

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMIRO BUSTAMANTE

Petitioner-Appellant,

v.

MICHAEL VALENZUELA, et al.,

Respondents-Appellees.

C.A. No. 10-15714

D.Ct. No. CV 09-8192-PCT-ROS

**RESPONDENTS VALENZUELA
AND ANCHONDO'S JOINT
MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION
BASED ON MOOTNESS**

Respondent Michael Valenzuela, by and through undersigned counsel, Amanda Sampson and Kimberly Van Amburg, and Respondent Vincente Anchondo, by and through undersigned counsel, Karla Hotis Delord, and pursuant to Ninth Circuit Rule 27-9.2, hereby move to dismiss Petitioner-Appellant's ("Petitioner's") appeal on the ground that it is moot. This Court lacks jurisdiction over Petitioner's appeal from the denial of his habeas petition challenging the custodial length of his tribal sentence because Petitioner completed that sentence and was released from imprisonment on September 18, 2010.

///

///

///

///

Under Ninth Circuit Rule 27-11, the filing of this motion stays the briefing schedule pending this Court's resolution of the motion.

Respectfully submitted this 8th day of October, 2010.

DENNIS K. BURKE
United States Attorney
District of Arizona

/s/ Karla Hotis Delord
KARLA HOTIS DELORD
Assistant U.S. Attorney
Attorney for Respondent-Appellee Anchondo

/s/ Amanda Sampson
AMANDA SAMPSON
Assistant Attorney General, Pascua Yaqui Tribe
KIMBERLY VAN AMBURG
Assistant Attorney General, Pascua Yaqui Tribe
Attorneys for Respondent-Appellee Valenzuela

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background.

On March 18, 2009, the Pascua Yaqui Tribe filed a four-count complaint against Petitioner in Pascua Yaqui Tribal Court (“tribal court”), charging him with (1) Domestic Violence, Burglary (Count 1); (2) Domestic Violence, Theft (Count 2); (3) Domestic Violence, Criminal Trespass (Count 3); and (4) Disobedience to a Lawful Court Order (Count 4). (CR 24-1; ER 76-77.)¹ At Petitioner’s arraignment that same day, Petitioner pled guilty to Counts 1, 2, and 4 of the complaint. (CR 24-1, 24-2; ER 80-81, 100-102.) The remaining count was set for trial, but was later dismissed at sentencing. (CR 24-1, 24-2; ER 81-82, 90, 116.)

At Petitioner’s sentencing hearing on April 22, 2009, the tribal court sentenced Petitioner to nine months’ imprisonment on each count. (CR 24-1, 24-2; ER 90, 115.) The tribal court ordered the sentences on Counts 1 and 4 to run concurrently, and the sentence on Count 2 to run consecutive to the sentence imposed on Count 1, resulting in a total sentence of 18 months’ imprisonment, with a release date set for September 18, 2010. (CR 24-1, 24-2; ER 90, 115.)

¹“CR” refers to the Clerk’s Record, followed by the docket number. The abbreviation “ER” refers to the Excerpts of Record, followed by the relevant page number(s). The government has included a document evidencing Petitioner’s release from custody in an Appendix attached to this motion.

Petitioner filed an appeal in the Pascua Yaqui Tribal Appellate Court, which the appellate court denied. (CR 24-4; ER 122-49.) Thereafter, Petitioner filed a petition for writ of habeas corpus in the federal district court of Arizona pursuant to 28 U.S.C. § 2241, arguing that his cumulative 18-month sentence violates the Indian Civil Rights Act (“ICRA”), 25 U.S.C. § 1302(7),² because it exceeds one year of imprisonment in connection with a single criminal transaction.³ (CR 1; ER 26-33.) On April 1, 2010, the district court denied Petitioner’s habeas petition, finding that Petitioner committed multiple criminal violations and that the ICRA allows tribes to impose a one-year term of imprisonment for each criminal violation; thus, Petitioner’s sentence totaling 18 months did not violate the ICRA. (CR #47; ER 25.)

