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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Vinod Kumar,**  
Petitioner  
-vs-  
**Katrina S. Kane, et al.,**  
Respondents

CV-09-0401-PHX-GMS (JRI)

**REPORT & RECOMMENDATION  
On Petition for Writ of Habeas Corpus  
Pursuant to 28 U.S.C. § 2241**

**I. MATTER UNDER CONSIDERATION**

Petitioner, incarcerated at the time in the Eloy Detention Center, Eloy, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on February 26, 2009 (#1) challenging his continued detention pending removal proceedings.

Petitioner has been released from detention upon his removal to India, and has failed to file a notice of change of address. Accordingly, the Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

**II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

On February 26, 2009, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241(#1), challenging his detention without bond in the Federal detention center in Eloy, Arizona, while awaiting removal to India. Petitioner's Petition alleges that his detention is unreasonable, had been ordered without individualized consideration, and is improperly indefinite. (Petition, #1 at 4-5.)

1 In the Notice of Assignment filed February 26, 2009 (#2), Petitioner was advised of  
2 his obligation to file a Notice of Change of Address. Similarly, the Service Order advised  
3 Petitioner that:

4 Petitioner must file and serve a notice of a change of address in  
5 accordance with Rule 83.3(d) of the Local Rules of Civil Procedure.  
6 Petitioner must not include a motion for other relief with a notice of  
change of address. Failure to comply may result in dismissal of this  
action.

7 (Order 3/27/09, #3 at 2.)

8 On November 3, 2009, the undersigned entered an Order (#11) directing a supplement  
9 as to the status of Petitioner's removal process. On November 9, 2009, Petitioner's copy of  
10 that Order mailed from the Court to Petitioner was returned undeliverable with the notation  
11 that Petitioner is no longer in custody (#12).

12 Accordingly, on November 17, 2009, the undersigned entered an Order (#13) giving  
13 Petitioner fifteen days to show cause why the Petition should not be dismissed as moot in  
14 light of Petitioner's apparent release from custody. In addition, Petitioner was given fifteen  
15 days to either: (1) file a notice of change of address; or (2) show cause why his Petition  
16 should not be dismissed for failure to prosecute in light of his failure to file a Notice of  
17 Change of Address as previously ordered. Copies of that order were sent to Petitioner at his  
18 last known incarceration address. Petitioner's copy of that order was returned undeliverable  
19 (#13) on November 20, 2009. Petitioner has not responded.

20 On April 28, 2009, Respondents filed a Notice re Petitioner's Status (#14), with  
21 documents reflecting Petitioner's release upon his removal to India on or about June 10,  
22 2009. Petitioner has not replied.

### 23 24 **III. APPLICATION OF LAW TO FACTS**

#### 25 **A. MOOTNESS OF HABEAS PETITION**

26 "Article III of the Constitution limits federal 'Judicial Power,' that is, federal-court  
27 jurisdiction, to 'Cases' and 'Controversies.'" *U.S. Parole Commission v. Geraghty*, 445  
28 U.S. 388, 395, 100 S.Ct. 1202, 1208 (1980). This limitation restricts the jurisdiction of the

1 federal courts to cases where there is a possible judicial resolution. *Id.* A moot action is not  
2 subject to a judicial resolution.

3 A moot action is one in which the parties lack a legally cognizable interest in the  
4 outcome. The test for mootness is whether the court can give a party any effective relief in  
5 the event that it decides the matter on the merits in their favor. “That is, whether the court  
6 can ‘undo’ the effects of the alleged wrongdoing.” *Reimers v. Oregon*, 863 F.2d 630, 632  
7 (9<sup>th</sup> Cir. 1989).

8 A habeas petition may be rendered moot following a subsequent release from custody,  
9 absent other, collateral consequences that flow from the complained of imprisonment. *Lane*  
10 *v. Williams*, 455 U.S. 624 (1982). While the existence of such collateral consequences is  
11 irrebuttably presumed in some habeas challenges to criminal convictions, *see e.g., Sibron v.*  
12 *New York*, 392 U.S. 40 (1968); *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994), no such  
13 presumption applies to habeas petitions challenging immigration orders.

14 Here, Petitioner was released from custody on June 10, 2008, upon his removal to  
15 India. (Notice re Status, #14 at Attachments, Warrant of Removal.) Petitioner does not  
16 challenge his underlying removal order, but merely his continued detention pending the  
17 execution of that order. Accordingly, his release upon his removal has rendered the claims  
18 in his Petition moot. Accordingly, the Petition should be dismissed with prejudice as moot.

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20 **B. FAILURE TO PROSECUTE**

21 **Failure to Update Address** - Local Civil Rule 83.3(d) provides:

22 An attorney or unrepresented party must file a notice of a name or  
23 address change, and an attorney must also file a notice of a change of  
24 firm name or e-mail address. The notice must be filed no later than 10  
25 days before the effective date of the change, except that an  
unrepresented party who is incarcerated must submit a notice within 5  
days after the effective date of the change. A separate notice must be  
filed in each active case.

