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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

AARON MONTGOMERY,

Petitioner,

v.

S. PERRY,

Respondent.

No. 2:15-cv-1220 KJM AC P

ORDER and FINDINGS AND  
RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2245. For the reasons set forth below, the undersigned recommends that the district court dismiss this action without prejudice for failure to prosecute.

I. Background

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. Petitioner was convicted by a jury of sexual intercourse by force, oral copulation by force, and genital penetration with a foreign object by force. See id. at 2; see also People v. Aaron Boone Montgomery, No. C067823, 2013 WL 6255704, at \*1 (Cal. Ct. App. Dec. 4, 2013).<sup>1</sup> Petitioner alleges he appealed his state court case on the grounds that the judge failed to instruct the jury on

<sup>1</sup> United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (The court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”) (citation and internal quotation marks omitted)).

1 battery as a lesser charge, and that his attorney failed to request adequate jury instruction. See  
2 ECF No. 1 at 2.

3 In July and August 2015, petitioner filed two motions to stay which were denied without  
4 prejudice because they were not in the proper form. ECF Nos. 8, 11. In September 2015,  
5 petitioner filed a third motion that was denied because petitioner failed to provide supplemental  
6 information regarding exhaustion that was necessary to determine whether a stay under Kelly v.  
7 Small was appropriate. ECF No, 15; see Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled  
8 on other grounds, Robbins v. Carey, 481 F.3d 1143. Petitioner filed a fourth motion to stay on  
9 February 16, 2016, which this court recommended the district court grant. ECF No. 35. The  
10 undersigned explained that petitioner needed to exhaust any remaining state court remedies, and  
11 directed petitioner to file a case status report every sixty days and inform the court within thirty  
12 days of a decision by the state's highest court exhausting his new claims. Id. at 6-7. The district  
13 court adopted the findings and recommendations, and the case was administratively closed. ECF  
14 No. 36.

15 Petitioner initially filed regular status reports updating his address and advising the court  
16 generally that he was working on his petition. ECF Nos. 38-48. However, his final status update  
17 was received on March 1, 2018. ECF No. 48. In July 2019, nearly three years after this case was  
18 stayed to allow petitioner to exhaust additional claims, petitioner still had not taken steps to  
19 pursue state court remedies or otherwise prosecute this case. On July 15, 2019, the court received  
20 a request for court files and transcripts so petitioner could "move forward with seeking relief in  
21 State or Federal US Court." ECF No. 49. On July 18, 2019, this court denied petitioner's request  
22 and ordered petitioner to show cause as to why the stay should not be lifted and the case  
23 dismissed for failure to prosecute. ECF No. 50.

24 On August 12, 2019, petitioner responded to the court's order to show cause, and  
25 described personal family circumstances that he alleged made it impossible for him to prosecute  
26 his case. ECF No. 51. Specifically, he said that his mother had passed away in 2018. Id. In the  
27 fourteen months since petitioner's request that the stay not be lifted, petitioner has not filed any  
28 further status reports or updates.

1 II. Discussion

2 Rule 41(b) of the Federal Rules of Civil Procedure grants federal district courts the  
3 authority to sua sponte dismiss actions for failure to prosecute. See, e.g., Chambers v. NASCO,  
4 Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act sua sponte to dismiss a suit for  
5 failure to prosecute”); Hells Canyon Preservation Council v. U.S. Forest Serv., 403 F.3d 683, 689  
6 (9th Cir. 2005) (recognizing that courts may dismiss an action pursuant to Federal Rule of Civil  
7 Procedure 41(b) sua sponte for a plaintiff’s failure to prosecute or comply with the rules of civil  
8 procedure or the court's orders); Link v. Wabash R. Co., 370 U.S. 626, 629-30 (1962). This  
9 court’s Local Rules are in accord. See E.D. Cal. Local Rule 110 (“Failure of counsel or of a party  
10 to comply with these Rules or with any order of the Court may be grounds for imposition by the  
11 Court of any and all sanctions authorized by statute or Rule or within the inherent power of the  
12 Court.”); E.D. Cal. Local Rule 183(a) (providing that a pro se party’s failure to comply with the  
13 Federal Rules of Civil Procedure, the court's Local Rules, and other applicable law may support,  
14 among other things, dismissal of that party's action).

