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

Evan J. Myers,

Petitioner,

vs.

Unknown Party,

Respondent.

No. CV 14-1728-PHX-DGC (JFM)

ORDER

Petitioner Evan J. Myers, who is confined in the Maricopa County Lower Buckeye Jail, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 2). The Court will dismiss the Petition without prejudice.

Petitioner appears to challenge government action in CR 2014-013519, CR 2014-030206, and CR 2014-109895, which are Arizona state criminal proceedings that appear to be on-going, have yet to proceed to trial, and do not appear to have resulted in any convictions or sentences of imprisonment.¹ Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). In Arizona, a petitioner sentenced to less than the death penalty may exhaust his federal claims by presenting them in a procedurally proper way to the Arizona Court of Appeals on direct appeal and/or in post-conviction proceedings, without seeking discretionary review in the

¹ Indeed, Petitioner states that there are no convictions and sentences “at the present time” that he is challenging. (Doc. 1 at 2).

1 Arizona Supreme Court. *Crowell v. Knowles*, 483 F. Supp. 2d 925, 928-30, 933 (D. Ariz.
2 2007) (following 1989 statutory amendment, Arizona Court of Appeals has jurisdiction
3 over criminal convictions involving less than a death sentence); *cf. Swoopes v. Sublett*,
4 196 F.3d 1008, 1010 (9th Cir. 1999) (citing pre-1989 statute). To exhaust a claim, a
5 petitioner must describe “both the operative facts and the federal legal theory on which
6 his claim is based so that the state courts [could] have a ‘fair opportunity’ to apply
7 controlling legal principles to the facts bearing upon his constitutional claim.” *Castillo v.*
8 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005) (quoting *Kelly v. Small*, 315 F.3d 1063,
9 1066 (9th Cir. 2003), *overruled in part on other grounds by Robbins v. Carey*, 481 F.3d
10 1143 (9th Cir. 2007)). The failure to exhaust subjects the Petitioner to dismissal. *See*
11 *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983).

12 If a prisoner has a direct appeal or initial petition for post-conviction relief
13 pending in state court, the federal exhaustion requirement is not satisfied. *See Sherwood*
14 *v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (pending appeal); *Schnepp v. Oregon*, 333
15 F.2d 288, 288 (9th Cir. 1964) (pending post-conviction proceeding); *see also Henderson*
16 *v. Johnson*, 710 F.3d 872, 874 (9th Cir. 2013) (“*Sherwood* stands for the proposition that
17 a district court may not adjudicate a federal habeas petition while a petitioner’s direct
18 state appeal is pending.”). The prisoner must await the outcome of the pending state-
19 court challenge before proceeding in this court, “even where the issue to be challenged in
20 the writ of habeas corpus has been finally settled in the state courts.” *Sherwood*, 716
21 F.3d at 634. The pending state-court proceeding could affect the conviction or sentence
22 and, therefore, could ultimately affect or moot these proceedings. *Id.*

23 Because Petitioner is not challenging any conviction or sentence he has received in
24 the above-mentioned state proceedings, the Court will deny the Petition without prejudice
25 as premature and order the Clerk of Court to close this case.

26 **IT IS ORDERED:**

27 (1) Petitioner’s Petition for Habeas Corpus (Doc. 1) and this case are
28 **dismissed without prejudice** as premature.

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(2) Petitioner's Application to Proceed *In Forma Pauperis* (Doc. 2) is **denied** as moot.

(3) The Clerk of Court must enter judgment accordingly and close this case.

(4) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a certificate of appealability because reasonable jurists would not find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 12th day of September, 2014.



David G. Campbell
United States District Judge