

1 On May 9, 2016, petitioner filed a motion to stay in which he requested Ground Five be
2 dismissed and that he be granted a Kelly stay so that he could exhaust Ground Five in state court.
3 ECF No. 12. On May 12, 2016, this court struck Ground 5 of the petition, and the case was
4 stayed as to the remaining grounds for the express purpose of allowing petitioner to return to state
5 court to exhaust his unexhausted claim. ECF No. 13. The order further provided that within
6 thirty days of receiving a decision by the state’s highest court exhausting his claim, petitioner was
7 to file a notice with this court requesting to lift the stay and an amended petition. Id. at 2-3.

8 A review of the online dockets for both the Third District Court of Appeal and the
9 California Supreme Court, reveals that petitioner has not filed any petitions in those courts since
10 his direct appeal, which was completed in 2014. United States ex rel. Robinson Rancheria
11 Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (the court “may take notice of
12 proceedings in other courts, both within and without the federal judicial system, if those
13 proceedings have a direct relation to matters at issue.”) (citation and internal quotation marks
14 omitted)).

15 On July 18, 2019, petitioner was ordered to show cause as to why the stay should not be
16 lifted and this case be dismissed for failure to prosecute. ECF No. 14. It has been over a year
17 since that order, and petitioner has not responded.

18 II. Discussion

19 Rule 41(b) of the Federal Rules of Civil Procedure grants federal district courts the
20 authority to sua sponte dismiss actions for failure to prosecute. Link v. Wabash R. Co., 370 U.S.
21 626, 629-30 (1962). In determining whether dismissal for failure to prosecute is appropriate,
22 courts examine several factors, including: (1) the public’s interest in expeditious resolution of
23 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to defendants; (4) the
24 availability of less drastic sanctions; and (5) the public policy favoring the disposition of cases on
25 their merits. Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002); Ferdik v. Bonzelet, 963
26 F.2d 1258, 1260-61 (9th Cir.1992).

27 Here, it is evident that the first two factors—public interest in expeditious resolution of
28 litigation and the need to manage the court’s docket—weigh in favor of dismissal. The court, in

1 its May 12, 2016 order, directed petitioner to inform the court of the exhaustion of his
2 unexhausted claims. ECF No. 13 at 2-3. On July 18, 2019, the court expressly requested
3 petitioner update this court on the status of his case and stated that “[f]ailure to respond to this
4 order will result in an order lifting the stay and a recommendation that the action be dismissed for
5 failure to prosecute.” ECF No. 14 at 2. Petitioner’s failure to comply with these orders places the
6 case at a standstill and delays the court from moving the case toward resolution. Moreover,
7 petitioner’s nonaction indicates that petitioner does not intend to litigate this action diligently.

8 As to the third factor—prejudice to respondent—petitioner’s inaction weighs in favor of
9 dismissal. Prejudice to a defendant alone due to the pendency of a lawsuit is insufficient to
10 justify dismissal. Ash v. Cvetkov, 739 F.2d 493, 496 (9th Cir. 1984). However, the Ninth Circuit
11 has held that prejudice may be presumed from unreasonable delay. See In re Eisen, 31 F.3d 1447,
12 1452-53 (9th Cir. 1994); Moore v. Teflon Commc’ns. Corp., 589 F.2d 959, 967-68 (9th Cir.
13 1978). This presumption can be rebutted if petitioner proffers a non-frivolous justification for the
14 delay. See Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); Pagtalunan, 291
15 F.3d at 642 (citing Yourish v. California Amplifier, 191 F.3d 983, 991 (9th Cir. 1999)).
16 Petitioner has offered no explanation for his failure to comply with the court’s orders. Because
17 petitioner has not attempted to justify his neglect of this case, or otherwise communicate with the
18 court since May 2016, the “prejudice” element favors dismissal.

19 The fourth factor—the availability of less drastic sanctions—typically weighs against
20 dismissal. However, the court tried to avoid outright dismissal by providing petitioner with an
21 opportunity to explain why he had not proceeded with exhaustion or otherwise prosecuted his
22 case. See ECF No. 14. Thus, the court explored meaningful alternatives to dismissal and these
23 alternatives have not been effective in furthering this case. See Henderson v. Duncan, 779 F.2d
24 1424 (9th Cir. 1986) (“The district court need not exhaust every sanction short of dismissal before
25 finally dismissing a case, but must explore possible and meaningful alternatives.”) (citation
26 omitted). The court therefore concludes that sanctions other than dismissal are not appropriate.

27 The fifth factor, the general policy favoring resolution of cases on the merits, arguably
28 favors retention of this action on the court’s docket. However, notwithstanding this policy, it is

1 the responsibility of the moving party to move the case toward disposition on the merits at a
2 reasonable pace and to refrain from dilatory and evasive tactics. Morris v. Morgan Stanley &
3 Co., 942 F.2d 648, 652 (9th Cir. 1991). Petitioner has declined to participate in his own litigation
4 since May 9, 2016. In these circumstances, it does not appear that the court's retention of this
5 action would increase the likelihood that the matter would be resolved on its merits.

6 III. Conclusion

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The stay of this case be lifted; and
- 9 2. The Clerk of the Court is directed to randomly assign a district judge to this action.

10 IT IS HEREBY RECOMMENDED that petitioner's petition for writ of habeas corpus
11 (ECF No. 5) be dismissed without prejudice for failure to prosecute.

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
14 after being served with these findings and recommendations, petitioner may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
17 within the specified time may waive the right to appeal the District Court's order. Martinez v.
18 Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: October 9, 2020

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21 ALLISON CLAIRE
22 UNITED STATES MAGISTRATE JUDGE
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