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5 UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
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8 David Wise,

9 Petitioner,

10 v.

11 Sheriff Gore, et al.,

12 Respondent.
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Case No.: 16-cv-00677-JLB

**ORDER GRANTING MOTION TO
DISMISS; DISMISSING THE
PETITION; DENYING MOTION
FOR SUMMARY JUDGMENT;
DENYING CERTIFICATE OF
APPEALABILITY**

[ECF Nos. 9, 17]

15
16 **INTRODUCTION**

17 Upon consent of the parties, this case was referred to United States Magistrate Judge
18 Jill L. Burkhardt to conduct all proceedings and order entry of final judgment in accordance
19 with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

20 On April 11, 2016, David Wise (“Petitioner”), proceeding *pro se*, filed his first
21 amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (“Petition”). On
22 May 10, 2016, the assigned magistrate judge issued a scheduling order, setting July 15,
23 2016 as the deadline for Respondent to file any motion to dismiss. (ECF No. 6.) On May
24 12, 2016, Petitioner filed an ex parte motion for summary judgment, seeking an order
25 allowing for Petitioner’s release from San Diego County Jail prior to his scheduled release
26 date of June 3, 2016. (ECF No. 9.) However, Petitioner is no longer incarcerated as
27 reflected in the notice of change of address he filed with the district court on June 13, 2016.
28 (ECF No. 10.)

1 On July 8, 2016, the Court issued a revised scheduling order that extended the
2 deadline for Respondent to file any motion to dismiss to August 15, 2016. (ECF No. 16.)
3 Respondent timely filed a motion to dismiss the Petition. (ECF No. 17.) The deadline for
4 Petitioner to respond in opposition to the motion to dismiss was September 14, 2016. (ECF
5 No. 16.) Petitioner did not file a response to Respondent's motion.

6 After a careful review of the parties' submissions, and for reasons set forth below,
7 this Court **GRANTS** Respondent's motion to dismiss, **DISMISSES** the Petition without
8 prejudice, **DENIES** as moot Plaintiff's motion for summary judgment, and **DENIES** a
9 certificate of appealability.

10 **BACKGROUND**

11 Petitioner and his wife were jointly prosecuted for a number of white collar crimes.
12 Ultimately, both entered guilty pleas pursuant to negotiated plea agreements. Petitioner
13 was sentenced to a prison term of almost eight years, but he was permitted to serve that
14 term in local custody in the county jail. He completed that sentence some time ago, and
15 thus, is no longer subject to loss of liberty as a result of this judgment.

16 Petitioner now seeks federal habeas corpus relief, but he expressly makes no
17 challenge to his convictions. Instead, he complains that, as a jail prisoner, he was treated
18 less favorably than other prisoners committed to serve their time in state prisons. In
19 general, he complains that: (1) prison detainees were eligible for more credits against their
20 sentences, so that a prisoner in prison might complete his sentence before those, like
21 Petitioner, who served their time in county jail; (2) prison detainees enjoyed some better
22 quality-of-life conditions, such as allegedly better medical and dental care; and (3) those
23 in state prison could qualify for alternative confinement programs that were not available
24 to jail prisoners. Petitioner contends that these disparities violate his rights to equal
25 protection of the laws or constitute cruel and unusual punishment.

26 **ANALYSIS**

27 Respondent's motion to dismiss (ECF No. 17) is **GRANTED** because the Court
28 construes Petitioner David Wise's failure to file an opposition in response to the motion as

1 constituting consent to the granting of the motion to dismiss under Civil Local Rule
2 7.1.f.3.c and because none of the claims are cognizable in a federal habeas corpus petition.

3 Petitioner was ordered to and failed to file an opposition to Respondent’s motion to
4 dismiss. (ECF No. 16.) Pursuant to the Court’s July 8, 2016 scheduling order, the deadline
5 for Petitioner to file his opposition to the motion was September 14, 2016. (*Id.*) In that
6 same scheduling order, the Court warned Petitioner that “**Pursuant to Civil Local Rule**
7 **7.1.f.3.c, if an opposing party fails to file opposition papers in the time and manner**
8 **required by the Court, that failure may constitute a consent to the granting of the**
9 **motion to dismiss.** (*Id.* (emphasis in original).) To date, Petitioner has not submitted an
10 opposition brief to Respondent’s motion to dismiss, nor has he requested an extension of
11 time in which to do so.

12 District courts have broad discretion to enact and apply local rules, including
13 dismissal of a case for failure to comply with the local rules. *See generally Ghazali v.*
14 *Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (affirming grant of an unopposed motion to dismiss
15 under local rule by deeming a pro se litigant’s failure to oppose as consent to granting the
16 motion); *Cano v. Hughes*, No. 13cv2335 H WVG, 2015 WL 2365687, at *4 (S.D. Cal.
17 May 18, 2015) (same). Before dismissing an action for failure to comply with local rules,
18 district courts “weigh several factors: ‘(1) the public’s interest in expeditious resolution of
19 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
20 defendants; (4) the public policy favoring disposition of cases of their merits; and (5) the
21 availability of less drastic sanctions.’” *Ghazali*, 46 F.3d at 53 (quoting *Henderson v.*
22 *Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). That a plaintiff is proceeding pro se does
23 not excuse his failure to follow the rules of procedure that govern other litigants. *King v.*
24 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the same rules of
25 procedure that govern other litigants.”).

