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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kirk E. Rudan,

Petitioner,

vs.

J. Schomig, et al.,

Respondents.

) No. CV 10-1093-PHX-JAT (MEA)

) **ORDER**

_____)
Petitioner Kirk E. Rudan, who is confined in the Red Rock Correctional Center in Eloy, Arizona, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. #1) and a “Motion for Appointment of Counsel” (Doc. #4). The \$5.00 filing fee has been paid.

The Court will deny Petitioner’s Motion without prejudice and dismiss the Petition without prejudice. Petitioner will be given 30 days from the filing date of this Order to file his amended petition on the court-approved form included with this Order.

I. Petition

Petitioner names J. Schomig as Respondent. The Attorney General of the State of Arizona is named as an Additional Respondent.

Petitioner sole ground for relief in his Petition is that he is “entitled to writ and discharge as the [R]espondents detain the [P]etitioner pursuant to an illegal sentence in which

1 the true calculation of his release date is in grave error” and that “Respondents violate
2 Petitioner[’]s civil rights and detain without authority and in violation of federal law as the
3 [P]etitioner can[]not be detained pursuant to due process with an illegal sentence.” Petitioner
4 states that he “is being held in violation of his civil rights by CCA prison Arizona (under
5 illegal sentenc[e]) entitled to Habeas Corpus release and damages pursuant to (42 U.S.C.
6 1983) ([P]etitioner requests 1 million dollar[s] in damages).” Petitioner does not allege that
7 he has exhausted his ground for relief by presenting the issue raised to a state court.

8 **II. Dismissal of Petition with Leave to Amend**

9 In response to the section of the court-approved Petition form that calls for the
10 “[n]ame and location of court that entered the judgment of conviction you are challenging,”
11 Petitioner has written “Red Rocks Correctional Center/Eloy Arizona 85231 28 U.S.C. 2241
12 (Execution of Sentence) Claim.” Petitioner has written “N/A” in response to all the other
13 sections on the court-approved Petition form calling for details of Petitioner’s conviction in
14 state court, his sentence, his appeals, and his post-conviction petitions. Also, Petitioner does
15 not indicate whether or not he has filed any type of petition, application or motion in a
16 federal court regarding the conviction that he challenges in the Petition.

17 Although Petitioner attempts to style his Petition as one challenging the execution of
18 his sentence, the underlying challenge is clearly to what he describes as “an illegal sentence.”
19 Because Petitioner has not provided the required details about his conviction and sentence,
20 the Petition is not reviewable in any meaningful way.¹ Accordingly, the Court will dismiss
21 the Petition without prejudice, with leave to amend to file an amended petition on a court-
22 approved form. Petitioner’s amended petition should be **completely filled** in to the extent
23 applicable, should clearly set out each claim Petitioner is making, and should also provide
24 information as to how Petitioner has first exhausted his administrative remedies as to each

25
26 ¹One of the attachments to the Petition includes an “Abstract Of Judgment - Prison
27 Commitment” from the “Superior Court Of California, County Of Los Angeles.”
28 Presumably, this is the state conviction and sentence that is at issue in the Petition. However,
Petitioner has not made this clear in his Petition.

1 and every claim.²

2 For each ground Petitioner alleges in an amended petition, he must allege how he is
3 in custody in violation of the Constitution or laws or treaties of the United States. Petitioner
4 must limit each ground to the allegation of the violation of a single constitutional right, must
5 describe the right and its source in the United States Constitution, and must clearly state
6 supporting facts showing how that constitutional right was violated. The grounds and facts
7 must be clearly set out as fully as possible on the court-approved petition form itself. If
8 Petitioner cannot fit all of his supporting facts or arguments in favor of a particular ground
9 on the court-approved form, then he may continue on an attachment, but each matter on any
10 attachment must be clearly referenced to a particular ground on the court-approved form.

11 Petitioner should note that by amending his Petition, he will be presumed to have
12 deliberately waived his right to raise any constitutional errors or deprivations other than those
13 set forth in his amended habeas petition, and the Court may dismiss any subsequent petitions.
14 28 U.S.C. § 2244.³

15 Petitioner should further note that all grounds alleged in his original Petition which
16 are not alleged in any amended petition will be waived. Hal Roach Studios v. Richard Feiner
17 & Co., 896 F.2d 1542, 1546 (9th Cir. 1990) (“an amended pleading supersedes the original”);
18 King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987).

19 _____
20 ²A prisoner attacking his or her state conviction must exhaust state remedies before a
21 federal court will entertain a petition for writ of habeas corpus. Rose v. Lundy, 455 U.S. 509
22 (1982); Szeto v. Rushen, 709 F.2d 1340 (9th Cir. 1983). The federal court will not entertain
23 a petition for writ of habeas corpus unless each and every issue has been exhausted. Rose,
24 455 U.S. at 521-22. The failure to exhaust subjects the Petitioner to dismissal. Gutierrez v.
Griggs, 695 F.2d 1195 (9th Cir. 1983).

