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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SALVADOR PAUL VIOLA,

Petitioner,

Civ. No. S-07-2556 LKK KJM P

vs.

WARDEN, California Correctional
Center,

Respondent.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. On June 4, 2008, defendants filed a motion to dismiss the petition as filed outside the statute of limitations.

On October 23, 2008, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. In the same order, plaintiff was informed that failure to file an opposition would result in a recommendation that this action be dismissed pursuant to Fed. R. Civ. P. 41(b). The thirty day period has now expired and plaintiff has not responded to the court’s order.

“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). “In determining whether to dismiss a case for failure to comply with a

1 court order the district court must weigh five factors including: ‘(1) the public's interest in
2 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
3 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;
4 and (5) the availability of less drastic alternatives.’” Ferdik, 963 F.2d at 1260-61 (quoting
5 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
6 F.3d 52, 53 (9th Cir. 1995).

7 In determining to recommend that this action be dismissed, the court has
8 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
9 support dismissal of this action. The action has been pending for more than a year. Plaintiff’s
10 failure to comply with the Local Rules and the court’s October 23, 2008 order suggests that he
11 has abandoned this action and that further time spent by the court thereon will consume scarce
12 judicial resources in addressing litigation plaintiff demonstrates no intention of pursuing.

13 The fifth factor also favors dismissal. The court has granted ample additional
14 time to oppose the pending motion, but petitioner has not responded to the court’s order. The
15 court finds no suitable alternative to dismissal of this action.

16 Under the circumstances of this case, the third factor, prejudice to defendants
17 from plaintiff’s failure to oppose the motion, should be given little weight. Plaintiff’s failure to
18 oppose the motion does not put defendants at any disadvantage in this action. See Ferdik, 963
19 F.2d at 1262. Indeed, defendants would only be “disadvantaged” by a decision by the court to
20 continue an action plaintiff has abandoned. The fourth factor, public policy favoring disposition
21 of cases on their merits, weighs against dismissal of this action as a sanction. However, for the
22 reasons set forth supra, the first, second, and fifth factors strongly support dismissal and the third
23 factor does not mitigate against it. Under the circumstances of this case, those factors outweigh
24 the general public policy favoring disposition of cases on their merits. See Ferdik, 963 F.2d at
25 1263.

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1 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
2 dismissed pursuant to Federal Rule of Civil Procedure 41(b).

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
5 days after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised
8 that failure to file objections within the specified time may waive the right to appeal the District
9 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10 DATED: January 8, 2009.

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13 U.S. MAGISTRATE JUDGE
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