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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DAMON KEITH GADDY,) NO. CV 11-08271 SS
12)
13) Petitioner,)
14)
15) v.) MEMORANDUM DECISION AND ORDER
16)
17) MIKE McDONALD, Warden,)
18)
19) Respondent.)
20)
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22)
23)
24)
25)
26)
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28)

17 I.
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19 INTRODUCTION

20 On September 19, 2011,¹ Damon Keith Gaddy ("Petitioner"), then a
21 California State prisoner proceeding pro se, constructively filed a
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23 ¹ Under the "mailbox rule," a pleading filed by a pro se prisoner
24 is deemed to be filed as of the date the prisoner delivered it to prison
25 authorities for mailing, not the date on which the pleading may have
26 been received by the court. See Houston v. Lack, 487 U.S. 266, 270, 108
27 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). Here, the Court has calculated
28 the filing date of the Petition pursuant to the mailbox rule because the
attached proof of service certifies that Petitioner delivered the
Petition to prison officials for mailing on September 19, 2011. (See
Petition at 63) (The Court refers to the pages of the Petition as if
they were consecutively paginated.).

1 Petition for Writ of Habeas Corpus by a Person in State Custody (the
2 "Petition") pursuant to 28 U.S.C. § 2254. On October 5, 2011, the Clerk
3 of Court issued a Notice of Reference to a United States Magistrate
4 Judge (the "Notice of Reference"). The Notice of Reference was mailed
5 to the High Desert State Prison, which was Petitioner's address of
6 record at the time. On October 12, 2011, Petitioner filed a Notice of
7 Change of Address informing the Court of his new mailing address at a
8 private residence in Chino Hills, California.

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10 On October 14, 2011, the Court issued an "Order To Show Cause Why
11 This Action Should Not Be Dismissed As Untimely" (the "Untimeliness
12 Order") because the Petition appeared to be untimely on its face. The
13 Untimeliness Order was mailed to Petitioner's new address at the private
14 residence in Chino Hills, California. Petitioner was required to file
15 a response by October 28, 2011 if he wished to contest the dismissal of
16 this action. (Untimeliness Order at 6). Petitioner failed to file a
17 response to the Untimeliness Order.

18
19 On October 17, 2011, the Court received the Notice of Reference
20 returned from Petitioner's original address at the High Desert State
21 Prison. Similarly, on October 20, 2011, the Court received the
22 Untimeliness Order returned from Petitioner's new address at the private
23 residence in Chino, Hills, California. Thus, on October 24, 2011, the
24 Court issued an Order To Show Cause Why This Action Should Not Be
25 Dismissed For Failure To Provide A Current Address (the "Address
26 Order"). The Address Order was mailed to Petitioner's new address at
27 the private residence in Chino Hills, California. Pursuant to Central
28 District Local Rule 41-6, Petitioner was required to provide the Court

1 with a current address by November 8, 2011. (Address Order at 2).
2 However, on October 31, 2011, the Court received the Address Order
3 returned from Petitioner's new address at the private residence in
4 Chino, Hills, California. As of today, Petitioner has failed to respond
5 to any of the Court's orders and has failed to provide a current
6 address.

7
8 Petitioner has consented to the jurisdiction of the undersigned
9 United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).² For the

