

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BRANDEN DOYLE COTTON,  
Petitioner,  
v.  
THE PEOPLE,  
Respondent.

Case No. 1:13-cv-00977-LJO-SKO-HC

**FINDINGS AND RECOMMENDATIONS  
TO DISMISS THE PETITION FOR  
PETITIONER'S FAILURE TO FOLLOW AN  
ORDER OF THE COURT, TO DECLINE TO  
ISSUE A CERTIFICATE OF  
APPEALABILITY, AND TO DIRECT THE  
CLERK TO CLOSE THE CASE**

**OBJECTIONS DEADLINE:**  
**THIRTY (30) DAYS**

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. 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 are the petition, which was filed on June 26, 2013, and several orders to Petitioner to inform the Court within thirty days of his decision to consent to, or to decline to consent to, the jurisdiction of a Magistrate Judge in the present case. The notices were served by mail on Petitioner at his address as listed in the docket on June 26, 2013; August 6, 2013; September 26, 2013; and November 1, 2013.

1           I. Dismissal of the Petition

2           Local Rule 110 provides:

3           Failure of counsel or of a party to comply with these  
4           Rules or with any order of the Court may be grounds  
5           for imposition by the Court of any and all sanctions  
6           authorized by statute or Rule or within the inherent  
7           power of the Court.

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

25           Here, Petitioner has repeatedly failed to respond to the  
26           Court's orders regarding consent for a period of over four months.  
27           In determining whether to dismiss an action for lack of prosecution,  
28           failure to obey a court order, or failure to comply with local  
          rules, the Court must consider several factors: (1) the public's  
          interest in expeditious resolution of litigation; (2) the Court's

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

7 Here, the petition has been pending for a lengthy period; thus  
8 the Court finds that the public's interest in expeditiously  
9 resolving this litigation and the Court's interest in managing the  
10 docket weigh in favor of dismissal. The third factor, risk of  
11 prejudice to respondents, also weighs in favor of dismissal, since a  
12 presumption of injury arises from the occurrence of unreasonable  
13 delay in prosecuting an action. Anderson v. Air West, 542 F.2d 522,  
14 524 (9th Cir. 1976). The fourth factor -- public policy favoring  
15 disposition of cases on their merits -- is greatly outweighed by the  
16 factors in favor of dismissal discussed herein. Finally, the Court  
17 has reviewed the "consideration of alternatives" requirement. See,  
18 Ferdik v. Bonzelet, 963 F.2d at 1262; Malone, 833 at 132-33;  
19 Henderson, 779 F.2d at 1424. The Court's order dated September 26,  
20 2013, gave Petitioner another thirty days to comply with the Court's  
21 order but expressly informed Petitioner that the action would be  
22 dismissed without prejudice if Petitioner failed to respond to the  
23 order within thirty days. Over thirty days have passed, but  
24 Petitioner has again failed to respond to the Court's order.

25 The Court concludes that dismissal is appropriate.

26 II. Certificate of Appealability

27 Unless a circuit justice or judge issues a certificate of  
28 appealability, an appeal may not be taken to the court of appeals

1 from the final order in a habeas proceeding in which the detention  
2 complained of arises out of process issued by a state court. 28  
3 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336  
4 (2003). A certificate of appealability may issue only if the  
5 applicant makes a substantial showing of the denial of a  
6 constitutional right. § 2253(c)(2). Under this standard, a  
7 petitioner must show that reasonable jurists could debate whether  
8 the petition should have been resolved in a different manner or that  
9 the issues presented were adequate to deserve encouragement to  
10 proceed further. Miller-El v. Cockrell, 537 U.S. at 336 (quoting  
11 Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A certificate should  
12 issue if the Petitioner shows that jurists of reason would find it  
13 debatable whether: (1) the petition states a valid claim of the  
14 denial of a constitutional right, or (2) the district court was  
15 correct in any procedural ruling. Slack v. McDaniel, 529 U.S. 473,  
16 483-84 (2000). In determining this issue, a court conducts an  
17 overview of the claims in the habeas petition, generally assesses  
18 their merits, and determines whether the resolution was debatable  
19 among jurists of reason or wrong. Id. An applicant must show more  
20 than an absence of frivolity or the existence of mere good faith;  
21 however, an applicant need not show that the appeal will succeed.  
22 Miller-El v. Cockrell, 537 U.S. at 338.

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

26 Here, it does not appear that reasonable jurists could debate  
27 whether the petition should have been resolved in a different  
28 manner. Petitioner has not made a substantial showing of the denial

1 of a constitutional right. Accordingly, a certificate of  
2 appealability should not issue.

3       III. Recommendations

4       Based on the foregoing, it is RECOMMENDED that:

5       1) The petition be DISMISSED without prejudice for  
6 Petitioner's failure to follow the order of the Court and failure to  
7 prosecute the action;

8       2) The Court DECLINE to issue a certificate of appealability;  
9 and

10       3) The Clerk be DIRECTED to close the action because an order  
11 of dismissal would terminate the proceeding in its entirety.

12       These findings and recommendations are submitted to the United  
13 States District Court Judge assigned to the case, pursuant to the  
14 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local  
15 Rules of Practice for the United States District Court, Eastern  
16 District of California. Within thirty (30) days after being served  
17 with a copy, any party may file written objections with the Court  
18 and serve a copy on all parties. Such a document should be  
19 captioned "Objections to Magistrate Judge's Findings and  
20 Recommendations." Replies to the objections shall be served and  
21 filed within fourteen (14) days (plus three (3) days if served by  
22 mail) after service of the objections. The Court will then review  
23 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
24 The parties are advised that failure to file objections within the  
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1 specified time may waive the right to appeal the District Court's  
2 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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5 IT IS SO ORDERED.

6 Dated: November 5, 2013

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