Petitioner filed a timely notice of appeal on April 2, 2010. (CR 49; ER 186.) On September 10, 2010, Petitioner filed his opening brief in this matter. In that brief, Petitioner noted that his case may become moot due to his scheduled release from

²Under 25 U.S.C. § 1302(7), an Indian tribe is prohibited, in relevant part, from imposing “for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both.”

³In his habeas petition, Petitioner named Vincente Anchondo, the Supervisory Correctional Specialist for the Bureau of Indian Affairs, District III, as a respondent. (CR 1.) At the time Petitioner filed his habeas petition and this appeal from the denial of that petition, Petitioner was housed at the Coconino County Detention Facility, in Flagstaff, Arizona, for which Respondent Anchondo had supervisory authority.

imprisonment on September 18, 2010. (Op. Br. at 5.) On September 18, 2010, Petitioner was, in fact, released from custody. (Appendix.)

II. Petitioner's Appeal Should Be Dismissed As Moot.

This case is moot because Petitioner has finished serving his sentence in this case and there are no collateral consequences beyond his now-concluded sentence. Even if Petitioner were to prevail in his challenge to the length of his sentence, no relief would be available to him.

“Article III, Section 2 of the United States Constitution establishes the scope of federal court jurisdiction, which includes ‘all Cases . . . arising under this Constitution . . . [and] Controversies to which the United States shall be a Party’” *Burnett v. Lampert*, 432 F.3d 996, 999 (9th Cir. 2005.) This case-or-controversy requirement demands that the parties continue to have a personal stake in the outcome of the lawsuit throughout all stages of federal judicial proceedings. *United States v. Verdin*, 243 F.3d 1174, 1177 (9th Cir. 2001). “This means that, throughout the litigation, the plaintiff ‘must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). A case becomes moot at any stage of the proceeding when it no longer presents a case or controversy under Article III, Section

2. *Caswell v. Calderon*, 363 F.3d 832, 836 (9th Cir. 2004). “Mootness is jurisdictional.” *Burnett*, 432 F.3d at 999.

“‘[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.’” *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). Generally, a petition for habeas corpus becomes moot when “a prisoner completes his sentence before the court has addressed the merits of his petition.” *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001) (internal quotation marks omitted). Such is the case at bar. There is no jurisdiction for this appeal.

Petitioner acknowledged that his release could moot his appeal (Op. Br. at 5), and he did not contend that any exceptions to mootness arguably apply. In fact, they do not.

A petition will not become moot by a petitioner’s release where the subject of the petitioner’s challenge carries “collateral consequences” beyond the now-ended sentence. *Spencer*, 523 U.S. at 7 (holding that an incarcerated convict’s challenge to the validity of his conviction always satisfies the case-or-controversy requirement because the incarceration constitutes a concrete injury, caused by the conviction, but that once a convict’s sentence has expired, “some concrete and continuing injury other than the now-ended incarceration or parole — some ‘collateral consequence’

of the conviction — must exist if the suit is to be maintained”). However, this Court has been unwilling to presume collateral consequences where a petitioner challenges only the length of his sentence, as Petitioner does. *See e.g., Abdala v. INS*, 488 F.3d 1061, 1065 (9th Cir. 2007) (finding that alien’s deportation six weeks after petitioning for writ of habeas corpus did not give rise to collateral consequences, thereby rendering his habeas petition moot where the petition challenged only the length of the alien’s pre-deportation INS detention); *Caswell*, 363 F.3d at 836 (dismissing petition under 28 U.S.C. § 2254 as moot after examining petitioner’s particularized assertion of collateral consequences).

Here, Petitioner only alleges that his cumulative 18-month sentence violates § 1302(7), because it exceeds one year in connection with a “single criminal transaction.” Petitioner has now completed his 18-month sentence. (Appendix.) The tribal court never imposed any type of supervised release or probation upon Petitioner when it sentenced him; therefore, neither the conviction nor sentence have any collateral consequences. (CR 24-1, CR 24-2; ER 90, 115.)

