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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBEY KURT HAIRSTON,
Petitioner,
v.
WASCO STATE PRISON,
Respondent.

Case No. 1:14-cv-00774-LJO-BAM-HC
FINDINGS AND RECOMMENDATIONS
TO DISMISS THE PETITION FOR
PETITIONER'S FAILURE TO FOLLOW AN
ORDER OF THE COURT, DECLINE TO
ISSUE A CERTIFICATE OF
APPEALABILITY, AND 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 through 304.

Pending before the Court are the petition, which was filed on April 11, 2014, and transferred to this division on May 21, 2014, as well as three orders of the Court that issued to Petitioner and directed him 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 April

1 14, 2014 (doc. 2-1, 1), May 21, 2014 (doc. 4-1, 1) and June 11, 2014
2 (doc. 6, 1). Petitioner has repeatedly failed to comply with the
3 Court's several orders to inform the Court of his decision regarding
4 consent.

5 I. Dismissal of the Petition

6 Local Rule 110 provides:

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

10 District courts have the inherent power to control their dockets and
11 "in 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 an
15 action, failure to obey a court order, or failure to comply with
16 local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52, 53-54 (9th
17 Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v.
18 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for
19 failure to comply with an order requiring amendment of complaint);
20 Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for
21 failure to comply with local rule requiring pro se plaintiffs to
22 keep court apprised of address); Malone v. U.S. Postal Service, 833
23 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with
24 court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir.
25 1986) (dismissal for lack of prosecution and failure to comply with
26 local rules).

27 In the instant case, Petitioner has repeatedly failed to
28 respond to the Court's orders regarding consent for a period of well

1 over three months.

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

12 In the instant case, because the petition has been pending for
13 a lengthy period, the Court finds that the public's interest in
14 expeditiously resolving this litigation and the Court's interest in
15 managing the docket weigh in favor of dismissal. The third factor,
16 risk of prejudice to respondents, also weighs in favor of dismissal,
17 because a presumption of injury arises from the occurrence of
18 unreasonable delay in prosecuting an action. Anderson v. Air West,
19 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor -- public
20 policy favoring disposition of cases on their merits -- is greatly
21 outweighed by the factors in favor of dismissal discussed herein.
22 Finally, the Court has reviewed the "consideration of alternatives"
23 requirement. See, Ferdik v. Bonzelet, 963 F.2d at 1262; Malone, 833
24 at 132-33; Henderson, 779 F.2d at 1424. Because Petitioner does not
25 respond to the Court's orders, the Court has no viable alternative
26 to dismissal.

27 In accordance with the foregoing analysis, the Court concludes
28 that dismissal is appropriate.

1 II. Certificate of Appealability

2 Unless a circuit justice or judge issues a certificate of
3 appealability, an appeal may not be taken to the Court of Appeals
4 from the final order in a habeas proceeding in which the detention
5 complained of arises out of process issued by a state court. 28
6 U.S.C. § 2253(c) (1) (A); Miller-El v. Cockrell, 537 U.S. 322, 336
7 (2003). A district court must issue or deny a certificate of
8 appealability when it enters a final order adverse to the applicant.
9 Rule 11(a) of the Rules Governing Section 2254 Cases in the United
10 States District Courts.

11 A certificate of appealability may issue only if the applicant
12 makes a substantial showing of the denial of a constitutional right.
13 § 2253(c) (2). Under this standard, a petitioner must show that
14 reasonable jurists could debate whether the petition should have
15 been resolved in a different manner or that the issues presented
16 were adequate to deserve encouragement to proceed further. Miller-
17 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.
18 473, 484 (2000)). A certificate should issue if the Petitioner
19 shows that jurists of reason would find it debatable whether: (1)
20 the petition states a valid claim of the denial of a constitutional
21 right, and (2) the district court was correct in any procedural
22 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

23 In determining this issue, a court conducts an overview of the
24 claims in the habeas petition, generally assesses their merits, and
25 determines whether the resolution was debatable among jurists of
26 reason or wrong. Id. An applicant must show more than an absence
27 of frivolity or the existence of mere good faith; however, the
28

1 applicant need not show that the appeal will succeed. Miller-El v.
2 Cockrell, 537 U.S. at 338.

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

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

9 III. Recommendations

10 Accordingly, it is RECOMMENDED that:

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

14 2) The Court DECLINE to issue a certificate of appealability;
15 and

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

18 These findings and recommendations are submitted to the United
19 States District Court Judge assigned to the case, pursuant to the
20 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local
21 Rules of Practice for the United States District Court, Eastern
22 District of California. Within thirty (30) days after being served
23 with a copy, any party may file written objections with the Court
24 and serve a copy on all parties. Such a document should be
25 captioned "Objections to Magistrate Judge's Findings and
26 Recommendations." Replies to the objections shall be served and
27 filed within fourteen (14) days (plus three (3) days if served by
28 mail) after service of the objections. The Court will then review

1 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).
2 The parties are advised that failure to file objections within the
3 specified time may waive the right to appeal the District Court's
4 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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7 IT IS SO ORDERED.

8 Dated: August 11, 2014

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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