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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEONCIO PALMA,)	1:10-cv-02120-OWW-SKO-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS THE PETITION FOR
v.)	PETITIONER'S FAILURE TO COMPLY
)	WITH AN ORDER OF THE COURT AND TO
)	PROSECUTE THE CASE (DOCS. 9, 1)
KATTY ALLISON,)	
)	FINDINGS AND RECOMMENDATIONS TO
Respondent.)	DECLINE TO ISSUE A CERTIFICATE OF
)	APPEALABILITY AND TO DIRECT THE
)	CLERK TO CLOSE THE CASE

Petitioner is a state prisoner proceeding in forma pauperis and pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the petition, which was filed on November 15, 2010.

I. Failure to Prosecute and Follow an Order of the Court

In view of the decision in Swarthout v. Cooke, 562 U.S. -, 131 S.Ct. 859, 861-62 (2011), the Court reconsidered its earlier order dismissing the petition with leave to amend, and on May 10, 2011, the Court again dismissed the petition with leave to file a

1 first amended petition (FAP) within thirty days of service of the
2 order. The order was served on Petitioner by mail on the same
3 date. Although thirty (30) days have passed, Petitioner has not
4 filed a FAP or requested an extension of time within which to
5 file one.

6 Local Rule 110 provides that "...failure of counsel or of a
7 party to comply with these Rules or with any order of the Court
8 may be grounds for the imposition by the Court of any and all
9 sanctions... within the inherent power of the Court." District
10 courts have the inherent power to control their dockets and "in
11 the exercise of that power, they may impose sanctions including,
12 where appropriate... dismissal of a case." Thompson v. Housing
13 Auth., 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an
14 action, with prejudice, based on a party's failure to prosecute
15 an action, failure to obey a court order, or failure to comply
16 with local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52, 53-54
17 (9th Cir. 1995) (dismissal for noncompliance with local rule);
18 Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)
19 (dismissal for failure to comply with an order requiring
20 amendment of complaint); Carey v. King, 856 F.2d 1439, 1440-41
21 (9th Cir. 1988) (dismissal for failure to comply with local rule
22 requiring pro se plaintiffs to keep court apprised of address);
23 Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987)
24 (dismissal for failure to comply with court order); Henderson v.
25 Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack
26 of prosecution and failure to comply with local rules).

27 In determining whether to dismiss an action for lack of
28 prosecution, failure to obey a court order, or failure to comply

1 with local rules, the court must consider several factors: (1)
2 the public's interest in expeditious resolution of litigation;
3 (2) the court's need to manage its docket; (3) the risk of
4 prejudice to the defendants; (4) the public policy favoring
5 disposition of cases on their merits; and (5) the availability of
6 less drastic alternatives. Thompson, 782 F.2d at 831; Henderson,
7 779 F.2d at 1423-24; Malone, 833 F.2d at 130; Ferdik, 963 F.2d at
8 1260-61; Ghazali, 46 F.3d at 53.

9 In this case, the Court finds that the public's interest in
10 expeditiously resolving this litigation and the Court's interest
11 in managing the docket weigh in favor of dismissal, as the case
12 has been pending since November 2010. The third factor, risk of
13 prejudice to respondents, also weighs in favor of dismissal,
14 since a presumption of injury arises from the occurrence of
15 unreasonable delay in prosecuting an action. Anderson v. Air
16 West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor --
17 public policy favoring disposition of cases on their merits -- is
18 greatly outweighed by the factors in favor of dismissal discussed
19 herein. Finally, a court's warning to a party that his failure
20 to obey the court's order will result in dismissal satisfies the
21 "consideration of alternatives" requirement. Ferdik v. Bonzelet,
22 963 F.2d at 1262; Malone, 833 at 132-33; Henderson, 779 F.2d at
23 1424. The Court's order directing Petitioner to file an
24 amendment expressly informed Petitioner that a failure to file a
25 petition in compliance with the order within the allotted time
26 would result in a recommendation that the petition be dismissed
27 and the action be terminated. (Doc. 9, 7.) Thus, Petitioner
28 received adequate warning that dismissal would result from his

1 noncompliance with the Court's order.

2 Accordingly, it will be recommended that the petition be
3 dismissed for Petitioner's failure to comply with the order of
4 the Court.

5 II. Certificate of Appealability

6 Unless a circuit justice or judge issues a certificate of
7 appealability, an appeal may not be taken to the Court of Appeals
8 from the final order in a habeas proceeding in which the
9 detention complained of arises out of process issued by a state
10 court. 28 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537
11 U.S. 322, 336 (2003).

12 A certificate of appealability may issue only if the
13 applicant makes a substantial showing of the denial of a
14 constitutional right. § 2253(c) (2). Under this standard, a
15 petitioner must show that reasonable jurists could debate whether
16 the petition should have been resolved in a different manner or
17 that the issues presented were adequate to deserve encouragement
18 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336
19 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
20 certificate should issue if the Petitioner shows that jurists of
21 reason would find it debatable whether the petition states a
22 valid claim of the denial of a constitutional right and that
23 jurists of reason would find it debatable whether the district
24 court was correct in any procedural ruling. Slack v. McDaniel,
25 529 U.S. 473, 483-84 (2000).

26 In determining this issue, a court conducts an overview of
27 the claims in the habeas petition, generally assesses their
28 merits, and determines whether the resolution was debatable among

1 jurists of reason or wrong. Id. It is necessary for an
2 applicant to show more than an absence of frivolity or the
3 existence of mere good faith; however, it is not necessary for an
4 applicant to show that the appeal will succeed. Miller-El v.
5 Cockrell, 537 U.S. at 338.

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

9 Here, it does not appear that reasonable jurists could
10 debate whether the petition should have been resolved in a
11 different manner. Petitioner has not made a substantial showing
12 of the denial of a constitutional right.

13 Accordingly, it will be recommended that the Court decline
14 to issue a certificate of appealability.

15 III. Recommendations

16 Accordingly, it is RECOMMENDED that:

17 1) The petition be DISMISSED for pursuant to Local Rule 110
18 for Petitioner's failure to comply with the Court's order and to
19 file a first amended petition; and

20 2) The Court DECLINE to issue a certificate of
21 appealability; and

22 3) The Clerk be DIRECTED to close the action.

23 These findings and recommendations are submitted to the
24 United States District Court Judge assigned to the case, pursuant
25 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
26 the Local Rules of Practice for the United States District Court,
27 Eastern District of California. Within thirty (30) days after
28 being served with a copy, any party may file written objections

1 with the Court and serve a copy on all parties. Such a document
2 should be captioned "Objections to Magistrate Judge's Findings
3 and Recommendations." Replies to the objections shall be served
4 and filed within fourteen (14) days (plus three (3) days if
5 served by mail) after service of the objections. The Court will
6 then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
7 636 (b) (1) (C). The parties are advised that failure to file
8 objections within the specified time may waive the right to
9 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
10 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: June 29, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE