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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

George Medina,
Petitioner,
vs.
Judy Friego, et al.,
Respondents.

No. CIV 05-2514-PHX-JAT (JI)

ORDER

On August 22, 2005, Petitioner George Medina, presently confined in the Arizona State Prison Complex in Florence, Arizona, filed a Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner paid the five dollar (\$5.00) filing fee on August 25, 2005. Due to a clerical error, the Petition was dismissed on October 26, 2005 for failure to pay the filing fee or file an Application to Proceed In Forma Pauperis. On October 31, 2005, Petitioner sent the Court a Notice of Payment of Filing Fee and receipt for payment of the filing fee. On November 3, 2005, Petitioner submitted another five dollars (\$5.00) for payment of the filing fee.

The Court will direct the Clerk of the Court to reopen this action and refund five dollars (\$5.00) to Petitioner.

TERMPSPREF

1 **Petition**

2 Judy Friego is named as a Respondent to the Petition and the Arizona Attorney
3 General is named as an additional Respondent. Petitioner challenges his June 25, 2002
4 judgment of conviction in Maricopa County Superior Court, case number CR 2001-013429,
5 for attempted murder and aggravated assault with a weapon.

6 Petitioner alleges two grounds for relief in support of the Petition: 1) Petitioner's Fifth
7 Amendment due process rights were violated when the trial judge abused his discretion by
8 denying Petitioner's motion to exclude the term "premeditation" from the indictment; and 2)
9 Petitioner's Sixth Amendment rights were violated when recordings of a police interview
10 conducted shortly after Petitioner's arrest were not made available to his attorneys for trial.
11 Petitioner alleges that Count I has been presented to the Arizona Supreme Court.

12 It is unclear from the face of the Petition whether Petitioner has properly exhausted
13 Count II. Exhaustion requires presentation to the Arizona Court of Appeals. See Swoopes
14 v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999) (when challenge is not to a life sentence or
15 capital sentence, exhaustion requires only fair presentation to the Arizona Court of Appeals),
16 cert. denied, 529 U.S. 1124 (2000). It also appears that further review of Petitioner's claims
17 is not available in the state courts because the deadline for filing an appeal has passed.
18 Consequently, any unexhausted claim may be procedurally barred. In light of the possibility
19 of procedural bar, a summary dismissal would be inappropriate. See Castille v. Peoples, 489
20 U.S. 346, 351-52 (1989) (remanding where petitioner failed to exhaust claims and it was not
21 clear whether claims were procedurally barred). An answer is therefore required. 28 U.S.C.
22 § 2254(a).

23 **IT IS THEREFORE ORDERED** as follows:

- 24 (1) The Clerk of the Court is DIRECTED to REOPEN this case;
25 (2) The Clerk of the Court is DIRECTED to REFUND five dollars (\$5.00) to
26 Petitioner, for overpayment of the filing fee;

1 (3) A copy of the Petition For Writ Of Habeas Corpus By A Person In State Custody
2 Pursuant to 28 U.S.C. § 2254 (Doc. #1) ("Petition") and this Order shall be SERVED by the
3 Clerk of the Court upon the Respondents by certified mail;

4 (4) Respondents shall answer the Petition within forty (40) days of the date of service.
5 Respondent shall not file a dispositive motion in place of an answer, but may file an answer
6 limited to relevant affirmative defenses, including but not limited to, statute of limitations,
7 procedural bar, or non-retroactivity. If the answer is limited to affirmative defenses, only
8 those portions of the record relevant to those defenses need be attached to the answer.
9 Failure to set forth an affirmative defense in an answer may constitute a waiver of the
10 defense. See Nardi v. Stewart, 354 F.3d 1134, 1140-41 (9th Cir. 2004); see also Morrison
11 v. Mahoney, 399 F.3d 1042, 1045-47 (9th Cir. 2005). If not limited to affirmative defenses,
12 the answer shall fully comply with all of the requirements of Rule 5 of the Rules Governing
13 Section 2254 Cases;

14 (5) Petitioner may file a reply within thirty (30) days from the date of service of the
15 answer;

16 (6) A clear, legible copy of every pleading or other document filed SHALL
17 ACCOMPANY each original pleading or other document filed with the Clerk for use by the
18 District Judge or Magistrate Judge to whom the case is assigned. See Local Rule of Civil
19 Procedure 5.4. Failure to submit a copy along with the original pleading or document
20 will result in the pleading or document being stricken without further notice to
21 Petitioner;

22 (7) Petitioner SHALL SERVE upon Respondents, or if appearance has been entered
23 by counsel, upon the attorney, a copy of every further pleading or other document submitted
24 for consideration by the Court. Petitioner shall include with the original document and copy,
25 to be filed with the Clerk of the Court, a certificate stating the date a true and correct copy
26 of the pleading or document was mailed to Respondents or the counsel. Any paper received
27 by a District Court Judge or Magistrate Judge which has not been filed with the Clerk of the
28 Court may be disregarded by the Court;

1 (8) At all times during the pendency of this action, Petitioner SHALL
2 IMMEDIATELY ADVISE the Court and the United States Marshal of any change of address
3 and its effective date. Such notice shall be captioned "NOTICE OF CHANGE OF
4 ADDRESS." The notice shall contain only information pertaining to the change of address
5 and its effective date, except that if Petitioner has been released from custody, the notice
6 should so indicate. The notice shall not include any motions for any other relief. Petitioner
7 shall serve a copy of the notice on all opposing parties. Failure to file a NOTICE OF
8 CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute
9 pursuant to Federal Rule of Civil Procedure 41(b);

10 (9) This matter is referred to Magistrate Judge Jay Irwin for further proceedings and
11 a report and recommendation; and

12 (10) The Clerk of Court is DIRECTED to forward a copy of this Order to Financial
13 Administration for the Phoenix Division of the U.S. District Court for the District of Arizona.

14 DATED this 6th day of December, 2005.

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19 James A. Teilborg
United States District Judge
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