15 A court must weigh five factors in determining whether to dismiss a case for failure to  
16 prosecute, failure to comply with a court order, or failure to comply with a district court’s local  
17 rules. See Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992). Specifically, the court  
18 must consider: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need  
19 to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring  
20 disposition of cases on their merits; and (5) the availability of less drastic alternatives. Id. at  
21 1260-61; accord, Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002); Ghazali v. Moran, 46  
22 F.3d 52, 53 (9th Cir. 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of  
23 Appeals has stated that “[t]hese factors are not a series of conditions precedent before the judge  
24 can do anything, but a way for a district judge to think about what to do.” In re  
25 Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

26 Although involuntary dismissal can be a harsh remedy, on balance the five relevant  
27 factors weigh in favor of dismissal of this action. The court, in its August 22, 2016 order and  
28 findings and recommendations expressly directed petitioner to inform the court of the exhaustion

1 of his unexhausted claims. ECF No. 35. The court also directed petitioner to file status updates.  
2 Id. In the court’s order to show cause, the court stated that “despite petitioner’s statements to the  
3 contrary, it does not appear that he has taken any steps to pursue his state court remedies or  
4 otherwise prosecute this action.” ECF No. 50 at 2. The court further explained that petitioner  
5 had not diligently complied with prior court orders and filed regular status updates. Failure to  
6 comply with these orders places the case at a standstill and delays the court from moving the case  
7 toward resolution. Moreover, petitioner’s nonaction indicates that petitioner does not intend to  
8 litigate this action diligently. See Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)  
9 (“The public’s interest in expeditious resolution of litigation always favors dismissal.”). Other  
10 than a response that failed to indicate how petitioner is pursuing this action (ECF No. 51), since  
11 this court’s order to show cause, petitioner has failed to file any status updates or otherwise  
12 comply with the general directives of this court. Any further time spent by the court on this case,  
13 which petitioner has demonstrated a lack of any serious intention to pursue, will consume scarce  
14 judicial resources and take away from other active cases. See Ferdik, 963 F.2d at 1261  
15 (recognizing that district courts have inherent power to manage their dockets without being  
16 subject to noncompliant litigants).

17 The third factor, prejudice to respondent, also weighs in favor of dismissal. At a  
18 minimum, respondent has been prevented from attempting to resolve this case on the merits by  
19 petitioner’s unreasonable delay in prosecuting this action. Unreasonable delay is presumed to be  
20 prejudicial. See In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

21 The fifth factor, the availability of less drastic sanctions, also supports dismissal. The  
22 court has pursued remedies that are less drastic than a recommendation of dismissal. See Malone  
23 v. U.S. Postal Serv., 833 F.2d 128, 132 (9th Cir. 1987) (stating that an “explicit discussion of  
24 alternatives is unnecessary if the district court actually tries alternatives before employing the  
25 ultimate sanction of dismissal.”), cert. denied, 488 U.S. 819 (1988); see also Henderson v.  
26 Duncan, 779 F.2d 1424 (9th Cir. 1986) (“The district court need not exhaust every sanction short  
27 of dismissal before finally dismissing a case, but must explore possible and meaningful  
28 alternatives.”) (citation omitted). The court has explicitly and repeatedly informed petitioner of

1 his obligations to provide status updates and to diligently pursue this case, and petitioner has  
2 failed to comply. The court therefore concludes that sanctions other than dismissal are not  
3 appropriate.

4 The court also recognizes the importance of giving due weight to the fourth factor, which  
5 addresses the public policy favoring disposition of cases on the merits. However, for the reasons  
6 set forth above, factors one, two, three, and five strongly support a recommendation of dismissal  
7 of this action, and factor four does not trump the remaining factors. Dismissal is proper “where at  
8 least four factors support dismissal or where at least three factors ‘strongly’ support dismissal.”  
9 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations and quotation marks  
10 omitted). Under the circumstances of this case, the other relevant factors outweigh the general  
11 public policy favoring disposition of actions on their merits. See Ferdik, 963 F.2d at 1263.

12 III. Conclusion

13 Accordingly, IT IS HEREBY ORDERED that the stay of this case be lifted.

14 IT IS HEREBY RECOMMENDED that petitioner’s petition for writ of habeas corpus  
15 (ECF No. 1) be dismissed without prejudice for failure to prosecute.

16 These findings and recommendations are submitted to the United States District Judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
18 after being served with these findings and recommendations, any party may file written  
19 objections with the court and serve a copy on all parties. Such a document should be captioned  
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
21 objections shall be served and filed within fourteen days after service of the objections. The  
22 parties are advised that failure to file objections within the specified time may waive the right to  
23 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 DATED: October 21, 2020

25   
26 ALLISON CLAIRE  
27 UNITED STATES MAGISTRATE JUDGE  
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