26 Here, Respondent attached a proof of service to its motion to dismiss, signaling that
27 Petitioner was served by First-Class Mail with the motion at his address of record on or
28 about August 15, 2016. (ECF No. 17 at 3.) Petitioner, who is not incarcerated, was

1 provided adequate time to prepare a response. More than six weeks have passed since
2 Petitioner's September 14, 2016 deadline to oppose the motion to dismiss and still
3 Petitioner has not filed an opposition. Thus, the Court finds that "the public's interest in
4 expeditious resolution of litigation," "the court's need to manage its docket," and "the risk
5 of prejudice to the defendant" all weigh in favor of granting the motion to dismiss. *See*
6 *Ghazali*, 46 F.3d at 53. Accordingly, the majority of the *Ghazali* factors weigh in favor of
7 dismissal.

8 The "availability of less drastic sanctions" also weighs in favor of dismissal because
9 Respondent has shown that none of Petitioner's claims are cognizable in this federal habeas
10 corpus case. (*See* ECF No. 17.) In the operative petition, Petitioner raises certain claims
11 relating to the conditions of confinement during the time period in which he was
12 incarcerated. Such claims *must* be brought exclusively in an action under 42 U.S.C. § 1983
13 pursuant to the Ninth Circuit's recent decision in *Nettles v. Grounds*.¹ *Nettles*, 830 F.3d
14 922, 927 (9th Cir. 2016). Petitioner's remaining claims challenge only Petitioner's
15 eligibility for an alternative custody program and conduct credits towards completion of
16 his sentence. He expressly pleads, "I'm not challenging my conviction." (ECF No. 4.)
17 Because Petitioner already completed his sentence, these claims concerning his sentence
18 are moot.

19 Petitioner bears the burden to demonstrate some remaining consequence that permits
20 this action to continue² and he has failed to do so. In fact, there is nothing in the record to
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23 ¹ The Court notes that the Petition is not amenable to a simple conversion from a § 2254 habeas corpus
24 petition to a civil rights claim under § 1983 because, as discussed herein, some of Petitioner's claims—
25 those addressing conduct credits—appear to fall within the habeas core, such that those claims could not
26 be part of a § 1983 action. *See Nettles*, 830 F.3d at 936.

27 ² *See United States v. Hardy*, 545 F.3d 280, 284 (4th Cir. 2008) (absent a presumption of collateral
28 consequences, the prisoner bears the burden of demonstrating collateral consequences sufficient to meet
Article III's case-or-controversy requirement); *DeFoy v. McCullough*, 393 F.3d 439, 442 n.3 (3d Cir.
2005) ("It is a petitioner's burden to demonstrate that collateral consequences exist to avoid having a
case dismissed as moot."); *United States v. Clark*, 193 F.3d 845, 847 (5th Cir. 1999) ("The petitioner has
the burden to establish [some concrete and continuing] injury, and if he fails to satisfy his burden we
must dismiss for lack of jurisdiction.").

1 show that some remaining consequence exists with respect to Petitioner’s completed
2 sentence to satisfy the case-or-controversy requirement of Article III, § 2 of the United
3 States Constitution. Therefore, each of the *Ghazali* factors weighs in favor of granting of
4 the motion to dismiss under Civil Local Rule 7.1.f.3.c.

5 Dismissal is also appropriate because, as explained in the Court’s analysis above of
6 the last *Ghazali* factor, Respondent has met its burden to show that none of Petitioner’s
7 claims are cognizable in a federal habeas corpus petition. Petitioner challenges the
8 conditions of his confinement and his eligibility for a reduction or alternative program to
9 in his now completed sentence. Petitioner’s conditions of confinement claims must be
10 brought in an action under 42 U.S.C. § 1983. *Nettles*, 830 F.3d at 927. And Petitioner’s
11 eligibility claims concerning his sentence are moot. Therefore, Respondent’s motion to
12 dismiss is GRANTED.

13 **CERTIFICATE OF APPEALABILITY**

14 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 cases, a district
15 court “must issue or deny a certificate of appealability when it enters a final order adverse
16 to the applicant.” A state prisoner may not appeal the denial of a Section 2254 habeas
17 petition unless he obtains a certificate of appealability from a district or circuit judge.
18 28 U.S.C. § 2253(c)(1)(A); *see also United States v. Asrar*, 116 F.3d 1268, 1269-70 (9th
19 Cir. 1997) (holding that district courts retain authority to issue certificates of appealability
20 under AEDPA). A certificate of appealability may issue “only if the applicant has made a
21 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). It must
22 appear that reasonable jurists could find the district court’s assessment of the petitioner’s
23 constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
24 The Court concludes that jurists of reason could not find it debatable whether this Court
25 was correct in dismissing the Petition. The Court denies a certificate of appealability.

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1 **CONCLUSION**

2 For the reasons set forth above, IT IS HEREBY ORDERED that:

3 1. Respondent's motion to dismiss (ECF No. 17) is **GRANTED**, and the Petition
4 (ECF No. 4) is hereby **DISMISSED WITHOUT PREJUDICE** to filing an amended
5 petition for writ of habeas corpus in this case and/or filing a separate action pursuant to 42
6 U.S.C. § 1983 concerning the conditions of confinement claims. Any amended petition
7 for writ of habeas corpus must be filed by **November 21, 2016**;


8 2. Petitioner's Ex Parte Motion for Summary Judgment and Order to Show
9 Cause (ECF No. 9) is **DENIED WITHOUT PREJUDICE** as moot;³

10 3. Petitioner is DENIED a certificate of appealability; and

11 4. The Clerk of Court is directed to close this case.

12 IT IS SO ORDERED.

13 Dated: November 7, 2016

14 
15 Hon. Jill L. Burkhardt
16 United States Magistrate Judge

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28 ³ The motion (seeking early release) is moot as Petitioner is no longer in custody and as the Petition fails to state a cognizable federal habeas corpus claim.