, et al.*, Case No. 2:17-cv-1402 (E.D. Cal.) moved to lift the stay and dismiss the case. ECF No. 125. Plaintiff does not oppose. ECF No. 128. The court submitted the matter without oral argument. ECF No. 129.

On August 17, 2021, defendants in *Wilson v. Beard et al.*, Case No. 1:15-cv-01424 (E.D. Cal.) moved to dismiss that case. ECF No. 45. The motion is unopposed.

On May 11, 2021, defendants in *Suarez v. Beard, et al.*, Case No. 2:18-cv-00340 (E.D. Cal.) moved to lift the stay and dismiss the action on grounds of qualified immunity. ECF No. 114. Plaintiff does not oppose the motion. ECF No. 115. The court submitted the matter without oral arguments. ECF No. 116.

The court lifts the stay in the four cases reviewed above and dismisses each plaintiff's action against defendants on qualified immunity grounds given the Ninth Circuit's decision. These cases are closed.

On September 9, 2021, the defendants in *Harris v. Sexton, et al.*, Case No. 1:18-cv-00080 (E.D. Cal) filed an "administrative motion to lift stay." ECF No. 73. Plaintiff has not responded to defendants' motion. Good cause appearing, this motion is construed as a motion to reopen this action. Defendants' motion was not filed within thirty days of the Circuit's denial of the rehearing petition. Nonetheless, the court acknowledges an ambiguity in the March 31, 2021 order as to whether the thirty-day deadline applies to all possible motions or only to a motion to extend the stay; the court grants this motion to lift the stay and reopen. Within thirty days from the date of this order defendants shall file, as appropriate, a dispositive motion or a motion for a new scheduling order. Any motion filed by defendants shall be briefed in accordance with the provisions of Local Rule 230(m).

On May 7, 2021, the defendants in *Lipsey v. Norum et al.*, Case No. 2:18-cv-00362 (E.D. Cal.) moved to lift the stay and dismiss the action. ECF No. 212. Plaintiff opposed. ECF No. 214. Defendants replied. ECF No. 215. On May 7, 2021, defendants in *Rico v. Ducart et al.*, Case No. 2:19-cv-01989 (E.D. Cal.) moved to lift the stay and dismiss that action. ECF No. 42. Plaintiff opposed. ECF No. 44. Defendants replied. ECF No. 45. The court submitted the matter without oral argument. ECF No. 46.

On appeal in *Rico*, the Ninth Circuit panel relied on the fact that defendants were completing Guard One checks required by an order of this court. *See Rico*, 980 F.3d at 1302. Relatedly, this court has allowed Christopher Lipsey to intervene in the *Coleman* case to litigate

his claim "that the Guard one suicide prevention monitoring system 'causes sleep deprivation in violation of the Eighth Amendment to the United States Constitution.'" Order (June 3, 2021), ECF No. 7191, at 2 (quoting Order (February 27, 2020) at 3, ECF No. 6487). After consideration of the two actions in which plaintiffs have filed opposition to defendants' motions and the *Coleman* pleadings discussed above, and good cause appearing, *Lipsey v. Norum*, Case No. 2:18-cv-00362 (E.D. Cal.) and *Rico v. Ducart*, Case No. 2:19-cv-01989 (E.D. Cal.), will remain stayed pending this court's decision on the claim in intervention in *Coleman*. Within thirty days from the date of this order defendants shall file, as appropriate, a dispositive motion or seek a new scheduling order. Any motion filed by defendants shall be briefed in accordance with the provisions of Local Rule 230(m).

For the reasons explained above, IT IS HEREBY ORDERED that:

1. The unopposed motions to lift the stays and dismiss the cases of *Matthews v. Holland et al.*, Case No. 1:14-cv-01959 (E.D. Cal.), ECF No. 86; *Rico v. Beard et al.*, Case No. 2:17-cv-1402 (E.D. Cal.), ECF No. 125; *Wilson v. Beard et al.*; Case No. 1:15-cv-01424 (E.D. Cal.), ECF No. 45; and *Suarez v. Beard, et al.*, Case No. 2:18-cv-00340 (E.D. Cal.), ECF No. 114, are **granted** on the grounds of qualified immunity. The Clerk of the Court is directed to enter judgment in favor of defendants in each case. These four cases are CLOSED.
2. The unopposed motion to lift the stay at ECF No. 73 in *Harris v. Sexton et al.*, Case No. 1:18-cv-00080 (E.D. Cal), is **granted**. Within thirty days from the date of this order defendants shall file, as appropriate, a dispositive motion or a motion for a new scheduling order. Any motion filed by defendants shall be briefed in accordance with the provisions of Local Rule 230(m).
3. Defendants' May 7, 2021 motions to lift stay and dismiss in the cases of *Lipsey v. Norum, et al.*, Case No. 2:18-cv-00362 (E.D. Cal.), ECF No. 212, and *Rico v. Ducart, et al.*, Case No. 2:19-cv-01989 (E.D. Cal), ECF No. 42, are denied without prejudice. These actions shall remain stayed pending resolution of plaintiff-intervenor Christopher Lipsey's claim in *Coleman v. Newsom*, Case No. 90-0520

KJM DB (E.D. Cal.). Counsel for plaintiffs in these two cases shall inform defendants in these cases within fourteen days of resolution of Lipsey's claim in intervention in *Coleman* and, thereafter, defendants may file, within thirty days of such notification, a dispositive motion or a motion for a new scheduling order.

DATED: October 4, 2021.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

JORGE ANDRADE RICO, Plaintiff, **v.** **JEFFREY BEARD, et al.,** Defendants.	Case No. 2:17-cv-1402 KJM DB P **DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS** Judge: Hon. Kimberly J. Mueller Action Filed: August 2, 2016

APPENDIX C

Additional material from this filing is available in the Clerk's Office.