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11 ² "Upon the consent of the parties," a magistrate judge "may
12 conduct any or all proceedings in a jury or nonjury civil matter and
13 order the entry of judgment in the case." 28 U.S.C. § 636(c)(1). Here,
14 Petitioner is the only "party" to the instant proceeding and has
15 consented to the jurisdiction of the undersigned United States
16 Magistrate Judge. (Petition at 61). Respondent has not yet been served
17 with the Petition and therefore is not a party to this proceeding. See,
18 e.g., Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135
19 (9th Cir. 2009) ("A federal court is without personal jurisdiction over
20 a defendant unless the defendant has been served in accordance with Fed.
21 R. Civ. P. 4." (internal quotation marks omitted)). Thus, all parties
22 have consented pursuant to 28 U.S.C. § 636(c)(1). See, e.g., Neals v.
23 Norwood, 59 F.3d 530, 532 (5th Cir. 1995) (holding that magistrate judge
24 had jurisdiction to dismiss prison inmate's action under 42 U.S.C. §
25 1983 as frivolous without consent of defendants because defendants had
26 not been served yet and therefore were not parties); United States v.
27 Real Property, 135 F.3d 1312, 1317 (9th Cir. 1998) (holding that
28 magistrate judge had jurisdiction to enter default judgment in an in rem
forfeiture action even though property owner had not consented to it
because 28 U.S.C. § 636(c)(1) only requires the consent of the "parties"
and the property owner, having failed to comply with the applicable
filing requirements, was not a "party"); see also Patrick Collins, Inc.
v. Doe, 2011 U.S. Dist. LEXIS 125671, at *4 n.1 (N.D. Cal. Oct. 31,
2011) ("Here, Plaintiff has consented to magistrate jurisdiction and the
Doe Defendants have not yet been served. Therefore, the Court finds that
it has jurisdiction under 28 U.S.C. § 636(c) to decide the issues raised
in the instant motion(s)."); Third World Media, LLC v. Doe, 2011 WL
4344160, at *3 (N.D. Cal. Sept. 15, 2011) ("The court does not require
the consent of the defendants to dismiss an action when the defendants
have not been served and therefore are not parties under 28 U.S.C. §
636(c)."); Kukiela v. LMA Prof'l Recovery Group, 2011 U.S. Dist. LEXIS
85417, at *1 n.1 (D. Ariz. Aug. 1, 2011) ("Plaintiff consented to

1 reasons discussed below, the Court DISMISSES THIS ACTION WITH PREJUDICE
2 pursuant to Federal Rule of Civil Procedure 41(b) for failure to
3 prosecute and failure to comply with Court orders.

4 5 II.

6 DISCUSSION

7
8 Federal Rule of Civil Procedure 41(b) grants district courts the
9 authority to sua sponte dismiss actions for failure to prosecute or for
10 failure to comply with court orders. See Link v. Wabash R.R., 370 U.S.
11 626, 629-31, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) ("The power to
12 invoke this sanction is necessary in order to prevent undue delays in
13 the disposition of pending cases and to avoid congestion in the
14 calendars of the District Courts."). Dismissal, however, is a harsh
15 penalty and is to be imposed only in extreme circumstances. See
16 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

17
18 In considering whether to dismiss an action for failure to
19 prosecute, the Court must weigh five factors: "(1) the public's interest
20

21 proceed before a United States Magistrate Judge for all proceedings in
22 this case, including entry of final judgment, pursuant to 28 U.S.C.
23 §636(c)(1). (Doc. 7.) Because Defendant did not appear and establish its
24 standing as a party in this action, the Magistrate Judge has
25 jurisdiction to enter the requested default judgment."); Quigley v.
26 Geithner, 2010 WL 3613901, at *1 (D. Idaho Sept. 8, 2010) ("Plaintiff,
27 the only party appearing in this case, has consented to the jurisdiction
28 of a United States Magistrate Judge to enter final orders in this
case."); Ornelas v. De Frantz, 2000 WL 973684, at *2 n.2 (N.D. Cal. June
29, 2000) ("The court does not require the consent of defendants in
order to dismiss this action because defendants have not been served,
and, as a result, are not parties under the meaning of 28 U.S.C. §
636(c).").

1 in expeditious resolution of litigation; (2) the court's need to manage
2 its docket; (3) the risk of prejudice to defendants/respondents; (4) the
3 availability of less drastic alternatives; and (5) the public policy
4 favoring disposition of cases on their merits." Pagtalunan v. Galaza,
5 291 F.3d 639, 642 (9th Cir. 2002).

6
7 **A. The Five Factors Support Dismissal**

8
9 **1. Expeditious Resolution And The Court's Need To Manage Its**
10 **Docket**

11
12 In the instant action, the first two factors—the public's interest
13 in expeditious resolution of litigation and the Court's need to manage
14 its docket—favor dismissal. The Court mailed the Notice of Reference,
15 the Untimeliness Order, and the Address Order to Petitioner's current
16 address of record. However, all of these documents were returned to the
17 Court unopened. Petitioner's failure to provide the Court with a
18 current address hinders the Court's ability to move this case toward
19 disposition and indicates that Petitioner does not intend to litigate
20 this action diligently. As a result, the first two factors favor
21 dismissal here.

