

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MARK LEON PEREZ	)	1:12-cv-01920-SKO-HC
	)	
Petitioner,	)	ORDER DISMISSING THE PETITION FOR
	)	FAILURE TO FOLLOW A COURT ORDER
	)	AND TO PROSECUTE (DOC. 1)
v.	)	
	)	ORDER DECLINING TO ISSUE A
ON HABEAS CORPUS,	)	CERTIFICATE OF APPEALABILITY AND
	)	DIRECTING THE CLERK TO CLOSE THE
Respondent.	)	ACTION
	)	
	)	

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. 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 12, 2012 (doc. 6). Pending before the Court is the petition filed by Petitioner on November 27, 2012, and the Court's order to show cause that was filed and served on Petitioner on January 24, 2013.

1 I. Background

2 Petitioner named as Respondent "On Habeas Corpus." (Pet.  
3 1.) On December 7, 2012, the Court issued an order granting  
4 leave to Petitioner to file a motion to amend the petition to  
5 name a proper respondent within thirty days, which was served on  
6 Petitioner on the same date. When Petitioner did not file a  
7 motion to amend the petition within the thirty-day period set by  
8 the Court, on January 24, 2013, the Court issued an order to  
9 Petitioner to show cause within twenty-one (21) days why the  
10 petition should not be dismissed for failure to comply with the  
11 Court's order. The order to show cause was served on Petitioner  
12 on the same date. Although over twenty-one (21) days have passed  
13 since the Court's order was served on Petitioner, Petitioner has  
14 not responded to the order to show cause or sought a timely  
15 extension of time within which to do so.

16 II. Failure to Prosecute and Follow an Order of the Court

17 Local Rule 110 provides that "...failure of counsel or of a  
18 party to comply with these Rules or with any order of the Court  
19 may be grounds for the imposition by the Court of any and all  
20 sanctions... within the inherent power of the Court." District  
21 courts have the inherent power to control their dockets and "in  
22 the exercise of that power, they may impose sanctions including,  
23 where appropriate... dismissal of a case." Thompson v. Housing  
24 Auth., 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an  
25 action, with prejudice, based on a party's failure to prosecute  
26 an action, failure to obey a court order, or failure to comply  
27 with local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52, 53-54  
28 (9th Cir. 1995) (dismissal for noncompliance with local rule);

1 Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)  
2 (dismissal for failure to comply with an order requiring  
3 amendment of complaint); Carey v. King, 856 F.2d 1439, 1440-41  
4 (9th Cir. 1988) (dismissal for failure to comply with local rule  
5 requiring pro se plaintiffs to keep court apprised of address);  
6 Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987)  
7 (dismissal for failure to comply with court order); Henderson v.  
8 Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack  
9 of prosecution and failure to comply with local rules).

10 In determining whether to dismiss an action for lack of  
11 prosecution, failure to obey a court order, or failure to comply  
12 with local rules, the court must consider several factors: (1)  
13 the public's interest in expeditious resolution of litigation;  
14 (2) the court's need to manage its docket; (3) the risk of  
15 prejudice to the defendants; (4) the public policy favoring  
16 disposition of cases on their merits; and (5) the availability of  
17 less drastic alternatives. Thompson, 782 F.2d at 831; Henderson,  
18 779 F.2d at 1423-24; Malone, 833 F.2d at 130; Ferdik, 963 F.2d at  
19 1260-61; Ghazali, 46 F.3d at 53.

20 In this case, the Court finds that the public's interest in  
21 expeditiously resolving this litigation and the Court's interest  
22 in managing the docket weigh in favor of dismissal, as the case  
23 has been pending since November 2012. The third factor, risk of  
24 prejudice to respondents, also weighs in favor of dismissal,  
25 since a presumption of injury arises from the occurrence of  
26 unreasonable delay in prosecuting an action. Anderson v. Air  
27 West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor --  
28 public policy favoring disposition of cases on their merits -- is

1 greatly outweighed by the factors in favor of dismissal discussed  
2 herein. Finally, a court's warning to a party that his failure  
3 to obey the court's order will result in dismissal satisfies the  
4 "consideration of alternatives" requirement. Ferdik v. Bonzelet,  
5 963 F.2d at 1262; Malone, 833 at 132-33; Henderson, 779 F.2d at  
6 1424.

7 The Court's order directing Petitioner to file an amendment  
8 expressly informed Petitioner that a failure to comply with the  
9 order would result in dismissal of the petition for lack of  
10 jurisdiction or failure to name as respondent a person with the  
11 power to produce the Petitioner. (Doc. 5, 4.) Further, the  
12 Court's order to show cause expressly stated that a failure to  
13 comply with an order of the court might result in dismissal (doc.  
14 7, 2), and a failure to respond to the order to show cause would  
15 result in dismissal of the action. (Doc. 7, 3.) Thus,  
16 Petitioner received adequate warning that dismissal would result  
17 from his noncompliance with the Court's order.

### 18 III. Certificate of Appealability

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

25 A certificate of appealability may issue only if the  
26 applicant makes a substantial showing of the denial of a  
27 constitutional right. § 2253(c)(2). Under this standard, a  
28 petitioner must show that reasonable jurists could debate whether

1 the petition should have been resolved in a different manner or  
2 that the issues presented were adequate to deserve encouragement  
3 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336  
4 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A  
5 certificate should issue if the Petitioner shows that jurists of  
6 reason would find it debatable whether the petition states a  
7 valid claim of the denial of a constitutional right or that  
8 jurists of reason would find it debatable whether the district  
9 court was correct in any procedural ruling. Slack v. McDaniel,  
10 529 U.S. 473, 483-84 (2000). In determining this issue, a court  
11 conducts an overview of the claims in the habeas petition,  
12 generally assesses their merits, and determines whether the  
13 resolution was debatable among jurists of reason or wrong. Id.  
14 It is necessary for an applicant to show more than an absence of  
15 frivolity or the existence of mere good faith; however, it is not  
16 necessary for an applicant to show that the appeal will succeed.  
17 Miller-El v. Cockrell, 537 U.S. at 338.

18 A district court must issue or deny a certificate of  
19 appealability when it enters a final order adverse to the  
20 applicant.

21 Rule 11(a) of the Rules Governing Section 2254 Cases.  
22 Here, it does not appear that reasonable jurists could debate  
23 whether the petition should have been resolved in a different  
24 manner. Petitioner has not made a substantial showing of the  
25 denial of a constitutional right. Accordingly, the Court will  
26 decline to issue a certificate of appealability.

27 IV. Disposition

28 Accordingly, it is ORDERED that:

1           1) The petition is DISMISSED pursuant to Local Rule 110 for  
2 Petitioner's failure to comply with the Court's order and to  
3 prosecute this action; and

4           2) The Court DECLINES to issue a certificate of  
5 appealability; and

6           3) The Clerk is DIRECTED to close the action.

7  
8 IT IS SO ORDERED.

9 **Dated: February 27, 2013**

**/s/ Sheila K. Oberto**  
**UNITED STATES MAGISTRATE JUDGE**

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28