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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JORGE FREGOSO,
Petitioner,
v.
KELLY HARRINGTON,
Respondent.

1:09-cv-01067 MJS HC
ORDER DISMISSING PETITION DUE TO
PETITIONER'S FAILURE TO FOLLOW
COURT ORDER
[Doc. 8]

____ Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the Petitioner has consented to the jurisdiction of the United States Magistrate Judge. Local Rule 305(b).

On June 17, 2009, Petitioner filed a petition for writ of habeas corpus. Following a preliminary review of the petition, the Court on May 3, 2010, issued an order to show cause why the petition should not be dismissed for failure to exhaust state remedies. (Order to Show Cause, ECF No. 8.) Petitioner was granted thirty (30) days to inform the Court whether his claims had been presented to the California Supreme Court.

Over thirty (30) days have passed, and Petitioner has not complied with the order.

I. DISCUSSION

Local Rule 110 provides that a “[f]ailure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and

1 all sanctions authorized by statute or Rule or within the inherent power of the Court." District
2 courts have the inherent power to control their dockets and in the exercise of that power they
3 may impose sanctions including dismissal of a case. Thompson v. Housing Auth., 782 F.2d
4 829, 831 (9th Cir. 1986). A court may dismiss an action, with prejudice, based on a party's
5 failure to prosecute an action, failure to obey a court order, or failure to comply with local rules.
6 See, e.g., Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance
7 with local rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for
8 failure to comply with an order requiring amendment of complaint); Carey v. King, 856 F.2d
9 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to comply with local rule requiring pro se
10 plaintiffs to keep court apprized of address); Malone v. U.S. Postal Service, 833 F.2d 128, 130
11 (9th Cir. 1987) (dismissal for failure to comply with court order); Henderson v. Duncan, 779
12 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack of prosecution and failure to comply with
13 local rules). In determining whether to dismiss an action for lack of prosecution, failure to obey
14 a court order, or failure to comply with local rules, the court must consider several factors: (1)
15 the public's interest in expeditious resolution of litigation; (2) the court's need to manage its
16 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
17 cases on their merits; and (5) the availability of less drastic alternatives. Ghazali, 46 F.3d at
18 53; Ferdik, 963 F.2d at 1260-61; Malone, 833 F.2d at 130; Thompson, 782 F.2d at 831;
19 Henderson, 779 F.2d at 1423-24.

20 In the instant case, the Court finds that the public's interest in expeditiously resolving
21 this litigation and the Court's interest in managing the docket weigh in favor of dismissal
22 because this case has been pending in this Court since June 17, 2009. The third factor, risk
23 of prejudice to defendants, also weighs in favor of dismissal because a presumption of injury
24 arises from any unreasonable delay in prosecuting an action. Anderson v. Air West, 542 F.2d
25 522, 524 (9th Cir. 1976). The fourth factor, public policy favoring disposition of cases on their
26 merits, is outweighed by the factors in favor of dismissal. Finally, a court's warning to a party
27 that his failure to obey the court's order will result in dismissal satisfies the "consideration of
28 alternatives" requirement. Ferdik, 963 F.2d at 1262; Malone, 833 F.2d at 132-33; Henderson,

1 779 F.2d at 1424. The Court's order for Petitioner to show that he exhausted his state
2 remedies stated that dismissal would result from non-compliance with the Court's order.

3 **II. CONCLUSION**

4 Petitioner has failed to comply with a court order. Therefore, the petition must be
5 dismissed.

6 **III. CERTIFICATE OF APPEALABILITY**

7 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal
8 a district court's denial of his petition, and an appeal is only allowed in certain circumstances.
9 Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining
10 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

11 (a) In a habeas corpus proceeding or a proceeding under section
12 2255 before a district judge, the final order shall be subject to
13 review, on appeal, by the court of appeals for the circuit in which
14 the proceeding is held.

15 (b) There shall be no right of appeal from a final order in a
16 proceeding to test the validity of a warrant to remove to another
17 district or place for commitment or trial a person charged with a
18 criminal offense against the United States, or to test the validity of
19 such person's detention pending removal proceedings.

20 (c) (1) Unless a circuit justice or judge issues a certificate of
21 appealability, an appeal may not be taken to the court of appeals
22 from—

23 (A) the final order in a habeas corpus proceeding in
24 which the detention complained of arises out of process issued by
25 a State court; or

26 (B) the final order in a proceeding under section
27 2255.

28 (2) A certificate of appealability may issue under paragraph
(1) only if the applicant has made a substantial showing of the
denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall
indicate which specific issue or issues satisfy the showing required
by paragraph (2).

If a court denies a petitioner's petition, the court may only issue a certificate of
appealability "if jurists of reason could disagree with the district court's resolution of his
constitutional claims or that jurists could conclude the issues presented are adequate to

1 deserve encouragement to proceed further." Miller-EI, 123 S.Ct. at 1034; Slack v. McDaniel,
2 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case,
3 he must demonstrate "something more than the absence of frivolity or the existence of mere
4 good faith on his . . . part." Miller-EI, 123 S.Ct. at 1040.

5 In the present case, reasonable jurists would not find debatable or wrong the Court's
6 determination that Petitioner is not entitled to federal habeas corpus relief nor would they
7 believe his claim is deserving of encouragement to proceed further. Petitioner has not made
8 the required substantial showing of the denial of a constitutional right. Accordingly, the Court
9 hereby DECLINES to issue a certificate of appealability.

10 **IV. ORDER**

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 1. The Petition for Writ of Habeas Corpus is DISMISSED without prejudice;
- 13 2. The Clerk of Court is DIRECTED to enter judgment; and
- 14 3. The Court DECLINES to issue a certificate of appealability.

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16 IT IS SO ORDERED.

17 Dated: July 16, 2010

1s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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