Nor does Petitioner’s appeal fall within the rare mootness exception that applies to cases that are “capable of repetition, yet evading review.” *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). In the absence of a class action, the “capable of repetition, yet evading review” exception applies only in “exceptional situations,”

where the following two circumstances are simultaneously present: “(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 would be subjected to the same action again.” *Spencer*, 523 U.S. at 17 (internal quotation marks, alterations, and end citations omitted); *accord* *Murphy*, 455 U.S. at 482. The tribal sentencing issue raised by Petitioner will not evade appellate review. Indeed, the identical issue is currently pending before this Court in *Miranda v. Braatz, et al.*, C.A. Nos. 10-15167, 10-15308 (consolidated).⁴ The petitioner in *Miranda* was released pending appeal, and has time remaining on her sentence to serve should the government prevail on appeal. Thus, this Court can address the same legal issue in *Miranda*, without mootness concerns.⁵

///

///

⁴ On April 4, 2010, this Court denied Petitioner’s motion to stay proceedings in this case while *Miranda* was decided, and ordered that the two cases be calendared before the same panel deciding the merits of the case. *Bustamante*, C.A. No. 10-15714, CR 4.

⁵ The government would also note that on July 29, 2010, President Obama signed into law the Tribal Law and Order Act of 2010. Pub. L. No. 111-211, 124 Stat. 2261. This Act defines the term “offense” as “a violation of a criminal law.” *See* Tribal Law and Order Act, Title VII, § 304(a)(1)(e). Thus, it is questionable whether Petitioner’s appellate issue will recur.

III. Conclusion.

Because Petitioner is only challenging the length of his confinement and has been released from custody, his appeal is moot and this Court is without jurisdiction to consider it. *Burnett*, 432 F.3d at 999 (affirming district court's dismissal of petitioner's habeas petition as moot). For the foregoing reasons, this Court should dismiss Petitioner's appeal.

Respectfully submitted this 8th day of October, 2010.

DENNIS K. BURKE
United States Attorney
District of Arizona

/s/ Karla Hotis Delord
KARLA HOTIS DELORD
Assistant U.S. Attorney
Attorney for Respondent-Appellee Anchondo

/s/ Amanda Sampson
AMANDA SAMPSON
Assistant Attorney General, Pascua Yaqui Tribe
KIMBERLY VAN AMBURG
Assistant Attorney General, Pascua Yaqui Tribe
Attorneys for Respondent-Appellee Valenzuela

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Karla Hotis Delord

Karla Hotis Delord
Assistant U.S. Attorney

Appendix

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
Plaintiff,
vs.
BUSTAMANTE, RAMIRO
D.O.B.: 11/14/68
Defendant

NO. CR-09-159
ORDER OF RELEASE

The defendant, RAMIRO BUSTAMANTE has served the time imposed and has
satisfied the judgment of the Court. The defendant is to be released SEPTEMBER 18, 2010
at 8:00 A .m..

SO ORDERED THIS 16TH DAY OF SEPTEMBER, 2010.


JUDGE, PASCUA YAQUI TRIBAL COURT

Date: 09/16/10
Faxed to COCONINO
By RENE GARCIA at 4:15P .m.
(520) 879-6276
CC: PYT DETENTION

SEP-20-2010 10:35 From: INTRK 928225236 10:915208195510 P.272
 User: MORMSBY Cocoonino County Detention Facility 09/20/2010 11:06:07

Inmate Release

Main Booking

RELEASE REPORT

NAME: BUSTAMANTE,RAMIRO OSUNA

Name ID 401113 Race I Sex M DOB 11/14/1968

Booking No. 200902633
 Booked 03/18/2009 23:02:45
 Released 09/18/2010 07:26:03
 Released By SALT,CRYSTAL L
 Released To RELEASED BY COURT

Reason TIME SERVED

Status INACTIVE

Notes RELEASE ON TIME SERVED OUT OF FLAGSTAFF JAIL ON
 09-18-10. ON BEHALF OF PASCUA YAQUI TRIBAL COURT.
 FOR HIS RELEASE DATE ON 09-18-10 @ 0800.

29-NEG# 376

Charg Desc	JDSstatus	BondAmt	SentDate	MaxRel	MinRel	Snt Yr	Snt Mth	Snt Day	Rprt Date
COURT REMAND/JAIL	TS	\$ 0.00				0	0	0	