25 ³Title 28 U.S.C. § 2244(b) states that a District Court shall dismiss a claim presented in
26 a second or successive habeas corpus application under section 2254 that was not presented
27 in a prior application, except under certain circumstances. Furthermore, under 28 U.S.C.
28 § 2244(b)(3)(A), before a second or successive application is filed in the district court, the
applicant shall move in the court of appeals for an order authorizing the district court to
consider the application.

1 Lastly, Petitioner should note that damages are not an available remedy in a habeas
2 corpus action. Accordingly, to the extent that Petitioner seeks damages pursuant to 42 U.S.C.
3 § 1983, he must file a civil rights complaint in a new case with either an Application to
4 Proceed *In Forma Pauperis* and a six-month trust account statement or payment of the \$350
5 filing fee.⁴

6 **III. Motion for Appointment of Counsel**

7 In Petitioner’s “Motion for Appointment of Counsel” (Doc. #4), Petitioner seeks the
8 appointment of counsel to provide due process protection and the means to provide
9 discovery. “Indigent state prisoners applying for habeas corpus relief are not entitled to
10 appointed counsel unless the circumstances of a particular case indicate that appointed
11 counsel is necessary to prevent due process violations.” Chaney v. Lewis, 801 F.2d 1191,
12 1196 (9th Cir. 1986) (citing Kreiling v. Field, 431 F.2d 638, 640 (9th Cir. 1970); Eskridge
13 v. Rhay , 345 F.2d 778, 782 (9th Cir. 1965)). However, the Court has discretion to appoint
14 counsel when “the interests of justice so requires.” 18 U.S.C. § 3006A(a)(2).

15 Petitioner has not made the necessary showing for appointment of counsel at this time.
16 Accordingly, Petitioner’s Motion will be denied without prejudice. If, at a later date, the
17 Court determines that an evidentiary hearing is required, counsel will be appointed in
18 accordance with Rule 8(c) of the Rules Governing Section 2254 Proceedings.

19 **IV. Warnings**

20 **A. Address Changes**

21 Petitioner must file and serve a notice of a change of address in accordance with Rule
22 83.3(d) of the Local Rules of Civil Procedure. Petitioner must not include a motion for other
23 relief with a notice of change of address. Failure to comply may result in dismissal of this
24 action.

25
26 ⁴ Local Rule of Civil Procedure 3.4(a) requires prisoners to use the court-approved form
27 complaint for civil rights cases and the court-approved Application to Proceed *In Forma*
28 *Pauperis* form.

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B. Copies

Petitioner must submit an additional copy of every document that he files for use by the Court. See LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice to Petitioner.

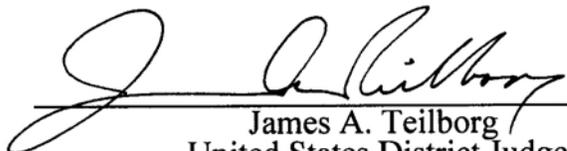
C. Possible Dismissal

If Petitioner fails to timely comply with every provision of this Order, including these warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to comply with any order of the Court).

IT IS ORDERED:

- (1) Petitioner’s “Motion for Appointment of Counsel” (Doc. #4) is **denied without prejudice**.
- (2) The Petition (Doc. #1) is **dismissed without prejudice**. Petitioner has **30 days** from the date this Order is filed to file an amended petition that complies with this Order.
- (3) If Petitioner fails to file an amended petition within 30 days, the Clerk of Court **must enter** a judgment of dismissal without prejudice of this action.
- (4) The Clerk of Court **must provide** to Petitioner a current court-approved form for filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

DATED this 8th day of June, 2010.



James A. Teilborg
United States District Judge

**Instructions for Filing a Petition Under 28 U.S.C. § 2254
for a Writ of Habeas Corpus by a Person in State Custody
in the United States District Court for the District of Arizona**

1. Who May Use This Form. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence on the grounds that your conviction or sentence violates the United States Constitution or other federal law. You also may use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment. **This form should not be used in death penalty cases.** If you were sentenced to death, you are entitled to the assistance of counsel and you should request the appointment of counsel.
2. The Form. **Local Rule of Civil Procedure (LRCiv) 3.5(a) provides that habeas corpus petitions must be filed on the court-approved form.** The form must be typed or neatly handwritten. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages. The form, however, must be completely filled in to the extent applicable. You do not need to cite law. If you want to file a brief or arguments, you must attach a separate memorandum.
3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. The Filing Fee. The filing fee for this action is \$5.00. If you are unable to pay the filing fee, you may request permission to proceed *in forma pauperis* by completing and signing the Application to Proceed *In Forma Pauperis* provided with the petition form. You must have an official at the prison or jail complete the certificate at the bottom of the application form. If the amount of money in your account exceeds \$25.00, you must pay the \$5.00 filing fee. LRCiv 3.5(b).
5. Original and Judge's Copy. You must send an **original plus one copy** of your petition and of any other document submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.
6. Where to File. You should **file your petition in the division where you were convicted.** See LRCiv 5.1(b). If you are challenging a judgment of conviction entered in Maricopa, Pinal, Yuma, La Paz, or Gila County, file your petition in the Phoenix Division. If you are challenging a judgment of conviction entered in Apache, Navajo, Coconino, Mohave, or Yavapai County, file your petition in the Prescott Division. If you are challenging a judgment of conviction entered in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file your petition in the Tucson Division. See LRCiv 5.1(b) and 77.1(a).

