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## IN THE UNITED STATES DISTRICT COURT

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## FOR THE DISTRICT OF ARIZONA

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9 Moises Alfredo Escobedo-Sanchez,

No. CV-16-08307-PCT-SPL

10 Petitioner,

(No. CR-15-08221-PCT-SPL)

11 v.

**ORDER**

12 USA,

13 Respondent.

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On December 27, 2016, Movant Moises Alfredo Escobedo-Sanchez, who was then confined in Federal Correctional Institution in Phoenix, Arizona, filed a pro se Motion Under § 2255 to Vacate, Set Aside, or Correct Sentence. On October 31, 2017, Magistrate Judge Michelle H. Burns entered a Report and Recommendation recommending that Movant's motion be denied and dismissed with prejudice. On November 20, 2017, the Report and Recommendation was returned to the Court as undeliverable.<sup>1</sup> Movant has not provided the Court with an updated address.

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Rule 3.5 of the Local Rules of Civil Procedure requires a § 2255 movant to comply with the instructions attached to the court-approved § 2255 form. Those instructions state: "You must immediately notify the Court . . . in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**" Instructions for Filing a Motion to

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<sup>1</sup> Bureau of Prisons records confirm that Movant was released from custody on July 11, 2017. See <https://www.bop.gov/inmateloc/> (search by number for "17771-081") (last visited Dec. 4, 2017).

1 Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody (Motion Under  
2 28 U.S.C. § 2255) in the United States District Court for the District of Arizona at 1. In  
3 addition, Local Rule of Civil Procedure 83.3(d) requires parties to submit a notice of  
4 change of address within seven days.

5 Movant has the general duty to prosecute this case. *Cf. Fidelity Phila. Trust Co. v.*  
6 *Pioche Mines Consol., Inc.*, 587 F.2d 27, 29 (9th Cir. 1978). In this regard, it is the duty  
7 of a movant who has filed a pro se action to keep the Court apprised of his current  
8 address and to comply with the Court’s orders in a timely fashion. This Court does not  
9 have an affirmative obligation to locate Movant. “A party, not the district court, bears the  
10 burden of keeping the court apprised of any changes in his mailing address.” *Carey v.*  
11 *King*, 856 F.2d 1439, 1441 (9th Cir. 1988). Movant’s failure to keep the Court informed  
12 of his new address constitutes failure to prosecute.

13 Rule 41(b) of the Federal Rules of Civil Procedure provides that “if the plaintiff  
14 fails to prosecute or to comply with these rules or a court order, a defendant may move to  
15 dismiss the action or any claim against it.” In *Link v. Wabash Railroad Co.*, 370 U.S.  
16 626, 629-31 (1962), the Supreme Court recognized that a federal district court has the  
17 inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the  
18 language of Rule 41(b) of the Federal Rules of Civil Procedure appears to require a  
19 motion from a party. Moreover, in appropriate circumstances, the Court may dismiss a  
20 pleading for failure to prosecute even without notice or hearing. *Id.* at 633.

21 In determining whether Movant’s failure to prosecute warrants dismissal of the  
22 case, the Court must weigh the following five factors: “(1) the public’s interest in  
23 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk  
24 of prejudice to the [respondents]; (4) the public policy favoring disposition of cases on  
25 their merits; and (5) the availability of less drastic sanctions.” *Carey*, 856 F.2d at 1440  
26 (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). “The first two of  
27 these factors favor the imposition of sanctions in most cases, while the fourth factor cuts  
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1 against a default or dismissal sanction. Thus the key factors are prejudice and availability  
2 of lesser sanctions.” *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).

3 Here, the first, second, and third factors favor dismissal of this case. Movant’s  
4 failure to keep the Court informed of his address prevents the case from proceeding. The  
5 fourth factor, as always, weighs against dismissal. The fifth factor requires the Court to  
6 consider whether a less drastic alternative is available. Without Movant’s current  
7 address, however, certain alternatives are bound to be futile. Here, as in *Carey*, “[a]n  
8 order to show cause why dismissal is not warranted or an order imposing sanctions would  
9 only find itself taking a round trip tour through the United States mail.” 856 F.2d at  
10 1441.

11 Additionally, because the R&R was returned in the mail, Movant has not filed any  
12 objections to it. This relieves the Court of its obligation to review the R&R. *See Reyna-*  
13 *Tapia*, 328 F.3d at 1121; *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (“[Section 636(b)(1)]  
14 does not... require any review at all... of any issue that is not the subject of an  
15 objection.”); Fed. R. Civ. P. 72(b)(3) (“The district judge must determine de novo any  
16 part of the magistrate judge’s disposition that has been properly objected to.”). The Court  
17 has nonetheless reviewed the R&R and finds that it is well-taken. The Court will adopt  
18 the R&R and deny the Motion. *See* 28 U.S.C. § 636(b)(1) (stating that the district court  
19 “may accept, reject, or modify, in whole or in part, the findings or recommendations  
20 made by the magistrate”); Fed. R. Civ. P. 72(b)(3) (“The district judge may accept, reject,  
21 or modify the recommended disposition; receive further evidence; or return the matter to  
22 the magistrate judge with instructions.”).

23 Accordingly,

24 **IT IS ORDERED:**

25 1. That Magistrate Judge Burns’ Report and Recommendation (Doc. 12) is  
26 **accepted** and **adopted** by the Court;

27 2. That the Motion to Vacate, Set Aside, or Correct Sentence by a Person in  
28 Federal Custody pursuant to 28 U.S.C. § 2255 (CV-16-08307-PCT-SPL, Doc. 1; Doc. 26,

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CR-15-08221-PCT-SPL) is **denied**;


3. That this case is **dismissed with prejudice**;

4. That a certificate of appealability and leave to proceed *in forma pauperis* on appeal are **denied** because Petitioner has not made a substantial showing of the denial of a constitutional right;

5. That the Clerk of Court shall file this Order in the underlying related criminal action, Case No. CR-15-08221-PCT-SPL; and

6. That the Clerk of Court shall enter judgment accordingly and **terminate** this action.

Dated this 8th day of December, 2017.

  
Honorable Steven P. Logan  
United States District Judge