26 Petitioner was twice been given specific notice (Notice of Assignment, #2; Order, #3  
27 at 2) of his obligation to file a notice of change of address, and an Order (#13) specifically  
28 directing him to do so.

1           It is the duty of a party who has filed a *pro se* action to keep the Court apprised of his  
2 or her current address and to comply with the Court's orders in a timely fashion. This Court  
3 does not have an affirmative obligation to locate Petitioner. "A party, not the district court,  
4 bears the burden of keeping the court apprised of any changes in his mailing address." *Carey*  
5 *v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988).

6           Moreover, Petitioner has failed to respond to the Court's Order to Show Cause about  
7 his address and the mootness of his petition. In so doing, Petitioner has failed to prosecute  
8 this action.

9           "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally  
10 been considered an 'inherent power,' governed not by rule or statute but by the control  
11 necessarily vested in courts to manage their own affairs so as to achieve the orderly and  
12 expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962).  
13 "Accordingly, when circumstances make such action appropriate, a District Court may  
14 dismiss a complaint for failure to prosecute even without affording notice of its intention to  
15 do so or providing an adversary hearing before acting. Whether such an order can stand on  
16 appeal depends not on power but on whether it was within the permissible range of the  
17 court's discretion." *Id.* at 633.

18           In determining whether an abuse of discretion has occurred, a number of factors are  
19 relevant, including the plaintiff's diligence, the trial court's need to manage its docket, the  
20 danger of prejudice to the party suffering the delay, the availability of alternate sanctions, and  
21 the existence of warning to the party occasioning the delay. *See, e.g., Hamilton v. Neptune*  
22 *Orient Lines, Ltd.*, 811 F.2d 498, 499 (9th Cir.1987).

23           Petitioner has failed to prosecute this action, and dismissal is therefore within the  
24 discretion of the Court. *Link v. Wabash R. Co., supra*. In the instant case, Petitioner appears  
25 to have abandoned this action upon his release from the Detention Center. Petitioner has had  
26 over a month since his release to file a notice of change of address. Further delay to the  
27 Court and to Respondents is not warranted. Also, Petitioner has received adequate warning  
28 of the potential of such action, and in light of Petitioner's refusal to respond to the Court, less

1 onerous sanctions will be ineffective.

2 The undersigned finds that only one less drastic sanction is realistically available. Rule 41(b)  
3 provides that a dismissal for failure to prosecute operates as an adjudication upon the merits  
4 "[u]nless the court in its order for dismissal otherwise specifies." In the instant case, the undersigned  
5 finds that a dismissal with prejudice would be unnecessarily harsh. Therefore, a recommendation  
6 will be made that this matter be dismissed without prejudice.

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8 **C. CERTIFICATE OF APPEALABILITY**

9 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the  
10 "district court must issue or deny a certificate of appealability when it enters a final order  
11 adverse to the applicant." However, such certificates are only required in cases concerning  
12 detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C.  
13 § 2255 attack a federal criminal judgment or sentence. This case arises under 28 U.S.C. §  
14 2241, and does not attack a State court detention. Accordingly, no ruling on a certificate of  
15 appealability is required.

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18 **IV. RECOMMENDATION AND ORDER**

19 **IT IS THEREFORE RECOMMENDED** that the Petitioner's Petition for Writ of  
20 Habeas Corpus, filed February 26, 2009 (#1) and this action be **DISMISSED WITH**  
21 **PREJUDICE** as moot.

22 **ALTERNATIVELY, IT IS RECOMMENDED** Petitioner's Petition for Writ of  
23 Habeas Corpus, filed February 26, 2009 (#1) and this action be **DISMISSED WITHOUT**  
24 **PREJUDICE** for failure to prosecute.

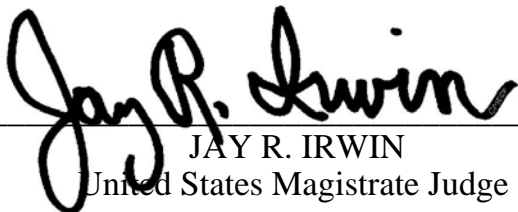
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26 **V. EFFECT OF RECOMMENDATION**

27 This recommendation is not an order that is immediately appealable to the Ninth  
28 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*

1 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

2           However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall  
3 have fourteen (14) days from the date of service of a copy of this recommendation within  
4 which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing  
5 Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to  
6 file a response to the objections. Failure to timely file objections to any factual or legal  
7 determinations of the Magistrate Judge will be considered a waiver of a party's right to *de*  
8 *novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup>  
9 Cir. 2003)(*en banc*).

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11 DATED: December 22, 2009

  
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JAY R. IRWIN  
United States Magistrate Judge

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