Mail the original and one copy of your petition with the \$5.00 filing fee or the application to proceed *in forma pauperis* to:

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. Change of Address. You must immediately notify the Court and respondents in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must provide the respondents with a copy of any document you submit to the Court (except the initial petition and application to proceed *in forma pauperis*). Each original document (except the initial petition and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the respondents and the address to which it was mailed. Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:
Name: _____
Address: _____
Attorney for Respondent(s)

(Signature)

9. Amended Petition. If you need to change any of the information in the initial petition, you must file an amended petition. The amended petition must be written on the court-approved form. You may file one amended petition without leave (permission) of Court before any respondent has answered your original petition. See Fed. R. Civ. P. 15(a). After any respondent has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended petition. LRCiv 15.1. An amended petition may not incorporate by reference any part of your prior petition. LRCiv 15.1(a)(2). **Any grounds not included in the amended petition are considered dismissed.**

10. Exhibits. If available, you should attach a copy of all state and federal court written decisions regarding the conviction you are challenging. Do **not** submit any other exhibits with the petition. Instead, you should paraphrase the relevant information in the petition.

11. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Warnings.

- a. Judgment Entered by a Single Court. You may challenge the judgment entered by only one court. Multiple counts which resulted in a judgment by the same court may be challenged in the same petition. If you wish to challenge judgments entered by more than one court, however, you must file separate petitions for each judgment.
- b. Grounds for Relief. You must raise all grounds for relief that relate to this conviction or sentence. Any grounds not raised in this petition will likely be barred from being raised in any subsequent federal action.
- c. Exhaustion. In order to proceed in federal court, you ordinarily must exhaust the remedies available to you in the state courts as to each claim on which you request action by the federal court. If you did not fairly present each of your grounds to the Arizona Court of Appeals, your petition may be dismissed. If you did not present one or more of your grounds to the Arizona Court of Appeals, explain why you did not.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your petition being stricken or dismissed by the Court. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the petition is being continued and number all pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

_____,)
(Full Name of Petitioner))

Petitioner,)

vs.)

CASE NO. _____

(To be supplied by the Clerk)

_____,)
(Name of the Director of the Department of)
Corrections, Jailor or authorized person having)
custody of Petitioner))

Respondent,)

and)

The Attorney General of the State of _____,)

Additional Respondent.)

**PETITION UNDER 28 U.S.C. § 2254
FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
(NON-DEATH PENALTY)**

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

(b) Criminal docket or case number: _____

2. Date of judgment of conviction: _____

3. In this case, were you convicted on more than one count or crime? Yes No

4. Identify all counts and crimes for which you were convicted and sentenced in this case: _____

5. Length of sentence for each count or crime for which you were convicted in this case: _____

6. (a) What was your plea?
- Not guilty
 - Guilty
 - Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or charge, and a not guilty plea to another count or charge, give details: _____

(c) If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

7. Did you testify at the trial? Yes No

8. Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction?
Yes No

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

9. Did you appeal to the Arizona Supreme Court? Yes No

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

10. Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

11. Other than the direct appeals listed above, have you filed any other petitions, applications or motions concerning this judgment of conviction in any state court? Yes No

If yes, answer the following:

(a) First Petition.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding (Rule 32, special action or habeas corpus): _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(b) Second Petition.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding (Rule 32, special action or habeas corpus): _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

Please answer these additional questions about this petition:

13. Have you previously filed any type of petition, application or motion in a federal court regarding the conviction that you challenge in this petition? Yes No

If yes, give the date of filing, the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available: _____

14. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, as to the judgment you are challenging? Yes No

If yes, give the date of filing, the name and location of the court, the docket or case number, the type of proceeding, and the issues raised: _____

15. Do you have any future sentence to serve after you complete the sentence imposed by the judgment you are challenging? Yes No

If yes, answer the following:

(a) Name and location of the court that imposed the sentence to be served in the future:

(b) Date that the other sentence was imposed: _____

(c) Length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition challenging the judgment or sentence to be served in the future? Yes No

16. **TIMELINESS OF PETITION:** If your judgment of conviction became final more than one year ago, you must explain why the one-year statute of limitations in 28 U.S.C. § 2244(d) does not bar your petition.*

*Section 2244(d) provides in part that:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

17. Petitioner asks that the Court grant the following relief: _____

or any other relief to which Petitioner may be entitled. (Money damages are not available in habeas corpus cases.)

I declare under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____(month, day, year).

Signature of Petitioner

Signature of attorney, if any

Date