22
23 **2. The Risk Of Prejudice To Respondent**

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25 The third factor—prejudice to the Respondent—also favors dismissal.
26 The risk of prejudice to a respondent is related to the plaintiff's
27 reason for failure to prosecute an action. See Pagtalunan, 291 F.3d at
28

1 642 (citing Yourish v. California Amplifier, 191 F.3d 983, 991 (9th Cir.
2 1999)).

3
4 Here, Petitioner has failed to provide the Court with a current
5 address and has not provided any excuse for failing to do so. Where a
6 party offers a poor excuse for failing to comply with a court's order,
7 the prejudice to the opposing party is sufficient to favor dismissal.
8 See Yourish, 191 F.3d at 991-92. Accordingly, the prejudice to
9 Respondent favors dismissal.

10 11 **3. Less Drastic Alternatives**

12
13 The fourth factor—the availability of less drastic
14 alternatives—also favors dismissal. The Court has meaningfully
15 attempted to avoid outright dismissal of this action by granting
16 Petitioner numerous opportunities to respond. The Court initially
17 provided Petitioner fourteen days to respond to the Untimeliness Order.
18 (Untimeliness Order at 6). When that order was returned undelivered
19 from Petitioner's listed address, the Court provided Petitioner fifteen
20 days to respond to the Address Order. (Address Order at 2). Once
21 again, the Court's order was returned undelivered. Central District
22 Local Rule 41-6 allows the Court to dismiss an action with or without
23 prejudice "if mail is returned undelivered by the Postal Service, and
24 if, within fifteen (15) days of the service date, such [petitioner]
25 fails to notify, in writing, the Court and opposing parties of said
26 [petitioner's] current address" C.D. Cal. L.R. 41-6. Here,
27 Petitioner has failed to provide the Court with a current address within
28 fifteen days of service. Accordingly, the Court is unable to move this

1 case forward because Petitioner has not received any of the Court's
2 orders. Alternatives other than dismissal do not appear to be
3 appropriate given Petitioner's failure to participate in his own
4 litigation. See Henderson, 779 F.2d at 1424 ("The district court need
5 not exhaust every sanction short of dismissal before finally dismissing
6 a case, but must explore possible and meaningful alternatives.").

7
8 **4. Public Policy Favoring Disposition On The Merits**
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10 The fifth factor—the public policy favoring the disposition of
11 cases on their merits—ordinarily weighs against dismissal. However, it
12 is the responsibility of the moving party to prosecute the action at a
13 reasonable pace, and to refrain from dilatory and evasive tactics. See
14 Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991).
15 Petitioner's failure to update his address is evidence that he does not
16 intent to prosecute this action at a reasonable pace. Under these
17 circumstances, the public policy favoring the resolution of disputes on
18 the merits does not outweigh Petitioner's failure to file responsive
19 documents.

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21 **B. Dismissal Of This Action Is Appropriate**
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23 For the stated reasons, the Court concludes that dismissal of this
24 action is warranted under Rule 41(b), which states:

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26 [A] dismissal under this subdivision (b) and any
27 dismissal not under this rule--except one for lack
28 of jurisdiction, improper venue, or failure to join

1 a party under Rule 19--operates as an adjudication
2 on the merits.

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4 Fed. R. Civ. P. 41(b).

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6 The Court concludes that dismissal of this action is appropriate
7 due to Petitioner's failure to prosecute and obey Court orders. As this
8 case does not fall into one of the three exceptions noted above, the
9 dismissal will operate as an adjudication on the merits. The dismissal
10 will thus be with prejudice to Plaintiff's refiling of a new petition
11 based on the same underlying conviction. See Stewart v. U.S. Bancorp,
12 297 F.3d 953, 956 (9th Cir. 2002) (dismissal interpreted as an
13 adjudication on the merits unless one of the Rule 41(b) exceptions
14 applies); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 714
15 (9th Cir. 2001) (dismissal for failure to prosecute is treated as an
16 adjudication on the merits) (citing United States v. Schimmels (In re
17 Schimmels), 127 F.3d 875, 884 (9th Cir. 1997)).

18
19 **III.**

20 **CONCLUSION**

21
22 IT IS ORDERED THAT Judgment shall be entered dismissing this action
23 with prejudice for failure to prosecute and obey Court orders.

24
25 DATED: November 9, 2011.

26 /s/

27 SUZANNE H. SEGAL
28 UNITED STATES MAGISTRATE JUDGE