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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALBERT ANDREW LUCERO,)	1:10-cv-01714-SKO-HC
)	
Petitioner,)	ORDER DISMISSING PETITION FOR
)	PETITIONER'S FAILURE TO PROSECUTE
)	AND FOLLOW A COURT ORDER (DOC.
v.)	1)
)	
MIKE D. McDONALD,)	ORDER DECLINING TO ISSUE A
)	CERTIFICATE OF APPEALABILITY
Respondent.)	
)	
)	

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on December 2, 2010 (doc. 8), and entered on the docket on December 10, 2010. Pending before the Court is the petition, which was filed on September 10, 2010, and transferred to this division on September 20, 2010.

///

1 I. Background

2 On September 21, 2010, the Court issued and served on
3 Petitioner by mail new case documents and an order authorizing
4 Petitioner to proceed in forma pauperis. (Docs. 5, 6.) On
5 October 1 and 8, 2010, the orders served on Petitioner were
6 returned by the U.S. Postal Service as undeliverable and with the
7 notation "unable to forward." Petitioner filed a consent to the
8 jurisdiction of the Magistrate Judge on December 2, 2010. On
9 December 20, 2010, the Court issued and served by mail on
10 Petitioner an order to Petitioner to file within fourteen days
11 updated address information and an explanation for the previous
12 delay, or to face dismissal of the petition. (Doc. 9.) On
13 January 3, 2011, the mailed order was returned as undeliverable.

14 II. Analysis

15 Pursuant to Local Rule 183(b), a party appearing in propria
16 persona is required to keep the Court apprised of his or her
17 current address at all times. Local Rule 183(b) provides, in
18 pertinent part:

19 If mail directed to a plaintiff in propria persona by
20 the Clerk is returned by the U.S. Postal Service, and
21 if such plaintiff fails to notify the Court and
22 opposing parties within sixty-three (63) days
thereafter of a current address, the Court may dismiss
the action without prejudice for failure to prosecute.

23 Further, Local Rule 110 provides:

24 Failure of counsel or of a party to comply with these
25 Rules or with any order of the Court may be grounds
26 for imposition by the Court of any and all sanctions
authorized by statute or Rule or within the inherent
power of the Court.

27 District courts have the inherent power to control their dockets
28 and "in the exercise of that power, they may impose sanctions

1 including, where appropriate...dismissal of a case." Thompson v.
2 Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986). A court may
3 dismiss an action, with prejudice, based on a party's failure to
4 prosecute an action, failure to obey a court order, or failure to
5 comply with local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52,
6 53-54 (9th Cir. 1995) (dismissal for noncompliance with local
7 rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)
8 (dismissal for failure to comply with an order requiring
9 amendment of complaint); Carey v. King, 856 F.2d 1439, 1440-41
10 (9th Cir. 1988) (dismissal for failure to comply with local rule
11 requiring pro se plaintiffs to keep court apprised of address);
12 Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987)
13 (dismissal for failure to comply with court order); Henderson v.
14 Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack
15 of prosecution and failure to comply with local rules).

16 In the instant case, over sixty-three days (63) have passed
17 since Petitioner's mail was first returned, and he has not
18 notified the Court of a current address.

19 Further, over fourteen days have passed since the Court
20 directed Petitioner to file updated address information and an
21 explanation, but Petitioner has failed to respond with the
22 required information or seek an extension of time within which to
23 do so. The Court's order to Petitioner has been returned as
24 undeliverable.

25 In determining whether to dismiss an action for lack of
26 prosecution, failure to obey a court order, or failure to comply
27 with local rules, the Court must consider several factors: (1)
28 the public's interest in expeditious resolution of litigation;

1 (2) the Court's need to manage its docket; (3) the risk of
2 prejudice to the respondents; (4) the public policy favoring
3 disposition of cases on their merits; and (5) the availability of
4 less drastic alternatives. Thompson, 782 F.2d at 831; Henderson,
5 779 F.2d at 1423-24; Malone, 833 F.2d at 130; Ferdik, 963 F.2d at
6 1260-61; Ghazali, 46 F.3d at 53.

7 In the instant case, because the petition has been pending
8 for a lengthy period, the Court finds that the public's interest
9 in expeditiously resolving this litigation and the Court's
10 interest in managing the docket weigh in favor of dismissal. The
11 third factor, risk of prejudice to respondents, also weighs in
12 favor of dismissal, since a presumption of injury arises from the
13 occurrence of unreasonable delay in prosecuting an action.

14 Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The
15 fourth factor -- public policy favoring disposition of cases on
16 their merits -- is greatly outweighed by the factors in favor of
17 dismissal discussed herein. Finally, a court's warning to a
18 party that his failure to obey the court's order will result in
19 dismissal satisfies the "consideration of alternatives"
20 requirement. Ferdik v. Bonzelet, 963 F.2d at 1262; Malone, 833
21 at 132-33; Henderson, 779 F.2d at 1424. The Court's order
22 requiring Petitioner to provide updated information and an
23 explanation expressly informed Petitioner that if Petitioner did
24 not comply with the order, the petition would be dismissed for
25 Petitioner's failure to prosecute and comply with the rules and
26 orders of the Court. (Doc. 9, 3.) Thus, Petitioner had adequate
27 warning that dismissal would result from his noncompliance with
28 the Court's order.

1 The Court concludes that dismissal is appropriate.

2 III. Certificate of Appealability

3 Unless a circuit justice or judge issues a certificate of
4 appealability, an appeal may not be taken to the court of appeals
5 from the final order in a habeas proceeding in which the
6 detention complained of arises out of process issued by a state
7 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537
8 U.S. 322, 336 (2003). A certificate of appealability may issue
9 only if the applicant makes a substantial showing of the denial
10 of a constitutional right. § 2253(c)(2). Under this standard, a
11 petitioner must show that reasonable jurists could debate whether
12 the petition should have been resolved in a different manner or
13 that the issues presented were adequate to deserve encouragement
14 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
15 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
16 certificate should issue if the Petitioner shows that jurists of
17 reason would find it debatable whether the petition states a
18 valid claim of the denial of a constitutional right and that
19 jurists of reason would find it debatable whether the district
20 court was correct in any procedural ruling. Slack v. McDaniel,
21 529 U.S. 473, 483-84 (2000).

22 In determining this issue, a court conducts an overview of
23 the claims in the habeas petition, generally assesses their
24 merits, and determines whether the resolution was debatable among
25 jurists of reason or wrong. Id. It is necessary for an
26 applicant to show more than an absence of frivolity or the
27 existence of mere good faith; however, it is not necessary for an
28 applicant to show that the appeal will succeed. Miller-El v.

1 Cockrell, 537 U.S. at 338.

2 A district court must issue or deny a certificate of
3 appealability when it enters a final order adverse to the
4 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

5 Here, it does not appear that reasonable jurists could
6 debate whether the petition should have been resolved in a
7 different manner. Petitioner has not made a substantial showing
8 of the denial of a constitutional right. Accordingly, the Court
9 will decline to issue a certificate of appealability.

10 IV. Disposition

11 Accordingly, it is ORDERED that:

12 1) The petition is DISMISSED without prejudice for
13 Petitioner's failure to follow the order of the Court and failure
14 to prosecute the action; and

15 2) The Clerk is DIRECTED to close the action because this
16 order terminates the proceeding in its entirety; and

17 3) The Court DECLINES to issue a certificate of appeal
18 ability.

19
20 IT IS SO ORDERED.

21 **Dated:** January 18, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE