THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

JOHN REDMOND,
 	
     Petitioner,
 	
v.
 	
ROSIE RIVERA,
 	
     Respondent.
	**MEMORANDUM DECISION
	& DISMISSAL ORDER**
	
	Case No. 2:21-CV-122-DAK
	
	District Judge Dale A. Kimball

BACKGROUND

On March 1, 2021, Petitioner submitted a federal habeas-corpus petition, 28 U.S.C.S. §

2241 (2022), proceeding *in forma pauperis*. (ECF Nos. 1, 3-6.) Over the next year, Petitioner

filed several documents seeking to advance this litigation. (ECF Nos. 7-9, 14, 16-17.) On March

1, 2022, Respondent filed an Answer. (ECF No. 15.) When Petitioner did not respond to the

Answer as required, on June 16, 2022, the Court issued Petitioner an Order to within thirty days

show cause why the Petition should not be dismissed. (ECF No. 18.) Petitioner has never

responded. Indeed, the Order to Show Cause was returned to sender, marked, "MOVED LEFT

NO ADDRESS." (ECF No. 19.) Petitioner has not since updated his address, as required. *See* D.

Utah Civ. R. 83-1.3(e) ("In all cases, counsel and parties appearing *pro se* must notify the clerk's

office immediately of any change in address, email address, or telephone number.").

ANALYSIS

Federal Rule of Civil Procedure 41(b) allows involuntary dismissal of an action "[i]f the

[petitioner] fails to prosecute or to comply with . . . a court order." Fed. R. Civ. P. 41(b). This

Court may dismiss actions *sua sponte* for failure to prosecute. *Olsen v. Mapes*, 333 F.3d 1199, 1204 n.3 (10th Cir. 2003) ("Although the language of Rule 41(b) requires that the [respondent] file a motion to dismiss, the Rule has long been interpreted to permit courts to dismiss actions *sua sponte* for a [petitioner's] failure to prosecute or comply with . . . court orders."); s*ee also Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (stating court has inherent authority to clear "calendar[] of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief"); *Bills v. United States*, 857 F.2d 1404, 1405 (10th Cir. 1988) ("Dismissal for failure to prosecute is a recognized standard operating procedure in order to clear the deadwood from the courts' calendars where there has been prolonged and unexcused delay.").

In determining whether to dismiss this action, the Court applies the factors from *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992)--i.e., "(1) the degree of actual prejudice to [Respondent]"; (2) "the amount of interference with the judicial process"; (3) the litigant's culpability; (4) whether the noncomplying litigant was warned that dismissal was a likely sanction; and (5) "the efficacy of lesser sanctions." *Id*. at 921 (internal quotation marks omitted); *see also Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009) (applying *Ehrenhaus* factors in habeas case). Dismissal with prejudice is appropriate only when these factors overshadow the judicial system's strong preference to decide cases on the merits. *DeBardeleben v. Quinlan*, 937 F.2d 502, 504 (10th Cir. 1991). The *Ehrenhaus* factors are not "a rigid test; rather, they represent criteria for the district court to consider [before] imposing dismissal as a sanction." *Ehrenhaus*, 965 F.2d at 921; *see also Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1323 (10th Cir. 2011) ("The *Ehrenhaus* factors are simply a non-exclusive list of sometimes-helpful 'criteria' or guide posts the district court may wish to 'consider' in the exercise of what must always be a discretionary

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function."); *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1044 (10th Cir. 2005) (describing

Ehrenhaus factors as "not exhaustive, nor . . . equiponderant"); *Archibeque v. Atchison, Topeka*

& Santa Fe Ry. Co., 70 F.3d 1172, 1174 (10th Cir. 1995) ("[D]etermining the correct sanction is

a fact specific inquiry that the district court is in the best position to make.").

  Factor 1: Degree of actual prejudice to Respondent. Prejudice may be inferred from

delay, uncertainty, and rising attorney's fees. *Faircloth v. Hickenlooper*, No. 18-1212, 2018 U.S.

App. LEXIS 36450, at *5 (10th Cir. Dec. 26, 2018) (unpublished); *Jones v. Thompson*, 996 F.2d

261, 264 (10th Cir. 1993); *see also Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886

F.3d 852, 860 (10th Cir. 2018) (concluding substantial prejudice when plaintiff "sparked months

of litigation" and defendants "wasted eight months of litigation"); *Riviera Drilling &*

Exploration Co. v. Gunnison Energy Corp., 412 F. App'x 89, 93 (10th Cir. 2011) (unpublished)

(approving district court's observation that "delay would 'prolong for the defendants the

substantial uncertainty faced by all parties pending litigation'") (citation omitted).

  Reviewing the docket here, the Court concludes that Petitioner's neglect prejudices

Respondent, who has spent time defending this lawsuit. Respondent has adhered to the Order,

(ECF No. 10), to file an answer, (ECF No. 15). The Answer recites the facts and law, and

analyzes the issues. (*Id*.) This apparently took Respondent time and resources--and for naught as

Petitioner has been unresponsive.

  Including preparing its answer, Respondent has wasted nearly ten months of litigation. To

let the case proceed, when Petitioner has not met his duty, may make Respondent spend more

unnecessary time and money to defend a case that Petitioner seems to have no interest in

pursuing. This factor weighs toward dismissal. *See Kalkhorst v. Medtronic, Inc*., No. 18-cv-580-

KLM, 2018 U.S. Dist. LEXIS 215598, at *8 (D. Colo. Dec. 19, 2018); *see also Tolefree v.*

Amerigroup Kan., Inc., No. 18-2032-CM-TJJ, 2018 U.S. Dist. LEXIS 195448, at *5 (D. Kan.

Nov. 15, 2018) ("Defendants have had plaintiff's allegations pending in an open court case for

nearly ten months, with no end in sight. Plaintiff, on the other hand, has shown little interest in

pursuing her claims or following court orders."); *Oliver v. Wiley*, No. 09-cv-441-PAB, 2010 U.S.

Dist. LEXIS 92836, at *5 (D. Colo. Aug. 18, 2010) ("Applicant's failure to provide the Court

with a current address . . . and failure to keep abreast of his case has prejudiced Respondent, who

was forced to answer an Application that Applicant appears to have no intention of pursuing.

While arguably this prejudice is not ongoing, this factor weighs slightly in favor of dismissal.").

Factor 2: Amount of interference with judicial process. In *Jones*, the Tenth Circuit

concluded that the plaintiff had significantly interfered with the judicial process when he did not

answer a show-cause order or join a telephone conference. *Jones*, 996 F.2d at 265. Though Jones

later argued that the district court could have abated the suit and revisited the status in three to

six months, the court noted that abeyance would have delayed the proceedings for the other

parties and the court. *Id*. The court said, "In similar circumstances, we have held that a district

court could find interference with the judicial process when the plaintiff 'repeatedly ignore[s]

court orders and thereby hinder[s] the court's management of its docket and its efforts to avoid

unnecessary burdens on the court and the opposing party.'" *Id*. (citation omitted).

Meanwhile, in *Villecco*, the Tenth Circuit concluded that the plaintiff had "caused great

interference with the judicial process by failing to provide the court with a current mailing

address or an address that he regularly checked; respond to discovery requests; appear at his

deposition; list any fact witnesses or otherwise comply with the court's Initial Pretrial Order, or

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respond to the Defendants' Motion to Dismiss." *Villeco v. Vail Resorts, Inc.*, 707 F. App'x 531,

533 (10th Cir. 2017); *see also Banks v. Katzenmeyer*, 680 F. App'x 721, 724 (10th Cir. 2017)

(unpublished) ("[H]e did not (1) respond to the order to show cause or (2) notify the court of his

change of address as required by the local rules, even though his past actions show he was aware

of the requirement."); *Taylor v. Safeway, Inc.*, 116 F. App'x 976, 977 (10th Cir. 2004)

(dismissing under *Ehrenhaus* when "judicial process essentially ground to a halt when [Plaintiff]

refused to respond to either the defendant[s' filings] or the district court's orders"); *Killen v.*

Reed & Carnick, No. 95-4196, 1997 U.S. App. LEXIS 430, at *4 (10th Cir. Jan. 9, 1997)

(unpublished) ("Plaintiff's willful failure to comply with [court] orders flouted the court's

authority and interfered with the judicial process." (Internal quotation marks & citation

omitted.)). "[F]ailure to respond to court orders cannot be ignored." *Davis*, 571 F.3d at 1062.

Likewise here, this Court concludes Petitioner's failure to prosecute his case--i.e., not

responding to the Court's order and not replying to the Answer--necessarily interferes with

effective administration of justice. The issue here "is respect for the judicial process and the

law." *See Cosby v. Meadors,* 351 F.3d 1324, 1326-27 (10th Cir. 2003); *Oliver*, 2010 U.S. Dist.

LEXIS 92836, at *6 (holding petitioner's noncompliance with rules and order to show cause

shows lack of respect for court, respondent, and judicial process, and concluding, if petitioner's

case were not dismissed, court's merits review of petition would unnecessarily increase court's

workload and interfere with justice administration). Petitioner's failure to put himself in a

position to comply with court orders disrespects the Court and the judicial process. His neglect

has caused the Court and staff to spend unnecessary time and effort. The Court's frequent review

of the docket and preparation of orders to move this case along have increased the Court's

workload and hijacked its attention from other matters with parties who have met their

obligations and deserve prompt resolution of their issues. "This order is a perfect example,

demonstrating the substantial time and expense required to perform the legal research, analysis,

and writing to craft this document." *Lynn v. Roberts*, No. 01-cv-3422-MLB, 2006 U.S. Dist.

LEXIS 72562, at *7 (D. Kan. Oct. 4, 2006).

This factor weighs toward dismissal. *See Kalkhorst,* 2018 U.S. Dist. LEXIS 215598, at

*8-9; *see also Estate of Strong v. City of Northglen*, No. 1:17-cv-1276-WJM-SKC, 2018 U.S.

Dist. LEXIS 211095, at *10 (D. Colo. Dec. 14, 2018) (report & recommendation) ("It is hard to

fathom how failing to respond to orders of the federal district court would *not* interfere with the

judicial process." (Emphasis in original.)).

Factor 3: Litigant's culpability. Evidence of culpability may be drawn from Petitioner's

failure to file a response to Respondent's Answer, (ECF No. 15), and the passage of time. *See*

Villecco, 707 F. App'x at 534 (10th Cir. 2017); *see also Faircloth*, 2018 U.S. App. 36450, at *6

(finding culpability when plaintiff "had been solely responsible for his failure to update his

address, to respond to the show-cause order"); *Stanko v. Davis*, 335 F. App'x 744, 747 (10th Cir.

2009) (unpublished) ("For at least seven months, Stanko failed to follow this order. The district

court ordered Stanko to show cause for this failure. Stanko made no effort to explain his failure

regarding those seven months."); *Theede v. U.S. Dep't of Labor*, 172 F.3d 1262, 1265 (10th Cir.

1999) (holding plaintiff responsible for inability to receive court filings based on not notifying

court of correct address).

Earlier here, Petitioner showed ability to initiate this case on his own and understand the

need to respond to Court orders. (ECF Nos. 1, 4, 6, 17.) Now, more than five months have

passed since Petitioner's last filing--with no further word at all. And Petitioner has simply never

responded to the Answer, as required. *See Banks*, 680 F. App'x at 724; *see also Oliver*, 2010

U.S. Dist. LEXIS 92836, at *6-7 ("Applicant has, without any reasonable excuse, ignored [his

duty to update his address]. Applicant has also failed to show cause why his case should not be

dismissed or provide any justification for his failure to prosecute his case. Although Applicant's

pleadings are construed liberally because he is proceeding pro se, he is not excused from his

obligations to follow the same rules of procedure that govern other litigants. Therefore, the Court

concludes that Applicant is culpable for his failure to follow the Local Rules and failure to

litigate his case." (Citation omitted.)).

This factor weighs in favor of dismissal.

Factor 4: Whether court warned noncomplying litigant that dismissal was likely

sanction. In *Faircloth*, the court twice warned the plaintiff that failure to comply could result in

dismissal. *Faircloth*, 2018 U.S. App. 36450, at *7. On appeal, when the plaintiff argued he did

not get these warnings, the Tenth Circuit stated, "But he could have received the warnings had he

complied with the local rule requiring him to update his address. Because he did not, the court's

only option was to mail documents to him at his last known address. These mailings constituted

effective service [under Fed. R. Civ. P. 5(b)(2)(C)]." *Id*; *see also O'Neil v. Burton Grp.*, 559 F.

App'x 719, 722 (10th Cir. 2014) (unpublished) (supporting dismissal with prejudice for failure to

appear especially after litigant had been warned repeatedly of consequences).

Here, the Court stated in its June 16, 2022 Order, "Petitioner has thirty days in which to

SHOW CAUSE why his petition should not be dismissed because he has not filed his required

response to Respondent's Answer, docketed March 1, 2022, over three months ago." (ECF No.

18.) Other orders in this case also reflected the Court's warning that failure to comply with orders would result in case dismissal. (ECF Nos. 3, 10.) There can be no mistaking the Court's intentions.

Factor 5: Efficacy of lesser sanctions. Also in *Faircloth*, the district court had decided that no lesser sanction than dismissal could be effective when "[t]he court had been unable to receive a response from Mr. Faircloth and had no way of learning where Mr. Faircloth was or when he would disclose his new address." *Faircloth*, 2018 U.S. App. 36450, at *7-8. Due to this uncertainty, "the court reasonably concluded that dismissal was necessary." *Id*.

Another case upheld dismissal when, "given [plaintiff's] failure to communicate, to respond to any notices or the Motion to Dismiss, or to comply with any deadlines, the [district] court found no lesser sanction than dismissal would be effective." *Villecco,* 707 F. App'x at 533. The court noted, "A lesser sanction would be ineffective because a stay would not have a 'real impact on [Plaintiff] in encouraging responsiveness.'" *Id*. at 535; *see also O'Neil v. Burton Grp*., 559 F. App'x 719, 722 (10th Cir. 2014) (unpublished) ("[S]imply because lesser sanctions were available does not mean that the court was obligated to apply them.").

In yet another appeal, the Tenth Circuit stated that, though "dismissal should be imposed only after careful exercise of judicial discretion," it

> is an appropriate disposition against a party who disregards court orders and fails to proceed as required by court rules. . . . Dismissal of the [case] is a strong sanction to be sure, but it is no trifling matter for [a party] to abuse our office by disappearing and failing to meet our deadlines. The federal courts are not a playground for the petulant or absent-minded; our rules and orders exist, in part, to ensure that the administration of justice occurs in a manner that most efficiently utilizes limited judicial resources.

United States ex rel. Jimenez v. Health Net, Inc., 400 F.3d 853, 855, 856 (10th Cir. 2005).

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It is true that, for a *pro se* party, "the court should carefully assess whether it might . . .

impose some sanction other than dismissal, so that the party does not unknowingly lose its right

of access to the courts because of a technical violation." *Ehrenhaus*, 965 F.2d at 920 n.3; *see also*

Callahan v. Commun. Graphics, Inc., 657 F. App'x 739, 743 (10th Cir. 2016) (unpublished)

("'The Court has been beyond lenient with Plaintiff throughout these proceedings based on his

pro se status.'") (Citation omitted.)). On the other hand, "[m]onetary sanctions are meaningless

to a plaintiff who has been allowed to proceed *in forma pauperis*." *Smith v. McKune*, 345 F.

App'x 317, 320 (10th Cir. 2009) (unpublished); *cf. Riviera Drilling & Exploration Co. v.*

Gunnison Energy Corp., 412 F. App'x 89, 93 (10th Cir. 2011) (unpublished) ("Because Riviera

had filed for bankruptcy, a financial sanction was out of the question.").

Again, dismissal is a drastic sanction, but the Tenth Circuit has "repeatedly upheld

dismissals in situations where the parties themselves neglected their cases or refused to obey

court orders." *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992). Dismissal is warranted when

there is a persistent failure to prosecute the complaint. *See Meade v. Grubbs,* 841 F.2d 1512,

1518 n.6, 1521-22 (10th Cir. 1988).

Applying these principles, the Court concludes that no sanction less than dismissal would

be effective. First, though Petitioner is *pro se*, he is not excused of neglect. *See Green,* 969 F.2d

at 917. Second, Petitioner has ignored this case long enough that it is doubtful monetary or

evidentiary sanctions would be effective (even if such sanctions could be motivating for an

indigent, *pro se* prisoner). Indeed, there is no way to even know whether Petitioner is aware of

orders at this point. "It is apparent that Plaintiff is no longer interested in and/or capable of

prosecuting his claims. Under these circumstances, no lesser sanction is warranted and dismissal

is the appropriate result." *Kalkhorst,* 2018 U.S. Dist. LEXIS 215598, at *12-13; *see also Oliver*,

2010 U.S. Dist. LEXIS 92836, at *7-8 ("[B]ased upon Applicant's unknown location, the Court

doubts that a monetary sanction would be practical or effective. Further, Applicant's conduct

impacts both the judicial system and Respondent jointly, and considering that Applicant has

essentially neglected his case, the Court finds that no lesser sanction would be effective.").

<p align="center">**CONCLUSION**</p>

Having analyzed the *Ehrenhaus* factors against the timeline and Petitioner's lack of

responsiveness, the Court concludes that dismissal is appropriate.

IT IS THEREFORE ORDERED that the petition is DISMISSED with prejudice.

DATED this 31st day of August, 2022.

BY THE COURT:

JUDGE DALE A. KIMBALL
United States District Court

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